

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Feb 02 2022 04:17 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

JACK LEAL,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 83451

District Court No. 8th JD A-20-814369-W
(Clark County)

RESPONDENT'S ANSWERING BRIEF

AARON D. FORD
Attorney General
MICHAEL J. BONGARD (Bar No. 7997)
Senior Deputy Attorney General

Office of the Attorney General
1539 Avenue F, Suite 2
Ely, Nevada 89301
(775) 289-1632 (phone)
(775) 289-1653 (fax)
mbongard@ag.nv.gov

Attorneys for Respondent

DIANE C. LOWE, ESQ
LOWE LAW, LLC

7350 W. Centennial Pkwy
#3085
Las Vegas, Nevada 89113
(725) 212-2451

Attorney for Appellant

NRAP 26.1. Respondent, the State of Nevada is exempt from filing a disclosure pursuant to Rule 26.1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION..... 1

ROUTING STATEMENT 1

ISSUE PRESENTED FOR REVIEW 2

STATEMENT OF THE FACTS AND HISTORY OF THE CASE 2

I. INTRODUCTION 2

II. LEGAL PROCEEDINGS TO DATE 3

A. Leal Enters a Guilty Plea After Twice Waiving a Potential Conflict..... 3

B. The Court of Appeals Affirms Leal’s Conviction (Case 74050)..... 4

C. Leal Files His First State Habeas Petition, and the Nevada Court of Appeals Affirmed the Denial of the Petition..... 4

D. Leal Files a Second, Untimely, Successive State Habeas Petition..... 5

SUMMARY OF THE ARGUMENT 6

ARGUMENT 8

I. THE RELEVANT LAW 8

A. The Standard of Review..... 8

B. Evidentiary Hearings..... 8

II. LEAL FILED HIS SECOND STATE HABEAS CORPUS PETITION WELL AFTER THE STATUTE OF LIMITATION RAN AND ALL CLAIMS ARE BARRED PURSUANT TO NRS 34.726(1) AND/OR 34.810 9

A. NRS 34.726(1) Establishes a One-year Statute of Limitations for Filing State Habeas Corpus Petitions (Issue One) 9

B. NRS 34.810 Preventing Piecemeal Litigation of Habeas Corpus Claims (Issue Two) 10

C. Leal Failed to Demonstrate Cause or Prejudice to Excuse Dismissal of His Petitions 14

III. THE DISTRICT COURT CORRECTLY DENIED LEAL’S ATTEMPT TO WITHDRAW HIS PLEA 21

A. Legal Standards 21

B. Leal’s Claims 22

C. Leal’s Claim is Procedurally Defaulted..... 23

IV. LEAL RECEIVED THE ASSISTANCE OF EFFECTIVE COUNSEL DURING SENTENCING 25

A. The Claim is Procedurally Defaulted..... 25

B. Leal Fails to Demonstrate Cause and Prejudice to Excuse the Default..... 25

V. LEAL FAILED TO PRESENT FACTS JUSTIFYING AN EVIDENTIARY HEARING.....	25
A. <i>Nevada’s Standard for Evidentiary Hearings</i>	26
B. <i>Leal Presents No Evidence Supporting an Evidentiary Hearing on Defaulted Claims</i>	27
CONCLUSION	27
CERTIFICATE OF COMPLIANCE WITH NRAP 28.2.....	29
CERTIFICATE OF SERVICE	31

TABLE OF AUTHORITIES

CASES

<i>Crump v. Warden</i> , 113 Nev. 293, 302, 934 P.2d 247, 252 (1997)	19
<i>Gonzales v. State</i> , 492 P.3d 556, 562 (Nev. 2021).....	8, 12
<i>Guy v. State</i> , 108 Nev. 770, 780, 839 P.2d 578, 584 (1992)	23
<i>Hargrove v. State</i> , 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984)	26
<i>Hathaway v. State</i> , 119 Nev. 248, 252, 71 P.3d 503, 506 (2003)	16, 24
<i>Hill v. Lockhart</i> , 474 U.S. 52, 58 (1985)	22
<i>Kirksey v. State</i> , 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996)	8, 21
<i>Lader v. Warden</i> , 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005)	8
<i>Little v. Warden</i> , 117 Nev. 845, 854, 34 P.3d 540, 546 (2001)	9
<i>Mann v. State</i> , 118 Nev. 351, 354, 46 P.3d 1228, 1230	9
<i>McConnell v. State</i> , 125 Nev. 243, 258, 212 P.3d 307, 317 (2009)	27
<i>McKenna v. State</i> , 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998)	23
<i>Molina v. State</i> , 120 Nev. 185, 191, 87 P.3d 533, 537 (2004)	21
<i>Nika v. State</i> , 124 Nev. 1272, 1300-01, 198 P.3d 839, 858 (2008).....	26
<i>Nobles v. Warden, Nevada Dept. of Prisons</i> , 106 Nev. 67, 68, 787 P.2d 390, 391 (1990)	20
<i>Passanisi v. Director</i> , 105 Nev. 63, 66, 769 P.2d 72, 74 (1989)	19
<i>People v. Walford</i> , 716 P.2d 137 (Colo. App. 1985).....	20
<i>Riley v. State</i> , 110 Nev. 638, 647, 878 P.2d 272, 278 (1994)	8

<i>State v. Eighth Judicial District Court (Riker)</i> , 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005)	24
<i>Strickland v. Washington</i> , 466 U.S. 668, 687–88, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)	7, 18, 20, 21
<i>Sullivan v. State</i> , 120 Nev. 537, 96 P.3d 761 (2004).....	15, 16, 18
<i>Tollett v. Henderson</i> , 411 U.S. 258, 267 (1979)	12
<i>Wainwright v. Sykes</i> , 433 U.S. 72, 93 n.1 (1977)	22
<i>Warden v. Lyons</i> , 100 Nev. 430, 432–33, 683 P.2d 504, 505 (1984)	21
<i>Whitehead v. State</i> , 128 Nev. 259, 285 P.3d 1053 (2012)	14, 17
<i>Witter v. State</i> , 135 Nev. 412, 414, 452 P.3d 406, 408 (2019)	17, 19

STATUTES

NRS 176.033	17
NRS 176.105	17
NRS 34.575	1
NRS 34.726	passim
NRS 34.810	passim

RULES

NRAP 17	1
NRAP 4	1

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK LEAL,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 83451

District Court No. 8th JD A-20-814369-W
(Clark County)

RESPONDENT’S ANSWERING BRIEF

STATEMENT OF JURISDICTION

Appellant Jack Leal (Leal) appeals from the district court’s dismissal of his untimely and successive petition for a writ of habeas corpus. The clerk entered the trial court’s order denying the petition on September 6, 2021. 2 AA 434.¹ Leal filed his amended notice of appeal on September 10, 2021. 2 AA 444; *see also*, NRAP 4(b)(1)(A), NRS 34.575(1).

ROUTING STATEMENT

Procedural rules presumptively assign this matter to the Nevada Court of Appeals, because Leal appeals the denial of his state habeas corpus petition challenging a judgment of conviction and sentence for an offense that is not a

¹ Items in Leal’s appendix are referred to by volume and page number (__ AA __). Items in Respondent’s appendix are referenced by page number (RA __).

category A felony. NRAP 17(b)(3).

ISSUE PRESENTED FOR REVIEW

Issue One: Leal filed his *pro se* and counseled petitions and supplements in this case after the statute of limitations expired (NRS 34.726) and all claims are also procedurally defaulted pursuant to NRS 34.810 and Leal failed to demonstrate cause and prejudice to excuse the dismissal of his petitions.

Issue Two: Leal's claim that his plea was unknowing, unintelligent, and not voluntary is defaulted

Issue Three: Leal's claim that trial counsel performed ineffectively at sentencing is defaulted.

Issue Four: Leal's petitions failed to meet the threshold for the district court to conduct an evidentiary hearing on Leal's claims.

STATEMENT OF THE FACTS AND HISTORY OF THE CASE

I. INTRODUCTION

Leal owned and operated a business with his co-defendant (Jessica Garcia) called Parcelnomics, LLC (d/b/a Investments Deals). 1 AA 19, 44. Leal, Garcia, or their representatives, sold parcels of land to the 11 victims in this case after falsely representing to the victims that the titles to properties sold to the victims were not encumbered by liens or other security interests. *See*, 1 AA 120. The scheme netted Leal and his co-defendant approximately \$750,000.00. *See*, 1 AA 89.

II. LEGAL PROCEEDINGS TO DATE

A. Leal Enters a Guilty Plea After Twice Waiving a Potential Conflict

On November 29, 2016, the State filed a criminal complaint charging Leal and Garcia with one count of Racketeering, 12 counts of Theft in the Amount of \$3,500.00 or More, and one count of Multiple Transactions Involving Fraud or Deceit in the Course of an Enterprise of Occupation. 1 AA 19.

After the State amended the complaint (1 AA 44), on April 11, 2017, Leal, represented by counsel who also represented his co-defendant, filed an Unconditional Waiver of Preliminary Hearing and a Conflict-of-Interest Waiver. 1 AA 74-77. The State filed a criminal information in the district court alleging one count of Multiple Transactions Involving Fraud or Deceit in the Course of an Enterprise and Occupation. 1 AA 90. Leal filed another conflict-of-interest waiver in the district court. 1 AA 94.

On April 24, 2017, the parties appeared for entry of plea and filed a guilty plea agreement in open court. 1 AA 82. Leal pleaded guilty to the charge in the information and agreed to jointly and severally pay restitution in the amount of \$757,420.00. 1 AA 89. The plea agreement named the victims and the amount of restitution owed to each victim. *Id.* The plea agreement provided that if full restitution were paid prior to sentencing, the State would not oppose a suspended sentence and probation. *Id.* However, if Leal failed to make restitution, the State

retained the right to argue for a sentence of imprisonment. *Id.*

At his August 17, 2017, sentencing hearing, Leal failed to make restitution. *See*, 1 AA 122-25. The Court imposed a sentence of seventy-two (72) to one hundred eighty (180) months in the Nevada Department of Corrections. 1 AA 140. The clerk filed the Judgment of Conviction on August 23, 2017. 1 AA 142. Leal filed a timely notice of appeal. 1 AA 145.

B. The Court of Appeals Affirms Leal's Conviction (Case 74050)

On direct appeal, Leal presented two issues:

- Did the District Court err by failing to hold an evidentiary hearing or inquire into the nature and materiality of the alleged breach of the plea agreement;
- Did the District Court err by denying Appellant's motion to withdraw counsel due to a concurrent conflict of interest which could not be waived.

1 AA 155.

After full briefing by the parties (RA 1, 38), the Nevada Court of Appeals affirmed Leal's conviction. 1 AA 192. The Nevada Supreme Court denied Leal's petition for review and request for rehearing.

Remittitur (triggering the start of the statute of limitations in NRS 34.726(1)) issued December 24, 2018.² 1 AA 197.

C. Leal Files His First State Habeas Petition, and the Nevada Court of Appeals Affirmed the Denial of the Petition

² In his opening brief, Leal references the date the Supreme Court filed the remittitur. OB at 6. However, the Court issued the remittitur December 24, 2018.

On March 21, 2019, Leal filed his counseled post-conviction petition for a writ of habeas corpus petition challenging the judgment and sentence.³ In his petition, Leal raised the following claims:

Ground One: The original information failed to put the petitioner on notice of the charges;

Ground Two: Ineffective assistance of counsel:

(A) Counsel failed to obtain a waiver of conflict;

(B) Counsel coerced petitioner into accepting a plea;

1 AA 200.

After full briefing (RA 53, 182), the parties presented argument and the district court denied Leal's petition.⁴ 1 AA 230-31. The clerk filed the order denying petition on June 21, 2019. 1 AA 233. Leal filed a timely appeal. 2 AA 243.

Leal submitted a pro se brief after electing to not retain counsel to represent him on appeal. 2 AA 245. In case number 79243, the Nevada Court of Appeals affirmed the denial of Leal's habeas corpus petition on October 9, 2020. 2 AA 288.

D. Leal Files a Second, Untimely, Successive State Habeas Petition

On April 29, 2020, Leal filed a second state habeas corpus petition through

³ The Clark County Clerk filed this petition in Leal's criminal case, C-17-322664-2.

⁴ The district court ordered an amended judgment of conviction (filed May 9, 2019) to comply with the plea agreement's provision that Leal pay restitution jointly and severally with his co-defendant. 1 AA 231.

counsel. 2 AA 254. One month later, Leal filed a pro se supplemental petition. 2 AA 262. Respondents filed an answer to both pleadings in August. 2 AA 274.

In December of 2020, after Leal’s counsel filed a motion to withdraw, Leal filed a pro se supplement to his petition. 2 AA 319. The court granted counsel’s motion to withdraw and appointed new counsel. Leal filed a counseled supplemental petition in May of 2021. 2 AA 330. Two months later, Respondents filed an answer addressing all claims in all pending petitions. 2 AA 402.

On August 27, 2021, the parties argued the claims before the district court. 2 AA 418. The district court dismissed the petitions, finding the claims procedurally barred, or alternatively denied by the law of the case doctrine. 2 AA 434 After the clerk entered the order, Leal filed a timely amended notice of appeal. 2 AA 444.

SUMMARY OF THE ARGUMENT

The district court correctly found Leal’s second state habeas petition untimely. Over a decade ago, the Nevada Supreme Court held that an amended judgment of conviction does not restart the one-year statute of limitations for filing a state habeas corpus petition challenging a judgment of conviction. Instead, the Court found that an amended judgment of conviction may provide cause to excuse the raising of untimely claims if the claims touch on the subject matter of the amended judgment.

In Leal’s case, none of the claims in his pro per and counseled petitions arise from the amended judgment of conviction—which merely made the payment of

restitution joint and several among the co-defendants.

The district court also correctly dismissed Leal's second state habeas petition based on findings that the petition was alternatively successive or an abuse of the writ. Leal could have raised all of the claims that he raised in his second state habeas petition during his first state habeas corpus proceeding, and in fact, some of the claims he raised in his second habeas petition were raised and rejected during the first proceeding.

Leal presented the district court with no basis to overcome the application of NRS 34.726(1) or NRS 34.810 to dismiss his second state habeas petition. While Leal argues that the amended judgment of conviction restarted the limitations period in NRS 34.726(1), Nevada cases clearly hold that an amended judgment, at best, may only provide cause to excuse an untimely filing if the claim address the subject of the amendment to the judgment and the petitioner demonstrates no fault for the delay.

Leal also claims that the prejudice from a *Strickland* claim became apparent only after the co-defendant was sentenced and received a more favorable sentence. This argument lacks merit.

Leal alleges that his plea was coerced and that his counsel was ineffective at his sentencing hearing. However, Leal presents no cause or prejudice to excuse these procedurally defaulted claims. Therefore, this Court should eschew review of the

merits of these claims until Leal establishes cause and prejudice to excuse the procedural defaults. In the event this Court finds cause and prejudice to excuse the defaults, this Court should remand to the district court in the first instance so the district court can address the claims and if necessary, conduct an evidentiary hearing.

Finally, Leal failed to satisfy his burden to obtain an evidentiary hearing on his claims. Therefore, the district court correctly denied a request for evidentiary hearing in this matter.

ARGUMENT

I. THE RELEVANT LAW

A. The Standard of Review

Review of the denial of a habeas corpus petition presents a mixed question of law and fact. *See, Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). A reviewing court gives deference to a lower court’s factual findings “so long as they are supported by substantial evidence and are not clearly wrong.” *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005), *see also, Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). The district court’s application of the law is reviewed *de novo*. *See, Gonzales v. State*, 492 P.3d 556, 562 (Nev. 2021).⁵

B. Evidentiary Hearings

“In instances where a defendant’s claim is neither belied by the record, nor

⁵ 137 Nev. Adv. Op. 40.

procedurally or doctrinally barred, the district court should conduct an evidentiary hearing.” *Little v. Warden*, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001). “A claim is ‘belied’ when it is contradicted or proven to be false by the record as it existed at the time the claim was made.” *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

II. LEAL FILED HIS SECOND STATE HABEAS CORPUS PETITION WELL AFTER THE STATUTE OF LIMITATION RAN AND ALL CLAIMS ARE BARRED PURSUANT TO NRS 34.726(1) AND/OR 34.810

A. NRS 34.726(1) Establishes a One-year Statute of Limitations for Filing State Habeas Corpus Petitions (Issue One)

The Legislature provided a one-year time period for petitioner to file a state habeas petition challenging the validity of a judgement or sentence. NRS 34.726(1). The period begins when after the clerk enters a judgment of conviction. *Id.* In cases where a petitioner appealed his conviction or sentence, the year begins to run when the appellate court issues remittitur. *Id.*

A petitioner may excuse the filing of an untimely petition by demonstrating good cause for the delay and by demonstrating that “dismissal of the petition as untimely will unduly prejudice the petitioner. NRS 34.726(1)(a) and (b).

1.) The Start of the Statute of Limitations in Leal’s Case

Leal filed a notice of appeal after the district court sentenced him in August of 2017. 1 AA 145. The Court of Appeals affirmed Leal’s conviction in September

of 2018. 1 AA 192.

The statute of limitations began when the remittitur issued December 24, 2018. 1 AA 197. Thus, the statute of limitation ran December 24, 2019.

2.) Leal filed his initial petition in this case 16 months after the limitations period expired

Leal filed the counseled state habeas corpus petition at issue in this case on April 28, 2020. 2 AA 254. The subsequent filings in this case, two filed by Leal and one filed by counsel, were also filed after the running of the statute of limitations. 2 AA 262, 319, and 330.

Leal filed all of petitions in this case after the running of the statute of limitations in NRS 34.726(1). Thus, the district court correctly dismissed Leal's claims as untimely. 2 AA 434. Leal attempted to establish cause and prejudice to excuse his late filings. However as discussed below, Leal establishes neither good cause nor prejudice to excuse his untimely filings.

B. NRS 34.810 Preventing Piecemeal Litigation of Habeas Corpus Claims (Issue Two)

In addition to NRS 34.726(1) preventing litigation of untimely claims, the Legislature enacted NRS 34.810 to help prevent repeated and piecemeal litigation of habeas claims.

A petitioner who entered a guilty plea is barred from litigating claims NOT based on allegations "that the plea was involuntarily or unknowingly entered or that

the plea was entered without effective assistance of counsel.” NRS 34.810(1)(a).

The same statute prevents litigation of claims that a petitioner failed to raise on direct appeal or in a previous habeas corpus petition. NRS 34.810(1)(b). The statute also places restrictions on second or successive petitions. NRS 34.810(2).

A petitioner may demonstrate cause and prejudice to excuse dismissal of his petition. NRS 34.810(3).

Leal’s petition was second or successive and was therefore procedurally barred pursuant to NRS 34.810(2). In Leal’s second habeas petition, all claims fall into at least one of the following categories: (1) claims that do not challenge the voluntariness of his entry of plea and were therefore barred by NRS 34.810(1)(a); (2) claims that Leal previously raised and were therefore barred by NRS 34.810(1)(b); and (3) claims that Leal failed to raise on direct appeal or in his first habeas corpus petition and were therefore barred by NRS 34.810(1)(b). Also, as addressed above, all claims are untimely.

1.) Leal’s petitions raised claims not challenging the entry of his plea

Leal’s pro se and counseled petition raised several claims that failed to allege his plea was not involuntary or unknowing. Those claims include:

- The pro se petition's claim that counsel failed to disclose to the Court a civil forfeiture case filed by the Attorney General's Office (Ground 2(a)). 2 AA 269.
- The pro se petition's claim that counsel failed to disclose to the Court that a more thorough plea canvass was necessary because the plea agreement

involved both co-defendants (Ground 2(b)). 2 AA 269.

- The pro se petition's claim counsel failed to litigate a jurisdictional defect regarding out-of-state properties (Ground 2(c)). 2 AA 269.
- The pro se petition's claim counsel represented both co-defendants for a period of time without a conflict-of-interest waiver (Ground 2(d)). 2 AA 269.
- The pro se petition's claim counsel did not dispute an allegedly insufficient charging document (Ground 2(e)). 2 AA 269.

Leal also failed to explain why he failed to raise these claims in his first state habeas corpus petition or failed to raise them on direct appeal. The claims are defaulted pursuant to NRS 34.810(1)(a). *See also, Gonzales v. State*, 492 P.3d 556 (Nev. 2021) (claims prohibited by NRS 34.810(1)(a) are those “relating to the deprivation of constitutional rights that occurred prior to the entry of guilty plea”) (*citing to Tollett v. Henderson*, 411 U.S. 258, 267 (1979)).⁶

2.) Leal’s petition raised claims that were successive

Leal raises several claims in this second petition that he previously raised in his first petition. Those claims are:

- The pro se petition’s claim that the guilty plea was involuntary (Ground 1). 2 AA 268.
- The pro se petition’s claim that counsel represented both co-defendants “for a period of time” without a conflict-of-interest waiver (Ground 2(d)). 2 AA 269.⁷
- The pro se petition’s claim that counsel did not dispute an insufficient charging document (Ground 2(e)). 2 AA 269.

⁶ 1376 Nev. Adv. Op. 40.

⁷ The previous petition alleged there was no waiver of conflict of interest. To the extent the addition of the phrase “for a period of time” changes the nature or substance of the claim, Leal fails to explain why he failed to raise the claim in his first state habeas petition.

- The supplemental pro se petition's claim that the plea was invalid and under duress because of undue influence and coercion. 2 AA 320.
- The supplemental counseled petition's claim that the plea was involuntary (Ground A). 2 AA 345.
- The supplemental counseled petition's claim that the plea was unknowing, involuntary, and unintelligent and entered without the effective assistance of counsel (Ground B). 2 AA 345.⁸

Leal fails to explain why he reraises these claim in his second petition after litigating them in his first petition. NRS 34.810(2).

3.) Leal's petition raised claims that he failed to raise in his prior state habeas petition

Finally, Leal's four separate petitions filed in this matter present claims that he could have but failed to assert in his first state habeas petition.

- The counseled petition's claim that counsel failed to present mitigating factors at sentencing regarding difficulty selling the property to pay restitution (Ground 1). 2 AA 260.
- The counseled petition's claim that counsel failed to correct errors in the pre-sentence report (Ground 2). 2 AA 260.
- The counseled petition's claim that counsel failed to correct or explain errors in Leal's criminal history prior to sentencing (Ground 3). 2 AA 260.
- The pro se petition's claim that counsel failed to disclose to the Court a civil forfeiture case filed by the Attorney General's Office (Ground 2(a)). 2 AA 269.
- The pro se petition's claim that counsel failed to disclose to the Court that a more thorough plea canvass was necessary because the plea agreement involved both co-defendants (Ground 2(b)). 2 AA 269.
- The pro se petition's claim counsel failed to litigate a jurisdictional defect regarding out-of-state properties (Ground 2(c)). 2 AA 269.
- The pro se petition's claim appellate counsel was ineffective for failing

⁸ While Leal sets for the claims separately in his summary of argument, he addresses them together under the argument section of the pleading.

to raise a claim that petitioner never received a copy of his pre-sentence investigative report (Ground 3). 2 AA 270.

Leal fails to explain why he failed to raise these claims in his first state habeas petition. Therefore, the claims are defaulted pursuant to NRS 34.810(2).

C. Leal Failed to Demonstrate Cause or Prejudice to Excuse Dismissal of His Petitions

In his opening brief, Leal argues that the filing of the Amended Judgment of Conviction in May of 2019 restarted the statute of limitations in NRS 34.726(1). OB at 35.⁹

In support of his argument, Leal cites this Court’s decision in *Whitehead v. State*, 128 Nev. 259, 285 P.3d 1053 (2012). In *Whitehead*, the Court held that “a judgment of conviction that imposes a restitution obligation but does not specify its terms is not a final judgment.” *Id.* at 263, 285 P.3d at 1055. The Court further held such a judgment “is not sufficient to trigger the one-year period under NRS 34.726 for filing a postconviction petition for writ of habeas corpus.” *Id.*

Leal argues that *Whitehead* permits “changes to the Judgment of Conviction pertaining to restitution,” to trigger a new one-year limitation period under NRS 34.726(1). OB at 36. However, Leal does not cite to the Court’s language supporting his argument, and he does not accurately describe the decision. In *Whitehead*, the

⁹ Leal also mistakenly states that the remittitur issued January 17, 2019. OB at 35. However, the January date cited by Leal reflects the date the clerk filed the remittitur.

district court issued judgments of conviction which left restitution to be determined at a later date. 128 Nev. at 261, 285 P.3d at 1054. In *Whitehead*, the Court found that the first two judgments of conviction in his case did not constitute final judgments of conviction because the district court never addressed the specifics of Whitehead's restitution obligation. 128 Nev. at 263, 285 P.3d at 1055. The Court found that a subsequent amendment to the judgment of conviction, filed on January 27, 2009, which set forth the specific amount and terms of the restitution, was the final judgment that started the one-year statute of limitations in NRS 34.726(1). 128 Nev. at 263, 285 P.3d at 1055.

1.) The amended judgment of conviction does not provide cause to excuse Leal's default

As explained in more detail below, the judgment entered on August 23, 2017 (1 AA 142) was the final judgment for purposes of NRS 34.726. And while that judgment was subsequently amended in 2019, that amended judgment did not restart the one-year period in NRS 34.726(1). Nor would it provide good cause for Leal's untimely second petition or excuse his successive petitions.

In *Sullivan v. State*, the Nevada Supreme Court found that an Amended Judgment of Conviction does not in itself provide good cause to excuse an untimely (or successive) petition. 120 Nev. 537, 96 P.3d 761 (2004).

Finding that no language in NRS 34.726 addresses the effect of an amended judgment of conviction on the one-year time limit for filing state habeas petitions,

the Court in *Sullivan* found that construing NRS 34.726 to allow for a restart of the statute of limitations would “result in an absurdity that the Legislature could not have intended,” noting that a judgment of conviction may be amended years later in order to correct a clerical error or to correct an illegal sentence. 120 Nev. at 540, 96 P.3d at 764 (citations omitted).

The *Sullivan* Court found however, “if the claims presented in a petition filed within one year of the entry of the amended judgment challenge the proceedings leading to a substantive amendment to the judgment and could not have been raised in prior proceedings, there may be no delay attributable to the ‘fault of the petitioner.’” *Id.* at 541, 96 P.3d at 764, (citing NRS 34.726(1)(a) and *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003)).

a. The August of 2017 judgment is a final judgment

In Leal’s case, his August of 2017 judgment of conviction clearly set forth his restitution obligation. That document stated that Leal owed restitution in the amount of \$757,420.00 to the following parties:

Party	Restitution Owed
LoryLee Plancarte	\$70,000.00
Edelyn Rudin	\$75,000.00
Chatty Becker	\$37,000.00
Irene Segura	\$57,500.00
Liih-Ling Yang	\$98,620.00
Lina Palafox	\$90,300.00
Adilson Gibellato	\$85,000.00
Juan Eloy Ramirez	\$50,000.00

Catherine Wyngarden	\$115,000.00
Shahram Bozorgina	\$25,000.00
Tat Lam	\$53,500.00

See, 1 AA 143.

It is clear that Leal’s Judgment of Conviction constituted a final judgment of conviction. That document set forth with specificity the terms of the restitution, as well as the “amount of restitution for each victim of the offense.” *See, Witter v. State*, 135 Nev. 412, 414, 452 P.3d 406, 408 (2019) (citing to NRS 176.105(1)(c) and NRS 176.033(1)(c)). In *Whitehead*, the Court found that a judgment that imposes restitution but does not specify the terms is not a final judgment. 128 Nev. at 263, 285 P.3d at 1055.

The August 2017 judgment sets forth the terms and the amount of restitution, complying with the provisions of NRS 176.105(1)(c). The district court correctly found the August 2017 judgment of conviction constituted a final judgment of conviction, triggering Leal’s time for filing a direct appeal and a state habeas corpus petition. 2 AA 438.

b. The May 2019 judgment corrected a clerical error, and Leal’s second state habeas petition does not challenge the error

In the May of 2019 judgment, the district court added the language that Leal pay restitution jointly and severally with his co-defendant. 1 AA 234. This amendment to the judgment of conviction did not change the amount of restitution

due. *Id.*, see also 1 AA 143. The addition of the language also conformed the judgment to the terms of the plea agreement, which called for a joint plea and joint and several liability for restitution. 1 AA at 83.

None of the claims in Leal’s second state habeas petition challenge the amendment that inured to Leal’s benefit—making restitution jointly responsible between Leal and his co-defendant. Other than the claim that Strickland prejudice did not manifest itself until the codefendant’s sentence was modified (argued below), Leal presented no other argument as cause to excuse the untimely filing of his petition. Therefore, the district court correctly found that Leal failed to demonstrate cause and prejudice to excuse the application of NRS 34.726(1) and 34.810 to bar his claims. *See, Sullivan*, 120 Nev. at 541-42, 96 P.3d at 765 (all claims “arose during the proceedings leading to the original judgment of conviction and during the prosecution of the direct appeal” and therefore the amended judgment failed to provide good cause to excuse untimely filing).

c. Leal treated the August 2017 judgment as a final order

The record reflects that Leal treated the August 2017 judgment of conviction as a final order, taking a direct appeal from that order, as well as challenging the order in a state habeas petition, and in neither proceeding challenging the 2017 judgment as “not final.” *See*, 1 AA 145 (Notice of Appeal); 1 AA 200 (first state habeas petition). Leal should be estopped from disavowing his prior stance that he

appealed the 2017 judgment on both direct appeal and through habeas corpus proceedings.

The Nevada Supreme Court agrees. In *Witter*, the Court held that a party may not argue that a judgment was not final “when the party treated the judgment as final.” 125 Nev. at 409-10, 452 P.3d at 416.

Respondents request the Court find that even if the August 2017 judgment did not constitute a final judgment, Leal is estopped from arguing that judgment is not final because he treated it as final until his second state habeas petition.

2.) Leal failed to demonstrate cause to avoid application of NRS 34.810

Leal argues that he can evade default under NRS 34.810 because the claims in the second petition “present new grounds not available at the time of the previous writ petition.” OB at 41. Leal further claims that the prejudice prong for an ineffective assistance claim at sentencing only arose after the arrest of his wife, who received a lesser sentence than her husband. *Id.*

Leal is mistaken. A habeas petitioner demonstrates cause for a default when he demonstrates that something external to him prevented him from raising a claim earlier. *Crump v. Warden*, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997) (*citing* *Passanisi v. Director*, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989)). Assuming (without conceding) that counsel performed deficiently at sentencing, nothing prevented Leal from raising his claim that counsel was ineffective at sentencing in his first state

habeas petition (and the allegation of prejudice that he received a harsh sentence). OB at 41. Because Leal failed to raise this issue in his first petition, the claim is both untimely and successive. The district court correctly dismissed the claim.

Leal also fails to demonstrate actual prejudice. The Nevada Supreme Court recognizes that “[S]entencing is an individualized process; therefore, no rule of law requires a court to sentence codefendants to identical terms.” *Nobles v. Warden, Nevada Dept. of Prisons*, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990) (citing to *People v. Walford*, 716 P.2d 137 (Colo. App. 1985)).

Finding cause and prejudice, or in the alternative, finding merit for a claim based solely upon subsequent events (as Leal argues) runs afoul of the Court’s visionary guidance in *Strickland* that cautions against permitting a defendant to “second-guess counsel’s assistance after conviction or adverse sentence,” or for a reviewing court to conclude counsel’s actions unreasonable after an unsuccessful result. *Strickland*, 466 U.S. at 689.

Arguments that prejudice from counsel’s actions could only be discerned after the sentencing of Leal’s codefendant constitute the best evidence that Leal cannot satisfy his burden of demonstrating cause and prejudice under *Strickland* regarding counsel’s performance at sentencing. Arguing prejudice in hindsight also hints at the fact that counsel’s actions were reasonable at the time. *Id.* (“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting

effects of hindsight...and to evaluate the conduct from counsel's perspective at the time."). If Leal can only demonstrate prejudice based upon a different result based upon a different strategy, then he fails to demonstrate constitutionally deficient conduct, as opposed to merely employing an unsuccessful strategy.

III. THE DISTRICT COURT CORECTLY DENIED LEAL'S ATTEMPT TO WITHDRAW HIS PLEA

A. Legal Standards

1.) Counsel must perform effectively during the plea process

In order to establish a claim of ineffective assistance of counsel, a petitioner must demonstrate: (1) that counsel's conduct fell below an objective standard of reasonableness; and (2) actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *Warden v. Lyons*, 100 Nev. 430, 432–33, 683 P.2d 504, 505 (1984) (adopting the standard in *Strickland*). A reviewing court "may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996), *citing to Strickland*, 466 U.S. at 697.

2.) Judging counsel's conduct during plea proceedings

The entry of a guilty plea by a defendant must be knowing, intelligent, and voluntary. *Molina v. State*, 120 Nev. 185, 191, 87 P.3d 533, 537 (2004).

The United States Supreme Court found that the two-part test in *Strickland*

applies to counsel’s performance during plea bargaining. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). The Court found the deficient conduct prong remains the same. *Id.* at 58-59. A petitioner demonstrates prejudice by showing that “counsel’s constitutionally ineffective performance affected the outcome of the plea process.” *Id.* at 59. The ultimate decision to accept or reject an offer belongs to the defendant. *See, Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring).

B. Leal’s Claims

In one of his pro se pleadings, Leal alleged that his plea was coerced. 2 AA 268. Leal further alleged a claim of actual innocence because his victims signed purchase agreements subject to liens and encumbrances. *Id.*

Leal alleges that the district court failed to allow him to withdraw his guilty plea. OB at 44. In his brief, Leal alleges that he is not claiming coercion—rather, he alleges that he is actually innocent because his victims signed a purchase agreement that they are taking the property subject to liens.¹⁰ *Id.* at 44-46.

Leal admits he is presenting new argument on the issue that “is slightly different not focused on coercion.” *Id.* at 43.

In essence Leal argues now, he is actually innocent because “he was of the belief that he fulfilled all disclosure duties and points to the contract language

¹⁰ Leal ignores the fact that despite the language in contracts executed by the parties, either the defendants or their employees represented to the victims that the properties were free and clear of liens or mortgages. *See*, 1 AA 122.

reviewed and signed by the purchasers.” OB at 44.¹¹ It appears that Leal alleges counsel was ineffective during the plea process for some reason connected to this claim, but his brief does not specify why counsel was ineffective.

This Court held, “Where a defendant fails to present an argument below and the district court has not considered its merit, we will not consider it on appeal.” *McKenna v. State*, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998) (citing *Guy v. State*, 108 Nev. 770, 780, 839 P.2d 578, 584 (1992)). This Court should decline to consider this claim, as Leal admits that it differs from the claim presented below.

C. Leal’s Claim is Procedurally Defaulted

As noted above, (see, II(C), above) Leal presented this claim more than one year after the issuance of remittitur at the conclusion of Leal’s direct appeal proceedings. Leal also could have presented this claim in his first state habeas petition. The claim is procedurally defaulted, and Leal presents no cause or prejudice to excuse his default.

To the extent that he alleges actual innocence to excuse his default. OB 44. However, the claim of actual innocence based upon ineffective assistance of trial counsel for coercing a guilty plea is itself procedurally defaulted. Leal could have raised this claim in a prior petition but failed to do so. The claim is also untimely.

¹¹ Leal now alleges actual innocence but admitted at sentencing that apparently “we didn’t explain it correctly, I guess, what we were selling.” 1 AA 124.

See, State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005) (*citing Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003)).

To the extent that Leal's claim asserts a freestanding claim of actual innocence, the Nevada Supreme Court does not recognize such a claim. But even if *arguendo*, the Court considered the claim, it is belied by the record. Leal alleges that "he was of the belief that he fulfilled all disclosure duties and points to the contract language reviewed and signed by the purchasers." OB at 44. However, Leal ignores the fact that the record reflects that Leal or his co-defendant/representatives falsely represented to his victims that the titles to properties sold to the victims were not encumbered by liens or other security interests, false representations which netted the defendants approximately three quarters of a million dollars. See, 1 AA 120.

Leal fails to demonstrate good cause and prejudice to evade the application of NRS 34.726(1) and NRS 34.810. Additionally, based upon Leal's admittedly new argument, this Court need not address the claim. However, in the event the Court finds that Leal presents cause and prejudice to overcome the procedural default, this Court should remand the claim to the district court. This would give the district court the first opportunity to consider Leal's new argument and conduct an evidentiary hearing (if necessary). Then, if Leal appeals again, this Court could review the district court's record and any factual findings made by district court.

IV. LEAL RECEIVED THE ASSISTANCE OF EFFECTIVE COUNSEL DURING SENTENCING

Leal alleges that his counsel performed deficiently at sentencing. OB at 48. Leal alleges that counsel was ineffective for failing to request a continuance of Leal's sentencing. *Id.*

A. The Claim is Procedurally Defaulted

The district court found the claim procedurally defaulted pursuant to NRS 34.726(1) and NRS 34.810. 2 AA 436, 438.

B. Leal Fails to Demonstrate Cause and Prejudice to Excuse the Default

As discussed above (*see*, II(C)), Leal failed to present cause and prejudice to evade application of NRS 34.726(1) and NRS 34.810.

Because the district court never addressed the merits of the claim, should this Court find cause and prejudice to excuse Leal's procedural default of the claim, remand to the district court to address the merits and (if necessary) conduct an evidentiary hearing.

V. LEAL FAILED TO PRESENT FACTS JUSTIFYING AN EVIDENTIARY HEARING

“If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.” NRS 34.770(2).

///

In Leal’s case, he failed to demonstrate the necessity of an evidentiary hearing to excuse the procedural default of the claims in his petitions.

In his brief, Leal cites to a string of federal cases over 30 years old that purportedly allege that a petitioner receives an evidentiary hearing when a “petitioner raises a colorable claim of ineffective assistance.” OB at 56. However, the cases do not cite the Nevada standard for evidentiary hearings. Nor do the cases address procedurally defaulted claims.¹²

A. Nevada’s Standard for Evidentiary Hearings

In Nevada, the district court conducts an evidentiary hearing when a petitioner “asserts specific factual allegations that are not belied or repelled by the record and that, if true, would entitle him to relief.” *Nika v. State*, 124 Nev. 1272, 1300-01, 198 P.3d 839, 858 (2008), *citing Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

In his brief, Leal “urge[s] this court to find his claim is not procedurally barred and that an evidentiary hearing should have been held to determine why his attorney did not obtain the necessary extensions.” OB at 58.

///

///

¹² Leal cites one case, *Morris v. California*, as 996 F.2d 448 (9th Cir. 1991). However, typing 996 F.2d 448 into Westlaw brings up a First Circuit case, *Ward v. Hickey*, a non-habeas case.

B. Leal Presents No Evidence Supporting an Evidentiary Hearing on Defaulted Claims

In his brief, Leal failed to present good cause and prejudice to excuse the procedural default of his claims. The Nevada Supreme Court concluded that procedurally defaulted claims are not entitled to an evidentiary hearing absent first excusing the application of Nevada’s statutory procedural default bars. *See, McConnell v. State*, 125 Nev. 243, 258, 212 P.3d 307, 317 (2009).

Absent this Court finding that Leal demonstrated good cause and prejudice, this Court need not apply the Nevada standard for an evidentiary hearing. Second, even if this Court found that Leal demonstrated cause and prejudice to excuse his procedurally defaulted claims, Leal failed to satisfy the Nevada standard by pleading facts “not belied by the record that, if true, entitled him to relief.”

The State requests the Court affirm the district court’s denial of an evidentiary hearing in this matter.

CONCLUSION

Based upon the argument and law presented herein, the State requests this Court affirm the district court’s dismissal of Leal’s second state habeas corpus petition. If the Court finds cause and prejudice exist to excuse Leal’s procedural default of his claims, the State requests that the Court remand the matter to the

///

///

district court so that the district court may address the claims in the first instance and also determine if an evidentiary hearing is necessary.

RESPECTFULLY SUBMITTED this 2nd day of February 2022.

AARON D. FORD
Attorney General

By: /s/ Michael J. Bongard
Michael J. Bongard (Bar No. 007997)
Senior Deputy Attorney General

CERTIFICATE OF COMPLIANCE WITH NRAP 28.2

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 Microsoft Word 2016, 14 point Times New Roman type style.

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 proportionately spaced, has a typeface of 14 points or more and contains 7512 words.

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: February 2, 2022

AARON D. FORD
Attorney General

By: /s/ Michael J. Bongard
Michael J. Bongard (Bar No. 007997)
Senior Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on February 2, 2022.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

DIANE C. LOWE, ESQ.
Lowe Law, L.L.C.
7350 West Centennial Pkwy #3085
Las Vegas, Nevada 89113
(725) 212-2451

/s/ M. Landreth
An employee of the Office of the Attorney General