

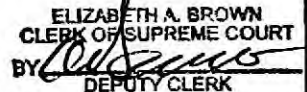
IN THE SUPREME COURT OF THE STATE OF NEVADA

MAURICIO ISRAEL MELENDEZ,
Appellant,
vs.
RENEE BAKER, WARDEN,
Respondent.

No. 80192

FILED

MAR 09 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  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; David M. Jones, Judge. Appellant Mauricio Israel Melendez argues that the district court erred in denying his petition as procedurally barred. We affirm.

Melendez filed the petition more than six years after remittitur issued on his direct appeal. *Melendez v. State*, Docket No. 54770 (Order of Affirmance, July 29, 2011). 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. See NRS 34.810(1)(b)(2); NRS 34.810(2); *Melendez v. State*, Docket No. 65479 (Order of Reversal, October 16, 2015). Melendez'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, Melendez was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

Melendez argues that the Supreme Court's recent decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), provides good cause because his

trial counsel conceded guilt to involuntary manslaughter without his informed consent. He is mistaken, as *McCoy* is distinguishable. *McCoy* holds that an attorney may not concede a defendant's guilt of a charged crime where the defendant expressly objects or insists on maintaining his or her innocence. 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. *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.*; *see also Nixon*, 543 U.S. at 186-92 (rejecting notion that concession strategy requires express consent or that it is the functional equivalent of a guilty plea).¹ Here, trial counsel conceded that Melendez committed manslaughter while arguing that the evidence did not show he was guilty of murder. The record shows that Melendez did not expressly object to this concession. Because *McCoy* is distinguishable, we need not resolve Melendez's argument that *McCoy* applies retroactively. Accordingly, Melendez has not shown that *McCoy* provides good cause.²

¹Notably, *McCoy* did not alter the holding in *Nixon*. *McCoy*, 138 S. Ct. at 1509.

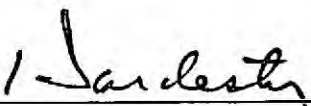
²We reject the State's argument that a claim based on *McCoy* can only be raised on direct appeal. A *McCoy* claim can be raised in a postconviction habeas petition, albeit subject to the procedural bar in NRS 34.810(1)(b) because it could have been raised on appeal. *See* NRS 34.724(1) ("Any person 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 . . .").

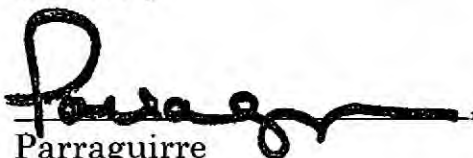
Melendez has further not demonstrated the district court erred in determining the petition was barred by laches. The State pleaded laches, and prejudice was presumed based on the more-than-five-year period from the decision on direct appeal. NRS 34.800(2). Melendez has not overcome the presumption of prejudice to the State. See NRS 34.800(1) (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).

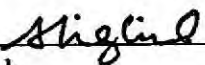
We conclude that the district court correctly applied the mandatory procedural bars and did not abuse its discretion in determining the petition was barred by laches. See *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 233, 112 P.3d 1070, 1074, 1075 (2005).

Having considered Melendez's contentions and concluded that they do not warrant relief, we

ORDER the judgment of the district court AFFIRMED.

 _____, C.J.
Hardesty

 _____ J.
Parraguirre

 _____ J.
Stiglich

cc: Hon. David M. Jones, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk