

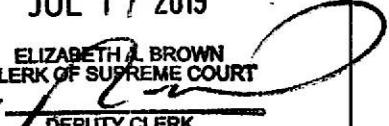
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JESUS AMIEVA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 77203-COA

**FILED**

JUL 17 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Jesus Amieva appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on April 5, 2013.<sup>1</sup> Second Judicial District Court, Washoe County; Jerome M. Polaha, Judge.

Amieva's petition was untimely because it was filed more than fourteen years after the remittitur on direct appeal was issued on June 10, 1998.<sup>2</sup> See NRS 34.726(1). Consequently, the petition was procedurally barred absent a demonstration of good cause and actual prejudice or that the failure to consider his claim would result in a fundamental miscarriage of justice. See NRS 34.726(1); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev.,

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

<sup>2</sup>See *Amieva v. State*, Docket No. 26736 (Order of Remand, May 22, 1998). Amieva did not pursue an appeal from the amended judgment of conviction the district court entered on July 10, 1998. See generally *Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2009) (concluding the statutory time limit for filing a postconviction petition for a writ of habeas corpus does not automatically restart simply because the district court entered an amended judgment of conviction).

Adv. Op. 53 at \*22 n.12, 423 P.3d 1084, 1097 n.12 (2018). Furthermore, because the State specifically pleaded laches, Amieva was required to overcome the rebuttable presumption of prejudice to the State. See NRS 34.800(2).

Amieva claimed he had good cause because his former postconviction counsel abandoned him in 1999, during the pendency of his first postconviction petition for a writ of habeas corpus. However, Amieva 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 bar. See *Brown v. McDaniel*, 130 Nev. 565, 571, 331 P.3d 867, 871-72 (2014). Moreover, even if abandonment by postconviction counsel could constitute good cause to excuse the procedural bar, Amieva has known about this claim for more than eleven years and has failed to demonstrate good cause for the entire length of the delay. See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

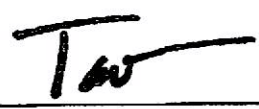
Amieva also claimed he is actually innocent. A colorable showing of actual innocence may overcome procedural bars under the fundamental miscarriage of justice standard. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. However, the petitioner must show "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence presented in his habeas petition." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schulp v. Delo*, 513 U.S. 298, 327 (1995)). Amieva has made no such showing, and therefore he has not demonstrated a fundamental miscarriage of justice sufficient to excuse the procedural bars to his petition.

Amieva further claimed laches should not apply because “the Nevada Supreme Court has not been steadfast in applying [this doctrine]” and “[the State] cannot show any actual prejudice occurred by way of lost witnesses, evidence, [and] transcripts of records.” However, Amieva, and not the State, had the burden of overcoming the rebuttable presumption of prejudice to the State, which arose when Amieva filed his petition more than five years after the Nevada Supreme Court entered its decision on direct appeal of the judgment of conviction. See NRS 34.800(2).

We conclude the district court did not err by denying Amieva’s procedurally-barred postconviction habeas petition without an evidentiary hearing.<sup>3</sup> See NRS 34.770(2); *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005); *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

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<sup>3</sup>Although the district court reached the correct result, it erred by finding this petition was successive because Amieva’s first petition was not decided on the merits. See NRS 34.810(2); *Amieva v. State*, Docket No. 35257 (Order of Affirmance, August 29, 2001); *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

cc: Hon. Jerome M. Polaha, District Judge  
Jesus Amieva  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk