

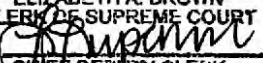
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GARY SHEPARD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 79478-COA

**FILED**

APR 27 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Gary Shepard appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Shepard filed his petition on April 29, 2019, more than 16 years after issuance of the remittitur on direct appeal on October 8, 2002. *See Shepard v. State*, Docket No. 38308 (Order of Affirmance, September 10, 2002). Thus, Shepard's petition was untimely filed. *See* NRS 34.726(1). Moreover, Shepard's petition was successive because he had previously filed several postconviction petitions for a writ of habeas corpus, and to the extent Shepard raised a new claim, it constituted an abuse of the writ.<sup>1</sup> *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Shepard's 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).

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<sup>1</sup>*Shepard v. State*, Docket No. 72089-COA (Order of Affirmance, November 14, 2017); *Shepard v. State*, Docket No. 68699 (Order of Affirmance, April 14, 2016); *Shepard v. State*, Docket No. 45481 (Order of Affirmance, November 8, 2006).

Shepard claimed the decision in *McCoy v. Louisiana*, \_\_\_ U.S. \_\_\_, 138 S. Ct. 1500 (2018), provided good cause to overcome the procedural bars to his claim that trial counsel was ineffective for conceding his guilt to a lesser charge at trial. Shepard also sought an evidentiary hearing.

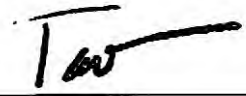
In *McCoy*, the United States Supreme Court held, “[w]hen a client expressly asserts that the objective of his [defense] is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt.” *Id.* at \_\_\_, 138 S. Ct. at 1509 (internal quotation marks, emphasis omitted). Even assuming, without deciding, that the holding in *McCoy* is new constitutional law that must be applied retroactively and is thus good cause, Shepard could not demonstrate actual prejudice. Shepard raised the underlying claim in his first postconviction petition and, at the evidentiary hearing on this petition, counsel testified that Shepard consented to the manslaughter defense. The district court found that Shepard had been properly advised of his counsel’s intention to concede his guilt to a lesser charge, and the district denied the claim. The Nevada Supreme Court affirmed the district court’s decision on appeal. *Shepard v. State*, Docket No. 45481 (Order of Affirmance, November 8, 2006). Therefore, the record demonstrates that Shepard, unlike the defendant in *McCoy*, did not expressly assert that his objective was to maintain his innocence and Shepard was not entitled to relief based upon application of the holding in *McCoy*.

We conclude the district court did not err by dismissing the petition as procedurally barred without conducting an evidentiary hearing. *See Rubio v. State*, 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008) (noting a district court need not conduct an evidentiary hearing

concerning claims that are procedurally barred when the petitioner cannot overcome the procedural bars). Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>2</sup>

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

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

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

cc: Hon. Scott N. Freeman, District Judge  
Gary Shepard  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk

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<sup>2</sup>We have reviewed Shepard's amended brief filed in this court on January 10, 2020, and we conclude no relief is warranted.