

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RUDIBERTO GUERRERO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72581

FILED

OCT 12 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Rudiberto Guerrero appeals from an order of the district court denying the postconviction petition for a writ of habeas corpus he filed on November 3, 2016.¹ Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Guerrero filed his petition nearly 15 years after issuance of the remittitur on direct appeal on December 26, 2001. *See Guerrero v. State*, Docket Nos. 32173, 32242 (Order of Affirmance, November 19, 2001). Thus, Guerrero's petition was untimely filed. *See* NRS 34.726(1). Moreover, Guerrero's petition was successive because he had previously filed three postconviction petitions 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). Guerrero's

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

²*Guerrero v. State*, Docket Nos. 55789, 55790 (Order of Affirmance, November 1, 2010); *Guerrero v. State*, Docket Nos. 53441, 53839, 53943 (Order of Affirmance, September 10, 2010); *Guerrero v. State*, Docket No. 41023 (Order of Affirmance, March 23, 2004).

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). Moreover, because the State specifically pleaded laches, Guerrero was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

Guerrero argued he had good cause to excuse the procedural defects because he relied on the recent holding in *Riley v. McDaniel*, 786 F.3d 719 (9th Cir. 2015), to challenge the definition of premeditation given at his trial.


The district court found Guerrero failed to demonstrate good cause and prejudice and failed to overcome the presumption of prejudice to the State. The district court concluded *Riley* did not apply to Guerrero because Guerrero could have raised his claim regarding the premeditation instruction on direct appeal or in his first postconviction petition and failed to do so, Guerrero did not file his petition within one year of *Riley* being decided, and the Nevada Supreme Court already decided that even if the instruction was erroneous, the error was harmless given the facts of the case. Substantial evidence supports the decision of the district court, see *Hathaway v. State*, 119 Nev. 248, 71 P.3d 503 (2003); *Guerrero v. State*, Docket Nos. 53441, 53839, 53943 (Order of Affirmance, September 10, 2010), and we conclude the district court did not err by denying the petition as procedurally barred.³


³Further, the Nevada Supreme Court has recently disagreed with the interpretation of Nevada law as set forth in *Riley* and concluded *Riley* does not establish good cause for filing an untimely petition. *Leavitt v. State*, 132 Nev. ___, ___, 386 P.3d 620, 620-21 (2016).

In his opening brief, Guerrero also claims he has good cause because of recent decisions by the United States Supreme Court regarding retroactivity. However, Guerrero did not raise this claim in his petition filed in the district court below and we decline to address this claim for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Richard Scotti, District Judge
Rudiberto Guerrero
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁴We conclude the district court did not abuse its discretion by denying Guerrero's motion for joinder, motion for evidentiary hearing, and motion for the appointment of counsel. *See* NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. ___, ___, 391 P.3d 760, 760-61 (2017); *Rubio v. State*, 124 Nev. 1032, 1046 & n.4, 194 P.3d 1224, 1233-34 & n.53 (2008).