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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>JOHNNIE MITCHELL,</p> <p style="text-align: center;">Petitioner - Appellant,</p> <p style="text-align: center;">v.</p> <p>ROBERT HILDRETH, Warden; THE ATTORNEY GENERAL OF THE STATE OF NEVADA,</p> <p style="text-align: center;">Respondents - Appellees.</p>
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No. 08-15290

D.C. No. CV-02-01470-PMP/PAL

MEMORANDUM *

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted March 9, 2009
San Francisco, California

Before: WALLACE, THOMAS and BYBEE, Circuit Judges.

Mitchell appeals from the district court’s order dismissing his petition for writ of habeas corpus. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. §§ 1291 and 2253. We affirm in part, reverse in part, vacate in part, and remand.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

The district court did not address the merits of Grounds 11(e) and 12(b) of Mitchell's petition. We therefore vacate the district court's order to the extent that it disposed of these grounds, and remand the petition for the district court's initial consideration of these grounds.

We affirm the district court's dismissal of Ground 4 as procedurally barred. The state court properly dismissed this ground pursuant to Nevada Revised Statute § 34.810(1)(b)(2). *Vang v. Nevada*, 329 F.3d 1069, 1073-74 (9th Cir. 2003) (holding that section 34.810 is an adequate and independent state ground). Mitchell's reliance on *Pellegrini v. State*, 34 P.3d 519 (Nev. 2001) to distinguish *Vang* is unavailing because that case does not speak to the Nevada Supreme Court's application of section 34.810 to non-capital cases, like the instant case. We reject Mitchell's alternative argument that the procedural bar is excused because he is actually innocent of the sentencing enhancement applied. *Bousley v. United States*, 523 U.S. 614, 623-24 (1998) (requiring petitioner to show "factual innocence").

We reverse the district court's dismissal of Ground 7. The allegedly un-*Mirandized* statement is apparent from the record, and it is otherwise undisputed that Mitchell has pled sufficient facts to merit review of this claim.

We affirm the district court's dismissal of Ground 9 because Mitchell fails to point to any clearly established Supreme Court precedent holding that a trial court must sua sponte sever an ex-felon in possession charge to comply with due process. 28 U.S.C. § 2254(d)(1).

**AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART,
AND REMANDED.**