

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 No. 83451

3
4 **JACK LEAL,**

5
6 Appellant,

7 vs.

8 **THE STATE OF NEVADA,**

9
10 Respondent.

11
12 **Appeal from the Judgment of Conviction and Post-Conviction Denial of**
13 **Relief for Writ of Habeas Corpus - Eighth Judicial District Court, Clark**
14 **County The Honorable Judge Michael P. Villani 8th Judicial District**
15 **Court Judge Department 17, Presiding, Order Dismissing Petition for**
16 **Writ of Habeas Corpus Issued September 6, 2021**
17 **District Court Case No. A-20-814369-W**

18 **APPELLANT'S OPENING BRIEF**

19
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IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK LEAL,)	No. 83451
)	
Appellant,)	
)	
vs.)	Dist. Ct. Case No.
)	
STATE OF NEVADA,)	NRAP 26.1(a) DISCLOSURE
)	
Respondent.)	
<hr style="width: 40%; margin-left: 0;"/>)	

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Attorney of record for Appellant: Diane C. Lowe Esq. of Lowe Law, L.L.C.

1. Appellant Jack Leal is an individual. He is the only subject of this appeal. The company he owned with his wife, codefendant Jessica Garcia, that was an initial subject of this action was PARCELNOMICS, LLC (d/b/a Investment Deals); but the company dropped off of charging documents by the time of the plea bargain.

Attorney Jason Weiner represented Jack Leal for his criminal case. The direct appeal of his plea conviction was case 74050.

Attorney Craig A. Mueller, Mueller, Hinds & Associates filed the notice of appeal.

Attorney Lester M. Paredes III took over for the remainder of the direct appeal.

Attorney Joseph Z Gersten, The Gersten Law Firm PLLC filed the first writ of habeas corpus petition

Jack Leal submitted an information brief for the appeal 79243.

Attorney Jean Schwartzer, Law Office of Jean J. Schwartzer, filed a motion to Modify Sentence.

Respectfully submitted,

/s/ Diane C. Lowe
Diane C. Lowe Esq.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 13,215 words;

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 6th Day of October 2021

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CERTIFICATE OF SERVICE

I hereby certify that service of the **APPELLANT’S OPENING BRIEF** was filed electronically with the Nevada Supreme Court on October 6, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD

/s/ Diane C. Lowe
DIANE C. LOWE, ESQ.

ALEXANDER CHEN

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

Jack Leal

BY /s/ Diane C. Lowe
DIANE C. LOWE

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October 6, 2021

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1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 _____

3 JACK LEAL,) No. 83451
4)
5 Appellant,)
6)
7 vs.)
8 STATE OF NEVADA,)
9 Respondent.)
10 _____)

11
12 **APPELLANT’S OPENING BRIEF**

13
14 **I. JURISDICTIONAL STATEMENT**

15
16 This Court has Jurisdiction over an appeal from the denial of post-conviction
17 relief for a plea agreement under N.R.S. 34.575(1).
18

19 This is an appeal from the denial of a post-conviction petition for writ of
20 habeas corpus in Jack Leal vs. Warden, William Hutchings of Southern
21 Desert State Prison, Civil Case No. A-20-814369-W. 2AA434-443. The
22 judgment of conviction was filed initially on August 23, 2017. 1AA142-143.
23

24 An amended judgment of conviction filed May 9, 2019, for the companion
25 criminal case C-17-322664-2. 1AA233-234. The trial court denied post-
26 conviction relief initially orally at the hearing on the briefings August 27,
27
28

1 2021. 2AA428-430. The Notice of Entry of Order of Dismissal was filed
2 and served by Odyssey eServe September 9, 2021. 2AA434-443. A timely
3 amended notice of appeal was filed on September 10, 2021. 2AA444-446.
4

5 **II. ROUTING STATEMENT**

6
7 This appeal is presumptively retained by the Nevada Court of Appeals
8 because it relates to a post-conviction Petition for a guilty plea
9 NRAP17(b)(1) to a Category B felony. NRAP 17(b)(3).
10

11 **III. ISSUES PRESENTED FOR REVIEW**

- 12
13
14
15 1. The District Court erred in determining Mr. Leal's Writ of Habeas Corpus
16 Action was not timely per NRS 34.726 and Nevada Caselaw.
- 17
18 2. The District Court erred in determining the Writ of Habeas Corpus
19 Petition, Addition and Supplements are Procedurally Defaulted as Successive
20 per NRS 34.810.(2) and (3) and should not be considered on the merits.
- 21
22 3. The District Court Erred in Not Allowing Plea Withdrawal.
- 23
24 4. The District Court erred in not finding ineffectiveness of counsel as to the
25 sentencing of Mr. Leal, including the failure to present mitigating factors and
26 to prepare properly ensuring readiness and if not ready to proceed; to fight to
27 have continuances granted until the necessary actions were completed to pay
28 the liens. This led to prejudice and manifest injustice.
5. The District Court erred in not granting an evidentiary hearing.

1
2 **IV. STATEMENT OF THE CASE**
3

4 On September 30, 2016, the State filed in the Eighth Judicial District Court a
5 complaint for forfeiture against, inter alia, property located at 1024 Santa
6 Helena Avenue, Henderson, NV 89001 case A-16-744347-C. 1AA1-9. The
7 request for forfeiture was based on the allegation that the home constituted
8 the proceeds of fraudulent real estate transactions. 1AA10-11.
9

10
11 Mr. LEAL was summoned and charged November 29, 2016, with his wife
12 JESSICA GARCIA and their company PARCELNOMICS, LLC (d/b/a
13 Investment Deals) under three cases at the Las Vegas Justice Court for 14
14 felony B criminal charges: 1 Racketeering, 12 theft, and 1 Multiple
15 transactions involving fraud or deceit in course of enterprise or occupation.
16
17

18 Justice Court Case 16F19220B (Jack Leal), 16F19220A (Parcelnomics,
19 LLC), 16F19220C (Jessica Garcia). 1AA12-42. Thirteen people claimed
20 they sold them houses and did not comply with disclosure requirements to
21 alert them about liens on the properties, defrauding them of a combined
22 amount of \$757,420.00 between March 1, 2015, and March 31, 2016.
23
24 1AA19-42. On December 27, 2016, Attorney Jason G. Weiner confirmed as
25 counsel for both defendants. 1AA43. An Amended Criminal Complaint was
26 also filed. 1AA44-66. On April 11, 2017, Jack Leal unconditionally waived
27
28

1 his right to a preliminary hearing and the Justice Court cases were closed and
2 bound over to District Court. 1AA74-75. Submitted the same day were forms
3 signed and sworn to by Mr. Leal waiving his preliminary hearing and any
4 conflict of interest caused by his attorney Mr. Weiner representing both he
5 and his wife Jessica Garcia. 1AA76-77.
6
7
8

9 An Information was issued April 18, 2017. 1AA90-93. There was a brief
10 hearing on April 20, 2017, wherein the conflict waivers of dual representation
11 was touched on briefly and the matter was continued to the next week.
12 1AA79-81. On April 24, 2017, Mr. Leal entered a guilty plea agreement to
13 Count 14 – Multiple transactions involving fraud or deceit in course of
14 enterprise or occupation with all the other counts being incorporated into
15 Count 14. Jack Leal signed Plea Form is found in the appendices. 1AA82-
16 87. Signed Certificate of Defense Counsel. 1AA88-89. Exhibit 1
17 Information 4/18/17 1AA91-93. Leal Signed and additional Conflict of
18 Interest Waiver dated 04/20/2017. 1AA94-96. Codefendant Jessica Garcia
19 Signed Guilty Plea Agreement. 1AA97-102. Signed Certificate of Defense
20 Counsel. 1AA103-107. Plea Hearing Transcript: 1AA108-117. Hearing
21 Minutes 1AA118. The PSI had recommended a sentence of a minimum of 24
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1 months incarceration and a maximum sentence of 120 months with \$757,420
2 restitution jointly and severally with the co-defendant. Page 10. 2AA374.

3
4 He was sentenced on August 17, 2017, to a minimum initial incarceration
5 time of 72 months and a maximum of 180 months (6 years – 15 years) with 0
6 credit for time served and ordered to pay restitution to the thirteen people
7 defrauded. 1AA119-141. The Judgment of Conviction (Plea of Guilty) for
8 Jack Leal was filed August 23, 2017. 1AA142-143. Jessica Leal did not
9 show up to this sentencing hearing though she was supposed to be there.
10 1AA129, 217. An Amended Judgment of Conviction for Mr. Leal was
11 entered May 9, 2019, by the Court which corrected the original judgment of
12 conviction by adding the oral order given at the sentencing hearing and on the
13 plea agreement of restitution ‘jointly and severally’. 1AA233-234

18 **Actions After Conviction**

19 Before this current appeal, two appeals had been filed by Mr. Leal. The first
20 was direct appeal 74050. A Notice of Appeal was filed by Attorney Craig A.
21 Mueller on September 14, 2017. 1AA145-146. After that, attorney Lester
22 M. Paredes III took over and submitted the opening brief. 1AA155-176.

25 The Issues Raised in Opening Brief: 1AA157

- 26 1. Did the District Court Err by Failing to Hold an Evidentiary
27 Hearing or Inquire into the Nature and Materiality of the alleged
28 breach of the guilty plea agreement?

1 2. Did the District Court Err by denying appellant's motion to
2 withdraw counsel due to an unwaiveable concurrent conflict of
3 interest?

4 They lost. 1AA192-194. A Remittitur was filed January 17, 2019. 1AA197.

5 A writ of habeas corpus petition was filed March 21, 2019. 1AA200-211.

6 The issues raised in the initial Petition which was typed and prepared by
7

8 Attorney Gerstein were:

9 A. Mr. Leal's Conviction and Sentence are Invalid under the 6th
10 and 14th Federal Constitutional amendment guarantees of due
11 process and equal protection and under the law of article 1 of the
12 Nevada Constitution because the Original Information failed to
13 put the petitioner on notice of the charges. 1AA205.

14 B. Mr. Leal's conviction and sentence are invalid under the 6th and 14th
15 Federal Constitutional Amendment guarantees of due process and
16 equal protection and under the law of article 1 of the Nevada
17 Constitution because prior counsel's performance fell below an
18 objective standard of reasonableness as is mandated by Strickland, 466
19 U.S. 668, 104 S. Ct. 2052 (1984). 1AA207.

20 1) Petitioner's criminal counsel's assistance was
21 ineffective, because prior counsel's performance fell
22 below an objective standard of reasonableness as
23 mandated by Strickland, by failing to obtain a conflict
24 waiver; 1AA208.

25 2) Petitioner's criminal counsel's assistance was
26 ineffective, because prior counsel's performance fell
27 below an objective standard of reasonableness as is
28 mandated by Strickland, by coercing petitioner into
entering a plea. 1AA210.

After briefing and an evidentiary hearing the Petition was denied June 19,

2019 by Judge Michael P. Villani. 1AA235-238. Attorney Gerstein filed the

1 preliminary appeal documents July 19, 2019, challenging Judge Villani's
2 ruling. 2AA243-244. Mr. Leal filed an Informal Brief December 30, 2019.
3 2AA245-253. But relief was denied October 9, 2020. 2AA288-291.
4 Remittitur was filed January 27, 2021. 2AA326-327. On April 28, 2020,
5 Attorney Jean J Schwartzer filed a second Writ of Habeas Corpus Petition in
6 order to try to preserve timeliness. 2AA254-261.
7

8
9 The Amended Judgment of Conviction was filed May 9, 2019. 1AA233-234.
10 The original judgment of conviction was filed August 23, 2017. 1AA142-
11 143.
12

13 In it she raises the following issues: 2AA260.
14

15 1 Based upon information and belief, Petitioner received
16 ineffective assistance of counsel in violation of his right
17 to counsel pursuant to the Sixth Amendment to the
18 Constitution of the United States of America and Article
19 1 of the Nevada Constitution due to trial counsel's
20 failure to present mitigation factors at sentencing,
21 including but not limited to the inability of Petitioner to
22 pay the restitution prior to sentencing due to
23 document(s) being records on the property located at
24 1024 Santa Helena Avenue, Henderson Nevada 89002
25 at the mandate of the Attorney General, thereby making
26 it difficult to sell.

27 2 Based upon information and belief, Petitioner received
28 ineffective assistance of counsel in violation of his right
to counsel pursuant to the Sixth Amendment to the
Constitution of the United States of America and Article
1 of the Nevada Constitution due to trial counsel's
failure to go over or correct Petitioner's Presentence
Investigation Report prior to sentencing.

3 Based upon information and belief, Petitioner received

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ineffective assistance of counsel in violation of his right to counsel pursuant to the Sixth Amendment to the Constitution of the United States of America and Article 1 of the Nevada Constitution due to trial counsel's failure to correct and/or explain errors in Petitioner's criminal history and nature of the instant offense. 2 PA 155 (pdf 20).

4 Petitioner requests an evidentiary hearing pursuant to NRS 34.770.

On May 27, 2020, Mr. Leal filed a handwritten Petition for Writ of Habeas Corpus supplementing the previous one filed by Ms. Schwartz. 2AA262-273. 2AA420 line 9-13

Ground 1: Challenge to validity of guilty plea. 2AA268.

Supporting Facts: My plea was involuntary as I was coerced and it was not entered into of my own free will. My plea was entered into without the effective assistance of counsel as there was a clear actual conflict of interest between both Defendants who were being represented by the same attorney. Jason Weiner began representing both Defendants but seems to have only had meaningful conversations with Garcia and not Leal. Both co-defendants were unable to be properly represented due to no contact orders stemming from domestic violence issues related to this criminal case. Since almost all communications were done solely with only Garcia as she was the one to retain and pay for Weiner's services, Leal simply was not involved in discussions regarding the case and had I had independent counsel to discuss with would have been able to proceed to trial.

I believe I am actually innocent as each victim signed a purchase agreement to purchase the properties which clearly stated that the properties were being sold "subject to liens and encumbrances and believe that a trial would show my innocence."

1 My plea was also entered without any meaningful
2 representation. (See: Ground Two).

3
4 Ground 2: Ineffective Assistance of Counsel Jason Weiner – Trial Counsel 2
5 2AA269.

6 Supporting Facts: Weiner failed to disclose the court of the
7 Civil Forfeiture case which was filed by the A.G. and had a
8 direct impact on my ability to pay any restitution as it caused a
9 Lis Pendens to be placed against a home which was to be sold to
10 pay restitution. Instead the A.G. argued that there was nothing
11 done to pay anybody back but that was simply not the case –
12 Weiner did not disclose to the court the fact that this was a
13 “package plea deal” which should have resulted in a more
14 thorough plea canvass which would have prevented the issues in
15 Ground One.

16 Weiner did not present the jurisdictional issues relating to the
17 fact that certain properties were located and sold in Florida with
18 Nevada having no jurisdiction for these sales.

19 Weiner represented both co-defendants from the period of
20 December 2016 through April 9 2017 with no conflict of interest
21 waiver in place at all while the co-defendants were involved in
22 several actual conflicts (See Ground One).

23 Weiner did not dispute or challenge a insufficient charging
24 document which made my plea unknowingly entered. The
25 Information by which I was charged does not put me on notice
26 of the charges as it does not contain each and every element of
27 the crime charged or the facts showing how I allegedly
28 committed the acts. It is not clear and concise and therefore a
29 Defendant cannot plea to charges which do not constitute a
30 crime.

31 Due to all of the above, counsel’s assistance was clearly
32 ineffective and in violation of my constitutional rights to
33 effective counsel.

1 Ground Three: Ineffective Assistance of Counsel Craig A. Mueller and
2 Lester M. Paredes – Appellate Counsel. 2AA270.

3
4 Supporting Facts: I was never provided a copy of my pre-
5 sentence investigation report (P.S.I.) prior to being sentenced as
6 required by N.R.S. 176.153.

7 This is a due process violation as information in his PSI was
8 presumably used against him at sentencing and is still being used
9 against him by N.D.O.C. for purposes of classification. This
10 non-disclosure affects the Petitioner’s rights and ability to
11 challenge and dispute incorrect information as per Nevada Law,
12 the only opportunity to do so is at sentencing. Petitioner will
13 also be prejudiced moving forward as the Nevada Parole Board
14 has stated that the P.S.I. is the primary document used to
15 determine eventual release. Just a few errors from my PSI are:
16 My offense date is listed as being over a period of 1 year when it
17 was a period of approximately 90 days. Under “Offense
18 Synopsis” there are 7 paragraphs which I do not know what they
19 relate to. This information appears to have come directly from
20 the A.G.’s office and was never provided to me. It also does not
21 list my actual limited involvement and instead refers to “an
22 individual” in 12 separate paragraphs. The referenced
23 “individual” is not me but it is implied that it was me and a
24 reader without knowing this could surely not make this
25 distinction.

26 Appellate counsel was ineffective for not raising this issue as it
27 was error that was on the record and therefore appealable.

28
29 On August 12 2020 Michael J Bongard, Senior Deputy Attorney General
30 submitted an Answer to the Post-Conviction Petition for Writ of Habeas
31 Corpus. 2AA274-287. On October 28, 2020, Attorney Schwartzer filed a
32 Motion to Modify Sentence on behalf of Jack Leal. 2AA292-301.

1 And on November 9, 2020, Michael Kovac Chief Deputy Attorney General
 2 filed ‘State’s Opposition to Defendant’s Motion to Modify Sentence.’
 3 2AA302-309. The Motion to Modify was Denied without Prejudice
 4
 5 November 17, 2020. 2AA318.

6
 7 The issues raised for the four prior actions include:

<p>8 Grounds Raised for 9 the 4 actions after 10 conviction prior to 11 this appeal 12 13 [Not including the 14 Motion to Modify 15 Sentence submitted 16 10/28/2020 17 2AA292-301 and 18 the most recent 19 Writ of Mandamus 20 action filed 21 September 2, 2021, 22 District Court case 23 A-21-840493-W]</p>	<p>ACTION 1 Direct Appeal 74050 Filed 9/14/17 1AA145-146 Brief: 1AA155-176 09/11/2018 Order Denying Relief: 1AAA192- 194 Remittitur issued 1/17/19</p>	<p>ACTION 2 First Writ of Habeas Corpus C-17-322664- 2 Started 3/21/2019 1AA200-211 Denied after briefing and argument on briefing hearing 6/19/19 1AA235-238</p>	<p>ACTION 3 1st Writ appeal Appeal 79243 Filed 7/19/19 2AA243-244 Court of Appeals Order Denying Relief 2AA288-291 Remittitur was filed 1/27/21 2AA326-327</p>	<p>ACTION 4 2nd / current writ of Habeas Corpus A-20-814 369-W filed 4/28/20 2AA254-261 5/27/20 2AA262-273 12/08/2020 2AA319-324 District Court Order 2AA434-443 Subject of this appeal 83451</p>
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<p>23 Unknowing 24 involuntary 25 unintelligent plea – 26 ineffective 27 Assistance of 28 Counsel in plea</p>		<p>[But see 1AA224 line 20 - “There was nothing in the original petition that talked about the fact that while raising that claim there</p>		<p>Ground 1 2AA268</p>
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		was somehow a knowing and an unintelligent or involuntary [phonetic plea.] Atty Gersten new issues]		
Failure to hold Evidentiary Hearing on breach of plea agreement re if restitution paid in advance would recommend or not object to probation	Ground 1AA157			Ground 2 2AA269
Denying appellant’s motion to withdraw counsel due to an unwaiveable concurrent conflict of interest	Ground 2 1AA157			Ground 2 2AA269
Original Information failed to put the petitioner on notice of the charges.		Point A 1AA205	2AA249-250	Ground 2 2AA269
Conflict – waiver due to representation same attorney for the 2 codefendants Petitioner’s criminal counsel’s assistance was ineffective, by <u>failing to obtain a conflict waiver</u> ;		Point B 1 1AA208	2AA250	
Coercion Petitioner’s		Point B 2 1AA210	2AA251-252	Point 1 2AA260

1	criminal counsel's			2AA320
2	assistance was			
3	ineffective, because			
4	prior counsel's			
5	performance fell			
6	below an objective			
7	standard of			
8	reasonableness as is			
9	mandated by			
10	<u>Strickland</u> , by			
11	<u>coercing petitioner</u>			
12	<u>into entering a plea.</u>			
13				
14	Trial counsel's			Point 1
15	failure to present			2AA260
16	mitigation factors			
17	at sentencing,			
18	including but not			
19	limited to the			
20	inability of			
21	Petitioner to pay			
22	the restitution prior			
23	to sentencing due to			
24	document(s) being			
25	records on the			
26	property located at			
27	1024 Santa Helena			
28	Avenue, Henderson			
	Nevada 89002 at			
	the mandate of the			
	Attorney General,			
	thereby making it			
	difficult to sell.			
	PSI			Ground 3
				2AA270
	Due to trial			Point 2
	counsel's failure to			2AA260
	go over or correct			
	Petitioner's			
	Presentence			

1	Investigation			
2	Report prior to			
3	sentencing.			
4	Due to trial			Point 3
5	counsel's failure to			2AA260
6	correct and/or			
7	explain errors in			
8	Petitioner's			
9	criminal history			
10	and nature of the			
11	instant offense.			
12	Petitioner requests			Point 4
13	an evidentiary			2AA260
14	hearing pursuant to			
15	NRS 34.770.			
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V. STATEMENT OF FACTS

2AA369 PSI Synopsis. The Offense Synopsis is identical in the PSI of both defendants Jack Leal and Jessica Garcia. Also identical are the Sentencing Recommendations found on page 10 of the PSI. Mr. Leal's full PSI has been filed under seal with the Nevada Supreme Court. Ms. Garcia's report, which was forwarded with trial counsel's casefile to this attorney, was redacted significantly and included in the appendix for a limited purpose.

PSI OFFENSE SYNOPSIS 2AA369

Records provided by the State of Nevada Attorney General's Office reflect that the instant offense occurred substantially as follows:

1 In March of 2015, a victim found a property being auctioned off through
2 Ebay.com and began email communications with the Jack Leal, the seller of
3 the property. On March 11, 2015, the victim won the auction of the property
4 with a bid of \$50,600. After winning the bid, the victim agreed to purchase an
5 additional property. On March 11, 2015, the victim wired a total of \$98,620
6 to Jack Leal's personal bank account for the purchase of both properties. On
7 April 1, 2015, the victim contact a title insurance company with questioning
8 regarding the properties she purchased and was informed that liens existed
9 for both properties. She contacted the defendant regarding the liens and he
10 stated he had discussed the liens that existed on the properties with his
11 attorney, claiming his attorney said the liens are "clouds" on the title. In
12 February of 2016, the victim learned the second property she purchased was
13 in foreclosure. Since April of 2015, she has been served with two foreclosure
14 notices on both properties that Jack Leal claimed were "free and clear" of
15 liens.
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22 In June of 2015, a victim found a home on a website and met with an
23 individual of the business owned by Jack Leal and Jessica Garcia. After
24 negotiations, the victim and individual agreed on a price of \$70,000 for the
25 house. The individual stated to the victim that purchasing the home for cash
26 would allow the closing to go very quickly. The victim met the individual at
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1 the Clark County Recorder's Office on August 6, 2015, where they completed
2 the sales transaction. In exchange, the victim directly handed the individual a
3 cashier's check totaling \$70,000. In February of 2016, the victim attempted to
4 refinance the property and was informed by the title company that there were
5 a first and second mortgage totaling over \$300,000. On March 2, 2016, the
6 victim found a foreclosure notice taped to the front door of the property. The
7 victim attempted to contact the individual numerous times but he never
8 returned her phone calls or messages.

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12 In August of 2015, a victim found a property she wanted to purchase on a
13 website. On September I, 2015, the victim met with the individual, and Jack
14 Leal at the Clark County Recorder's Office. Mr. Leal stated he saw no liens
15 with the property. The victim then gave the individual a cashier's check for
16 \$60,000 and was given a signed deed which was recorded. A few days after
17 the sale, the victim saw another property listed by the individual that she
18 wanted to purchase. The initial price of the property was \$50,000 but
19 eventually agreed upon \$30,300. On September 9, 2015, the victim met with
20 the individual at the Clark County Recorder's Office. She provided the
21 individual with a cashier's check for \$30,300 made out to Jack Leal and
22 Jessica Garcia's business and the deed for the property was recorded. On
23 September 22, 2015, the victim learned that both of the properties she
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1 purchased had existing bank liens. She was able to get in contact with Leal
2 and demanded her money back. He stated he would not return her money
3 because there was no benefit for him to do so. The victim indicated she
4 would take the purchase price minus what the individual earned for the sale.
5
6 In November of 2015, Jessica Garcia contacted the victim regarding the
7 original property she purchased and offered to purchase it back for \$40,000.
8
9 The victim rejected the offer stating she paid \$60,000 for it and wanted her
10 money back. On March 23, 2016, the victim made her final attempt to get
11 her money and after feeling desperate, she told Jessica Garcia she would
12 accept \$40,000 for the property. Approximately a week later, the victim was
13 informed that the property would be purchased for \$30,000. Jessica Garcia
14 told the victim she would transfer the property into the name of SRT
15 Holdings, a company located in Arizona and would fax the victim a copy of
16 the deed regarding the purchase. When the victim saw the deed was a
17 warranty deed, she rejected the offer and did not have any further
18 communication with the employee, defendant or co-defendant. A foreclosure
19 notice on the second property the victim purchased was filed on March 28,
20 2016. 2AA369.

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26 In August of 2015, a victim agreed to purchase a property for \$65,000 from
27 the individual listed on the advertisement. They met at the Clark County
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1 Recorder's Office and handed him a cashier's check for that amount and
2 received the deed. The victim agreed to purchase a second property, met the
3 individual at the Clark County Recorder's Office again and handed him a
4 check for \$57,500. She reported that she did not receive keys for the property
5 and was informed the deed would be mailed to her. She attempted to contact
6 the individual asking for the deeds and the deed and did not receive any
7 response. The victim stated she was advised to obtain an attorney to try and
8 resolve the title issues on her properties.
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12 In August of 2015, a victim agreed to a purchase price. She met the
13 individual at the Clark County Recorder's Office, handed him a cashier's
14 check for \$87,500 and was provided the deed. Within a few weeks, the victim
15 discovered the home's title history and saw that it had "clouded title". The
16 victim made contact with Leal who informed her that if she deeded the
17 property back to him, she would receive \$50,000 back. In September of 2016,
18 the victim deeded the property back and she received a \$50,000 check.
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22 In August of 2015, a victim located a property for sale and agreed to purchase
23 the property for \$149,000. The victim met the individual at the Clark County
24 Clerk's Office and handed the individual two cashier's checks totaling
25 \$149,000. Approximately thirty to forty-five days after the purchase, the
26 victim was notified that there was an outstanding mortgage note on the
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1 property for approximately \$404,000. The victim obtained an attorney and
2 was advised to accept partial payment from Jack Leal who offered a return of
3 \$27,500. The victim accepted and that amount was returned to him. Near the
4 end of April of 2016, the victim received a foreclosure notice on the property.
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6 In August of 2015, the victim agreed to rent a property and paid \$2,500
7 upfront to the individual. After two days of renting, Jessica Garcia showed up
8 to the property and was angry the individual had rented out the property to
9 the victim. The victim ended up making a rent to own deal with Jessica
10 Garcia and in September of 2015, agreed to purchase the property for
11 \$40,000. The victim met Jessica Garcia at the Clark County Recorder's Office
12 and handed a cashier's check for \$40,000. The victim reported the deed
13 Jessica Garcia brought was already filled out and was given to the agent at
14 the recorder's office on September 17, 2015. It was noted that the cashier's
15 check was made out to Jack Leal and Jessica Garcia's business, but the deed
16 provided to the victim stated that another business name was selling the
17 home. The victim began receiving lien notices on the property. He contacted
18 Jessica Garcia who stated she believed they were already paid and that they
19 were not her concern anymore. The victim ultimately paid the liens which
20 totaled approximately \$10,000.
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1 In September of 2015, the victim found a property for sale on the website
2 Zillow that was located in Florida. He contacted the individual who stated his
3 company had power of attorney from Jack Leal and Jessica Garcia's company
4 to sell the property, indicating the company was a Nevada corporation. They
5 agreed on a price and he met the individual at the County Recorder's Office
6 located in Florida, handed a cashier's check for \$85,000 and the deed was
7 recorded. Approximately three weeks after the purchase, the victim
8 discovered the house in foreclosure.

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12 On September 20, 2015, the victim located a property for sale and offered
13 \$75,000 for the property and they agreed to meet later in the day at the Clark
14 County Recorder's Office. During the signing of the documents, Jessica
15 Garcia stated the property was free and clear of all liens. The victim brought
16 a purchase agreement with her, and both she and Jessica Garcia signed the
17 document; however, she decided not to use the agreement and had blackened
18 out her signature. Instead, Jessica Garcia used her own purchase agreement.
19 After signing the deed, the victim gave Jessica Garcia a cashier's check for
20 \$75,000. The victim spent approximately \$25,000 in renovations and placed
21 the property for sale in December of 2015. While the sale was in escrow, the
22 title search revealed an existing mortgage of approximately \$186,000. fu
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1 February of 2016, the property went into foreclosure and was sold at auction.

2 Additionally, the victim had previously bought a second [2AA370]
3 property from the Jessica Garcia for \$95,000 and in June of 2016, she
4 received a foreclosure notice on that property. For both properties, the victim
5 was defrauded out of \$205,000.
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8 In October of 2015, the victim agreed to buy property for \$60,000 and on
9 November 2, 2015, she met the individual at the Clark County Recorder's
10 Office. She handed over a check and the deed for the property was recorded.
11

12 Later on, the victim discovered that there was a mortgage for approximately
13 \$15,000. The victim hired an attorney and through negotiations, Jack Leal
14 and Jessica Garcia's company offered approximately half of the \$60,000
15 payment back. In return, the victim had to sign a non-disclosure agreement
16 with the company.
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19 In November of 2015, a victim couple located a property for sale and offered
20 \$100,000. On November 22, 2016, the victims met with the individual at the
21 Clark County Recorder's Office and handed him a cashier's check for
22 \$100,000 and the deed was recorded. In July of 2016, the victims were
23 notified they may or not actually own their home and would want to verify
24 with a title company. Approximately a week later, they stated their further
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1 research of the property indicated that there was in fact an encumbrance on
2 the property.

3 In November of 2015, a victim decided to purchase property totaling
4 \$100,000. On November 24, 2015, the victim met with the individual at the
5 Clark County Recorder's Office and gave him the remaining balance of
6 \$50,000 in cashier's checks and he was provided the deed. In December of
7 2015, the victim discovered there were still previous exiting liens on the
8 property. The victim contacted and met with both the individual and Jack
9 Leal, stating he was aware of the fraud and demanded a full refund of
10 \$150,000. Jack Leal told the victim he would give him a full refund but he
11 needed some time. hi February of 2016, the victim stated he received a
12 cashier's check for \$120,000; however, he never received the remaining
13 \$30,000.

14 In February of 2016, an elderly victim couple met with an individual at the
15 Clark County Recorder's Office and handed a check in the amount of
16 \$20,000. Additionally, the victims reported they paid the individual a cash
17 bonus on each transaction for giving them "such great deals". For this
18 property, they stated the individual received approximately \$2,500. The
19 victims ended up purchasing several additional properties from the individual
20 which they paid approximately \$317,000 and additional bonuses paid to the
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1 individual for approximately \$24,000. A police report was submitted by the
2 victim stating he paid the defendant \$50,000 for a property. After the
3 purchase of the property, the victim received a foreclosure notice from the
4 bank that he was never made aware of by Jack Leal.
5

6 In March of 2016, a victim agreed to purchase property. On April 8, 2016, the
7 victim met the individual at the Clark County Recorder's Office, handed him
8 a check for \$124,000 and the deed was recorded. She indicated the deed was
9 already filled out when the individual arrived. Shortly after moving in, the
10 victim discovered there was approximately \$10,000 in delinquent HOA liens
11 on the property, which she paid herself. Within days of moving, she had seen
12 a foreclosure notice posted to her door but did not pay attention to it because
13 she believed it was for the previous owner.
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17 On March 16, 2016, the investigator contacted a bankruptcy trustee who
18 stated he was the legal trustee for the multiple properties purchased at
19 bankruptcy auctions by Jack Leal. The trustee stated that Jack Leal was
20 "definitely knowledgeable" about the liens and encumbrances that stayed
21 with the property after the purchase at the auction and that those liens are
22 specifically highlighted in the deed that is signed after purchase. He stated
23 that the property was sold at a telephone auction and that a list of the
24 properties for auction would be sent to approximately fifty people. These
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1 emails contained two sections: properties to be sold free and clear and
2 properties to be sold subject to an existing mortgage. Additionally, the trustee
3 stated that free and clear properties sell for an average of \$100,000 and
4 properties with mortgages sell for an average of \$5,000. The trustee provided
5 a list of six properties Jack Leal and Jessica Garcia's business purchased from
6 him and those [2AA371] properties matched the addresses that relate to the
7 defrauding victims. It was appeared that Jack Leal and Jessica Garcia's
8 business purchased these properties for pennies on the dollar and "sold" them
9 to unsuspecting victims at a much high value without telling victims about
10 the existing encumbrances on the property.
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15 Based on the investigation from the investigator, Jack Leal and Jessica Garcia
16 were fraudulently misrepresenting encumbered properties to the victims as
17 "free and clear" of any liens or mortgages. The business Jack Leal and Jessica
18 Garcia operated appeared on forty-nine deeds in the Clark County, Nevada, at
19 least several properties in Florida, over twenty properties in Michigan, as
20 well as other properties in Ohio. Large rounded dollar cashier's checks
21 identifying at least 15-30 other possible victims have been viewed in the bank
22 accounts owed by Jack Leal and Jessica Garcia. The new alleged owners of
23 the properties would then receive foreclosure notices, pay other outstanding
24 liens, and be faced with financial burdens associated from . the alleged
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1 property sale. Jack Leal and Jessica Garcia would then ignore the victims
2 after the purported sale of the home, or offer to "buy" it back for less than
3 they receive for it. Additionally, the business's Jack Leal and Jessica Garcia
4 owned and operated are not licensed to conduct business with Clark County
5 and Jack Leal and Jessica Garcia are not licensed with the Nevada Division
6 of Real Estate to sell real estate.
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9 Based on the aforementioned circumstances, a summons to appear was issued
10 for Mr. Leal and Ms. Garcia. 2AA372.
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12 13 **VI. STANDARD OF REVIEW**

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15 ‘A claim of ineffective assistance of counsel presents a mixed question of law
16 and fact, subject to independent review. To establish ineffective assistance of
17 counsel, a claimant must show both that counsel's performance was deficient
18 and that the deficient performance prejudiced the defense. Deficient
19 performance is representation that falls below an objective standard of
20 reasonableness. To show prejudice, the claimant must show a reasonable
21 probability that but for counsel's errors the result of the trial would have been
22 different. Judicial review of a lawyer's representation is highly deferential,
23 and a defendant must overcome the presumption that a challenged action
24 might be considered sound strategy. The reviewing court must try to avoid
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1 the distorting effects of hindsight and evaluate the conduct under the
2 circumstances and from counsel's perspective at the time.’
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4 Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001). Whorton v.
5 Sheppard, No. 54284, 2010 Nev. LEXIS 72, at *1-2 (June 23, 2010). An
6 appellate court reviews de novo the denial of a petition for a writ of habeas
7 corpus. Shackleford v. Hubbard, 234 F.3d 1072, 1074 (9th Cir. 2000).
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12 **VII. SUMMARY OF THE ARGUMENT**

13 The timeliness of this petition should be calculated from the date of the
14 Amended Judgment of Conviction. May 9, 2019. 1AA233-234. This second
15 petition for writ of habeas corpus was filed April 28, 2020. 2AA254-261.
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17 The Amended Judgment of Conviction should start the timeframe for
18 commencement of the 1-year deadline for writ of habeas corpus filing
19 because the amendment is a substantive change to the written document
20 adding the language ‘Restitution payable jointly and severally with Co-
21 Defendant...’ 1AA234. If not, good cause exists to waive the time bar so
22 these claims still should be considered on the merits. A fundamental
23 miscarriage of justice would result otherwise. See N.R.S. 34.810
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26 Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519 (2001)
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1 Also, at issue –successive petitions. We are not appealing those issues raised
2 that are law of the case. The next issue considered - Could the issues raised
3 in this writ of habeas corpus 2nd action have been raised in the earlier writ of
4 habeas corpus action. We argue herein that they could not have because a
5 new prejudice prong – the much better sentence of his codefendant though
6 recommendations by the PSI that they receive the same sentence due to their
7 background and equal participation in the crime. Her final judgment of
8 conviction was July 16, 2019. 1AA241-242. This was after the first Writ of
9 Habeas Corpus Petition C-17-322664-2 was filed which was March 21 2019.
10 1AA200-211. Hearing on Petition May 7, 2019. 1AA221. The District
11 Court Order Denying Petition for Writ of Habeas Corpus was June 19, 2019.
12 1AA235-238. The District Court erred in not allowing plea withdrawal.
13 Manifest injustice has occurred.

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19 Trial counsel was prejudicially ineffective for failing to obtain the same
20 continuances Leal’s codefendant got, to ensure the sale of the house and
21 payment of restitution before sentencing occurred.
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25 Mr. Leal and his wife Jessica Garcia were charged identically, and both took
26 the same plea agreement. 1AA82-96; 97-107. The PSI recommended the
27 same sentence for each of them. 2AA374. Page 10 of Leal Sealed PSI. They
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1 have very similar criminal records [2AA347-8; 2AA367-368] and their
2 participation in these crimes was equal at best with her being the dominant
3 partner. 2AA369-370. Both waived the conflict of interest which could
4 occur by having the same attorney represent them. 1AA74-7794-96;
5 1AA105-107. In the end Mr. Leal wound up with a sentence of a Maximum
6 of One hundred eight (180) months with a minimum parole eligibility of
7 Seventy-two (72) months in the Nevada Department of Corrections and 0
8 days for credit for time served and restitution of \$757,420.00 to be paid
9 jointly and severally with Jessica Garcia. 1AA234. Ms. Garcia on the other
10 hand who absconded and skipped out on the sentencing hearing only to be
11 captured in Florida [1AA217] was given a final sentence of a Maximum of
12 One Hundred Twenty (120) months with a Minimum parole eligibility of
13 Forth-Eight (48) Months in the Nevada Department of Corrections with six
14 hundred fifth-one (651) days credit for time served and restitution to be paid
15 jointly and severally with Jack Leal. 1AA242.

16 Jack Leal 6 years minimum - 15 years maximum; sentenced August 17, 2017.

17 1AA120-141.

18 Jessica Garcia 4 years minimum – 10 years maximum; resentenced July 9,
19 2019. 1AA239-240, 1AA241-242.

1 The District Court should have granted him an evidentiary hearing to present
2 testimony of trial counsel and Leal on these issues. 2AA262.

3
4 The District Court erred in denying Mr. Leal’s Writ of Habeas Corpus 2nd
5 petition for release.

6 **VIII. ARGUMENT**

7
8 **A. MR. LEAL’S COUNSEL WEINER WAS PREJUDICIALLY**
9 **INEFFECTIVE**

10 **NRS 34.360 Persons who may prosecute writ.** Every person
11 unlawfully committed, detained, confined or restrained of his or her liberty,
12 under any pretense whatever, may prosecute a writ of habeas corpus to
13 inquire into the cause of such imprisonment or restraint. [1:93:1862; B §
14 349; BH § 3671; C § 3744; RL § 6226; NCL § 11375] — (NRS A 1967,
15 1469; 1969, 106)

16 **....NRS 34.500 Grounds for discharge in certain cases.** If it appears
17 on the return of the writ of habeas corpus that the petitioner is in custody by
18 virtue of process from any court of this State, or judge or officer thereof, the
19 petitioner may be discharged in any one of the following cases:.....

20 3. When the process is defective in some matter of substance
21 required by law, rendering it void.

22 4. When the process, though proper in form, has been issued in a case
23 not allowed by law.....

24 9. Where the court finds that there has been a specific denial of the
25 petitioner’s constitutional rights with respect to the petitioner’s conviction
26 or sentence in a criminal case.

27 [20:93:1862; B § 368; BH § 3690; C § 3762; RL § 6245; NCL § 11394]
28 — (NRS A 1967, 1469; 1971, 773; 1985, 1236)

29 The Sixth Amendment to the United States Constitution provides that, “[i]n
30 all criminal prosecutions the accused shall enjoy the right to have the
31 Assistance of Counsel for is defense.” This court has long recognized that
32 “the right to counsel is the right to effective assistance of counsel.” Strickland
33 v Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984); see also State

1 v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). To prevail on a
2 claim of ineffective assistance of trial counsel a defendant must prove he was
3 denied “reasonably effective assistance” of counsel by satisfying the two-
4 prong test of Strickland. 466 U.S. at 686-67, 104 S. Ct. at 2063-64; see also
5 Love, 109 Nev. At 1138, 865 P.2d at 323. Under the Strickland test, a
6 defendant must show first that his counsel’s representation fell below an
7 objective standard of reasonableness, and second, that but for counsel’s
8 errors, there is a reasonable probability that the result of the proceedings
9 would have been different. 466 U.S. 687-88, 694, 104 S. Ct at 2065, 2068;
10 Warden, Nevada State Prison v Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505
11 (1984)(adopting the Strickland two-part test). The Nevada Supreme Court
12 has held “claims of ineffective assistance of counsel must be reviewed under
13 the ‘reasonably effective assistance’ standard articulated by the U.S. Supreme
14 Court in Strickland v Washington, requiring the petitioner to show that
15 counsel’s assistance was deficient, and that the deficiency prejudiced the
16 defense.” Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (Nev.
17 1995), and Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (Nev
18 1996).

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26 The court begins with the presumption of effectiveness and then must
27 determine whether the defendant has demonstrated by a preponderance of the
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1 evidence that counsel was ineffective. Means v State, 120 Nev. 1001, 1011,
2 103 P.3d 25, 32 (2004). The Nevada Supreme Court has held “that a habeas
3 corpus petitioner must prove the factual allegations underlying his
4 ineffective-assistance claim by a preponderance of the evidence.” Means, 120
5 Nev. At 1012, 103 P.3d at 33. Furthermore, claims of ineffective assistance
6 of counsel asserted in a petition for post-conviction relief must be supported
7 with specific factual allegations, which if true, would entitle the petitioner to
8 relief. Hargrove v State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).
9 “Effective counsel does not mean errorless counsel, but rather counsel whose
10 assistance is “[w]ithin the range of competence demanded of attorneys in
11 criminal cases.” Jackson v Warden, 91 Nev. 430, 432, 537 P.2d 473, 474
12 (1975).

13 "Deficient" assistance requires a showing that counsel's representation fell
14 below an objective standard of reasonableness. In order to eliminate the
15 distorting effects of hindsight, courts indulge in a strong presumption that
16 counsel's representation falls within the broad range of reasonable
17 assistance. If the defendant shows that counsel's performance was
18 deficient, the defendant must show that the error caused prejudice.
19 Dawson v. State, 108 Nev. 112, 825 P.2d 593, 594 (1992). Performance of
20 counsel will be judged against the objective standard for reasonableness
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1 and is deficient when it falls below that standard. State v. Powell, 122
2 Nev. 751, 759, 138 P.3d 453, 458 (Nev. 2006); Means v State, 120 Nev.
3 1001, 103 P.3d 25 (Nev. 2004). Where counsel might claim that an action
4 was a strategic one, the reviewing court must satisfy itself that the
5 decisions were, indeed, reasonable. Strickland, 466 U.S. at 691.


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8 Prejudice to the defendant occurs where there is a reasonable probability that,
9 but for counsel's errors, the result of the proceeding would have been
10 different." Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (Nev.
11 1996). A 'reasonable probability' is one sufficient to undermine confidence
12 in the outcome. Id. A conviction cannot stand when defense counsel fails
13 to provide effective assistance during a critical stage of criminal proceedings.
14 U.S. Const. Amends. V, VI, & XIV; Nevada Constitution Art. I.
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19 Postconviction habeas review at the state level is a creation of state law.

20 See Pellegrini v. State, 117 Nev. 860, 870 n.11, 34 P.3d 519, 526 n.11
21 (2001) ("The Federal Constitution provides no right to post-conviction
22 habeas review by state courts."), [*3] *abrogated on other grounds*
23 by Rippo v. State, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12
24 (2018).

25
26
27 NRS 34.810(1) states:
28

1 The court shall dismiss a petition if the court determines that:

2 (a) The petitioner's conviction was upon a plea of guilty or guilty but
3 mentally ill and the petition is not based upon an allegation that the plea
4 was involuntarily or unknowingly entered or that the plea was entered
5 without effective assistance of counsel. 

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8 Gonzales v. State, 2020 Nev. App. LEXIS 8, 136 Nev. Adv. Rep. 60, 2020
9 WL 5889017 was overturned by the Nevada Supreme Court after accepting a
10 Petition for Review. 137 Nev. Adv. Op. 40, _____, Docket 78152 (July 29
11 2021). Thus, allowing again for consideration issues pertaining to sentencing
12 and appeal in a post-conviction petition for writ of habeas corpus action.
13 2AA424 line 12.

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18 Nev. Rev. Stat. §176.165 allows a defendant who has pleaded guilty, but not
19 been sentenced, to petition the district court to withdraw his plea. A court
20 may grant such motions for any substantial reason that is “fair and just”.
21 Stevenson v. State, 131 Nev. 598, 599, 354 P.3d 1277, 1278 (Nev. 2015).

22
23 The Eighth District has recently discussed and distinguished the standards of
24 before and after plea withdrawal citing the 2015 Stevenson case; the easier
25 standard to withdraw your plea under is “fair and just” and is before
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1 sentencing. After sentencing it is the more stringent standard of “manifest
2 injustice.” State v Barajas, 2018 Nev. Dist. LEXIS 243, 9.

3 “The Nevada Supreme Court disavows Crawford’s exclusive focus on the
4 validity of a plea and holds that a district court must consider the totality of
5 the circumstances to determine whether permitting withdrawal of a guilty
6 plea before sentencing would be fair and just.” Stevenson v. State, 354 P.3d
7 1277, 1278 (Nev. 2015).

8 Nev. Rev. Stat. § 176.165 provides, in pertinent part: a motion to withdraw
9 a plea of guilty or of nolo contendere may be made only before sentence is
10 imposed or imposition of sentence is suspended; but to correct manifest
11 injustice the court after sentence may set aside the judgment of conviction
12 and permit the defendant to withdraw his plea. Hargrove v. State, 100
13 Nev. 498, 500, 686 P.2d 222, 223 (1984).

14 And that is what we have here among other things. Manifest injustice due
15 to ineffective assistance of counsel to Mr. Leal.

16 **1. The District Court erred in determining Mr. Leal’s Writ of Habeas
17 Corpus Action was not timely per NRS 34.726 and Nevada Caselaw.**

18 Standard of Review: Same.

19 A petition challenging a judgment of conviction’s validity must be filed
20 within one year of the judgment or within one year of the remittitur, unless
21

1 there is good cause to excuse delay. NRS 34.726(1). Under Sullivan v. State
2 the Nevada Supreme Court has ruled that entry of an Amended Judgment of
3 Conviction can at times restart the statutory time limit for post-conviction
4 claims. Sullivan v. State, 120 Nev. 537, 540-1, 96 P.3d 761, 764. (2004).

6 The Senior Deputy Attorney General argued in their initial Answer to the
7 Petition for Postconviction Petition that both petitions are untimely thus
8 barring their claims from this Court's consideration. State Brief, August 12,
9 2020. 2AA406-408.

11 On April 28, 2020, Attorney Jean J Schwartzer filed a second Writ of Habeas
12 Corpus Petition in order to preserve timeliness. 2AA254-261. The Amended
13 Judgment of Conviction was filed May 9, 2019. 1AA233-234. The original
14 Judgment of Conviction was filed August 23, 2017. 1AA142-143. The
15 Remittitur for the Direct Appeal was issued January 17, 2019. 1AA197. On
16 May 27, 2020, Mr. Leal filed a handwritten Petition for Writ of Habeas
17 Corpus supplementing the previous one filed by Ms. Schwartzer. 2AA262-
18 273. The Amended Judgment of Conviction entered by the Court May 9,
19 2019 corrected the original judgment of conviction by ordering restitution
20 jointly and severally. 1AA233-234.
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1 Under Whitehead v. State the Nevada Supreme Court ruled that changes to
2 the Judgement of Conviction pertaining to restitution, qualified as a
3 substantive change which allowed the date of the Amended Judgment of
4 Conviction to serve as the commencement time of the 1-year time period
5 under NRS 34.726 for the purposes of filing a Petition for Writ of Habeas
6 Corpus. “The Supreme Court of Nevada concludes that a judgment of
7 conviction that imposes restitution but does not set an amount of restitution,
8 in violation of Nevada statutes, is not final and therefore does not trigger the
9 one-year time limit for filing a post-conviction petition for a writ of habeas
10 corpus.” Whitehead v. State, 128 Nev. 259, 260, 285 P.3d 1053, 1053
11 (2012). “Given the requirements in Nev. Rev. Stat. § 176.105(1) that
12 restitution, if appropriate, be included in the judgment of conviction and in a
13 specific dollar amount, the Supreme Court of Nevada concludes that a
14 judgment of conviction that imposes a restitution obligation but does not
15 specify its terms is not a final judgment. In those circumstances, the
16 intermediate judgment is not sufficient to trigger the one-year period under
17 Nev. Rev. Stat. § 34.726 for filing a post-conviction petition for a writ of
18 habeas corpus.” Id. The petition for reconsideration was granted. The
19 judgment was reversed, and the case was remanded to the district court for
20 further proceedings. In doing so they determined it did not matter that the
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1 issues raised by Petitioner did not relate to the change causing the amendment
2 in the judgment of conviction. “In that petition, Whitehead raised 45 claims
3 of constitutional error, none of which related to the amount of restitution.”
4 Whitehead v. State, at 261-62, 1054.
5

6
7
8 Therefore, the Petition for Relief filed by Attorney Schwartz and by Mr.
9 Leal are timely and require consideration on the merits.

10 This though the plea form 1AA89 line 16 and the Judge at the April 24 2017
11 plea hearing 1AA110 line 4-8 both advise the sentence is to be joint and
12 several between he and Jessica Garcia. See also Sentencing Transcript
13 August 17, 2017. 1AA127 lines 4-6. Whitehead is clear. The judgment of
14 conviction must reflect the full restitution terms. This is more than the
15 clerical error issue addressed in Sullivan v. State above.
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19
20 The Leal District Court did not agree. 2AA436. They found that the one-
21 year clock for this writ of habeas corpus action started with the filing of the
22 first judgment of conviction and was not changed by the filing of an
23 Amended Judgment of Conviction. In doing so it found that Leal’s missing
24 verbiage regarding joint and several restitution was a clerical error of the type
25 found under Sullivan v State, 120 Nev. 537, 96 P.3d 761 (2004). 2AA437.
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1 The court pointed to the language in Whitehead which states “Setting the
2 amount of restitution after an evidentiary hearing is not analogous to
3 correction an error; rather it is an integral part of the sentence.” 2AA428 line
4
5 4. So it was clearly his position that because the amount of restitution was set
6 at the plea hearing and sentencing hearing and on the plea form including the
7 provision of restitution being joint and several between Garcia and Jack – the
8 spirit and intent of Whitehead in this case would not allow the amended
9 judgment of conviction to become the new commencement time date for the
10 purposes of the one year filing deadline for a writ of habeas corpus action.
11

12 Moreover, Judge Villani noted on top of all that and bolstering a denial is that
13 - the addition of the verbiage ‘jointly and severally’ [1AA234] on the
14 amended judgment of conviction could only serve to benefit Jack. 2AA427
15 line 23. In other words, beneficial changes to a judgment of conviction
16 should never be the cause for changing date of the one-year time bar.
17

18 We disagree and urge this court to find his 2nd Petition for Writ of Habeas Corpus
19 timely. There is no ‘beneficial’ exception under Whitehead. The plain language
20 of the case clearly states if the amount of restitution is not outlined on the
21 judgment of conviction it is not final. “The Supreme Court of Nevada concludes
22 that a judgment of conviction that imposes restitution but does not set an amount
23 of restitution, in violation of Nevada statutes, is not final and therefore does not
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1 trigger the one-year time limit for filing a post-conviction petition for a writ of
2 habeas corpus. Whitehead v. State, 128 Nev. 259, 260, 285 P.3d 1053, 1053
3 (2012).
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5
6 Mr. Leal at the time of his first writ did not have sufficient access to the prejudice
7 prong of an ineffective action to prove that his attorney's successor got a far
8 more favorable sentence for his wife and also repeated extensions were granted
9 while efforts were made to sell their house and pay the restitution. He was not
10 provided the same reasonable attorney services that a typical attorney would have
11 done, and we can see in black and white, that this prejudiced him by adding an
12 extra 2 to 5 years to his sentence over and above that of his wife. More on this
13 in our next session on successive petitions.
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19 **2. The District Court erred in determining the Writ of Habeas Corpus**
20 **Petition, Addition and Supplements are Procedurally Defaulted as**
21 **Successive per NRS 34.810.(2) and (3) and should not be considered on**
22 **the merits.**

23 Standard of Review: Same.

24 **NRS 34.810 Additional reasons for dismissal of**
25 **petition. [Effective January 1, 2020.]**

26 1. The court shall dismiss a petition if the court determines
27 that:

28 (a) The petitioner's conviction was upon a plea of guilty or
guilty but mentally ill and the petition is not based upon an

1 allegation that the plea was involuntarily or unknowingly
2 entered or that the plea was entered without effective assistance
3 of counsel.

4 ...

5 **2. A second or successive petition must be dismissed if**
6 **the judge or justice determines that it fails to allege new or**
7 **different grounds for relief and that the prior determination**
8 **was on the merits or, if new and different grounds are**
9 **alleged, the judge or justice finds that the failure of the**
10 **petitioner to assert those grounds in a prior petition**
11 **constituted an abuse of the writ.**

12 **3. Pursuant to subsections 1 and 2, the petitioner has**
13 **the burden of pleading and proving specific facts that**
14 **demonstrate:**

15 **(a) Good cause for the petitioner's failure to present the**
16 **claim or for presenting the claim again; and**

17 **(b) Actual prejudice to the petitioner.**

18 **↪ The petitioner shall include in the petition all prior**
19 **proceedings in which the petitioner challenged the same**
20 **conviction or sentence.**

21 4. The court shall dismiss a petition without prejudice if:

22 (a) The petition challenges the computation of time that the
23 petitioner has served pursuant to a judgment of conviction; and

24 (b) The court determines that the petitioner did not exhaust
25 all available administrative remedies to resolve such a challenge
26 as required by NRS 34.724.

27 5. The court may dismiss a petition that fails to include any
28 prior proceedings of which the court has knowledge through the
record of the court or through the pleadings submitted by the
respondent.

Claims that could have been considered in a prior proceeding are generally
waived. The district court must dismiss any claims that could have been
raised in a prior proceeding unless the court finds

(1) Cause for the procedural default & actual prejudice NRS 34.810(1)(b); or

1 (2) That failure to consider the claims would result in a fundamental
2 miscarriage of justice. Pellegrini, 117 Nev. at 887.
3

4 “To overcome the procedural bars of Nev. Rev. Stat. §§ 34.726 and
5 34.810, the habeas petitioner has the burden of demonstrating good
6 cause for delay in bringing his new claims or for presenting the same
7 claims again and actual prejudice. To show "good cause," the petitioner
8 must demonstrate that an impediment external to the defense prevented
9 him from raising his claims earlier. For example, such an impediment
10 might be demonstrated by a showing that the factual or legal basis for a
11 claim was not reasonably available or that some interference by
12 officials made compliance with the procedural rule impracticable.
13 "Actual prejudice" requires a showing not merely that the errors
14 complained of created a possibility of prejudice, but that they worked
15 to the petitioner's actual and substantial disadvantage, in affecting the
16 state proceeding with error of constitutional dimensions.”

14 Pellegrini v. State, 117 Nev. 860, 864, 34 P.3d 519, 522 (2001).
15

16
17 The claims herein of Mr. Leal are not barred under NRS 34.810.2 because
18 they present new grounds not available at the time of the previous writ
19 petition.
20

21 Mr. Leal at the time of his first writ did not have sufficient access to the prejudice
22 prong of an ineffective action to prove that his attorney’s successor got a far
23 more favorable sentence for his wife and also repeated extensions were granted
24 while efforts were made to sell their house and pay the restitution. He was not
25 provided the same reasonable attorney services that a typical attorney would have
26 given, and we can see in black and white, that this prejudiced him by adding an
27
28

1 extra 2 to 5 years to his sentence over and above that of his wife. This though
2 their PSI reports recommended that they receive the same sentence:
3
4

5 “Garcia was originally set for sentencing on August 17, 2017, and failed to
6 appear. She never traveled to Las Vegas for her sentencing but instead stayed in
7 Florida. On September 27, 2017, she was arrested in Florida on this Court’s
8 warrant and has been in continuous custody ever since.” She was ultimately
9 sentenced the first time on April 23, 2019. 1AA213. Present with her at her
10 hearings after she was brought back from Florida was a new attorney Gabriel
11 Grasso who commence representation by stipulated substitution September 12,
12 2017.
13
14
15

16 Garcia Motion to Reconsider Sentence May 6, 2019 1AA216 at 217 line 15.

17 There were extensions granted 07/24/2018 [1AA190]; 08/23/2018 [1AA191];
18 10/18/2018 [1AA195]; 11/27/2018 [1AA192]; 03/21/2019 [1AA212];
19 04/23/2019 [1AA213]; with the hearing July 9 2019 wherein her sentence was
20 reduced and the Amended Judgment of Conviction was filed July 16, 2019.
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26 **3. The District Court Erred in Not Allowing Plea Withdrawal.**
27

28 Standard of Review: Same

1 The District Court found this ineffective claim law of the case but this
2 argument on that issue is slightly different not focused on coercion.
3
4 2AA440-441. Manifest Injustice is defined in Black’s Law Dictionary as “A
5 Direct, obvious, and observable error in a trial court, such as a defendant’s
6 guilty plea that is involuntary or is passed on a plea agreement that the
7 prosecution has rescinded.” [*Manifest Injustice* page 1152, Black’s Law
8 Dictionary, (Deluxe 11th Edition, 2019).]
9

10
11 **NRS 176.165 When plea of guilty, guilty but mentally ill or nolo**
12 **contendere may be withdrawn.** Except as otherwise provided in
13 this section, a motion to withdraw a plea of guilty, guilty but mentally
14 ill or nolo contendere may be made only before sentence is imposed or
15 imposition of sentence is suspended. To correct manifest injustice, the
16 court after sentence may set aside the judgment of conviction and
17 permit the defendant to withdraw the plea.

18 (Added to NRS by 1967, 1434; A 1989, 1983; 1995, 2456; 2003,
19 1467; 2007, 1421)
20

21 Several Nevada cases define Manifest injustice as having occurred if a plea
22 was done involuntarily, unknowingly and or without the effective assistance
23 of counsel.
24

25 Manifest injustice does not exist if defendant entered his plea
26 voluntarily. Baal v. State, 106 Nev. 69, 72, 787 P.2d 391,
27 394(1990). To determine whether a guilty plea was voluntarily,
28 entered the Court will review the totality of the circumstances
surrounding the defendant's plea. Bryant, 102 Nev. 268 at 271, 721
P.2d 364 at 367. A proper plea canvass should reflect that: “(1) the
defendant knowingly waived his privilege against self-
incrimination, the right to trial by jury, and the right to confront his
accusers; (2) the plea was voluntary, was not coerced, and was not

1 the result of a promise of leniency; (3) the defendant understood
2 the consequences of his plea and the range of punishments; and (4)
3 the defendant understood the nature of the charge, i.e., the elements
4 of the crime.” Wilson v. State, 99 Nev. 362 at 367, 664 P.2d 328 at
5 331 (citing Higby v. Sheriff, 86 Nev. 774, 476 P.2d 950 (1970)).
6 This standard requires the court to personally address the defendant
7 at the time he enters his plea in order to determine whether he
8 understands the nature of the charges to which he is pleading.
9 Bryant, 102 Nev. at 271, 721 P.2d at 367. A court may not rely
10 simply on a written plea agreement without some verbal interaction
11 with a defendant. Id.

12 In Strickland v Washington the 1984 seminal U.S. Supreme Court case on
13 ineffectiveness the Court ultimately found Mr. Washington’s attorney was
14 not ineffective in his representation during the plea agreement and
15 sentencing. 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984). In doing so
16 they set a new precedent followed by the country mandating that in order to
17 find ineffectiveness sufficient to overturn a conviction generally the movant
18 must also show that there was enough prejudice caused by the ineffectiveness
19 to hurt the defendant by most likely causing a detrimental change in the
20 outcome.

21
22 As support to his argument that he would have taken the matter to trial but for
23 an ineffective trial counsel - Mr. Leal states he was of the belief that he
24 fulfilled all disclosure duties and points to the contract language reviewed
25 and signed by the purchasers: [2AA268 line 21]

26
27
28 **GRANT, BARGAIN AND SALE DEED**

1 FOR A VALUABLE CONSIDERATION, receipt of which is
2 hereby acknowledged do by these presents transfer, sell and
3 convey by this deed unto grantee, without warranty whether
4 expressed or implied, in “as-is, where-is” condition and with any
5 faults, all grantor’s interest, if any, Grantee will take title to the
6 property, subject to any and all claims, liens, and other
7 encumbrances, if any.” 2AA268. 2AA377, 381, 385, 389, 395,
8 399.

9 A simple internet search “how do you find out if a property in Nevada is
10 encumbered” shows how easy it is to follow up with background checks.

11 This is important to keep in mind because in order to show manifest injustice
12 for plea withdrawal efforts you must show that there is a reasonable
13 probability that but for the unknowing, unintelligent, involuntary plea and or
14 ineffectiveness of counsel - there is a reasonable probability that you would
15 have declined the plea offer and taken the matter to trial. Mr. Leal has signed
16 a Declaration asserting this. 2AA328-329. In determining the credibility of
17 this Declaration on of the things the court is to look at the strength of the
18 case.
19
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22 “Assessing the strength of the prosecution's evidence against the
23 defendant is, of course, one step in applying a harmless-error
24 standard.” See Schneble v. Florida, 405 U.S. 427
25 (1972); Harrington v. California, 395 U.S. 250 (1969). Holloway v.
26 Arkansas, 435 U.S. 475, 487-88, 98 S. Ct. 1173, 1180, 55 L.Ed.2d 426,
27 436-37 (1978).
28

1 He states he had limited involvement in the crimes and the PSI often
2 misleadingly points to ‘an individual’ when describing who was committing
3 some of the alleged illegal actions. 2AA340 lines 7-9. Further he points to
4 the contract language which specifically states the property is being sold as is
5 and subject to existing liens: “Grantee will take title to the property, subject
6 to any and all claims, liens, and other encumbrances, if any.” 2AA268.
7
8 2AA377, 381, 385, 389, 395, 399. Examples from Contract at issue in
9 Counts 3, 4, 6, 7, 10, 13 - demonstrative of all contracts for this case.
10
11 2AA365. Though he plead guilty at the plea hearing he maintains his actual
12 innocence in his writ of habeas petition. 2AA268 line 21. [See Burt v.
13 Titlow, 571 U.S. 12, 17-18, 134 S. Ct. 10, 14 (2013) discussing the strength
14 of the factual record merits consideration when determining whether claims
15 the plea would not have been committed to ‘but for’ - credible.]
16
17

18 Both codefendants Leal and Garcia pled guilty to count 14 – Multiple
19 transactions involving fraud or deceit in the court of an enterprise and
20 occupation.
21
22

23 In Nevada via statute and caselaw you must show ineffectiveness of counsel
24 manifest injustice as to the totality of circumstances.
25

26 **Nevada Revised Statutes (NRS) Habeas Corpus – Petitions for**
27 **Postconviction Relief**
28

1 **NRS 34.810 Additional reasons for dismissal of petition.**
2 **[Effective through December 31, 2019.]**

3 1. The court shall dismiss a petition if the court determines
4 that:

5 (a) The petitioner’s conviction was upon a plea of guilty or
6 guilty but mentally ill and the petition is not based upon an
7 allegation that the plea was involuntarily or unknowingly entered or
8 that the plea was entered without effective assistance of counsel.

9 “To establish prejudice in the context of challenging a guilty plea
10 agreement based upon ineffective assistance of counsel, Petitioner
11 must demonstrate a reasonable probability that, but for counsel’s
12 errors, he would not have pleaded guilty and would have insisted on
13 going to trial.” Molina v State, 120 Nev. 185, 190-191, 87 P.3d 533,
14 537 (2004). Kirksey v State, 112 Nev. 980, 988, 923 P.2d 1102, 1107
15 (1996).

16 Leal’s less favorable sentence is further proof under Strickland of the
17 prejudice caused by his counsel. Prejudice was difficult for Mr. Leal to prove
18 until he had the conclusive undeniable evidence in the form of the amended
19 Judgment of Conviction of Jessica Garcia showing she got extension after
20 extension and a sentence 2 to 5 years less than he did for the exact same thing
21 with very comparable backgrounds.

22 Mr. Leal’s plea agreement was unknowing and committed to involuntarily
23 and unintelligently due to ineffective assistance of counsel. Had he known
24 what could unfold after the agreement he would not have agreed to it.
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1 **4. The District Court erred in not finding ineffectiveness of counsel as to**
2 **the sentencing of Mr. Leal, including the failure to present mitigating**
3 **factors and to prepare properly ensuring readiness and if not ready to**
4 **proceed; to fight to have continuances were granted until the necessary**
5 **actions were completed to pay the liens.**

6 Standard of Review: Same.

7 Given its decision on time bar and successive petitions, the district court did
8 not truly engage with the merits of Mr. Leal’s claims anywhere in its order
9 given that its entire discussion section was directed at the procedural bars.
10 That being the case, there is no decision to review, and thus no deference to
11 afford. 2AA434-441.
12

13
14 Under well-established caselaw codefendants are to be treated similarly with
15 identical charges and no significant difference.
16

17 “A disparity in the sentences of codefendants or accomplices may be a
18 relevant mitigating circumstance. It is not mere disparity that is
19 significant, however, but unexplained disparity.” State v. Dickens, 187
20 Ariz. 1, 926 P.2d 468 (1996). It is manifestly unfair that she absconds – does
21 not show up at their sentencing hearing, is picked up a month later and has a
22 very similar criminal background -and yet her sentence is modified shortly
23 after receiving the same sentence as Mr. Leal because by July 9 2019 all the
24 restitution had been paid. So her sentence was changed to 4 to 10 years
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1 instead of 6 to 15. This is important new information that was not available
2 at the time of the plea hearing or at any of the prior postconviction actions.
3 of sentencing. So, it seems she is being rewarded for her bad behavior.
4

5 Mr. Leal was pressured to settle and counting on Jessica since the house they
6 needed to sell to pay restitution was in her name - to take care of the
7 necessary paperwork so restitution could be paid in time for the sentencing.
8

9 But it wasn't.

10
11 "When a conviction is the result of a guilty plea,
12 the second, or "prejudice," requirement . . . focuses on whether
13 counsel's constitutionally ineffective performance affected the
14 outcome of the plea process. In other words, in order to satisfy
15 the "prejudice" requirement, the defendant *must show that there*
16 *is a reasonable probability that, but for counsel's errors, he*
would not have pleaded guilty and would have insisted on going
to trial". Hill v. Lockhart, 474 U.S. 52, 59, 88 L. Ed. 2d 203,
106 S. Ct. 366 (1985) (emphasis added);

17
18 *see also State v. Langarica, 107 Nev. 932, 933, 822 P.2d 1110, 1111*
19 *(1991), cert. denied, 506 U.S. 924, 121 L. Ed. 2d 261, 113 S. Ct. 346*
20 *(1992). "A reasonable probability is a probability sufficient to undermine*
21 *confidence in the outcome." Strickland, 466 U.S. at 694. Kirksey v. State,*
22 *112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).*

23
24 Mr. Leal and Jessica Garcia both plead guilty at a plea hearing on April
25 24, 2017. PSIs were ordered and on August 17, 2017 a Sentencing Hearing
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1 was held. Jessica Garcia did not show up. Mr. Leal was sentenced. The
2 Court asked ...So, can we go forward on Mr. Leal; is that correct?

3 Mr. Weiner: Yes, Your Honor. 1AA121. The plea hearing had been April
4 24, 2017. 1AA108-117. And the prosecutor excoriates Jack for not having
5 paid the \$700,00+ plus restitution amount in the few months (115 days) that
6 had gone by since the plea hearing. “Based on the financial impact of this
7 case, and really no remorse by the Defendant --he’s done little to nothing to
8 make restitution in this case. He said that he was going to sell a house in
9 order to pay this off.” 1AA122. And the District Court fell for it hook line
10 and sinker: “Leal also argued prejudice, citing that the Court imposed
11 different sentences for Leal and his co-defendant. However, the Court finds
12 that the difference in the sentences imposed upon Leal and his co-defendant
13 resulted in part due to Leal’s inaction prior to sentencing, waiting until a
14 week prior to sentencing to place a lien on his property to secure restitution.
15 The Court finds that any disparity in the sentences does not constitute
16 prejudice to overcome the default of claims in his petitions.” 2AA439. And
17 at the Writ of Habeas Corpus Hearing on the Arguments: “The Court: Did
18 Mr. Leal just place the lien on the property one week before sentencing? I
19 mean, that was my concern at the time of sentencing that didn’t show good
20 faith on his part, trying to, you know, resolve the issue of restitution.”
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1 2AA422. Mr. Leal tried to explain this at the Sentencing hearing but it was
2 too late.

3
4 “The Court: All right, thank you. Mr. Leal, do you have anything to
5 say before I sentence you? The Defendant: I do. There’s been a lot of
6 issues going on between myself and Jessica who is not here. She was
7 actually in charge of the property sale. I’ve since jumped in. I have
8 recorded a lien in the State’s favor for over \$600,000.00 which is the
9 balance due. I accept responsibility for this but there's a lot of
10 underlying things that are not addressed at the moment, I should say.
11 My goal was to get restitution to everybody. The property, as per the
12 Assessor's site today, is valued just over a million which is what it's
13 listed at. There's an offer that should be in today. I've done all I could
14 to remove myself from the house to get everybody restitution, put
15 everybody else before myself at the moment. Jessica's not here. She --
16 like I said, she was the one who was dealing with this. We have a no
17 contacting order. She cannot contact me. I've had no contact with her
18 for the past 60 days. I have a copy of that. That's really where the delay
19 in all of this came out. It wasn't us doing nothing. It was me assuming
20 she was doing it but being unable to contact each other.

21 THE COURT: Whose name is on the title?

22 THE DEFENDANT: Mine as of --

23 MR. WEINER: [Indiscernible].

24 THE DEFENDANT: -- last week. I transferred it because she had
25 gotten nothing done to this point.

26 THE COURT: Well, how could you transfer it if it was her name?

27 THE DEFENDANT: It was in a trust. The trustee was able to sign it
28 over to me. I recorded the deed on the 11th. The property’s in my
name. As soon as that came out I flew out here. I recorded the lien. I
have a copy of the lien in the State’s favor right now. The property is
actively marketed. The restitution is the main concern in my eye. I
assumed Jessica had been getting that done. I – we’re not allowed to
speak. She has an open domestic case and we have no contact. I
assumed this was done by now. As soon as I found out it wasn’t I flew
out here. I’ve been trying to get this done. ...” 1AA123-124.

1 Attorney Weiner was prejudicially ineffective in failing to communicate with
2 both clients about the progress of restitution compliance and do this well in
3 advance of sentencing. He never moved for an extension. At the sentencing
4 hearing he told the judge that he was ready to proceed [1AA121] and then,
5 further on, notes that he had recently called the Bar Ethics Hotline [1AA126]
6 because his clients appeared to be getting into a he said she said argument
7 about the restitution [1AA126] and he no longer felt that he could continue
8 his representation.
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11 Attorney Weiner was prejudicially ineffective for not moving for a
12 continuance well in advance of sentencing. A reasonable attorney would
13 have moved for a continuance and gotten affidavits from both clients and the
14 Ethics Hotline of the State Bar to present to the court regarding the status of
15 lien and sale. The last-minute action clearly annoyed the court and made him
16 feel any actions were disingenuous and should have been made much earlier
17 as to the lien sign over and the notification of these issues to the court. And
18 not just waiting to the last minute when the victims were present at court and
19 they were at the actual sentencing hearing. By then it was too late for
20 meaningfully discussion of these issues. The Court was irritated.
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23 The court needed to hear the timeline of all this and whether he was in
24 continuous contact with both and whether Garcia assured him she would be
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1 there and was taking care of the restitution issue. Clearly the court was
2 susceptible to argument on this issue. Jessica Garcia who did not even bother
3 to show up for the Sentencing hearing and did not bother to provide a good
4 excuse for her absence having had to be picked up on a warrant in Florida
5 was given continuance after continuance and finally the property was sold
6 and restitution was paid. Attorney Weiner "...The lien has been filed with
7 the State in favor of the Attorney General's office. I've provided a copy of
8 that to Mr. Kovac. His name is even on it to be informed once it's actually
9 approved because the assessor kind of when cross eyed on my client when he
10 went down there because liens are generally not filed against yourself. And
11 so, they wanted to send it to their legal department and contact the AG's
12 office which apparently hasn't happened yet but we do have the paperwork
13 showing that my client signed off on it. .." 1AA127. "We have a letter
14 which I provided to Mr. Kovac showing – from the real estate agent showing
15 that it has been actively marketed." 1AA128. Performance of counsel will be
16 judged against the objective standard for reasonableness and is deficient
17 when it falls below that standard. State v. Powell, 122 Nev. 751, 759, 138
18 P.3d 453, 458 (Nev. 2006); Means v State, 120 Nev. 1001, 103 P.3d 25 (Nev.
19 2004). Where counsel might claim that an action was a strategic one, the
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1 reviewing court must satisfy itself that the decisions were, indeed, reasonable.

2 Strickland, 466 U.S. at 691.

3 Here there is no reasonableness or strategy found in not obtaining
4 continuance in advance and not alerting the court as to the growing conflict.

5 The prejudice can be seen in that she was given a much better sentence and
6 given continuance after continuance so the restitution issue could be
7 addressed. Had he acted reasonably and effectively the prejudice of disparate
8 sentences would not have occurred.

9 August 17, 2017 Jessica Garcia does not show up at her sentencing hearing.

10 She does not have an excuse. 1AA217

11 September 27, 2017 Jessica Garcia is picked up in Florida on District Court's
12 warrant and brought back to Las Vegas.

13 1AA217.

14 July 24, 2018 District Court Minutes Codefendant Garcia Extension Granted.

15 1AA191.

16 August 23, 2018 District Court Minutes Codefendant Garcia Extension
17 Granted. 1AA191.

18 October 18, 2018. District Court Minutes. Codefendant Garcia Extension
19 Granted. 1AA195.

1 November 27, 2018. District Court Minutes Codefendant Garcia Extension
2 Granted. 1AA196.

3 March 23, 2019. Garcia Hearing. 1AA212.
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5 April 23, 2019. District Court Minutes Codefendant Garcia Sentencing.
6 1AA213.

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8 July 9, 2019. District Court Minutes. Garcia Sentence Vacated and Reduced.
9 1AA239-240.

10 July 16, 2019. Amended Judgment of Conviction. 1AA241-242.
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12 Trial counsel should have taken more of a role in ensuring that the
13 continuances Ms. Garcia was granted so easily and repeatedly – were also
14 given to Mr. Leal so he could ensure the sale of the house to pay the
15 restitution was done before sentencing. He believed this was begin taken care
16 of by Ms. Garcia. Instead, not only did she abscond on the court she
17 absconded on him. And yet she ended up being rewarded with years off her
18 sentence. Garcia was the purchaser of the real property at 1024 Santa
19 Helena Avenue in Henderson Nevada and remained the beneficial owner and
20 continued to maintain control over it. 1AA3.
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25 **5. The District Court erred in not granting an evidentiary hearing.**

26 Standard of Review: A district court’s denial of a request for an evidentiary
27 hearing is reviewed for an abuse of discretion. See Rubio v. State, 124 Nev.
28 1032, 1047, 194 P.3d 1224, 1234 (2008).

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2 Petitioner requested an evidentiary hearing. 1AA260, 262. But this was
3 denied by the District Court implicitly when it found that Leal's petitions
4 were procedurally barred. 2AA441.
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8 NRS 34.770 determines when a defendant is entitled to an evidentiary
9 hearing. A petitioner is entitled to an evidentiary hearing where the petitioner
10 raises a colorable claim of ineffective assistance. Smith v McCormick, 914
11 F.2d 1153, 1170 (9th Cir. 1990); Hendricks v. Vasques, 974 F.2d 1099, 1103,
12 1109-10 (9th Cir. 1992). See also Morris v California, 996 F.2d 448, 454 (9th
13 Cir. 1991)(remand for evidentiary hearing required where allegations in
14 petitioner's affidavit raise inference of deficient performance); Harich v.
15 Wainwright, 813 F.2d 1082, 1090 (11th Cir. 1987) ("W]here a petitioner raises
16 a colorable claim of ineffective assistance, and where there has not been a
17 state or federal hearing on this claim, we must remand to the district court for
18 an evidentiary hearing."); Porter v Wainwright, 805 F.2d 930 (11th Cir. 1986).
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24 NRS 34.770 provides:
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26 1. The judge or justice, upon review of the return, answer and all supporting
27 documents which are filed, shall determine whether an evidentiary hearing is
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1 required. A petitioner must not be discharged or committed to the custody of
2 a person other than the respondent unless an evidentiary hearing is held.

3 2. If the judge or justice determines that the petitioner is not entitled to relief
4 and an evidentiary hearing is not required, he shall dismiss the petition
5 without a hearing.
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7 3. If the judge or justice determines that an evidentiary hearing is required, he
8 shall grant the writ and shall set a date for the hearing.
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12 The Nevada Supreme Court has held that a post-conviction habeas petitioner
13 “is entitled to a post-conviction evidentiary hearing when he asserts claims
14 supported by specific factual allegations not belied by the record that, if true,
15 would entitle him to relief.” McConnell v. State, 125 Nev. 243, 212 P.3d at
16 314 (2009). “when a defendant's allegations . . . are based on facts outside of
17 the record, an evidentiary hearing is required.” Doganieri v. United
18 States, 914 F.2d 165, 168 (9th Cir. 1990) (citing United States v.
19 Espinoza, 866 F.2d 1067, 1069 (9th Cir. 1988)), *cert. denied*, 499 U.S. 940
20 (1991). An exception to this mandatory requirement exists when the issue of
21 the prisoner's credibility can be “conclusively decided on the basis of
22 documentary testimony and evidence in the record.” Espinoza, 866 F.2d at
23 1069 (quoting Watts v. United States, 841 F.2d 275, 277 (9th Cir. 1988)); *see*
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1 also Blackledge v. Allison, 431 U.S. 63, 75-76, 52 L. Ed. 2d 136, 97 S. Ct.
2 1621 (1977) (vague or palpably incredible or frivolous allegations warrant
3 summary dismissal of a petition for habeas corpus). We have jurisdiction
4 over this timely appeal under 28 U.S.C. § 2255, and we reverse.” Frazer v.
5 United States, 18 F.3d 778, 781 (9th Cir. 1994).
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8 We urge this court to find his claim is not procedurally barred and that an
9 evidentiary hearing should have been held to determine why his attorney did
10 not obtain the necessary extensions – communicate with both clients about
11 the progress of restitution compliance and do this well in advance of
12 sentencing. He never moved for an extension. At the sentencing hearing he
13 told the judge that he was ready to proceed and then further on notes that he
14 had recently called the Bar Ethics Hotline because his clients appeared to be
15 getting into a he said she said argument about the restitution and he no longer
16 felt that he could continue his representation. The court needed to hear the
17 timeline of all this and whether he was in continuous contact with both and
18 whether Garcia assured him she would be there and was taking care of the
19 restitution issue. The Court also needed to hear more from the parties on the
20 totality of circumstances and the manifest injustice that resulted from
21 ineffective assistance of counsel in committing to the plea agreement.
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IX. CONCLUSION

WHEREFORE, based upon the above, Mr. Leal respectfully requests this Court to overturn his plea agreement and or order resentencing, and thus reverse the District Court Order and / or remand the case back to the District Court for an evidentiary hearing on the plea and sentencing issues raised herein.

Dated this 6th day of October 2021.

Respectfully submitted,

s/ Diane C. Lowe
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