IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAINE ANTON CRAWLEY,

Appellant,

v.

BRIAN WILLIAMS, WARDEN, HIGH DESERT STATE PRISON,

Respondent.

Case No. 83136-COA

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

DAINE ANTON CRAWLEY,
#1167447
Warm Springs Correctional Center
3301 E. 5th Street
P. O. Box 7007
Carson City, Nevada 89702
(775) 977-5807

Pro Per Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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ROUTING STATEMENT

The Nevada Supreme Court transferred this case transferred to the Court of Appeals on October 18, 2021.

STATEMENT OF THE ISSUE(S)

1. Whether Crawley Was Actually Represented By Counsel During Post-Conviction Proceedings;
2. Whether the District Court Properly Struck, Or Did Not Consider, Fugitive Documents Crawley Filed While Represented By Counsel;
3. Whether the District Court Properly Denied Crawley's Habeas Petitions

STATEMENT OF THE CASE

On April 7, 2020, the district court filed a Judgment of Conviction reflecting that Crawley pled guilty to, was convicted of, Carrying Concealed Firearm or Other

Deadly Weapon (Category C Felony) and sentencing him under the small habitual statute to 84-240 months with 67 days credit for time served.[1]

Crawley initially filed a pro se Petition for Writ of Habeas Corpus (Post-conviction) ("First Petition") and Motion to Proceed in Forma Pauperis (Confidential) on June 4, 2020. 1 Record on Appeal ("ROA") 1-15.[2] On June 9, 2020, the district court ordered the State to respond to Crawley's Petition. 1 ROA 18. On June 12, 2020, Crawley filed another Petition for Writ of Habeas Corpus (Postconviction) ("Second Petition"). 1 ROA 19-35.

On July 21, 2020, the State responded to Crawley's First and Second Petitions. 1 ROA 36-43.

On August 26, 2020, the district court appointed Roger Bailey, Esq. as post-conviction counsel. 1 ROA 168-169.

On December 28, 2020, the district court forwarded some documents, presumably Crawley's Second Petition, to his appointed counsel. 1 ROA 92-93.

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[1] The ROA indicates that the Judgment of Conviction is located at 1 ROA 130-131. *See* 2 ROA 1. That does not appear to be correct – 1 ROA 130-131 is part of one of Crawley's pleadings. However, the actual JOC is not relevant to the appeal, and the district court correctly identified the crime Crawley was convicted of in its findings. 1 ROA 162.

[2] According to the ROA, pages 16-17 are sealed. The State assumes this is the Motion to Proceed In Forma Pauperis (Confidential), to which undersigned does not have access either in the appellate record on in Odyssey through the district court. 1 ROA 16.

On March 18, 2021, Crawley filed a "SUPPLEMENT: PETITION for Writ of Habeas Corpus (Post Conviction) This Petition Shall Supersede any previous Petition, as contact with Court appointed Counsel remains futile" and a Petition for Writ of Habeas Corpus (Post-Conviction) (collectively, ("Supplement")). 1 ROA 44-69.[3] That same day, the district court ordered the State to respond to the Supplement. 1 ROA 70-71.

On May 6, 2021, the State responded to the Supplement. 1 ROA 72-78.

On May 25, 2021, the district court denied the Petition as procedurally barred and dismissed the Supplement as a fugitive document. 1 ROA 170-171.

On June 3, 2021, Crawley filed a "Motion for Production of Response to Writ of Habeas Corpus A-20-816041-W (due 45 days from March 18th, 2021.) 1 ROA 79-82.

[3] The pleadings normally would suggest that Crawley filed a third petition, but he labeled it as a supplement in another filing. 1 ROA 44-69. The district court ordered the State to respond to the supplement as if it were a third petition. 1 ROA 70. Because it was not clear what Crawley intended to file, the State argued the pleading should be denied if it were either a third petition, or a supplemental petition, below. 1 ROA 72-78 (arguing that the petition was successive and an abuse of the writ, or a fugitive document.) The district court appears to have considered it as a supplement to the First and Second Petition, rather than as a third petition, so the State treats it as one here. 1 ROA 157-158; 1 ROA 170-171 (findings, and minutes, dismissing the "supplemental petition" as a fugitive document, and therefore treating it as a supplement to the First and Second Petitions, rather than as a third petition and dismissing it pursuant to NRS 34.810.)

On July 22, 2021, the district court issued a Findings of Fact, Conclusions of Law, and Order 1 ROA 153-160 denying the First and Second Petitions as procedurally barred and striking the supplemental petition as a fugitive document. 1 ROA 153-159.

STATEMENT OF THE FACTS

The district court relied on the following factual summary in sentencing Crawley:

> On June 12, 2019, officers were dispatched to a location between the Excalibur and the Luxor in reference to a person threatening pedestrians with a knife. Upon arrival, contact was made with a witness who stated he was walking with his friend through the hotel parking lot when they were approached by a male, later identified as defendant Daine Anton Crawley, who got in his face and made unintelligible comments while retrieving a knife from his backpack. The witness felt threatened by the defendant who held the knife in his hand with the blade exposed. He stepped away from the defendant who then approached a vehicle with three occupants and attempted to open the door before the car drove away. As the defendant walked to another vehicle and hit the window, the witness notified police and security.
>
> Officers also spoke to witness' friend who relayed the same events as described by the witness. While the defendant was being detained, he stated that he did not have a knife; however, officers located a knife in his pocket.
>
> Based on the above facts, Mr. Crawley was arrested, transported to the Clark County Detention Center, and booked accordingly.

1 ROA 163.

SUMMARY OF THE ARGUMENT

In the Order Directing Response, filed November 18, 2021, this Court directed the State to answer two questions, as well as respond to Crawley's appeal.

The first question was "whether Crawley was actually represented by counsel for the petition filed in district court A-20-816041-W." The answer to that question appears to be no. Counsel was appointed but did not appear to actually represent Crawley.

The second question is "whether the district court properly denied the petition as a fugitive document because Crawley filed the document in pro se while he was represented by counsel." While some of Crawley's pleadings were stricken, the district court denied the petition as procedurally barred. The pleadings which were stricken were filed while counsel was appointed, and therefore were fugitive documents, but even if they were not fugitive documents the district court was not required to consider Crawley's filings.

Finally, the district court properly denied the petition, and all subsequent pleadings, as procedurally barred.

ARGUMENT

I. Counsel was Appointed for Crawley During Post-Conviction Proceedings But Did Not Represent Him

Crawley filed his First Petition *pro se* on June 4, 2020. 1 ROA 1-15. At the time, Crawley was litigating a direct appeal from his judgment of conviction, so the

First Petition was timely filed. *See* Crawley v. State, 81011 (issuing remittitur on April 13, 2021.) Carl Arnold, Esq. represented Crawley on direct appeal. Id.; *see also* 2 ROA 281. Crawley filed a Second Petition shortly thereafter, on June 12, 2020. 1 ROA 19-35.

After Crawley filed the Second Petition, the district court appointed Roger Bailey, Esq. as post-conviction counsel on August 26, 2020. 1 ROA 168-169. Nothing in the Record on Appeal, nor that the State can access on Odyssey, indicates that Mr. Bailey ever appeared on behalf of Crawley other than to accept appointment as post-conviction counsel.[4] Id.

Accordingly, it appears that Mr. Bailey was appointed as post-conviction counsel, but did not "actually represent" Crawley below.

II. The District Court Properly Struck, Or Did Not Consider, Fugitive Pleadings By Crawley

On May 25, 2021, the district court denied Crawley's claims raised in the First and Second Petition as procedurally barred, and struck the Supplement as a fugitive document. 1 ROA 170-171. EDCR 7.40(a), which the district court relied upon,

[4] Those minutes conclude with "Carl Arnold APPOINTED as counsel." 1 ROA 169. However, the context of the minute order indicates that Roger Bailey was appointed because Carl Arnold was appointed on "another case," presumably Crawley's direct appeal. Because Mr. Arnold could not appear as both appellate and post-conviction counsel for Crawley, it makes sense that Mr. Bailey "accept the appointment" instead. The State assumes the last portion of the minutes is in error, but there is no transcript of the ex parte hearing in the record on appeal.

states that "[w]hen a party has appeared by counsel, the party cannot thereafter appear on the party's own behalf in the case without the consent of the court." Counsel for Crawley was appointed on August 26, 2020. 1 ROA 169. The Supplement was filed on March 18, 2021. Because the Supplement was filed seven months after Crawley was appointed counsel, and Crawley neither sought nor received permission to file a *pro per* pleading after counsel was appointed, the district court properly struck the Supplement.

Even if the pleading were not a "fugitive document," however, the district court properly disregarded it. NRS 34.724 permitted Crawley to file a Petition. The district court properly ordered the State to respond to Crawley's timely filed First Petition. NRS 34.745; 1 ROA 18. The State responded to both the First and Second Petitions on July 21, 2020. 1 ROA 36-43.

Counsel was appointed on August 26, 2020, and was *permitted*, but not *required*, to file a supplement to the First Petition within 30 days, or longer if permitted by the district court. NRS 34.750(3). Counsel neither filed a supplemental petition nor asked for additional time within which to file one. If the State moved to dismiss the Petition, Crawley could have filed a reply, but the State did not move to dismiss either the First or Second Petition. Accordingly, Crawley, whether through counsel or not, could file "[n]o further pleadings … except as ordered by the court." NRS 34.750(5). When Crawley filed his Supplement seven months later, without

leave of the court, the pleading was not permitted by statute and the district court was not required to accept or consider it.

Whether stricken as a fugitive document, or not considered pursuant to NRS 34.750(5), the district court did not err in striking the Supplement. And, as demonstrated below, the claims in the Second Petition and the Supplement were substantially the same, and the district court denied the Second Petition as procedurally barred in any event.

III. The District Court Properly Denied Crawley's Petitions and Pleadings

On appeal of a district court's decision regarding claims of ineffective assistance of counsel, this Court gives deference to the district court's factual findings, but it reviews the district court's application of the law to those facts de novo. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012) (citing Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005)).

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). The Supreme Court has held that there is a constitutional right to effective assistance of counsel in a

direct appeal from a judgment or conviction. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S.Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994).

To prevail on a claim of ineffective assistance of counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland. 466 U.S. at 686-87, 104 S.Ct. at 2063-64; see also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068; Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S.Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Surmounting Strickland's high bar is never an easy task," Padilla v. Kentucky, 559 U.S. 356, 371, 130 S.Ct. 1473, 1485 (2010), because the

issue is whether the attorney's representation amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S.Ct. 770, 778 (2011). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970)).

Regarding appellate counsel, there is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong

and weak contentions." Id. at 753, 103 S.Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S.Ct. at 3314.

Moreover, a defendant is not entitled to a particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S.Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. See id.

The role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S.Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S.Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S.Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S.Ct. at 2064-65, 2068). Indeed, "it is not enough to show that the errors had some conceivable effect on the outcome of the proceeding." Harrington, 562 U.S. at 104, 131 S.Ct. at 787 (quotation and citation omitted). Instead, the petitioner must demonstrate that but for counsel's incompetence the results of the proceeding would have been different:

> In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, Strickland asks whether it is reasonably likely the results would have been different. This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. The likelihood of a different result must be substantial, not just conceivable.

Id. at 111-12, 131 S.Ct. at 791-92 (internal quotation marks and citations omitted).

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, 120 Nev. at 102, 103 P.3d at 33. 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) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause [the] petition to be dismissed." (Emphasis added).

Crawley's pleadings were largely similar, with Crawley iterating on arguments presented in the First Petition as he continued to file successive pleadings.

Crawley's Informal Brief argues that the district court erred in denying his petitions because "the sentence is erroneous under NRS 207.010 foreign convictions." Informal Brief at 5. He claims that "ineffective assistance of counsel was a factor in not presenting my claims sooner" and claims that "the entire direct appeal process was tainted" and argues that his plea agreement was breached in some manner. Id. Assuming Crawley is arguing in his Informal Brief that post-conviction counsel was ineffective, the ineffective assistance of post-conviction counsel is irrelevant because Crawley had neither the constitutional nor statutory right to counsel and, therefore, did not have the right to the effective assistance of post-conviction counsel. Brown v. McDaniel, 130 Nev. 565, 567, 331 P.3d 867, 869 (2014) ("[A] petitioner has no constitutional right to post-conviction counsel and … post-conviction counsel's performance does not constitute good cause to excuse the procedural bars under NRS 34.726(1) or NRS 34.810 unless the appointment of that counsel was mandated by statute.")

The district court's findings appear to address the claims largely as raised in the Supplement, but because the claims were similar all along it is not entirely clear. The district court understood Crawly to be raising four claims: "(1) Equal protection/Due Process violation; (2) errors within Defendant's PSI; (3) violation of the Court's Administrative Order; and (4) error in adjudication as a habitual criminal." 1 ROA 165. Crawley's claims were denied because the claims were

outside the scope of NRS 34.810, and because the claims were appropriate for direct appeal and, therefore, waived. Id.

Crawley's claims were not clearly presented, and this district court did not err in its construction of his claims. Indeed, it was often difficult to determine what Crawley even intended to file, much less what claims Crawley intended to present. Some confusion resulted from Crawley simultaneously proceeding with a direct appeal, where he was represented by Carl Arnold, and post-conviction proceedings, where he initially proceeded *pro per* and where Roger Bailey was later appointed. This difficulty was compounded by Crawley's filing multiple petitions (or supplements) and iterative arguments presented within each. Ultimately the district court correctly denied all the claims, though it could perhaps have done so more clearly or methodically.

Crawley's First Petition was the only timely filed petition.

His first claim complained about his arrest, an inventory sheet, and the timeliness of his initial appearance hearing, 1 ROA 8. All of this was outside the scope of NRS 34.810, as the district court held.

His second claim argued errors within his PSI, as the district court identified. Id. at 9. This, too, was outside the scope of NRS 34.810. Crawley also argued that he should have been able to withdraw his plea based on various alleged mental deficiencies, but whether the district court properly denied his motion to withdraw

his guilty plea was the subject of direct appeal. Id. Crawley argued that he "believed he was signing a 1 to 5 year probationable sentence with 18 to 60 months recommended by PNP." Id. Crawley's GPA reflected that he was facing a potential sentence of 1-5 years for Carrying Concealed Firearm or Other Deadly Weapon, and that that charge was probationable, but also that the State would have the unqualified right to argue for habitual treatment under certain conditions. Respondent's Appendix ("RA") 1-2. Crawley could not possibly have believed that parole and probation would recommend any particular sentence when he decided to plead guilty because they did not make their recommendation until well after he agreed to plead guilty. PSI at 9. Moreover, P&P actually recommended a sentence of 12-36 months, even less than Crawley purportedly believed they would. PSI at 9. If adjudicated as a habitual criminal – an option that did not present itself until after Crawley pleaded guilty and subsequently committed a new offense – P&P recommended a sentence of 72-174 months. Crawley's 1-to-5-year potential sentence would have remained intact, except that approximately three weeks after he entered into his guilty plea agreement on July 15, 2019, he was arrested for stealing in excess of $3,500 from a Neiman Marcus. RA 10. Crawley attempted to withdraw his plea, but the district court denied the motion, and this Court affirmed that decision. Crawley v. State, 481 P.3d 1266 (Nev. App. 2021).

Crawley's third claim was that the district court violated Administrative Order 20-06. 1 ROA 10. That claim, too, was outside the scope of NRS 34.810. Interspersed with this claim is argument that the court erred in denying continuances to discuss alleged errors in his PSI with counsel, but alleged court error is a matter for direct appeal, not habeas. To the extent that Crawley claimed he wanted to speak with counsel more during sentencing about alleged errors in his PSI, he was able to address the court directly with any alleged errors and failed to explain what counsel could or should have done differently that would have led to a different outcome at sentencing. RA 12. When P&P investigated alleged errors, they found none. PSI at 7.

Crawley's fourth and final claim was entitled "8th Amendment cruel and unusual punishment, 7th amendment right to jury trial," but that heading is unrelated to the contents of his claim. 1 ROA 11. In his claim, Crawley asserted "prosecutorial misconduct," and counsel's advice not to bring up assertions about the prosecutor which allegedly occured some 21 years prior during his motion to withdraw guilty plea. Id. The district court found this claim was outside the scope of NRS 34.810, but to the extent that it was within the scope nothing about that advice is apparently deficient, much less "objectively unreasonable," nor did Crawley demonstrate that he would have received a more favorable result had he made those allegations.

In sum, all of the claims in the First Petition were outside the scope of NRS 34.810 or, if they were not, demonstrated neither deficiency nor prejudice under Strickland.

Crawley's Second Petition was filed June 12, 2020. 1 ROA 19-35. Crawley's first claim was substantially the same as the first and second claims in the First Petition. Id. at 24-25. His second claim was new, asserting errors in his probation success probability form, or that the PSP form used correct statements about Crawley's "mental disability" against him in some improper manner. Id. at 26-30. His third claim was substantially similar to the third claim in his First Petition. Id. at 31-33.

To the extent the claims in Crawley's Second Petition were largely the same as the First Petition, the district court correctly denied them for the same reasons. However, to the extent the claims were new or different from those raised in the First Petition, the district court should have denied them an abuse of the writ. The claims in Crawley's Second Petition did not rely on any new or different evidence that was unavailable when he filed the First Petition. NRS 34.810(2) reads:

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

(emphasis added). Even assuming the district court erred in equating the claims in the Second Petition with those in the First Petition, or erred in determining that the claims were outside the scope of NRS 34.810, the claims were correctly denied because Crawley failed to demonstrate good cause or prejudice for failing to raise the claims in the First Petition. This Court will affirm a judgment or order of the district court if it reached the right result albeit for a wrong reason. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

Crawley's Supplement stated that grounds 1 through 3 were substantially the same as those previously raised. 1 ROA 49. Ground Four of the Supplement argued that the district court erred in considering some of Crawley's prior convictions when sentencing him to habitual treatment. 1 ROA 63-65. For the reasons stated in Section II, *supra*, if the Supplement was truly a supplement to the First or Second Petition, the district court correctly struck the pleading either because it was a fugitive document or because its filing was not permitted under NRS 34.750(3).

Alternatively, if the Supplement was really a Third Petition, the district court should have denied it as an abuse of the writ for all the same reasons just stated in relation to the Second Petition. Similarly, Crawley's assertion that the district court erred in adjudicating him a habitual criminal as outside the scope of NRS 34.810 and was a matter for direct appeal. The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and

appellate counsel must first be pursued in post-conviction proceedings…. [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). Crawley asserted no good cause or prejudice for failing to present a claim of district court error on direct appeal, and so the claim was barred by NRS 34.810(1)(a), NRS 34.810(1)(b)(2), and NRS 34.810(2).

Crawley's claims failed on the merits as well. Crawley asserted that some of his Virginia convictions would not have constituted felonies in Nevada, or that his felonies were in some manner defective. 1 ROA 63-65. He provided no support for this proposition. However, even assuming the crimes were felonies in Virginia, but would not have been felonies in Nevada, Crawley's argument fails because a defendant may be sentenced under the habitual criminal statute if they have been "two times convicted, whether in this State or elsewhere, of any crime which **under the laws of the situs of the crime or of this State would amount to a felony**…"

NRS 207.010.[5] Crawley had previously been convicted of **nine** prior felonies. PSI at 3-6. Even if his Virginia and California felonies would not have been considered felonies in Nevada, they were felonies "under the laws of the situs of the crime," i.e. Virginia and California, and so were eligible to be counted for felony treatment. P&P investigated alleged errors in the PSI, but after contacting Virginia determined that the PSI was correct both as to the crimes of which Crawley was convicted and the sentences which Crawley served. PSI at 7. Accordingly, whether stricken as an improper supplement, considered a Third Petition and denied as an abuse of the writ, or denied on the merits, the district court correctly denied the claims in the Supplement. This Court should affirm the correct result even if that result should have been reached for an alternative reason.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court AFFIRM the district court's denial of Appellant's First Petition, Second Petition, and Supplement.

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/ / /

[5] Subsequent to Crawley's sentencing NRS 207.012 was amended to require five, rather than two, felonies, but was otherwise unchanged.

Dated this 13th day of January, 2022.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ John Afshar*
JOHN AFSHAR
Chief Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

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 Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and 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, contains 5,034 words and does not exceed 30 pages.
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 13th day of January, 2022.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ John Afshar*
JOHN AFSHAR
Chief Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 13, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

JOHN AFSHAR
Deputy District Attorney

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

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Warm Springs Correctional Center
3301 E. 5th Street
Post Office Box 7007
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BY */s/ E. Davis*
Employee, District Attorney's Office

JA//ed