No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

PHILLIP MINOR, *Petitioner*,

v.

RENEE BAKER, Warden, et al., *Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

APPENDIX

ANGELA H. DOWS
Cory Reade Dows & Shafer
1333 North Buffalo Drive, Suite 210
Las Vegas, NV 89128
Telephone: (702) 794-4411
Facsimile: (702) 794-4421

Counsel of record for Petitioner
PHILLIP MINOR

APPENDIX A

MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JANUARY 20, 2021

NOT FOR PUBLICATION

FILED

JAN 20 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHILLIP MINOR, Petitioner-Appellant, v. RENEE BAKER, Warden; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 19-15822 D.C. No. 2:15-cv-02005-RFB-PAL MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Richard Boulware, District Judge, Presiding

Submitted January 14, 2021**
San Francisco, California

Before: WALLACE and M. SMITH, Circuit Judges, and LASNIK,*** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

We write primarily for the parties who are familiar with the facts. Appellant Phillip Minor appeals from the dismissal of his federal habeas petition as untimely. The Nevada state trial court had previously entered a judgment of conviction in 1986 sentencing Minor to life in prison without the possibility of parole after he had pleaded guilty to first-degree murder. On November 26, 2013, the state trial court entered a second amended judgment of conviction, modifying the amount of presentence credit by eight days. Almost two years later, on October 16, 2015, Minor filed a federal habeas petition under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

The district court dismissed Minor's petition as untimely under AEDPA's one-year statute of limitations, 28 U.S.C. § 2244(d). In order for Minor's petition to have been timely, he needed the limitations period to run from the date that the second amended judgment became final, and he needed to qualify for statutory tolling under 28 U.S.C. § 2242(d)(2) for the period of time his state petition was pending.[1] Although the district court concluded that the limitations period began to run from the date the second amended judgment became final, the district court also determined that Minor's petition was not "properly filed" for purposes of statutory tolling under 28 U.S.C. § 2244(d)(2) because the state courts held that the petition was untimely.

[1] Minor's state petition was pending between September 2, 2014 and July 13, 2015.

Our court granted a certificate of appealability with respect to whether Minor's 28 U.S.C. § 2254 petition was timely filed.

We review *de novo* the question whether a petitioner's application for federal habeas relief was timely filed. *Rudin v. Myles*, 781 F.3d 1043, 1053 (9th Cir. 2014). We also review *de novo* the question whether AEDPA's statute of limitations should be tolled. *Id.* We conclude that the district court correctly determined that the statute of limitations began to run from the date the second amended judgment became final, and that the district court properly dismissed Minor's petition as untimely because Minor was disqualified from statutory tolling.

1. Under AEDPA, a one-year limitations period exists for federal habeas petitions filed by state prisoners. 28 U.S.C. § 2244(d)(1). The limitations period runs from, as relevant here, "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The "judgment" refers to "the state judgment pursuant to which the petitioner is being held." *Smith v. Williams*, 871 F.3d 684, 687 (9th Cir. 2017) (interpreting 28 U.S.C. § 2244(d)(1)); *see also Magwood v. Patterson*, 561 U.S. 320, 330–33 (2010) (interpreting 28 U.S.C. § 2244(b) and holding that whenever there is a "new judgment," the procedural limitation on second or successive habeas petitions refreshes). Where there is a new, amended judgment pursuant to which the petitioner is being held, the statute of limitations runs from the

date of that new judgment. *Smith*, 871 F.3d at 687–88. The Supreme Court "did not provide a comprehensive answer" to what constitutes a "new judgment." *Turner v. Baker*, 912 F.3d 1236, 1239 (9th Cir. 2019). Under Nevada law, however, our court has held that a state court's amended judgment awarding a defendant credit for time served constitutes a new judgment. *Turner*, 912 F.3d at 1240. Accordingly, Minor's amended judgment awarding him presentence credit constitutes a new judgment. *See also Gonzalez v. Sherman*, 873 F.3d 763, 773 n.5 (9th Cir. 2017) ("For AEDPA purposes, it does not matter whether the error in the judgment was minor or major."). Therefore, the district court properly determined that AEDPA's one-year limitations period began to run from the date the second amended judgment became final.

2. AEDPA's one-year limitations period prescribed by 28 U.S.C. § 2244(d)(1) must be tolled during the time in which "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). "When a post-conviction petition is untimely under state law, that is the end of the matter for purposes of § 2244(d)(2)." *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) (quotations and alteration omitted). The Nevada Supreme Court concluded that Minor's petition was untimely under state law, and we are "not at liberty to second guess that court's decision when it was acting on direct appeal of the state post-conviction court's judgment." *Rudin*, 781 F.3d at 1054. Thus, Minor's petition was not properly filed per 28 U.S.C.

§ 2244(d)(2), and the limitations period does not toll during the time in which the state petition was pending. Minor's petition was not timely filed.

AFFIRMED.

APPENDIX B

ORDER AS TO MOTION TO DISMISS PETITIONER'S CIVIL HABEAS CASE BEFORE THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

MARCH 20, 2019

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

PHILIP MINOR, Petitioner, v. BRIAN WILLIAMS, et al., Respondents.	Case No. 2:15-cv-02005-RFB-PAL ORDER

This counseled habeas petition pursuant to 28 U.S.C. § 2254 comes before the Court on respondents' motion to dismiss (ECF No. 18). Petitioner has opposed (ECF No. 21), and respondents have replied (ECF No. 22).

I. Background

Petitioner in this action is a Nevada state inmate challenging a judgment of conviction originally entered, pursuant to a guilty plea, in 1986. (ECF No. 15-2 (Exs. 7-9)). Petitioner did not file any motions or petitions challenging the judgment in state or federal court until 2007, when he filed a motion to correct illegal sentence. (ECF No. 15-3 (Ex. 11)). The motion was denied. (*Id.* at Ex. 13). Petitioner thereafter filed two state habeas petitions, one in 2009 and the other in 2013. (ECF No. 15-5 (Ex. 19); ECF No. 15-8 (Ex. 28)). Both petitions were denied as untimely pursuant to Nevada Revised Statutes § 34.726 and the second was also denied as successive and an abuse of the writ. (ECF No. 15-7 (Ex. 27); ECF No. 15-12 (Ex 45)).

On November 26, 2013, the state court entered a second amended judgment of conviction to credit petitioner with eight more days of presentence jail time. (ECF 15-11 (Ex. 38)). Petitioner

filed a notice of appeal following entry of the second amended judgment. (*Id.* at Ex. 39). The Nevada Supreme Court dismissed the appeal on April 4, 2014, because petitioner had been awarded the relief he had sought and there was thus no appealable order. (ECF No. 15-12 (Ex. 44)).

On September 2, 2014, petitioner filed a third state habeas petition. (ECF No. 15-13 (Ex. 46)). The district court dismissed the petition as untimely, and the Nevada Supreme Court affirmed, finding it both untimely and an abuse of the writ. (ECF No. 15-16 (Ex. 56); ECF No. 15-17 (Ex. 62)). Remittitur issued on the Nevada Supreme Court's decision on July 13, 2015. (ECF No. 15-17 (Ex. 62)).

Petitioner filed the instant federal habeas petition on October 12, 2015. (ECF No. 4 at 1). Respondents move to dismiss the petition as, *inter alia*, untimely.

II. Discussion

A. Timeliness

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") established a one-year period of limitations for federal habeas petitions filed by state prisoners. The limitations period runs from the latest of

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). The limitations period is tolled while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *Id.* § 2244(d)(2). An untimely state habeas petition is not "properly filed" and thus does not toll the limitations period. *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005).

It is the second amended judgment of conviction that petitioner challenges in this case, as that is the judgment pursuant to which petitioner is being held. (ECF No. 21 at 4); *Smith v. Williams, Warden*, 871 F.3d 684 (9th Cir. 2017). The one-year statute of limitations to challenge the second amended judgment began to run from the date that judgment became final. *Id.* at 688.

The second amended judgment of conviction was entered on November 26, 2013. Petitioner appealed, and the Nevada Supreme Court dismissed the appeal on April 4, 2014. The Court will assume for the purposes of this motion that petitioner's appeal was appropriate and that the judgment of conviction did not become final until the expiration of the time for direct review, *i.e.*, when the ninety-day time period for filing a petition of writ of certiorari with the United States Supreme Court expired. As such, the clock began running – at the latest – on or about July 4, 2014, and, absent a basis for tolling or delayed accrual, expired on or about July 3, 2015. The instant petition, filed more than three months later, is thus untimely on its face.

Petitioner argues that the third state habeas petition filed on September 2, 2014, and resolved on July 13, 2015, tolled the limitations period during the time it was pending.[1] However, petitioner's third habeas petition did not constitute a "properly filed" state petition for purposes of statutory tolling under 28 U.S.C. § 2244(d)(2) because the state courts held that it was untimely filed. *Pace*, 544 U.S. 408. Petitioner contends that he could not have filed a habeas petition challenging his second amended judgment of conviction until after the second amended judgment of conviction was entered. However, petitioner's challenge herein does not relate to the changes made in the second amended judgment and traces back, instead, to the original judgment of conviction. The state courts' holding that the timeliness of petitioner's petition was measured from the date of the original judgment of conviction and that the third petition was untimely under Nevada state law is "the end of the matter for purposes of § 2244(d)(2)." *Allen v. Siebert*, 552 U.S. 3, 4 (2007); *Pace*, 544 U.S. at 413–14. Federal decisions such as *Magwood v. Patterson*, 561 U.S. 320 (2010) and *Smith* addressing federal procedural law issues do not govern the state courts' resolution of the state law issues. The *Allen* and *Pace* federal decisions instead state the apposite

[1] None of the state habeas petitions filed before the amended judgment was entered tolled the limitations period as the limitations period was not running at any time during their pendency.

governing rule, which is that the state courts' state law determination is controlling with regard to the application of statutory tolling under § 2244(d)(2). In this regard, the state supreme court is the final arbiter of Nevada state law. Thus, as the third habeas petition was untimely, it did not toll the federal statute of limitations.

As the statute of limitations expired on July 3, 2015, the instant federal habeas petition is untimely.

B. Actual Innocence

Petitioner argues that he is actually innocent as means to avoid the procedural bars in his case, including the statute of limitations.

Demonstrating actual innocence is a narrow "gateway" by which a petitioner can obtain federal court consideration of habeas claims that are otherwise procedurally barred, including claims filed after the expiration of the federal limitations period. *Schlup v. Delo*, 513 U.S. 298, 314–15 (1995); *Lee v. Lampert*, 653 F.3d 929, 932 (9th Cir. 2011) (en banc) (A "credible claim of actual innocence constitutes an equitable exception to AEDPA's limitations period, and a petitioner who makes such a showing may pass through the *Schlup* gateway and have his otherwise time-barred claims heard on the merits."); *see also McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). In this regard, "actual innocence" means actual factual innocence, not mere legal insufficiency. *See, e.g.*, *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). "To be credible, [an actual innocence] claim requires petitioner to support his allegations of constitutional error with new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial." *Schlup*, 513 U.S. at 324. The narrow *Schlup* standard is satisfied only if the new, reliable evidence, together with the evidence adduced at trial, demonstrates that it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt. *Id.* at 329. It is unclear whether the actual innocence gateway always applies to petitioners who pled guilty. *See Smith v. Baldwin*, 510 F.3d 1127, 1140 n.9 (9th Cir. 2007).

"[T]enable actual-innocence gateway pleas are rare: '[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no

juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *McQuiggen*, 569 U.S. at 386 (quoting *Schlup*, 513 U.S. at 329); *see also House v. Bell*, 547 U.S. 518, 538 (2006) (emphasizing that the *Schlup* standard is "demanding" and seldom met).

Petitioner argues that it is uncontested that he did not fire the shot that killed the victim and that he is liable for, and pled guilty to, first-degree murder only under an aiding and abetting theory. Petitioner argues that pursuant to a subsequent change in Nevada law, his actions no longer qualify as aiding and abetting and thus he is actually innocent of first-degree murder.

At the time of his plea, "aiders and abettors [we]re criminally responsible for all harms that [we]re a natural, probable, and foreseeable result of their actions." *Mitchell v. State*, 971 P.2d 813, 820 (Nev. 1998), *overruled in relevant part by Sharma v. State*, 56 P.3d 868 (Nev. 2002). Subsequent to petitioner's conviction, the Nevada Supreme Court stepped back from *Mitchell* and narrowed the definition of aiding and abetting by holding that "in order for a person to be held accountable for the specific intent crime of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime." *Sharma*, 56 P.3d at 872. Petitioner argues that under the definition of aiding and abetting set forth in *Sharma*, his actions do not qualify as aiding and abetting first-degree murder because he did not have the requisite specific intent.[2]

Petitioner was charged along with co-defendants Donald Ray Lee, Edward Ray Hampton and Reginald D. Hayes in a ten-count indictment for crimes committed on August 9, 1985, and August 10, 1985. (ECF No. 15-1 (Ex. 2)). The indictment charged the defendants with four counts of attempted murder and with the robbery, kidnapping, conspiracy to commit robbery and/or kidnapping, battery and first-degree murder with use of a deadly weapon of a fifth victim, John Brown. (*Id.*) The indictment charged the defendants with kidnapping Brown for the purposes of committing robbery, then beating, robbing and ultimately murdering him by shooting him with a gun. (*Id.*) While the indictment did not specify which defendant actually pulled the trigger, the

[2] Respondents contend that petitioner's argument is a legal claim of actual innocence, not a factual claim of innocence. However, under analogous factual circumstances, the Ninth Circuit has found a petitioner "actually innocent" where petitioner's actions were no longer criminal under a subsequent change or clarification of the law. *Alaimalo v. United States*, 645 F.3d 1042, 1045 (9th Cir. 2011); *see also Vosgien v. Persson*, 742 F.3d 1131, 1135 (9th Cir. 2014).

criminal complaint identified the shooter as Lee. (*See id.*; Ex. 1). Petitioner entered a plea of guilty to first-degree murder with use of a deadly weapon, but the other three defendants ultimately went to trial. (*See* Ex. 4).

Petitioner claims that Lee shot and killed Brown of his own initiative and against the wishes of petitioner, Hayes and Hampton. Petitioner claims that after the kidnapping, beating and robbery, all four defendants returned to their vehicle and were getting ready to leave when Lee said he wanted to shoot Brown. Petitioner, Hayes and Hampton pled with him not to. Lee did so anyway while the other three defendants waited in the car. This, petitioner argues, shows that he did not have the specific intent that Brown be murdered.

But even if no juror could have reasonably found petitioner guilty of first-degree murder under an aiding and abetting theory, petitioner has not shown that he is actually innocent of first-degree murder under any other theory, including importantly felony murder, with which he was charged alongside aiding and abetting. (See ECF No. 15-1 at 18-19 (Ex. 2 (charging petitioner with murdering Brown during the perpetration of a robbery and/or kidnapping))).

Under Nevada state law, the felony murder rule subjects all participants in a crime to criminal liability for any murder committed during the chain of events that constitutes an enumerated crime, such as robbery. *See, e.g., Echavarria v. State*, 839 P.2d 589, 599 (Nev. 1992). The crime of robbery includes acts taken to facilitate the perpetrators' escape, and the crime of robbery is not complete until the perpetrators have escaped with their ill-gotten gains. *Echavarria*, 839 P.2d at 599; *Payne v. State*, 406 P.2d 922, 925 (Nev. 1965). "The escape of the robber with his ill-gotten gains by means of arms is as important to the execution of the robbery as gaining possession of the property. . . ." *State v. Fouquette*, 221 P.2d 404, 416 (Nev. 1950). The determination of when the chain of events constituting a crime is completed is a question for the jury, and it turns upon the facts and circumstances of each case. *Payne*, 406 P.2d at 924 & 925.

In *Fouquette*, the state supreme court stated either as an alternative holding or as quite extensively-reasoned dicta that the defendant could be found guilty under the felony murder rule even if he murdered the victim thirty minutes after securing possession of the robbery proceeds at a service station, where he took the attendant with the money bag in a vehicle to another location.

See 221 P.2d at 415-17; *see also Archibalo v. State*, 77 Nev. 301, 303 & 304-05, 362 P.2d 721, 721 & 722 (1961) (relying upon *Fouquette*, the state supreme court held that a murder of a service station attendant who was robbed in California and then abducted to and later killed in Nevada was committed in perpetration of the robbery for purposes of the felony murder rule).[3] In *State v. Williams*, 28 Nev. 395, 82 P. 353 (1905), the state supreme court rejected a contention that the evidence was insufficient under the felony murder rule "because the shooting was not done until about two minutes after the robbery." The court rejected the argument because, *inter alia*, the shooting "occurred as part of a continuous assault, lasting from the robbery to the shooting, and apparently was done for the purpose of preventing detection." *Id.*

A reasonable juror could find petitioner guilty beyond a reasonable doubt of first-degree murder under Nevada's felony murder rule because the murder was committed within minutes of the robbery and could have been done as a means of avoiding detection. The only specific intent needed to establish liability for felony murder is the specific intent to commit the underlying crime, here robbery and/or kidnapping. *See State v. Contreras*, 46 P.3d 661, 662 (Nev. 2002). That has been clearly established in this case by Hayes' testimony indicating petitioner initiated the kidnapping and/or robbery, (Case No. 3:05-cv-378-ECR-RAM, ECF No. 57-13 (Ex. 46 (Tr. 1671-75))), and petitioner's admission that he participated in the robbery, (s*ee* ECF No. 15-2 (Ex. 7)) and has not been persuasively contradicted by any evidence provided by petitioner. Accordingly, petitioner cannot establish that no reasonable juror would have found him guilty beyond a reasonable doubt of first-degree murder pursuant to the felony murder rule under Nevada state law. With no other basis for tolling or to support his actual innocence, the petition is untimely and must be dismissed.

III. Certificate of Appealability

In order to proceed with an appeal, petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-

[3] Kidnapping did not become an enumerated felony for first-degree murder under the Nevada murder statute until 1973. *Compare* Nev. Rev. Stat. § 200.030, *as amended through* 1967 Laws, c. 523, § 438, at p. 1470, with Nev. Rev. Stat. § 200.030, *as amended by* 1973 Laws., c. 798, § 5, at pp. 1803–04. The state supreme court's analysis in both *Fouquette* and *Archibalo* therefore necessarily was based upon robbery being the enumerated felony for purposes of the felony murder rule, and that in fact was the rationale applied by the court in both cases.

951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551–52 (9th Cir. 2001). Generally, a petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are debatable among jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to deserve encouragement to proceed further. *Id.* When the petitioner's claim is denied on procedural grounds, a certificate of appealability should issue if the petitioner shows: (1) "that jurists of reasons would find it debatable whether the petition states a valid claim of the denial of a constitutional right"; and (2) "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484–85 (2000).

The Court concludes that reasonable jurists would not find the Court's dismissal of the petition as untimely to be debatable or wrong, for the reasons stated herein. Accordingly, the Court will deny petitioner a certificate of appealability.

IV. Conclusion

In accordance with the foregoing, IT IS THEREFORE ORDERED that respondents' motion to dismiss the petition as untimely (ECF No. 18) is GRANTED. The petition in this case is therefore DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that petitioner is DENIED a certificate of appealability.

IT IS FURTHER ORDERED that the Clerk of the Court shall close this case.

IT IS SO ORDERED.

DATED: March 20, 2019.

RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE

APPENDIX C

ORDER ON MANDATE BEFORE THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

MARCH 9, 2021

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PHILLIP MINOR,

Petitioner-Appellant,

vs.

RENEE BAKER, et al.,

Respondents-Appellees.

District No. 2:15-cv-02005-RFB-PAL

U.S.C.A. No. 19-15822

ORDER ON MANDATE

The above-entitled cause having been before the United States Court of Appeals for the Ninth Circuit, and the Court of Appeals having on 01-20-2021, issued its judgment AFFIRMING the judgment of the District Court, and the Court being fully advised in the premises, NOW, THEREFORE, IT IS ORDERED that the mandate be spread upon the records of this Court.

Dated this 9th day of March, 2021.

Richard F. Boulware, II

United States District Judge

APPENDIX D

ORDER DISMISSING APPEAL BEFORE THE SUPREME COURT OF THE STATE OF NEVADA

APRIL 4, 2014

IN THE SUPREME COURT OF THE STATE OF NEVADA

PHILLIP MINOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64561

ORDER DISMISSING APPEAL

This is a proper person appeal from an order granting a motion for amended judgment of conviction to include jail time credits. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

On October 24, 2013, appellant filed a motion for amended judgment of conviction to include jail time credits, requesting 128 presentence credits. The district court granted the motion and filed an amended judgment of conviction awarding appellant 128 presentence credits. Appellant then filed a notice of appeal from the district court's order.

The district court awarded appellant the relief he sought, and therefore, he was not an aggrieved party and there was no appealable order from which he may appeal. *See* NRS 177.015 (discussing that only the aggrieved party in a criminal action may appeal to this court). To the extent appellant attempted to file a direct appeal from the amended judgment of conviction, appellant was also not aggrieved by the amendment to the judgment of conviction as the district court simply

awarded appellant the credits he requested. *See id.* Therefore, this appeal must be dismissed and we

ORDER this appeal DISMISSED.[1]

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. Elissa F. Cadish, District Judge
Phillip Minor
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[1]We have reviewed the proper person documents submitted in this matter and we conclude no relief is warranted for the reasons stated above.

APPENDIX E

ORDER OF AFFIRMANCE BEFORE THE SUPREME COURT OF THE STATE OF NEVADA

APRIL 10, 2014

IN THE SUPREME COURT OF THE STATE OF NEVADA

PHILLIP MINOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64085

FILED

APR 10 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant filed his petition on May 22, 2013, more than 27 years after entry of the judgment of conviction on February 25, 1986.[2] Thus, appellant's petition was untimely filed. *See* NRS 34.726(1). Moreover, appellant's petition constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.[3]

---

[1]This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. *See Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[2]No direct appeal was taken. An amended judgment of conviction to correct a clerical error was entered on May 6, 1986. In addition, we note that the petition was untimely from the January 1, 1993, effective date of NRS 34.726. *See* 1991 Nev. Stat., ch. 44, § 33, at 92; *Pellegrini v. State*, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001).

[3]*Minor v. State*, Docket No. 55481 (Order of Affirmance, November 8, 2010).

See NRS 34.810(2). Appellant's 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, appellant was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

First, appellant claimed that he had good cause because he was young when he committed the crime and did not have knowledge of the law. These were insufficient to demonstrate good cause. *See generally Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that petitioner's claim of organic brain damage, borderline mental retardation, and reliance on assistance of inmate law clerk unschooled in the law did not constitute good cause for the filing of a successive post-conviction petition).

Second, appellant claimed that the procedural bars did not apply because he was actually innocent. Appellant asserted that he was actually innocent because of ineffective assistance of counsel, an insufficient plea canvass, and because he was waiting in the vehicle when the victim was shot and killed. As appellant pleaded guilty, he must demonstrate not only that he is factually innocent of the charge to which he pleaded guilty but that he is factually innocent of any more serious charges forgone in the plea bargaining process. *Bousley v. United States*, 523 U.S. 614, 623-24 (1998). Appellant did not address actual innocence regarding the multiple felony charges relinquished by the State during negotiations. In addition, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537; *Calderon v. Thompson*, 523 U.S. 538, 559 (1998). Appellant's claims involved legal innocence and he did not

demonstrate that his claim was based upon new evidence, and therefore, he failed to show that "'it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.'" *Calderon*, 523 U.S. at 559 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also Pellegrini*, 117 Nev. at 887, 34 P.3d at 537; *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

Finally, appellant failed to overcome the presumption of prejudice to the State. Therefore, the district court did not err in denying the petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. Elissa F. Cadish, District Judge
Phillip Minor
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

APPENDIX F

ORDER OF AFFIRMANCE BEFORE THE SUPREME COURT OF THE STATE OF NEVADA

JUNE 16, 2015

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PHILLIP MINOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67404

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant Phillip Minor filed his petition on September 2, 2014, more than 28 years after entry of the judgment of conviction on February 25, 1986.[2] Thus, Minor's petition was untimely filed. *See* NRS 34.726(1). Moreover, Minor's petition constituted an abuse of the writ as he raised claims new and different from those raised in his previous

[1]This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude the record is sufficient for our review and briefing is unwarranted. *See Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[2]No direct appeal was taken. We note the petition was untimely from the January 1, 1993, effective date of NRS 34.726. *See* 1991 Nev. Stat., ch. 44, § 33, at 92; *Pellegrini v. State*, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001).

15-900632

petitions.[3] *See* NRS 34.810(2). Minor's 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, Minor was required to overcome the rebuttable presumption of prejudice. *See* NRS 34.800(2).

First, Minor claimed the decision in *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309 (2012), provided good cause. The Nevada Supreme Court held *Martinez* does not apply to Nevada's statutory post-conviction procedures. *See Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 871-72 (2014). Thus, the decision in *Martinez* would not provide good cause for this late petition.

Second, Minor claimed the procedural bars did not apply because he filed his petition within one year of the filing of an amended judgment of conviction on November 16, 2013.[4] Minor's claim was without merit. Minor did not challenge any changes made in the amended judgment of conviction; rather his claims challenged the original judgment of conviction. Therefore, the amended judgment of conviction did not provide good cause to overcome the procedural bars. *See Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004) (explaining that an amended judgment of conviction may provide good cause to raise claims relating to

---

[3]*Minor v. State*, Docket No. 64085 (Order of Affirmance, April 10, 2014); *Minor v. State*, Docket No. 55481 (Order of Affirmance, November 8, 2010).

[4]The district court entered the amended judgment of conviction to award Minor an additional 128 days of credit for time served.

the amendment, but not for claims that could have been raised in prior proceedings).

Finally, Minor claimed the Nevada Supreme Court erred in dismissing a previous appeal. *See Minor v. State*, Docket No. 64561 (Order Dismissing Appeal, April 4, 2014). This claim was not within the scope of a post-conviction petition for a writ of habeas corpus. *See* NRS 34.720; NRS 34.724(1). Therefore, the district court did not err in denying relief for this claim.

Minor also failed to overcome the presumption of prejudice against the State. Therefore, the district court did not err in denying the petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Elissa F. Cadish, District Judge
Phillip Minor
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk