

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM BRYON LEONARD,  
Appellant,  
vs.  
WARDEN, ELY STATE PRISON, E.K.  
MCDANIEL,  
Respondent.

No. 50581

**FILED**

NOV 17 2009

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing appellant William Bryon Leonard's post-conviction petition for a writ of habeas corpus. First Judicial District Court, Carson City; James Todd Russell, Judge.

In 1987, Leonard was serving a term of imprisonment after having twice been convicted of murder when he attacked and killed fellow inmate Joseph Wright. A jury convicted Leonard of first-degree murder, battery with the use of a deadly weapon by a prisoner in lawful custody or confinement, and possession of a dangerous weapon by a prisoner in lawful custody or confinement, and sentenced him to death. This court affirmed his convictions and sentence. Leonard v. State, 108 Nev. 79, 824 P.2d 287 (1992).

In September 1992, Leonard filed a timely post-conviction petition for a writ of habeas corpus, which was denied by the district court. This court affirmed the judgment on appeal. Leonard v. State, 114 Nev. 639, 663, 958 P.2d 1220, 1237 (1998).

Leonard filed a second post-conviction petition for a writ of habeas corpus in October 2006. The State filed a motion to dismiss the petition as untimely, successive, and violating the doctrine of laches. The district court granted the motion. This appeal followed.

Leonard's petition was filed 14 years after the remittitur issued from the affirmance of his convictions and sentence on direct appeal and eight years after this court affirmed on appeal the district court's judgment regarding Leonard's first post-conviction petition. Thus, his petition was untimely. See NRS 34.726(1). Furthermore, because Leonard raised all of his claims in a previous post-conviction petition, his current petition is successive. See NRS 34.810(2). Moreover, because the delay in filing the current petition was well over five years, Leonard's petition was subject to dismissal based on the doctrine of laches. See NRS 34.800(2). Accordingly, the district court correctly concluded that Leonard's petition was procedurally barred.

Leonard claims that he demonstrated good cause and prejudice sufficient to overcome the procedural bars, see NRS 34.726(1); NRS 34.810(3), or, alternatively, that application of the procedural bars in his case results in a fundamental miscarriage of justice, see Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002). He also claims that (1) the district court erred in applying the doctrine of laches because he successfully rebutted the presumption of prejudice to the State, see NRS 34.800(2); (2) the procedural bars are invalid because this court applies them discretionarily and inconsistently; and (3) the district court erred in denying his claims on the merits. For the reasons below, we conclude that the district court did not err in dismissing Leonard's petition.

### Good cause and prejudice

Leonard claims that he has good cause to overcome the procedural bars based on the ineffective assistance of post-conviction counsel. The six claims that Leonard raised in his petition below were only a few of the numerous claims that he raised in his first post-conviction petition. On appeal from the denial of that petition, Leonard's previous post-conviction counsel raised at least 15 claims. However, he chose not to raise on appeal every claim that had been denied by the district court. The six claims raised in the current petition were among those that were not raised on appeal from the denial of Leonard's first post-conviction petition. Leonard argues that prior post-conviction counsel was ineffective for failing to appeal the denial of these six claims and thus he has good cause sufficient to overcome the procedural bars. See Crump v. Warden, 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997). He also claims that the district court erred in failing to hold an evidentiary hearing on the ineffectiveness of post-conviction counsel.

For two reasons, we conclude that the district court did not err in summarily rejecting Leonard's claim of good cause.

First, Leonard cannot base a claim of good cause on the ineffective assistance of post-conviction counsel because his first petition was filed prior to the effective date of the statute mandating the appointment of counsel for a first post-conviction habeas petition in a death penalty case, see NRS 34.820(1); 1991 Nev. Stat., ch. 44, §§ 32-33, at 92; Mazzan v. Warden, 112 Nev. 838, 841 n.1, 921 P.2d 920, 921 n.1

(1996), and Leonard therefore did not have a right to the effective assistance of post-conviction counsel.<sup>1</sup> See Bejarano v. Warden, 112 Nev. 1466, 1470 n.1, 929 P.2d 922, 925 n.1 (1996); McKague v. Warden, 112 Nev. 159, 165 n.5, 912 P.2d 255, 258 n.5 (1996). Therefore, the ineffective assistance of post-conviction counsel cannot serve as good cause to overcome the procedural bars. Pellegrini v. State, 117 Nev. 860, 887-88, 34 P.3d 519, 537-38 (2001); Bejarano, 112 Nev. at 1469, 929 P.2d at 925.

Second, even if Leonard had a right to the effective assistance of post-conviction counsel, he fails to demonstrate good cause because his ineffective-assistance claim is itself procedurally defaulted. In Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003), this court explained that “to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted.” See also Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000) (concluding that claim of ineffective assistance of counsel cannot serve as cause for another procedurally defaulted claim); Stewart v. LaGrand, 526 U.S. 115, 120 (1999) (concluding that ineffective-assistance-of-counsel claim failed as good cause because ineffective-assistance claim was itself procedurally defaulted). The denial of Leonard’s first post-conviction petition was final as of February 22, 1999. Leonard fails to explain his 7-year delay in filing the instant petition and therefore he did not demonstrate good cause to

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<sup>1</sup>To the extent that Leonard claims his due process and equal protection rights were violated because his petition was filed during the period of time when capital defendants were not granted post-conviction counsel as a matter of right, we reject Leonard’s contention.

overcome the procedural default. Thus, he cannot use his claim of ineffective assistance of post-conviction counsel as good cause to overcome the procedural bars to his other claims.

Fundamental miscarriage of justice

Leonard claims that even if he cannot demonstrate good cause to overcome the procedural bars, application of the procedural default rules in his case will result in a fundamental miscarriage of justice. Leonard's claim is without merit.

A fundamental miscarriage of justice requires "a colorable showing" that the petitioner is "actually innocent of the crime or is ineligible for the death penalty." Pellegrini, 117 Nev. at 887, 34 P.3d at 537. When claiming a fundamental miscarriage based on actual innocence, the petitioner thus "must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation." Id. In this context, "actual innocence means factual innocence, not mere legal insufficiency." Mitchell v. State, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (internal quotation marks and citation omitted). Similarly, when claiming a fundamental miscarriage based on ineligibility for the death penalty, the petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

In support of his claim of a fundamental miscarriage of justice, Leonard argues that (1) based on Mills v. Maryland, 486 U.S. 367, 374-75 (1988), the jury was not properly instructed that the mitigators did not need to be found unanimously and (2) there was an oppressive law

enforcement presence in the courtroom during his trial. Leonard's first claim fails because the instructions given at his trial were the same as those that this court upheld in Jimenez v. State, 112 Nev. 610, 624, 918 P.2d 687, 695-96 (1996), and his second claim fails because even if his allegations were true, they do not demonstrate that he was actually innocent of first-degree murder or ineligible for the death penalty. Leonard challenges neither the evidence upon which the jury based its guilty verdict nor the validity of the aggravating circumstances. Therefore, he fails to demonstrate that application of the procedural bars will result in a fundamental miscarriage of justice.

#### Doctrine of laches

Leonard contends that NRS 34.800 should not operate to bar his petition because he overcame the presumption of prejudice to the State. Leonard's arguments are unpersuasive.

NRS 34.800 allows the dismissal of a post-conviction petition if the delay in filing it prejudices the State in responding to the petition or in its ability to retry the petitioner. The statute also creates a rebuttable presumption of prejudice to the State based upon laches. To rebut the presumption that the State would be prejudiced in responding to the petition, a petitioner must demonstrate that his "petition is based upon grounds of which he could not have had [previous] knowledge by the exercise of reasonable diligence." NRS 34.800(1)(a). To rebut the presumption that the State would be prejudiced in retrying the petitioner, the petitioner must demonstrate a "fundamental miscarriage of justice." NRS 34.800(1)(b); Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001).

Leonard cannot overcome the presumption of prejudice under NRS 34.800(1)(a) because the claims were previously available; in fact, he raised the same claims in a prior petition. As to the presumption of prejudice under NRS 34.800(1)(b), we concluded above that Leonard failed to demonstrate a fundamental miscarriage of justice.

Validity of the procedural bars

Leonard claims that the procedural default rules are unenforceable because this court has discretion to apply those rules and does so in an inconsistent manner. Leonard's claims are without merit.<sup>2</sup>

The procedural default rules are mandatory, see Clem v. State, 119 Nev. 615, 623 n.43, 81 P.3d 521, 527 n.43 (2003); Pellegrini v. State, 117 Nev. 860, 886, 34 P.3d 519, 536 (2001), and we have rejected claims that this court has discretion to disregard the procedural bars. See State v. Dist. Ct. (Riker), 121 Nev. 225, 239, 112 P.3d 1070, 1079 (2005). Leonard fails to cite any new authority that calls into question this court's reasoning in this regard and therefore his claim is without merit.

As to the contention that the procedural default rules are applied inconsistently, this court has previously rejected similar claims. See id. at 236, 112 P.3d at 1077. Moreover, even assuming that Leonard can demonstrate some inconsistency in this court's application of the

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<sup>2</sup>Leonard also claims in a footnote that the district court erred by failing to address his claim that the delay in filing was not his fault and that applying NRS 34.726 would violate due process principles of notice. Because Leonard fails to present any cogent argument on these issues we decline to address them.

procedural bars, we have rejected the idea that any prior inconsistency excuses a petitioner from his own procedural default. Id. Therefore, Leonard's claims in this regard are without merit.

Having considered all of Leonard's claims and concluded that no relief is warranted,<sup>3</sup> we

ORDER the judgment of the district court AFFIRMED.

Hardesty, C.J.  
Hardesty

Parraguirre, J.  
Parraguirre

Douglas, J.  
Douglas

Cherry, J.  
Cherry

Saitta, J.  
Saitta

Gibbons, J.  
Gibbons

Pickering, J.  
Pickering

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<sup>3</sup>Leonard claims that the district court erred in failing to hold an evidentiary hearing on his claims of ineffective assistance of trial and appellate counsel and in denying those claims on the merits. Because all of Leonard's claims are procedurally barred, the district court was not required to hold an evidentiary hearing on those claims or consider them on the merits.



cc: Hon. James Todd Russell, District Judge  
Kay Ellen Armstrong  
Attorney General Catherine Cortez Masto/Carson City  
Attorney General Catherine Cortez Masto/Las Vegas  
Carson City District Attorney  
Carson City Clerk