

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CURT MCLELLAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82325-COA

FILED

NOV 17 2021

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

ORDER OF AFFIRMANCE

Curt McLellan appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

McLellan argues the district court erred by denying his petition as procedurally barred. McLellan filed his petition on March 6, 2020, more than 11 years after issuance of the remittitur on direct appeal on May 27, 2008. *See McLellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008). Thus, McLellan's petition was untimely filed. *See* NRS 34.726(1). Moreover, McLellan's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus that was decided on the merits, and it constituted an abuse of the writ as he raised a claim new and different from those raised in his previous petition.¹ *See* NRS 34.810(1)(b)(2); NRS 34.810(2). McLellan'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).

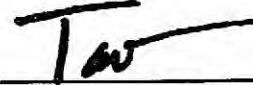
McLellan contended he had good cause because any delay was not his fault, as he raised claims that have not previously been considered

¹*McLellan v. State*, No. 64012, 2016 WL 5820460 (Nev. Sept. 30, 2016) (Order of Affirmance).

and he therefore must exhaust state remedies in order to pursue relief in federal court. However, filing a procedurally barred petition for exhaustion purposes does not amount to good cause. *See Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), *abrogated by statute on other grounds as recognized by State v. Huebler*, 128 Nev. 192, 197 n.2, 275 P.3d 91, 95 n.2 (2012). Moreover, McLellan's underlying claims were reasonably available to have been raised during the timely filing period for a postconviction petition, and McLellan did not demonstrate an impediment external to the defense prevented him from raising them in a timely manner. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Accordingly, we conclude that the district court did not err by dismissing McLellan's petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

²McLellan argues for the first time in his reply brief on appeal that he would suffer from a fundamental miscarriage of justice if his claims were not considered on the merits because he is actually innocent. We decline to consider arguments not raised in the district court in the first instance. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999). And we decline to consider arguments raised for the first time in a reply brief. *See* NRAP 28(c); *Browning v. State*, 120 Nev. 347, 368 n.53, 91 P.3d 39, 54 n.53 (2004).

cc: Hon. Kathleen E. Delaney, District Judge
Sgro & Roger
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk