IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 83451

JACK LEAL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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

APPELLANT'S REPLY BRIEF

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March 4, 2022

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DATED this 4th Day of MARCH 2022.

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CERTIFICATE OF SERVICE

I hereby certify that service of the **APPELLANT'S REPLY BRIEF** was filed electronically with the Nevada Supreme Court on March 4, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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ALEXANDER CHEN

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

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

LEAL REPLY

1. The Amended Judgment of Conviction and Extended Deadlines

The Attorney General argues in their Answering Brief that neither Whitehead, Sullivan nor Witte provide relief to Leal via his amended judgment of conviction to make this, his second petition for writ of habeas corpus timely. Answering Brief at 14-19. Opening Brief 35-40.

Jonathan Whitehead, 18, (DOB 7/23/1988) was intoxicated with alcohol and THC and speeding on September 20, 2006 with 7 friends packed into a Ford Expedition when it started veering off the road. He overcorrected, causing it to roll several times and land upside down on the roof. A 17 year old sitting on someone's lap went flying out of the vehicle and died on the scene and several others were gravely injured. At 27, he was discharged from prison in 2016 owing $1,390,647 in restitution. He had taken a plea agreement to a DUI causing death and DUI causing substantial bodily harm; sentences to be run concurrently. The court sentenced him on May 5, 2008. The judgment of conviction issued that same day May 5 2008. His postconviction petition for writ of habeas corpus was filed May 13 2009. The court found restitution would be appropriate but the judgment and amended judgment left open its amount with terms to be determined at a later hearing. Whitehead at 260. Both parties had stipulated to a subsequent hearing on restitution after sentencing. Answering Brief at 13 line 25. Appeal 55865. After the restitution hearing a second

amended judgment of conviction issued on January 27, 2009 ordering Whitehead to pay $1,390,647. Id. at 261. Whitehead's post-conviction petition was filed within a year of this date. He did not file a direct appeal but on May 13, 2009 he filed a petition for writ of habeas corpus raising 45 claims of constitutional error, *none of which related to the amount of restitution*.

The Supreme Court of Nevada, in an en banc hearing on a petition for reconsideration after initial claim denial; held '… that it was timely filed under Nev. Rev. Stat. § 34.726(1), and the district court erred in dismissing it was procedurally barred.' Id. '….a judgment of conviction that imposes restitution but does not set an amount of restitution, in violation of Nevada statutes, is not final and therefore does not trigger the one-year time limit for filing a post-conviction petition for a writ of habeas corpus.' Whitehead v. State, 128 Nev. 259, 260, 285 P.3d 1053, 1053 (2012).

Judgment was reversed and his case was remanded for further proceedings. In doing so they found that an amended judgment of conviction due to restitution terms is a difference species from one which is because of a clerical error.

> **Upon reconsideration, however, we conclude that Sullivan is distinguishable.** In that case, the judgment of conviction was amended to correct a clerical error. The court noted that NRS 176.565 permits the district court to amend a judgment of conviction to correct such an error "years, even decades, after the entry of the original judgment of conviction." Sullivan, 120 Nev. at 540, 96 P.3d at 764. Setting the amount of restitution after an evidentiary hearing is not analogous to correcting an error; rather, **it is an integral part of the sentence. To that end, NRS 176.105(1) states that "the judgment of conviction must set forth . . . any term of imprisonment, the amount and terms of any fine, restitution or administrative assessment." Another** provision, NRS

> 176.033(1)(c), requires the district court to "set an amount of restitution" when it determines that restitution "is appropriate" as part of a sentence. We have held that this statute "contemplates that the district court will set a specific dollar amount of restitution" and therefore "does not allow the district court to award restitution in uncertain terms." Botts v. State, 109 Nev. 567, 569, 854 P.2d 856, 857 (1993). Whitehead v. State, 128 Nev. 259, 262, 285 P.3d 1053, 1055 (2012).

In Sullivan v. State, Sullivan burglarized a home, robbed the owners of several household items and took their Mercedes Benz by force. Sullivan v. State, 120 Nev. 537, 96 P.3d 761 (2004). When he was caught, he took a plea deal.

> Nev. Rev. Stat. § 34.726(1) provides that a timely post-conviction habeas petition must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. No specific language in § 34.726 expressly provides that the one-year time period restarts if the judgment of conviction is amended.
> Sullivan v. State, 120 Nev. 537, 538, 96 P.3d 761, 762 (2004)

The clerical error in the original judgment of conviction issued on or around January 7, 1998, was that it reflected he was found guilty of robbery *with use of a deadly weapon* instead of his actual accepted plea of guilty to simple robbery *without* use of a deadly weapon. Sullivan at 538-9. A corrected judgment of conviction issued January 3, 2000 and the remittitur from the direct appeal issued January 10, 2000.

On May 10, 2001, 14 months after remittitur from his direct appeal – Sullivan filed a postconviction motion. Sullivan at 539.

The State moved on October 2, 2001 to dismiss the May 10, 2001 petition for relief arguing based on untimeliness it was procedurally barred. Sullivan at 539. The District Court found it did not have jurisdiction over the case via the corrected judgment of conviction because at the time remittitur had not issued yet in the direct appeal. So the court vacated the corrected judgment and entered an amended judgment of conviction on December 11, 2001. The parties then stipulated to the supplemental petition and subsequent pleadings' timeliness because they were filed within a year of this amended date. The habeas action was ultimately denied on the merits after an evidentiary hearing and Sullivan filed a timely appeal. Id.

Though the parties stipulated to the timeliness, the Nevada Supreme Court found that parties cannot stipulate to overcome procedural barriers alone without further justification of good cause. Sullivan at 541. "We conclude that the petition was improperly treated as timely under NRS 34.726 simply because it was filed within one year of the entry of the amended judgment of conviction." Sullivan at 539-40.

They ultimately decided that if an amended judgment of conviction was due to a correction of clerical errors it did not extend any deadline the judgment of conviction sets for tolling purposes unless the clerical error pertained to one of the claims raised in the post-conviction claim.

> In this case, Sullivan alleged that his counsel in the initial district court proceedings leading to his conviction and his counsel on direct appeal were ineffective. Sullivan also challenged the validity of his guilty plea. *These claims were not related to and did not contest the clerical correction contained in the amended judgment of conviction. Rather, they all arose during the proceedings leading to the original judgment of conviction and during the prosecution of the direct appeal. As such, those claims could have been previously raised in a timely petition filed on or before January 10, 2001*- within one year after this court issued the remittitur in the direct appeal. Therefore, the entry of the amended judgment of conviction did not provide good cause to excuse the untimely filing of Sullivan's petition. Sullivan at 541-542. …We conclude that because the claims presented in appellant's post-conviction petition were unrelated to the district court's clerical amendment, the entry of the amended judgment in this case did not provide good cause to excuse appellant's failure to raise the claims asserted in his petition within the statutory deadline. Sullivan at 542.

The court in Whitehead clearly states that a judgment of conviction which does not outline the restitution is not final.

The Attorney General for this action uses the fact that Leal had already filed a direct appeal, a writ of habeas corpus petition and an appeal on the first writ of habeas corpus to say that a defendant/ convict has the personal power by filing an appeal to determine the legal validity of his judgment of conviction. [But recall Sullivan. The court specifically said parties do not have the power to stipulate away procedural bars.]

If restitution terms have not been outlined on the judgment of conviction - the judgment per Whitehead is not final.

And yet after Sullivan and Whitehead it is still not crystal clear to the Attorney General, whether Leal's scenario, we present to you here, falls under one or the other. We argue that it is a restitution term that was added to the judgment of

conviction and thus serves to make Leal's second petition for writ of habeas corpus timely, regardless of whether his actual writ claims have to do with restitution and whether the restitution amount added ultimately may serve to his benefit '*jointly and severally'*. The Attorney General and the District Court insist that since this language was determined at the plea hearing and written in the plea agreement, it's absence on the original judgment of conviction is clerical.

Next the court should not try to evaluate the worth of the restitution and or the missing verbiage on restitution to decide whether it will be sufficient to allow a Whitehead extension.

The Attorney General argues that: 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. Attorney General Answering Brief p. 17. But the attorney general in Leal fails to address the missing verbiage 'Jointly and severally" sufficiently. The statute does not limit the requirement to just the important parts of restitution that will hurt the defendant in the long run. If this

court allows a sort of weighing factor of what the missing restitution term is, they are in for trouble.

Statutes are to be interpreted favorably to the defendant. One aims to conserve judicial resources and go, if possible, with the plain language of the statute. And the plain language is that all restitution terms must (not may) be included.

NRS 176.105 Judgment in criminal action generally.

1. If a defendant is found guilty and is sentenced as provided by law, the judgment of conviction ***must*** set forth:

(a) The plea;

(b) The verdict or finding;

(c) The adjudication and sentence, including the date of the sentence, any term of imprisonment, the amount and terms of any fine, restitution or administrative assessment, a reference to the statute under which the defendant is sentenced and, if necessary to determine eligibility for parole, the applicable provision of the statute; and

(d) The exact amount of credit granted for time spent in confinement before conviction, if any.

2. If the defendant is found not guilty, or for any other reason is entitled to be discharged, judgment must be entered accordingly.

3. The judgment must be signed by the judge and entered by the clerk.

(Added to NRS by 1967, 1433; A 1973, 161; 1979, 1124; 1989, 938; 1993, 78; 1997, 905)

'Statutory interpretation is a question of law subject to independent review. When the language of a statute is clear, we will ascribe to the statute its plain meaning and not look beyond its language. However, when the language of a statute is ambiguous, the intent of the Legislature is controlling. In such instances, we will interpret the statute's language in accordance with reason and public policy.' Lader v. Warden , 121 Nev. 682, 687, 120 P.3d 1164, 1167 (2005). 'To the extent that Warden v. Lischko, 90 Nev. 221, 523 P.2d 6 (1974), supports the discretionary application of the current statutory procedural bar for waiver, the Nevada Supreme Court overrules it. The current statutory language of Nev. Rev. Stat. § 34.810 is mandatory.' Pellegrini v. State, 117 Nev. 860, 864, 34 P.3d 519, 522 (2001). 'When the scope of a criminal statute is at issue, ambiguity should be resolved in favor of the defendant. And when a specific statute is in conflict with a general one, the specific statute will take precedence.' Lader v. Warden,

121 Nev. 682, 684, 120 P.3d 1164, 1165 (2005). 'The State's interpretation of NRS § 176.033 ignores the clear language of the statute. The statute provides that if restitution is appropriate, "the court *shall* . . . set an amount of restitution." NRS § 176.033(1)(c) (emphasis added). As this Court has noted, the word "shall" marks that which is mandatory "and does not denote judicial discretion." Johanson v. District Court, ___ Nev. ___, ___, 182 P.3d 94, 97 (2008); Washoe Med. Ctr. v. District Court, 122 Nev. 1298, 1303, 148 P.3d 790, 793 (2006); accord. S.N.E.A. v. Daines, 108 Nev. 15, 19, 824 P.2d 276, 278 (1992) (" '[M]ay' is permissive and "shall" is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature."). Likewise, "the judgment of conviction must set forth . . . the amount and terms of any . . . restitution." NRS § 176.105(1)(c) (emphasis added). If a district court must set an amount for restitution, and that amount must be part of the judgment of conviction, then a judgment that does not comply with the statutes is not a valid final judgment of conviction.' p. 1-2 Reply Brief Supreme Court Whitehead 11-01939 Appeal 55865. Penal statutes should be strictly construed and resolved in favor of the defendant when the applicability of such statute is uncertain. Finger v. State, 117 Nev. 548, 550, 27 P.3d 66, 68 (2001) In Nevada, cases which seek to resolve whether "may" is treated as permissive or mandatory are considered under the rubric of words with a definite meaning. "May" is permissive and "shall" is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature or unless the purpose of the statute requires that construction. Nelson v. Halima Acad. Charter Sch., No. 03:05-CV-0171-LRH (RAM), 2006 U.S. Dist. LEXIS 48164, at *1 (D. Nev. July 13, 2006).

The Witter case was first raised by the Attorney General in his answering brief. In Witter the court discussed restitution:

And we remain convinced that given our statutory scheme, the specific amount of restitution is a weighty matter that must be included in the judgment of conviction when the sentencing court determines that restitution is warranted. *See Martinez v. State*, 115 Nev. 9, 12-13, 974 P.2d 133, 135 (1999) (recognizing that "[r]estitution under NRS 176.033(1)(c) is a sentencing determination," and while the defendant is not entitled to a full hearing, a defendant is entitled to challenge restitution at sentencing). In particular, the amount of restitution is not an inconsequential matter when a judgment imposing restitution "constitutes a lien in like manner as a judgment for money rendered in a civil action," NRS

176.275(1), which may be "enforced as any other judgment for money rendered in a civil action," NRS 176.275(2)(a), and "[d]oes not expire until the judgment is satisfied," NRS 176.275(2)(b). Although we adhere to our prior decisions, they are distinguishable in two respects and therefore not controlling in the circumstances presented by this case. Witter v. State, 452 P.3d 406, 408-09 (Nev. 2019).

The Attorney General in the present case cites Witter v State as supporting their position on the amended judgment of conviction. Witter v. State, 135 Nev. 412, 414, 452 P.3d 406, 408 (2019) Answering Brief at 17, 19.

There are two Witter cases. 2019 (6 pages) and an unpublished 2021 (2 pages). The Attorney General cites the 2019 case. p. 18: "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. Answering Brief p. 18-19.

Witter is distinguishable from the Leal case. It was based on a jury trial and a death penalty order, because of heinous crimes.

Witter's conviction was in 1995. And the changed judgment of conviction at issue was 12 years later. From 1995 to 2017 he went forward on several actions treating the judgment of conviction as final for appeal purposes. And he wanted all those actions to be upended in 2017 because they were not based on a final judgment. Also his new action raised claims previously litigated and resolved on the merits and raised new issues prohibited by NRS 34.810(1)(b). He bases part of the claim on what he argues is new law setting forth retroactive rules. Hurst v. Florida, 577 U.S. 92 (2016), But said 2016 case was actually just a restatement of Ring v Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002). And Witter failed to state why he delayed in making these claims. Witter v. State, 486 P.3d 722 (Nev. 2021). Any statements by the court in these opinions beyond what is necessary is uncontrolling dicta. And the edicts issued if applicable should be interpreted to apply to the limited facts of the case: An amended judgment of conviction is substantively appealable under Nev. Rev. Stat. § 177.015(3). 'The scope of the appeal is limited, however, to

issues arising from the amendment. Witter v. State, 452 P.3d 406, 407 (Nev. 2019)'. Clearly this holding applies to those cases limited to similar facts and claims as found in Witter. It should not be read to overturn Whitehead which finds that an amended judgment of conviction due to added restitution terms can extend the postconviction appeal action due dates not just as to the restitution amount but also to any other claim available.

Whitehead filed a post-conviction petition for a writ of habeas corpus on May 13, 2009, listing May 16, 2008, as the date of his conviction. In that petition, Whitehead raised 45 claims of constitutional error, *none of which related to the amount of restitution*. Whitehead v. State, 128 Nev. 259, 261-62, 285 P.3d 1053, 1054 (2012).

And finally Witter's claim is 12 years past the original judgment of conviction. Nev. Rev. Stat. § 34.800(1) states that a petition may be dismissed if the delay in filing the petition prejudices the State in either responding to the petition or retrying the petitioner. A rebuttable presumption of prejudice arises when the delay is more than five years from a decision on direct appeal. Nev. Rev. Stat. § 34.800(2). "Where a defendant raises a claim in an untimely or successive post-conviction petition for a writ of habeas corpus, the defendant has the burden of demonstrating good cause and actual prejudice to overcome the procedural default. Also, if a petition is: (1)

filed over five years after the remittitur disposing of the direct appeal or the judgment of conviction where no direct appeal was filed; and (2) the State pleads laches, the defendant will have the heavy burden of proving a fundamental miscarriage of justice to overcome the presumption of prejudice to the State." Little v. Warden, 117 Nev. 845, 847, 34 P.3d 540, 542 (2001). Leal's current claim was made April 28, 2020. The Original judgment of conviction issued April 23, 2017; the Amended Judgment of Conviction: May 9, 2019.

To overcome the presumption of prejudice to the State in responding to the petition, the petitioner must show that the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred. Nev. Rev. Stat. § 34.800(1)(a). And to overcome the prejudice to the State in retrying the petitioner, the petitioner must demonstrate that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence. NRS 34.800(1)(b). A petitioner may demonstrate a fundamental miscarriage of justice by presenting new evidence of actual innocence. Chappell v. State, 501 P.3d 935, 944 (Nev. 2021).

Leal's initial judgment of conviction issued August 23, 2017. His amended judgment of conviction adding the restitution term 'jointly and severally' issued May 9, 2019. The Petition for Writ of Habeas Corpus this appeal is based on, was filed

April 28, 2020. We are not saying the decisions by the court in his postconviction actions and appeals to date are not final and must be overturned. [Direct Appeal 74050, First Writ of Habeas Corpus Action C-17-322664-2, First writ appeal 792434]. Rather we are stating that because of the amendment to the judgment of conviction and his new issues raised that were previously unavailable – this new final judgment of conviction will take the place of the previous one without upending the direct appeal decision, and the first writ decision and appeal decision. The court still allows amended judgments of conviction as to restitution to extend the time for filing claims without overturning the prior postconviction decisions for actions to date – it is clear this can be done.

Since his conviction- the courts treated his conviction as final for the purposes of a direct appeal and several postconviction proceedings in state and federal court. In August 1995 the judgment of conviction was amended to required Witter pay restitution "in the amount of $2,790 with 'an additional amount to be determined'. Witter v. State, 452 P.3d 406, 407 (Nev. 2019). And in 2017 when he attempted to file another postconviction petition for 2017 he pointed to the indeterminate language "with an additional amount to be determined" to prove his judgment was not final and thus his action could still be considered timely. The district court agreed based on this the conviction was not final and amended the amended judgment of conviction by removing the indeterminate term. Witter v. State, 452 P.3d 406, 407-

08 (Nev. 2019). Witter then appealed within the year from this third amended judgment of conviction. The cases it cites for final judgment are from 1913, 1908 and 1983 and are civil cases where the defendant's rights are not as great.

> While it is a general rule that a jurisdictional question may be raised at any time, it is also settled that a party may, by his conduct, become estopped to raise such a question. A party in an appellate court who has treated the judgment as final and asked that the same be affirmed or reversed will not be heard afterwards, when the decision has gone against him, to contend that the judgment was not final and the court therefore without jurisdiction to determine the questions presented on the appeal. Chadbourne v. Hanchett, 35 Nev. 319, 323, 133 P. 936, 937 (1912).
>
> The Renfros contend that the Honda motor companies are estopped from asserting, in district court, the judgment's lack of finality. We agree. The Honda motor companies previously treated the judgment against them as final when they appealed to this court from the judgment, and when they did not request an NRCP 54(b) certification before they appealed. They are now estopped from asserting that the judgment was not final and that a certification of finality was necessary under NRCP 54(b). *See* State v. Commissioners Lander Co., 22 Nev. 71, 35 P. 300 (1894). *Cf.* Gamble v. Silver Peak, 35 Nev. 319, 323, 133 P. 936, 937 (1912) (opinion on reh'g) ("[a] party in an appellate court who has treated the judgment as final and asked that the same be affirmed or reversed will not be heard afterwards, when the decision has gone against him, to contend that the judgment was not final and the court therefore without jurisdiction to determine the questions presented on the appeal").
> Renfro v. Forman, 99 Nev. 70, 71-72, 657 P.2d 1151, 1152 (1983)
> Even if there is room for argument as to whether a judgment rendered in a cause is a final judgment, an appellant by treating it as such, and appealing therefrom, is estopped to deny the finality of the decree. Newhall v. Scott, 30 Nev. 43, 59, 93 P. 1, 2 (1908).

In Slaatte v. State, even though the convict filed an appeal from his indefinite judgment of conviction because restitution terms were not outlined in it, the

Nevada Supreme Court dismissed it because they lacked jurisdiction. Slaatte v. State, 129 Nev. 219, 298 P.3d 1170 (2013):

> Our recent decision in Whitehead v. State, 128 Nev. 259, 285 P.3d 1053 (2012), is controlling. In that case, we considered whether a judgment of conviction that imposed restitution but did not specify the amount of restitution was sufficient to trigger the one-year period under NRS 34.726 for filing a post-conviction petition for a writ of habeas corpus. *Id.* at 263, 285 P.3d at 1055. Based on the requirement in NRS 176.105(1)(c) that the amount of restitution be included in the judgment of conviction if the court imposes restitution, we concluded "that a judgment of conviction that imposes a restitution obligation but does not specify its terms is not a final judgment" and therefore it does not trigger the one-year period for filing a habeas petition. *Id.* Slaatte v. State, at 221, 1171.

If not, good cause exists to waive the time bar so these claims still should be considered on the merits. A fundamental miscarriage of justice would result otherwise. See N.R.S. 34.810. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519 (2001). Opening Brief p. 26, 27-30.

2. Cause to Review – External to Defense N.R.S. 34.810.

The Attorney General claims we fail due to the judgment of conviction issue as well as for not showing a cause external to defense for presenting these claims. Answering Brief p. 19-20. Opening Brief p. 26-29, 32-33. But they do not fully address why they the think our prejudice prong in the form of the wife's sentence is inadequate under the law to show a cause external to defense. 'To show good cause, Riker must demonstrate that an impediment external to the defense prevented

him from complying with procedural rules. Actual prejudice requires him to show "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Absent a showing of good cause to excuse procedural default, the court will consider a claim only if the petitioner demonstrates that failure to consider it will result in a fundamental miscarriage of justice.' State v. Eighth Judicial Dist. Court, 121 Nev. 225, 232, 112 P.3d 1070, 1075 (2005). 'Generally, "good cause" under Nev. Rev. Stat. § 34.726(1) for not timely filing a post-conviction habeas petition means a substantial reason; one that affords a legal excuse. In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default *rules. An impediment external to the defense may be demonstrated by a* ***showing that the factual or legal basis for a claim was not reasonably available to counsel****, or that some interference by officials, made compliance impracticable.* A claim of ineffective assistance of counsel may also excuse a procedural default if counsel was so ineffective as to violate the Sixth Amendment. However, in order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted. In other words, a petitioner must demonstrate cause for raising the ineffective assistance of counsel claim in an untimely fashion. In terms of a procedural time-bar, an adequate

allegation of good cause would sufficiently explain why a petition was filed beyond the statutory time period. Thus, a claim or allegation that was reasonably available to the petitioner during the statutory time period would not constitute good cause to excuse the delay.' Hathaway v. State, 119 Nev. 248, 250, 71 P.3d 503, 505 (2003). 'To show prejudice, the claimant must show a reasonable probability that but for counsel's errors the result of the trial would have been different. ' Evans v. State, 117 Nev. 609, 617, 28 P.3d 498, 505 (2001). And here with the wife's much better sentence – it can be conclusively shown that not only was there ineffectiveness on the part of the trial counsel as to Leal – it was very prejudicial to Mr. Leal. Opening Brief p. 13-14. A reasonable attorney would have talked to Mr. Leal's wife, Jessica Garcia. She had made a hollow promise that she would take care of the sale of the house to pay restitution but she did not. Then she did not show up for the sentencing hearing and instead of moving in advance of the hearing in light of the disappearance of Ms. Garcia – to submit a well thought out motion to postpone the sentencing hearing – trial counsel plunged right in headfirst with no plan. A reasonable attorney would have ensured either that the house was sold; that Jessica Garcia was present to report on her responsibility and efforts to sell the house and or to ensure the hearing was postponed. Sentencing hearings are postponed all the time. This is not an extraordinary measure and if it had been approached correctly it could have cut years off of Mr. Leal's sentence.

A decision by counsel not to present mitigating evidence in a capital case cannot be excused as a strategic decision unless it is supported by reasonable investigations. There is a constitutional right to present mitigating evidence to the jury. The traditional deference owed to the strategic judgments of counsel is not justified where there was not an adequate investigation supporting those judgments. An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all. Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. Correll v. Ryan, 539 F.3d 938, 941 (9th Cir. 2008). A capital sentencing proceeding which involves a hearing with a right to an advisory jury, with argument by counsel and findings of aggravating and mitigating circumstances, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, that counsel's role in the proceeding is comparable to counsel's role at trial for the purposes of determining constitutionally effective assistance of counsel. Strickland v. Washington , 466 U.S. 668, 671, 104 S. Ct. 2052, 2056, 80 L.Ed.2d 674, 683 (1984).

Throughout the evidentiary hearing, defense counsel revealed a fundamental misconception of mitigation evidence. He referred to the sentencing hearing as "a

dog and pony show" and "so much smoke." He said he felt that the judge would not have been receptive to mitigation evidence that was "touchy-feely [sic] fuzzy-headed kind of stuff." When asked about the classic mitigation evidence that was available, such as potential brain injury, 3 a history of drug addiction, and abuse suffered as a child, counsel testified that he didn't think of the evidence as favorable evidence. However, it is precisely this type of evidence that the Supreme Court has deemed "powerful." Wiggins, 539 U.S. at 534. Correll v. Ryan, 539 F.3d 938, 950 (9th Cir. 2008)

A disparity in the sentences of codefendants or accomplices may be a relevant mitigating circumstance. It is not mere disparity that is significant, however, but *unexplained* disparity. State v. Dickens, 187 Ariz. 1, 926 P.2d 468 (1996). And that is what we have here. Jessica absconded. Jessica was going to take care of the sale of the house. Jessica was given extension after extension until the house was sold and restitution was paid. This presents far more then a conclusory claim.

A defendant seeking post-conviction relief cannot rely on conclusory claims for relief but must support any claims with specific factual allegations that if true would entitle him or her to relief. The defendant is not entitled to an evidentiary hearing if

the allegations are belied or repelled by the record. Evans v. State, 117 Nev. 609, 617, 28 P.3d 498, 505 (2001)

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6).

The attorney general says: '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).' Answering Brief p. 19.

But that's not true. We showed that his codefendant got extensions to pay the restitution and thus got a much lighter sentence even though she participated equally and she had a similar criminal background – this does leave open the possibility that external to defense is the codefendants sentencing and proving the prejudice.

Nev. Rev. Stat. 34.810(3) provides that pursuant to Nev. Rev. Stat. 34.810(1) and Nev. Rev. Stat. 34.810(2), the petitioner for a writ of habeas corpus has the burden of pleading and proving specific facts that demonstrate: a) good cause for the petitioner's failure to present the claim or for presenting the claim again; and (b) actual prejudice to the petitioner. The petitioner shall include in the petition all prior proceedings in which he challenged the same conviction or sentence

Crump v. Demosthenes, 113 Nev. 293, 294, 934 P.2d 247, 248 (1997).

When you read Crump, you see that it supports Leal's external to defense argument: This court has recognized that good cause must afford a legal excuse. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented her from complying with the procedural rules. *Id.* A claim of ineffective assistance of counsel may provide good cause but only where there is a right to counsel (statutory or constitutional) and the right to the effective assistance of counsel, see Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253

(1997); McKague v. Warden, 112 Nev. 159, 165 n.5, 912 P.2d 255, 258 n.5 (1996), and only where the good cause claim explains the procedural defects and is not itself procedurally barred, Hathaway, 119 Nev. at 252, 71 P.3d at 506; *see also* Edwards v. Carpenter, 529 U.S. 446, 451, 453, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000) (explaining that an ineffective-assistance-of-counsel-good-cause argument must not itself be procedurally defaulted); Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) (explaining that a petitioner may demonstrate good cause where the procedural default is the result of ineffective assistance of counsel). If all the above is true, Mr. Leal is entitled to relief.

3. Claims of Actual Innocence and Strength of Case

The Attorney General argues: In one of his pro se pleadings, Leal alleged that his plea was coerced. 2 AA p. 22 268. 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

p. 23: 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.'

Answering Brief p. 23.

We discussed the strength of the case largely to show the likelihood that he would have taken the case to trial but for the errors of trial counsel – they are two different things - subtle but there – Actual innocence is you want the court to consider the claim of statutory actual innocence.

The Attorney General is confusing our duty to show the strength of the case to support the believability of willingness to go to trial had he known – with an

argument of actual innocence – if the AG's interpretation is correct everyone would have to argue actual innocence to try to withdraw their plea

One step in applying a harmless error standard involves an assessment of the strength of the prosecution's evidence against the defendant.

Holloway v. Arkansas, 435 U.S. 475, 476, 98 S. Ct. 1173, 1175 (1978). In meeting the "prejudice" requirement, the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 694. When a conviction is the result of a guilty plea, the second, or "prejudice," requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant *must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.* Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

United State v. Davis, 428 F.3d 802 ((9th Cir. 2005). United States v. Day, 969 F.2d 39, 40 (3d Cir. 1992).

4. Belied by the record.

The attorney general argues: procedurally or doctrinally barred, the district court should not 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). Attorney General Answering Brief p. 9.

However, a claim is not "belied by the record" just because a factual dispute is created by the pleadings or affidavits filed during the post-conviction proceedings. *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. *For example, a petitioner's claim that he was not informed of the maximum penalty that he could face before he pleaded guilty is belied if the transcript of the entry of plea shows that the district court judge clearly informed the petitioner of the penalty*. The instant situation is different. Mann and his attorneys apparently disagree about whether he requested an appeal. Neither Mann's claim, nor his attorneys' claims are belied by the record, and the fact that his attorneys' affidavits refute Mann's claims does not mean Mann's contentions are necessarily false. Mann v. State, 118 Nev. 351, 354-55, 46 P.3d 1228, 1230 (2002) A post-conviction petitioner is entitled to an evidentiary hearing if he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief. Nika v. State, 124 Nev. 1272, 1276, 198 P.3d 839, 842 (2008).

Throughout this action in pleadings and appendices and exhibits we have presented more than enough information to take our claims out of the conclusory category. The Attorney General fails to state just what arguments presented are in their mind conclusory.

CONCLUSION

WHEREFORE, based upon the above, Mr. Leal respectfully requests this Court to overturn his plea agreement and sentencing, and thus reverse the District Court Habeas Findings of Fact, Conclusions of Law & Order and / or remand the case back to the District Court for an evidentiary hearing or in the alternative resentencing.

Dated this 4th day of March 2022.

Respectfully submitted,

s/ Diane C. Lowe
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