

FILED

OCT 04 2021

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY D. Richards
DEPUTY CLERK

James H. Hayes

Appellant,

vs.

State of Nevada, et al

Respondent.

Supreme Court No. 83151

District Court No. A-19-793315-W

APPELLANT'S INFORMAL BRIEF

INSTRUCTIONS: If you are an appellant proceeding pro se (without an attorney) in the Nevada Supreme Court, you must file either (1) a brief that complies with Nevada Rule of Appellate Procedure (NRAP) 28(a), or (2) a completed copy of this informal brief form, see NRAP 28(k), with the Nevada Supreme Court on or before the due date, see NRAP 31. In civil appeals, if you do not file one of these documents by the due date, the Nevada Supreme Court may dismiss your appeal. In postconviction criminal appeals, if you do not file one of these documents by the due date, the Nevada Supreme Court or Nevada Court of Appeals may decide your appeal on the record without briefing.

HOW TO FILL OUT THIS FORM: This form must be typed, unless you are incarcerated, in which case it must be clearly handwritten. You do not need to refer to legal authority or the district court record. If you are completing your brief on this form, write only in the space allowed on the form. **Additional pages and attachments are not allowed.** If typing an informal brief, you may either use the lined paper contained in this form or an equivalent number of pages of your own paper. Your brief will be stricken if you fail to follow the directions in this form and the Nevada Rules of Appellate Procedure.

WHERE TO FILE THE BRIEF: You may file your brief in person or by mail.

To file your brief in person: Bring the brief to the Clerk's Office at the Supreme Court of Nevada, 201 South Carson Street, Carson City, Nevada, or at the Regional Justice Center Clerk's Office (Drop Box), 200 Lewis Street, 17th Floor, Las Vegas, Nevada.

You can file your brief Monday through Friday, 8:00 a.m. to 4:00

p.m.

OCT 04 2021

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To file your brief by mail: Mail the brief to the Clerk of the Supreme Court of Nevada, 201 South Carson Street, Carson City, Nevada 89701. **Your brief must be postmarked on or before the due date.**

You must file the original brief and 1 copy with the clerk of the Nevada Supreme Court. If you want the clerk to return a file-stamped copy of your brief, you must file the original form and 2 copies and include a self-addressed, stamped envelope. Documents cannot be faxed or emailed to the Supreme Court Clerk's Office.

Copies of the brief must be mailed or delivered to the other parties to this appeal or to the parties' attorneys, if they have attorneys. You must also include a proper certificate of service or complete the certificate that is attached to the informal brief form.

CAUTION: Pro se parties are prohibited from representing other parties. A pro se party may not complete a brief on behalf of other parties. Pro se parties may collaborate on their briefs, however, provided that if one brief is submitted on behalf of multiple pro se parties, each party must sign and date the brief to confirm that he or she has participated in the preparation of the brief and, by his or her signature, joins in the arguments and representations contained therein.

Judgment or Order You Are Appealing. List the judgment or order that you are appealing from and the date that the judgment or order was filed in the district court.

Filed Date	Name of Judgment or Order
5-10-2021	Supplemental petition for writ of habeas corpus

Notice of Appeal. Give the date you filed your notice of appeal in the district court: July 2, 2021

Related Cases. List all other court cases related to this case. Provide the case number, title of the case and name of the court where the case was filed.

Case No.	Case Title	Name of Court
315718-1	Attempted Grand Larceny	8th Judicial Dist. Ct.

Pro Bono Counsel. Would you be interested in having pro bono counsel assigned to represent you in this appeal?

☒ Yes ☐ No

NOTE: If the court determines that your case may be appropriate for having pro bono counsel assigned, an appropriate order will be entered. Assignment of pro bono counsel is not automatic.

Statement of Facts. Explain the facts of your case. (Your answer must be provided in the space allowed.)

ON or about July 23, 2013, James H. Hayes, appellant was charged by way of criminal complaint with one count of Burglary (NRS 205.010) and one count of attempted grand larceny (NRS 205.220.1; 205.222.2; 193.330). At conclusion of preliminary hearing in Justice Court, Las Vegas Township on July 14, 2016, the charge of burglary was bound over to district court, and the charge of attempted grand larceny was dismissed. On November 7, 2018 pursuant to a

guilty plea agreement, appellant entered a plea of guilty pursuant to North Carolina v. Alford (400 U.S. 25) to one count of attempted grand larceny. State's factual synopsis filed in open court Nov. 7, 2018 stated in pertinent part that "on or about the 9th day of April, 2013, within the county of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada, did wilfully, unlawfully, feloniously, and intentionally with intent to deprive the owner permanently thereof, attempt to steal, take and carry away lawful money of the United States in an amount of \$155.88, or greater, owned by another person, to wit: Joshua Jarvis, by attempting to steal lawful money of the United States, an iPhone and other personal items from the said Joshua Jarvis". At preliminary hearing there was insufficient evidence produced to satisfy the elements of the statute for the crime of attempted grand larceny so the state's factual synopsis was not a public offense for a charge of attempted grand larceny. Appellant will show the following facts supporting a lack of probable cause and insufficient evidence per the evidence produced by the state at the preliminary hearing: 1. Mr. Jarvis testified that no one was in the room at the time of the alleged ^{event} took place. (see pretrial transcripts p. 6 & 9) that was inconsistent with testimony (page 7 at 21-23) and (page 8 at 11-13) that sister friend Daisy was in room, that was one of the three female occupants of the room. (page 11 at 15) he testified

that he sees appellant going thru his luggage. That he later testified under cross that all his luggage was in the vehicle (page 24 at 23) So in essence none of the three female occupants gave testimony that appellant did not have their permission to be in said room nor that any of their property was moved or missing, and the only possession Mr. Jarvis had in room was his phone that was on his person. So after all the testimony presented at preliminary hearing the evidence was devoid of lawful money of the United States in an amount of \$650.00 or greater; unlawful feloniously intent to deprive the owner Mr. Jarvis of \$650.00 or greater leaving the factual suspects false that left the Burglary charge fatal with no intent and claim of unlawful entry.

Statement of District Court Error. Explain why you believe the district court was wrong. Also state what action you want the Nevada Supreme Court to take. (Your answer must be provided in the space allowed).

On the attempted grand larceny charge, appellant contends that a sufficient factual basis for the Atford plea was lacking because there was no evidence that appellant unlawfully entered said room nor was the value of \$650.00 or greater proven and the completed crime of attempted grand larceny requires these essential elements, and the state have not provided argument to the contrary. The value and unlawful entry is an essential element of the crime of which the appellant has been charged and convicted, hence these elements of the crime cannot be established by the uncorroborated evidence produced at prelim. hearing. It follows that the appellant

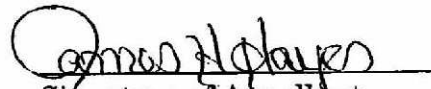
could not properly be convicted of the crime upon the testimony of Mr. Jarvis, uncorroborated as it was. It therefore was ineffective assistance of counsel for trial counsel to advise appellant to enter an Alford plea to the charge when there was no factual basis for such a charge on the undisputed facts. There simply was no factual basis for a plea to a charge of attempted grand larceny. It was attached upon preliminary hearing pursuant to the filed criminal complaint, and NRS 174.085(3) comes into play. State clearly brought another prosecution for the charge of attempted grand larceny following dismissal of an action of dismissal at conclusion of prelim. hearing in violation of NRS 178.562(1). District court failed to make the requisite individualized determination that it was proper that appellant be judged a habitual criminal as mandated by state law violated appellant's due process rights. Court had to properly understand the discretionary nature of habitual criminal adjudication and exercise its discretion. As NSC precedent clearly states that a prior conviction record for non-violent property crimes that appellant could not be sent to prison for though reprehensible simply does not warrant the harsh sanction available under the habitual criminality statute. Habitual criminality was not alleged in the state's filed amended info., so there was no proper notice to the appellant that the state was seeking enhancement of penalty and no reasonable notice as violation of due process nor was appellant counseled by judge for enhancement of penalty. And the amended notice that was filed was for the burglary charge and not the wobbler charge of attempted grand larceny, as one must assume that when

the burglary charge was dismissed the emanded notice was also voided. Appellant never had retained or appointed counsel for the direct appeal process only trial counsel that had to be threaten with sanction to file fast-track statement and appellant never had appellate counsel to raise meritorious claims or reply to state's response. Trial counsel failed to challenge state breach of guilty plea agreement based on impeachable and highly suspect evidence of a burglary charge the alleged victim was unable to identify appellant as the perpetrator of the crime in open court at preliminary hearing rendering the evidence false and rise to irreparable misidentification. Appellant was entitled to specific performance where the state intentionally breached the 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 in the misplace ruling of probable cause between the entry of the plea and the time of sentencing the change of circumstances was not a sufficient reason to deprive appellant of the benefit of his bargain. Trial counsel failed to challenge the presentence investigation report that contains material mistakes concerning appellant's criminal record that has prejudice appellant during his incarceration and will negatively affect his parole and programs. State's prosecution of appellant was vindictive and malicious and fraud upon the court in bad faith as the burglary charge was fatal with no intent and the attempted grand larceny charge was without the essential elements to satisfy the statute. Counsel failed to challenge appellants

conviction under sufficiency of the evidence theory. Accordingly, appellant has demonstrated that he would have prevailed on appeal had counsel to include a sufficiency of the evidence claim. Appellant's Alford plea was not entered knowingly, intelligently, and voluntarily due to ineffective assistance of counsel in violation of the 6th and 14th amendments and the failures were the results of counsel lack of preparation, experience, knowledge, and skill. Cumulative and singular counsel's failures resulted in prejudice to appellant, as there was a reasonable probability of a different outcome had counsel not been ineffective as no jury could convict appellant of burglary without the essential element of intent and the attempted grand larceny was without probable cause...

Mr. Hayes respectfully requests that this honorable court consider the merits and vacate the judgment of conviction

DATED this 28th day of September, 2021.


Signature of Appellant

JAMES H. HAYES #1175072
Print Name of Appellant

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a copy of this completed informal brief form upon all parties to the appeal as follows:

- ☐ By personally serving it upon him/her; or
☒ By mailing it by first-class mail with sufficient postage prepaid to the following address(es) (list names and address(es) of parties served):

DATED this 28th day of September, 2021.

James H. Hayes
Signature of Appellant

JAMES H. HAYES
Print Name of Appellant

SDCC P.O. Box 208
Address

Indian Springs, NV 89470
City/State/Zip

N/A
Telephone