

1 Hayes, James H ID NO. 1175077

2 SOUTHERN DESERT CORRECTIONAL CTN.
3 20825 COLD CREEK RD.
4 P.O. BOX 208
5 INDIAN SPRINGS, NV 89070

FILED

DEC 02 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: [Signature]
DEPUTY CLERK

6 IN THE SUPREME COURT OF THE STATE OF
7 NEVADA

8 JAMES H. HAYES
9 (APPELLANT)

10 v.

11 STATE OF NEVADA
12 (RESPONDENT)

CASE NO.: 82734

DEPT. NO.: _____

DOCKET: _____

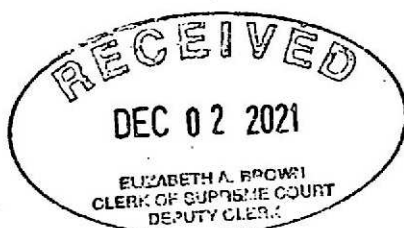
13 MOTION FOR RECONSIDERATION (ENBANC)
14
15
16

17 COMES NOW, ~~appellee~~, JAMES H. HAYES, herein above respectfully
18 moves this Honorable Court for an ruling in favor of appellant as
19 "GOOD CAUSE" EXISTS for this honorable court's ENBANC
20 review.

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

23 DATED: this 26 day of November, 2021

24 BY: James H. Hayes
25 JAMES H. HAYES # 1175077
26 Defendant In Proper Personam



ADDITIONAL FACTS OF THE CASE:

Memorandum of Points and Authorities

This is a Motion for reconsideration from an order of the Court of Appeals affirmance of the district court denying a postconviction petition for writ of habeas corpus.

1. Appellant James H. Hayes argues the Court of Appeals erred in affirmance of the district court's denial of postconviction petition for writ of habeas corpus when all his claims were based on an allegation that his "Afford" plea was involuntarily or unknowingly entered or that his plea was entered without the effective assistance of counsel, and therefore all claims were permissible in his postconviction petitions.

2. NRS Chapter 34 contemplates that the court will review all of the documents filed in the post-conviction proceedings, including but not limited to pre-trial writ, supplemental petitions, petitions for rehearing/ reconsideration when making decision concerning the disposition of the petitions. The court of appeals failed to review all documents filed in the matter, and based upon that relief is warranted by this honorable court's en banc consideration.

3. Note the district court directed appellant to file supplemental briefing March 8, 2021 and set briefing schedule. Appellant followed the court's instructions and filed a supplemental petition to address the

specifically issue ordered and filed petition April 7, 2021
and Addendum April 14, 2021 November 12, 2021.

4. Court of Appeals affirmance is contrary to or
an unreasonable application of clearly established law
as determined by the Supreme Court or based on an
unreasonable determination of the facts in light of
the evidence presented in the Justice and District Courts.

5. However, Mr. Hayes was not eligible for
sentencing under the habitual criminal statute. Texas
convictions for credit card abuse and fraudulent
possession of identifying information was one event,
occurrence prosecuted in the same information and
trial (BEZIN V. STATE 95 NA 461) although the state filed
two separate TDC with different case numbers, this
court must look to the event dates trial dates, and
conviction dates to gain clarity that it was two
convictions that grew out of the same act. In addition,
section 17 of the California penal code reads "A felony is
a crime which is punishable with death or by imprison-
ment in the state prison." Texas convictions did not
carry a prison term, appellant could not be sent to prison
for his conviction(s) the offenses were not felonies
under state law, notwithstanding that the courts
continued to describe offenses as felonies so the state's
judgment as to punishment was entitled to deference.
Further, appellant was not properly adjudicated a
habitual criminal when failure of the state trial court

1 to make the requisite individualized determination that
2 it was just and proper that appellant be judged a
3 habitual offender as mandated by state law NRS 207.010.
4 Trial court failed to properly understand the discretionary
5 nature of habitual offender adjudication and exercise
6 its discretion violated appellant's due process rights.
7 A prior conviction record for non-violent property-crimes
8 though reprehensible simply does not warrant the harsh
9 sanctions available under the habitual criminality statute
10 (*Hughes v. State* 116 Nev. 327)

11 6. NRS 173.095 NOR NRS 174.145 NOR NRS 34.520
12 permits a court allow the amendment of an information
13 to restate a charge that has been dismissed by a
14 magistrate at conclusion of preliminary hearing. An
15 information cannot be amended so as to charge an
16 offense not shown by the evidence taken at the
17 preliminary hearing. Here all parties agree that the
18 charge of attempted grand larceny was dismissed
19 at conclusion of preliminary hearing and not bound
20 over to district court. (see NRS 174.085(3)(5))

21 7. Court of Appeals failed to review de novo
22 the district court's conclusion that probable cause
23 existed (*Beckham v. Weinswright* 638 F.2d 2162)

24 8. Statutory text, its not discretionary but
25 mandatory, however the court of appeals has interpreted
26 the statute differently. Court of appeals application of
27 the statute is deceiving. Appellant argues that his

1 conviction is unconstitutional, and therefore invalid,
2 as the dismissed charge at conclusion of preliminary
3 hearing is barred from subsequent prosecution whether
4 or not if the prosecution of the charge was the result
5 of negotiations. The court of appeals in essence has
6 reversed the statute erroneously. However, the statute
7 ought be interpreted literally as it is not a "term of
8 art" and must be interpreted with respect to
9 legislative intent. This court is now confronted with
10 jurisprudence error in the abstract of legal conse-
11 quences.

12 9. therefore, good cause exists for this
13 honorable court's EVIDENCE REVIEW of MR. HAYES,
14 claims in an effort to avoid a miscarriage of
15 justice and prejudice

16 10. Nothing strategic by trial counsel about
17 failing to object at sentencing to categorically non-
18 qualifying convictions that would prevent appellant
19 from being eligible for sentencing under a habitual
20 criminal statute. The prosecution alleges that appellant
21 is a habitual criminal on the basis of non-qualifying
22 convictions. The appellant has everything to gain and
23 nothing to lose by objecting (Deficiency Hears)
24 the facts alleged by ~~prosecution~~ ~~prosecution~~ appellant trial
25 counsel had provided ineffective assistance of
26 counsel by failing to object to the proffered non-
27 qualifying convictions, and thereby limited the

trial courts consideration to non-qualifying convictions Appellant would have been ineligible for sentencing as a habitual criminal under NRS 207.010. In other words, the trial court could not sentence Appellant to 5 to 15 years, instead, Appellant would have faced a statutory maximum of 19 to 48 months (Prejudice prong) (Tilcock v. Bodge 538 F.3d 1138)

11. Trial counsel was ineffective for failing to challenge state's breach of guilty plea agreement on impeachable and highly suspect evidence, as the victim in allege burglary charge case NO BFO1534X was unable to identify Appellant as the perpetrator of the crime in open court rendering the evidence false and case to irreparable misidentification (Denham v. Dada 954 F.2d 1501) (Simmons v. United States 390 U.S. 377) The breach was not material nor volitional. Appellant was entitled to "specific performance" where the state intentionally breached the guilty plea agreement based on a change in circumstances insufficient to deprive Appellant of the benefit of his bargain. Although there was arguable change of circumstances between the entry of the plea and the time of sustaining the change of circumstances was not a sufficient reason to deprive Appellant of the benefit of his bargain as state violated the terms or the spirit of the plea bargain as a misplace ruling of probable cause.

12. Appellant never had appointed nor retained appellate counsel, only had trial counsel that prepared post trial statement only after he was threatened by this court with sanctions, constitutes complete denial of counsel.

13. Appellant would also note the great disparity between the stipulated sentence in guilty plea agreement 30 days in Clark County Detention Center with 30 days time served credit on a gross misdemeanor, and the sentence imposed by the Judge 5 to 14.5 years. Trial and appellate counsel does not challenge the sentence on due process grounds as posing a realistic likelihood of vindictiveness (*Blackledge v. Perry* 417 U.S. 21)

14. State failed to confer subject matter jurisdiction and set forth true facts sufficient to constitute a public offense of attempted grand larceny pursuant to statute (see NRS 171.206) (*Lamb v. Loveless* 468 P.2d 24)

15. No reasonable notice of intent to seek punishment as a habitual ~~criminal~~ criminal for the charge of attempted grand larceny (gross-misdemeanor) in violation of due process. (*James Gray v. State* 178 P.3d 154)

16. Trial court violated appellant's due process rights "PSI Mistakes" failure to rule on objections was prejudicial because scores are incorrect, they have followed appellant to prison, and used to determine his parole eligibility, classification, and eligibility for programs. (*Bress v. State* 2020 Nev. App. Unpub. LEXIS 867)

17. No factual basis for such a charge on the undisputed facts (*Alford v. Schomig* 2006 U.S. Dist. LEXIS 66711) thus advice appellant received from counsel was constitutionally inadequate (*Tollet v. Henderson* 411 U.S. 258)

CERTIFICATE OF SERVICE BY MAILING

I, JAMES H. HOLMES, hereby certify, pursuant to NRCP 5(b), that on this 26
day of NOVEMBER, 2021, I mailed a true and correct copy of the foregoing, "Motion for
RECONSIDERATION (ENBANC)"

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

SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
201 S. CALLE ST. SUITE 201
CARSON CITY, NV
89701

Attorney General of Nevada
100 N. CALLE ST.
CARSON CITY, NV
89701

CC:FILE

DATED: this 26 day of November, 2021.

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