

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS AURELIO URENDA-BUSTOS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79640

FILED

FEB 16 2021

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge. Luis Aurelio Urenda-Bustos argues that the district court erred in denying his petition as procedurally barred. We affirm.

Urenda-Bustos filed the petition six years after remittitur issued on his direct appeal. *Urenda-Bustos v. State*, Docket No. 59946 (Order of Affirmance, April 9, 2013). Thus, his petition was untimely filed. See NRS 34.726(1). The petition was also successive because he had previously litigated a postconviction petition for a writ of habeas corpus in which he asserted a similar claim for relief. See NRS 34.810(1)(b)(2); NRS 34.810(2); *Urenda-Bustos v. State*, Docket No. 72615 (Order of Affirmance, May 15, 2018). Urenda-Bustos's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3). Good cause may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available to be raised in a timely petition. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Further, as the State specifically pleaded laches, Urenda-Bustos

was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

Urenda-Bustos argues that the United States Supreme Court's decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), provides good cause because trial counsel conceded his guilt without his informed consent. He is mistaken, as this court previously determined that Urenda-Bustos's case was distinguishable from *McCoy* because he was canvassed on the concession strategy and consented. *Urenda-Bustos*, Docket No. 72615, Order of Affirmance at 6 n.3; see also *McCoy*, 138 S. Ct. at 1509 (holding that an attorney may not concede a defendant's guilt where the defendant expressly objects or insists on maintaining his or her innocence). That determination is the law of the case. *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975) (holding that "[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same" and that "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument" in later proceedings).

Moreover, *McCoy* does not provide good cause because it is distinguishable. *McCoy* held that an attorney may not concede guilt of a charged crime over a defendant's express objection. 138 S. Ct. at 1509. *McCoy* differentiated a defendant who opposed counsel's concession from a defendant who "was generally unresponsive' during discussions of trial strategy, and 'never verbally approved or protested'" the concession strategy. *Id.* (quoting *Florida v. Nixon*, 543 U.S. 175, 181 (2004)). *McCoy* did not hold that a defendant must expressly consent to a concession or that a canvass must precede a concession. See *id.* Here, trial counsel conceded several of the charges and contested the others. The district court canvassed Urenda-Bustos on this strategy, and he acknowledged that he

and counsel discussed the strategy before trial and that he accepted it. Because *McCoy* is distinguishable, we need not resolve Urenda-Bustos's argument that *McCoy* applies retroactively. Accordingly, Urenda-Bustos has not shown that *McCoy* provides good cause.¹

Urenda-Bustos has further not demonstrated the district court erred in determining the petition was barred by laches. The State sufficiently pleaded laches, and prejudice was presumed based on the more-than-five-year period from the decision on direct appeal. NRS 34.800(2). Urenda-Bustos has not overcome the presumption of prejudice to the State. See NRS 34.800 (requiring a petitioner to demonstrate a fundamental miscarriage of justice when the State is prejudiced in its ability to conduct a retrial and lack of knowledge or exercise of reasonable diligence when the State is prejudiced in responding to the petition); see also *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (recognizing that fundamental miscarriage of justice requires a showing of actual innocence).

We conclude that the district court correctly applied the mandatory procedural bars and did not err in determining the petition was barred by laches. See *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 233, 112 P.3d 1070, 1074, 1075 (2005).


¹We reject the State's argument that a claim based on *McCoy* can only be raised on direct appeal. A *McCoy* claim can be raised in a postconviction habeas petition, albeit subject to the procedural bar in NRS 34.810(1)(b) because it could have been raised on appeal. See NRS 34.724(1) ("Any person convicted of a crime and under sentence of . . . imprisonment who claims that the conviction was obtained . . . in violation of the Constitution of the United States or the Constitution or laws of this State . . . may . . . file a postconviction petition for a writ of habeas corpus to obtain relief from the conviction . . .").

Having considered Urenda-Bustos's contentions and concluded that they do not warrant relief, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cadish


_____, J.
Pickering


_____, J.
Herndon

cc: Hon. Mary Kay Holthus, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk