

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANNY L. MCELROY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38231

**FILED**

**APR 10 2002**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On April 10, 1995, the district court convicted appellant, pursuant to a guilty plea, of one count of robbery with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of ten years in the Nevada State Prison. This court dismissed appellant's untimely appeal from his judgment of conviction for lack of jurisdiction.<sup>1</sup>

On April 24, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition arguing that the petition was untimely filed.

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<sup>1</sup>McElroy v. State, Docket No. 27909 (Order Dismissing Appeal, February 23, 1996).

Moreover, the State specifically pleaded laches. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On August 16, 2001, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than six years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.<sup>2</sup> Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice.<sup>3</sup> In order to demonstrate good cause, a petitioner must show an impediment external to the defense prevented him or her from complying with the state procedural default rules.<sup>4</sup> The United States Supreme Court has recognized that a "showing that the factual or legal basis for a claim was not reasonably available to counsel . . . or that 'some interference by officials,' . . . made compliance impracticable, would constitute cause."<sup>5</sup> Finally, because the State

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<sup>2</sup>NRS 34.726(1).

<sup>3</sup>Id.

<sup>4</sup>Passanisi v. Director, Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989).

<sup>5</sup>Murray v. Carrier, 477 U.S. 478, 488 (1986) (quoting Brown v. Allen, 344 U.S. 443, 486 (1953)).

specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.<sup>6</sup>

In an attempt to excuse his procedural defects, appellant argued that he had no knowledge that the deadly weapon enhancement was unconstitutional pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000), and Jones v. United States, 526 U.S. 227 (1999).<sup>7</sup>

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate adequate cause to excuse his delay and failed to overcome the presumption of prejudice to the State. Appellant's reliance upon Apprendi and Jones was misplaced and did not constitute good cause to overcome the procedural defects. The decision to enter a guilty plea barred appellant from raising independent claims charging the deprivation of

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<sup>6</sup>NRS 34.800(2).

<sup>7</sup>In Apprendi, the United States Supreme Court held that any fact that increases the penalty for an offense beyond the prescribed statutory maximum, other than fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. at 490. The Jones Court, in construing a federal statute, held that any fact that increases the penalty for an offense beyond the prescribed statutory maximum, other than fact of a prior conviction, must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt. 526 U.S. at 243, n.6.

constitutional rights that preceded the entry of his guilty plea.<sup>8</sup> Moreover, appellant was adequately informed in the charging information that he was charged with robbery with the use of a deadly weapon pursuant to NRS 200.380 and NRS 193.165. Appellant did not need to be charged with a particular statutory subsection of NRS 193.165 because the deadly weapon enhancement does not charge a separate offense.<sup>9</sup> Appellant did not need to be informed of the potential range of punishment in the charging information.<sup>10</sup> Therefore, the district court did not err in denying appellant's petition as procedurally barred.

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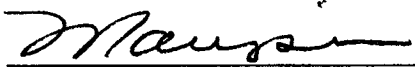
<sup>8</sup>Williams v. State, 103 Nev. 227, 737 P.2d 508 (1987); Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975).


<sup>9</sup>See 1981 Nev. Stat., ch. 780, § 1, at 2050 ("This section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact."); but see Jones, 526 U.S. 227 (holding that where statute established three separate offenses by specification of distinct elements in three subsections that each subsection relating to a separate offense must be charged in the indictment, submitted to the jury and proved beyond a reasonable doubt).


<sup>10</sup>NRS 173.075(1) ("The indictment or the information must be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . It need not contain a formal commencement, a formal conclusion or any other matter not necessary to the statement.").

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>11</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>12</sup>

 \_\_\_\_\_, C.J.  
Maupin

 \_\_\_\_\_, J.  
Agosti

 \_\_\_\_\_, J.  
Leavitt

cc: Hon. Kathy A. Hardcastle, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Danny L. McElroy  
Clark County Clerk

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<sup>11</sup>Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>12</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.