

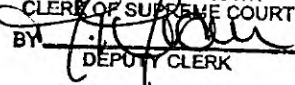
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TERRANCE L. LAVOLL A/K/A  
TERRANCE LEDERR LAVOLL, A/K/A  
TERRANCE L. LOVOLL,  
Appellant,  
vs.  
CALVIN JOHNSON, WARDEN, HIGH  
DESERT STATE PRISON; WILLIAM  
GITTERE, ACTING DIRECTOR,  
NEVADA DEPARTMENT OF  
CORRECTIONS; AND AARON D.  
FORD, ATTORNEY GENERAL,  
Respondents.

No. 86187-COA

FILED

SEP 28 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Terrance L. Lavoll appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on December 9, 2022. Eighth Judicial District Court, Clark County; David Barker, Senior Judge.

Lavoll argues the district court erred by denying his petition as procedurally barred. Lavoll filed his petition more than 22 years after issuance of the remittitur on direct appeal on May 23, 2000, *see Lavoll v. State*, Docket No. 31779 (Order Dismissing Appeal, April 27, 2000), and more than 10 years after entry of the amended judgment of conviction on July 6, 2012.<sup>1</sup> Thus, Lavoll's petition was untimely filed. *See* NRS 34.726(1). Moreover, Lavoll's petition constituted an abuse of the writ as he raised claims new and different from those raised in his previous

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<sup>1</sup>Lavoll did not appeal from the amended judgment of conviction.

petitions.<sup>2</sup> See NRS 34.810(1)(b)(2); NRS 34.810(3).<sup>3</sup> Lavoll's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(4). Further, because the State specifically pleaded laches, Lavoll was required to overcome the rebuttable presumption of prejudice to the State. See NRS 34.800(2).

*Whether the time bar should apply*

As an initial matter, Lavoll claimed that the procedural time bar did not apply because his judgment of conviction did not set forth the terms of restitution as required under NRS 176.105(1) and was thus not final. A defendant may not "treat a judgment of conviction with an indeterminate restitution provision as final by litigating a direct appeal and postconviction habeas petitions only to later change course and argue that the judgment was never final." *Witter v. State*, 135 Nev. 412, 415, 452 P.3d 406, 409 (2019). The district court correctly determined that Lavoll treated the judgment of conviction as final by litigating a direct appeal and a postconviction habeas petition without raising his restitution claim. See *Lavoll*, Docket No. 31779; *Lavoll*, Docket No. 48899.

On appeal, Lavoll challenges the district court's determination that he was estopped from raising his claims because of his prior litigation. Specifically, he contends that (1) he raised his restitution claim in a

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<sup>2</sup>See *Lavoll v. State*, No. 76043-COA, 2019 WL 2158323 (Nev. Ct. App. May 15, 2019) (Order of Affirmance); *Lavoll v. State*, Docket No. 48899 (Order of Affirmance, November 16, 2007).

<sup>3</sup>The subsections within NRS 34.810 were recently renumbered. We note the substance of the subsections cited herein was not altered. See A.B. 49, 82d Leg. (Nev. 2023).

postconviction habeas petition filed on March 13, 2018; and (2) he did not appeal from the amended judgment of conviction. First, Lavoll's 2018 petition was filed more than 20 years after entry of the judgment of conviction, after Lavoll had litigated his direct appeal and a prior postconviction habeas petition. Therefore, to the extent Lavoll contended in his 2018 petition that his judgment of conviction was not final because it contained an indeterminate restitution provision, Lavoll could not at that time "change course and argue that the judgment was never final." *Witter*, 135 Nev. at 415, 452 P.3d at 409.

Second, although an amended judgment of conviction is substantively appealable, "[t]he scope of the appeal is limited . . . to issues arising from the amendment." *See id.* at 416-17, 452 P.3d at 410. Lavoll's amended judgment of conviction did not impose or alter the terms of restitution set forth in the original judgment of conviction. Therefore, Lavoll was required to raise his restitution claim in his appeal from the original judgment of conviction, and the fact that Lavoll did not litigate an appeal from the amended judgment of conviction is immaterial. *See Jackson v. State*, 133 Nev. 880, 881-82, 410 P.3d 1004, 1006 (Ct. App. 2017) ("The entry of an amended judgment of conviction should not provide a basis for raising claims that could have, and should have, been raised on appeal from the original judgment of conviction."). Accordingly, we conclude the district court did not err in determining Lavoll was estopped from arguing that his judgment of conviction was not final.

#### *Good cause arguments*

In his petition, Lavoll claimed he had good cause to overcome the procedural bars because one of his claims was based on the United States Supreme Court's decision in *McCoy v. Louisiana*, 584 U.S. \_\_\_, 138


S. Ct. 1500 (2018). Lavoll contended that he could not have raised this claim in a prior petition because *McCoy* was issued in May 2018. Even assuming *McCoy* applies retroactively and to Lavoll's case, Lavoll did not explain why he waited more than four years after the decision was issued to file the instant petition. Therefore, Lavoll failed to support his claim with specific factual allegations that demonstrate good cause. See *Rippo v. State*, 134 Nev. 411, 420, 423 P.3d 1084, 1096 (2018) (“[W]hen a petition raises a claim that was not available at the time of a procedural default under NRS 34.726(1), it must be filed within a reasonable time after the basis for the claim becomes available.” (internal quotation marks omitted)). Accordingly, we conclude the district court did not err by denying this claim.

Lavoll also claimed he had good cause to overcome the procedural bars because one of his claims challenged the amended judgment of conviction and he was not notified of the amendment hearing or served with a copy of the amended judgment. In his petition, Lavoll stated that he became aware of the amended judgment in May or June 2018. Lavoll did not explain why he waited more than four years after becoming aware of the amended judgment to file the instant petition. Therefore, Lavoll failed to support his claim with specific factual allegations that demonstrate good cause. See *Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004) (stating a delay in filing a petition challenging an amended judgment of conviction is not “attributable to the fault of the petitioner” if the petition is “filed within one year of the entry of the amended judgment” (internal quotation marks omitted)); see also *Rippo*, 134 Nev. at 420, 423 P.3d at 1096. Accordingly, we conclude the district court did not err by denying this claim.

Lavoll also appears to have claimed he had good cause to overcome the procedural bars because the amended judgment of conviction is void due to "structural error" and a double jeopardy violation. The amended judgment of conviction's purported invalidity does not explain why Lavoll failed to file his petition within a reasonable time after the basis for his claims became available. Therefore, we conclude Lavoll is not entitled to relief on this claim. *See Rippo*, 134 Nev. at 420, 423 P.3d at 1096.

Finally, Lavoll did not overcome the presumption of prejudice to the State. *See NRS 34.800(2)*. For the foregoing reasons, we conclude the district court did not err by denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Bulla

  
\_\_\_\_\_, J.  
Westbrook

cc: Chief Judge, Eighth Judicial District Court  
Eighth Judicial District Court, Department 7  
Hon. David Barker, Senior Judge  
Terrance L. Lavoll  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk