

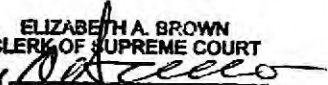
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SALLY DORIAN VILLAVERDE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 84026-COA

FILED

JUN 13 2022

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

Sally Dorian Villaverde appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on October 4, 2021. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Villaverde filed his petition more than 15 years after issuance of the remittitur on direct appeal on March 14, 2006. *See Villaverde v. State*, Docket No. 43443 (Order of Affirmance, February 15, 2006). Thus, Villaverde's petition was untimely filed. *See* NRS 34.726(1). Moreover, Villaverde's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus that was decided on the merits.<sup>1</sup> *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Villaverde'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(3). Further, because the State specifically pleaded laches, Villaverde was required to

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<sup>1</sup>*See Villaverde v. State*, No. 51000, 2010 WL 3271248 (Nev. May 10, 2010) (Order of Affirmance). Villaverde also filed a second petition that was denied as procedurally barred. *See Villaverde v. State*, No. 77563-COA, 2020 WL 399170 (Nev. Ct. App. Jan. 22, 2020) (Order Granting Rehearing and Order of Affirmance).

overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2).

Villaverde argues that the district court erred by denying his petition as procedurally barred because an amended judgment of conviction adding credit for time served was filed on June 14, 2021. Specifically, Villaverde argues that NRS 176.105(d) requires that the “exact amount of credit granted for time spent in confinement before conviction” must be included in the judgment of conviction. Further, he argues that the failure to include credit for time served in the judgment of conviction rendered the judgment of conviction invalid similarly as to when the amount of restitution is not included in the judgment of conviction. *See Whitehead v. State*, 128 Nev. 259, 262-263, 285 P.3d 1053, 1055 (2012) (interpreting NRS 176.105(1) and holding that a judgment of conviction is not final when the judgment contains an indeterminate restitution requirement). Thus, he argues, the one-year time period for filing a petition began when the amended judgment of conviction adding credits for time served was filed and any previous petition filed could not be used to find that his current petition was successive.

Since *Whitehead*, the Nevada Supreme Court has held that where a defendant is convicted by jury verdict, the finality of the subsequently entered judgment of conviction would not be determinative of this court’s jurisdiction because a defendant can appeal from a jury verdict. *See Witter v. State*, 135 Nev. 412, 415, 452 P.3d 406, 409 (2019). Further, the court held that a “defendant [cannot] 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.” *Id.*

We agree that the failure to include the credit for time served could have affected the finality of Villaverde’s judgment of conviction.

However, like the appellant in *Witter*, Villaverde was convicted pursuant to a jury verdict, and he was able to appeal from that verdict pursuant to NRS 177.015(3). Further, as in *Witter*, Villaverde litigated a direct appeal and two previous postconviction petitions, and he did not challenge the finality of his judgment of conviction on the ground that the judgment of conviction was not a final judgment for its failure to include credit for time served. Therefore, Villaverde is “estopped from now arguing the judgment was not final and that the subsequent proceedings were null and void for lack of jurisdiction.” *Id.* at 416, 452 P.3d at 410. Because all of Villaverde’s underlying claims in his petition related to his original judgment of conviction and not the amended judgment, his petition was procedurally barred. *See id.* at 416-417, 452 P.3d at 410.

Villaverde also argues the district court erred by denying his petition without allowing him to respond to the State’s assertion that statutory laches applied. The State filed its response to the petition on November 18, 2021, and stated it sent the response in the mail the same day. The district court denied the petition at a hearing on December 6, 2021, exactly 18 days later and on the final day Villaverde could have filed a reply. *See* NRAP 26(a) (extending the NRAP timing rules to statutes that do not specify a method of computing time), NRAP 26(c) (allowing an extra three days for service by paper); NRS 34.750(4) (allowing 15 days to respond to a motion to dismiss); NRS 34.800(2) (stating that a petitioner must be given an opportunity to respond to allegations regarding laches). Therefore, the district court erred by ruling on the petition prior to giving Villaverde the full 18 days to respond to the laches argument. However, we conclude the error was harmless because Villaverde did not attempt to respond to the laches argument in a late-filed response below nor does he specify on appeal what his argument would have been in response to the State’s laches


argument. See NRS 178.598 (“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”).

Finally, Villaverde argues the district court erred by denying his request for the appointment of postconviction counsel and for an evidentiary hearing. NRS 34.750(1) provides for the discretionary appointment of postconviction counsel if the petitioner is indigent and the petition is not summarily dismissed. Here, the district court found the petition was procedurally barred pursuant to NRS 34.810(2) and declined to appoint counsel. Because the petition was subject to summary dismissal, see NRS 34.745(4), we conclude the district court did not abuse its discretion by declining to appoint counsel. Further, because Villaverde was unable to overcome the procedural bars, Villaverde failed to demonstrate the district court erred by failing to conduct an evidentiary hearing concerning his underlying claims. See *Rubio v. State*, 124 Nev. 1032, 1046 n.53, 194 P.3d 1224, 1234 n.53 (2008).

Having concluded the district court did not err by denying Villaverde’s petition as procedurally barred, we

ORDER the judgment of the district court AFFIRMED.

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

  
\_\_\_\_\_, J.  
Tao

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

cc: Hon. Tierra Danielle Jones, District Judge  
Sally Dorian Villaverde  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk