

FILED

OCT 04 2021

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

Hayes, James H ID NO. 1175077

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

Supreme Court of Nevada

James H. Hayes

v.

State of Nevada

CASE NO.: 82734

DEPT. NO.: _____

DOCKET: _____

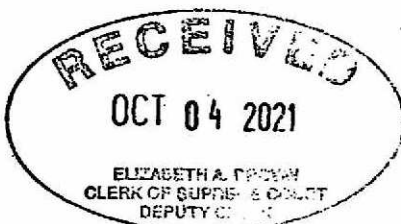
Petition for Rehearing/Reconsideration

COMES NOW, appellant, James H. Hayes, herein above respectfully
moves this Honorable Court for an rehearing of prior determination of
this court as the court has overlooked or misapprehended
a material matter; promote substantial justice...

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

DATED: this 28th day of September, 2021

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



ADDITIONAL FACTS OF THE CASE:

Standard of REVIEW:

The court has overlooked or misapplied or failed to consider a statute, procedural rule, or decision directly controlling a dispositive issue in the case.

The court has overlooked, ~~omitted~~ or misapprehended a material fact in the record or a material question of law in the case.

Court of Appeals decision is an unreasonable application of clearly established Supreme Court precedent and contrary to clearly established Supreme Court precedent.

Argument:

1. Hayes prosecution was barred by the application of NRS 174.085(3) and/or NRS 178.562. The charge of Attempted grand larceny was dismissed at the conclusion of the preliminary hearing after presentation of all the evidence, which did not satisfy the statute as to the elements of the charge and the state moved to dismiss at conclusion not during preliminary hearing. That placed appellant in jeopardy for that charge (see order of affirmance p.2.) by Complaint

NRS 174.085(3) clearly states in pertinent part "that when a defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment, information, or complaint,"

1 In Thompson v. State 125 Nev. 807 Justice Cherry stated "If
2 the state files a criminal complaint or information, then
3 dismisses the charge, and subsequently indicts the
4 defendant on the same charge or charges NRS 174.085(3)
5 comes into play to bar the subsequent prosecution for
6 the same offense that afforded appellant adequate
7 protection from state law double jeopardy. (Cress v. U.S. 1385 Ct. 773)

8 Accordingly, appellant has demonstrated that
9 his counsel's performance fell below an objective stand-
10 ard of reasonableness by failing to argue that appellant's
11 prosecution on the charge of attempted grand larceny
12 was barred by the application of NRS 174.085(3) and/or
13 NRS 178.562 that demonstrates a reasonable probability
14 of a different outcome.

15 1(b). Justice court ruling of probable cause to
16 believe that appellant committed burglary was mis-
17 placed. As appellant could not have committed burglary
18 as alleged by the state in its factual synopsis without
19 an intent when the state's intent of attempted grand
20 larceny was dismissed at conclusion of preliminary
21 hearing that made the burglary offense fatal and it
22 to must have been dismissed for lack of probable cause
23 and insufficient evidence. (see NRS 206.060; State v. Kirk
24 Patrick 94 Nev. 628; Simpson v. Eighth Judicial Dist. Court 88
25 Nev. 254)

26 1(c) State clearly brought another prosecution
27 following dismissal of an action in violation of NRS

178.562. The dismissal of the charge of attempted grand larceny without another pending vehicle for the prosecution of that charge runs afoul of the provisions of NRS 178.562(a) and barred further prosecution of the defendant on that charge. Even if the order of dismissal was upon motion of the district attorney providing for voluntary dismissal, the prohibition of NRS 178.562(a) was applicable and NRS 174.085(5)(A) was inapplicable as the state's voluntary dismissal was at conclusion of preliminary hearing and not before. Hence NRS 174.085(3) comes in to play to deny prosecution of appellant on the charge of attempted grand larceny.

Accordingly, counsel's performance fell below an objective standard of reasonableness by failing to move to dismiss or seek a bill of particulars to the information and amended information constituted constitutionally deficient performance. Here the information for the charge of Burglary was fatal as the intent of attempted grand larceny had been dismissed and intent is an essential element of Burglary and the charge could not be proven beyond a reasonable doubt as describe by the state in its filed factual synopsis contained in the information. The charge of attempted grand larceny in the state's filed amended information was without probable cause and lack the essential element of value of \$650.00 or greater so the charge could not be proven beyond a reasonable doubt. (Sheriff v. Hicks 89 Nev. 78)

ADDITIONAL FACTS OF THE CASE:

2. 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 (Walker v. Leeds 50 F.3d 670). Court had to properly understand the discretionary nature of habitual criminal adjudication and exercise its discretion (Hughes v. State 116 Nev. 327). As Nevada Supreme Court precedent clearly states that a prior conviction record for non-violent property crimes (credit card abuse; fraudulent possession of identification) though reprehensible simply does not warrant the harsh sanction available under the habitual criminality statute. Furthermore, the boilerplate clause is not sufficient notice of enhancement of penalty. Habitual criminality was not alleged in the state's filed amended information so there was no proper notice to the appellant that the state was seeking enhancement of penalty (Couss v. Bolles 368 U.S. 448) and no reasonable notice in violation of due process (Gray v. State 178 P.3d 154). Stocks v. Warden 476 P.2d 469 states "possibility of being charged as an habitual criminal should not weigh heavily if appellant were not guilty of the primary offense, since proof of guilt of the primary charge is a precondition to a subsequent habitual hearing." (Hodges v. State 78 P.3d 87)

*Footnote: 1. Section 12 of the California penal code reads: A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. Appellant could not be sent to prison for offense.

1 3. "No factual basis" (Alford v. Schomig 2006 U.S. Dist. LEXIS
2 66711) THERE WAS NO FACTUAL BASIS FOR APPELLANT'S ALFORD
3 PLEA TO THE CRIME OF ATTEMPTED GRAND LARCENY. IT THEREFORE
4 WAS INEFFECTIVE ASSISTANCE OF COUNSEL FOR TRIAL COUNSEL TO
5 ADVISE APPELLANT TO ENTER ALFORD PLEA TO THE CHARGE WHEN
6 THERE WAS NO FACTUAL BASIS FOR SUCH A CHARGE ON THE
7 UNDISPUTED FACTS PRESENTED AT PRELIMINARY HEARING. DUE
8 PROCESS REQUIRES THAT APPELLANT FACTUAL GUILT OF THE CRIME
9 CHARGED BE ESTABLISHED AND THE RECORD BEFORE THE JUDGE
10 CONTAINS STRONG EVIDENCE OF GUILT (North Carolina v. Alford
11 400 U.S. 25). A PLEA CANNOT SUPPRESS A JUDGMENT OF GUILT UNLESS
12 IT IS VOLUNTARY AND INTELLIGENT UNDER THE 14TH AMENDMENT.
13 THE U.S. SUPREME COURT HAS DETERMINED THAT A DEFENDANT'S
14 PLEA CANNOT BE VOLUNTARY IN THE SENSE THAT IT CONSTITUTED
15 AN INTELLIGENT ADMISSION THAT HE COMMITTED THE OFFENSE
16 UNLESS THE DEFENDANT RECEIVED REAL NOTICE OF THE TRUE
17 NATURE OF THE CHARGE, THE 1ST AND MOST UNIVERSALLY RECOGNIZED
18 REQUIREMENT OF DUE PROCESS. HERE APPELLANT DID NOT UNDER-
19 STAND NOT ONLY THE NATURE OF THE CHARGE AGAINST HIM BUT
20 ALSO THAT HIS CONDUCT ACTUALLY FALLS WITHIN THE CHARGE.
21 (TALE 738 F.2d 199). THE JUDGE FAILED TO DETERMINE THAT THE
22 CONDUCT WHICH THE APPELLANT ADMITTED CONSTITUTES A
23 PUBLIC OFFENSE (Mendez-Diaz v. U.S. 870 F.2d 417). BASED ON
24 SESSIONS V. DIMAZIA 138 S.Ct. 1204, APPELLANT COULD NOT
25 KNOWINGLY AND VOLUNTARILY PLEAD GUILTY TO SOMETHING THAT IS
26 NOT A CRIME. HERE THE ALLEGED CONDUCT IN THE STATE'S
27 FACTUAL SUPPERS IN ITS AMENDED INFORMATION IS VERBETIM

1 to the state's factual synopsis in its criminal complaint
2 that was dismissed at the conclusion of the preliminary
3 hearing on the state's motion for failure to satisfy
4 the elements of the statute that is a clear and convincing
5 showing that no public offense of attempted grand
6 larceny was committed by the appellant. There is
7 simply no indication on the record of the Affidavit
8 proceeding that appellant's plea can stand as an
9 intelligent, knowing, and voluntary admission of guilt
10 as to all elements of the crime with which he was
11 charged. (Nash v. Israel 707 F.2d 298)

12 4. Appellant never had retained or appointed
13 counsel for the completion of his direct appeal and
14 had trial counsel who filed fast-track statement
15 by threat of sanctions by this honorable court. Further
16 more trial counsel was dismissed in July 2019 and
17 the Order of Affirmance was January 2020. Leaving
18 appellant completely without counsel for direct appeal
19 and no reply being filed on appellant's behalf.

20 5. All appellant claims were based on an
21 allegation that his Affidavit plea was involuntary and
22 unknowingly entered or that his Affidavit plea was
23 entered without effective assistance of counsel (see
24 Supplemental petition filed 4-7-2021 and Supplemental
25 petition addendum filed 4-14-21)... Appellant followed
26 the court's instructions and filed the supplemental
27 pleadings to address the specificity issue ordered by

1 by the district court March 8, 2021 (SEE EXHIBIT 2020).

2 "GOOD CAUSE TO ENTERTAIN PETITION" FOR
3 REHEARING/RECONSIDERATION. FAILURE TO CONSIDER
4 THE MERITS WILL RESULT IN PREJUDICE TO APPELLANT.
5 IF THE COURT DENIES THE PETITION WITHOUT CONSIDERING
6 THE MERITS, THE COURT WILL EFFECTIVELY FORCE APPELLANT
7 TO CONTINUE HIS UNLAWFUL INCARCERATION THAT VIOLATES
8 NARADA LAW, NARADA CONSTITUTION AND THE U.S. CONSTI-
9 TUTIONS. IN SUM, IF THE COURT DECLINES TO ADDRESS THE
10 ISSUES THE COURT WILL UNDERMINE AN EFFORT TO AVOID A
11 MISCARriage OF JUSTICE AND PREJUDICE.

12 THEREFORE, THIS HONORABLE COURT SHOULD CONSIDER
13 THE MERITS OF THE CLAIMS IN THE PETITION FOR REHEARING/
14 RECONSIDERATION TO REDRESS THIS MANIFEST INJUSTICE,
15 SO THE STATE WILL NOT SUFFER OR WILL IT PREJUDICE THE
16 STATE AS A RESULT OF THIS HONORABLE COURT CONSIDERATION
17 OF CLAIMS. MOREOVER, NRS 34.724 EXPRESSLY PERMITS A APPELLANT
18 TO CHALLENGE A CONVICTION THAT VIOLATES THE CONSTITUTION
19 OF THE UNITED STATES OR THE CONSTITUTION OF NARADA
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**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

COURT CLERK: Alan Castle

RECORDER: Rebeca Gomez

REPORTER:

PARTIES

PRESENT: Iscan, 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, 2021 to supplement his petition; State has until May 5, 2021 to file a response.

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

EXHIBIT 2020

CERTIFICATE OF SERVICE BY MAILING

I, JAMES H. HAYES, hereby certify, pursuant to NRCP 5(b), that on this 28th day of September, 2021, I mailed a true and correct copy of the foregoing, "Petition for rehearing / reconsideration"

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. CARSON ST. STE 201
CARSON CITY, NV
89701

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

Clerk County District Attorney
200 LEWIS AVE
WESVICKS, NV
89155-2212

CC:FILE

DATED: this 28th day of September, 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: