

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES HOWARD HAYES, JR.,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

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Case No: A-19-793315-W

Docket No: 82734

RECORD ON APPEAL VOLUME 3

ATTORNEY FOR APPELLANT
JAMES HAYES, JR.,
PROPER PERSON
P.O. BOX 208
INDIAN SPRINGS, NV 89070

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

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A-19-793315-W

James Hayes, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

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1 205.060) and one count of ATTEMPT GRAND LARCENY (Category D Felony/Gross
2 Misdemeanor – NRS 205.220.1, 205.222.2, 193.330). Following a Preliminary Hearing in
3 Justice Court, Las Vegas Township on June 14, 2016, the charge of BURGLARY was bound
4 over to District Court, and the charge of ATTEMPT GRAND LARCENY was dismissed.

5 On June 17, 2016, the State filed an Information with the District Court, charging
6 Petitioner with one count of BURGLARY. On August 29, 2017, the State filed an Amended
7 Notice of Intent to Seek Punishment as a Habitual Criminal. On November 7, 2018, pursuant
8 to a Guilty Plea Agreement (“GPA”), Petitioner entered a plea of Guilty pursuant to North
9 Carolina v. Alford, 400 U.S. 25 (1970) to one count of ATTEMPT GRAND LARCENY. The
10 terms of the GPA are as follows:

11 The State has agreed to make no recommendation at the time of sentencing. The
12 State has no opposition to probation with the only condition being thirty (30)
13 days in the Clark County Detention Center (CCDC), with thirty (30) days credit
for time served.

14 GPA at 1:22-24. The GPA further includes, in pertinent part, the following acknowledgement:

15 I understand and agree that, if...an independent magistrate, by affidavit review,
16 confirms probable cause against me for new criminal charges including reckless
17 driving or DUI, but excluding minor traffic violations, the State will have the
18 unqualified right to argue for any legal sentence and term of confinement
19 allowable for the crime(s) to which I am pleading guilty, including the use of
20 any prior convictions I may have to increase my sentence as a habitual criminal
to five (5) to twenty (20) years, Life without the possibility of parole, Life with
the possibility of parole after ten (10) years, or a definite twenty-five (25) year
term with the possibility of parole after ten (10) years.

21 GPA at 2: 1-9. An Amended Information reflecting the new charge of ATTEMPT GRAND
22 LARCENY was filed in conjunction with the GPA. Petitioner was adjudged Guilty pursuant
23 to Alford that same day, and the sentencing hearing was scheduled for March 6, 2019.

24 On January 31, 2019, the State filed a State’s Notice of Motion and Motion to Revoke
25 Bail, asserting that in Las Vegas Justice Court case number 19F01534X, a Justice of the Peace
26 had found probable cause to charge Petitioner with Burglary for acts committed on or around
27 January 26, 2019. The State’s Motion to Revoke Bail was granted after a hearing on February
28 4, 2019.

1 At the sentencing hearing on March 6, 2019, the State argued that it had regained the
2 right to argue pursuant to the terms of the GPA. The Court agreed, and the State argued that
3 Petitioner should be punished under NRS 207.010 (the "Small Habitual Statute"). The Court
4 agreed, and Petitioner was sentenced to sixty (60) to one hundred seventy-four (174) months
5 in the Nevada Department of Corrections (NDOC), consecutive to Petitioner's sentence in
6 another case (C315125). The Court also awarded Petitioner ten (10) days credit for time
7 served. The Judgment of Conviction in this case was filed on March 12, 2019.

8 Petitioner filed a Notice of Appeal on March 28, 2019. Petitioner's Case Appeal
9 Statement was filed on August 9, 2019 (SCN 78590).

10 On April 15, 2019, Petitioner filed a Petition for Writ of Habeas Corpus ("Petition").
11 Pursuant to Court order, the State filed its Response on June 26, 2019. At the hearing on the
12 Petition on August 19, 2019, the Court noted that Petitioner filed two Addenda to his original
13 Petition (the first on May 7, 2019, and the second on May 9, 2019). Pursuant to the Court's
14 order, the State filed a Response to the Addenda on October 10, 2019. Petitioner filed a Reply
15 to the State's Response on November 4, 2019. On November 18, 2019, Petitioner's Petition
16 came before the Court, at which time the Court took the matter OFF CALENDAR due to
17 Petitioner's pending appeal.

18 On November 19, 2019, Petitioner filed another Notice of Appeal, appealing the denial
19 of his Coram Nobis motion. His Case Appeal Statement was filed on December 11, 2019 (SCN
20 80222). On August 31, 2020, the Nevada Court of Appeals affirmed the Court's denial of
21 Petitioner's Coram Nobis motion. Remittitur issued on October 12, 2020.

22 On January 14, 2020, the Nevada Supreme Court AFFIRMED Petitioner's Judgment
23 of Conviction in SCN 78590. Remittitur issued on February 25, 2020.

24 On February 12, 2020, Petitioner filed an "Amended Petition for Writ of Habeas
25 Corpus" (his "Amended Petition"). This Court ordered a Response to that Amended Petition
26 on March 4, 2020. The State filed its Response to Petitioner's Amended Petition on April 17,
27 2020. Petitioner replied to the State's Response on May 15, 2020.

28 //

1 On May 15, 2020, Petitioner also filed an "Affidavit of Actual Innocence not Mere
2 Legal Insufficiency but 'Factual Innocence.'" On May 27, 2020, Petitioner filed a
3 Supplemental Petition. While Petitioner's numerous pleadings were pending, Petitioner filed
4 a Motion for Peremptory Challenge of Judge and to Disqualify Judge William Bill Kephart.
5 Thereafter, the State filed its Responses to Petitioner's Affidavit of Actual Innocence and
6 Petitioner's Supplemental Petition on June 10, 2020. As a result of Petitioner's Peremptory
7 Challenge, Petitioner's pending matters were taken off calendar on June 15, 2020. On June
8 29, 2020, Petitioner filed his Reply to the State's Response to Petitioner's Affidavit of Actual
9 Innocence.

10 On July 7, 2020, Chief Judge Linda Bell considered, and denied, Petitioner's Motion
11 for Peremptory Challenge of Judge Kephart. Chief Judge Bell's Decision and Order was filed
12 on July 8, 2020.

13 On July 23, 2020, Petitioner filed his Reply to the State's Response to Petitioner's
14 Supplemental Petition. Petitioner, that same day, filed a Motion for Ruling for Rule 60b
15 Motion for Relief; Motion to Vacate; Amended Petition for Writ of Habeas Corpus. The State
16 filed its Response to Petitioner's Motion for Ruling on September 2, 2020. Petitioner's Motion
17 for Ruling was denied on September 9, 2020.

18 On September 25, 2020, Petitioner filed a Motion for Expeditious Ruling for "Amended
19 Petition for Writ of Habeas Corpus" 3rd Request. On October 7, 2020, he filed a Motion to
20 Set Evidentiary Hearing and Issue Transport Order. On October 14, 2020, Petitioner filed a
21 Motion to Reconsider Order Denying Motion for Ruling for Rule 60b Motion for Relief;
22 Motion to Vacate; Amended Petition for Writ of Habeas Corpus. The State filed responsive
23 pleadings to each of Petitioner's respective filings on November 10, 2020. On November 16,
24 2020, the Court considered, and denied, Petitioner's three Motions. The Court's Order was
25 filed on November 21, 2020.

26 On December 22, 2020, Petitioner filed a "Motion to Compel Judgment Pursuant to
27 Nevada Revised Statutes Chapter 34 FRCP Rule 12(c) for Amended Petition for Writ of
28 Habeas Corpus." The State filed its Response to the instant Motion to Compel on January 27,

2021. Contemporaneous with its ruling on the instant Amended Petition, the Court denied Petitioner's Motion to Compel on February 1, 2021.

On February 1, 2021, this matter came on for hearing before this Court. This Court did not accept argument at the time of hearing, but made the following findings and conclusions:

ANALYSIS

I. PETITIONER'S AMENDED PETITION IS BARRED AS SUCCESSIVE

NRS 34.750(3) allows *appointed counsel* to file certain supplemental pleadings within 30 days. However, "[n]o further pleadings may be filed except as ordered by the court." NRS 34.750(5). Additionally, NRS 34.810(2) reads:

A second or successive petition *must be dismissed* if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that *the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ*.

(Emphasis added). It is strictly the petitioner's burden to demonstrate good cause and prejudice to survive the court's analysis. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also, Hart v. State, 116 Nev. 558, 563-64, 1 P.3d 969 972 (2000) (holding, "where a defendant previously has sought relief from the judgment, the defendant's failure to identify all grounds for relief in the first instance should weigh against consideration of the successive motion.")

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes, "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions *may be dismissed based solely on the fact of the petition*." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995) (emphasis added). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467,

1 497-98 (1991). Application of NRS 34.810(2) is *mandatory*. State v. Eighth Judicial Dist.
2 Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) (noting, “[h]abeas corpus
3 petitions that are filed many years after conviction are an unreasonable burden on the criminal
4 justice system.”) The Riker Court further determined that district courts have no discretion
5 regarding application of statutory procedural bars, and such bars “cannot be ignored [by the
6 district court] when properly raised by the State.” Id. at 233.

7 This Court finds that, in the instant case, Petitioner continues to file supplemental
8 pleadings in the form of multiple addenda as well as the instant “Amended Petition.” However,
9 under NRS 34.750, the right to file supplements lies exclusively with appointed counsel.
10 Furthermore, this Court finds that the factual bases for Petitioner’s claims existed at the time
11 Petitioner filed his first Petition. Therefore, this Court concludes that Petitioner’s pleadings
12 are successive and subject to dismissal absent a showing of good cause and prejudice. NRS
13 34.810(2). Petitioner does not argue good cause nor prejudice. See generally, Amended
14 Petition. Thus, this Court further concludes that Petitioner’s Amended Petition does not entitle
15 Petitioner to relief.

16 **II. PETITIONER’S AMENDED PETITION DOES NOT ENTITLE HIM TO** 17 **RELIEF**

18 The Nevada Supreme Court has explained:

19 “[A] guilty plea represents a break in the chain of events which has preceded it
20 in the criminal process. When a criminal defendant has solemnly admitted in
21 open court that he is in fact guilty of the offense with which he is charged, he
22 may not thereafter raise independent claims relating to the deprivation of
constitutional rights that occurred prior to the entry of the guilty plea.”

23 Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (quoting Tollett v. Henderson, 411
24 U.S. 258, 267, 93 S.Ct. 1602, 1608 (1973)). An entry of a guilty plea “waive[s] all
25 constitutional claims based on events occurring prior to the entry of the plea[], except those
26 involving voluntariness of the plea[] [itself].” Warden, Nevada State Prison v. Lyons, 100
27 Nev. 430, 431, 683 P.2d 505 (1984); see also Kirksey v. State, 112 Nev. 980, 999, 923 P.2d
28 1102, 1114 (1996) (“Where the defendant has pleaded guilty, the only claims that may be

1 raised thereafter are those involving the voluntariness of the plea itself and the effectiveness
2 of counsel.”). Under NRS 34.810,

3 I. The court *shall* dismiss a petition if the court determines that:

4 (a) The petitioner’s conviction was upon a plea of guilty or guilty but
5 mentally ill and the petition is not based upon an allegation that the plea was
6 involuntarily or unknowingly entered or that the plea was entered without
effective assistance of counsel.

7 ...
8 unless the court finds both cause for the failure to present the grounds and actual
prejudice to the petitioner.

9 (emphasis added). Furthermore, the Nevada Supreme Court has held that “challenges to the
10 validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must
11 first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a
12 direct appeal must be pursued on direct appeal, or they will be *considered waived in*
13 *subsequent proceedings.*” Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994)
14 (emphasis added) (disapproved of on other grounds by Thomas v. State, 115 Nev. 148, 979
15 P.2d 222 (1999)). “A court must dismiss a habeas petition if it presents claims that either were
16 or could have been presented in an earlier proceeding, unless the court finds both cause for
17 failing to present the claims earlier or for raising them again and actual prejudice to the
18 petitioner.” Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001), overruled on other
19 grounds by Lisle v. State, 131 Nev. 356, 351 P.3d 725 (2015). Additionally, substantive claims
20 are beyond the scope of habeas and waived. NRS 34.724(2)(a); see also Evans, 117 Nev. at
21 646-47, 29 P.3d 498 at 523; Franklin, 110 Nev. at 752, 877 P.2d 1058 at 1059.

22 A proper petition for post-conviction relief must set forth specific factual allegations
23 that would entitle the petitioner to relief. NRS 34.735(6) states, in pertinent part, “[Petitioner]
24 must allege specific facts supporting the claims in the petition [he] file[s] seeking relief from
25 any conviction or sentence. Failure to raise specific facts rather than just conclusions may
26 cause the petition to be dismissed.” “Bare” and “naked” allegations are not sufficient to
27 warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v.
28 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “A claim is ‘belied’ when it is contradicted

1 or proven to be false by the record as it existed at the time the claim was made.” Mann v. State,
2 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

3 **A. Petitioner’s Claims of Ineffective Assistance of Counsel are Belied by the Record**

4 Petitioner first claims that his counsel, Mr. Michael Sanft, Esq. (“Mr. Sanft”) was
5 ineffective for 1) failing to appropriately investigate; 2) failing to ensure Petitioner fully
6 understood the conditions of the GPA; 3) failing to file a Motion to Withdraw Guilty Plea; and
7 4) failing to file a Notice of Appeal and/or informing Petitioner of his right to appeal. However,
8 this Court finds that Petitioner’s claims are belied by the record.

9 The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal
10 prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his
11 defense.” The United States Supreme Court has long recognized that “the right to counsel is
12 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,
13 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
14 (1993).

15 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
16 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of
17 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865
18 P.2d at 323. Under Strickland, a defendant must show first that his counsel's representation
19 fell below an objective standard of reasonableness, and second, that but for counsel's errors,
20 there is a reasonable probability that the result of the proceedings would have been different.
21 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100
22 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). “[T]here is
23 no reason for a court deciding an ineffective assistance claim to approach the inquiry in the
24 same order or even to address both components of the inquiry if the defendant makes an
25 insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

26 The Court begins with the presumption of effectiveness and then must determine
27 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
28 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel

1 does not mean errorless counsel, but rather counsel whose assistance is “[w]ithin the range of
2 competence demanded of attorneys in criminal cases.” Jackson v. Warden, 91 Nev. 430, 432,
3 537 P.2d 473, 474 (1975).

4 Counsel cannot be ineffective for failing to make futile objections or arguments. See
5 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
6 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
7 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
8 (2002). Further, a defendant who contends his attorney was ineffective because he did not
9 adequately investigate must show how a better investigation would have rendered a more
10 favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

11 Based on the above law, the role of a court in considering allegations of ineffective
12 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
13 whether, under the particular facts and circumstances of the case, trial counsel failed to render
14 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
15 (1978). This analysis does not mean that the court should “second guess reasoned choices
16 between trial tactics nor does it mean that defense counsel, to protect himself against
17 allegations of inadequacy, must make every conceivable motion no matter how remote the
18 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
19 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
20 cannot create one and may disserve the interests of his client by attempting a useless charade.”
21 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

22 “There are countless ways to provide effective assistance in any given case. Even the
23 best criminal defense attorneys would not defend a particular client in the same way.”
24 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
25 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
26 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
27 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel's

28 //

1 challenged conduct on the facts of the particular case, viewed as of the time of counsel's
2 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

3 Even if a defendant can demonstrate that his counsel’s representation fell below an
4 objective standard of reasonableness, she must still demonstrate prejudice and show a
5 reasonable probability that, but for counsel’s errors, the result of the trial would have been
6 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
7 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
8 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-
9 89, 694, 104 S. Ct. at 2064-65, 2068). This portion of the test is slightly modified when the
10 convictions occurs due to a guilty plea. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v.
11 State, 112 Nev. 980, 988 (1996). For a guilty plea, a defendant “must show that there is a
12 reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and
13 would have insisted on going to trial.” Kirksey, 112 Nev. at 998 (quoting Hill, 474 U.S. at 59).

14 The text of the GPA includes the following (labeled “VOLUNTARINESS OF PLEA”),
15 in pertinent part:

16 I have discussed the elements of all of the original charge(s) against me with
17 my attorney and I understand the nature of the charge(s) against me.

18 ...

19 I have discussed with my attorney any possible defenses, defense strategies
20 and circumstances which might be in my favor.

21 All of the foregoing elements, consequences, rights, and waiver of rights
22 have been thoroughly explained to me by my attorney.

23 ...

24 I am signing this agreement voluntarily, after consultation with my
25 attorney...

26 ...

27 My attorney has answered all my questions regarding this guilty plea
28 agreement and its consequences to my satisfaction and I am satisfied with the
services provided by my attorney.

26 GPA at 5-6. Petitioner affirmed that he had read the GPA. Recorder’s Transcript of Hearing:
27 November 7, 2018 (“Transcript”) at 2:24-25, 3:21-22. Petitioner affirmed that Mr. Sanft
28 answered any questions regarding the GPA. Transcript at 3:1-3, 3:23-4:6. Petitioner affirmed

1 that he understood the charge in the Amended Information. Id. at 3:4-6, 4:7-9. Petitioner
2 affirmed that he signed the GPA. Id. at 3:16-20. Contrary to Petitioner's assertion that he was
3 told he was agreeing to a gross misdemeanor, when asked by the Court about his
4 understanding, Petitioner acknowledged two possible sentencing outcomes:

5 THE COURT: Okay. Can you tell me what your understanding is that you're
6 facing as a form of punishment for the charge of attempt grand larceny here in
7 the State of Nevada?

8 THE DEFENDANT: One to four in the Nevada Department of Corrections.

9 THE COURT: Okay.

10 THE DEFENDANT: Or a gross misdemeanor of 364 days.

11 THE COURT: Okay. You can also be fined up to \$5,000 if I treat it as a felony.
12 And you could be fined up to \$2,000 if I treat it as a gross misdemeanor?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: You understand that?

15 THE DEFENDANT: Yes, sir.

16 Id. at 4:16-5:3. Therefore, this Court finds that Petitioner affirmed, both verbally to the court
17 and by signing the GPA, that he knew the terms of the GPA, the potential outcomes of his
18 plea, and that Mr. Sanft answered all the questions Petitioner had to Petitioner's satisfaction.

19 This Court further finds that a review of the record belies Petitioner's claim regarding
20 his appeal. Petitioner timely filed a notice of appeal on March 12, 2019. Therefore, this Court
21 concludes that Petitioner cannot demonstrate prejudice sufficient to satisfy Strickland, as his
22 appellate rights were not infringed upon.

23 Furthermore, to the extent that Petitioner argues Mr. Sanft was ineffective in his
24 investigation, this Court finds that Petitioner fails to allege, much less show, what a proper
25 investigation would have uncovered, much less how that information would have led
26 Petitioner to reject guilty plea negotiations and proceed to trial. See, Amended Petition at 10-
27 11. Instead, Petitioner relies upon the vague allegation that Mr. Sanft "failed to do appropriate
28 investigation of potentially meritorious claims." Id. at 10. Such vague allegations are
insufficient to warrant relief under Molina. 120 Nev. at 192, 87 P.3d at 538. Furthermore,
Petitioner's lack of specific factual support for his claim leaves the same bare and naked under
Hargrove. 100 Nev. at 502, 686 P.2d at 225.

1 This Court concludes, therefore, that because each of Petitioner's arguments in support
2 of his claim of ineffective assistance of counsel is belied by the record, Petitioner is not entitled
3 to relief on this claim.

4 **B. Petitioner's Claim Against his Breach of the Guilty Plea Agreement is Belied by**
5 **the Record**

6 Petitioner goes on to claim that the State violated his right to Due Process in arguing
7 that Petitioner had surrendered the stipulated sentence in the GPA. Amended Petition at 13.
8 This claim is likewise belied by the record.

9 In the GPA, Petitioner expressly agreed to the clause:

10 I understand and agree that, if I fail to interview with the Department of Parole
11 and Probation (P&P), fail to appear at any subsequent hearings in this case, or
12 an independent magistrate, by affidavit review, confirms *probable cause* against
13 me for new criminal charges including reckless driving or DUI, but excluding
14 minor traffic violations, the State will have *the unqualified right to argue for any*
15 *legal sentence* and term of confinement allowable for the crime(s) to which I am
16 pleading guilty, including the use of any prior convictions I may have to increase
17 my sentence as an habitual criminal to five (5) to twenty (20) years, Life without
the possibility of parole, Life with the possibility of parole after ten (10) years,
or a definite twenty-five (25) year term with the possibility of parole after ten
(10) years.

18 GPA at 2 (emphasis added). Later in the GPA, Petitioner also expressly agreed: "the
19 sentencing judge has the discretion to order the sentences served concurrently or
20 consecutively." *Id.* at 3.

21 As stated *supra*, a Justice of the Peace found *probable cause* to charge Petitioner with
22 Burglary in Las Vegas Justice Court case 19F01534X. Therefore, pursuant to the express
23 language of the GPA, this Court agrees that the State regained the *unqualified* right to argue
24 for any legal sentence. GPA at 2.

25 Furthermore, this Court finds that Petitioner's representations that the probable cause
26 in the other case had been erroneously found are also belied by the record. In District Court
27 case C338412, in which the Information was filed after probable cause had been found, there
28 //

1 was no dismissal or other acquittal of Petitioner. In fact, Petitioner *pled guilty* in that case to
2 reduced charges.

3 Because Petitioner's claim consists of arguments that are belied by the record,
4 Petitioner is not entitled to relief.

5 **C. Petitioner's Conviction Does Not Implicate Double Jeopardy**

6 Petitioner's third ground for relief alleges that his conviction is invalid because it
7 violates statutory prohibitions against "Double Jeopardy." See, Amended Petition at 17-19.
8 However, this Court concludes that this claim is not cognizable in a Petition for Writ of Habeas
9 Corpus and was waived by Petitioner's failure to raise it on direct appeal.

10 The Nevada Supreme Court has explained:

11 "[A] guilty plea represents a break in the chain of events which has preceded it
12 in the criminal process. When a criminal defendant has solemnly admitted in
13 open court that he is in fact guilty of the offense with which he is charged, he
14 may not thereafter raise independent claims relating to the deprivation of
constitutional rights that occurred prior to the entry of the guilty plea."

15 Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (quoting Tollett v. Henderson, 411
16 U.S. 258, 267, 93 S.Ct. 1602, 1608 (1973)). An entry of a guilty plea "waive[s] all
17 constitutional claims based on events occurring prior to the entry of the plea[], except those
18 involving voluntariness of the plea[] [itself]." Warden, Nevada State Prison v. Lyons, 100
19 Nev. 430, 431, 683 P.2d 505 (1984); see also Kirksey v. State, 112 Nev. 980, 999, 923 P.2d
20 1102, 1114 (1996) ("Where the defendant has pleaded guilty, the only claims that may be
21 raised thereafter are those involving the voluntariness of the plea itself and the effectiveness
22 of counsel."). Under NRS 34.810,

23 I. The court *shall* dismiss a petition if the court determines that:

24 (a) The petitioner's conviction was upon a plea of guilty or guilty but
25 mentally ill and the petition is not based upon an allegation that the plea was
26 involuntarily or unknowingly entered or that the plea was entered without
effective assistance of counsel.

27 ...

28 unless the court finds both cause for the failure to present the grounds and actual
prejudice to the petitioner.

1 (emphasis added). Furthermore, the Nevada Supreme Court has held that “challenges to the
2 validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must
3 first be pursued in post-conviction proceedings... [A]ll other claims that are appropriate for a
4 direct appeal must be pursued on direct appeal, or they will be *considered waived in*
5 *subsequent proceedings.*” Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994)
6 (emphasis added) (disapproved of on other grounds by Thomas v. State, 115 Nev. 148, 979
7 P.2d 222 (1999)). “A court must dismiss a habeas petition if it presents claims that either were
8 or could have been presented in an earlier proceeding, unless the court finds both cause for
9 failing to present the claims earlier or for raising them again and actual prejudice to the
10 petitioner.” Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001), overruled on other
11 grounds by Lisle v. State, 131 Nev. 356, 351 P.3d 725 (2015). Additionally, substantive claims
12 are beyond the scope of habeas and waived. NRS 34.724(2)(a); see also Evans, 117 Nev. at
13 646-47, 29 P.3d 498 at 523; Franklin, 110 Nev. at 752, 877 P.2d 1058 at 1059.

14 This Court finds that this claim does not challenge the voluntariness of Petitioner’s
15 guilty plea, nor does it allege ineffective assistance of counsel. Therefore, this claim should
16 have been pursued on direct appeal, rather than for the first time in a petition. NRS 34.810(1);
17 Franklin, 110 Nev. at 752, 977 P.2d at 1059. Petitioner does not attempt to argue good cause
18 or prejudice for raising this claim for the first time in the instant proceedings. This Court
19 further finds that such an argument would be meritless, as Petitioner specifically and
20 unconditionally waived his right to a direct appeal on this issue. GPA at 5. Furthermore,
21 Petitioner waived any potential constitutional defect by entering his guilty plea. Lyons, 100
22 Nev. at 431, 683 P.2d at 505.

23 Therefore, because Petitioner waived all constitutional issues prior to the entry of his
24 plea, and because his claim does not challenge the voluntariness of Petitioner’s plea, this Court
25 concludes that this claim must be denied.

26 **D. Petitioner’s Claim Regarding his PSI Does Not Warrant Relief**

27 Petitioner then claims that his sentence was based on multiple mistakes regarding his
28 criminal history in his PSI. Amended Petition at 20. However, this Court finds that Petitioner

1 fails to demonstrate that he properly raised this claim before the Court at sentencing. This
2 Court further finds that Petitioner's assertions are belied by a reading of the controlling
3 authority regarding his sentence.

4 When imposing a sentence on a defendant, the district court must base its sentence on
5 accurate information contained in a PSI. Stockmeier v. Bd. of Parole Comm'rs, 127 Nev. 243,
6 247, 255 P.3d 209, 212 (2011). "[I]t is important for a defendant to object to his PSI at the
7 time of sentencing because 'Nevada law does not provide any administrative or judicial
8 scheme for amending a PSI after the defendant is sentenced.'" Sasser v. State, 130 Nev. 387,
9 390, 324 P.3d 1221, 1223 (2014) (quoting Stockmeier, 127 Nev. at 249, 255 P.3d at 213).
10 Furthermore, "if not resolved in the defendant's favor, the objections [to the PSI] *must be*
11 *raised on direct appeal*." Stockmeier, 127 Nev. at 250, 255 P.3d at 213 (emphasis added).

12 Pursuant to Stockmeier, Petitioner should have raised his claims regarding the
13 misinformation in his PSI to the Court at sentencing, then upon direct appeal. 127 Nev. at 250,
14 255 P.3d at 213. This Court finds that Petitioner did neither. Therefore, pursuant to Franklin,
15 this Court finds that Petitioner waived these claims. 110 Nev. at 752, 877 P.2d at 1059.
16 Petitioner does not argue good cause or prejudice to overcome the procedural bars, and could
17 not successfully do so, as these alleged incorrections were available at the time Petitioner
18 pursued his direct appeal.

19 This Court further finds that, to the extent Petitioner claims that the timing of his
20 separate claims was misinterpreted by the sentencing court, his claim is belied by the statute
21 governing treatment as a habitual criminal. Pursuant to NRS 207.010, the analysis of prior
22 convictions occurs at the time of *conviction, not at the time the crime was alleged*. See NRS
23 207.010(1). At the time of sentencing, the State argued in support of habitual criminal
24 treatment, and the Court determined that the State had met its burden pursuant to statute.

25 This Court concludes that, because Petitioner waived this claim, and because this Court
26 has found that it is further belied by the record and by applicable laws, this claim must be
27 summarily denied.

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CERTIFICATE OF SERVICE

I hereby certify that service of the State's Findings of Fact, Conclusions of Law, and Order was made this 26th day of February, 2021, by mail to:

JAMES HAYES, #1175077
SOUTHERN DESERT CORRECTIONAL CENTER
P.O. BOX 208
INDIAN SPRINGS, NV 89070

BY: /s/ E. GOMEZ
Employee of the District Attorney's Office

13F10723X/JVB/jj/L1

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

5
6 James Hayes, Plaintiff(s)

CASE NO: A-19-793315-W

7 vs.

DEPT. NO. Department 3

8 Nevada State of, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the
13 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

14 Service Date: 3/9/2021

15 Melissa Boudreaux

mezama@clarkcountynv.gov

Heather Shuman
CLERK OF THE COURT

Hayes, James H ID NO. 1175077

SOUTHERN DESERT CORRECTIONAL CTN.
20825 COLD CREEK RD.
P.O. BOX 208
INDIAN SPRINGS, NV 89010

In the 8th Judicial District Court of the State
of Nevada in and for the County of Clark

JAMES H. HAYES
(Petitioner)

v.

State of Nevada
(Respondent)

"HEARING REQUEST"

CASE NO.: A-19-793315-W

DEPT. NO.: 3

DOCKET: _____

Petition to Reconsider "Findings of Fact,
CONCLUSIONS OF LAW" ADDENDUM

COMES NOW, petitioner, James H. Hayes, herein above respectfully
moves this Honorable Court for an reconsideration of findings of fact,
CONCLUSIONS OF LAW pursuant to the true facts NRS 174.085(3),
NRS 178.512, the Nevada Constitution, and US Constitution in "GOOD FAITH"

This Motion is made and based upon the accompanying Memorandum of Points and
Authorities,

DATED: this 4th day of March, 2021

BY James H. Hayes
James H. Hayes # 1175077
Defendant In Proper Personam

RECEIVED

MAR - 9 2021

CLERK OF THE COURT

ADDITIONAL FACTS OF THE CASE:

1 COMES NOW the petitioner, MR. JAMES H. HAYES IN
2 proper person, IN NECESSITY, AND HEREBY MOVES, this
3 honorable court for reconsideration of findings of
4 fact, conclusions of law pursuant to NRS Chapter 34,
5 NRS 174.085(3), NRS 178.512, Nevada Constitution, and
6 U.S. Constitution, as Justice so requires, in favor of
7 petitioner. In support the petitioner shows this honor-
8 able court that alleged findings of fact, conclusions
9 of law are UNLAWFUL for the following:

10 I, JAMES H. HAYES, depose and state that the
11 following FACTS and CONCLUSIONS are TRUE and CORRECT
12 UNDER PENALTY OF PERJURY.

13 1. Petitioner's Amended Petition IS NOT
14 SUCCESSIVE pursuant to NRS Chapter 34, as no determin-
15 ation was on the merits and petition did not
16 constitute an abuse of the writ.

17 2. Petitioner's Amended Petition DOES entitle him to
18 Relief as Afford per was not equally voluntary,
19 knowing, and intelligent entered. United States Supreme
20 Court has held that it cannot be truly voluntary unless
21 the petitioner possesses an understanding of the law
22 in relation to the facts. A per cannot be voluntary
23 where the trial court provides the petitioner with an
24 incorrect understanding of the law in relation to
25 the facts of his case and in the instant case the
26 charge of attempt grand larceny was dismissed at
27 the conclusion of preliminary hearing after presence

1 loss of all the evidence for lack of admissible evidence,
2 no corpus delicti, no mens rea, and no slight or marginal
3 evidence of guilt.

4 A. State is now attempting to once again
5 violate "DUE PROCESS" based upon asserted facts that the
6 state knows to be FALSE and a misstatement of
7 pertinent laws. What is fact, after all the evidence
8 presented at preliminary hearing it was proven that the
9 essential elements of the charged offense of attempt
10 grand larceny was not proven as they relate to fact
11 and Nevada Revised Statutes. So the state's assertion
12 that preliminary hearing results are irrelevant is an
13 omission inconsistent with the rudimentary demands
14 of law and fair procedure.

15 B. State's contentions are clearly made in BAD
16 FAITH to once again deprive this court of its ability
17 to pass judgment based on accurate information, laws,
18 and facts.

19 C. That the court that determined and delivered
20 the criminal judgment lacked SUBJECT-MATTER
21 jurisdiction and the challenge of jurisdiction of
22 convicting court not waived by failure to raise in
23 direct appeal

24 D. Petitioner hereby avers that the state's
25 contention that entering the plea agreement serves as
26 waiver to the right to challenge the conviction, is
27 tantamount to conclusive evidence of ineffective

1 assistance of counsel during plea negotiations. The state's
2 findings of fact, conclusions of law serves as an
3 unconditional stipulation that counsel was in fact
4 constitutionally ineffective, and this issue alone would
5 serve as sufficient grounds for this honorable court
6 to exercise sound judicial prudence by issuing a
7 writ of habeas corpus to have petitioner before it, that
8 petitioner be discharged from his unconstitutional
9 confinement and restraint.

10 E. That challenge to plea when petitioner is
11 actually innocent is not waived by failure to raise on
12 direct appeal by ineffective counsel that has resulted in
13 a fundamental miscarriage of justice. The quintessential
14 miscarriage of justice is the conviction of a person who
15 is entirely innocent (Rousey v. United States 118 S.Ct 1604)

16 F. Petitioner must understand not only the
17 nature of the charge against him, but also that his
18 conduct actually falls within the charge (True 738 F.2d 111)

19 G. Petitioner is wrongfully imprisoned because
20 he was convicted under NRS, which did not prohibit his
21 behavior, and no crime was committed that is furthered
22 to be true by Justice Court Magistrate dismissal of charge
23 after all evidence presented at preliminary hearing, so
24 it clear and convincing evidence petitioner is imprisoned
25 for conduct that did not violate NRS 205.220.1; 205.222.2
26 93.330, and the Supreme Court has held that such
27 imprisonment violates the DUE PROCESS clause of 14th Amend.

3. Petitioner has presented specific factual support for claim of ineffective assistance of counsel per the two prong test of Strickland, with ample evidence and matters of law.

A. Petitioner's conviction can not stand because it resulted specifically and directly from the consequences of the state's denying him the right to effective counsel in violation of petitioner's right to counsel under the 6th Amend. In practical terms, a constitutionally effective counsel would have move to dismiss the information for the charge of Burglary as the state's intent was dismissed at conclusion of preliminary hearing of attempt grand larceny and amended information for the charge attempt grand larceny was barred against petitioner per NRS 174.085(3); NRS 178.562 and for lack of probable cause and the state court would have been required to dismiss prosecution against petitioner with prejudice. Thus, if petitioner had been provided effective counsel as the state was required to do petitioner would never have been prosecuted, convicted and sentenced all for the reasons that the state failed to adhere to Nevada constitution and U.S. constitution in violation of due process and state law double jeopardy.

B. Petitioner has demonstrated by a preponderance of the evidence that counsel was ineffective.

C. If counsel would have adequately investigated there would have been a favorable outcome.

1 under the particular facts and circumstances of the
2 case from its inception.

3 D. Contrary to state's assertion the guilty plea
4 agreement is clear and convincing that petitioner was
5 agreeing to a gross-misdemeanor as the agreement
6 was for 30 days in Clark County detention center with
7 30 days time served credit with no years of probation
8 to be served, no suspended sentence.

9 E. Petitioner's appellate rights were infringed
10 upon by ineffective assistance as counsel failed to
11 notify petitioner about right to appeal, failed to file
12 notice of appeal, conflict of interest, and counsel was
13 dismissed prior to perfection of appeal by district court
14 Judge William Kepner.

15 F. Petitioner would have want to trial if
16 not for counsel ineffective assistance and been
17 acquitted as the Burglary charge was fatal with no
18 intent and attempt grand larceny was without probable
19 cause.

20 4. Petitioner's Claim Against breach of the
21 GUILTY PLEA agreement was supported by ample
22 evidence and matters of law

23 A. State used impeachable evidence of an
24 ipse dixit Burglary charge case NO 19FO1534X that
25 alleged victim testified under oath facing the
26 penalty of prison that petitioner was not the
27 perpetrator of alleged event and was sure of it and

1 further testified that alleged perpetrator NEVER ENTERED
2 room only stood in doorway said sorry and left
3 without incident, that represents that probable cause
4 was erroneously found against petitioner and had
5 counsel not been ineffective and challenge the ruling
6 of probable cause the ruling would have been different
7 when in fact petitioner filed a pre-trial writ that was
8 denied for Rule 3.70 and forwarded to counsel so
9 that he could file on petitioner's behalf but failed
10 to do so.

11 5. Petitioner's conviction does implicate state
12 law Double Jeopardy as the charge of Attempt Grand
13 Larceny was "BARRED" from prosecution against petitioner
14 per NRS 174.185(3) and 178.562.

15 A. Petitioner hereby avers that the state's
16 contention that entering the plea agreement serves as
17 waiver to the right to challenge the conviction on state
18 law Double Jeopardy (Charge BARRED) is tantamount to
19 CONCLUSIVE EVIDENCE OF INEFFECTIVE ASSISTANCE OF COUNSEL
20 during events occurring prior to the entry of the
21 Alford plea. Thus, state's conclusion serves as an un-
22 conditional stipulation that counsel was in fact consti-
23 tutionally ineffective and this issue alone would serve
24 as sufficient ground for this honorable court to exercise
25 sound judicial prudence by issuing a writ of habeas
26 corpus to have petitioner before it that petitioner be
27 discharged from his unconstitutional confinement

1 and restraint.

2 B. Challenge to plea when petitioner is
3 actually innocent (ACTUAL INNOCENCE) is not waived by
4 failure to raise on direct appeal and petitioner seeks relief
5 based on state law, U.S. constitutional violations and
6 Nevada constitutional violations that has resulted in
7 a fundamental miscarriage of justice.

8 C. It will be held that petitioner will be
9 entitled to a hearing on the merits if the petitioner makes
10 the necessary showing of actual innocence to relieve
11 any procedural default in failing to contest his Affidavit
12 plea in his prior direct appeal. (Bousley v. United States 118
13 S. Ct. 1604) Here, the record in the petitioner's case clearly
14 shows his factual innocence even when reviewed by
15 laymen of law, and that he is held hostage in violation
16 of the constitution and laws passed in pursuance
17 thereof.

18 D. Petitioner hereby swears that he stands
19 firmly on all points raised in his Amended petition.
20 The petitioner therefore, files this "ADDENDUM" in GOOD
21 FAITH as it will serve the truly useful purpose of
22 preserving judicial resources.

23 E. The state have indicated a willingness to
24 rely on the record, and the merits of petitioner's claims,
25 and petitioner's affidavit of actual innocence can be
26 reached without ordering an evidentiary hearing.

27 6. Petitioner's Claim Regarding his PSI does

ADDITIONAL FACTS OF THE CASE:

1 warrant relief. When in fact, petitioner objected to the
2 PSI at sentencing to the mistakes regarding his
3 criminal history.

4 A. Petitioner hereby avers that the state's
5 contention that failure to raise this claim before
6 sentencing serves as waiver to the right to challenge
7 is tantamount to conclusive evidence of ineffective
8 assistance of counsel during sentencing. Thus, the state's
9 conclusion serves as an unconditional stipulation that
10 counsel was in fact constitutionally ineffective and this
11 issue alone serves as sufficient ground for relief.

12 B. State failed to notice Petitioner of
13 habitual offender for the instant offense of attempt
14 grand larceny. And the ~~conviction~~ conviction for Burglary
15 in 2016 was not prior to the instant offense of
16 attempt grand larceny that occurred in 2013. The
17 Texas conviction is one event and not a felony as
18 it carries no prison term and would not constitute
19 a felony under laws and juris of Nevada.

20 7. Petitioner's claim against entry of his Amended
21 plea is not barred by the Record.

22 A. Petitioner hereby avers that he stands
23 firmly on all points raised in his Amended petition.

24 B. Petitioner hereby avers that the state's
25 contention that entering the plea agreement was
26 knowingly and voluntarily ~~waives~~ is tantamount to
27 conclusive evidence of ineffective assistance of counsel.

1 during events occurring prior to the entry of the
2 Affidavit. Thus, states conclusions serves as an
3 unconditional stipulation that counsel was in fact
4 constitutionally ineffective and this issue alone
5 would serve as sufficient ground for this honorable
6 court to exercise sound judicial prudence by
7 issuing a writ of habeas corpus to have petitioner
8 before it that petitioner be discharged from his
9 unconstitutional confinement and restraint.
10

11 C. states notice its intent to seek habitual
12 criminal treatment filed on August 29 2017 was
13 for the felony charge of Burglary and not
14 for the gross-misdemeanor charge of attempt
15 grand larceny.
16

17 D. Any convictions of "attempt" are never
18 permitted to be consecutive (stacked) in any criminal
19 proceeding.
20

21 Wherefore, petitioner moves this honorable
22 court to make a GOOD FAITH ruling in favor of
23 petitioner that will redress this fundamental
24 miscarriage of justice, as justice so requires...
25
26
27
28

CERTIFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 4th day of March, 2021, I mailed a true and correct copy of the foregoing, "Petition to Reconsider Findings of Fact, Conclusions of Law" by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

Clerk County District Courts
Office of the Clerk
200 LAUREL AVE. 3RD FL
LAS VEGAS, NV
89165-1160

Clerk County Dist Attorney
200 LAUREL AVE
LAS VEGAS, NV
89165-2212

Nevada Att General
100 N. Carson St
Carson City, NV
89701

CC:FILE

DATED: this 4 day of March, 2021.

James H. Hayes
#1175077
In Propria Personam
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

Stamps, Stamps # 1175077
30cc
P.O. Box 208
Indian Springs, NV
89070

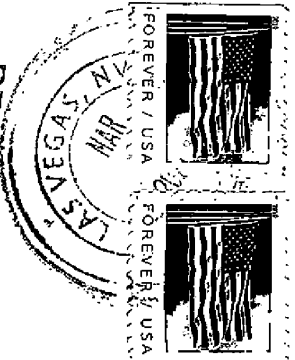
Check County District Courts
"Office of the Clerk"

200 Lewis Ave; 3rd Floor

Las Vegas, Nevada

CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA



James Hayes, Plaintiff(s)

Case No.: A-19-793315-W

vs.

Nevada State of, Defendant(s)

Department 3

NOTICE OF HEARING

Please be advised that the Petition to Reconsider Findings of Fact Conclusion of Law
" Addendum in the above-entitled matter is set for hearing as follows:

Date: April 12, 2021

Time: 8:30 AM

Location: RJC Courtroom 11C
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

**NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the
Eighth Judicial District Court Electronic Filing System, the movant requesting a
hearing must serve this notice on the party by traditional means.**

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion
Rules a copy of this Notice of Hearing was electronically served to all registered users on
this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

Amend. Shinn
CLERK OF THE COURT

HAYES, James H ID NO. 1175077

SOUTHERN DESERT CORRECTIONAL CTN.
20825 COLD CREEK RD.
P.O. BOX 208
INDIAN SPRINGS, NV 89070

IN THE 8th Judicial District Court of
THE STATE OF NEVADA IN and for the
County of Clark

James H. Hayes
PETITIONER

v.

State of Nevada

"HEARING REQUESTED"

CASE NO.: A-19-793315-IN

DEPT. NO.: 3

DOCKET: _____

Petition for Reconsider findings of "fact and
conclusions of law"

COMES NOW, petitioner James H. Hayes, herein above respectfully
moves this Honorable Court for an Order pursuant to Nev. Code of Judicial
Conduct Canon 3(B)(7) allowing petitioner opportunity to respond
to the proposed findings and conclusions.

This Motion is made and based upon the accompanying Memorandum of Points and
Authorities,

DATED: this 22 day of February, 2021

BY: Cameron H. Shinn
James H Hayes # 1175077
Defendant In Proper Personum

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MAR 16 2021

CLERK OF THE COURT

Petition for Reconsideration

Petitioner Mr. James A. Hayes prays this Honorable Court for reconsideration of its order entered February 1, 2021, and in support states:

A. Nevada Code Judicial Conduct Canon 3B(7) allows opposing party opportunity to respond to the proposed findings and conclusions

1. Petitioner be provided the opportunity to be heard on the state's proposed findings of fact and conclusions of law

2. Petitioner "Objects" to the proposed findings and conclusions district court has endorse of the order drafted unilaterally by the state's response

3. Under rule the district court must make a ruling and state its findings of fact and conclusions of law before state can draft a proposed order for the district court's review (Burford v. State 156 P.3d 691), at a minimum, enter an order that sets forth specific findings of fact and conclusion of law to support its decision disposing of them.

B. District court has failed to adequately address claims of Ineffective Assistance of Counsel trial and appellate.

1. Petitioner's ~~Alford~~ plea was not entered knowingly, intelligently, and voluntarily due to ineffective assistance of counsel in violation of the sixth and fourteenth Amendments of the U.S. Constitution.

1 2. Trial counsel failed to inform petitioner of the
2 elements of the offense to which petitioner pled Alford.

3 3. Trial counsel failed to ensure that the trial
4 court conversed petitioner as to the elements of the
5 offense and as to a factual basis for a Alford plea
6 to Attempt Grand Larceny before petitioner entered a
7 Alford plea. Where, as here, there was no factual basis
8 as the charge Attempt Grand Larceny was dismissed
9 at conclusion of preliminary hearing after the present-
10 ation of all the evidence by Justice Court magistrate
11 as the elements of the crime was not proven and
12 there was no corpus delicti, mens rea, slight or
13 marginal evidence of guilt.

14 4. Petitioner's decision to plead Alford was the
15 result of coercion by trial counsel and state prosecutor.
16 Where as here the evidence was false and without
17 probable cause and the agreement was for a gross-
18 misdemeanor no more evident than the 30 days
19 in Clark County detention center with 30 days credit
20 for time served and no time period of probation to
21 be served with no suspended sentence.

22 5. Trial counsel's failure to move to dismiss or
23 seek a bill of particulars to the information and
24 amended information constituted constitutionally
25 deficient performance. Where, as here the information
26 for the charge of Burglary was void as the intent
27 of Attempt Grand Larceny had been dismissed and

1 intent is an essential element of Burglary and the
2 charge could not be proven beyond a reasonable
3 doubt as describe by the state in its filed information
4 the charge of attempt grand larceny in the state's
5 filed amended information was without probable
6 cause and lack the essential elements of value of
7 \$1500 or greater and expectation, so the charge
8 could not be proven beyond a reasonable doubt.

9 6. Trial counsel failed to object to inaccurate
10 material in the presentence investigation report utilized
11 by the court at the time of sentencing. Where, as
12 here, the Burglary conviction in the year 2016 was not
13 prior to the instant charge of attempt grand larceny
14 committed in the year 2013, and should not have been
15 on P.S.I report that had many inaccuracies that
16 was cognizably argued in petitioner's amended
17 petition.

18 7. Trial counsel failed to submit to the
19 sentencing court the existing U.S. Supreme Court
20 precedent which cast serious doubt on the legality
21 of imposing consecutive sentences. Where, as here,
22 crimes of "attempt" can never be run consecutive and
23 the conviction of attempt grand larceny occurred
24 three years prior to the Burglary conviction

25 8. Trial counsel failed to challenge the
26 sufficiency of the information and amended information
27 charging petitioner with Burglary and Attempt Grand Larceny.

1 9. Trial counsel's unreasonable failure to
2 meaningfully investigate petitioner's actual innocence.

3 10. Petitioner was denied effective assistance
4 of counsel when counsel failed to properly advise
5 him the consequences of his Afford plea.

6 11. Petitioner was denied rights to the
7 effective assistance of counsel when counsel failed
8 to consult with him regarding his right to an appeal
9 and failed to file a notice of appeal on his behalf,
10 and counsel was dismissed by district court judge
11 William Keppert prior to the perfection of petitioner's
12 direct appeal leaving petitioner without counsel
13 throughout the appeal process.

14 12. Petitioner was denied effective assistance
15 of counsel when trial counsel failed to have the correct
16 amount of credit for presentence confinement applied
17 to petitioner's ultimate sentence pursuant to NRS
18 176.055; *Mays v. Dist Court* 901 P.2d 643; *Johnson v.*
19 *State* 89 P.3d 669. Where, as here, petitioner should have
20 received credit from the time his bond was
21 exonerated at conclusion of preliminary hearing to
22 the day of sentencing for the charge of Attempt
23 grand larceny and credit may not be denied to petitioner.

24 All allegations of ineffective assistance of counsel
25 contained in this ground cannot reasonably be presumed
26 to be the result of any tactical or strategic choice
27 within the range of reasonable attorney competence.

1 Neither, the defects were the results of counsel lack
2 of preparation, experience, knowledge of pertinent
3 laws, and skill. Cumulative and singularly counsel's
4 failures resulted in prejudice to petitioner.

5 C. State's response was belied and repelled
6 by the law and the facts.

7 1. Petitioner's Amended petition was not
8 procedurally barred under NRS chapter 34 as
9 second or successive when petitioner has never
10 had determination on the merits of his claims
11

12 2. All petitioner's claims in his amended
13 petition was based on ineffective assistance of
14 counsel or involuntarily or unknowingly entered,
15 and any procedural bars claimed by the state was
16 overcome by a showing of good cause and prejudice
17 or as a fundamental miscarriage of justice.
18

19 3. Petitioner fundamental miscarriage of
20 justice was based on FACTUAL INNOCENCE not
21 mere legal insufficiency and it is more likely
22 than not that no reasonable juror would have
23 convicted petitioner absent a constitutional violation.
24 Where as here there was no probable cause for
25 the charge of ~~attempt~~ grand larceny after all the
26 evidence presented at preliminary hearing, and
27
28

-CONT-

the state's charging information for Burglary was without
an intent leaving it fatal and unable to be proven
beyond a reasonable doubt.

4. State law Double Jeopardy violation per
NRS 174.085(3); NRS 178.522(1); NRS 174.145, 34.520
as an information cannot be amended so as to charge
an offense not shown by the evidence taken at the
preliminary hearing, nor permit the court to order the
amendment of an information to restate a charge that
has been dismissed by the magistrate at the preliminary
hearing. *Thompson v. State* 221 P.3d. 708

5. State breach guilty plea agreement on
impalpable and highly suspect evidence on a misplace
ruling of probable cause when victim's own sworn
testimony was that petitioner was not the perpetrator
and no one entered said room only stood in doorway
said sorry and left without incident.

6. The state's response contains glaring factual
errors that affected the court's considerations along
with legal errors that prejudice the petitioner relying on
a recitation of the facts which ignores all evidence and
inferences contrary to the verdict.

For the foregoing reasons, petitioner James H. Hayes prays
that this court grant "Petition for Recusal" and that upon
recusal, he be discharged from his unlawful conviction
and sentence.

James H. Hayes
James H. Hayes # 1175022
Defendant / In PRO PER

CERTIFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this
day of _____, 20____, I mailed a true and correct copy of the foregoing, "Petition for
Reconsider findings of "FACT and Conclusions of Law""
by placing document in a sealed pre-postage paid envelope and deposited said envelope in the
United State Mail addressed to the following:

Clerk County Dist Courts
OFFICE OF THE CLERK
200 LAKE AVE. 2ND FLOOR
LAS VEGAS, NV
89155-1160

Clerk County Dist. Attorney
200 LAKE AVE
LAS VEGAS, NV
89155-2212

Atty General of Nevada
100 N. Carson St
Carson City, NV
89701

CC:FILE

DATED: this _____ day of _____, 20____.

James H. Hayes
James H. Hayes #1125072
/In Propria Personam
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

Hayes, James *1175077
JDC
P.O. Box 208
Indian Springs, NV
89070

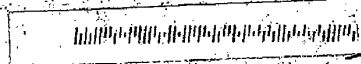
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CLARK COUNTY DISTRICT COURTS
"OFFICE OF THE CLERK"
200 LEWIS AVE, 3RD FLOOR
LAS VEGAS, NEVADA
89155-1160



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A.A.
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03/17/2021

Heather Shuman
CLERK OF THE COURT

1 HAYES, James H # 1175077

2 / In Propria Personam
3 Post Office Box 208 S.D.C.C.
4 Indian Springs, Nevada 89018

5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 James H. Hayes
8 Petitioner
9 v.

10 State of Nevada

HEARING REQUESTED

Case No. A-R-793315-K

Dept No. 3

Docket _____

13
14 NOTICE OF MOTION

15 YOU WILL PLEASE TAKE NOTICE, that Petition for Reconsideration
16 of FINDINGS of "FACTS and CONCLUSIONS of LAW"

17 will come on for hearing before the above-entitled Court on the _____ day of _____, 20____,

18 at the hour of _____ o'clock _____ M. In Department _____, of said Court.

19
20 CC:FILE

21
22 DATED: this 22 day of February, 2021.

23
24 BY: James H. Hayes
25 JAMES H. HAYES # 1175077
/ In Propria Personam

CLERK OF THE COURT

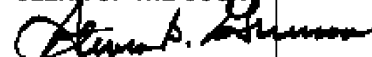
MAR 16 2021

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**DISTRICT COURT
CLARK COUNTY, NEVADA

Electronically Filed
3/17/2021 10:13 AM
Steven D. Grierson
CLERK OF THE COURT



James Hayes, Plaintiff(s) vs. Nevada State of, Defendant(s)	Case No.: A-19-793315-W Department 3
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NOTICE OF HEARING

Please be advised that the Plaintiff's - Petition for Reconsider Findings of "Fact and Conclusion of Law" in the above-entitled matter is set for hearing as follows:

Date: April 29, 2021
Time: Chambers
Location: RJC Courtroom 11C
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES HOWARD HAYES,
aka James Howard Hayes Jr.,
#2796708

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-19-793315-W

C-16-315718-1

DEPT NO: III

**FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER**

DATE OF HEARING: FEBRUARY 1, 2021
TIME OF HEARING: 8:30 AM

THIS CAUSE having come before the Honorable MONICA TRUJILLO, District Court Judge, on the 1st day of February, 2021, the Petitioner not being present, not being represented by counsel, and the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, through STEVEN L. WATERS, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

STATEMENT OF THE CASE

On or about July 23, 2013, James H. Hayes (hereinafter, "Petitioner") was charged by way of Criminal Complaint with one count of BURGLARY (Category B Felony – NRS

1 205.060) and one count of ATTEMPT GRAND LARCENY (Category D Felony/Gross
2 Misdemeanor – NRS 205.220.1, 205.222.2, 193.330). Following a Preliminary Hearing in
3 Justice Court, Las Vegas Township on June 14, 2016, the charge of BURGLARY was bound
4 over to District Court, and the charge of ATTEMPT GRAND LARCENY was dismissed.

5 On June 17, 2016, the State filed an Information with the District Court, charging
6 Petitioner with one count of BURGLARY. On August 29, 2017, the State filed an Amended
7 Notice of Intent to Seek Punishment as a Habitual Criminal. On November 7, 2018, pursuant
8 to a Guilty Plea Agreement (“GPA”), Petitioner entered a plea of Guilty pursuant to North
9 Carolina v. Alford, 400 U.S. 25 (1970) to one count of ATTEMPT GRAND LARCENY. The
10 terms of the GPA are as follows:

11 The State has agreed to make no recommendation at the time of sentencing. The
12 State has no opposition to probation with the only condition being thirty (30)
13 days in the Clark County Detention Center (CCDC), with thirty (30) days credit
for time served.

14 GPA at 1:22-24. The GPA further includes, in pertinent part, the following acknowledgement:

15 I understand and agree that, if...an independent magistrate, by affidavit review,
16 confirms probable cause against me for new criminal charges including reckless
17 driving or DUI, but excluding minor traffic violations, the State will have the
18 unqualified right to argue for any legal sentence and term of confinement
19 allowable for the crime(s) to which I am pleading guilty, including the use of
20 any prior convictions I may have to increase my sentence as a habitual criminal
to five (5) to twenty (20) years, Life without the possibility of parole, Life with
the possibility of parole after ten (10) years, or a definite twenty-five (25) year
term with the possibility of parole after ten (10) years.

21 GPA at 2: 1-9. An Amended Information reflecting the new charge of ATTEMPT GRAND
22 LARCENY was filed in conjunction with the GPA. Petitioner was adjudged Guilty pursuant
23 to Alford that same day, and the sentencing hearing was scheduled for March 6, 2019.

24 On January 31, 2019, the State filed a State’s Notice of Motion and Motion to Revoke
25 Bail, asserting that in Las Vegas Justice Court case number 19F01534X, a Justice of the Peace
26 had found probable cause to charge Petitioner with Burglary for acts committed on or around
27 January 26, 2019. The State’s Motion to Revoke Bail was granted after a hearing on February
28 4, 2019.

1 At the sentencing hearing on March 6, 2019, the State argued that it had regained the
2 right to argue pursuant to the terms of the GPA. The Court agreed, and the State argued that
3 Petitioner should be punished under NRS 207.010 (the “Small Habitual Statute”). The Court
4 agreed, and Petitioner was sentenced to sixty (60) to one hundred seventy-four (174) months
5 in the Nevada Department of Corrections (NDOC), consecutive to Petitioner’s sentence in
6 another case (C315125). The Court also awarded Petitioner ten (10) days credit for time
7 served. The Judgment of Conviction in this case was filed on March 12, 2019.

8 Petitioner filed a Notice of Appeal on March 28, 2019. Petitioner’s Case Appeal
9 Statement was filed on August 9, 2019 (SCN 78590).

10 On April 15, 2019, Petitioner filed a Petition for Writ of Habeas Corpus (“Petition”).
11 Pursuant to Court order, the State filed its Response on June 26, 2019. At the hearing on the
12 Petition on August 19, 2019, the Court noted that Petitioner filed two Addenda to his original
13 Petition (the first on May 7, 2019, and the second on May 9, 2019). Pursuant to the Court’s
14 order, the State filed a Response to the Addenda on October 10, 2019. Petitioner filed a Reply
15 to the State’s Response on November 4, 2019. On November 18, 2019, Petitioner’s Petition
16 came before the Court, at which time the Court took the matter OFF CALENDAR due to
17 Petitioner’s pending appeal.

18 On November 19, 2019, Petitioner filed another Notice of Appeal, appealing the denial
19 of his Coram Nobis motion. His Case Appeal Statement was filed on December 11, 2019 (SCN
20 80222). On August 31, 2020, the Nevada Court of Appeals affirmed the Court’s denial of his
21 Coram Nobis motion. Remittitur issued on October 12, 2020.

22 On January 14, 2020, the Nevada Supreme Court AFFIRMED Petitioner’s Judgment
23 of Conviction in SCN 78590. Remittitur issued on February 25, 2020.

24 On February 12, 2020, Petitioner filed an “Amended Petition for Writ of Habeas
25 Corpus” (his “Amended Petition”). This Court ordered a Response to that Amended Petition
26 on March 4, 2020. Thereafter, on March 6, 2020, Petitioner filed a “Petition: Expeditious
27 Judicial Examination NRS 34.360-34.830” (his “Petition: EJE”). Pursuant to this Court’s

28 //

1 order, the State filed its Response to both filings on April 17, 2020. Petitioner replied to the
2 State's Response on May 15, 2020.

3 On May 15, 2020, Petitioner also filed an "Affidavit of Actual Innocence not Mere
4 Legal Insufficiency but 'Factual Innocence.'" On May 27, 2020, Petitioner filed a
5 Supplemental Petition. While Petitioner's numerous pleadings were pending, Petitioner filed
6 a Motion for Peremptory Challenge of Judge and to Disqualify Judge William Bill Kephart.
7 Thereafter, the State filed its Responses to Petitioner's Affidavit of Actual Innocence and
8 Petitioner's Supplemental Petition on June 10, 2020. As a result of Petitioner's Peremptory
9 Challenge, Petitioner's pending matters were taken off calendar on June 15, 2020. On June
10 29, 2020, Petitioner filed his Reply to the State's Response to Petitioner's Affidavit of Actual
11 Innocence.

12 On July 7, 2020, Chief Judge Linda Bell considered, and denied, Petitioner's Motion
13 for Peremptory Challenge of Judge Kephart. Chief Judge Bell's Decision and Order was filed
14 on July 8, 2020.

15 On July 23, 2020, Petitioner filed his Reply to the State's Response to Petitioner's
16 Supplemental Petition. Petitioner, that same day, filed a Motion for Ruling for Rule 60b
17 Motion for Relief; Motion to Vacate; Amended Petition for Writ of Habeas Corpus. The State
18 filed its Response to Petitioner's Motion for Ruling on September 2, 2020. Petitioner's Motion
19 for Ruling was denied on September 9, 2020.

20 On September 25, 2020, Petitioner filed a Motion for Expeditious Ruling for "Amended
21 Petition for Writ of Habeas Corpus" 3rd Request. On October 7, 2020, he filed a Motion to
22 Set Evidentiary Hearing and Issue Transport Order. On October 14, 2020, Petitioner filed a
23 Motion to Reconsider Order Denying Motion for Ruling for Rule 60b Motion for Relief;
24 Motion to Vacate; Amended Petition for Writ of Habeas Corpus. The State filed responsive
25 pleadings to each of Petitioner's respective filings on November 10, 2020. On November 16,
26 2020, the Court considered, and denied, Petitioner's three Motions. The Court's Order was
27 filed on November 21, 2020.

28 //

1 On December 22, 2020, Petitioner filed the instant "Motion to Compel Judgment
2 Pursuant to Nevada Revised Statutes Chapter 34 FRCP Rule 12(c) for Amended Petition for
3 Writ of Habeas Corpus." The State filed its Response to the instant Motion to Compel on
4 January 27, 2021.

5 On February 1, 2021, this matter came on for hearing before this Court. This Court did
6 not accept argument at the time of hearing, but made the following findings and conclusions:

7 **ANALYSIS**

8 **I. PETITIONER'S RELIANCE UPON THE FEDERAL RULES OF CIVIL**
9 **PROCEDURE IS INAPPROPRIATE**

10 In support of his instant Motion, Petitioner cites to Federal Rule of Civil Procedure
11 12(c). Instant Motion at 1, 3. However, this Court finds that Petitioner's reliance upon that
12 Rule is improper, as Nevada law clearly details that even the *Nevada* Rules of Civil Procedure
13 only apply in the instant proceedings to the extent that they are not inconsistent with Nevada
14 statutes guiding habeas proceedings. See, NRS 34.780(1); State v. Powell, 122 Nev. 751, 757,
15 138 P.3d 453, 457 (2006); Mazzan v. State, 109 Nev. 1067, 1072, 863 P.2d 1035, 1038 (1993).
16 This Court finds that Petitioner has not offered any rational, much less justification, for his
17 reliance upon the Federal Rule. Therefore, this Court concludes that Petitioner's reliance
18 thereon does not provide relevant support for the relief Petitioner seeks.

19 **II. PETITIONER'S DECISION TO ENTER A GUILTY PLEA RENDERED THE**
20 **PRELIMINARY HEARING RESULT IRRELEVANT**

21 The Nevada Supreme Court has explained that objections to the filing of an Amended
22 Information are waived when they are not asserted in pretrial motions, nor on direct appeal
23 from conviction. Roseneau v. State, 90 Nev. 161, 521 P.2d 369 (1974); NRS 174.105. A
24 review of Petitioner's entry of plea demonstrates that not only did Petitioner fail to object to
25 the Amended Information (charging Petitioner with Attempt Grand Larceny), but Petitioner
26 requested that the Court accept that filing, and Petitioner's guilty plea to the charge contained
27 therein:

28 //

1 THE COURT: Mr. Hayes, I've been handed a copy of an amended
information in this case. Have you received a copy of that?

2 THE DEFENDANT: Yes sir.

3 THE COURT: Do you have any objection of it being filed here today?

4 THE DEFENDANT: No, sir.

5 ...

6 THE COURT: ...So how do you plead to the amended information that
charges you with attempt grand larceny that took place on or about the 9th day
7 of April, 2013 while you're here in Las Vegas, Clark County, Nevada, where
you willfully and lawfully and feloniously and intentionally deprived the owner
8 permanently, thereof, by attempting to steal, take or carry away lawful money
of the United States, \$650 or greater, owned by a Joshua Jarvis. And you -- by
9 doing this you were attempting to steal lawful money and an iPhone from Joshua
Jarvis. How do you plead to that?

10 THE DEFENDANT: Guilty by the way of *Alford*.

11
12 Recorder's Transcript of Hearing, dated November 7, 2018 (filed September 25, 2019 in Case
13 No. C-16-315718-1), at 2, 5.

14 This Court finds that Petitioner not only understood the Amended Information, and the
15 charge contained therein, but further asked the Court to accept the same. Therefore, this Court
16 concludes that Petitioner waived any future challenge to that charge and document.

17 **ORDER**

18 THEREFORE, Court ORDERED, because Petitioner James H. Hayes has failed to
19 provide any relevant legal basis for the relief he now seeks, Petitioner's instant Motion to
20 Compel shall be, and is, DENIED.

Dated this 17th day of March, 2021

21 DATED this _____ day of February, 2021.

22 
23 DISTRICT COURT JUDGE

24 Respectfully submitted,
25 STEVEN B. WOLFSON
Clark County District Attorney
26 Nevada Bar #001565

BB9 076 8B3E 35C3
Monica Trujillo
District Court Judge

27 BY /s/ JONATHAN VANBOSKERCK
28 JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

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CERTIFICATE OF SERVICE

I hereby certify that service of the State's Findings of Fact, Conclusions of Law, and Order was made this 26th day of February, 2021, by mail to:

JAMES HAYES, #1175077
SOUTHERN DESERT CORRECTIONAL CENTER
P.O. BOX 208
INDIAN SPRINGS, NV 89070

BY: /s/ E. GOMEZ
Employee of the District Attorney's Office

13F10723X/JVB/jj/L1

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 James Hayes, Plaintiff(s)

CASE NO: A-19-793315-W

7 vs.

DEPT. NO. Department 3

8 Nevada State of, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the
13 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

14 Service Date: 3/17/2021

15 Melissa Boudreaux

mezama@clarkcountynv.gov

1 HOYES, James H #1175077
2 In Propria Personam
3 Post Office Box 208, S.D.C.C.
4 Indian Springs, Nevada 89018

FILED

MAR 18 2021

Elizabeth A. Brown
CLERK OF COURT

5 IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF CLARK

7
8 State of Nevada

9
10 Plaintiff,

11 vs.

12 JAMES H. HOYES

13 Defendant.

HEARING REQUESTED

Case No. A-19-793315-W

Dept. No. 3

Docket _____

14
15
16 **NOTICE OF APPEAL**

17 NOTICE IS HEREBY GIVEN, That the Petitioner/Defendant,
18 JAMES H. HOYES, in and through his proper person, hereby
19 appeals to the Supreme Court of Nevada from the ORDER denying and/or
20 dismissing the

21 Petition (Amended) for Writ of Habeas Corpus

22
23 ruled on the 1 day of February, 2021.

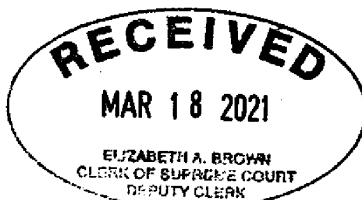
A-19-793315-W
NOASC
Notice of Appeal (criminal)
4950062



24
25 Dated this 8th day of March, 2021.

26 Respectfully Submitted,

27 James H. Hoyes



28 RECEIVED
APPEALS

APR - 6 2021

CLERK OF THE COURT

CERTIFICATE OF SERVICE BY MAILING

I, JAMES H. HUBBS, hereby certify, pursuant to NRCP 5(b), that on this 8th day of MARCH, 2021, I mailed a true and correct copy of the foregoing, "NOTICE of APPEAL Amended Petition for writ of HABEAS CORPUS" by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

CLERK OF THE COURT
CLERK COUNTY DIST CT
200 LEWIS AVE. 310 91
LAS VEGAS, NV
89135-1160

CLERK COUNTY DIST. APPLS
200 LEWIS AVE
LAS VEGAS, NV
89135-2212

ATTORNEY GENERAL of Nev.
100 N. ORSON ST.
CARSON CITY, NV
89701

SUPREME COURT of Nevada
201 SOUTH CHEYENNE ST., STE 201
CARSON CITY, NV
89701

CC:FILE

DATED: this 8th day of MARCH, 2021.

James H. Hubbs
James H. Hubbs #1175072
/s/ Propria Personam
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

A-19-793315-W

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

February 01, 2021

A-19-793315-W James Hayes, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

February 01, 2021 8:30 AM Motion to Compel

HEARD BY: Trujillo, Monica

COURTROOM: RJC Courtroom 11C

COURT CLERK: Grecia Snow

RECORDER: Rebeca Gomez

PARTIES

PRESENT: Waters, Steven L Attorney

JOURNAL ENTRIES

- COURT ORDERED, Motion to Compel DENIED for the reasons stated in the State's response. State to prepare the order. Court noted as to the prior Amended Petition for Writ no order had been filed. COURT FURTHER ORDERED, Amended Petition for Writ DENIED. State to prepare the order as to findings of fact and conclusion of law consistent with the State's response.

NDC

CLERK'S NOTE: The above minute order has been distributed to: James Hayes #1175077, P.O. BOX 208, Indian Springs, Nevada 89070. /// 2/16/21 gs

PRINT DATE: 02/16/2021

Page 1 of 1

Minutes Date: February 01, 2021

1 **E. Petitioner's Claim Against Entry of his Guilty Plea is Belied by the Record**

2 Petitioner's final claim is that his guilty plea was not knowingly and voluntarily
3 entered, as he alleges that he did not understand the consequences of a breach of the agreement.
4 Amended Petition at 22. Again, this Court finds that Petitioner's claim is belied by the record.

5 Contrary to Petitioner's assertion that he believed he would simply go to trial if he
6 violated the terms of the GPA (see, Amended Petition at 23), this Court finds that the plain
7 language of the GPA sets forth that, upon a breach, "the State will have the unqualified right
8 to argue for any legal sentence and term of confinement..." GPA at 2. As stated *supra*, the
9 Court thoroughly canvassed Petitioner and determined that Petitioner understood the terms of
10 the GPA. See, Section II(A), *supra*. This Court further finds that Petitioner's claim that he was
11 unaware that a sentence as a habitual criminal was possible is belied, as the State Noticed its
12 Intent to Seek Habitual Criminal Treatment on August 29, 2017, and the GPA expressly
13 included the possibility of habitual criminal treatment as a result of Petitioner's breach of the
14 terms of the GPA. GPA at 2.

15 Because Petitioner's claim is expressly belied by the record, this Court concludes that
16 he is not entitled to relief on the same.

17 **ORDER**

18 THEREFORE, Court ORDERED, Petitioner James H. Hayes's Amended Petition for
19 Writ of Habeas Corpus (Post-Conviction) shall be, and is, DENIED.

20 DATED this _____ day of February, 2021.

21
22
23 _____
DISTRICT COURT JUDGE

24 Respectfully submitted,

25 STEVEN B. WOLFSON
26 Clark County District Attorney
Nevada Bar #001565

27 BY /s/ JONATHAN VANBOSKERCK
28 JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

Buy #1172274
50cc
P.O. Box 228
Federal Springs, NV
89102

8/5 #

Supreme Court of Nevada
"Office of the Clerk"

201 South Carson Street, Suite 201

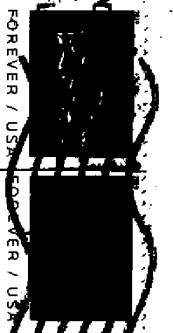
Carson City, Nevada

83701-478051

83701

Legal Mail

LAS VEGAS NV 890
MAR 16 2021 PM 4



OUTGOING MAIL
MAR 16 2021
SOUTHERN DESERT
CORRECTIONAL CENTER

Hayes, James H. 1175077
Petitioner/In Propria Persona
Post Office Box 208, SDCC
Indian Springs, Nevada 89070-0208

FILED

MAR 18 2021

Sharon A. Spence
CLERK OF COURT

IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF Clark

State of Nevada

Plaintiff,

vs.

James H. Hayes

Defendant.

CASE No.

A-19-793315-W

DEPT.No.

3

DESIGNATION OF RECORD ON APPEAL

TO:

A-19-793315-W
DROA
Designation of Record on Appeal
4960063



The above-named Plaintiff hereby designates the entire record of the above-entitled case, to include all the papers, documents, pleadings, and transcripts thereof, as and for the Record on Appeal.

DATED this 8th day of March, 2021.

RESPECTFULLY SUBMITTED BY:

James H. Hayes
James H. Hayes # 1175077

Plaintiff/In Propria Persona

RECEIVED
APPEALS

APR - 6 2021

CLERK OF THE COURT



1 NEFF

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4 JAMES HAYES,

5
6 Petitioner,

Case No: A-19-793315-W

Dept No: III

7 vs.

8 STATE OF NEVADA,

9 Respondent,

NOTICE OF ENTRY OF FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

10
11 PLEASE TAKE NOTICE that on March 17, 2021, the court entered a decision or order in this matter, a
true and correct copy of which is attached to this notice.

12 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
13 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
14 mailed to you. This notice was mailed on March 19, 2021.

15 STEVEN D. GRIERSON, CLERK OF THE COURT

16 /s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

17
18
19 CERTIFICATE OF E-SERVICE / MAILING

20 I hereby certify that on this 19 day of March 2021, I served a copy of this Notice of Entry on the
following:

21 ☒ By e-mail:

22 Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

23
24 ☒ The United States mail addressed as follows:

25 James Hayes # 1175077
P.O. Box 208
Indian Springs, NV 89070

26
27 /s/ Amanda Hampton

28 Amanda Hampton, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES HOWARD HAYES,
aka James Howard Hayes Jr.,
#2796708

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-19-793315-W

C-16-315718-1

DEPT NO: III

**FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER**

DATE OF HEARING: FEBRUARY 1, 2021
TIME OF HEARING: 8:30 AM

THIS CAUSE having come before the Honorable MONICA TRUJILLO, District Court Judge, on the 1st day of February, 2021, the Petitioner not being present, not being represented by counsel, and the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, through STEVEN L. WATERS, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

STATEMENT OF THE CASE

On or about July 23, 2013, James H. Hayes (hereinafter, "Petitioner") was charged by way of Criminal Complaint with one count of BURGLARY (Category B Felony – NRS

1 205.060) and one count of ATTEMPT GRAND LARCENY (Category D Felony/Gross
2 Misdemeanor – NRS 205.220.1, 205.222.2, 193.330). Following a Preliminary Hearing in
3 Justice Court, Las Vegas Township on June 14, 2016, the charge of BURGLARY was bound
4 over to District Court, and the charge of ATTEMPT GRAND LARCENY was dismissed.

5 On June 17, 2016, the State filed an Information with the District Court, charging
6 Petitioner with one count of BURGLARY. On August 29, 2017, the State filed an Amended
7 Notice of Intent to Seek Punishment as a Habitual Criminal. On November 7, 2018, pursuant
8 to a Guilty Plea Agreement (“GPA”), Petitioner entered a plea of Guilty pursuant to North
9 Carolina v. Alford, 400 U.S. 25 (1970) to one count of ATTEMPT GRAND LARCENY. The
10 terms of the GPA are as follows:

11 The State has agreed to make no recommendation at the time of sentencing. The
12 State has no opposition to probation with the only condition being thirty (30)
13 days in the Clark County Detention Center (CCDC), with thirty (30) days credit
for time served.

14 GPA at 1:22-24. The GPA further includes, in pertinent part, the following acknowledgement:

15 I understand and agree that, if...an independent magistrate, by affidavit review,
16 confirms probable cause against me for new criminal charges including reckless
17 driving or DUI, but excluding minor traffic violations, the State will have the
18 unqualified right to argue for any legal sentence and term of confinement
19 allowable for the crime(s) to which I am pleading guilty, including the use of
20 any prior convictions I may have to increase my sentence as a habitual criminal
to five (5) to twenty (20) years, Life without the possibility of parole, Life with
the possibility of parole after ten (10) years, or a definite twenty-five (25) year
term with the possibility of parole after ten (10) years.

21 GPA at 2: 1-9. An Amended Information reflecting the new charge of ATTEMPT GRAND
22 LARCENY was filed in conjunction with the GPA. Petitioner was adjudged Guilty pursuant
23 to Alford that same day, and the sentencing hearing was scheduled for March 6, 2019.

24 On January 31, 2019, the State filed a State’s Notice of Motion and Motion to Revoke
25 Bail, asserting that in Las Vegas Justice Court case number 19F01534X, a Justice of the Peace
26 had found probable cause to charge Petitioner with Burglary for acts committed on or around
27 January 26, 2019. The State’s Motion to Revoke Bail was granted after a hearing on February
28 4, 2019.

1 At the sentencing hearing on March 6, 2019, the State argued that it had regained the
2 right to argue pursuant to the terms of the GPA. The Court agreed, and the State argued that
3 Petitioner should be punished under NRS 207.010 (the "Small Habitual Statute"). The Court
4 agreed, and Petitioner was sentenced to sixty (60) to one hundred seventy-four (174) months
5 in the Nevada Department of Corrections (NDOC), consecutive to Petitioner's sentence in
6 another case (C315125). The Court also awarded Petitioner ten (10) days credit for time
7 served. The Judgment of Conviction in this case was filed on March 12, 2019.

8 Petitioner filed a Notice of Appeal on March 28, 2019. Petitioner's Case Appeal
9 Statement was filed on August 9, 2019 (SCN 78590).

10 On April 15, 2019, Petitioner filed a Petition for Writ of Habeas Corpus ("Petition").
11 Pursuant to Court order, the State filed its Response on June 26, 2019. At the hearing on the
12 Petition on August 19, 2019, the Court noted that Petitioner filed two Addenda to his original
13 Petition (the first on May 7, 2019, and the second on May 9, 2019). Pursuant to the Court's
14 order, the State filed a Response to the Addenda on October 10, 2019. Petitioner filed a Reply
15 to the State's Response on November 4, 2019. On November 18, 2019, Petitioner's Petition
16 came before the Court, at which time the Court took the matter OFF CALENDAR due to
17 Petitioner's pending appeal.

18 On November 19, 2019, Petitioner filed another Notice of Appeal, appealing the denial
19 of his Coram Nobis motion. His Case Appeal Statement was filed on December 11, 2019 (SCN
20 80222). On August 31, 2020, the Nevada Court of Appeals affirmed the Court's denial of his
21 Coram Nobis motion. Remittitur issued on October 12, 2020.

22 On January 14, 2020, the Nevada Supreme Court AFFIRMED Petitioner's Judgment
23 of Conviction in SCN 78590. Remittitur issued on February 25, 2020.

24 On February 12, 2020, Petitioner filed an "Amended Petition for Writ of Habeas
25 Corpus" (his "Amended Petition"). This Court ordered a Response to that Amended Petition
26 on March 4, 2020. Thereafter, on March 6, 2020, Petitioner filed a "Petition: Expeditious
27 Judicial Examination NRS 34.360-34.830" (his "Petition: EJE"). Pursuant to this Court's

28 //

1 order, the State filed its Response to both filings on April 17, 2020. Petitioner replied to the
2 State's Response on May 15, 2020.

3 On May 15, 2020, Petitioner also filed an "Affidavit of Actual Innocence not Mere
4 Legal Insufficiency but 'Factual Innocence.'" On May 27, 2020, Petitioner filed a
5 Supplemental Petition. While Petitioner's numerous pleadings were pending, Petitioner filed
6 a Motion for Peremptory Challenge of Judge and to Disqualify Judge William Bill Kephart.
7 Thereafter, the State filed its Responses to Petitioner's Affidavit of Actual Innocence and
8 Petitioner's Supplemental Petition on June 10, 2020. As a result of Petitioner's Peremptory
9 Challenge, Petitioner's pending matters were taken off calendar on June 15, 2020. On June
10 29, 2020, Petitioner filed his Reply to the State's Response to Petitioner's Affidavit of Actual
11 Innocence.

12 On July 7, 2020, Chief Judge Linda Bell considered, and denied, Petitioner's Motion
13 for Peremptory Challenge of Judge Kephart. Chief Judge Bell's Decision and Order was filed
14 on July 8, 2020.

15 On July 23, 2020, Petitioner filed his Reply to the State's Response to Petitioner's
16 Supplemental Petition. Petitioner, that same day, filed a Motion for Ruling for Rule 60b
17 Motion for Relief; Motion to Vacate; Amended Petition for Writ of Habeas Corpus. The State
18 filed its Response to Petitioner's Motion for Ruling on September 2, 2020. Petitioner's Motion
19 for Ruling was denied on September 9, 2020.

20 On September 25, 2020, Petitioner filed a Motion for Expeditious Ruling for "Amended
21 Petition for Writ of Habeas Corpus" 3rd Request. On October 7, 2020, he filed a Motion to
22 Set Evidentiary Hearing and Issue Transport Order. On October 14, 2020, Petitioner filed a
23 Motion to Reconsider Order Denying Motion for Ruling for Rule 60b Motion for Relief;
24 Motion to Vacate; Amended Petition for Writ of Habeas Corpus. The State filed responsive
25 pleadings to each of Petitioner's respective filings on November 10, 2020. On November 16,
26 2020, the Court considered, and denied, Petitioner's three Motions. The Court's Order was
27 filed on November 21, 2020.

28 //

1 On December 22, 2020, Petitioner filed the instant "Motion to Compel Judgment
2 Pursuant to Nevada Revised Statutes Chapter 34 FRCP Rule 12(c) for Amended Petition for
3 Writ of Habeas Corpus." The State filed its Response to the instant Motion to Compel on
4 January 27, 2021.

5 On February 1, 2021, this matter came on for hearing before this Court. This Court did
6 not accept argument at the time of hearing, but made the following findings and conclusions:

7 **ANALYSIS**

8 **I. PETITIONER'S RELIANCE UPON THE FEDERAL RULES OF CIVIL**
9 **PROCEDURE IS INAPPROPRIATE**

10 In support of his instant Motion, Petitioner cites to Federal Rule of Civil Procedure
11 12(c). Instant Motion at 1, 3. However, this Court finds that Petitioner's reliance upon that
12 Rule is improper, as Nevada law clearly details that even the *Nevada* Rules of Civil Procedure
13 only apply in the instant proceedings to the extent that they are not inconsistent with Nevada
14 statutes guiding habeas proceedings. See, NRS 34.780(1); State v. Powell, 122 Nev. 751, 757,
15 138 P.3d 453, 457 (2006); Mazzan v. State, 109 Nev. 1067, 1072, 863 P.2d 1035, 1038 (1993).
16 This Court finds that Petitioner has not offered any rational, much less justification, for his
17 reliance upon the Federal Rule. Therefore, this Court concludes that Petitioner's reliance
18 thereon does not provide relevant support for the relief Petitioner seeks.

19 **II. PETITIONER'S DECISION TO ENTER A GUILTY PLEA RENDERED THE**
20 **PRELIMINARY HEARING RESULT IRRELEVANT**

21 The Nevada Supreme Court has explained that objections to the filing of an Amended
22 Information are waived when they are not asserted in pretrial motions, nor on direct appeal
23 from conviction. Roseneau v. State, 90 Nev. 161, 521 P.2d 369 (1974); NRS 174.105. A
24 review of Petitioner's entry of plea demonstrates that not only did Petitioner fail to object to
25 the Amended Information (charging Petitioner with Attempt Grand Larceny), but Petitioner
26 requested that the Court accept that filing, and Petitioner's guilty plea to the charge contained
27 therein:

28 //

1 THE COURT: Mr. Hayes, I've been handed a copy of an amended
information in this case. Have you received a copy of that?

2 THE DEFENDANT: Yes sir.

3 THE COURT: Do you have any objection of it being filed here today?

4 THE DEFENDANT: No, sir.

5 ...

6 THE COURT: ...So how do you plead to the amended information that
charges you with attempt grand larceny that took place on or about the 9th day
7 of April, 2013 while you're here in Las Vegas, Clark County, Nevada, where
you willfully and lawfully and feloniously and intentionally deprived the owner
8 permanently, thereof, by attempting to steal, take or carry away lawful money
of the United States, \$650 or greater, owned by a Joshua Jarvis. And you -- by
9 doing this you were attempting to steal lawful money and an iPhone from Joshua
Jarvis. How do you plead to that?

10 THE DEFENDANT: Guilty by the way of *Alford*.

11
12 Recorder's Transcript of Hearing, dated November 7, 2018 (filed September 25, 2019 in Case
13 No. C-16-315718-1), at 2, 5.

14 This Court finds that Petitioner not only understood the Amended Information, and the
15 charge contained therein, but further asked the Court to accept the same. Therefore, this Court
16 concludes that Petitioner waived any future challenge to that charge and document.

17 **ORDER**

18 THEREFORE, Court ORDERED, because Petitioner James H. Hayes has failed to
19 provide any relevant legal basis for the relief he now seeks, Petitioner's instant Motion to
20 Compel shall be, and is, DENIED.

Dated this 17th day of March, 2021

21 DATED this _____ day of February, 2021.

22 
23 _____
DISTRICT COURT JUDGE

24 Respectfully submitted,
25 STEVEN B. WOLFSON
Clark County District Attorney
26 Nevada Bar #001565

BB9 076 8B3E 35C3
Monica Trujillo
District Court Judge

27 BY /s/ JONATHAN VANBOSKERCK
28 JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

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CERTIFICATE OF SERVICE

I hereby certify that service of the State's Findings of Fact, Conclusions of Law, and Order was made this 26th day of February, 2021, by mail to:

JAMES HAYES, #1175077
SOUTHERN DESERT CORRECTIONAL CENTER
P.O. BOX 208
INDIAN SPRINGS, NV 89070

BY: /s/ E. GOMEZ
Employee of the District Attorney's Office

13F10723X/JVB/jj/L1

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 James Hayes, Plaintiff(s)

CASE NO: A-19-793315-W

7 vs.

DEPT. NO. Department 3

8 Nevada State of, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the
13 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

14 Service Date: 3/17/2021

15 Melissa Boudreaux

mezama@clarkcountynv.gov

Heavenly. Shinn
CLERK OF THE COURT

HAYES, JAMES H
NDOC No. 1175077
JDOC P.O. Box 208

In proper person

IN THE 8th JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE
COUNTY OF CLARK

JAMES H. HAYES)
)
Petitioner,)
v.)
)
STATE OF NEVADA)
Respondent.)
)

Case No. A-19-793315-1W

Dept. No. 3

MOTION AND ORDER FOR TRANSPORTATION
OF INMATE FOR COURT APPEARANCE
OR, IN THE ALTERNATIVE,

FOR APPEARANCE BY TELEPHONE OR VIDEO CONFERENCE

RECEIVED
MAR 19 2021
CLERK OF THE COURT
Petitioner, JAMES H. HAYES, proceeding pro se, requests
that this Honorable Court order transportation for his personal appearance or, in the
alternative, that he be made available to appear by telephone or by video conference
at the hearing in the instant case that is scheduled for April 12, 2021
at 8:30 AM.

1 In support of this Motion, I allege the following:

2 1. I am an inmate incarcerated at Southern Desert Correctional Ctr

3 My mandatory release date is 10-4-2026.

4
5 2. The Department of Corrections is required to transport offenders to and
6
7 from Court if an inmate is required or requests to appear before a Court in this state.

8
9 NRS 209.274 Transportation of Offender to Appear Before Court states:

10 "1. Except as otherwise provided in this section, when an offender is
11 required or requested to appear before a Court in this state, the
12 Department shall transport the offender to and from Court on the day
13 scheduled for his appearance.

14 2. If notice is not provided within the time set forth in NRS 50.215, the
15 Department shall transport the offender to Court on the date scheduled
16 for his appearance if it is possible to transport the offender in the usual
17 manner for the transportation of offenders by the Department. If it is
18 not possible for the Department to transport the offender in the usual
19 manner:

20 (a) The Department shall make the offender available on the date scheduled
21 for his appearance to provide testimony by telephone or by video conference,
22 if so requested by the Court.

23 (b) The Department shall provide for special transportation of the offender to
24 and from the Court, if the Court so orders. If the Court orders special
25 transportation, it shall order the county in which the Court is located to
26 reimburse the Department for any cost incurred for the special transportation.

27 (c) The Court may order the county sheriff to transport the offender to and
28 from the Court at the expense of the county."

29 3. My presence is required at the hearing because:

1 ☐ I AM NEEDED AS A WITNESS.

2 My petition raises substantial issues of fact concerning events in which I
3 participated and about which only I can testify. *See U.S. v. Hayman*, 342 U.S.
4 205 (1952) (District Court erred when it made findings of fact concerning
5 Hayman's knowledge and consent to his counsel's representation of a witness
6 against Hayman without notice to Hayman or Hayman's presence at the
7 evidentiary hearing).

8 ☒ THE HEARING WILL BE AN EVIDENTIARY HEARING.

9 My petition raises material issues of fact that can be determined only in my
10 presence. *See Walker v. Johnston*, 312 U.S. 275 (1941) (government's contention
11 that allegations are improbable and unbelievable cannot serve to deny the
12 petitioner an opportunity to support them by evidence). The Nevada
13 Supreme Court has held that the presence of the petitioner for habeas corpus
14 relief is required at any evidentiary hearing conducted on the merits of the
15 claim asserted in the petition. *See Gebers v. Nevada*, 118 Nev. 500 (2002).

16 4. The prohibition against ex parte communication requires that I be present
17 at any hearing at which the state is present and at which issues concerning the claims
18 raised in my petition are addressed. U.S. Const. amends. V, VI.

19 5. If a person incarcerated in a state prison is required or is requested to
20 appear as a witness in any action, the Department of Corrections must be notified in
21 writing not less than 7 business days before the date scheduled for his appearance in
22 Court if the inmate is incarcerated in a prison located not more than 40 miles from
23 Las Vegas. NRS 50.215(4). If a person is incarcerated in a prison located 41 miles or
24 more from Las Vegas, the Department of Corrections must be notified in writing not
25 less than 14 business days before the date scheduled for the person's appearance in
26 Court.

27 6. Southern Desert Correctional Ctr. is located approximately
28 25-30 miles from Las Vegas, Nevada.

1 7. If there is insufficient time to provide the required notice to the Department
2 of Corrections for me to be transported to the hearing, I respectfully request that this
3 Honorable Court order the Warden to make me available on the date of the
4 scheduled appearance, by telephone, or video conference, pursuant to NRS
5 209.274(2)(a), so that I may provide relevant testimony and/or be present for the
6 evidentiary hearing.

7 8. The rules of the institution prohibit me from placing telephone calls from
8 the institution, except for collect calls, unless special arrangements are made with
9 prison staff. Nev. Admin. Code DOC 718.01. However, arrangements for my
10 telephone appearance can be made by contacting the following staff member at my
11 institution: MR. HUTCHINSON, WARDEN,
12 whose telephone number is _____

13
14 Dated this 19th day of March, 2021.

15 James H. Hayes
16

17
18 JAMES H. HAYES #1175077
19
20
21
22
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CERTIFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 19th
day of March, 2021, I mailed a true and correct copy of the foregoing, "Motion and
Order for Transportation of inmate for court appearance"
by placing document in a sealed pre-postage paid envelope and deposited said envelope in the
United State Mail addressed to the following:

Clerk, County Dist Courts
Office of the Clerk
200 LAUREL AVE
LAS VEGAS, NV
89133-1160

Clerk County District Atty
200 LAUREL AVE
LAS VEGAS, NV
89133-2212

CC:FILE

DATED: this 19th day of March, 2021.

James H. Hayes
#1135032
/In Propria Personam
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

Hayes, James #1175071
SDCC
P.O. Box 208
Indian Springs, NV
89070

Clark County District Courts
"Office of the Clerk"
200 Lewis Ave; 3rd Floor
LAS VEGAS, Nevada
89155-1160

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1 ASTA

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6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**

9 JAMES H. HAYES,

10 Plaintiff(s),

11 vs.

12
13 STATE OF NEVADA; WARDEN JERRY
14 HOWELL,

15 Defendant(s),

Case No: A-19-793315-W

Dept No: III

16
17 **CASE APPEAL STATEMENT**

18 1. Appellant(s): James H. Hayes

19 2. Judge: Monica Trujillo

20 3. Appellant(s): James H. Hayes

21 Counsel:

22 James H. Hayes #1175077
23 P.O. Box 208
24 Indian Springs, NV 89070

25 4. Respondent (s): State of Nevada; Warden Jerry Howell

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Ave.

Las Vegas, NV 89155-2212

5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A

Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A

6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A

***Expires 1 year from date filed*

Appellant Filed Application to Proceed in Forma Pauperis: Yes,
Date Application(s) filed: June 4, 2020

9. Date Commenced in District Court: April 15, 2019

10. Brief Description of the Nature of the Action: Civil Writ

Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus

11. Previous Appeal: No

Supreme Court Docket Number(s): N/A

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 6 day of April 2021.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: James H. Hayes

Andrew Shuman
CLERK OF THE COURT

1 Hayes, James H # 1175077

2 Defendant In Pro Persona
3 Post Office Box 208 S.D.C.C.
4 Indian Springs, Nevada 89018

5 IN THE 8th JUDICIAL DISTRICT COURT OF
6 THE STATE OF NEVADA IN AND FOR THE
7 COUNTY OF CLARK

8 Case No. A-19-793315-W

9 Dept. No. 3

Docket _____

10 James H. Hayes

11 Petitioner,

12 vs.

13 State of Nevada

14 Respondent

"Supplemental Petition
for Writ of Habeas
Corpus"

15 PETITION : ~~EXPEDITIOUS JUDICIAL EXAMINATION~~
16 (NRS 34.360 - 34.830)

17 Date of Hearing: 5-10-2021

18 Time of Hearing: 8:30 A.M.

19 "ORAL ARGUMENT REQUESTED, Yes ☒ No _____"

20 Comes Now, defendant, James H. Hayes, proceeding in proper
21 person, hereby moves this Honorable Court for its **ORDER** granting petitioner an
22 Expedient Judicial Examination of petitioner's Writ of Habeas Corpus. In addition,
23 to hold an **Evidentiary Hearing** for meaningful Habeas Corpus Judicial Review.
24
25
26
27
28

CLERK OF THE COURT

APR 10 2021

RECEIVED

1 T. DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL WHICH
2 VIOLATES THE UNITED STATES CONSTITUTION, WHICH VIOLATES
3 THE 1st AND 14th AMENDMENTS:

4 A. PETITIONER, JAMES H. ADAMS CLAIMS CLAIM OF INEFFECTIVE
5 ASSISTANCE OF COUNSEL CONSIST OF THREE ELEMENTS: PETITIONER'S
6 HAVE BEEN DEPRIVED OF A CONSTITUTIONAL RIGHT DURING THE
7 CRIMINAL PROCEEDINGS; 2. IT WAS DUE TO COUNSEL ERRORS
8 THAT THE CLAIM OR CONSTITUTIONAL VIOLATION, WAS NOT
9 PERFECTED FOR DIRECT APPEAL, OR COUNSEL FAILED TO RAISE THE
10 CLAIM IN DIRECT APPEAL; 3. PETITIONER WAS PREJUDICED BY THE
11 DEPRIVATION OF THE CONSTITUTIONAL RIGHT

12 B. PETITIONER'S "ATTEMPT" WAS NOT ENTERED KNOW-
13 INGLY, INTELLIGENTLY, AND VOLUNTARILY DUE TO INEFFECTIVE ASSIST-
14 ENCE OF COUNSEL IN VIOLATION OF THE 6th AND 14th AMEND-
15 MENTS AS PETITIONER CANNOT KNOWINGLY AND VOLUNTARILY
16 PLEAD "ATTEMPT" TO SOMETHING THAT IS NOT A CRIME. WHAT IS
17 THE STATE'S AMENDED INFORMATION ALLEGED CONDUCT WAS
18 VERBATIM TO THE STATE'S CRIMINAL COMPLAINT CONDUCT THAT
19 WAS DISMISSED AT CONCLUSION OF PRELIMINARY HEARING FOR
20 LACK OF ADMISSIBLE EVIDENCE, NO CORPUS DELICTI, NO MENS
21 REA, NO SLIGHT OR MARGINAL EVIDENCE OF GUILT FOR THE
22 OFFENSE OF ATTEMPT GRAND LARCENY THAT'S CLEAR AND
23 CONVINCING THAT PETITIONER'S CONDUCT WAS NOT A CRIME,
24 AND NO PROBABLE CAUSE. AS PROBABLE CAUSE MUST SHOW
25 NOT ONLY THAT A CRIME WAS COMMITTED, BUT ALSO THAT
26 THE PARTICULAR DEFENDANT COMMITTED IT. (STOCKS 476 P.2d 469)

27 C. COUNSEL FAILED TO INFORM PETITIONER OF THE

1 elements of the offense of attempt grand larceny to which
2 petitioner pled "Affirm".

3 D. Counsel failed to ensure that the trial
4 court conversed petitioner as to the elements of the offense
5 and as to a factual basis for a "Affirm" plea to attempt
6 grand larceny before petitioner entered his "Affirm" plea.
7 Where, as here, there was no factual basis as the charges
8 of attempt grand larceny was dismissed at conclusion
9 of preliminary hearing after the presentation of all the
10 evidence by Justice Court magistrate as the elements of
11 the crime of attempt grand larceny was not proven. Mr.
12 Hayes cannot knowingly, intelligently, and voluntarily plead
13 "Affirm" to something that is not a crime. (North Carolina v.
14 Afford 400 U.S. 37) SEE EXHIBIT 103

15 E. The conduct upon which the plea was
16 entered did not occur and the Judge and the State knew
17 that the evidence was false and did not justify the
18 statute and without probable cause. SEE EXHIBIT 104 The
19 activities petitioner allegedly engaged in did not constitute
20 criminal activity of attempt grand larceny. What is fact, the State
21 induce petitioner to plead "Affirm" to a non-committed crime
22 by unwittingly convincing the petitioner that the non-
23 criminal conduct for which he was convicted constituted a
24 criminal offense, due to ineffective assistance of counsel.
25 (Lewis v. State 775 P.2d 219)

26 7. State failed to confer jurisdiction and to set
27 forth true facts sufficient to constitute a public offense of
28 attempt grand larceny due to ineffective assistance of counsel

1 what counsel failed to investigate the pertinent laws and
2 history of the case. What in fact, the alleged conduct in the
3 criminal complaint was verbatim to the alleged conduct in
4 the amended information that had been dismissed at
5 conclusion of preliminary hearing by magistrate for lack of
6 probable cause, leaving the judgment fatally defective and the
7 petitioner held under such judgment must be released on
8 habeas corpus. Cause had the petitioner gone to trial, and the
9 facts disclosed by the prosecution failed to bear out the
10 elements of the offense, the jury could not have found the
11 petitioner guilty of attempt grand larceny nor burglary. No
12 set of facts, no mitigating statements of conditions, could
13 warrant the court in passing judgment upon the petitioner
14 for a crime not included within the crime for which the
15 information was filed. It therefore follows that the commitment
16 under which and by reasons of which petitioner is now
17 detained is invalid and void, and petitioner is legally entitled
18 to be discharged. (Guse v. Chief of Police 489 P.2d. 1163)

19 G. Failure by counsel to perfect petitioner's appeal
20 where the petitioner had indicated a desire to appeal amounts
21 to ineffective assistance of counsel. Failure to perfect petitioner's
22 appeal fell below objective standard of reasonableness,
23 constituting ineffective assistance of counsel and excusing
24 a procedural default, and the principles of cause and
25 prejudice must yield to the imperative of a fundamentally
26 unjust incarceration. As here, petitioner had to file his notice
27 of appeal pro se and trial counsel was dismissed prior to
28 the perfection of petitioner's appeal by district court judge

1 William Kenhart that completely left petitioner without counsel
2 for the completion of the appellate process (Clay v. Director,
3 Juvenile division, dept. of corrections 749 F.2d 422)

4 H. Counsel's failure to move to dismiss or seek
5 a bill of particulars to the information and amended info-
6 rmation constituted constitutionally deficient performance
7 and prejudice petitioner to his extreme detriment. As has,
8 the state's filed information for the charge of Burglary
9 was fatal as the intent of attempt grand larceny had been
10 dismissed at conclusion of preliminary hearing for lack
11 of probable cause, NO corpus delicti NO MENS REA, and
12 intent is an essential element of Burglary and the charge
13 could not be proven beyond a reasonable doubt as alleged
14 by the state in its filed information, thus the constitutional
15 requirement of definiteness was violated by the state as it
16 failed to give petitioner fair notice that his ~~conduct~~ consti-
17 tuted conduct was forbidden by the statute. The underlying
18 principle is that no man shall be held criminally responsible
19 for conduct which he could not reasonably understand to be
20 proscribed. The charge of attempt grand larceny in the state's
21 filed amended information was without probable cause
22 and lack the essential elements of the criminal statute.
23 so the charge could not be proven beyond a reasonable
24 doubt, it put forth a composite junk

25 I. Counsel failed to challenge "SUBJECT-MATTER
26 JURISDICTION" as court that determined and delivered the
27 criminal judgment lack jurisdiction. As the means that ~~what~~
28 petitioner was alleged of doing is not against the law (NRS)

1 WHEREAS NRS 174.085(2) NRS 178.522 and NRS 178.391
2 provides the legal authority that petitioner should have been
3 immune from prosecution for the charge of attempt grand
4 larceny in the 8th Judicial District Court, Clark County, Nevada
5 when the charge was dismissed at conclusion of preliminary
6 hearing by magistrate for lack of probable cause which proved
7 that conduct upon which plea was entered in criminal
8 complaint and verification in amended information did not
9 occur and the judge, counsel, and the state knew that the
10 corroborating evidence was false did not constitute the crime
11 of attempt grand larceny and was without probable cause;
12 furthermore petitioner had no involvement in such a
13 crime (North Carolina v. Alford, 400 U.S. 37) see Exhibits 103, 104
14 Here, the state claims petitioner engaged in unlawful conduct
15 but the fact is that petitioner did not engage in such
16 conduct and the conduct petitioner were engaged in did
17 not reach the essential elements of the charged offense
18 as they relate to fact and law ("FACTUAL INNOCENCE").
19 Court lacked jurisdiction to sentence petitioner as a habitual
20 criminal under NRS 207.10 because state failed to file notice
21 of habitual criminality in amended information and for the
22 charge of Attempt Grand Larceny as primary offense when in
23 fact the state's notice was for the charge of burglary and
24 did not conform with the rules of the statute as it
25 must had been included as a count in the information.
26 State's method of notice was only proper if petitioner was
27 charged under indictment pursuant to statute. Although the
28 state claims that it filed required notice of habitual

1 criminality before sentencing hearing. This is belied by the
2 record and the law that violates legislative intent of
3 NRS 207.010, additionally in a light favorable to the pro-
4 secution when the burglary information was dismissed
5 one must assume that the state's count of habitual
6 criminality must have dismissed as well, as no one
7 would negotiate for a lighter sentence and a lesser
8 charge to face a harsher punishment than going to trial
9 would have produced. The alleged felony committed by the
10 petitioner under Texas state jail laws of credit card abuse,
11 would have not been a felony under the laws and rules
12 of Nevada and the burglary conviction used by sentencing
13 judge was not a prior conviction as it occurred in
14 2016 and the commission of the instant offense attempt
15 grand larceny occurred in 2013. So this is a clear and
16 convincing showing that counsel was ineffective as
17 petitioner was entitled to an evidentiary hearing on this
18 claim but counsel's failure to investigate the convictions
19 and his concessions of the convictions showed his
20 deficient performance, that has prejudiced petitioner to
21 an additional 60 to 174 months in prison, when petitioner
22 does not meet the statutory requirements of number of
23 prior felony convictions and is inadequate because it
24 does not disclose that the court weighed the appropriate
25 factors for and against habitual criminal enhancement.
26 J. Petitioner was denied effective assistance of
27 counsel when counsel failed to properly advise him the
28 consequences of his "Alford Plea". Whereas, the court must

1 determine, and the record must affirmatively show that the
2 petitioner understood that a habitual criminal determination
3 may be a consequence of his "Alford plea". Here, the constitu-
4 tional requirement of reasonable notice was not satisfied,
5 and petitioner did not fully understand the consequences
6 of pleading "Alford" due to counsel's failures.

7 K. Petitioner was denied effective assistance of
8 counsel when counsel failed to have the correct amount of
9 credit for presentence confinement applied to petitioner's
10 ultimate sentence pursuant to (NRS 176.055; *Mays v.*
11 *District Court*, 901 P.2d 643; *Johnson v. State*, 89 P.3d 669).
12 Where as here, petitioner should have received credit from
13 the day that his bond was exonerated for attempt
14 grand larceny at conclusion of preliminary hearing to
15 the day of sentencing and credit must not be denied
16 to petitioner.

17 L. Petitioner's fundamental miscarriage of
18 justice is based on ACTUAL INNOCENCE not mere legal
19 insufficiency and more likely than not that no reason-
20 able juror would have convicted petitioner absent a
21 constitutional violation and ineffective assistance of
22 counsel.

23 M. Counsel failed to challenge state's breach
24 of guilty plea agreement as state's breach was based
25 on impeachable and highly suspect evidence of a mis-
26 placed ruling of probable cause as victim's own sworn
27 testimony was that petitioner was not the perpetra-
28 tor of alleged event and that no one but [redacted] said

1 room only stood in doorway said sorry and left without
2 incident. Had counsel provided effective assistance of
3 counsel he would have challenge the ruling of probable
4 cause and the court would have been required to
5 REVERSE it's mistaken ruling of probable cause. Furthermore
6 state knew petitioner had no involvement in the 1995
7 drug burglary, and ignored all evidence and interviews
8 contrary to the ruling of found probable cause.

9 N. All allegations of ineffective assistance of
10 counsel contained in this ground(s) cannot reasonably
11 be presumed to be the result of any tactical or
12 strategic choice within the range of reasonable
13 attorney competence. Rather, the deficiencies were the
14 results of counsel lack of preparation, experience,
15 knowledge of pertinent laws and skill. Cumulative and
16 singularly counsel's failures resulted in prejudice to
17 petitioner. Here, petitioner has presented specific factual
18 support for his claim of ineffective assistance of counsel
19 per the two prong test of Strickland, with ample evidence
20 and matters of law with prejudice.

21 O. Petitioner hereby swears that he stands firmly
22 on all points raised in his Amended petition. The petitioner
23 therefore files this "Supplemental petition" in "GOOD FAITH"
24 as it will serve the truly useful purpose of preserving
25 judicial resources as the state have indicated a will-
26 ingness to rely on the record the merits of petitioner's
27 claims, and petitioner's affidavits to reach a decision
28 in favor of petitioner without ordering an evidentiary

ADDITIONAL FACTS OF THE CASE:

1 hearing, thus the state's conclusion serves as an un-
2 conditional stipulation that counsel was in fact counsel
3 wholly ineffective and petitioner must be released
4 from this unconstitutional incarceration and conviction.
5 As justice so requires...

6 Wherefore petitioner MOVES this honorable
7 court to make a "GOOD FAITH" ruling in favor of
8 petitioner and issue the writ that will redress this
9 fundamental miscarriage of justice, as justice so
10 demands...

CERTIFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 24th
day of MARCH, 2021, I mailed a true and correct copy of the foregoing, "Supplemental
Petition for writ of habeas corpus"

by placing document in a sealed pre-postage paid envelope and deposited said envelope in the
United State Mail addressed to the following:

Clerk County District Court
OFFICE OF THE CLERK
200 LAUREL AVE. 3RD FLOOR
LAS VEGAS, NV
89155-1160

Clerk County District Attorney
200 LAUREL AVE
LAS VEGAS, NV
89155-2212

Attorney General of Nevada
100 NORTH CAROLINA ST
CARSON CITY, NV
89101

CC:FILE

DATED: this 24th day of MARCH, 2021.

James H. Hayes
SCOTT R. BROWN # 1175077
/In Propria Personam
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

March 24, 2021

Supplemental Petition for Writ of Habeas Corpus

"EXHIBITS"

EXHIBIT 100 - As information cannot be
amended so as to charge an
offense not shown by the evidence
taken at prelon. examination

EXHIBIT 101 A charge already dismissed may
not be added by amendment

EXHIBIT 102 Affidavit "Jurisdiction of the
Subject Matter is derived from law"

EXHIBIT 103 Affidavit "No factual statements
on the record"

EXHIBIT 104 Affidavit "Actual INNOCENCE not
mere legal insufficiency but
FACTUAL INNOCENCE"

EXHIBIT 100

habitually violent felon with the court.

3. The court shall permit an information to be amended pursuant to subsection 4 of NRS 173.035.

HISTORY:

1967, p. 1413; 1985, p. 1026; 1993, ch. 50, § 2, p. 82; 1995, ch. 341, § 5, p. 857; 1995, ch. 443, § 195, p. 1245.

Editor's note.

Acts 1995, ch. 443, § 393, provides: "The amendatory provisions of sections 1 to 230, inclusive, and 232 to 374, inclusive, of this act do not apply to offenses which are committed before July 1, 1995."

NOTES TO DECISIONS

Charges shown at a preliminary examination may be added.

An amendment of the original information adding the charge of extortion was properly allowed by the trial court, where plentiful evidence of extortion was adduced at the preliminary examination and the defendant stated he needed no additional time to prepare for trial. *Nall v. State*, 85 Nev. 1, 448 P.2d 826, 1969 Nev. LEXIS 464 (Nev. 1969).

Superseding indictment not barred.

A superseding indictment filed while the original indictment is validly pending is not barred by the statute of limitations if the new indictment does not broaden or substantially amend the original charges. *Benitez v. State*, 111 Nev. 1363, 904 P.2d 1036, 111 Nev. Adv. Rep. 154, 1995 Nev. LEXIS 153 (Nev. 1995).

A superseding indictment charging an offense that is a lesser included offense of an offense contained in the original indictment does not broaden or substantially amend the original charges. *Benitez v. State*, 111 Nev. 1363, 904 P.2d 1036, 111 Nev. Adv. Rep. 154, 1995 Nev. LEXIS 153 (Nev. 1995).

The justice court had no authority to sua sponte amend a felony complaint to a misdemeanor. *Parsons v. District Court*, 110 Nev. 1239, 885 P.2d 1316, 110 Nev. Adv. Rep. 147, 1994 Nev. LEXIS 165 (Nev. 1994), overruled in part, *Parsons v. State*, 116 Nev. 928, 10 P.3d 836, 116 Nev. Adv. Rep. 101, 2000 Nev. LEXIS 113 (Nev. 2000).

An information cannot be amended so as to charge an offense not shown by the evidence taken at the preliminary examination. *Hanley v. Zenoff*, 81 Nev. 9, 398 P.2d 241, 1965 Nev. LEXIS 195 (1965), superseded by statute, *Snyder v. State*, 103 Nev. 275, 738 P.2d 1303, 1987 Nev. LEXIS 1633 (1987) (decision under former similar statute).

Information properly amended to conform with preliminary hearing testimony.

State was properly permitted to amend the information on the first day of trial because defendant's rights were not prejudiced and the charges remained same; the information was amended to conform to the victim's testimony at the preliminary hearing. *Viray v. State*, 121 Nev. 159, 111 P.3d 1079, 121 Nev.

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EXHIBIT 101

Adv. Rep. 19, 2005 Nev. LEXIS 23 (Nev. 2005).

An amendment cannot prejudice the defendant.

Although amendment of an information is usually within the trial court's discretion, that discretion is abused if an additional or different offense is charged or the substantial rights of the defendant are prejudiced. *Green v. State*, 94 Nev. 176, 576 P.2d 1123, 1978 Nev. LEXIS 516 (Nev. 1978).

Defendant's substantial rights were prejudiced by an amendment of the information that added felony murder, alleging that defendant kidnapped victim prior to murdering him, because defendant had already testified, had no notice prior to testifying of any allegations of facts that would support a charge of felony murder and thus had no opportunity to defend the charge. *Jennings v. State*, 116 Nev. 488, 998 P.2d 557, 116 Nev. Adv. Rep. 56, 2000 Nev. LEXIS 61 (Nev. 2000).

Amendment prejudiced substantial rights.

The trial court did not abuse its discretion in determining that defendant's substantial rights were prejudiced by the amended information alleging aiding and abetting as an additional theory of murder where State did not offer this amended information until the day of trial and there was no indication that prior to the morning of trial defendant received adequate actual notice of the State's theory that he aided and abetted the murder of victim. *State v. Eighth Judicial Dist. Court*, 116 Nev. 374, 997 P.2d 126, 116 Nev. Adv. Rep. 40, 2000 Nev. LEXIS 36 (Nev. 2000).

A charge already dismissed may not be added by amendment.

Neither NRS 174.145, 34.520, nor this section permit the court to order the amendment of an information to restate a charge that has been dismissed by the magistrate at the preliminary examination, even though the magistrate's order was clearly erroneous. *Martin v. Sheriff, Clark County*, 88 Nev. 303, 496 P.2d 754, 1972 Nev. LEXIS 453 (Nev. 1972).

Clerical change is not prejudicial.

An amendment of the information immediately prior to trial, at the suggestion of the trial judge, to correct the spelling of the defendant's name was not prejudicial. *Collins v. State*, 88 Nev. 9, 492 P.2d 991, 1972 Nev. LEXIS 382 (Nev. 1972).

Charges must be resubmitted after dismissal.

Where due to a clerical error a defendant was charged with larceny instead of cheating at gambling, and the prosecutor's motion to amend was denied while the defendant's habeas corpus petition was granted, the prosecutor should have resubmitted the charges to a magistrate or grand jury. The trial court was without jurisdiction to allow him leave to file a new information charging cheating at gambling. *Glasgow v. Sheriff, Clark County*, 89 Nev. 463, 515 P.2d 64, 1973 Nev. LEXIS 556 (Nev. 1973).

Venue.

The amendment of an indictment charging defendant with the crime of murder so as to allege the venue or locality of the crime was improper, as an allegation of the county wherein a crime is committed is manifestly material, as much so as any fact constituting the body of the offense itself. *State v. Chamberlain*, 6 Nev. 257, 6 Nev. 258, 1871 Nev. LEXIS 1 (Nev. 1871) (decision under former similar

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statute).

Amendment did not prejudice substantial rights of defendant.

Where the original information alleged that the act of sexual penetration was accomplished by fellatio, and after the amendment, defendant's charged offense remained sexual assault accomplished by fellatio and only the facts of the offense were changed, the substantial rights of the defendant were not prejudiced by the amendment of this information since no additional offense was charged. *Shannon v. State*, 105 Nev. 782, 783 P.2d 942, 1989 Nev. LEXIS 306 (Nev. 1989).

There was no error in allowing the amendment of an information to conform to the evidence presented and remove one of the State's theories of liability since there was no prejudice of defendant's substantial rights; no additional or different charges were added. During trial, the State conceded that it had not shown the baby suffered any physical injury and sought to file a second amended information, striking the intentional physical injury theory of abuse or neglect. *Anderson v. State*, 2016 Nev. App. Unpub. LEXIS 109 (Nev. Ct. App. Mar. 16, 2016).

Amendment disallowed.

State could not be allowed to amend indictment where if the state were granted leave to amend the indictment so as to add previously alternately pleaded offenses as separate counts, the defendants would be denied due process because it could not be said that the grand jury found probable cause on each and every amended count. *State v. Hancock*, 114 Nev. 161, 955 P.2d 183, 114 Nev. Adv. Rep. 20, 1998 Nev. LEXIS 21 (Nev. 1998).

Amendment adding habitual criminal charge.

This section allows a prosecutor to add a habitual criminal charge to an indictment or information if the prosecutor discovers sufficient prior convictions to warrant a habitual criminal sentence under NRS 207.010. *McGervey v. State*, 114 Nev. 460, 958 P.2d 1203, 114 Nev. Adv. Rep. 56, 1998 Nev. LEXIS 71 (Nev. 1998).

Relation back not shown.

It was improper to amend an indictment because additional and different charges did not relate back to the original complaint, in violation of this statute; the statute of limitations was not tolled and the newly added charges, originating from the grand jury, as opposed to justice court, were procedurally barred. *State v. Jackson*, 2016 Nev. App. Unpub. LEXIS 127 (Nev. Ct. App. Mar. 16, 2016), review denied, 2016 Nev. LEXIS 741 (Nev. June 24, 2016).

Cited in:

Gallegos v. State, 84 Nev. 608, 446 P.2d 656, 1968 Nev. LEXIS 419 (1968); *Harris v. State*, 86 Nev. 197, 466 P.2d 850, 1970 Nev. LEXIS 484 (1970); *Roseneau v. State*, 90 Nev. 161, 521 P.2d 369, 1974 Nev. LEXIS 343 (1974); *Huntley v. Sheriff, Clark County*, 90 Nev. 187, 522 P.2d 147, 1974 Nev. LEXIS 355 (1974); *Armstrong v. State*, 92 Nev. 675, 557 P.2d 272, 1976 Nev. LEXIS 720 (1976); *Randolph v. State*, 117 Nev. 970, 36 P.3d 424, 2001 Nev. LEXIS 84 (2001).

Research References and Practice Aids

NVCODE

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8th Judicial District for the County of Clark

JUL 31 2020

HEARING
REQUESTED

CLERK OF COURT
AFFIDAVIT OF

Jurisdiction of the subject matter is derived from the law; it neither can be waived nor conferred by contract or acquiescence.

STATE OF NEVADA

COUNTY OF CLARK

ss: Motion to Vacate Sentence (Conviction Invalid)

CASE NO: C-16-315242-1

DEPT NO: 19

TO WHOM IT MAY CONCERN:

I, James H. Hayes, the undersigned, do hereby swear that all the following statements and description of events, are true and correct, of my own knowledge, information, and belief, and to those I believe to be true and correct. Signed under penalty of perjury pursuant to NRS 208.165.

(1) THAT James H. Hayes is the affiant in this affidavit and is currently incarcerated at Southern Desert Correctional Center a victim of a fundamental miscarriage of justice trying to overcome a fundamentally unjust incarceration and all procedural bars against the ruling on the merits of his Motion to Vacate (Conviction Invalid). When in fact categorically a fundamental miscarriage of justice would continue and permit manipulation of justice from this court's failure to consider Mr Hayes claim for relief on its merit.

(2) That it is Black Letter Law in the State of Nevada that Subject Matter Jurisdiction can only be established by the District Court at the conclusion of preliminary hearing by one of the following: 1) Magistrate finds slight or meager evidence to bound over charge. 2) Grand Jury indictment. 3) Motion of leave of the court to file instrument by affidavit. Here, after the presentation of all the evidence at preliminary hearing and conclusion of hearing Mr. Hayes charge of Attempt Grand Larceny was dismissed. In the District Court categorically lack subject matter jurisdiction be the charge of Attempt Grand Larceny.

JUL 20 2020

CLERK OF THE COURT

1 of 1

EXHIBIT
102

1 constitutionally against Mr. Hayes

2 (3) That Mr. Hayes actually and legally never waived
3 his preliminary hearing for the instant charge of
4 attempt grand larceny. Moreover at conclusion of preliminary
5 hearing after state's presentation of all the evidence
6 the magistrate dismissed the charge for no slight or
7 marginal evidence of guilt.

8 (4) That no evidence of guilt = innocence Mr. Hayes
9 has established sufficient factual innocence warranting
10 granting Motion to Vacate.

11 (5) That to accept Alford plea by Judge the record
12 before the judge must contain strong evidence of guilt.
13 actual guilt. (North Carolina v. Alford 400 U.S. 961). Here Mr.
14 Hayes is actually innocent of the crime of attempt grand
15 larceny through clear and convincing evidence shown
16 at preliminary examination when magistrate dismissed
17 the charge for lack of evidence, no corpus delicti, no mens
18 rea, and no slight or marginal evidence.

19 (6) That Judge and the State knew Mr. Hayes had no
20 involvement in the crime of attempt grand larceny as it
21 is clear that no evidence of actual guilt existed on the
22 underlying criminal conduct that may have justified
23 accepting Mr. Hayes Alford plea to a crime he did not
24 commit, and the conduct upon which the plea was
25 entered was false.

26 (7) That the charge of Burglary was false without the
27 state's intent of the charge of attempt grand larceny.

1 in the state's filed information dated June 17, 2016 the
2 was based on an & misplaced ruling of probable cause
3 by magistrates. What in fact one can not have Burglary
4 without intent so the state failed to sufficiently
5 establish facts for slight or marginal evidence that
6 Mr. Hayes committed the crime of Burglary after the
7 presentation of all the evidence at preliminary hearing
8 (8) That Mr. Hayes has established sufficient factual
9 grounds and a colorable showing of actual innocence
10 and that no jury would have convicted Mr. Hayes of
11 Attempt Grand Larceny nor the crime of Burglary
12 based on facts introduced or events occurring during
13 the course of the proceedings leaving the sentencing
14 judge no factual basis for his constitutionally
15 mandated responsibility for acceptance of Mr. Hayes
16 Affidavit.

17 (9) That the indefinite information obscures the reality that
18 the prosecution was unable to frame a proper information for
19 Burglary and Amendment information for attempt grand larceny
20 consistently with facts now known as the means was false
21 confirmed by magistrate after all witness testimony.

22 FURTHER, AFFIANT SWEARS NAUGHT.

23 EXECUTED AT San Jose

this 14 day of July 2020

24 IN FRONT OF:

BY Camille Ochoa
NOC 1175022

25
26
27 3 of 4
28

UNDER PENALTY OF PERJURY

I, the undersigned, certify, declare, or state that the foregoing is true and correct, to the best of my knowledge and belief, in accordance with NRS 208.165 and 28 USCA § 1746.

Executed on the 22nd day of April, 2020

James H. Hayes # 1175079 James H. Hayes
Name and Prison BAC#, printed

4 of 4



EXHIBIT
103

"No factual statements on the record which
AFFIDAVIT OF: would constitute an admission of "Guilt"

1
2 STATE OF NEVADA
3 COUNTY OF CLARK

ss: CASE No: A-19-993315
Dept: 19

4 TO WHOM IT MAY CONCERN:

5 I, James H. Hayes the undersigned, do hereby swear that
6 all statements, facts and events within my foregoing Affidavit are
7 true and correct of my own knowledge, information and belief, and
8 as to those, I believe them to be True and Correct. Signed under the
9 penalty of perjury, pursuant to, NRS. 29.010; 53.045; 208.165, and state
10 the following: Whereas, In Alford, the court held a plea contains
11 a protestation of innocence was constitutionally acceptable
12 when "a defendant intelligently concludes that his interests
13 require entry of guilty plea and the record before the judge
14 contains strong evidence of guilt" (400 U.S. at 37). In the instant
15 case, there was, of course, no evidence of actual guilt of the crime
16 of Attempted Grand Larceny, as the sentencing judge and the state knew
17 Mr. Hayes had no involvement in such a crime. Moreover, when prison
18 examination showed no criminal act of Attempted Grand Larceny,
19 it is clear that no evidence of actual guilt existed on the under-
20 lying criminal conduct that may have justified accepting Mr. Hayes
21 plea, therefore Mr. Hayes did not waive his right to complete of the
22 acceptance of an unconstitutional plea. Mr. Hayes neither made factual
23 statements regarding an admission to the attempted grand larceny
24 charge nor admitted facts constituting the elements of attempted grand
25 larceny. Mr. Hayes did not understand the elements of the crime that he
26 pleaded to.
27 FURTHER YOUR AFFIANT SAYETH NAUGHT.

EXECUTED At: Indian Springs, Nevada, this 1st day of March

2020.

BY: James H. Hayes
James H. Hayes
Post Office Box-293 (SDCC)
Indian Springs, Nevada, 89070,
Affiant, In Propria Persona:

EXHIBIT

104

HEARINGS

Requested!!

CASE NO: A-19-493315-W

DEPT: 19

STATE OF NEVADA

COUNTY OF CLARK

8th Judicial District Court for the County of Clark

AFFIDAVIT OF actual INNOCENCE Not mere legal insufficiency
or technical INNOCENCE

vs: Amended Petition for Writ of Habeas Corpus

CASE NO: A-19-493315-W

DEPT: 19

TO WHOM IT MAY CONCERN:

MAY 15 2020

I, James H. Hayes, the undersigned, do hereby swear that the following statements and description of events, are true and correct, of my own knowledge, information, and belief, and to those I believe to be true and correct. Signed under penalty of perjury pursuant to NRS 208.165.

(1) THAT James H. Hayes is the affiant in this affidavit and is currently incarcerated at Southern District Correctional Center a victim of a fundamental miscarriage of justice trying to overcome a fundamentally unjust incarceration, and all procedural bars against the ruling on the merits of his Amended petition for Writ of Habeas Corpus. When in fact a fundamental miscarriage of justice would continue from the failure to consider Mr. Hayes claims for relief on the merits.

WHEREAS Mr. Hayes is actually innocent of the crime of Attempted Grand Larceny through clear and convincing evidence shows of preliminary examination when magistrate dismissed the charge for lack of evidence. No corpus delicti, no slight or marginal evidence. Moreover, this is a colorable showing that it is more likely than not that no reasonable juror would have convicted Mr. Hayes absent a constitutional violation. Where as here, there was, of course, no evidence of actual guilt of the crime of Attempted Grand Larceny, as the fact-finding Judge and the State knew Mr. Hayes had no

1 of 2

RECEIVED

MAY - 1 2020

CLERK OF THE COURT

1 involvement in such a crime as it is clear that no evidence
2 of actual guilt existed on the underlying criminal conduct
3 that may have justified accepting Mr. Hayes' Alford plea
4 to a crime he did not commit, and sentence was based
5 on speculation, not based on the facts Mr. Hayes committed
6 So here Mr. Hayes has made a colorable showing of cause
7 and prejudice to overcome a procedural default and to
8 ensure fundamental fairness that is the central concern
9 of the writ of habeas corpus. As the instant case, is an
10 extraordinary case, where a constitutional violation has
11 resulted in the conviction of Mr. Hayes who is actually
12 innocent, and it would be an affront to justice and due
13 process to hold Mr. Hayes to his plea when the conduct upon
14 which the plea was entered did not occur. Furthermore,
15 Mr. Hayes received no consideration whatsoever in exchange
16 for his Alford plea to a crime he did not commit as he was
17 induced by the state to plead to a crime not committed and
18 Mr. Hayes' agreement to this unconstitutional guilty plea was
19 predicated on his belief of time credit earned for a gross
20 misdemeanor sentence and did not explicitly agree to a
21 period of imprisonment in exchange for a plea.
22 That this court is fully aware Mr. Hayes was not properly
23 advised or conversed as to the defects he may have waived
24 as part of the negotiations. What is fact, Mr. Hayes never
25 agreed to waive any and all defects in the pleadings so
26 Mr. Hayes never waived claims to "Defects" voluntarily, nor
27 did Mr. Hayes waive right to complain of the acceptance
28 of an unconstitutional plea. Furthermore, Mr. Hayes guilty

1 plea agreement did not explicitly specify waiver to defects and
2 Mr. Hayes was not well aware of the charges against him
3 nor the surrounding negotiations and the plea process is
4 unambiguous evidence of this and confirms Mr. Hayes did
5 not explicitly understand the plea negotiations. Moreover,
6 there is clear and convincing evidence Mr. Hayes did not
7 commit the crime of Attempted Grand Larceny and the
8 charge of Burglary was fatal without the state's intent of
9 Attempt Grand Larceny that's a colorable showing that no
10 jury would have convicted Mr. Hayes of Attempted Grand
11 Larceny nor the underlying crime of Burglary leaving the
12 sansfear Judge no technical basis for acceptance of Mr.
13 Hayes Afford Plea as he never admitted in open court to
14 committing the acts underlying the offense for which he
15 entered his plea, and the prosecution knew that the evidence
16 was false and without probable cause.

17 That, the record shows without doubt that Mr. Hayes has
18 pleaded Afford to a crime that he did not commit, and this
19 court must hesitate to apply technical rules to prevent Mr.
20 Hayes from obtaining relief. What is fact, the cause and
21 prejudice formula of Wainwright v. Sykes is not dispositive
22 when the fundamental fairness of a prisoner's conviction
23 is at issue as in the instant case, that appellate procedural
24 default should not preclude habeas corpus review of a
25 meritorious constitutional claim that will establish Mr.
26 Hayes innocence. As this is an extraordinary case where
27 a constitutional violation has resulted in the conviction of
28 one who is actually innocent and this court shall grant the

1 writ areas if the absence of a showing of cause and prejudice
2 for the procedural default, when counsel's failure to raise a
3 particular claim on appeal is to be scrutinized under the
4 cause and prejudice standard what that failure is treated
5 as a procedural default would deny Mr. Hayes fundamental
6 fairness and continue this greatest injustice. What the
7 writ of habeas corpus is the fundamental instrument for
8 safeguarding individual freedom against arbitrary and
9 lawless state action and its well-known history bears
10 repetition. As it has been given explicit protection in our
11 constitution, and the very nature of the writ demands
12 that it be administered with the initiative and flexibility
13 essential to insure that miscarriages of justice within its
14 reach are surfaced and corrected that must occur in the
15 instant case, as there is no rigid procedural rule that
16 prevented the writ's fundamental mission - serving justice
17 from being realized and must yield to the imperative of
18 correcting a fundamentally unjust incarceration and
19 prevent illegal imprisonments.

20 That the state breached the guilty plea agreement on
21 implausible and highly suspect evidence as the evidence used
22 was false and the state was wrong that the alleged victim
23 of preliminary examination for the 1st degree Burglary
24 charge (case no: 19701534X) testified under oath feeling the
25 pressure of perjury that Mr. Hayes was not the perpetrator
26 of alleged crime and 100% sure of it and further stated
27 that alleged perpetrator did not enter room only stood in
28 doorway and sang and close door and left without

1 incident, so Mr. Hayes has showed detrimental reliance since
2 there was no breach and no fault of Mr. Hayes as the
3 Burglary charge was dismissed and Justice court magistrate
4 ruling of probable cause was mislabeled as alleged victim
5 testified Mr. Hayes was not perpetrator and Mr. Hayes
6 had a valid room hotel key issued to him from an
7 authorized registered hotel guest, so this is a manifest
8 improbability in permitting the state to break the agreement
9 when they know Mr. Hayes did not break his promise making
10 the state estopped from asserting right to argue for a
11 different sentence when there was in essence no substantial
12 breach that warrants releasing state of its promises. What
13 in fact, the agreement did not contain explicit language
14 conditionally releasing the state from its promise for an
15 excludable ruling of probable cause by magistrate as was
16 done in the instant case. Whereby had the sentencing
17 judge held an evidentiary hearing as required to determine
18 if there was a breach per the rulings of the Nevada
19 Supreme Court and the 9th Circuit this fundamental mis-
20 carriage of justice would not have occurred as Mr. Hayes
21 has clear and convincing evidence he did not break
22 his promise and no breach occurred on his behalf.
23 That habitual adjudication was not just and proper for
24 Mr. Hayes to be punished and segregated as a habitual
25 criminal and the court abused its discretion as crimes
26 were nonviolent and not a felony under the state
27 and laws of Nevada. Court had abuse in terms and not
28 price of Burglary is Nevada 2016. As the sentencing judge

1 violated legislation intent of NRS 207.010 and failed
2 to serve the purposes of the statute of the interests
3 of justice. What in fact, Mr. Hayes did not warrant
4 the harsh sanction under the habitual criminal statute
5 though not conduct reprehensible simply does not
6 warrant habitual treatment.

7 That the court that rendered the judgment and
8 sentence lack subject matter jurisdiction per NRS 44.085
9 and NRS 178.572. Wherein jurisdiction of the subject
10 matter is derived from the law; it neither can be
11 waived nor conferred by consent of Mr. Hayes

22 FURTHER, AFFIANT SAYS: NAUGHT.

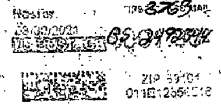
23 EXECUTED AT Carson City, Nevada, this 27 day of April, 2020

24 IN FRONT OF:

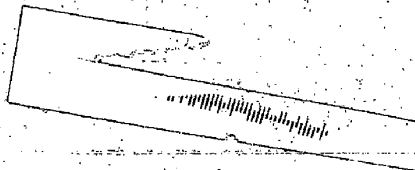
By: Carson City

NOTARIAL PUBLIC

Haley, James #1175077
JDEC
P.O. Box 208
Indian Springs, NV
89070



CLARK County District Courts
"Office of the clerk"
200 LEWIS AVE, 3RD Floor
Las Vegas, Nevada
89155-1160



Legal
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SECURITY REPORT
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1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JONATHAN VANBOSKERCK
6 Chief Deputy District Attorney
7 Nevada Bar #06528
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 JAMES HOWARD HAYES,
10 aka James Howard Hayes Jr.,
11 #2796708

Plaintiff,

CASE NO: A-19-793315-1

-VS-

THE STATE OF NEVADA,

DEPT NO: III

Defendant.

15 **STATE'S OPPOSITION TO PETITIONER'S PETITION TO RECONSIDER**
16 **"FINDINGS OF FACT AND CONCLUSIONS OF LAW"**
17 **and**
18 **PETITION TO RECONSIDER**
19 **FINDINGS OF "FACT AND CONCLUSIONS OF LAW"**

DATE OF HEARING: APRIL 12, 2021
TIME OF HEARING: 8:30 AM

20 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
21 District Attorney, through JONATHAN VANBOSKERCK, Chief Deputy District Attorney,
22 and hereby submits the attached Points and Authorities in Opposition to Petitioner's Petition
23 for Reconsider [sic] "Findings of Fact and Conclusions of Law."

24 This Opposition is made and based upon all the papers and pleadings on file herein, the
25 attached points and authorities in support hereof, and oral argument at the time of hearing, if
26 deemed necessary by this Honorable Court.

27 //

28 //

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On or about July 23, 2013, James H. Hayes (hereinafter, "Petitioner") was charged by
4 way of Criminal Complaint with one count of BURGLARY (Category B Felony – NRS
5 205.060) and one count of ATTEMPT GRAND LARCENY (Category D Felony/Gross
6 Misdemeanor – NRS 205.220.1, 205.222.2, 193.330). Following a Preliminary Hearing in
7 Justice Court, Las Vegas Township on June 14, 2016, the charge of BURGLARY was bound
8 over to District Court, and the charge of ATTEMPT GRAND LARCENY was dismissed.

9 On June 17, 2016, the State filed an Information with the District Court, charging
10 Petitioner with one count of BURGLARY. On August 29, 2017, the State filed an Amended
11 Notice of Intent to Seek Punishment as a Habitual Criminal. On November 7, 2018, pursuant
12 to a Guilty Plea Agreement ("GPA"), Petitioner entered a plea of Guilty pursuant to North
13 Carolina v. Alford, 400 U.S. 25 (1970) to one count of ATTEMPT GRAND LARCENY. The
14 terms of the GPA are as follows:

15 The State has agreed to make no recommendation at the time of sentencing. The
16 State has no opposition to probation with the only condition being thirty (30)
17 days in the Clark County Detention Center (CCDC), with thirty (30) days credit
for time served.

18 GPA at 1:22-24. The GPA further includes, in pertinent part, the following acknowledgement:

19 I understand and agree that, if...an independent magistrate, by affidavit review,
20 confirms probable cause against me for new criminal charges including reckless
21 driving or DUI, but excluding minor traffic violations, the State will have the
22 unqualified right to argue for any legal sentence and term of confinement
23 allowable for the crime(s) to which I am pleading guilty, including the use of
24 any prior convictions I may have to increase my sentence as a habitual criminal
to five (5) to twenty (20) years, Life without the possibility of parole, Life with
the possibility of parole after ten (10) years, or a definite twenty-five (25) year
term with the possibility of parole after ten (10) years.

25 GPA at 2: 1-9. An Amended Information reflecting the new charge of ATTEMPT GRAND
26 LARCENY was filed in conjunction with the GPA. Petitioner was adjudged Guilty pursuant
27 to Alford that same day, and the sentencing hearing was scheduled for March 6, 2019.

28 //

1 On January 31, 2019, the State filed a State's Notice of Motion and Motion to Revoke
2 Bail, asserting that in Las Vegas Justice Court case number 19F01534X, a Justice of the Peace
3 had found probable cause to charge Petitioner with Burglary for acts committed on or around
4 January 26, 2019. The State's Motion to Revoke Bail was granted after a hearing on February
5 4, 2019.

6 At the sentencing hearing on March 6, 2019, the State argued that it had regained the
7 right to argue pursuant to the terms of the GPA. The Court agreed, and the State argued that
8 Petitioner should be punished under NRS 207.010 (the "Small Habitual Statute"). The Court
9 agreed, and Petitioner was sentenced to sixty (60) to one hundred seventy-four (174) months
10 in the Nevada Department of Corrections (NDOC), consecutive to Petitioner's sentence in
11 another case (C315125). The Court also awarded Petitioner ten (10) days credit for time
12 served. The Judgment of Conviction in this case was filed on March 12, 2019.

13 Petitioner filed a Notice of Appeal on March 28, 2019. Petitioner's Case Appeal
14 Statement was filed on August 9, 2019 (SCN 78590).

15 On April 15, 2019, Petitioner filed a Petition for Writ of Habeas Corpus ("Petition").
16 Pursuant to Court order, the State filed its Response on June 26, 2019. At the hearing on the
17 Petition on August 19, 2019, the Court noted that Petitioner filed two Addenda to his original
18 Petition (the first on May 7, 2019, and the second on May 9, 2019). Pursuant to the Court's
19 order, the State filed a Response to the Addenda on October 10, 2019. Petitioner filed a Reply
20 to the State's Response on November 4, 2019. On November 18, 2019, Petitioner's Petition
21 came before the Court, at which time the Court took the matter OFF CALENDAR due to
22 Petitioner's pending appeal.

23 On November 19, 2019, Petitioner filed another Notice of Appeal, appealing the denial
24 of his Coram Nobis motion. His Case Appeal Statement was filed on December 11, 2019 (SCN
25 80222). On August 31, 2020, the Nevada Court of Appeals affirmed the Court's denial of his
26 Coram Nobis motion. Remittitur issued on October 12, 2020.

27 On January 14, 2020, the Nevada Supreme Court AFFIRMED Petitioner's Judgment
28 of Conviction in SCN 78590. Remittitur issued on February 25, 2020.

1 On February 12, 2020, Petitioner filed an "Amended Petition for Writ of Habeas
2 Corpus" (his "Amended Petition"). This Court ordered a Response to that Amended Petition
3 on March 4, 2020. Thereafter, on March 6, 2020, Petitioner filed a "Petition: Expeditious
4 Judicial Examination NRS 34.360-34.830" (his "Petition: EJE"). Pursuant to this Court's
5 order, the State filed its Response to both filings on April 17, 2020. Petitioner replied to the
6 State's Response on May 15, 2020.

7 On May 15, 2020, Petitioner also filed an "Affidavit of Actual Innocence not Mere
8 Legal Insufficiency but 'Factual Innocence.'" On May 27, 2020, Petitioner filed a
9 Supplemental Petition. While Petitioner's numerous pleadings were pending, Petitioner filed
10 a Motion for Peremptory Challenge of Judge and to Disqualify Judge William Bill Kephart.
11 Thereafter, the State filed its Responses to Petitioner's Affidavit of Actual Innocence and
12 Petitioner's Supplemental Petition on June 10, 2020. As a result of Petitioner's Peremptory
13 Challenge, Petitioner's pending matters were taken off calendar on June 15, 2020. On June
14 29, 2020, Petitioner filed his Reply to the State's Response to Petitioner's Affidavit of Actual
15 Innocence.

16 On July 7, 2020, Chief Judge Linda Bell considered, and denied, Petitioner's Motion
17 for Peremptory Challenge of Judge Kephart. Chief Judge Bell's Decision and Order was filed
18 on July 8, 2020.

19 On July 23, 2020, Petitioner filed his Reply to the State's Response to Petitioner's
20 Supplemental Petition. Petitioner, that same day, filed a Motion for Ruling for Rule 60b
21 Motion for Relief; Motion to Vacate; Amended Petition for Writ of Habeas Corpus. The State
22 filed its Reponse to Petitioner's Motion for Ruling on September 2, 2020. Petitioner's Motion
23 for Ruling was denied on September 9, 2020.

24 On September 25, 2020, Petitioner filed a Motion for Expeditious Ruling for "Amended
25 Petition for Writ of Habeas Corpus" 3rd Request. On October 7, 2020, he filed a Motion to
26 Set Evidentiary Hearing and Issue Transport Order. On October 14, 2020, Petitioner filed a
27 Motion to Reconsider Order Denying Motion for Ruling for Rule 60b Motion for Relief;
28 Motion to Vacate; Amended Petition for Writ of Habeas Corpus. The State filed responsive

1 pleadings to each of Petitioner's respective filings on November 10, 2020. On November 16,
2 2020, the Court considered, and denied, Petitioner's three Motions. The Court's Order was
3 filed on November 21, 2020.

4 On December 22, 2020, Petitioner filed a "Motion to Compel Judgment Pursuant to
5 Nevada Revised Statutes Chapter 34 FRCP Rule 12(c) for Amended Petition for Writ of
6 Habeas Corpus." The State filed its Response to that Motion on January 27, 2021. On February
7 1, 2021, the Court denied Petitioner's Motion to Compel. The Court also noted that no order
8 had been filed regarding Petitioner's Amended Petition for Writ of Habeas Corpus; therefore,
9 the Court denied the Amended Petition as well.

10 On March 9, 2021, the Court filed its Findings of Fact, Conclusions of Law and Order
11 denying Petitioner's Amended Petition. On March 11, 2021, Petitioner filed a Petition to
12 Reconsider "Findings of Fact, Conclusion of Law" ADDENDUM (his "First Reconsideration
13 Petition"). Thereafter, on March 17, 2021, Petitioner filed a Petition for Reconsider [sic] findings
14 of "Fact and Conclusions of Law" (his "Second Reconsideration Petition"). On March 18,
15 2021, Petitioner noticed his appeal from the denial of his Amended Petition.

16 On April 7, 2021, Petitioner filed a Supplemental Petition for Writ of Habeas Corpus.

17 The State now responds to Petitioner's Petitions for Reconsideration, as follows:

18 ARGUMENT

19 **I. PETITIONER'S PETITIONS FOR RECONSIDERATION ARE NOT** 20 **PROPERLY BEFORE THE COURT**

21 Eighth Judicial District Court Rule (EJDCR) 2.24 addresses the conditions under which
22 reconsideration of a court's ruling may be sought:

- 23 (a) No motions once heard and disposed of may be renewed in the same cause,
24 nor may the same matters therein embraced be reheard, *unless by leave of the*
25 *court granted upon motion therefore*, after notice of such motion to the
26 adverse parties.
27 (b) A party seeking reconsideration of a ruling of the court, other than any order
28 which may be addressed by motion pursuant to NRCP 50(b), 52(b), 59, or
60, must file a motion for such relief within 10 days after service of written
notice of the order or judgment unless the time is shortened or enlarged by
order. A motion for rehearing or reconsideration must be served, noticed,
filed and heard as is any other motion. A motion for reconsideration does not

1 toll the 30-day period for filing a notice of appeal from a final order or
2 judgment.

3 (Emphasis added). Thus, the EJDCR makes clear that a party seeking reconsideration must
4 *first seek leave of the court* before filing such a motion. EJDCR 2.24(a).

5 Likewise, EJDCR 7.12 bars multiple applications for relief:

6 When an application or a petition for any writ or order shall have been made
7 to a judge and is pending or has been denied by such judge, the same
8 application, petition, or motion may not again be made to the same or another
9 district judge, except in accordance with any applicable statute and upon the
consent in writing of the judge to whom the application, petition or motion
was first made.

10 Moreover, EJDCR 13(7) contains the same prohibition on pursuing reconsideration
11 without first obtaining leave of the court:

12 No motion once heard and disposed of shall be renewed in the same cause,
13 nor shall the same matter therein embraced be reheard, unless by leave of the
14 court granted upon motion thereof, after notice of such motion to the adverse
parties.

15 The Nevada Supreme Court has been consistent in its disapproval for multiple
16 applications for the same relief. See Whitehead v. Nevada Com'n on Judicial Discipline, 110
17 Nev. 380, 388, 873 P.2d 946, 951-52 (1994) ("it has been the law of Nevada for 125 years that
18 a party will not be allowed to file successive petitions for rehearing...The obvious reason for
19 this rule is that successive motions for rehearing tend to unduly prolong litigation"); Groesbeck
20 v. Warden, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984), superseded by statute as
21 recognized in Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000) ("petitions that are filed many
22 years after conviction are an unreasonable burden on the criminal justice system. The necessity
23 for a workable system dictates that there must exist a time when a criminal conviction is
24 final."). Indeed, such an approach to manifold applications for the same relief is reflected by
25 the lack of the right to appeal the denial of reconsideration. See Phelps v. State, 111 Nev. 1021,
26 1022, 900 P.2d 344, 346 (1995). Likewise, this attitude is reinforced by the Rule clarifying
27 that a motion for reconsideration does not toll the time for noticing an appeal. EJDCR 2.24(b);
28 see In re Duong, 118 Nev. 920, 923, 59 P.3d 1210, 1212 (2002).

1 Petitioner failed to seek leave of this Court before filing his instant Reconsideration
2 Petitions. Therefore, pursuant to EJD CR 2.24 and 13(7), Petitioner's Reconsideration Petitions
3 are not properly before this Court. As such, these Petitions should be denied.

4 **II. RECONSIDERATION IS UNWARRANTED**

5 Petitioner alleges, among other things, that this Court should reconsider its rulings
6 because Petitioner was not given the opportunity to review the State's proposed Findings of
7 Fact, Conclusions of Law and Orders ("Findings") before the Court signed and filed the same.
8 See Second Reconsideration Motion at 2. While the State concedes that Petitioner should have
9 been given such an opportunity, Petitioner fails to demonstrate that reconsideration is the
10 appropriate relief, especially in light of the fact that the respective Findings correctly deny
11 Petitioner's claims.

12 A review of Petitioner's respective Reconsideration Motions reveals that Petitioner
13 does not include relevant legal authority to contradict or undermine the Court's determinations
14 in the Findings. See generally First Reconsideration Motion; see also Second Reconsideration
15 Motion. Instead, Petitioner merely seems to be dissatisfied with the Court's decisions. See id.
16 A party seeking review bears the responsibility "to cogently argue, and present relevant
17 authority" to support his assertions. Edwards v. Emperor's Garden Restaurant, 122 Nev. 317,
18 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v.
19 Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant's failure to present legal
20 authority resulted in no reason for the district court to consider defendant's claim); Maresca
21 v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments
22 with relevant authority and cogent argument; "issues not so presented need not be addressed");
23 Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may
24 decline consideration of issues lacking citation to relevant legal authority); Holland Livestock
25 v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant
26 legal authority do not warrant review on the merits). The State submits that Petitioner's single-
27 sentence assertions of district court error, with infrequent, unexplained and/or unconnected
28 legal citations, fails to meet this responsibility.

1 Petitioner's repetition of claims that were already deemed meritless, without any further
2 elaboration or additional, relevant legal authority, fails to demonstrate that this Court's
3 Findings warrant reconsideration. As such, Defendant's earlier Amended Petition, and Motion
4 to Compel, were properly denied, and the oversight of submitting the Findings to Petitioner
5 for review should be deemed harmless.

6 **CONCLUSION**

7 Based on the above, the State respectfully requests that this Court DENY both of
8 Petitioner's Reconsideration Petitions in their entirety.

9 DATED this 9th day of April, 2021.

10 Respectfully submitted,

11 STEVEN B. WOLFSON
12 Clark County District Attorney
13 Nevada Bar #001565

14 BY

BB for
15 JONATHAN VANBOSKERCK
16 Chief Deputy District Attorney
17 Nevada Bar #06528

18 **CERTIFICATE OF MAILING**

19 I hereby certify that service of the above and foregoing was made this 9th day of
20 April, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

21 JAMES H. HAYES, BAC #1175077
22 SOUTHERN DESERT CORRECTIONAL CENTER
23 P.O. BOX 208
24 INDIAN SPRINGS, NV 89018

25 BY

C. Garcia

26 C. Garcia
27 Secretary for the District Attorney's Office
28

cg/L2



1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JONATHAN VANBOSKERCK
6 Chief Deputy District Attorney
7 Nevada Bar #06528
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

9 JAMES HOWARD HAYES,
10 aka, James Howard Hayes Jr., #2796708

11 Plaintiff,

CASE NO: A-19-793315-1

12 -vs-

13 THE STATE OF NEVADA,

DEPT NO: III

14 Defendant.

15
16 **STATE'S OPPOSITION TO PETITIONER'S MOTION TO
MODIFY AND/OR CORRECT ILLEGAL SENTENCE**

17 DATE OF HEARING: APRIL 19, 2021

18 TIME OF HEARING: 8:30 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
20 District Attorney, through JONATHAN VANBOSKERCK, Chief Deputy District Attorney,
21 and hereby submits the attached Points and Authorities in State's Opposition to Petitioner's
22 Motion to Modify and/or Correct Illegal Sentence.

23 This Opposition is made and based upon all the papers and pleadings on file herein, the
24 attached points and authorities in support hereof, and oral argument at the time of hearing, if
25 deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On or about July 23, 2013, James H. Hayes (hereinafter, "Petitioner") was charged by
4 way of Criminal Complaint with one count of BURGLARY (Category B Felony – NRS
5 205.060) and one count of ATTEMPT GRAND LARCENY (Category D Felony/Gross
6 Misdemeanor – NRS 205.220.1, 205.222.2, 193.330). Following a Preliminary Hearing in
7 Justice Court, Las Vegas Township on June 14, 2016, the charge of BURGLARY was bound
8 over to District Court, and the charge of ATTEMPT GRAND LARCENY was dismissed.

9 On June 17, 2016, the State filed an Information with the District Court, charging
10 Petitioner with one count of BURGLARY. On August 29, 2017, the State filed an Amended
11 Notice of Intent to Seek Punishment as a Habitual Criminal. On November 7, 2018, pursuant
12 to a Guilty Plea Agreement ("GPA"), Petitioner entered a plea of Guilty pursuant to North
13 Carolina v. Alford, 400 U.S. 25 (1970) to one count of ATTEMPT GRAND LARCENY.

14 The terms of the GPA are as follows:

15 The State has agreed to make no recommendation at the time of sentencing. The
16 State has no opposition to probation with the only condition being thirty (30)
17 days in the Clark County Detention Center (CCDC), with thirty (30) days credit
for time served.

18 GPA at 1:22-24.

19 The GPA further includes, in pertinent part, the following acknowledgement:

20 I understand and agree that, if...an independent magistrate, by affidavit review,
21 confirms probable cause against me for new criminal charges including reckless
22 driving or DUI, but excluding minor traffic violations, the State will have the
23 unqualified right to argue for any legal sentence and term of confinement
24 allowable for the crime(s) to which I am pleading guilty, including the use of
25 any prior convictions I may have to increase my sentence as a habitual criminal
to five (5) to twenty (20) years, Life without the possibility of parole, Life with
the possibility of parole after ten (10) years, or a definite twenty-five (25) year
term with the possibility of parole after ten (10) years.

26 GPA at 2: 1-9.

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1 An Amended Information reflecting the new charge of ATTEMPT GRAND
2 LARCENY was filed in conjunction with the GPA. Petitioner was adjudged Guilty pursuant
3 to Alford that same day, and the sentencing hearing was scheduled for March 6, 2019.

4 On January 31, 2019, the State filed a State's Notice of Motion and Motion to Revoke
5 Bail, asserting that in Las Vegas Justice Court case number 19F01534X, a Justice of the Peace
6 had found probable cause to charge Petitioner with Burglary for acts committed on or around
7 January 26, 2019. The State's Motion to Revoke Bail was granted after a hearing on February
8 4, 2019.

9 At the sentencing hearing on March 6, 2019, the State argued that it had regained the
10 right to argue pursuant to the terms of the GPA. The Court agreed, and the State argued that
11 Petitioner should be punished under NRS 207.010 (the "Small Habitual Statute"). The Court
12 agreed, and Petitioner was sentenced to sixty (60) to one hundred seventy-four (174) months
13 in the Nevada Department of Corrections (NDOC), consecutive to Petitioner's sentence in
14 another case (C315125). The Court also awarded Petitioner ten (10) days credit for time
15 served. The Judgment of Conviction in this case was filed on March 12, 2019.

16 Petitioner filed a Notice of Appeal on March 28, 2019. Petitioner's Case Appeal
17 Statement was filed on August 9, 2019 (SCN 78590).

18 On April 15, 2019, Petitioner filed a Petition for Writ of Habeas Corpus ("Petition").
19 Pursuant to Court order, the State filed its Response on June 26, 2019. At the hearing on the
20 Petition on August 19, 2019, the Court noted that Petitioner filed two Addenda to his original
21 Petition (the first on May 7, 2019, and the second on May 9, 2019). Pursuant to the Court's
22 order, the State filed a Response to the Addenda on October 10, 2019. Petitioner filed a Reply
23 to the State's Response on November 4, 2019. On November 18, 2019, Petitioner's Petition
24 came before the Court, at which time the Court took the matter OFF CALENDAR due to
25 Petitioner's pending appeal.

26 On November 19, 2019, Petitioner filed another Notice of Appeal, appealing the denial
27 of his Coram Nobis motion. His Case Appeal Statement was filed on December 11, 2019 (SCN
28

1 80222). On August 31, 2020, the Nevada Court of Appeals affirmed the Court's denial of his
2 Coram Nobis motion. Remittitur issued on October 12, 2020.

3 On January 14, 2020, the Nevada Supreme Court AFFIRMED Petitioner's Judgment
4 of Conviction in SCN 78590. Remittitur issued on February 25, 2020.

5 On February 12, 2020, Petitioner filed an "Amended Petition for Writ of Habeas
6 Corpus" (his "Amended Petition"). This Court ordered a Response to that Amended Petition
7 on March 4, 2020. Thereafter, on March 6, 2020, Petitioner filed a "Petition: Expeditious
8 Judicial Examination NRS 34.360-34.830" (his "Petition: EJE"). Pursuant to this Court's
9 order, the State filed its Response to both filings on April 17, 2020. Petitioner replied to the
10 State's Response on May 15, 2020.

11 On May 15, 2020, Petitioner also filed an "Affidavit of Actual Innocence not Mere
12 Legal Insufficiency but 'Factual Innocence.'" On May 27, 2020, Petitioner filed a
13 Supplemental Petition. While Petitioner's numerous pleadings were pending, Petitioner filed
14 a Motion for Peremptory Challenge of Judge and to Disqualify Judge William Bill Kephart.
15 Thereafter, the State filed its Responses to Petitioner's Affidavit of Actual Innocence and
16 Petitioner's Supplemental Petition on June 10, 2020. As a result of Petitioner's Peremptory
17 Challenge, Petitioner's pending matters were taken off calendar on June 15, 2020. On June
18 29, 2020, Petitioner filed his Reply to the State's Response to Petitioner's Affidavit of Actual
19 Innocence.

20 On July 7, 2020, Chief Judge Linda Bell considered, and denied, Petitioner's Motion
21 for Peremptory Challenge of Judge Kephart. Chief Judge Bell's Decision and Order was filed
22 on July 8, 2020.

23 On July 23, 2020, Petitioner filed his Reply to the State's Response to Petitioner's
24 Supplemental Petition. Petitioner, that same day, filed a Motion for Ruling for Rule 60b
25 Motion for Relief; Motion to Vacate; Amended Petition for Writ of Habeas Corpus. The State
26 filed its Response to Petitioner's Motion for Ruling on September 2, 2020. Petitioner's Motion
27 for Ruling was denied on September 9, 2020.

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1 On September 25, 2020, Petitioner filed a Motion for Expeditious Ruling for “Amended
2 Petition for Writ of Habeas Corpus” 3rd Request. On October 7, 2020, he filed a Motion to
3 Set Evidentiary Hearing and Issue Transport Order. On October 14, 2020, Petitioner filed a
4 Motion to Reconsider Order Denying Motion for Ruling for Rule 60b Motion for Relief;
5 Motion to Vacate; Amended Petition for Writ of Habeas Corpus. The State filed responsive
6 pleadings to each of Petitioner’s respective filings on November 10, 2020. On November 16,
7 2020, the Court considered, and denied, Petitioner’s three Motions. The Court’s Order was
8 filed on November 21, 2020.

9 On December 22, 2020, Petitioner filed a “Motion to Compel Judgment Pursuant to
10 Nevada Revised Statutes Chapter 34 FRCP Rule 12(c) for Amended Petition for Writ of
11 Habeas Corpus.” The State filed its Response to that Motion on January 27, 2021. On February
12 1, 2021, the Court denied Petitioner’s Motion to Compel. The Court also noted that no order
13 had been filed regarding Petitioner’s Amended Petition for Writ of Habeas Corpus; therefore,
14 the Court denied the Amended Petition as well.

15 On March 9, 2021, the Court filed its Findings of Fact, Conclusions of Law and Order
16 denying Petitioner’s Amended Petition. On March 11, 2021, Petitioner filed a Petition to
17 Reconsider “Findings of Fact, Conclusion of Law” ADDENDUM. Thereafter, on March 17,
18 2021, Petitioner filed a Petition for Reconsider [sic] findings of “Fact and Conclusions of Law.”
19 On March 18, 2021, Petitioner noticed his appeal from the denial of his Amended Petition.

20 On March 25, 2021, Petitioner filed the instant Motion to Modify and/or Correct Illegal
21 Sentence (his “Motion to Modify”).

22 On April 7, 2021, Petitioner filed a Supplemental Petition for Writ of Habeas Corpus.

23 The State now responds to Petitioner’s Motion to Modify, as follows:

24 **ARGUMENT**

25 **I. PETITIONER FAILS TO DEMONSTRATE THAT HIS SENTENCE IS** 26 **ILLEGAL**

27 In general, a district court lacks jurisdiction to modify or vacate a sentence once the
28 defendant has started serving it. Passanisi v. State, 108 Nev. 318, 322, 831 P.2d 1371, 1373

1 (1992), overruled on other grounds by Harris v. State, 130 Nev. 435, 447, 329 P.3d 619, 627
2 (2014). Not every mistake or error during sentencing gives rise to a due process violation.
3 State v. District Court (Husney), 100 Nev. 90, 97, 677 P.2d 1044, 1048 (1984).

4 Instead, the Nevada Supreme Court has emphasized, “a motion to modify a sentence is
5 limited in scope to sentences based on mistaken assumptions about a defendant’s criminal
6 record which work to the defendant’s extreme detriment.” Edwards v. State, 112 Nev. 704,
7 708, 918 P.2d 321, 324 (1996). Such motions address “only the facial legality of a sentence”
8 and cannot “be used as a vehicle for challenging the validity of a judgment of conviction or
9 sentence based on alleged errors occurring at trial or sentencing.” Id. The latter “must be raised
10 in habeas proceedings.” Id.

11 However, district courts have “wide discretion” in sentencing decisions, and “[s]o long
12 as the record does not demonstrate prejudice resulting from consideration of information or
13 accusations founded on facts supported only by impalpable or highly suspect evidence,” their
14 decisions will not be disturbed. Allred v. State, 120 Nev. 410, 420, 92 P.2d 1246, 1253 (2004)
15 (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). Pursuant to statute,
16 district courts may consider “any reliable and relevant evidence at the time of sentencing.”
17 NRS 176.015(6). So long as the district court’s sentencing decision falls within the statutory
18 range of punishment, the length of a sentence itself will not be considered an abuse of the
19 court’s discretion. See Glegola v. State, 110 Nev. 344, 349, 871 P.2d 950, 953 (1994) (citing
20 Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980).

21 Petitioner enumerates eight (8) arguments against his sentence. See generally, Motion
22 to Modify. However, Petitioner’s arguments fall short as they are each beyond the limited
23 scope of motions to modify, or are belied by the record.

24 **A. Petitioner was Properly Adjudicated a Habitual Criminal**

25 At the time Petitioner entered his guilty plea,¹ NRS 207.010 explained (in pertinent
26 part):

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28 ¹ NRS 207.010 was amended, effective July 1, 2020. However, the State’s Response reflects the
effective version of the statute as of the time of Petitioner’s conviction.

1 ...a person convicted in this State of:

- 2 (a) Any felony, who has previously been two times convicted, whether in this
3 State or elsewhere, of any crime which under the laws of the situs of the crime
4 or of this State would amount to a felony is a habitual criminal and shall be
punished for a category B felony by imprisonment in the state prison for a
minimum term of not less than 5 years and a maximum term of not more than
20 years.

5 Petitioner argues that he was improperly adjudicated as a habitual criminal, because he
6 did not have the requisite number of convictions. Motion to Modify at 2-3. However, Court
7 Minutes from Petitioner's Sentencing hearing reflect that the State presented evidence of
8 Petitioner's previous convictions, and that the Court found that the State had met its burden
9 under NRS 207.010. See Court Minutes, dated March 6, 2019 (filed March 12, 2019).
10 Furthermore, the Presentence Investigation Report ("PSI") reflected four (4) prior felony
11 convictions, including two (2) prior felonies in Houston, Texas, and two (2) prior felonies in
12 Las Vegas, Nevada. PSI at 3-4. Therefore, Petitioner's claim is belied by the record, and cannot
13 entitle Petitioner to relief. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984)
14 ("bare" and "naked" claims are insufficient to warrant relief).

15 Petitioner also argues that he could not properly be adjudicated as a habitual criminal,
16 as the two (2) Las Vegas felonies in Petitioner's PSI occurred *after* the alleged offenses
17 occurred in the instant underlying case. Motion to Modify at 3. However, Petitioner fails to
18 support his assertion that the date of *offense*, rather than the date of *conviction*, controls for
19 purposes of NRS 207.010.² See id. Therefore, Petitioner cannot demonstrate that the district
20 court erred in adjudicating Petitioner a habitual criminal.

21 Petitioner finally argues that the district court abused its discretion by imposing habitual
22 criminalization when his prior felonies were not violent. Motion to Modify at 3. While
23 Petitioner argues that "the sentencing Judge violated legislation intent," Petitioner fails to state
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25 ² The State represents that the Nevada Supreme Court has not given guidance regarding which
26 controls; however, an interpretation that the date of *conviction* controls would be consistent with the
27 Nevada Supreme Court's determination in Gallego v. State, 101 Nev. 782, 792-93, 711 P.2d 856, 863-
28 64 (1985), in which the Nevada Supreme Court sustained a "prior conviction" aggravating
circumstance where the conduct occurred chronologically *after* the offense for which the death penalty
was sought, but the sentence occurred *prior* to the penalty hearing in the capital case. Citing NRS
200.033(2).

1 *what* that intent was, much less in light of the statute's blatant omission of characterization of
2 felonies to be used. See id.; see also NRS 207.010. Moreover, Petitioner's argument is belied
3 by Nevada precedent, as the Nevada Supreme Court has previously recognized that, after
4 existence of prior felonies has been shown, a district court has only the discretion to *dismiss* a
5 count of habitual criminality, *not* the discretion to adjudicate a defendant a habitual criminal.
6 See O'Neill v. State, 123 Nev. 9, 12-16, 153 P.3d 38, 40-42 (2007). As such, because
7 Petitioner's arguments are belied and/or unsupported, Petitioner's claim cannot entitle
8 Petitioner to relief.

9 **B. The State Properly Noticed its Intent to Seek Punishment as a Habitual**
10 **Criminal**

11 Petitioner next claims that the State failed to properly notice its intent to seek habitual
12 criminal punishment for his Attempt Grand Larceny charge. Motion to Modify at 3. However,
13 Petitioner's claim is directly belied by the record, as the Amended Notice of Intent to Seek
14 Punishment as a Habitual Criminal, filed on August 29, 2017, includes a notice that the State
15 would seek punishment under NRS 207.010 "in the event of a felony conviction in the above-
16 entitled action." At 1:21-22. Therefore, pursuant to Hargrove, Petitioner's claim does not
17 warrant relief. 100 Nev. at 502, 686 P.2d at 225.

18 To the extent Petitioner asserts that the State was required to specify under *which* count
19 the State would seek habitual criminal treatment, Petitioner fails to support such an assertion
20 with legal authority. Motion to Modify at 3. Therefore, Petitioner's claim is naked and still
21 falls subject to Hargrove, 100 Nev. at 502, 686 P.2d at 225.

22 To the extent Petitioner believes that the State was required to include a separate count
23 under the habitual criminal statute in the charging document, Petitioner's own quotation belies
24 Petitioner's claim for relief. See Motion to Modify at 3 (quoting NRS 207.010(2))
25 (acknowledging prosecutors' *discretion* to charge habitual criminalization as a separate
26 count). As the statute is clearly permissive, and leaves such a decision up to prosecutors'
27 discretion, the State's decision in the instant, underlying case to *not* include a separate count
28 does not entitle Petitioner to relief.

1 **C.Petitioner’s Claims Against his PSI Should Have Been Raised on Direct Appeal**

2 Petitioner also includes a claim that his PSI improperly and prejudicially includes
3 Petitioner’s 2016 Burglary conviction. Motion to Modify at 4. As a preliminary issue,
4 Petitioner fails to appreciate that his argument should have been raised on direct appeal, and
5 is waived for Petitioner’s failure to raise it thus. See Stockmeier v. State Bd. of Parole Com’rs,
6 127 Nev. 243, 250-51, 255 P.3d 209, 214 (2011) (“to allow a defendant to wait and challenge
7 a PSI in a later action would open courts to a flood of litigation from prisoners seeking
8 amendments to their PSIs long after being sentenced...”). Petitioner fails to support his
9 argument that, simply because that conviction occurred *chronologically* later, that conviction
10 should not have been included. See id. Moreover, Petitioner does not argue that his 2016
11 Burglary conviction was “impalpable or highly suspect”; therefore, Petitioner cannot argue
12 that consideration of other criminal activity constituted an abuse of the district court’s
13 discretion. See Allred, 120 Nev. at 420, 92 P.2d at 1253. Therefore, because Petitioner does
14 not challenge the validity of *that* conviction, and because Petitioner failed to raise this claim
15 on direct appeal, Petitioner’s claim is naked and does not constitute grounds for relief.
16 Hargrove, 100 Nev. at 502, 686 P.2d at 225.

17 Instead, the State would submit that, as the Court may – pursuant to statute – consider
18 any relevant evidence at sentencing, and as Petitioner’s criminal conduct was relevant to the
19 Court’s determination of an appropriate sentence, the Court properly considered Appellant’s
20 2016 Burglary at sentencing. NRS 176.015(6). Therefore, Petitioner cannot demonstrate that
21 he was unduly prejudiced by the inclusion of that information in his PSI.

22 **D.Petitioner Voluntarily Pled Guilty**

23 Petitioner next claims that that “proof of guilt of the primary charge” was required
24 before Petitioner could have properly been adjudicated as a habitual criminal. Motion to
25 Modify at 4. In so claiming, Petitioner relies on Stocks v. Warden, 86 Nev. 758, 476 P.2d 469
26 (1970). However, Petitioner’s reliance on Stocks is misplaced, as that case does not support
27 Petitioner’s claim.

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1 In Stocks, the Nevada Supreme Court did not treat the validity of adjudication under
2 the habitual criminal statute. See 86 Nev. 758, 476 P.2d 469. Instead, the Stocks Court upheld
3 the denial of a petitioner's postconviction pleading. See id. It appears that Petitioner, here, is
4 relying on dicta regarding the irrelevance of the district court's canvass regarding the
5 possibility of habitual criminalization on the validity of a defendant's guilty plea. Compare
6 Motion to Modify at 4 with Stocks, 86 Nev. at 761, 476 P.2d at 471. However, the Stocks
7 Court did not define "primary offense," much less in the way Petitioner now seeks to employ
8 that term. See id. Therefore, it is unclear how Stocks could entitle Petitioner to relief.

9 Petitioner fails to demonstrate that his guilty plea to Attempt Grand Larceny was
10 insufficient under NRS 207.010. Therefore, Petitioner's claim is naked and insufficient to
11 warrant relief pursuant to Hargrove. 100 Nev. at 502, 686 P.2d at 225. Moreover, Petitioner's
12 decision to plead guilty to that charge waives any challenge to any alleged defects related to
13 Petitioner's conviction. Woods v. State, 114 Nev. 468, 477, 958 P.2d 91, 97 (1998); Reuben
14 C. v. State, 99 Nev. 845, 845-46, 673 P.2d 493, 493 (1983); Powell v. Sheriff, 85 Nev. 684,
15 687, 462 P.2d 756, 758 (1969).

16 **E. Petitioner Fails to Support his Argument Regarding Credit for Time Served**

17 Petitioner next claims that he was not given the proper amount of credit for time served.
18 Motion to Modify at 4-5. However, Petitioner's "claim" amounts to only a naked assertion,
19 without any specific facts or argument. Id. As such, Petitioner's claim is suitable only for
20 summary denial under Hargrove. 100 Nev. at 502, 686 P.2d at 225.

21 Indeed, what sparse argument Petitioner *does* include is belied by Nevada precedent.
22 NRS 176.055 entitles defendants to credit for the time spent incarcerated prior to the
23 defendants' sentence. However, pursuant to Petitioner's PSI, Petitioner was released on bail
24 pending his trial and, ultimately, his guilty plea. See PSI at 6. Therefore, Petitioner was only
25 entitled to the time of actual "presentence confinement" prior to sentencing. See Kuykendall
26 v. State, 112 Nev. 1285, 926 P.2d 781 (1996). The Nevada Department of Public Safety
27 calculated that Petitioner spent ten (10) days in presentence confinement. See PSI at 6.
28 Petitioner fails to offer any factual or legal basis for disregarding this precedent, or for

1 challenging the calculation included in Petitioner's PSI. See Motion to Modify. Therefore,
2 Petitioner has failed to demonstrate that he is entitled to relief.

3 **F. Petitioner's Guilty Plea Waived his Challenge to his Conviction**

4 Petitioner then recycles his claim against his conviction for Attempt Grand Larceny,
5 arguing that the dismissal of that count at the Justice Court level precluded any conviction of
6 that offense. Motion to Modify at 5. However, Petitioner fails to recognize that this claim has
7 been repeatedly rejected throughout the instant postconviction proceedings. See, e.g.,
8 Petitioner's "Motion in the Nature of a Writ of Coram Nobis," filed on September 9, 2019.
9 Moreover, Petitioner's claim fails even on the merits thereof, as it is belied by Petitioner's plea
10 canvass and the text of Petitioner's GPA.

11 The Court addressed Petitioner, and asked if Petitioner had any objection to the
12 Amended Information containing the charge of Attempt Grand Larceny, to which Petitioner
13 responded, "No, sir." Recorder's Transcript, dated November 7, 2018 (filed September 25,
14 2019) at 2. Petitioner affirmed that he had read, and that he understood, the Amended
15 Information and the GPA. Id. at 3-4. Petitioner asserted that he believed pleading guilty
16 pursuant to Alford to Attempt Grand Larceny was in his best interest. Id. at 5-6. When the
17 State gave its factual synopsis to support Petitioner's plea, Petitioner and his counsel agreed
18 with those facts. Id. at 7. The Court also advised Petitioner that he did not need to acknowledge
19 actual guilt; rather, Petitioner simply acknowledged that he believed his plea was in his best
20 interest. Id.

21 In Petitioner's GPA, Petitioner specifically agreed to plead guilty pursuant to Alford to
22 Attempt Grand Larceny. GPA at 1. Again, Petitioner acknowledged the circumstances of his
23 plea, which included that he did not need to admit actual guilt. Id. at 2. Petitioner recognized
24 his voluntary waiver of his right to demand that the State prove every element of the crimes
25 against him at trial. Id. at 5. Petitioner endorsed the notion that the guilty plea was in his best
26 interest, and that a trial would be contrary to his best interest. Id.

27 Because Petitioner knowingly and voluntarily adopted the Amended Information, and
28 knowingly and voluntarily pled guilty pursuant to Alford to the charge of Attempt Grand

1 Larceny, Petitioner cannot now challenge the basis for his conviction. Furthermore, as
2 Petitioner's claim is belied by the record, the same should be summarily dismissed. Hargrove,
3 100 Nev. at 502, 686 P.2d at 225.

4 **G. Attempt Grand Larceny was Properly Adjudicated**

5 Petitioner proceeds by asserting that the crime to which he pled guilty should have been
6 deemed a misdemeanor. Motion to Modify at 5. Petitioner does not include any authority for
7 this assertion. Id. In fact, both the Amended Information and the GPA clearly label Attempt
8 Grand Larceny a "Category D Felony/Gross Misdemeanor," a label supported by the
9 enumerated statutes in those documents. See GPA at 1. Therefore, Petitioner's claim that he
10 should have received a misdemeanor conviction is belied by the record, and by applicable
11 statutes, and cannot entitle Petitioner to relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

12 **H. Petitioner's Claim of Actual Innocence is Irrelevant and Unsubstantiated**

13 Finally, Petitioner again raises a claim of "actual innocence" regarding the very crime
14 to which he pled guilty. Motion to Modify at 5-6. Petitioner continues to overlook the fact that
15 he waived this claim by pleading guilty. Woods, 114 Nev. at 477, 958 P.2d at 97; Reuben C.,
16 99 Nev. at 845-46, 673 P.2d at 493; Powell, 85 Nev. at 687, 462 P.2d at 758. Moreover,
17 Petitioner's claim of actual innocence lacks merit.

18 The main case cited by Petitioner is instructive: in Bousley v. United States, 523 U.S.
19 614, 623, 118 S.Ct. 1604, 1611 (1998), the United States Supreme Court determined that
20 actual innocence means *factual* innocence, not *legal insufficiency*. See Motion to Modify at 5
21 (citing Bousley); see also Sawyer v. Whitley, 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19
22 (1992). To establish actual innocence of a crime, a petitioner "must show that it is more likely
23 than not that no reasonable juror would have convicted him absent a constitutional violation."
24 Pellegrini, 117 Nev. at 887, 34 P.3d at 537. However, the standard for actual innocence is a
25 stringent one, designed to be applied only in the most extraordinary situations. See Schlup v.
26 Delo, 513 U.S. 298, 316, 115 S.Ct. 851, 861 (1995). Indeed, a petitioner must demonstrate
27 newly discovered evidence of his innocence that is "so strong that a court cannot have
28 confidence in the outcome of the trial." Id.

1 However, even if a petitioner can meet such a stringent standard, the doctrine of actual
2 innocence is not, itself, a free-standing basis for habeas relief. See Meadows v. Delo, 99 F.3d
3 280, 283 (8th Cir. 1996) (citing Herrera v. Collins, 506 U.S. 390, 400, 113 S.Ct. 853, 860
4 (1993)). Instead, the doctrine is a “gateway” through which a petitioner may overcome
5 procedural defaults and require the reviewing court to review his claims on the merits. Schlup,
6 513 U.S. at 315, 115 S.Ct. at 861.

7 Petitioner claims that the early dismissal of the count of Attempt Grand Larceny is
8 evidence of his innocence. Motion to Modify at 6. However, Petitioner’s claim amounts to a
9 “legal sufficiency” claim, as Petitioner simply argues that *as a matter of law* he should have
10 been precluded from entering a guilty plea to the charge of Attempt Grand Larceny, since that
11 charge was dismissed after the Preliminary Hearing. Id. While Petitioner’s argument relies on
12 the *factual findings* at the Preliminary Hearing, Petitioner fails to assert any “new evidence”
13 of Petitioner’s evidence that would call into question Petitioner’s guilty plea and resulting
14 conviction. Id.

15 Moreover, Petitioner attempts to utilize his claim of actual innocence as a freestanding
16 claim that he asserts entitles him to relief. See Motion to Modify at 5-6. Petitioner, therefore,
17 fails to recognize that actual innocence is available only to overcome procedural defaults, and
18 is not available to, on its own, entitle Petitioner to relief. See Schlup, 513 U.S. at 315, 115
19 S.Ct. at 861. Therefore, as Petitioner is not attempting to overcome any procedural bars, his
20 claim of actual innocence is irrelevant and does not entitle Petitioner to relief.

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CONCLUSION

Because Petitioner's claims are outside the limited scope of motions to modify, and/or are belied by the record and relevant legal authority, the State respectfully requests that this Court DENY Petitioner's Motion to Modify and/or Correct Illegal Sentence in its entirety.

DATED this 14th day of April, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ JONATHAN VANBOSKERCK
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #06528

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 14th day of April, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JAMES H. HAYES, BAC #1175077
SOUTHERN DESERT CORRECTIONAL CENTER
P.O. BOX 208
INDIAN SPRINGS, NV 89018

BY /s/ J. MOSLEY
Secretary for the District Attorney's Office

Electronically Filed
04/14/2021

HOLES, JAMES H. 1175077
Petitioner/In Propria Persona
Post Office Box 208, SDCC
Indian Springs, Nevada 89070

Heather L. Lemin
CLERK OF THE COURT

IN THE 8th JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE
COUNTY OF Clark

JAMES H. HOLES

Petitioner,

vs.

State of Nevada

Respondent(s).

Case No. A-19-783315-W

Dept. No. 3

Docket _____

SUPPLEMENTAL "ADDENDUM"

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the institution. If you are not in a specific institution of the department within its custody, name the director of the department of corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction and sentence.

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CLERK OF THE COURT

1 Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating
2 additional grounds and facts supporting same.

3 23. (a) GROUND ONE: Violations of Mr. Hayes right to "DUE PROCESS
4 of law" in violation of the United States Constitution
5 5th and 14th Amendments and Nevada Constitution
6 "State Due Process and Equal Protection"

7 23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law): IN
8 the court's ORDER on March 8, 2021 that after reviewing the
9 petitioner's petition, court determined petitioner needs to
10 supplement his petition with specificity, claims that
11 "GOOD CAUSE" exists when, through specific allegations,
12 the petitioner demonstrates that fully developing the
13 record would establish his detention is ILLEGAL and
14 deserving of relief. Even though the petitioner has
15 effectively established that he has shown "GOOD CAUSE"
16 by this court's more stringent standard, he was only
17 bound to show "GOOD CAUSE" according to the standards
18 set out by the Supreme Court of the United States in
19 James v. Nelson 394 U.S. 286 that clearly states in
20 PERTINENT part that:

21 "Where specific allegations before the
22 court show reason to believe that
23 the petitioner may, if the facts are
24 fully developed, be able to demonstrate
25 that he is confined illegally and is
26 therefore entitled to relief, it is the
27 duty of the court to provide the

NECESSARY FACILITIES AND PROCEDURES FOR
AN ADEQUATE INQUIRY. Obviously, IN
EXERCISING THIS POWER, THE COURT MAY
UTILIZE FAMILIAR PROCEDURES, AS APPROPRIATE,
WHETHER THESE ARE FOUND IN CIVIL OR CRIMINAL
RULES OR ELSEWHERE IN THE USAGES AND
PRINCIPLES OF LAW...

B. Hopefully, this honorable court will NOT BE PERSUADED BY
THE STATE'S GROSSLY INCORRECT APPLICATION OF LAW OR FACTS TO
LAW

1. THE STATE'S ARGUE THAT PETITIONER'S CLAIMS ARE PRO-
CEDURELLY BARRED BECAUSE THE ISSUE COULD HAVE BEEN RAISED
ON DIRECT APPEAL AND PETITIONER HAS NOT SHOWN CAUSE FOR
FAILING TO DO SO OR PREJUDICE. HOWEVER NRS 34.810 DOES
NOT IMPOSE SUCH REQUIREMENTS ON A FIRST POST CONVICTION
HOBBS PETITION CHALLENGING A CONVICTION BASED ON A GUILTY
PLEA. (HODGES V. STATE 78 P.3d 67)

2. IN BAUSLEY V. UNITED STATES, 523 U.S. 614, THE COURT
HELD THAT A PETITIONER MAY CHALLENGE THE VOLUNTARY CHARACTER
OF A PLEA, NOTWITHSTANDING PROCEDURAL DEFAULT CONSIDERATIONS
IF THE PLEA HAS PROBABLY RESULTED IN THE CONVICTION OF ONE
WHO IS ACTUALLY INNOCENT. PETITIONER IS LEGALLY AND FACTUALLY
INNOCENT OF THE ATTEMPT GROSS FORCERY CHARGE. MOREOVER,
BASED ON JESSONS V. DIMAYE 138 S. CT 1204, PETITIONER CANNOT
KNOWINGLY AND VOLUNTARILY PLEAD GUILTY TO SOMETHING THAT IS
NOT A CRIME. IN FACT, THE ALLEGED CONDUCT IN THE STATE'S
FILED AMENDED INFORMATION IS VERBATIM TO THE STATE'S FILED
CRIMINAL COMPLAINT THAT WAS DISMISSED AT THE CONVICTION

1 of the preliminary hearing on the state's initiation for
2 failure to satisfy the elements of the statute and lack
3 of probable cause, as probable cause must show not only
4 that a crime was committed, but also that the petitioner
5 committed it. (SEE EXHIBIT 44) (SEE EXHIBIT 27)

6 3. DEFECTS IN THE PROSECUTION THE INFORMATION WAS
7 BASED ON FAKE INFORMATION AND THIS IS IDENTIFIED WHEN THE
8 LISTED CONDUCT OF THE OFFENSE DID NOT RISE TO A VIOLATION
9 OF THE CRIMINAL STATUTE FOR THE CHARGE OF ~~ATTEMPT~~ GRAND
10 LARCENY, BASED ON THE ESSENTIAL ELEMENTS OF THE CHARGED
11 OFFENSE. (SEE EXHIBIT 27)

12 4. DEFECT IN THE PLEADINGS THE AMENDED INFORMATION
13 WAS AN IMPROPER AMENDMENT TO THE PLEADINGS AND INVALID
14 BECAUSE IT WAS A SUBSEQUENT PROSECUTION AGAINST STATE
15 LAW (NRS 174.085(3); NRS 178.542). A FUNDAMENTAL ERROR, THIS
16 ERROR IS SO BLATANT OF A VIOLATION OF BASIC PRINCIPLES
17 RENDERING THE PROCEEDINGS UNFAIR TO THE DUE PROCESS RIGHTS
18 OF THE PETITIONER. HERE, THE PETITIONER'S RIGHT TO A FAIR AND
19 JUST PROCEEDING WAS DETRIMENTALLY EFFECTED BY THE DENIAL
20 OF PROCEDURAL OPPORTUNITIES FOR THE ASCERTAINMENT OF TRUTH
21 TO WHICH HE IS ENTITLED. (STRUCTURAL ERROR) (SEE EXHIBIT 44)

22 5. WHERE THE PETITIONER PLEAD AFFORD TO A CRIME WITH-
23 OUT HAVING BEEN INFORMED OF THE ELEMENTS OF THE CRIME,
24 HIS PLEA WAS INVOLUNTARY. (BREDSHOW V. STUMPF 545 U.S. 175)
25 THE PETITIONER'S KNOWLEDGE OF THE ELEMENTS WAS LACKING
26 BECAUSE OF FAKE EVIDENCE AND HIS AWARENESS WAS NOT
27 SUFFICIENT FOR HIS PLEA TO BE VOLUNTARY. THE FACT IS, IF THE
28 JUDGE WOULD HAVE MADE FINDINGS ON THE EVIDENCE,

1 petitioner would not have been found guilty or accepted
2 petitioner's Affid Pet in the first place, as the guilty plea
3 contract in question was based upon omissions of fact
4 and law, and state's actions were clearly made "IN
5 BAD FAITH". In the alternative, this court must order
6 that this case be investigated as this behavior is
7 indicative of the state's misconduct from the inception
8 of this case.

9 6. The records in the instant case clearly shows
10 petitioner's factual innocence, even when reviewed by
11 laymen of law and that he is held hostage in violation
12 of the constitution and Nevada state laws passed in
13 pursuance thereof. Whereas, the court has continually
14 announced its intention to exercise an arbitrary approach to
15 justice by denying the petitioner the DUE PROCESS RIGHT
16 to present facts and evidence and state laws that are
17 indicative to his factual innocence.

18 7. The presiding judge's abuse of discretion
19 rendered counsel's assistance constitutionally ineffective,
20 the subject of the petitioner's amended petition. As trial
21 counsel MR. SMITH continued as appellate counsel, he was
22 duty bound to raise his own ineffectiveness on appeal
23 in a conflict of interest that prevented him from perform-
24 ing that duty. In addition appellate counsel also trial
25 counsel was dismissed by presiding judge prior to the
26 perfection and completion of the appeal process leaving
27 petitioner completely without counsel.

28 8. Counsel failed to investigate the status of

1 of prior conviction - The court has held that it is fundamental
2 that counsel representing petitioners must exonerate himself
3 not only with the facts of law, but also of the case
4 before he can render reasonably effective assistance of
5 counsel, and that relying upon the facts of the case
6 as represented by a prosecuting attorney is not
7 sufficient (Butler v. State 716 S.W.2d 48) with respect to
8 an ineffective assistance of counsel claim, the United
9 States court of appeals for the 9th circuit can think of
10 nothing strategic about failing to object at sentencing
11 to categorically non-qualifying convictions that would
12 prevent petitioner from being eligible for sentencing
13 under a habitual criminal statute. If the prosecution
14 alleges that a defendant is a habitual criminal on the
15 basis of non-qualifying convictions, the petitioner has
16 everything to gain and nothing to lose by objecting.
17 Here the state court did not afford the petitioner a full
18 and fair hearing so the court's decision was based on
19 an unreasonable determination of the facts (Epp 431 F.
20 3d 1167). Furthermore, the court failed to weigh petitioner's
21 prior convictions as a prior conviction record for non-
22 violent property crime(s) did not warrant the harsh
23 sanction available under the habitual criminality statute.
24 The 9th circuit court held that petitioner's due process rights
25 were violated because the trial court did not make the
26 requisite individualized determination that it was just
27 and proper that petitioner be adjudged a habitual

1 offender as mandated by state law violated petitioner's
2 due process right (Walker v. North Carolina 50 F.3d 670) NRS
3 207.010 provides, in part:

4 "In proceeding under this section,
5 each previous conviction shall be
6 alleged in the accusatory pleading
7 charging the primary offense, but no
8 such conviction may be alluded to
9 on trial of the primary offense"

10 All prior convictions used to enhance a sentence must
11 have preceded the primary offense (emphasis added) Here
12 the ~~primary~~ conviction used was not a preceding
13 conviction as it occurred in 2016 and the instant
14 offense of attempt grand larceny occurred in 2013. Finally,
15 the district court was without jurisdiction to sentence
16 petitioner as an habitual criminal because although he
17 pleaded "Alford" to the negotiated "wobbler" offense
18 petitioner had not entered a formal plea to the charge
19 of habitual criminality as it was not alleged in
20 the state's filed amended information so there was no
21 notice to the petitioner that the state was seeking enhance-
22 ment of penalty (Coker v. Georgia 368 U.S. 418) NO REASONABLE
23 NOTICE IN VIOLATION OF DUE PROCESS.

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WHEREFORE, MR. HAYES, prays that the court grant PETITIONER relief to which he may be entitled in this proceeding.

EXECUTED at SOUTHERN DESERT Correctional Center on the 9th day of April, 2021.

James H Hayes
Signature of Petitioner

VERIFICATION

Under penalty of perjury, pursuant to N.R.S. 208.165 et seq., the undersigned declares that he is the Petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true and correct of his own personal knowledge, except as to those matters based on information and belief, and to those matters, he believes them to be true.

James H Hayes
Signature of Petitioner

Attorney for Petitioner

CERTIFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCF 5(b), that on this 9th
day of April, 2021, I mailed a true and correct copy of the foregoing, "SUPPLEMENTAL
ADDENDUM" petition for writ of habeas corpus ..

by placing document in a sealed pre-postage paid envelope and deposited said envelope in the
United State Mail addressed to the following:

Clerk, County Dist Courts
OFFICE OF THE CLERK
200 LOUISIANA AVE
LAS VEGAS, NV
89155-1160

Clerk County Dist. Attorney
200 LOUISIANA AVE
LAS VEGAS, NV
89155-2212

Attorney General of Nevada
100 N. PERSON STREET
CARSON CITY, NV
89701

CC: FILE

DATED: this 9th day of April, 2021.

James H. Hayes
James H. Hayes #1175077
/In Propria Personam
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

EXHIBIT 44

Handley
/s/ Paraguirre, J.
Paraguirre
/s/ Douglas, J.
Douglas
/s/ Gibbons, J.
Gibbons
/s/ Pickering, J.
Pickering

MUST READ !!

Concur

CHERRY

Concur by:
CHERRY, J., concurring:

I just want to make it perfectly clear how I view the jurisprudence set forth in *Turnip v. Sheriff*, 87 Nev. 236, 494 P.2d 1083 (1971), and the amendment identified as NRS 174.085 as an exception to bar another prosecution for the same offense following dismissal of an action where there is no other information or indictment pending for that offense.

The big distinction between using *Turnip* to allow the State to prosecute a defendant when it has elected, between two pending forms of prosecution and not allowing the State to pursue an election between two pending forms of prosecution in accordance with NRS 174.085 is when the dismissal occurs either before the subsequent form of prosecution is obtained or after the subsequent form of prosecution is obtained by the State.

If the State files a criminal complaint or information, then dismisses the case, and subsequently indicates the defendant on the same charge or charges, NRS 174.085 comes into play to bar the subsequent prosecution for the same offense or offenses, unless good cause is shown to the court and upon written findings and a court order to that effect. However, if the dismissal occurs when (125 Nev. 818) both forms of prosecution are still pending NRS 174.085 is not applicable.

Finally, I want prosecutors and criminal defense attorneys to know that if a criminal complaint or information is filed and then the defendant is indicted on the same charges and additional charges, *Turnip* applies if the criminal complaint or information is dismissed and NRS 174.085 would not be applicable (221 P.3d 716) nor would dismissal by the court of the indictment be proper.

/s/ Cherry, J.
Cherry

Footnote

1
Judge Joseph T. Bonaventura signed Thompson's judgment of conviction; however, Judge Lee A. Gates signed the order denying Thompson's motion to dismiss.

2
Judge Lee A. Gates also signed the order denying Thompson's motion to suppress identification.

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3
NRS 174.085 governs, among other things, the effect of a voluntary dismissal and states that "[e]ither the arrest or incarceration of the defendant, the prosecuting attorney may voluntarily dismiss an indictment or information without prejudice to the right to bring another indictment or information only upon good cause shown to the court and upon written findings and a court order to that effect." NRS 174.085(7).

4
NRS 178.554 allows the State to dismiss a criminal complaint or indictment at any time prior to trial.

5
NRS 178.556 permits a court to dismiss an indictment, information, or criminal complaint for unnecessary delay.

6
Because we conclude that the district court properly found that Coppola was not testifying as an expert, we need not reach Thompson's argument that he was not given notice of the alleged expert testimony.

7

From this it follows that it was not an abuse of discretion for the district court to deny Thompson's pretrial motion in limine to exclude the photographs. Thompson also argues on appeal that the district court should have excluded the photographs because their probative value was substantially outweighed by the danger of unfair prejudice. See NRS 48.035(1). Thompson did not object to the photographs on the ground below, and he cannot assert new grounds for objection on appeal. *Geer v. State*, 82 Nev. 221, 224, 548 P.2d 948, 947 (1976). Thompson also has not demonstrated plain error in this respect. See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); *Moore v. State*, 122 Nev. 27, 36-37, 126 P.3d 508, 514 (2006) (explaining that failure to object generally precludes appellate review unless the defendant demonstrates plain error).

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MARTINEZ V. RYAN
561 U.S. (2012)

US DEPT OF JUSTICE
ATTN: CIVIL RIGHTS DIVISION
950 PENNSYLVANIA AVE NW
WASH., DC 20530-0001

EXHIBIT 27

A superseding indictment charging an offense that is a lesser included offense of an offense contained in the original indictment does not broaden or substantially amend the original charges. *Benitez v. State*, 111 Nev. 1363, 904 P.2d 1036, 111 Nev. Adv. Rep. 154, 1995 Nev. LEXIS 153 (Nev. 1995).

The justice court had no authority to sua sponte amend a felony complaint to a misdemeanor. *Parsons v. Fifth Judicial Dist. Court ex rel. County of Nye*, 110 Nev. 1239, 885 P.2d 1316, 1994 Nev. LEXIS 185 (1994).

An information cannot be amended so as to charge an offense not shown by the evidence taken at the preliminary examination. *Hanley v. Zenoff*, 81 Nev. 9, 398 P.2d 241, 1965 Nev. LEXIS 195 (1965), superseded by statute, *Snyder v. State*, 103 Nev. 275, 738 P.2d 1303, 1987 Nev. LEXIS 1633 (1987) (decision under former similar statute).

Information properly amended to conform with preliminary hearing testimony.

State was properly permitted to amend the information on the first day of trial because defendant's rights were not prejudiced and the charges remained same; the information was amended to conform to the victim's testimony at the preliminary hearing. *Viray v. State*, 121 Nev. 159, 111 P.3d 1079, 121 Nev. Adv. Rep. 19, 2005 Nev. LEXIS 23 (Nev. 2005).

An amendment cannot prejudice the defendant.

Although amendment of an information is usually within the trial court's discretion, that discretion is abused if an additional or different offense is charged or the substantial rights of the defendant are prejudiced. *Green v. State*, 94 Nev. 176, 576 P.2d 1123, 1978 Nev. LEXIS 516 (Nev. 1978).

Defendant's substantial rights were prejudiced by an amendment of the information that added felony murder, alleging that defendant kidnapped victim prior to murdering him, because defendant had already testified, had no notice prior to testifying of any allegations of facts that would support a charge of felony murder and thus had no opportunity to defend the charge. *Jennings v. State*, 116 Nev. 488, 998 P.2d 557, 116 Nev. Adv. Rep. 56, 2000 Nev. LEXIS 81 (Nev. 2000).

Amendment prejudiced substantial rights.

The trial court did not abuse its discretion in determining that defendant's substantial rights were prejudiced by the amended information alleging aiding and abetting as an additional theory of murder where State did not offer this amended information until the day of trial and there was no indication that prior to the morning of trial defendant received adequate actual notice of the State's theory that he aided and abetted the murder of victim. *State v. Eighth Judicial Dist. Court*, 116 Nev. 374, 997 P.2d 128, 116 Nev. Adv. Rep. 40, 2000 Nev. LEXIS 36 (Nev. 2000).

A charge already dismissed may not be added by amendment.

Neither NRS 174.145, 34.520, nor this section permit the court to order the amendment of an information to restate a charge that has been dismissed by the magistrate at the preliminary examination, even though the magistrate's order was clearly erroneous. *Martin v. Sheriff, Clark County*, 88 Nev. 303, 496 P.2d 754, 1972 Nev. LEXIS 453 (Nev. 1972).

Clerical change is not prejudicial.

NV CODE

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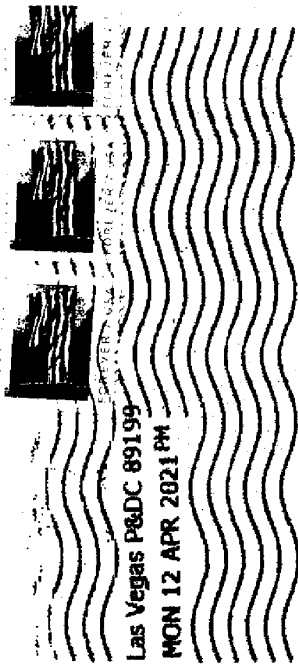
Stamps # 1175077

SDCC

P.O. Box 208

Indian Springs, NV

89070



Las Vegas P&DC 89199
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Clerk County District Court

"Office of the Clerk"

200 LEWIS AVE; 3RD Floor

LAS VEGAS, NEVADA

89155-1160

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CLERK OF THE COURT

LEGG
Mc



1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JONATHAN VANBOSKERCK
6 Chief Deputy District Attorney
7 Nevada Bar #06528
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 JAMES HOWARD HAYES,
10 aka James Howard Hayes Jr.,
#2796708

11 Plaintiff,

CASE NO: A-19-793315-W

12 -vs-

DEPT NO: III

13 THE STATE OF NEVADA,

14 Defendant.

15 **STATE'S OPPOSITION TO PETITIONER'S**
16 **"REPLY MOTION TO COMPEL JUDGMENT PURSUANT TO NEVADA**
17 **REVISED STATUTES CHAPTER 34...FRCP RULE 12(c) FOR AMENDED**
18 **PETITION FOR WRIT OF HABEAS CORPUS"**

19 DATE OF HEARING: MAY 10, 2021
20 TIME OF HEARING: 8:30 AM

21 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
22 District Attorney, through JONATHAN VANBOSKERCK, Chief Deputy District Attorney,
23 and hereby submits the attached Points and Authorities in Opposition to Petitioner's "Reply
24 Motion to Compel Judgment Pursuant to Nevada Revised Statutes Chapter 34...FRCP Rule
25 12(c) for Amended Petition for Writ of Habeas Corpus."

26 This Opposition is made and based upon all the papers and pleadings on file herein, the
27 attached points and authorities in support hereof, and oral argument at the time of hearing, if
28 deemed necessary by this Honorable Court.

//

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On or about July 23, 2013, James H. Hayes (hereinafter, "Petitioner") was charged by
4 way of Criminal Complaint with one count of BURGLARY (Category B Felony – NRS
5 205.060) and one count of ATTEMPT GRAND LARCENY (Category D Felony/Gross
6 Misdemeanor – NRS 205.220.1, 205.222.2, 193.330). Following a Preliminary Hearing in
7 Justice Court, Las Vegas Township on June 14, 2016, the charge of BURGLARY was bound
8 over to District Court, and the charge of ATTEMPT GRAND LARCENY was dismissed.

9 On June 17, 2016, the State filed an Information with the District Court, charging
10 Petitioner with one count of BURGLARY. On August 29, 2017, the State filed an Amended
11 Notice of Intent to Seek Punishment as a Habitual Criminal. On November 7, 2018, pursuant
12 to a Guilty Plea Agreement ("GPA"), Petitioner entered a plea of Guilty pursuant to North
13 Carolina v. Alford, 400 U.S. 25 (1970) to one count of ATTEMPT GRAND LARCENY.

14 The terms of the GPA are as follows:

15 The State has agreed to make no recommendation at the time of sentencing. The
16 State has no opposition to probation with the only condition being thirty (30)
17 days in the Clark County Detention Center (CCDC), with thirty (30) days credit
for time served.

18 GPA at 1:22-24.

19 The GPA further includes, in pertinent part, the following acknowledgement:

20 I understand and agree that, if...an independent magistrate, by affidavit review,
21 confirms probable cause against me for new criminal charges including reckless
22 driving or DUI, but excluding minor traffic violations, the State will have the
unqualified right to argue for any legal sentence and term of confinement
23 allowable for the crime(s) to which I am pleading guilty, including the use of
any prior convictions I may have to increase my sentence as a habitual criminal
24 to five (5) to twenty (20) years, Life without the possibility of parole, Life with
the possibility of parole after ten (10) years, or a definite twenty-five (25) year
25 term with the possibility of parole after ten (10) years.

26 GPA at 2: 1-9.

27 //

28 //

1 An Amended Information reflecting the new charge of ATTEMPT GRAND
2 LARCENY was filed in conjunction with the GPA. Petitioner was adjudged Guilty pursuant
3 to Alford that same day, and the sentencing hearing was scheduled for March 6, 2019.

4 On January 31, 2019, the State filed a State's Notice of Motion and Motion to Revoke
5 Bail, asserting that in Las Vegas Justice Court case number 19F01534X, a Justice of the Peace
6 had found probable cause to charge Petitioner with Burglary for acts committed on or around
7 January 26, 2019. The State's Motion to Revoke Bail was granted after a hearing on February
8 4, 2019.

9 At the sentencing hearing on March 6, 2019, the State argued that it had regained the
10 right to argue pursuant to the terms of the GPA. The Court agreed, and the State argued that
11 Petitioner should be punished under NRS 207.010 (the "Small Habitual Statute"). The Court
12 agreed, and Petitioner was sentenced to sixty (60) to one hundred seventy-four (174) months
13 in the Nevada Department of Corrections (NDOC), consecutive to Petitioner's sentence in
14 another case (C315125). The Court also awarded Petitioner ten (10) days credit for time
15 served. The Judgment of Conviction in this case was filed on March 12, 2019.

16 Petitioner filed a Notice of Appeal on March 28, 2019. Petitioner's Case Appeal
17 Statement was filed on August 9, 2019 (SCN 78590).

18 On April 15, 2019, Petitioner filed a Petition for Writ of Habeas Corpus ("Petition").
19 Pursuant to Court order, the State filed its Response on June 26, 2019. At the hearing on the
20 Petition on August 19, 2019, the Court noted that Petitioner filed two Addenda to his original
21 Petition (the first on May 7, 2019, and the second on May 9, 2019). Pursuant to the Court's
22 order, the State filed a Response to the Addenda on October 10, 2019. Petitioner filed a Reply
23 to the State's Response on November 4, 2019. On November 18, 2019, Petitioner's Petition
24 came before the Court, at which time the Court took the matter OFF CALENDAR due to
25 Petitioner's pending appeal.

26 On November 19, 2019, Petitioner filed another Notice of Appeal, appealing the denial
27 of his Coram Nobis motion. His Case Appeal Statement was filed on December 11, 2019 (SCN

28 //

1 80222). On August 31, 2020, the Nevada Court of Appeals affirmed the Court's denial of his
2 Coram Nobis motion. Remittitur issued on October 12, 2020.

3 On January 14, 2020, the Nevada Supreme Court AFFIRMED Petitioner's Judgment
4 of Conviction in SCN 78590. Remittitur issued on February 25, 2020.

5 On February 12, 2020, Petitioner filed an "Amended Petition for Writ of Habeas
6 Corpus" (his "Amended Petition"). This Court ordered a Response to that Amended Petition
7 on March 4, 2020. Thereafter, on March 6, 2020, Petitioner filed a "Petition: Expeditious
8 Judicial Examination NRS 34.360-34.830" (his "Petition: EJE"). Pursuant to this Court's
9 order, the State filed its Response to both filings on April 17, 2020. Petitioner replied to the
10 State's Response on May 15, 2020.

11 On May 15, 2020, Petitioner also filed an "Affidavit of Actual Innocence not Mere
12 Legal Insufficiency but 'Factual Innocence.'" On May 27, 2020, Petitioner filed a
13 Supplemental Petition. While Petitioner's numerous pleadings were pending, Petitioner filed
14 a Motion for Peremptory Challenge of Judge and to Disqualify Judge William Bill Kephart.
15 Thereafter, the State filed its Responses to Petitioner's Affidavit of Actual Innocence and
16 Petitioner's Supplemental Petition on June 10, 2020. As a result of Petitioner's Peremptory
17 Challenge, Petitioner's pending matters were taken off calendar on June 15, 2020. On June
18 29, 2020, Petitioner filed his Reply to the State's Response to Petitioner's Affidavit of Actual
19 Innocence.

20 On July 7, 2020, Chief Judge Linda Bell considered, and denied, Petitioner's Motion
21 for Peremptory Challenge of Judge Kephart. Chief Judge Bell's Decision and Order was filed
22 on July 8, 2020.

23 On July 23, 2020, Petitioner filed his Reply to the State's Response to Petitioner's
24 Supplemental Petition. Petitioner, that same day, filed a Motion for Ruling for Rule 60b
25 Motion for Relief; Motion to Vacate; Amended Petition for Writ of Habeas Corpus. The State
26 filed its Reponse to Petitioner's Motion for Ruling on September 2, 2020. Petitioner's Motion
27 for Ruling was denied on September 9, 2020.

28 //

1 On September 25, 2020, Petitioner filed a Motion for Expeditious Ruling for “Amended
2 Petition for Writ of Habeas Corpus” 3rd Request. On October 7, 2020, he filed a Motion to
3 Set Evidentiary Hearing and Issue Transport Order. On October 14, 2020, Petitioner filed a
4 Motion to Reconsider Order Denying Motion for Ruling for Rule 60b Motion for Relief;
5 Motion to Vacate; Amended Petition for Writ of Habeas Corpus. The State filed responsive
6 pleadings to each of Petitioner’s respective filings on November 10, 2020. On November 16,
7 2020, the Court considered, and denied, Petitioner’s three Motions. The Court’s Order was
8 filed on November 21, 2020.

9 On December 22, 2020, Petitioner filed a “Motion to Compel Judgment Pursuant to
10 Nevada Revised Statutes Chapter 34 FRCP Rule 12(c) for Amended Petition for Writ of
11 Habeas Corpus.” The State filed its Response to that Motion on January 27, 2021. On February
12 1, 2021, the Court denied Petitioner’s Motion to Compel. The Court also noted that no order
13 had been filed regarding Petitioner’s Amended Petition for Writ of Habeas Corpus; therefore,
14 the Court denied the Amended Petition as well.

15 On February 2, 2021, Petitioner filed the instant “Reply Motion to Compel Judgment
16 Pursuant to Nevada Revised Statutes Chapter 34...FRCP Rule 12(c) for Amended Petition for
17 Writ of Habeas Corpus” (his “Reply”). The State now opposes Petitioner’s Reply, as follows:

18 ARGUMENT

19 **I. PETITIONER’S STATED GROUNDS ARE BELIED BY THE RECORD**

20 Petitioner, though he titles his instant pleading as a “Reply,” asks this Court “enforce
21 EDCR 3.20” – essentially asking that this Court deem that the State has admitted that
22 Petitioner’s Motion to Compel, filed on December 22, 2020, is meritorious, due to the State’s
23 alleged failure to file an Opposition. See Reply at 3. However, Petitioner’s stated grounds –
24 that the State failed to file an Opposition – are belied by the record, as the State filed its
25 Opposition on January 27, 2021. Indeed, in denying Petitioner’s Motion to Compel, the Court
26 recognized the State’s Opposition. See Findings of Fact, Conclusions of Law and Order (filed
27 on March 17, 2021) at 5:3-4. Therefore, because the grounds upon which Petitioner bases his

28 //

1 Reply are belied by the record, Petitioner's Reply is suitable only for denial. See Hargrove v.
2 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

3 **II. THE COURT CORRECTLY APPLIED THE LAW**

4 In the event that this Court deems the State's earlier Opposition to be untimely,
5 Petitioner still would not be entitled to the relief he seeks. Instead, whether or not the State
6 contested Petitioner's assertions, the Court was still bound by the record and binding legal
7 precedent. See Cortes v. State, 127 Nev. 505, 509, 260 P.3d 184, 187-88 (2011) (movant was
8 not entitled to relief simply by filing a motion, and court properly denied relief where movant
9 failed to sufficiently substantiate his request). Therefore, even if the State's Opposition was
10 untimely, Petitioner is not entitled to relief simply because he filed his Motion to Compel.
11 Rather, this Court was required to comply with the law, which it did – and which it detailed in
12 its Findings. See generally, Findings of Fact, Conclusions of Law and Order (filed on March
13 17, 2021). As such, Petitioner's Motion to Compel was properly denied, and his instant request
14 should be rejected.

15 **CONCLUSION**

16 Because the underlying grounds for Petitioner's Reply are belied by the record, and
17 because this Court's Findings are supported by applicable legal authority, the State
18 respectfully requests that this Court DENY Petitioner's Reply.

19 DATED this 16th day of April, 2021.

20 Respectfully submitted,

21 STEVEN B. WOLFSON
22 Clark County District Attorney
23 Nevada Bar #001565

24 BY

25 BB for
26 JONATHAN VANBOSKERCK
27 Chief Deputy District Attorney
28 Nevada Bar #06528

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CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 16th day of April, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JAMES H. HAYES, BAC #1175077
SOUTHERN DESERT CORRECTIONAL CENTER
P.O. BOX 208
INDIAN SPRINGS, NV, 89070

BY



C. Garcia
Secretary for the District Attorney's Office

JV/jj/cg/L2

27

Important
Notice!!

Electronically Filed
04/22/2021

Heather Shuman
CLERK OF THE COURT

HAYES, JAMES H
NDOC No. 1175077
IDCC P.O. Box 208

In proper person

IN THE 8th JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE
COUNTY OF CLARK

JAMES H. HAYES

Petitioner,

v.

STATE OF NEVADA

Respondent.)

"HEARING REQUESTED"

Case No. A-19-793315-W

Dept. No. 3

MOTION AND ORDER FOR TRANSPORTATION
OF INMATE FOR COURT APPEARANCE
OR, IN THE ALTERNATIVE,
FOR APPEARANCE BY TELEPHONE OR VIDEO CONFERENCE

Petitioner, JAMES H. HAYES, proceeding pro se, requests

that this Honorable Court order transportation for his personal appearance or, in the
alternative, that he be made available to appear by telephone or by video conference
at the hearing in the instant case that is scheduled for May 10, 2021
at 8:30 AM.

CLERK OF THE COURT

1 In support of this Motion, I allege the following:

2 1. I am an inmate incarcerated at Southern Desert Correctional Cr.
3 My mandatory release date is Oct 4, 2024.

4
5 2. The Department of Corrections is required to transport offenders to and
6
7 from Court if an inmate is required or requests to appear before a Court in this state.
8

9 NRS 209.274 Transportation of Offender to Appear Before Court states:

10 "1. Except as otherwise provided in this section, when an offender is
11 required or requested to appear before a Court in this state, the
12 Department shall transport the offender to and from Court on the day
13 scheduled for his appearance.

14 2. If notice is not provided within the time set forth in NRS 50.215, the
15 Department shall transport the offender to Court on the date scheduled
16 for his appearance if it is possible to transport the offender in the usual
17 manner for the transportation of offenders by the Department. If it is
18 not possible for the Department to transport the offender in the usual
19 manner:

20 (a) The Department shall make the offender available on the date scheduled
21 for his appearance to provide testimony by telephone or by video conference,
22 if so requested by the Court.

23 (b) The Department shall provide for special transportation of the offender to
24 and from the Court, if the Court so orders. If the Court orders special
25 transportation, it shall order the county in which the Court is located to
26 reimburse the Department for any cost incurred for the special transportation.

27 (c) The Court may order the county sheriff to transport the offender to and
28 from the Court at the expense of the county."

29 3. My presence is required at the hearing because:

1 ☐ I AM NEEDED AS A WITNESS.

2 My petition raises substantial issues of fact concerning events in which I
3 participated and about which only I can testify. *See U.S. v. Hayman*, 342 U.S.
4 205 (1952) (District Court erred when it made findings of fact concerning
5 Hayman's knowledge and consent to his counsel's representation of a witness
6 against Hayman without notice to Hayman or Hayman's presence at the
7 evidentiary hearing).

8 ☒ THE HEARING WILL BE AN EVIDENTIARY HEARING.

9 My petition raises material issues of fact that can be determined only in my
10 presence. *See Walker v. Johnston*, 312 U.S. 275 (1941) (government's contention
11 that allegations are improbable and unbelievable cannot serve to deny the
12 petitioner an opportunity to support them by evidence). The Nevada
13 Supreme Court has held that the presence of the petitioner for habeas corpus
14 relief is required at any evidentiary hearing conducted on the merits of the
15 claim asserted in the petition. *See Gebers v. Nevada*, 118 Nev. 500 (2002).

16 4. The prohibition against ex parte communication requires that I be present
17 at any hearing at which the state is present and at which issues concerning the claims
18 raised in my petition are addressed. U.S. Const. amends. V, VI.

19 5. If a person incarcerated in a state prison is required or is requested to
20 appear as a witness in any action, the Department of Corrections must be notified in
21 writing not less than 7 business days before the date scheduled for his appearance in
22 Court if the inmate is incarcerated in a prison located not more than 40 miles from
23 Las Vegas. NRS 50.215(4). If a person is incarcerated in a prison located 41 miles or
24 more from Las Vegas, the Department of Corrections must be notified in writing not
25 less than 14 business days before the date scheduled for the person's appearance in
26 Court.

27 6. SOUTHERN DESERT CORRECTIONS CTR is located approximately
28 40 miles from Las Vegas, Nevada.

1 7. If there is insufficient time to provide the required notice to the Department
2 of Corrections for me to be transported to the hearing, I respectfully request that this
3 Honorable Court order the Warden to make me available on the date of the
4 scheduled appearance, by telephone, or video conference, pursuant to NRS
5 209.274(2)(a), so that I may provide relevant testimony and/or be present for the
6 evidentiary hearing.

7 8. The rules of the institution prohibit me from placing telephone calls from
8 the institution, except for collect calls, unless special arrangements are made with
9 prison staff. Nev. Admin. Code DOC 718.01. However, arrangements for my
10 telephone appearance can be made by contacting the following staff member at my
11 institution: MR. HUTCHINSON WARDEN
12 whose telephone number is _____

13
14 Dated this 6th day of April, 2021.

15
16 James H. Hayes
17

18
19 JAMES H. HAYES # 1175077
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CERTIFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 6th day of April, 2021, I mailed a true and correct copy of the foregoing, "Motion and Order for Transportation of Inmate for Court Appearance" by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

CLARK COUNTY DISTRICT COURT
OFFICE OF THE CLERK
200 LAWS AVE. 3RD FLOOR
LAS VEGAS, NV
89133-1160

CLARK COUNTY District Attorney
200 LAWS AVE
LAS VEGAS, NV
89133-2212

CC:FILE

DATED: this 6th day of April, 2021.

James H. Hayes
JAMES H. HAYES # 1175077
/In Propria Personam
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

Electronically Filed
04/22/2021

Heather L. Linn
CLERK OF THE COURT

1 James H. #1175077
2 / In Propria Personam
3 Post Office Box 208 S.D.C.C.
4 Indian Springs, Nevada 89018

5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 James H. Hayes
9 (Petitioner)

10 v.

11 State of Nevada
12 (Respondent)

HEARING REQUESTED

Case No. A-19-793315-W

Dept No. 3

Docket _____

13
14 NOTICE OF MOTION

15 YOU WILL PLEASE TAKE NOTICE, that _____

16
17 will come on for hearing before the above-entitled Court on the _____ day of _____, 20____,
18 at the hour of _____ o'clock ____ M. In Department _____, of said Court.

19
20 CC:FILE

21
22 DATED: this 6th day of April, 2021.

23
24 BY: James H. Hayes
25 JAMES H. HAYES #1175077
26 /In Propria Personam

27
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RECEIVED
APR 13 2021
CLERK OF THE COURT

LEFT SIDE
OF FILE PLEASE

IN THE 8th JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE
COUNTY OF CLARK

JAMES H. HAYES

Petitioner,

HEARING REQUESTED

v.

Case No. A-19-793315-W

STATE OF NEVADA

Dept. No. 3

Respondent.)

**ORDER FOR TRANSPORTATION OF INMATE FOR COURT APPEARANCE
OR, IN THE ALTERNATIVE, FOR APPEARANCE BY TELEPHONE OR VIDEO
CONFERENCE**

Based upon the above motion, I find that the presence of
_____ is necessary for the hearing that is scheduled in this
case on the _____ day of _____, _____, at
_____.

THEREFOR, IT IS HEREBY ORDERED that,

☐ Pursuant to NRS 209.274, Warden _____
of _____ is hereby commanded to have
_____ transported to appear before me at a hearing
scheduled for _____ at _____ at the
_____ County Courthouse. Upon completion of the hearing,

RECEIVED

APR 13 2021

CLERK OF THE COURT

1 _____ is to be transported back to the above
2 named institution.

3
4 ☐ Pursuant to NRS 209.274(2)(a), Petitioner shall be made available for telephonic
5 or video conference appearance by his or her institution. My clerk will contact
6 _____ at _____ to make
7 arrangements for the Court to initiate the telephone appearance for the hearing.
8

9 Dated this _____ day of _____
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13 _____
14 District Court Judge
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

August 19, 2019

A-19-793315-W	James Hayes, Plaintiff(s) vs. Nevada State of, Defendant(s)
---------------	---

August 19, 2019 8:30 AM Petition for Writ of Habeas Corpus

HEARD BY: Kephart, William D. **COURTROOM:** RJC Courtroom 16B

COURT CLERK: Tia Everett

RECORDER: Christine Erickson

REPORTER:

PARTIES

PRESENT: Zadrowski, Bernard B. Attorney

JOURNAL ENTRIES

- Court noted Defendant not present and in custody with the Nevada Department of Corrections. Further, Court noted State filed a response to Defendant's petition; however, Defendant has filed two addendums and ORDERED, matter CONTINUED for the State to file a response to the addendums. FURTHER ORDERED, State's response shall be due on or before 10/21/2019 and Defendant's reply shall be due on or before 11/04/2019.

NDC

CONTINUED TO: 11/18/2019 8:30 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

November 18, 2019

A-19-793315-W James Hayes, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

**November 18, 2019 8:30 AM Petition for Writ of Habeas
Corpus**

HEARD BY: Kephart, William D. **COURTROOM:** RJC Courtroom 16B

COURT CLERK: Tia Everett

RECORDER: Christine Erickson

REPORTER:

PARTIES

PRESENT: Marland, Melanie H. Attorney

JOURNAL ENTRIES

- Court noted Defendant not present and in custody with the Nevada Department of Corrections. Court stated the matter has been fully briefed; however, this matter is still pending appeal with the Supreme Court and COURT ORDERED, matter OFF CALENDAR as the Court lacks jurisdiction at this time.

NDC

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

June 15, 2020

A-19-793315-W James Hayes, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

June 15, 2020 10:15 AM Petition for Writ of Habeas Corpus

HEARD BY: Kephart, William D. **COURTROOM:** RJC Courtroom 16B

COURT CLERK: Tia Everett

RECORDER: Christine Erickson

REPORTER:

PARTIES

PRESENT: Waters, Steven L Attorney

JOURNAL ENTRIES

- Court noted Defendant not present and in custody with the Nevada Department of Corrections. Further, Court stated Defendant has filed a motion to disqualify him from the matter; therefore, COURT ORDERED, matter OFF CALENDAR pending decision.

NDC

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

July 07, 2020

A-19-793315-W James Hayes, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

July 07, 2020 11:00 AM Motion

HEARD BY: Bell, Linda Marie **COURTROOM:** RJC Courtroom 10C

COURT CLERK: Kimberly Estala

RECORDER: Renee Vincent

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- No parties present.

COURT FINDS, there is no evidence to support Mr. Hayes's allegations. The Judgement of Conviction was affirmed on appeal and Judge Kephart denied having any bias or prejudice. Therefore, COURT ORDERED, motion DENIED. Court to prepare the order.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

September 09, 2020

A-19-793315-W James Hayes, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

September 09, 2020 10:15 AM Motion

HEARD BY: Kephart, William D. **COURTROOM:** RJC Courtroom 16B

COURT CLERK: Tia Everett

RECORDER: Christine Erickson

REPORTER:

PARTIES

PRESENT: Marland, Melanie H. Attorney

JOURNAL ENTRIES

- Court noted Defendant not present and in custody with the Nevada Department of Corrections.
COURT ORDERED, Motion DENIED pursuant to EDCR 2.20.

NDC

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

November 16, 2020

A-19-793315-W James Hayes, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

November 16, 2020 8:30 AM All Pending Motions

HEARD BY: Kephart, William D. **COURTROOM:** RJC Courtroom 16B

COURT CLERK: Tia Everett

RECORDER: Christine Erickson

REPORTER:

PARTIES

PRESENT: Iscan, Ercan E Attorney

JOURNAL ENTRIES

- PLAINTIFF'S MOTION FOR EXPEDITIOUS RULING FOR "AMENDED PETITION FOR WRIT OF HABEAS CORPUS" 3RD REQUEST:

Court noted Defendant not present and in custody with the Nevada Department of Corrections.
COURT ORDERED, Motion DENIED.

PLAINTIFF'S MOTION TO SET EVIDENTIARY HEARING AND ISSUE TRANSPORT ORDER:

COURT ORDERED, Motion DENIED.

PLAINTIFF'S MOTION TO RECONSIDER ORDER DENYING MOTION FOR RULING FOR RULE

PRINT DATE: 04/23/2021

Page 6 of 10

Minutes Date: August 19, 2019

60 (B) MOTION FOR RELIEF; MOTION TO VACATE; AMENDED PETITION FOR WRIT OF HABEAS CORPUS:

COURT ORDERED, Motion DENIED as a reconsideration is not warranted.

NDC

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

February 01, 2021

A-19-793315-W James Hayes, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

February 01, 2021 8:30 AM Motion to Compel

HEARD BY: Trujillo, Monica **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Grecia Snow

RECORDER: Rebeca Gomez

REPORTER:

PARTIES

PRESENT: Waters, Steven L Attorney

JOURNAL ENTRIES

- COURT ORDERED, Motion to Compel DENIED for the reasons stated in the State's response. State to prepare the order. Court noted as to the prior Amended Petition for Writ no order had been filed. COURT FURTHER ORDERED, Amended Petition for Writ DENIED. State to prepare the order as to findings of fact and conclusion of law consistent with the State's response.

NDC

CLERK'S NOTE: The above minute order has been distributed to: James Hayes #1175077, P.O. BOX 208, Indian Springs, Nevada 89070. /// 2/16/21 gs

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

March 08, 2021

A-19-793315-W	James Hayes, Plaintiff(s)
	vs.
	Nevada State of, Defendant(s)

March 08, 2021	8:30 AM	Motion to Compel
-----------------------	----------------	-------------------------

HEARD BY: Trujillo, Monica	COURTROOM: RJC Courtroom 11C
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COURT CLERK: Alan Castle

RECORDER: Rebeca Gomez

REPORTER:

PARTIES

PRESENT:	Iskan, Ercan E	Attorney
	Nevada State of	Defendant

JOURNAL ENTRIES

- After reviewing petition, Court determined Defendant needs to supplement his petition with specificity. Further, Court directed State to respond to Defendant's petition. Supplemental briefing schedule set and matter continued for decision. Defendant has until April 4, 2020 to supplement his petition; State has until May 5, 2020 to file a response.

5/10/21 8:30 a.m. Decision

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

April 12, 2021

A-19-793315-W James Hayes, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

April 12, 2021 8:30 AM Motion to Reconsider

HEARD BY: Trujillo, Monica **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Natalie Ortega

RECORDER: Rebeca Gomez

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- Defendant not present; incarcerated in the Nevada Department of Corrections (NDC). COURT ORDERED, motion DENIED for the reasons set forward in the State's opposition; State to prepare the Order.

Certification of Copy and Transmittal of Record

State of Nevada }
County of Clark } SS:

Pursuant to the Supreme Court order dated April 20, 2021, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises three volumes with pages numbered 1 through 641.

JAMES H. HAYES,

Plaintiff(s),

vs.

STATE OF NEVADA; WARDEN JERRY
HOWELL,

Defendant(s),

Case No: A-19-793315-W

Dept. No: III

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 23 day of April 2021.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk