UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 30 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DOUGLAS HARRY WARENBACK, Petitioner-Appellant, v. D. W. NEVEN; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 19-17420 D.C. No. 2:15-cv-01789-APG-VCF District of Nevada, Las Vegas ORDER

Before: WARDLAW and BENNETT, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 3 & 4) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

Appendix A

9.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DOUGLAS HARRY WARENBACK,

Petitioner

v.

D.W. NEVEN, et al.,

Respondents

Case No.: 2:15-cv-01789-APG-VCF

ORDER

This habeas petition is before me for final disposition on the merits (ECF No. 40). As discussed below, the petition is denied.

I. Procedural History

On June 19, 2013, petitioner Douglas Harry Warenback pleaded guilty to pandering of a child (exhibit 10).[1] The state district court sentenced him to a term of 48 to 120 months in custody. Exh. 13. Judgment of conviction was filed on December 17, 2013. Exh. 15.

Warenback did not file a direct appeal. The Supreme Court of Nevada affirmed the denial of his state postconviction habeas corpus petition. Exh. 91. Warenback also filed a petition for writ of certiorari with the Supreme Court of Nevada. Exh. 70. That court declined to exercise original jurisdiction and dismissed the petition for writ of certiorari without considering it on the merits. Exh. 74.

[1] Exhibits referenced in this order are exhibits to the respondents' motion to dismiss, ECF No. 21, and are found at ECF Nos. 22-26.

Appendix B 10.

Warenback also filed two petitions for writ of mandamus. Exhs. 71, 87. The Supreme Court of Nevada declined to exercise original jurisdiction over either petition in an order dated July 23, 2015. Exh. 101.

Warenback filed a second state postconviction petition on September 14, 2015. Exh. 108. The Nevada Court of Appeals affirmed the denial of that petition. Exh. 127.

Warenback initiated this pro se federal habeas action on September 13, 2015 (ECF No. 11). I ultimately granted the respondents' motion to dismiss three grounds in the amended petition. ECF No. 34. The respondents have now answered the remaining ground of the petition—a claim that Warenback's counsel rendered ineffective assistance at sentencing—and Warenback replied. ECF Nos. 79, 80.

II. LEGAL STANDARDS

a. Antiterrorism and Effective Death Penalty Act (AEDPA)

The Antiterrorism and Effective Death Penalty Act (AEDPA) provides the legal standards for my consideration of the petition:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court

convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). My ability to grant a writ is limited to cases where "there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The Supreme Court has emphasized "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA standard as "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt") (internal quotation marks and citations omitted).

A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Lockyer*, 538 U.S. at 73 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell*, 535 U.S. at 694.

A state court decision is an unreasonable application of clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Lockyer*, 538 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous; the state court's application of clearly established law must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

To the extent that the state court's factual findings are challenged, the "unreasonable determination of fact" clause of § 2254(d)(2) controls on federal habeas review. *E.g., Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004). This clause requires that the federal courts "must be particularly deferential" to state court factual determinations. *Id.* The governing standard is not satisfied by a showing merely that the state court finding was "clearly erroneous." 393 F.3d at 973. Rather, AEDPA requires substantially more deference:

> [I]n concluding that a state-court finding is unsupported by substantial evidence in the state-court record, it is not enough that we would reverse in similar circumstances if this were an appeal from a district court decision. Rather, we must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.

Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir. 2004); *see also Lambert*, 393 F.3d at 972.

Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be correct unless rebutted by clear and convincing evidence. The petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to habeas relief. *Cullen*, 563 U.S. at 181.

b. Ineffective Assistance of Counsel

Ineffective assistance of counsel (IAC) claims are governed by the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a petitioner claiming ineffective assistance of counsel has the burden of demonstrating that (1) the attorney made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that the deficient performance prejudiced the defense. *Id.* at 687. To establish ineffectiveness, the defendant must show that counsel's

representation fell below an objective standard of reasonableness. *Id.* To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is "probability sufficient to undermine confidence in the outcome." *Id.* at 694. Additionally, any review of the attorney's performance must be "highly deferential" and must adopt counsel's perspective at the time of the challenged conduct, in order to avoid the distorting effects of hindsight. *Id.* at 689. It is the petitioner's burden to overcome the presumption that counsel's actions might be considered sound trial strategy. *Id.*

Ineffective assistance of counsel under *Strickland* requires a showing of deficient performance of counsel resulting in prejudice, "with performance being measured against an objective standard of reasonableness, . . . under prevailing professional norms." *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations and citations omitted). When the ineffective assistance of counsel claim is based on a challenge to a guilty plea, the *Strickland* prejudice prong requires a petitioner to demonstrate "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." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

If the state court has already rejected an ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary to, or an unreasonable application of, the *Strickland* standard. *See Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.*

The Supreme Court of the United States has described federal review of a state supreme court's decision on a claim of ineffective assistance of counsel as "doubly deferential." *Cullen*,

563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1413 (2009)). The Supreme Court emphasized that: "We take a 'highly deferential' look at counsel's performance . . . through the 'deferential lens of § 2254(d).'" *Id.* at 1403 (internal citations omitted). Moreover, federal habeas review of an ineffective assistance of counsel claim is limited to the record before the state court that adjudicated the claim on the merits. *Cullen*, 563 U.S. at 181-84. The Supreme Court has specifically reaffirmed the extensive deference owed to a state court's decision regarding claims of ineffective assistance of counsel:

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," . . . and when the two apply in tandem, review is "doubly" so . . . . The *Strickland* standard is a general one, so the range of reasonable applications is substantial. . . . Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Harrington, 562 U.S. at 105 (citations omitted). "A court considering a claim of ineffective assistance of counsel must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Id.* at 104 (quoting *Strickland*, 466 U.S. at 689). "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Id.* (internal quotations and citations omitted).

III. Instant Petition

Ground 3

Warenback asserts that his counsel was ineffective at sentencing when counsel failed to cross-examine the victim's mother. ECF No. 40, pp. 7. He argues that his counsel waived his right to cross-examine without his consent.

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The sentencing transcript reflects that the victim's mother made an impact statement. Exh. 13, pp. 19-24. Several voicemail messages that Warenback left for the mother right before and after he was arrested were played. Warenback had transported the 16-year-old victim from California to Nevada. He called the victim's mother multiple times in an attempt to make an "agreement" whereby the mother would sign an affidavit stating that she allowed him to take her daughter out of state, and in exchange Warenback would agree to never see the victim again. Warenback had a previous conviction related to possession of child pornography, which the mother referenced: "He is on child pornography and probation since 2011." *Id.* at 24. The court then asked the mother to focus on the impact Warenback's actions had on her family. The mother concluded that she hoped for a sentence of life in prison. The court asked defense counsel if he wanted to cross-examine the mother, and counsel indicated that he did not have any questions. *Id.*

At the beginning of the sentencing hearing and before the victim's mother testified, the State discussed the prior child pornography conviction. *Id.* at 2-3. Warenback also addressed the court. *Id.* at 4-12. As the judge pronounced the sentence, he told Warenback:

> [Y]our actions have consequences. Your history is very concerning to me. Your lack of empathy is equally if not more troubling because I look forward – some of the functions or things I have to think about is whether or not you're an ongoing, continuing threat to the community based upon the facts of the case, your history and everything I've heard. And, frankly, you don't demonstrate empathy to me. I think you're more concerned about the fact that you find yourself in custody as a function of this action and your frustrations with that. I'm troubled by the phone calls and the continuing conduct that you had with the mother.

Id. at 24-25. The judge sentenced Warenback at the top of the recommended range to a term of 48 to 120 months. *Id.* at 25.

The Nevada Court of Appeals affirmed the denial of this IAC claim:

> Warenback claimed that counsel was ineffective for waiving, without Warenback's consent, his right to cross-examine the victim's mother at sentencing regarding the text messages he sent her and her statement that he had been previously convicted or committed other bad acts. Warenback failed to demonstrate that counsel was deficient or that he was prejudiced. With respect to the text messages, this testimony did not trigger the limited circumstances under which cross-examination should be permitted. *See Buschauer v. State*, 804 P.2d 1046, 1048 (Nev. 1990). With respect to the prior bad acts, Warenback failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel cross-examined the victim's mother regarding the prior bad acts. We note that the reference to these prior bad acts was only a small portion of her statement. Therefore, the district court did not err in denying this claim.

Exh. 91, p. 3.

Warenback has not demonstrated that he is entitled to federal habeas relief. Before the victim's mother testified, the State had already described the prior child pornography conviction. Further, the mother made only a brief reference to the prior case. Nor does Warenback explain how there was a reasonable probability of a different outcome at sentencing had his counsel cross-examined the mother regarding the voicemails. The court stated that Warenback's lack of remorse or empathy weighed heavily in its sentencing determination. Warenback has not demonstrated that the decision affirming the denial of this claim was contrary to, or involved an unreasonable application of, *Strickland*, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). I deny federal ground 3.

The petition, therefore, is denied it is entirety.

IV. Certificate of Appealability

This is a final order adverse to the petitioner. Rule 11 of the Rules Governing Section 2254 Cases requires me to issue or deny a certificate of appealability (COA). I have evaluated

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the claims for suitability for the issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

A COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

None of my rulings meets the *Slack* standard. I therefore decline to issue a certificate of appealability for my resolution of Warenback's claim.

V. Conclusion

I THEREFORE ORDER that the first-amended petition (ECF No. 40) is **DENIED**.

I FURTHER ORDER that a certificate of appealability is **DENIED**.

I FURTHER ORDER the Clerk to enter judgment accordingly and close this case.

Dated: November 26, 2019.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

18.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DOUGLAS HARRY WARENBACK,

Petitioner,

v.

D.W. NEVEN, et al.,

Respondents.

Case No. 2:15-cv-01789-APG-VCF

ORDER

This *pro se* habeas matter under 28 U.S.C. § 2254 comes before the court on petitioner Douglas Harry Warenback's motion for leave to file an amended petition. ECF No. 69. Respondents opposed and Warenback replied. ECF Nos. 72, 75. I deny Warenback's motion.

On February 12, 2018, this court granted respondents' motion and dismissed ground 1 as procedurally barred, ground 2 as noncognizable in federal habeas corpus, and ground 4 as untimely. ECF No. 68. On February 23, 2018, Warenback filed a motion for leave to file an amended petition. ECF No. 69. Warenback states that respondents' exhibits filed June 27, 2016 contained the motion to withdraw due to conflict that his counsel filed on December 3, 2012. The 2012 state-court motion indicated that the public defender could not represent Warenback because his office was representing the victim in Warenback's case in a juvenile criminal case. Warenback acknowledges in his motion to amend that that he was notified at the time the motion was filed that there was a conflict of interest because the public defender represented the victim in another case. However, he states that he never saw the motion itself and that no one mentioned that there was a juvenile criminal case against the victim. He apparently argues that he may not have entered into the guilty plea if he had known about the juvenile case against the victim.

First, Warenback's claim of ignorance of the nature of the conflict appears to be belied by the record. The deputy public defender stated in his declaration in support of

the 2012 motion that the public defender was engaged in an ongoing representation of the victim in another case. ECF No. 22-3. Warenback acknowledges that he was notified of the motion at the time it was filed. Moreover, even assuming, arguendo, that Warenback was unaware of the victim's criminal case in 2012, he acknowledges that he became aware of it when respondents filed a copy of the motion as an exhibit to their first motion to dismiss. Those exhibits were filed in June, 2016, and Warenback offers no explanation whatsoever as to why he waited almost two years to try to add a claim based on the existence of the juvenile criminal case. He fails to demonstrate that the factual basis for this claim could not have been discovered earlier through due diligence. 28 U.S.C. § 2244(d)(1)(D).

IT IS THEREFORE ORDERED that petitioner's motion for leave to file an amended petition **(ECF No. 69) is DENIED**.

IT IS FURTHER ORDERED that petitioner's motion for certificate of appealability **(ECF No. 71) is DENIED**.

IT IS FURTHER ORDERED that respondents' motion to extend time to respond to the motion for leave to amend **(ECF No. 70) is GRANTED** *nunc pro tunc*.

IT IS FURTHER ORDERED that respondents' motion for extension of time to file their answer to the petition **(ECF No. 73) is GRANTED**. Respondents shall file their answer within **forty-five (45) days** of the date of this order.

DATED: 4 May 2018.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

20.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DOUGLAS HARRY WARENBACK, Petitioner, v. D.W. NEVEN, et al., Respondents.	Case No. 2:15-cv-01789-APG-VCF **ORDER** (ECF Nos. 42, 61, 62, 63, 66)

This *pro se* habeas matter under 28 U.S.C. § 2254 comes before the court on respondents' motion to dismiss petitioner Douglas Harry Warenback's amended petition (ECF No. 42). Warenback opposed (ECF No. 43), and respondents replied (ECF No. 50).

I. Procedural History and Background

On June 19, 2013, Warenback pleaded guilty to pandering of a child (exhibit 10).[1] The state district court sentenced him to a term of 48 to 120 months. Exh. 13. Judgment of conviction was filed on December 17, 2013. Exh. 15.

Warenback did not file a direct appeal. The Supreme Court of Nevada affirmed the denial of his state postconviction habeas corpus petition on April 14, 2015, and remittitur issued on May 11, 2015. Exhs. 91, 93. Warenback also filed a petition for writ of certiorari with the Supreme Court of Nevada. Exhs. 70. That court declined to exercise original jurisdiction and dismissed the petition for writ of certiorari without considering it on the merits. Exh. 74.

He also filed two petitions for writ of mandamus. Exhs. 71, 87. The Supreme Court of Nevada declined to exercise original jurisdiction over either petition in an order dated July 23, 2015. Exh. 101.

Warenback filed a second state postconviction petition on September 14, 2015. Exh. 108. The Nevada Court of Appeals affirmed the denial of the petition on May 18, 2016. Exh. 127.

[1] Exhibits referenced in this order are exhibits to respondents' first motion to dismiss (ECF No. 21) and are found at ECF Nos. 22-26.

Appendix D 21.

Meanwhile, Warenback dispatched his federal petition for mailing on September 13, 2015. ECF No. 11. Respondents now argue that the court should dismiss several grounds of the amended petition. ECF No. 42.

II. Legal Standards & Analysis

a. Relation Back

Respondents argue that ground 4 does not relate back to a timely-filed petition and should thus be dismissed as untimely. ECF No. 42, pp. 5-8. A new claim in an amended petition that is filed after the expiration of the Antiterrorism and Effective Death Penalty Act ("AEDPA") one-year limitation period will be timely only if the new claim relates back to a claim in a timely-filed pleading under Rule 15(c) of the Federal Rules of Civil Procedure; the claim must arise out of "the same conduct, transaction or occurrence" as a claim in the timely pleading. *Mayle v. Felix*, 545 U.S. 644 (2005). In *Mayle*, the United States Supreme Court held that habeas claims in an amended petition do not arise out of "the same conduct, transaction or occurrence" as claims in the original petition merely because the claims all challenge the same trial, conviction or sentence. 545 U.S. at 655–64. Rather, Rule 15(c) permits relation back of habeas claims asserted in an amended petition "only when the claims added by amendment arise from the same core facts as the timely filed claims, and not when the new claims depend upon events separate in 'both time and type' from the originally raised episodes." 545 U.S. at 657. In this regard, the reviewing court looks to "the existence of a common 'core of operative facts' uniting the original and newly asserted claims." A claim that merely adds "a new legal theory tied to the same operative facts as those initially alleged" will relate back and be timely. 545 U.S. at 659 and n.5; *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1297 (9th Cir. 2013).

Here, Warenback timely dispatched his original federal habeas petition for filing on September 13, 2015. ECF No. 11, p. 1. According to respondents, the AEDPA one-year limitation period expired on or about June 1, 2016. Warenback believes the limitation period expired in November 2015. ECF No. 43, p. 5. In any event, the parties do not dispute that the statute of limitation had expired when Warenback dispatched his amended petition for mailing

about March 7, 2017. *See* ECF No. 42, p. 6; ECF No. 43, p. 5. Accordingly, the claims in the amended petition must relate back to Warenback's original petition in order to be deemed timely.

Ground 4

Warenback claims in the amended petition that his counsel was ineffective in violation of his Sixth Amendment rights because counsel waived Warenback's rights at the guilty plea hearing without Warenback's express consent. ECF No. 40, p. 9. Respondents argue that ground 4 does not relate back to the amended petition. ECF No. 42, pp. 5-8. After reviewing Warenback's original petition and the arguments in his opposition, I find that ground 4 of the amended petition differs in time and type from the claims that raised in the original petition. Ground 4 is dismissed as untimely.

b. Guilty Plea and Federally Cognizable Claims

In *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), the United States Supreme Court held that "when a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." A petitioner may attack only the voluntary and intelligent character of the guilty plea. *Id.* When a petitioner has entered a guilty plea then subsequently seeks to claim his counsel rendered ineffective assistance, such claim is limited to the allegation that defense counsel was ineffective in advising petitioner to plead guilty. *Fairbank v. Ayers*, 650 F.3d 1243, 1254–1255 (9th Cir.2011) (citing *Tollett*, 411 U.S. at 266–267, and explaining that because a guilty plea precludes a claim of constitutional violations prior to the plea, petitioner's sole avenue for relief is demonstrating that advice of counsel to plead guilty was deficient); *Lambert v. Blodgett*, 393 F.3d 943, 979 (9th Cir.2004).

Ground 1

Warenback asserts that the pretrial transcript of a voicemail and the version of the voicemail played at sentencing do not match and the "tampered transcript" at sentencing violated his Fourteenth Amendment due process rights. ECF No. 40, p. 3. Respondents argue first that

ground 1 is barred by *Tollett*. ECF No. 42, pp. 3-4. However, Warenback claims that he did not know of the discrepancies until his sentencing hearing and he appears to allege that the voicemail played at sentencing was less incriminating than the pretrial transcript of the voicemail. ECF No. 40, p. 3. Thus, ground 1 challenges the voluntary and intelligent nature of his plea and is not subject to dismissal under *Tollett*.

Ground 2

Warenback contends that his counsel rendered ineffective assistance because he failed to file a motion for an evidentiary hearing when a detective committed perjury with respect to the arrest warrant, rendering the warrant invalid. ECF No. 40, p. 5. Respondents are correct that this is a claim of a pre-plea constitutional violation that is barred from federal habeas review under *Tollett*. Accordingly, ground 2 is dismissed.

c. Procedural Default

The AEDPA provides that a court may grant habeas relief if the relevant state court decision was either: (1) contrary to clearly established federal law as determined by the Supreme Court; or (2) involved an unreasonable application of clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d),

"Procedural default" refers to the situation where a petitioner in fact presented a claim to the state court but the state court disposed of the claim on procedural grounds instead of on the merits. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). A federal court will not review a claim for habeas corpus relief if the decision of the state court regarding that claim rested on a state law ground that is independent of the federal question and adequate to support the judgment. *Id.* The *Coleman* Court explained the effect of a procedural default:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). The procedural default doctrine ensures that the state's interest in correcting its own mistakes is respected in all federal habeas cases. *See Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003).

To demonstrate cause for a procedural default, the petitioner must be able to "show that some objective factor external to the defense impeded" his efforts to comply with the state procedural rule. *Murray*, 477 U.S. at 488 (emphasis added). For cause to exist, the external impediment must have prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991). To demonstrate actual prejudice on the basis of his or her claims, petitioner must demonstrate that the alleged errors so infected the trial or entry of plea that the resulting conviction violated due process. *See United States v. Frady*, 456 U.S. 152, 169 (1982).

To demonstrate a fundamental miscarriage of justice, a petitioner must show the constitutional error complained of probably resulted in the conviction of an actually innocent person. *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). This is a narrow exception, and it is reserved for extraordinary cases only. *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992). Bare allegations unsupplemented by evidence do not tend to establish actual innocence sufficient to overcome a procedural default. *Thomas v. Goldsmith*, 979 F.2d 746, 750 (9th Cir. 1992).

Ground 1

Respondents argue that ground 1—in which Warenback asserts discrepancies in transcripts of a voicemail he left for the victim's mother—is procedurally barred. ECF No. 42, p. 2. Warenback presented this claim to the Nevada Court of Appeals in his appeal of the denial of his second state postconviction petition. Exh. 127. The Nevada Court of Appeals affirmed the denial of the petition as procedurally barred because it was untimely and successive. *Id.*; NRS § 34.726(1); NRS § 34.810(2). The Ninth Circuit Court of Appeals has held that, at least in non-capital cases, application of the procedural bar at issue in this case (N.R.S. § 34.810) is an independent and adequate state ground. *Vang v. Nevada*, 329 F.3d 1069, 1073-75 (9th Cir.

2003); *see also Bargas v. Burns*, 179 F.3d 1207, 1210-12 (9th Cir. 1999). Therefore, the Nevada Court of Appeal's determination that federal ground 1 was procedurally barred under N.R.S. § 34.810 was an independent and adequate ground to affirm the denial of the claim in the state petition.

Warenback bears the burden of proving both good cause for his failure to present the claim and actual prejudice. *Coleman*, 501 U.S. at 750; *see also Murray*, 477 U.S. at 485. In his opposition to the motion to dismiss, Warenback states that the state district court denied his motion for a copy of the sentencing transcript, and he argues that this was an external impediment that prevented him from raising the claim earlier. ECF No. 43, pp. 1-2. Warenback fails to set forth any specific allegations regarding when he allegedly learned of the discrepancies. Moreover, even assuming without deciding that Warenback could demonstrate cause, he has failed to demonstrate actual prejudice. He points to his second state postconviction petition, in which he included a chart that allegedly compared the earlier transcript of the voicemail with the sentencing transcript that contains the voicemail. Exh. 108, p. 13. First, the alleged discrepancies are extremely minor and do not relate to Warenback's culpability. Second, Warenback acknowledged that he does not know which transcript version is accurate. *Id.* He simply has not demonstrated that any discrepancy so infected his guilty plea as to violate federal due process. Ground 1, therefore, is dismissed as procedurally barred.

III. Petitioner's Motions to Amend/Supplement

Finally, Warenback continues to file numerous motions in this case. Pending are the following: motion to amend the petition (ECF No. 61), motion to transfer petition (ECF No. 62), motion for leave to file supplement to motion to amend petition (ECF No. 63), and a second motion for leave to amend the petition (ECF No. 66). Despite how Warenback has styled the various motions, in each motion he seeks to file an amended petition or supplement. He wants to add a claim that his sentence improperly included the requirement that he register as a sex offender in violation of his federal due process rights. Warenback argues that under the relevant Nevada statute, the offense to which he pleaded guilty did not require the imposition of a term of

lifetime supervision. Respondents point out that this is purely a question of Nevada state law and is not cognizable in federal habeas proceedings. *See, e.g., Swarthout v. Cooke*, 562 U.S. 216, 219 (2011); *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Accordingly, the motions to amend the petition, as well as all other pending motions, are denied. Filing serial motions seeking the same relief only delays the resolution of the petition.

IV. Conclusion

IT IS THEREFORE ORDERED that respondents' motion to dismiss (ECF No. 42) is **GRANTED** as follows:

Ground 1 is **DISMISSED** as procedurally barred.

Ground 2 is **DISMISSED** as not cognizable in federal habeas.

Ground 4 is **DISMISSED** as untimely.

IT IS FURTHER ORDERED that respondents will have sixty (60) days from the date this order is entered within which to file an answer to the remaining claims in the First Amended Petition.

IT IS FURTHER ORDERED that petitioner will have forty-five (45) days following service of respondents' answer in which to file a reply.

IT IS FURTHER ORDERED that the following motions filed by petitioner: motion to amend the petition (**ECF No. 61**); motion to transfer petition (**ECF No. 62**); motion for leave to file supplement to motion to amend petition (**ECF No. 63**); and the second motion for leave to amend the petition (**ECF No. 66**) are all **DENIED**.

DATED this 12th day of February, 2018

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

27.

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

C286735

DOUGLAS HARRY WARENBACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66294

FILED

APR 14 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; David B. Barker, Judge.

In his petition filed on May 12, 2014, appellant Douglas Warenback claimed that he received ineffective assistance of counsel. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill* v.

[1]This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. *See Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

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Appendix E

28.

Lockhart, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). We give deference to the court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, Warenback claimed that counsel was ineffective for failing to challenge the arrest warrant as invalid. He claimed that he did not make certain statements on voicemail as claimed by the police and some of the statements used were not from voicemail but were actually from text messages and were exculpatory. Warenback failed to demonstrate prejudice because he failed to demonstrate that this motion would have been successful, that the text messages were exculpatory, or that there was a reasonable probability he would not have pleaded guilty. Therefore, the district court did not err in denying this claim.

Second, Warenback claimed that counsel was ineffective for failing to convey his acceptance of a guilty plea agreement. This claim is belied by the record. Warenback had until a hearing held on May 29, 2013, to accept the plea. At that hearing, counsel, with Warenback sitting next to him, informed the district court and State that Warenback was rejecting the offer. Warenback did not speak up at this hearing or refute this statement. Therefore, the district court did not err in denying this claim.

Third, Warenback claimed that counsel was ineffective for stating that Warenback would waive all procedural defects when he pleaded to a fictitious charge. This claim is belied by the record. Warenback was thoroughly canvassed regarding the fictitious charge and counsel waived the procedural defects so that he could plead to the fictitious charge. Counsel did not waive any other procedural defects. Therefore, the district court did not err in denying this claim.

Fourth, Warenback claimed that counsel was ineffective for waiving, without Warenback's consent, his right to cross-examine the victim's mother at sentencing regarding the text messages he sent her and her statement that he had been previously convicted or committed other bad acts. Warenback failed to demonstrate that counsel was deficient or that he was prejudiced. With respect to the text messages, this testimony did not trigger the limited circumstances under which cross-examination should be permitted. *See Buschauer v. State*, 106 Nev. 890, 893-94, 804 P.2d 1046, 1048 (1990). With respect to the prior bad acts, Warenback failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel cross-examined the victim's mother regarding the prior bad acts. We note that the reference to these prior bad acts was only a small portion of her statement. Therefore, the district court did not err in denying this claim.

Fifth, Warenback claimed that counsel was ineffective for telling him that he would not be subject to lifetime supervision. This claim is without merit. Warenback is not subject to lifetime supervision. Therefore, the district court did not err in denying this claim.

Sixth, Warenback claimed that counsel was ineffective for failing to challenge the district court's statement that it would sentence Warenback pursuant to parole and probation's recommendation. Warenback claimed that the district court misstated the recommendation. This claim is belied by the record. The district court never stated it was going to sentence Warenback pursuant to parole and probation's recommendation. Therefore, the district court did not err in denying this claim.

Seventh, Warenback claimed that counsel was ineffective for failing to provide him with a copy of the statements the victim made to police officers in California. Specifically, he claimed that because he was unable to read these statements, he was unable to develop empathy for the victim. The district court stated that one of the reasons he was sentencing Warenback harshly was because he did not appear to have empathy for the victim. Warenback failed to demonstrate that he was prejudiced because he failed to demonstrate a reasonable probability of a different outcome at sentencing had these statements been provided to him. Therefore, the district court did not err in denying this claim.

Finally, Warenback challenged Nevada's kidnapping laws and based on that challenge, he claimed that his conviction constituted cruel and unusual punishment. This claim fell outside the scope of claims available to be raised in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction entered pursuant to a guilty plea. NRS 34.810(1)(a). Therefore, the district court did not err in denying this claim.

Having considered Warenback's contentions and concluded that he is not entitle to relief, we

ORDER the judgment of the district court AFFIRMED.[2]

Gibbons, C.J.

Tao, J.

Silver, J.

cc: Hon. David B. Barker, District Judge
Douglas Harry Warenback
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[2]We have reviewed all documents that Warenback has submitted to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Warenback has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

IN THE SUPREME COURT OF THE STATE OF NEVADA

DOUGLAS HARRY WARENBACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 66294
District Court Case No. C286735

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:.

"ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 14th day of April, 2015.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this May 11, 2015.

Tracie Lindeman, Supreme Court Clerk

By: Amanda Ingersoll
Chief Deputy Clerk

33.

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DOUGLAS HARRY WARENBACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69536

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Appellant Douglas Harry Warenback filed his petition on September 14, 2015, more than one year after entry of the judgment of conviction on December 17, 2013.[2] Thus, Warenback's petition was untimely filed. *See* NRS 34.726(1). Moreover, Warenback's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus and the prior petition was denied on the merits.[3] *See* NRS 34.810(2). Warenback's petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3).

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[1]This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

[2]No direct appeal was taken.

[3]*Warenback v. State*, Docket No. 66294 (Order of Affirmance, April 14, 2015).

Appendix F 34.

Warenback first argues the district court erred in concluding there was no external impediment to excuse his delay in raising a claim regarding discrepancies in transcripts involving his recorded message to the victim's mother. Warenback asserts he recently discovered the discrepancies during review of the transcript of his sentencing hearing and did not raise it earlier due to confusion regarding the postconviction process. Warenback fails to demonstrate he is entitled to relief.

Warenback's underlying claim was reasonably available to be raised at an earlier time, and therefore, Warenback fails to demonstrate an impediment external to the defense provided good cause to overcome the procedural bars. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Moreover, Warenback's confusion regarding the postconviction proceedings does not constitute an impediment external to the defense that prevented him from raising this claim at an earlier time. *See Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that petitioner's claim of organic brain damage, borderline mental retardation and reliance on assistance of inmate law clerk unschooled in the law did not constitute good cause for the filing of a successive post-conviction petition).

Next, Warenback argues the State waived application of the procedural bars because it filed an untimely opposition to Warenback's petition. "Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory." *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). In addition, a petitioner has the burden of pleading and proving facts to demonstrate good cause to excuse the delay. *State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). As application of the procedural bars is mandatory and Warenback had the burden of demonstrating good cause, he fails to

demonstrate that the district court should have waived the procedural bars due to an untimely opposition from the State. Therefore, the district court did not err in denying the petition as procedurally barred.

Finally, Warenback argues the district court erred by adopting the State's proposed order denying his petition. Warenback does not identify any legal reason why the district court should not have adopted the proposed draft order. Moreover, Warenback does not demonstrate the adoption of the proposed order adversely affected the outcome of the proceedings or his ability to seek full appellate review. Therefore, Warenback is not entitled to relief based on this argument.

Having concluded Warenback is not entitled to relief, we ORDER the judgment of the district court AFFIRMED.[4]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

[4]We have reviewed all documents Warenback has submitted in this matter, and we conclude no relief based upon those submissions is warranted. To the extent Warenback has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we decline to consider them in the first instance.

cc: Hon. William D. Kephart, District Judge
Douglas Harry Warenback
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

The filed version of this order was handwritten in ecf 61

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DOUGLAS HARRY WARENBACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71902

FILED

JUL 12 2017

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

ORDER OF AFFIRMANCE

Douglas Harry Warenback appeals from an order of the district court denying a motion to correct an illegal sentence.[1] Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

In his motion filed on October 4, 2016, Warenback claimed that his sentence was illegal. Warenback asserted his judgment of conviction contained a typographical error as it stated he committed pandering of a child pursuant to "NRS 201.300(a)," but the statute did not actually contain such a subsection. Warenback claimed the error in the judgment of conviction meant his crime was not actually covered under the statute requiring sex offender registration and therefore, the district court improperly imposed a sentence requiring him to register as a sex offender upon his release from custody. Warenback failed to demonstrate his sentence was facially illegal or the district court lacked jurisdiction. *See Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

[1]This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

Appendix G

When Warenback committed his offense, NRS Chapter 179D required persons convicted of crimes involving a child, including an "offense involving pandering or prostitution pursuant to NRS 201.300 to 201.340, inclusive," to register as sex offenders following release from custody. *See* 2007 Nev. Stat., ch. 16, § 16(3), at 2757 (former version of NRS 179D.0357); *see also* 1997 Nev. Stat., ch. 137, § 2, at 295-96 (former version of NRS 201.300). As Warenback's offense was clearly encompassed by that provision, he did not demonstrate the typographical error in the judgment of conviction deprived the district court of the authority to order Warenback to register as a sex offender. Therefore, we conclude the district court did not err in denying Warenback's motion. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[2]

Silver, C.J.

Tao, J.

Gibbons, J.

[2]We note the district court can correct a clerical error at any time, *see* NRS 176.565, and therefore, it should correct the clerical error in the judgment of conviction by entering a corrected judgment of conviction specifying NRS 201.300 as the statute identifying Warenback's crime.

cc: Hon. William D. Kephart, District Judge
Douglas Harry Warenback
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

40.

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DOUGLAS HARRY WARENBACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73381

ORDER OF AFFIRMANCE

Douglas Harry Warenback appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Warenback filed his petition on March 21, 2017, more than three years after entry of the judgment of conviction on December 17, 2013. Thus, Warenback's petition was untimely filed. *See* NRS 34.726(1). Moreover, Warenback's petition was successive because he had previously filed several postconviction petitions for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petitions.[2] *See* NRS 34.810(2). Warenback's petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3).

[1]This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

[2]*Warenback v. State*, Docket No. 72280 (Order of Affirmance, July 12, 2017); *Warenback v. State*, Docket No. 71056 (Order of Affirmance, March 23, 2017); *Warenback v. State*, 69536 (Order of Affirmance, May 18, 2016); *Warenback v. State*, Docket No. 66294 (Order of Affirmance, April 14, 2015).

Appendix H 41.

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Warenback claimed he had good cause because he recently discovered the victim in this matter was the subject of juvenile court proceedings and information from those proceedings may have impacted his criminal matter. Warenback's initial trial-level counsel filed a motion to withdraw due to a conflict in the district court on December 3, 2012. The motion listed the juvenile court case number, asserted the conflict arose because the public defender's office represented the victim in that matter, and requested the appointment of substitute counsel for Warenback. The district court granted the motion and appointed substitute counsel.

Warenback's good-cause claim is based upon information contained in his case file and available since 2012. Warenback's failure to realize the significance of the juvenile court proceedings did not constitute an impediment external to the defense that prevented him from raising claims utilizing that information in a timely petition. *See Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014). Therefore, the district court properly denied the petition as procedurally barred.

Next, Warenback argues the district court erred in referring him to the Nevada Department of Corrections (NDOC) for the forfeiture of credits. The State moved for an order referring Warenback to the NDOC for forfeiture of credits and Warenback opposed the motion. The district court found Warenback has filed 30 motions or petitions, including the instant petition, in the district court since 2014, those petitions or motions were "meritless, barred, and frivolous," and Warenback filed the documents in bad faith.

NRS 209.451(1)(d)(1) permits the forfeiture of an offender's credits if the offender filed documents in court "for the purpose of harassing the offender's opponent, causing unnecessary delay in the litigation or

increasing the cost of the litigation." The Nevada Supreme Court has noted referral to the NDOC for the forfeiture of credits is an available sanction when an inmate litigant has submitted abusive court filings. *See Jones v. Eighth Judicial Dist. Court*, 130 Nev. 493, 500, 330 P.3d 475, 480 (2014). Given the district court's findings regarding Warenback's petitions and motions, as well as the record before this court, we conclude the district court did not err in referring Warenback to the NDOC for the forfeiture of credits. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[3]

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. William D. Kephart, District Judge
Douglas Harry Warenback
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[3]We grant Warenback's motion requesting we consider the petition and supplements he filed in Docket No. 73383, and have considered those documents in our disposition of this matter. We deny any other relief sought in that motion and deny Warenback's motion requesting leave to file a second informal brief.

Additional material from this filing is available in the Clerk's Office.