

IN THE SUPREME COURT OF THE STATE OF NEVADA

WAYNE BARKLEY SKEES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53105

**FILED**

JUL 06 2009

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

This is an appeal from a district court order denying appellant Wayne Barkley Skees' post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On December 27, 2006, Skees was convicted, pursuant to a guilty plea, of one count of burglary and sentenced to serve a prison term of 48-120 months to run consecutively to the sentence imposed in district court case number CR06-1646. This court affirmed the judgment of conviction and sentence on direct appeal. Skees v. State, Docket No. 48835 (Order of Affirmance, May 29, 2007). This court dismissed Skees' proper person attempt to file a second, untimely direct appeal due to a lack of jurisdiction. Skees v. State, Docket No. 49632 (Order Dismissing Appeal, July 9, 2007).

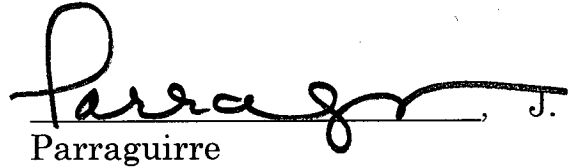
On October 16, 2007, Skees filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Among other things, Skees claimed that he would have received a "more appropriate sentence" had counsel objected "to the trial court, the Prosecutor and Reno Police Department's invidious discrimination by classifying and constantly referring to [him] as a 'ROP [Repeat Offender Program] Target.'" (Emphasis added.) The district court appointed

counsel to represent Skees and counsel elected not to file a supplement to the petition. The State opposed the petition. The district court did not conduct an evidentiary hearing and, on December 11, 2008, entered an order denying Skees' petition. In its order denying the petition, the district court found that the ineffective assistance claim noted above was addressed and rejected by this court on direct appeal and, therefore, the court "is precluded by the record from addressing this ground." This timely appeal followed.

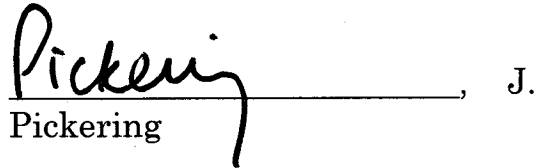
Skees contends that counsel was ineffective at sentencing by referring to his repeat offender status and that the district court erred by finding that his claim was barred by the law of the case doctrine. This argument is raised by Skees for the first time on appeal and was not presented in the habeas petition filed below; therefore, the argument was not considered by the district court. As a result, Skees' argument is not properly raised and we decline to address it. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (holding that this court need not consider arguments raised on appeal that were not presented to the district court in the first instance), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004); see also Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995) (explaining that this court has consistently held that an appellant "cannot change [his] theory underlying

an assignment of error on appeal”). Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>1</sup>

 J.  
Parraguirre

 J.  
Douglas

 J.  
Pickering

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<sup>1</sup>On direct appeal, this court found that the district court did not abuse its discretion by sentencing Skees to a term of incarceration rather than probation. Skees claimed that probation and entry into the mental health court program would have been more appropriate. In his habeas petition, as noted above, Skees raised a similar argument couched in terms of ineffective assistance of counsel. We conclude that the district court improperly rejected Skees’ ineffective assistance of counsel claim based on the law of the case doctrine, see Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975), because the argument was not made and this court did not address an ineffective assistance claim on direct appeal and, generally, refuses to do so. See Johnson v. State, 117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001). Nonetheless, we further conclude that the district court reached the correct result, albeit for the wrong reason, because Skees cannot demonstrate that he would have received a more lenient sentence but for counsel’s failure to object to references to his repeat offender status. See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984); see also Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (“If a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal.”).

cc: Hon. Steven R. Kosach, District Judge  
Scott W. Edwards  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk