

# IN THE SUPREME COURT OF THE STATE OF NEVADA

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

vs.

THE STATE OF NEVADA; AND JERRY  
HOWELL, WARDEN,  
Respondent(s),

Electronically Filed  
Oct 01 2021 10:48 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Case No: A-19-793315-W  
*Consolidated with A-21-831979-W*  
Docket No: 83151

# RECORD ON APPEAL VOLUME 3

**ATTORNEY FOR APPELLANT**  
JAMES HAYES #1175077,  
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

**I N D E X**

<b><u>VOLUME:</u></b>	<b><u>PAGE NUMBER:</u></b>
1	1 - 230
2	231 - 460
3	461 - 690
4	691 - 760

**I N D E X**

<b><u>VOL</u></b>	<b><u>DATE</u></b>	<b><u>PLEADING</u></b>	<b><u>PAGE NUMBER:</u></b>
1	02/12/2020	"AMENDED PETITION" PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) "HEARING REQUESTED"	125 - 151
4	08/11/2021	"HEARING REQUESTED" MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REQUEST FOR TRANSCRIPTS AT STATE EXPENSE	702 - 704
3	05/12/2021	"HEARING REQUESTED" OPPOSITION TO STATE'S OPPOSITION TO PETITIONER'S "REPLY MOTION TO COMPEL JUDGMENT PURSUANT TO NEVADA REVISED STATUTES CHAPTER 34".. "FCR RULE 12(C) FOR AMENDED PETITION FOR WRIT OF HABEAS CORPUS"	638 - 652
3	06/03/2021	"MEMORANDUM TO THE COURT"	657 - 658
2	07/23/2020	"MOTION FOR RULING" FOR "RULE 60B MOTION FOR RELIEF" ; "MOTION TO VACATE"; AMEND PETITION FOR WRIT OF HABEAS CORPUS"	328 - 332
1	11/04/2019	"PETITIONER'S REPLY" PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	104 - 112
2	02/02/2021	"REPL"Y MOTION TO COMPEL JUDGMENT PURSUANT TO NEVADA REVISED STATUTES CHAPTER 34... FRCP RULE 12(C) FOR "AMENDED PETITION FOR WRIT OF HABEAS CORPUS"...	444 - 451
1	07/05/2019	"REPLY TO STATE'S RESPONSE" PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)	69 - 76
3	05/06/2021	"REPLY" TO STATE'S OPPOSITION TO PETITIONER'S PETITION TO RECONSIDER "FINDING OF FACT AND CONCLUSIONS OF LAW"; HEARING REQUESTED	632 - 637
3	04/07/2021	"SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS" PETITION (NRS 34.360 - 34.830)	554 - 581
2	05/27/2020	"SUPPLEMENTAL PETITION" PETITION FOR WRIT OF HABEAS CORPUS "HEARING REQUESTED"	272 - 278
2	07/02/2020	AFFIDAVIT IN RESPONSE TO DEFENDANT JAMES HOWARD HAYES' MOTION FOR "PEREMPTORY CHALLENGE OF	318 - 321

**I N D E X**

<b><u>VOL</u></b>	<b><u>DATE</u></b>	<b><u>PLEADING</u></b>	<b><u>PAGE NUMBER:</u></b>
		JUDGE" AND TO DISQUALIFY JUDGE WILLIAM "BILL" KEPHART	
3	06/09/2021	AFFIDAVIT OF "THE STATE OF NEVADA KNOWINGLY, INTELLIGENTLY, CATEGORICALLY ACTED IN "BAD FAITH"; HEARING REQUESTED	659 - 664
1	05/15/2020	AFFIDAVIT OF ACTUAL INNOCENCE NOT MERE LEGAL INSUFFICIENCY BUT "FACTUAL INNOCENCE" AMENDED PETITION FOR WRIT OF HABEAS CORPUS	223 - 230
1	08/09/2019	AFFIDAVIT OF FACIAL LEGALITY	85 - 89
1	07/12/2019	AFFIDAVIT OF ISSUANCE OF WRIT OF HABEAS CORPUS	77 - 79
1	07/30/2019	AMENDED NOTICE OF HEARING FOR PETITION OF WRIT OF HABEAS CORPUS	83 - 84
2	06/04/2020	APPLICATION TO PROCEED INFORMA PAUPERIS (CONFIDENTIAL)	279 - 281
3	04/06/2021	CASE APPEAL STATEMENT	552 - 553
3	06/30/2021	CASE APPEAL STATEMENT	689 - 690
4	10/01/2021	CERTIFICATION OF COPY AND TRANSMITTAL OF RECORD	
2	07/08/2020	DECISION AND ORDER	322 - 327
3	03/18/2021	DESIGNATION OF RECORD ON APPEAL	536 - 536
3	06/29/2021	DESIGNATION OF RECORD ON APPEAL	682 - 688
4	10/01/2021	DISTRICT COURT MINUTES	745 - 760
4	08/23/2021	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	716 - 729
3	03/09/2021	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER	461 - 478
3	03/17/2021	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER	523 - 530
3	03/30/2021	MOTION AND ORDER FOR TRANSPORTATION OF INMATE FOR COURT APPEARANCE OR, IN THE ALTERNATIVE, FOR	546 - 551

**I N D E X**

<b><u>VOL</u></b>	<b><u>DATE</u></b>	<b><u>PLEADING</u></b>	<b><u>PAGE NUMBER:</u></b>
		APPEARANCE BY TELEPHONE OR VIDEO CONFERENCE	
3	04/22/2021	MOTION AND ORDER FOR TRANSPORTATION OF INMATE FOR COURT APPEARANCE OR, IN THE ALTERNATIVE, FOR APPEARANCE BY TELEPHONE OR VIDEO CONFERENCE "HEARING REQUESTED"	623 - 628
1	07/05/2019	MOTION FOR "JUDGMENT OF DEFAULT" AGAINST THE RESPONDENTS AND ENFORCE PROCEDURAL DEFAULT.	50 - 67
2	06/04/2020	MOTION FOR "PEREMPTORY CHALLENGE OF JUDGE" AND TO "DISQUALIFY JUDGE WILLIAM "BILL" KEPHART"	282 - 288
2	09/25/2020	MOTION FOR EXPEDITIOUS RULING FOR "AMENDED PETITION FOR WRIT OF HABEAS CORPUS " 3RD REQUEST!!	348 - 354
4	08/11/2021	MOTION FOR TRANSCRIPTS AT STATE EXPENSE	698 - 701
1	05/20/2019	MOTION OF NOTICE "PREEMPTORY CHALLENGE OF JUDGE"	37 - 40
2	12/22/2020	MOTION TO COMPEL JUDGMENT PURSUANT TO NEVADA REVISED STATUTES CHAPTER 34... FRCP RULE 12(C) FOR AMENDED PETITION FOR WRIT OF HABEAS CORPUS...	413 - 433
2	10/14/2020	MOTION TO RECONSIDER ORDER DENYING MOTION FOR RULING FOR RULE 60B MOTION FOR RELIEF; MOTION TO VACATE; AMENDED PETITION FOR WRIT OF HABEAS CORPUS	376 - 385
2	10/07/2020	MOTION TO SET EVIDENTIARY HEARING AND ISSUE TRANSPORT ORDER...	357 - 373
3	06/29/2021	NOTICE OF APPEAL	681 - 681
3	03/18/2021	NOTICE OF APPEAL; HEARING REQUESTED	531 - 535
1	07/24/2019	NOTICE OF CHANGE OF ADDRESS	80 - 82
1	12/04/2019	NOTICE OF CHANGE OF ADDRESS	113 - 115
2	08/26/2020	NOTICE OF CHANGE OF HEARING	341 - 341
2	11/03/2020	NOTICE OF CHANGE OF HEARINGS	388 - 388

**I N D E X**

<b><u>VOL</u></b>	<b><u>DATE</u></b>	<b><u>PLEADING</u></b>	<b><u>PAGE NUMBER:</u></b>
2	01/15/2021	NOTICE OF DEPARTMENT REASSIGNMENT	436 - 436
3	03/10/2021	NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	479 - 497
3	03/19/2021	NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	537 - 545
4	08/25/2021	NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	730 - 744
2	06/05/2020	NOTICE OF HEARING	297 - 297
2	07/23/2020	NOTICE OF HEARING	333 - 333
2	09/25/2020	NOTICE OF HEARING	356 - 356
2	10/07/2020	NOTICE OF HEARING	375 - 375
2	10/14/2020	NOTICE OF HEARING	386 - 386
2	12/22/2020	NOTICE OF HEARING	435 - 435
2	02/02/2021	NOTICE OF HEARING	452 - 452
3	03/11/2021	NOTICE OF HEARING	510 - 510
3	03/17/2021	NOTICE OF HEARING	522 - 522
3	05/13/2021	NOTICE OF HEARING	656 - 656
4	07/08/2021	NOTICE OF HEARING	697 - 697
4	08/11/2021	NOTICE OF HEARING	705 - 705
4	08/18/2021	NOTICE OF HEARING	715 - 715
1	07/05/2019	NOTICE OF MOTION	68 - 68
2	06/04/2020	NOTICE OF MOTION	289 - 289
2	09/25/2020	NOTICE OF MOTION	355 - 355

**I N D E X**

<b><u>VOL</u></b>	<b><u>DATE</u></b>	<b><u>PLEADING</u></b>	<b><u>PAGE NUMBER:</u></b>
2	10/07/2020	NOTICE OF MOTION	374 - 374
2	10/14/2020	NOTICE OF MOTION	387 - 387
2	12/22/2020	NOTICE OF MOTION	434 - 434
3	03/17/2021	NOTICE OF MOTION	521 - 521
4	07/08/2021	NOTICE OF MOTION; "HEARING REQUESTED"	695 - 696
4	08/18/2021	NOTICE OF MOTION; "HEARING REQUESTED"	714 - 714
3	04/22/2021	NOTICE OF MOTION; HEARING REQUESTED	629 - 629
1	04/30/2020	NOTICE OF RESCHEDULING OF HEARING	221 - 222
2	02/18/2021	OPPOSITION TO STATE'S RESPONSE TO PETITIONER'S MOTION TO COMPEL JUDGMENT PURSUANT TO NEVADA REVISED STATUTES CHAPTER 34; FRCP RULE 12(C) FOR AMENDED PETITION FOR WRIT OF HABEAS CORPUS	453 - 460
3	06/21/2021	ORDER DENYING DEFENDANT'S REPLY MOTION TO COMPEL JUDGMENT PURSUANT TO NEVADA REVISED STATUTES CHAPTER 34...FRCP RULE 12(C) FOR AMENDED PETITION FOR WRIT OF HABEAS CORPUS	665 - 667
3	05/12/2021	ORDER DENYING PETITIONER'S PETITION TO RECONSIDER "FINDINGS OF FACT CONCLUSIONS OF LAW" ADDENDUM	653 - 655
2	11/21/2020	ORDER DENYING PLAINTIFF'S MOTION FOR EXPEDITIOUS RULING FOR AMENDED PETITION FOR WRIT OF HABEAS CORPUS- 3RD REQUEST, PLAINTIFF'S MOTION TO SET EVIDENTIARY HEARING AND ISSUE TRANSPORT ORDER, AND PLAINTIFF'S MOTION TO RECONSIDER ORDER DENYING MOTION FOR RULING FOR RULE 60(B) MOTION FOR RELIEF; MOTION TO VACATE; AMENDED PETITION FOR WRIT OF HABEAS CORPUS	410 - 412
1	05/02/2019	ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS	16 - 16
1	03/04/2020	ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS	152 - 152

**I N D E X**

<b><u>VOL</u></b>	<b><u>DATE</u></b>	<b><u>PLEADING</u></b>	<b><u>PAGE NUMBER:</u></b>
3	03/17/2021	PETITION FOR RECONSIDER FINDINGS OF "FACT AND CONCLUSION OF LAW" "HEARING REQUESTED"	511 - 520
4	08/18/2021	PETITION FOR RECONSIDERATION/REHEARING; "HEARING REQUESTED"	708 - 713
2	05/15/2020	PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) HEARING REQUESTED	231 - 271
1	04/15/2019	PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)	1 - 15
1	05/07/2019	PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION) "ADDENDUM"	17 - 26
1	05/09/2019	PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION) ADDENDUM II (TWO)	27 - 36
3	03/11/2021	PETITION TO RECONSIDER 'FINDINGS OF FACT, CONCLUSION OF LAW " ADDENDUM	498 - 509
1	03/06/2020	PETITION: EXPEDITIOUS JUDICIAL EXAMINATION (NRS 34.360- 34.830)	153 - 177
1	12/20/2019	PETITIONER'S REPLY "ADDENDUM" PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	116 - 124
2	06/29/2020	REPLY TO STATE'S MOTION TO STRIKE PETITIONER'S AFFIDAVIT OF ACTUAL INNOCENCE NOT MERE LEGAL INSUFFICIENCY BUT "FACTUAL INNOCENCE"	309 - 317
2	07/23/2020	REPLY TO STATE'S RESPONSE "SUPPLEMENTAL PETITION FOR WRIT OF HABEAS"	334 - 340
4	07/08/2021	REQUEST FOR SUBMISSION; "HEARING REQUESTED"	691 - 694
3	06/24/2021	STATE'S OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS "COVID-19 (CORONAVIRUS)" AND MOTION TO CONSOLIDATE	668 - 680
3	04/16/2021	STATE'S OPPOSITION TO PETITIONER'S "REPLY MOTION TO COMPEL JUDGMENT PURSUANT TO NEVADA REVISED	616 - 622

**I N D E X**

<b><u>VOL</u></b>	<b><u>DATE</u></b>	<b><u>PLEADING</u></b>	<b><u>PAGE NUMBER:</u></b>
		STATUTES CHAPTER 34...FRCP RULE 12(C) FOR AMENDED PETITION FOR WRIT OF HABEAS CORPUS"	
3	04/14/2021	STATE'S OPPOSITION TO PETITIONER'S MOTION TO MODIFY AND/OR CORRECT ILLEGAL SENTENCE	590 - 603
2	11/10/2020	STATE'S OPPOSITION TO PETITIONER'S MOTION TO RECONSIDER ORDER DENYING MOTION FOR RULING FOR RULE 60B MOTION FOR RELIEF; MOTION TO VACATE; AMENDED PETITION FOR WRIT OF HABEAS CORPUS	389 - 395
2	11/10/2020	STATE'S OPPOSITION TO PETITIONER'S MOTION TO SET EVIDENTIARY HEARING AND ISSUE TRANSPORT ORDER	396 - 402
3	04/09/2021	STATE'S OPPOSITION TO PETITIONER'S PETITION TO RECONSIDER "FINDINGS OF FACT AND CONCLUSIONS OF LAW" AND PETITION TO RECONSIDER FINDINGS OF "FACT AND CONCLUSIONS OF LAW"	582 - 589
2	06/10/2020	STATE'S RESPONSE AND MOTION TO STRIKE PETITIONER'S AFFIDAVIT OF ACTUAL INNOCENCE NOT MERE LEGAL INSUFFICIENCY BUT "FACTUAL INNOCENCE"	298 - 302
1	10/10/2019	STATE'S RESPONSE TO DEFENDANT'S FIRST AND SECOND ADDENDUM TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	93 - 103
1	06/26/2019	STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	41 - 49
1	04/17/2020	STATE'S RESPONSE TO PETITIONER'S AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND PETITION: EXPEDITIOUS JUDICIAL EXAMINATION NRS 34.360-34.830	205 - 220
2	11/10/2020	STATE'S RESPONSE TO PETITIONER'S MOTION FOR EXPEDITIOUS RULING FOR AMENDED PETITION FOR WRIT OF HABEAS CORPUS 3RD REQUEST	403 - 409
2	01/27/2021	STATE'S RESPONSE TO PETITIONER'S MOTION TO COMPEL JUDGMENT PURSUANT TO NEVADA REVISED STATUTES CHAPTER 34 FRCP RULE 12 (C) FOR AMENDED PETITION FOR WRIT OF HABEAS CORPUS	437 - 443

**I N D E X**

<b><u>VOL</u></b>	<b><u>DATE</u></b>	<b><u>PLEADING</u></b>	<b><u>PAGE NUMBER:</u></b>
2	06/10/2020	STATE'S RESPONSE TO PETITIONER'S SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	303 - 308
2	09/02/2020	STATE'S RESPONSE TO PETITITONER'S MOTION FOR RULING	342 - 347
3	04/14/2021	SUPPLEMENTAL "ADDENDUM"	604 - 615
1	10/04/2019	UNFILED DOCUMENT(S) - DEFAULT REJECTION SLIP W/COPY OF UNFILED PREEMPTORY CHALLENGE OF JUDGE	90 - 92
1	03/12/2020	UNSIGNED DOCUMENT(S) - ORDER	178 - 204
4	08/11/2021	UNSIGNED DOCUMENT(S) - ORDER	706 - 706
3	04/22/2021	UNSIGNED DOCUMENT(S) - ORDER FOR TRANSPORTATION OF INMATE FOR COURT APPEARANCE OR, IN THE ALTERNATIVE FOR APPEARANCE BY TELEPHONE OR VIDEO CONFERENCE	630 - 631
2	06/05/2020	UNSIGNED DOCUMENT(S) - ORDER TO PROCEED IN FORMA PAUPERIS (CONFIDENTIAL)	290 - 291
2	06/05/2020	UNSIGNED DOCUMENT(S) - ORDER TO PROCEED IN FORMA PAUPERIS (CONFIDENTIAL)	292 - 296
4	08/11/2021	UNSIGNED DOCUMENT(S) - ORDER TO TRANSCRIBE RECORDS	707 - 707

1 **FCL**  
2 **STEVEN B. WOLFSON**  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 **JONATHAN VANBOSKERCK**  
6 Chief Deputy District Attorney  
7 Nevada Bar #006528  
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.,**  
11 **#2796708**

11 **Petitioner,**

12 **-vs-**

13 **THE STATE OF NEVADA,**

14 **Respondent.**

**CASE NO: A-19-793315-W**

**C-16-315718-1**

**DEPT NO: III**

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

17 **DATE OF HEARING: FEBRUARY 1, 2021**

18 **TIME OF HEARING: 8:30 AM**

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

25 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

26 **STATEMENT OF THE CASE**

27 On or about July 23, 2013, James H. Hayes (hereinafter, "Petitioner") was charged by  
28 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  
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.

28 //

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

- 2
- 3
- 4

5  
6  
7  
8  
9  
10  
11  
12  
13  
14

15  
16

## 17

18  
19

20

21

22

23

24

25

25

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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 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



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 9, 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 10, 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 10 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

1 **FCL**  
2 **STEVEN B. WOLFSON**  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 **JONATHAN VANBOSKERCK**  
6 Chief Deputy District Attorney  
7 Nevada Bar #006528  
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.,**  
11 **#2796708**

11 Petitioner,

12 -vs-

13 **THE STATE OF NEVADA,**

14 Respondent.

CASE NO: A-19-793315-W

C-16-315718-1

DEPT NO: III

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

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

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

25 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

26 **STATEMENT OF THE CASE**

27 On or about July 23, 2013, James H. Hayes (hereinafter, "Petitioner") was charged by  
28 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  
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,

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

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

#### 5 ANALYSIS

#### 6 I. PETITIONER'S AMENDED PETITION IS BARRED AS SUCCESSIVE

7 NRS 34.750(3) allows *appointed counsel* to file certain supplemental pleadings within  
8 30 days. However, "[n]o further pleadings may be filed except as ordered by the court." NRS  
9 34.750(5). Additionally, NRS 34.810(2) reads:

10 A second or successive petition *must be dismissed* if the judge or justice  
11 determines that it fails to allege new or different grounds for relief and that the  
12 prior determination was on the merits or, if new and different grounds are  
13 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.*

14 (Emphasis added). It is strictly the petitioner's burden to demonstrate good cause and prejudice  
15 to survive the court's analysis. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d  
16 944, 950 (1994); see also, Hart v. State, 116 Nev. 558, 563-64, 1 P.3d 969 972 (2000) (holding,  
17 "where a defendant previously has sought relief from the judgment, the defendant's failure to  
18 identify all grounds for relief in the first instance should weigh against consideration of the  
19 successive motion.")

20 The Nevada Supreme Court has stated: "Without such limitations on the availability of  
21 post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-  
22 conviction remedies. In addition, meritless, successive and untimely petitions clog the court  
23 system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950.  
24 The Nevada Supreme Court recognizes, "[u]nlike initial petitions which certainly require a  
25 careful review of the record, successive petitions *may be dismissed based solely on the fact of*  
26 *the petition.*" Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995) (emphasis added).  
27 In other words, if the claim or allegation was previously available with reasonable diligence,  
28 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.

28 //

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

- 2
- 3
- 4

5  
6  
7  
8  
9  
10  
11  
12  
13  
14

15  
16

## 17

18  
19

20

21

22

23

24

25

25

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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 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 L. Smith*  
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 8<sup>th</sup> 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

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 4<sup>th</sup> 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 DETERMINA-  
15 TION 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 ineffectiveness

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 14<sup>th</sup> Amend.

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

5 A. Petitioner's conviction can not stand because  
6 it resulted specifically and directly from the consequences  
7 of the state's denying him the right to effective counsel  
8 in violation of petitioner's right to counsel under the  
9 6th Amend. In practical terms, a constitutionally effective  
10 counsel would have move to dismiss the information  
11 for the charge of Burglary as the state's intent was  
12 dismissed at conclusion of preliminary hearing of attempt  
13 grand larceny and amended information for the charge  
14 attempt grand larceny was barred against petitioner per  
15 NRS 174.085(3); NRS 178.562 and for lack of probable cause,  
16 and the state court would have been required to dismiss  
17 prosecution against petitioner with prejudice. Thus, if  
18 petitioner had been provided effective counsel as the state  
19 was required to do petitioner would never have been  
20 prosecuted, convicted and sentenced all for the reasons  
21 that the state failed to adhere to Nevada constitution  
22 and U.S. constitution in violation of due process and  
23 state law double jeopardy.

24 B. Petitioner has demonstrated by a preponder-  
25 ance of the evidence that counsel was ineffective.

26 C. If counsel would have adequately  
27 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. (Bouslay 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:

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

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

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

7. Petitioner's claim against entry of his amended plea is not belied by the record.

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

B. Petitioner hereby avers that the state's contention that entering the plea agreement was knowingly and voluntarily ~~waives~~ is tantamount to 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 4<sup>th</sup> 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 LOUISIANA AVE. 3RD FL  
LAS VEGAS, NV  
89165-1160

Clerk County Dist Attorney  
200 LOUISIANA 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.

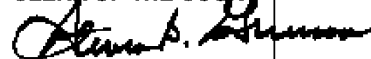
James H. Hayes  
James H. Hayes # 1175077  
/In Propria Personam  
Post Office Box 208, S.D.C.C.  
Indian Springs, Nevada 89018  
IN FORMA PAUPERIS:



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**DISTRICT COURT  
CLARK COUNTY, NEVADA  
\*\*\*\***

Electronically Filed  
3/11/2021 4:57 PM  
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

**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

*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 89070

IN THE 8<sup>th</sup> 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. Shuman  
James H Hayes # 1175077  
Defendant In Proper Personum

RECEIVED

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 \$150 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 instant leaving it false 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 Reconsideration" and that upon  
reconsideration, 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  
JDCC  
P.O. Box 208  
Indian Springs, NV  
89070

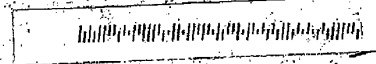
First Class Mail  
08/12/2021  
\$001.40  
ZIP 89101  
011E12650518

10/18/11  
2488889

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



LEGAL  
A.A.  
ELI



GOOGLE:

UCANTCMELLC

Subscribe and share YOUTUBE CHANNEL...

Electronically Filed  
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

RECEIVED



**DISTRICT COURT  
CLARK COUNTY, NEVADA  
\*\*\*\***

James Hayes, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

Case No.: A-19-793315-W

Department 3

**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

1 **FCL**  
2 **STEVEN B. WOLFSON**  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 **JONATHAN VANBOSKERCK**  
6 Chief Deputy District Attorney  
7 Nevada Bar #006528  
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.,**  
11 **#2796708**

11 Petitioner,

12 -vs-

13 **THE STATE OF NEVADA,**

14 Respondent.

CASE NO: A-19-793315-W

C-16-315718-1

DEPT NO: III

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

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

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

25 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

26 **STATEMENT OF THE CASE**

27 On or about July 23, 2013, James H. Hayes (hereinafter, "Petitioner") was charged by  
28 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.

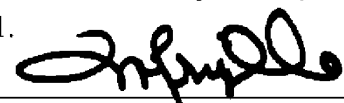
14 This Court finds that Petitioner not only understood the Amended Information, and the  
15 charge contained therein, but further asked the Court to accept the same. Therefore, this Court  
16 concludes that Petitioner waived any future challenge to that charge and document.

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.

21 DATED this \_\_\_\_\_ day of February, 2021.

Dated this 17th day of March, 2021



DISTRICT COURT JUDGE

22 Respectfully submitted,

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

BB9 076 8B3E 35C3  
Monica Trujillo  
District Court Judge

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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.

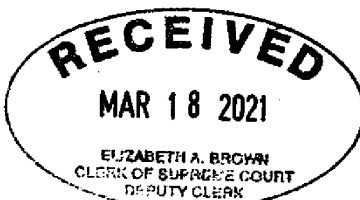
A-19-793315-W  
NOASC  
Notice of Appeal (criminal)  
4950062



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 8<sup>th</sup> 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  
CLARK 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 CHEVY ST., STE 201  
CARSON CITY, NV  
89701

CC:FILE

DATED: this 8<sup>th</sup> day of MARCH, 2021.

James H. Hubbs  
James H. Hubbs #117527  
/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
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2  
3  
4

5  
6  
7  
8  
9  
10  
11  
12  
13  
14

15

16

## 17

18  
19

20

22

24

25

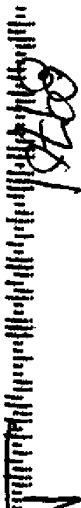
27  
28

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

8/5 #

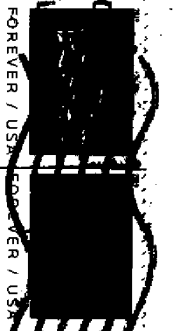
Supreme Court of Nevada  
"Office of the Clerk"  
201 South Carson Street, Suite 201  
Carson City, Nevada

83701-478051



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

1 **FCL**  
2 **STEVEN B. WOLFSON**  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 **JONATHAN VANBOSKERCK**  
6 Chief Deputy District Attorney  
7 Nevada Bar #006528  
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.,**  
11 **#2796708**

11 Petitioner,

12 -vs-

13 **THE STATE OF NEVADA,**

14 Respondent.

CASE NO: A-19-793315-W

C-16-315718-1

DEPT NO: III

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

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

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

25 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

26 **STATEMENT OF THE CASE**

27 On or about July 23, 2013, James H. Hayes (hereinafter, "Petitioner") was charged by  
28 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.

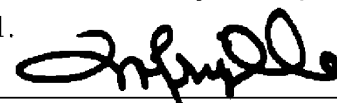
14 This Court finds that Petitioner not only understood the Amended Information, and the  
15 charge contained therein, but further asked the Court to accept the same. Therefore, this Court  
16 concludes that Petitioner waived any future challenge to that charge and document.

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.

21 DATED this \_\_\_\_\_ day of February, 2021.

Dated this 17th day of March, 2021



DISTRICT COURT JUDGE

22 Respectfully submitted,

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

BB9 076 8B3E 35C3  
Monica Trujillo  
District Court Judge

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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 19<sup>th</sup> day of March, 2021.

15  
16 James H. Hayes  
17

18  
19 JAMES H. HAYES #1175077  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

**CERTIFICATE OF SERVICE BY MAILING**

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 19<sup>th</sup>  
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, S.D.C.C.  
Indian Springs, NV  
89135-1160

Clerk County District Atty  
200 LAUREL AVE  
Indian Springs, NV  
89135-2212

CC:FILE

DATED: this 19<sup>th</sup> day of March, 2021.

James H. Hayes  
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

Hasler  
03/24/2021  
FIRST-CLASS MAIL  
US POSTAGE \$000.71<sup>0</sup>  
ZIP 89101  
011E12650516



Legal Mail



1 ASTA

2  
3  
4  
5  
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 1<sup>st</sup> AND 14<sup>th</sup> 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 6<sup>th</sup> AND 14<sup>th</sup> 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 (LIONS 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 1985  
7 didn't burglary, and ignored all evidence and inferences  
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 24<sup>th</sup>  
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 Carson St  
Carson City, NV  
89101

CC:FILE

DATED: this 24<sup>th</sup> 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 pre-trial 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.

NV CODE

64

© 2019 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

# 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

NV CODE

65

© 2019 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

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

66

© 2019 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

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 no criminal 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 2

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 Afford plea.

17 (9) That the indefinite information obscures the reality that  
18 the prosecution was unable to frame a proper information for  
19 Burglary and Amended 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 SWEETH NAUGHT.

23 EXECUTED AT SAC

this 14 day of July 2020

24 IN FRONT OF:

BY Commander  
NDOC # 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 22<sup>nd</sup> 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"

STATE OF NEVADA  
COUNTY OF CLARK

Case No: A-19-093315  
Dept: 19

TO WHOM IT MAY CONCERN:

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

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

2020.

BY: 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  
but actual INNOCENCE

vs: Amended Petition for Writ of Habeas Corpus FILED

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' Afford Plea  
4 to a crime he did not commit, and sentence was based  
5 on speculation, not based on the acts 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 Afford 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 in 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 sentencing judge no technical basis for acceptance of Mr.  
13 Hayes' Alford 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 Alford 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 grievous 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 precluded 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 well aware 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 saw 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 exculpatory 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 past 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  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21

22 FURTHER, AFFIANT SAYS: NAUGHT.

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

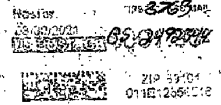
24 IN FRONT OF:

By: Carson City

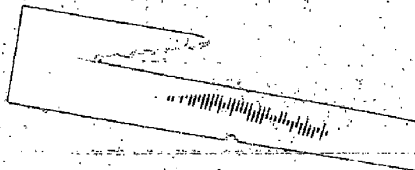
NOTARIAL PUBLIC

6 of 7

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  
Mail

SECURITY REPORT  
CORRELATION CENTER  
MAR 1964  
OUTGOING MAIL



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

12 -VS-

13 THE STATE OF NEVADA,

DEPT NO: III

14 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"**

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

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

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. 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.

26 ///

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.

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.

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 Response 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 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,<sup>1</sup> NRS 207.010 explained (in pertinent  
26 part):

27  
28 <sup>1</sup> 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.<sup>2</sup> 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  
24

25 <sup>2</sup> 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.

28          ///

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.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**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-19-78315-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.

RECEIVED

APR 14 2021

CLERK OF THE COURT

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

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

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

"Where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the 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  
HODGES PETITION CHALLENGING A CONVICTION BASED ON A GUILTY  
PLEA. (HODGES V. STATE 78 P.3d 67)

2. IN BAILEY 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 ATTEMPTED GRAND LARCENY 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 acquiesce 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. 448) NO REASONABLE  
23 NOTICE IN VIOLATION OF DUE PROCESS.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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 9<sup>th</sup> 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.

INVCAS65

9

© 2018 Matthew Bender & Company, Inc., a member of the Lexipol Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

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).

INVCAS65

10

© 2018 Matthew Bender & Company, Inc., a member of the Lexipol Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

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

2

© 2017 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

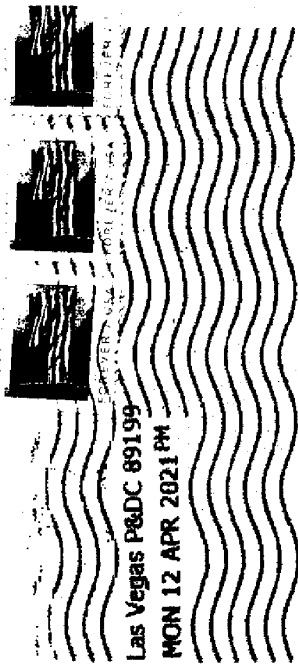
Stamps # 1175077

SDCC

P.O. Box 208

Indian Springs, NV

89070



Las Vegas P&DC 89199  
MON 12 APR 2021 PM

Clerk County District Court

"Office of the Clerk"

200 LEWIS AVE; 3RD Floor

LAS VEGAS, NEVADA

89155-1160

RECEIVED

APR 14 2021

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**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

23

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 8<sup>th</sup> 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 6<sup>th</sup> day of April, 2021.

15  
16 James H. Hayes  
17

18  
19 JAMES H. HAYES # 1175077  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

**CERTIFICATE OF SERVICE BY MAILING**

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 6<sup>th</sup>  
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  
89155-1160

CLARK COUNTY District Attorney  
200 LAWS AVE  
LAS VEGAS, NV  
89155-2212

CC:FILE

DATED: this 6<sup>th</sup> 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 6<sup>th</sup> day of April, 2021.

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

27  
28  
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 \_\_\_\_\_  
10  
11  
12

13 \_\_\_\_\_  
14 District Court Judge  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

Electronically Filed  
05/06/2021

*Heard Simon*  
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 8<sup>th</sup> 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-IN

DEPT. NO.: 3

DOCKET: \_\_\_\_\_

"Reply" to State's Oppositions to Petitioner's Motion to  
RECONSIDER "Findings of Fact and Conclusions of  
Law"

COMES NOW, petitioner, James H. Hayes, herein above respectfully  
moves this Honorable Court for an "GOOD FAITH" ruling as Justice so  
REQUIRES to redress this fundamental miscarriage of  
Justice

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

DATED: this 15<sup>th</sup> day of April, 2021

BY: James H. Hayes

James H. Hayes

# 1175077

Defendant In Proper Personam

RECEIVED  
27 MAY 10 2021

CLERK OF THE COURT

ADDITIONAL FACTS OF THE CASE:

1 COMES NOW the petitioner MR. JAMES H. HEURS IN  
2 proper person, IN NECESSITY, and hereby MOVES this honorable  
3 this court to reconsider findings of fact, conclusions  
4 of law pursuant rules governing Habeas corpus  
5 proceedings NRS Chapter 34. ENFORCEMENT OF NRS 174.  
6 085(3) AND NRS 178.362(4); Nevada Constitution; United  
7 States Constitution as Justice so requires. In favor of  
8 petitioner. In support the petitioner shows this honorable  
9 court that state's opposition to petitioner's petition to  
10 reconsider "findings of fact and conclusions of law  
11 are UNAVAILIBLE for the following:

12 1. State purportedly relied on Eighth Judicial  
13 Court Rule 2.24 as the basis for its opposition to petitioner's  
14 petition to reconsider "findings of fact and conclusions  
15 of law". The rule cited to is rule which provides grounds  
16 for relief from judgments or orders in civil proceedings  
17 and it should NOT apply here. State does NOT specifically  
18 allege, much less demonstrate, that the EJR 2.24 apply  
19 in criminal proceedings for opposing party opportunity  
20 to respond to the proposed findings and conclusions

21 2. Nevada Code Judicial Conduct Canon 3B(4)  
22 allows for petitioner be provided the opportunity to be  
23 heard on the state's proposed findings of fact and  
24 conclusions of law. (Butler v. State, 156 P.3d 691)

25 3. A review of state's opposition reveals that  
26 state does NOT contradict or undermine the petitioner's  
27 determinations in his petition. Instead, state merely

1 seems to be dissatisfied that petitioner has given these  
2 findings and conclusions, at a minimum the state  
3 should have set forth specific findings of fact and  
4 conclusions of law disposing of petitioner's claims of  
5 violation of state law NRS 174.085(3) and NRS 178.562.  
6 What is fact, there is no colorable argument that the  
7 state could make to overcome the state law violations  
8 see (Thompson v. State, 221 P.3d 708); there was no factual  
9 basis to accept petitioner's "Alford" plea as the instant  
10 charge attempt grand larceny was dismissed at the  
11 conclusion of the preliminary hearing as the elements  
12 of the crime of attempt grand larceny was not proven  
13 and the state has conceded that the charge was not  
14 proven by the evidence produced at preliminary hearing  
15 and dismissed as filed in the state's criminal complaint  
16 see (North Carolina v. Alford, 400 U.S. 37); the activities petitioner  
17 allegedly engaged in did not constitute criminal activity  
18 of attempt grand larceny, see (Lyons v. State, 775 P.2d 219);  
19 NO SUBJECT-MATTER JURISDICTION, state failed to confer  
20 jurisdiction and set forth true facts sufficient to  
21 constitute a public offense of attempt grand larceny. It  
22 therefore follows that the commitment under which  
23 and by reason of which petitioner is now detained  
24 is invalid and void (Giese v. Chief of Police, 489 P.2d 1163)  
25 ineffective assistance of counsel (trial) and appellate  
26 that was cogently argued in petition; failure to  
27 properly notice habitual criminality for the charge

1 of attempt grand larceny, etc.

2 4. The State suggests that these claims are  
3 procedurally barred because the issues could have  
4 been raised on direct appeal and petitioner, Mr. Hayes  
5 has not shown cause for failing to do so or prejudice.  
6 However, NRS 34.810 does not impose such require-  
7 ments on a first post-conviction habeas petition  
8 challenging a conviction based on a guilty plea.

9 5. State claims petitioner engaged in unlaw-  
10 ful conduct, but the fact is that petitioner did not  
11 engage in such conduct and the conduct petitioner  
12 were engaged in did not reach the essential elements  
13 of the charged offense as they relate to fact and law  
14 (ACTUAL INNOCENCE).

15 6. Petitioner hereby avers that he stands  
16 firmly on all points raised in his petitions.

17 7. The petitioner submits that his assertions  
18 of district court error with frequent, explained and/or  
19 connected legal citations, meets his responsibility to  
20 obtain relief, and demonstrates that this honorable  
21 court's findings and conclusions of law warrant  
22 reconsideration.

23 8. State's oversight of submitting the  
24 findings to petitioner for review and challenge can  
25 not be deemed harmless.

26 Wherefore, petitioner respectfully requests that this  
27 court GRANT Petitioner's Reconsideration Petitions.

**CERTIFICATE OF SERVICE BY MAILING**

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 15<sup>th</sup> day of April, 2021, I mailed a true and correct copy of the foregoing, "Reply to State's Opposition to Petitioner's Petition to Reconsider Findings of" 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 LEWIS AVE. 3RD FLOOR  
LAS VEGAS, NV  
89135-1160

Clerk County District Attorney  
200 LEWIS AVE  
LAS VEGAS, NV  
89135-2212

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

CC:FILE

DATED: this 15<sup>th</sup> day of April, 2021.

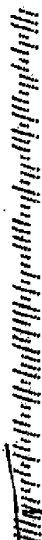
James H. Hayes  
James H. Hayes # 1176072  
/In Propria Persona  
Post Office Box 208, S.D.C.C.  
Indian Springs, Nevada 89018  
IN FORMA PAUPERIS:

Labels #1175037  
50cc  
P.O. Box 208  
Indian Springs, NV  
891020

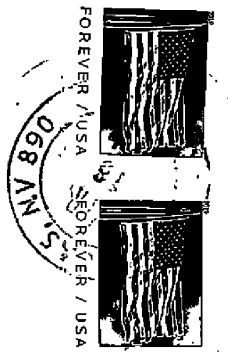
Clerk County District Courts  
"Office of the Clerk"

200 Leavis Ave, 3rd Floor  
Las Vegas, Nevada  
89155-1160

8910136300 COT5



LEAVIS  
NV



"JANUARY 2001" stamp for 2001

2773M2N4D2

2773M2N4D2

2773M2N4D2

000000

*Heather Stinson*  
CLERK OF THE COURT

1 HAYES, JAMES H # 1175077  
2 SACC; P.O. Box 208  
3 Indian Springs, NV 89070  
4

5 IN THE 8<sup>TH</sup> JUDICIAL DISTRICT COURT OF THE  
6 STATE OF NEVADA IN AND FOR THE COUNTY  
7 OF CLARK

8 "HEARING REQUESTED"

9 JAMES H. HAYES  
10 (Petitioner)

CASE NO: A-19-793315-W

DEPT NO: 3

11 v  
12 STATE OF NEVADA  
(Respondent)

13  
14 Opposition to State's Opposition to Petitioner's  
15 "Reply Motion to Compel Judgment pursuant to Nevada  
16 Revised Statutes Chapter 34," "FRCP rule 12(c) for  
17 Amended Petition for Writ of Habeas Corpus"

18  
19 Date of Hearing: May 10, 2021  
20 Time of Hearing: 8:30AM.

RECEIVED

MAY 03 2021

CLERK OF THE COURT

ADDITIONAL FACTS OF THE CASE:

Points And Authorities  
Statement of the Case

ON DECEMBER 22, 2020, PETITIONER'S "Motions to Compel Judgment pursuant to Nevada Revised Statutes Chapter 34... FRCP Rule 12(c) for Amended petition for writ of HABEAS CORPUS" was filed and set for hearing on JANUARY 28, 2021.

ON JANUARY 25, 2021, THE CLERK OF THE ~~COURT~~ COURT for Clark County District Courts RECEIVED PETITIONER'S "REPLY" Motions to Compel Judgment pursuant to Nevada Revised Statutes Chapter 34... FRCP rule 12(c) for Amended Petition for writ of HABEAS CORPUS (emphasis added) that was later filed ON February 2, 2021.

ON JANUARY 27, 2021, STATE'S RESPONSE to PETITIONER'S Motions to Compel Judgment pursuant to Nevada Revised Statutes Chapter 34... FRCP rule 12(c) for Amended Petition for writ of HABEAS CORPUS was filed, and set for hearing on February 1, 2021, that petitioner RECEIVED ON February 3, 2021 here at SDCC.

ON FEBRUARY 18, 2021, PETITIONER filed his "Oppositions" to STATE'S RESPONSE to PETITIONER'S Motions to Compel Judgment pursuant to Nevada Revised Statutes Chapter 34... FRCP rule 12(c) for Amended Petition for writ of HABEAS CORPUS.

ON APRIL 16, 2021, STATE filed its Oppositions to PETITIONER'S "REPLY" Motions to Compel Judgment pursuant

ADDITIONAL FACTS OF THE CASE:

1 to Nevada Revised Statutes Chapter 34... FRCP rule 12(c)  
2 be Amended Petition for writ of Habeas Corpus that  
3 petitioner received on April 27, 2021 here at SDCC

4  
5 ARGUMENT:

6 COMES NOW the petitioner, Mr. James H. Hayes  
7 in proper person, in NECESSITY, and hereby "MOVES"  
8 this honorable court to ENFORCE ENCR 3.20 as state's  
9 failure to adhere to the court rule has greatly  
10 prejudice petitioner and hindered a fair and just  
11 proceeding. Where as here, the state being duly served  
12 with a copy of the aforementioned motion on the 22<sup>ND</sup>  
13 day of DECEMBER, 2020 more than 30 days EXCLUSIVE of  
14 this day of service having expired since service upon  
15 the state that response was filed and with only  
16 one day before the date of hearing giving petitioner  
17 no opportunity to reply before this court's ruling  
18 that disadvantage petitioner in a no win situation,  
19 that was egregious and unfair.

20 HERE could not produce a colorable argument that  
21 would allow them to overcome the fact that they failed  
22 to adhere to ENCR 3.20 and there claim is belied  
23 and repelled by the record

24 IN support the petitioner shows this  
25 honorable court the following:

26 1. The presiding Judge must strike the  
27 state's ROGUE filing "State's Response" filed on

ADDITIONAL FACTS OF THE CASE:

1 JANUARY 27, 2021 to adhere to EDCR 3.20 and render  
2 a fair and just proceeding that is only fair to  
3 the pro se litigant, as his Motion to compel must  
4 be granted in its entirety.

5 2. State's claim that petitioner's claims are  
6 belied by the record is FALSE. What in fact the  
7 state's filed response was untimely and filed after  
8 the Clerk of the Court had received petitioner's  
9 reply asking this court to adhere to EDCR 3.20  
10 on January 25, 2021. So this honorable court should  
11 NOT have recognized the state's response, therefore,  
12 because the claims upon which the state bases its  
13 response are belied by the record, state's response  
14 and opposition are unsustainable and must be  
15 stricken.

16 3. Petitioner is entitled to the relief he seeks  
17 as this honorable court must be bound by the true  
18 and correct record and binding legal precedents  
19 that categorically would entitle petitioner to relief  
20 as justice so requires.

21 4. Therefore, this court is required to comply  
22 with the court rules and the law, which it must.  
23 As such, Petitioner's Motion to compel was improperly  
24 denied, and the state's request must be rejected.

25  
26 CONCLUSION:

27 Wherefore, the grounds and claims for

1 state's response and opposition are belied by the  
2 record, rules of the court, and the law, and because  
3 this court's findings are not properly supported  
4 by the applicable laws of the state of Nevada.  
5 (ie NRS 34.810; the state claims that the petitioner's  
6 Amended petition claiming is procedurally barred because  
7 the issues could have been raised on direct appeal  
8 and Mr. Hayes did not show cause for failing to  
9 do so or prejudice. However, NRS 34.810 does not  
10 impose such requirements on first post conviction  
11 Hayes petition challenging a conviction based on  
12 a guilty plea...) The petitioner respectfully requests  
13 that this court strike state's response and opposition  
14 and grant petitioner relief as justice requires to  
15 redress this fundamental miscarriage of justice.  
16 (see Exhibit 45)

**CERTIFICATE OF SERVICE BY MAILING**

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 27<sup>th</sup>  
day of April, 2021, I mailed a true and correct copy of the foregoing, "Opposition  
to State's Opposition to Defendant's "Reply""  
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  
CLERK OF THE COURT  
205 LEWIS AVE, SUITE 21  
LEWISVILLE, TX  
817-354-1100

Clerk County District Atty.  
205 LEWIS AVE  
LEWISVILLE, TX  
817-354-2712

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

CC:FILE

DATED: this 27<sup>th</sup> day of April, 2021.

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

THE STATE OF NEVADA KNOWINGLY, INTENTIONALLY,

AFFIDAVIT OF: Categorically noted in "BAD FAITH"

STATE OF NEVADA )

CASE NO: A-19-793315-W

COUNTY OF CLARK )

SS: DEPT: 3

HEARING DATE: 5-10-2021

TO WHOM IT MAY CONCERN:

HEARING REQUESTED

I, James H. HUIES

the undersigned, do hereby swear that

all statements, facts and events within my foregoing Affidavit are true and correct of my own knowledge, information and belief, and as to those, I believe them to be True and Correct. Signed under the penalty of perjury, pursuant to, NRS. 29.010; 53.045; 208.165, and state the following:

1. That, James H. HUIES, 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 redress this fundamentally unjust incarceration.

2. That, Preliminary hearing showed no criminal act of attempt grand larceny, the conduct upon which the plea was entered did not occur, and the alleged activities did not satisfy the statute to constitute the crime of attempt grand larceny, as the Justice court magistrate dismissed the charge for lack of probable cause.

3. That, State induce petitioner to plead "Alford" to a non-committed crime by unwittingly convincing the petitioner that the non-criminal conduct for which he was convicted constituted a criminal offense knowingly, that the elements of the crime was not proven

4. That, State failed to confer subject-matter jurisdiction and

FURTHER YOUR AFFIANT SAYETH NAUGHT.

EXECUTED At: Indian Springs, Nevada, this 19<sup>th</sup> Day Of April

2021

BY:

James H. HUIES

# 1175076

Post Office Box-208 (SDCC)

Indian Springs, Nevada. 89070./

Affiant, In Propria Personam:

RECEIVED

MAY 03 2021

CLERK OF THE COURT

1 to set forth true facts sufficient to constitute a public offense  
2 of attempt grand larceny as alleged in the state's filed amended  
3 information that was verbatim to the state's alleged conduct in  
4 its filed criminal complaint that had been dismissed at conclusion  
5 of preliminary hearing after presentation of all the evidence by  
6 magistrate for lack of probable cause that was initiated by the  
7 state.

8 5. That, state failed to adhere to the laws of the state  
9 NRS 174.085(a), NRS 178.562(a), and 178.391 which provides the legal  
10 authority that petitioner must have been immune from the state's  
11 malicious and vindictive prosecutions for the charge of attempt grand  
12 larceny in the 8th Judicial district court, Clark County, Nevada.

13 6. That, state claims petitioner engaged in unlawful conduct,  
14 but the fact is that the state categorically knows that petitioner did not  
15 engage in such conduct and the conduct petitioner were engaged  
16 in did not reach the essential elements of the charged offense as  
17 they relate to fact and law. That's clear, convincing, and undisputed  
18 that petitioner was convicted by reason of the commission of an act  
19 which the law did not prohibit or penalize and the state has  
20 concluded that petitioner is not guilty, leaving no factual basis  
21 for accepting petitioner's "Afford" plea.

22 7. That, state's assertion that preliminary hearing results  
23 are irrelevant is an omission inconsistent with the rudimentary  
24 demands of law and fair procedure and state's contentions  
25 are categorically made in "BAD FAITH" to once again deprive  
26 this honorable court of its ability to pass judgment based  
27 on true and accurate information, laws, and facts, as  
28 violation of DUE PROCESS OF LAW.

1 8. That, State from the inception of the case has knowingly  
2 and blatantly violated petitioner's constitutional rights as the  
3 most essential element in the criminal justice system is probable  
4 cause, which amounts to more than a mere suspicion. As Mr. Hayes  
5 has categorically not exhibited dangerous behavior or activities  
6 indicating a likelihood of committing the alleged crime of  
7 attempt grand larceny and no specific evidence of a violation  
8 of state laws, exists.

9 9. That, State acting in BAD FAITH has been displayed  
10 throughout the proceedings, and of note the state's continued  
11 attempts to enter prior bad acts during the criminal proceed-  
12 ings of the 2016 burglary conviction by unwittingly trying  
13 to convince the court that the 2016 occurring event was  
14 prior to the instant event that occurred in 2013 to once  
15 again insult this court's intelligence and deprive this  
16 court of its ability to pass judgment on accurate infor-  
17 mation and the true and correct facts.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**DECLARATION UNDER PENALTY OF PERJURY**

I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury. I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.  
See 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

Executed at Salt Lake Desert Correctional Center on 17<sup>th</sup> day of April, 2021  
(Location) (Date)

[Signature]  
(Signature)

1175077  
(Inmate prison number)

CERTIFICATE OF SERVICE

I, James A. Hayes

hereby certify that I am the  
Petitioner in this matter and I am representing myself in propria persona.

On this 19<sup>th</sup> day of April, 2021, I served copies of  
the Affidavit of "The State of Nevada knowingly, intelligently,  
categorically acted in "BAD FAITH"

in Case No. A-19-79315-W, and placed said document(s) in the United States  
Mail, first-class postage prepaid, addressed as follows:

Clark County District Courts  
Office of the Clerk  
201 LEWIS AVE. 3RD FL  
LAS VEGAS, NV  
89155-1100

Clark County District Attorney  
201 LEWIS AVE  
LAS VEGAS, NEVADA  
89155-2212

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the Petitioner in the  
above-entitled action, and he has read this Certificate of Service and the information  
contained therein is true and correct.

Executed pursuant to 28 U.S.C. § 1746 and 18 U.S.C. § 1621 at  
Southern Desert Correctional Center on this 19<sup>th</sup> day of  
April, 2021

James A. Hayes

DOC No 1175072

Petitioner - In Propria Persona

# STEVEN Bradley Hodges V. STATE 78 P.3d 82

improperly forced to change his mind. But he makes no specific factual allegations to support this speculation, and the plea memoranda and transcript of the plea canvass belie this claim. The district court did not err in dismissing this claim without an evidentiary hearing.

Hodges also contends that the sentencing court erred in not requiring the State to produce certified copies of his prior convictions before adjudicating him a habitual criminal. Hodges has not clearly articulated how this claim is cognizable under NRS 34.810(1)(a), 4 but he implies that his guilty plea was unknowing. We consider the merits of the claim on this basis, but a review of the relevant law demonstrates that the claim fails.

In *Staley v. State* in 1990, this court held that adjudicating a defendant a habitual criminal based on the defendant's stipulation to that status was improper. 6 Our opinion stated: "A person cannot (119 Nev. 483) stipulate to a status. The question of the validity of the prior convictions must be determined by the district court as a matter of law . . . ." 6 In *McAnulty v. State* in 1992, this court held that under *Staley* a defendant also could not be adjudicated a habitual criminal based solely on the defendant's stipulation that he had prior felony convictions. 7 *McAnulty* suggested that in finding prior convictions, a district court could rely only on certified copies of prior judgments of conviction, which by statute were *prima facie* evidence of such convictions. 8 The next year in *Robertson v. State* citing *Staley*, this court indicated in dictum that district courts also could not rely on stipulations regarding prior convictions to enhance a DUI conviction to a felony. 9

In 1997, however, the Legislature made clear that statutory law does not prohibit the use of a stipulation as a basis for an adjudication of habitual criminality. NRS 207.016(6) was enacted, providing: "Nothing in the provisions of this section, NRS 207.010, 207.012 or 207.014 prohibits a court from imposing an adjudication of habitual criminality, adjudication of habitual felon or adjudication of habitually fraudulent felon based upon a stipulation of the parties." 10 This court apparently has not addressed NRS 207.016(6) before, but in 2000 we issued *Krauss v. State*, which overrules *Robertson* to the extent that the opinion suggests that a defendant may not stipulate to or waive proof of prior DUI convictions." 11 *Krauss* explains that such a stipulation or waiver is consistent with other decisions a defendant can properly make.

Generally, a defendant is entitled to enter into agreements that waive or otherwise affect his or her fundamental rights. For example, a defendant may waive a preliminary hearing even though NRS 484.379(2) indicates that, if a felony DUI offense is alleged, the facts of the prior convictions "must also be shown at the preliminary examination or presented to the grand jury." Further, by pleading guilty a defendant may waive the trial itself, thereby relieving the State of its obligation to prove the substantive offense. It follows that a defendant should be able to stipulate to or waive proof of the prior convictions at sentencing. 12

(78 P.3d 70) (119 Nev. 484) More recently, we have also indicated that defendants "may stipulate to or waive proof of prior convictions" to enhance an offense of unlawful possession of a controlled substance. 13

This court has not explicitly overruled *Staley* and *McAnulty* and held that a defendant can stipulate to the existence of prior convictions as a basis for habitual criminal adjudication, but given NRS 207.016(6) and our reasoning in *Krauss*, we now do so. Hodges concedes that this is the state of the law. However, he distinguishes between stipulating to specific prior convictions and stipulating simply to the status of habitual criminal, as he did, and argues that the latter is not a sufficient basis for habitual criminal adjudication. The State agrees that our caselaw has made this distinction. We also agree: *Krauss* holds only that a defendant may "stipulate to or waive proof of the prior convictions" and

does not endorse stipulations to status alone.

However, the State argues that under NRS 207.016(6) stipulations to status alone should be a sufficient basis for habitual criminal adjudication. We reject this argument. We are concerned not only with statutory requirements but also constitutional guarantees of due process. 14 There is less chance for mistakes or abuse of the stipulation process as long as a defendant must at least admit that he received specific prior convictions, not just that he is "a habitual criminal;" before a district court can consider adjudicating the defendant a habitual criminal. As explained below, under the circumstances of this case, we conclude that Hodges did more than just stipulate to habitual criminal status.

Hodges tries to distinguish his case from *Krauss*. In *Krauss*, the appellant did not dispute the validity of his two prior DUI convictions and in response to questions from the district court indicated that he had been represented by counsel in both cases. 15 Hodges says that in his case no such colloquy with the district court occurred and that nothing in the record shows that he stipulated to or waived proof of his prior convictions. We disagree.

In the amended information in this case, the State specified the two prior felony convictions that it was relying on in charging that Hodges was a habitual criminal. In his plea memorandum, Hodges stipulated that he was a habitual criminal. The presentence reports described the two prior convictions, and defense counsel informed (119 Nev. 485) the court that there were no significant errors in the reports. Before accepting the guilty plea, the district court reminded Hodges that he was stipulating to being a habitual criminal and was liable for a prison term of five to twenty years, and Hodges said that he understood. In the sentencing hearing, the court referred specifically to the two prior convictions that served as the basis to adjudicate Hodges a habitual criminal. Finally, in seeking an amended judgment to reflect credit for time served, Hodges stipulated "to the admission" of the prior convictions alleged in the amended information. At no point did Hodges dispute nor has he now disputed the existence or validity of the prior convictions. Given these circumstances, we conclude that Hodges effectively stipulated to his prior convictions. Therefore, the district court did not err in dismissing this claim without an evidentiary hearing.

## CONCLUSION

We conclude that the claims that Hodges raises are without merit and affirm the district court's order dismissing his post-conviction petitions for habeas relief.

## Footnotes

1

The district court also sentenced Hodges to a concurrent prison term for assault with a deadly weapon in another case, which is not at issue in this appeal.

2

*Haigrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

3

*Id.* at 503, 686 P.2d at 225.

The State suggests that this claim is procedurally barred because the issue could have been raised on direct appeal and Hodges has not shown cause for failing to do so or prejudice. However, NRS

nvcases

5

© 2017 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

nvcases

6

© 2017 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

# EXHIBIT # 45

34.810 does not impose such requirements on a first post-conviction habeas petition challenging a conviction based on a guilty plea.

5  
106 Nev. 75, 78, 787 P.2d 396, 397 (1990).

6

Id.

7

106 Nev. 179, 181, 826 P.2d 587, 589-69 (1992); see also *Crutcher v. District Court*, 111 Nev. 1296, 903 P.2d 823 (1995).

8

See 108 Nev. at 181, 826 P.2d at 569.

9

109 Nev. 1086, 1089, 863 P.2d 1040, 1042 (1993).

10

1997 Nev. Stat., ch. 314, § 11, at 1187.

11

116 Nev. 307, 310, 998 P.2d 163, 165 (2000).

12

Id. at 310-11, 998 P.2d at 165 (citation omitted).

13

*Hudson v. Warden*, 117 Nev. 387, 395, 117 Nev. 987, 22 P.3d 1154, 1159 (2001) (citing *Krauss*, 116 Nev. 307, 998 P.2d 163).

14

See *Id.* at 394-95, 22 P.3d at 1159 ("In order to satisfy the requirements of due process when seeking to enhance an offense, the State must prove the prior convictions at or anytime before sentencing.").

15

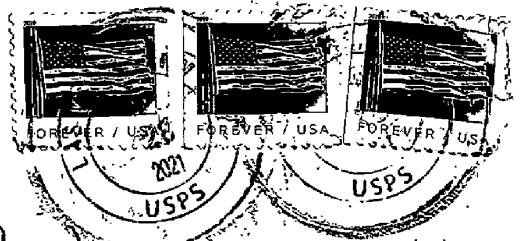
116 Nev. at 309, 998 P.2d at 164-65.

01VCBS65

7

© 2017 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

Me15-1175077  
5000  
P.O. Box 208  
Indian Springs, NV  
89070



Clark County District Court  
"Office of the Clerk"  
200 Lewis Ave, 3rd Floor  
Las Vegas, Nevada  
89155-1160

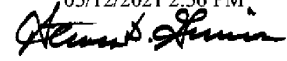
Legal  
Mail

Subscribe and share "YouTube" channel...

U CAN'T C ME LLC

Google:



  
CLERK OF THE COURT

**ORDR**

STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
ERCAN E. ISCAN  
Chief Deputy District Attorney  
Nevada Bar #009592  
200 Lewis Avenue  
Las Vegas, NV 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant.

CASE NO: A-19-793315-W

DEPT NO: III

**ORDER DENYING PETITIONER'S PETITION TO RECONSIDER "FINDINGS  
OF FACT CONCLUSION OF LAW" ADDENDUM**

DATE OF HEARING: April 12, 2021  
TIME OF HEARING: 08:30 A.M.

THIS MATTER having come on for hearing before the above-entitled Court on the  
12th day of April, 2021, the Defendant not being present, in proper person, the Plaintiff being  
represented by STEVEN B. WOLFSON, District Attorney, through ERCAN E. ISCAN,  
Chief Deputy District Attorney, without argument, based on the pleadings and good cause  
appearing therefor,

//

//

//

//

1 IT IS HEREBY ORDERED that Petitioner's Petition to Reconsider "Findings of Fact  
2 Conclusions of Law" Addendum, shall be, and it is DENIED. for the reasons set forth  
3 DATED this \_\_\_\_\_ day of April, 2021 in the State's opposition.  
4 Dated this 12th day of May, 2021

5   
DISTRICT JUDGE

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

47A B3B 6D98 4E33  
Monica Trujillo  
District Court Judge

8  
9 BY 

10 ERCAN E. ISCAN  
11 Chief Deputy District Attorney  
Nevada Bar #009592

12  
13  
14  
15 CERTIFICATE OF SERVICE

16 I certify that on the 21<sup>st</sup> day of April, 2021, I mailed a copy of the foregoing Order  
17 to:

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

21  
22 BY 

C. Garcia  
Secretary for the District Attorney's Office

23  
24  
25  
26  
27  
28 cg/L2

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 Order was served via the court's electronic eFile system to all  
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 5/12/2021

15 Melissa Boudreaux

mezama@clarkcountynv.gov



**DISTRICT COURT  
CLARK COUNTY, NEVADA  
\*\*\*\*\***

James Hayes, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

Case No.: A-19-793315-W

Department 3

**NOTICE OF HEARING**

Please be advised that the Opposition to State's Opposition to Petitioner's Reply Motion to Compel Judgment Pursuant to Nevada Revised Statutes Chapter 34... " FCR rule 12(c) for Amended Petition for Writ of Habeas Corpus in the above-entitled matter is set for hearing as follows:

**Date:** June 14, 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

ADDITIONAL FACTS OF THE CASE

5-12-2021

Electronically Filed  
06/03/2021

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

James A. Hayes (petitioner)

"HEARING REQUESTED"

v.

CASE NO: A-19-793315-W

State of Nevada (Respondent)

DEPT No: 3

"Memorandum to the Court"

Comes now the petitioner, Mr. James A. Hayes, in  
proper person, in necessity, and hereby moves this honor-  
able court presiding, Judge MONICA TRUJILLO to please  
inform petitioner of her rulings on his supplemental  
petition as her ordered supplemental briefing schedule  
was set for petitioner to have his supplement in for  
April 4, and the state had to May 5 to file a response  
with decision set for May 10, 2021 at 8:30 am, per the  
March 8, 2021 minute order. As petitioner has filed his  
ordered brief with the specificity as determined by this  
honorable court on April 7, 2021 and supplemental "AMENDUM"  
on April 14, 2021 and as of this day May 12, 2021 I  
have not received state's response nor this honorable  
court's decision. Further, petitioner has filed his Motion to  
Modify and/or Correct illegal sentence on March 25, 2021 and  
Reply Motion to Modify and/or Correct illegal sentence on April  
21, 2021, and opposition to state's Amended opposition on  
May 12, 2021 with no decision from this honorable court  
yet and pray upon you to please notify me of decisions!!

RECEIVED

MAY 17 2021

CLERK OF THE COURT

Page -

Thanks  
James A. Hayes  
James A. Hayes # 1175572

James H #1175072  
50cc  
P.O. Box 208  
Tularet Springs, NV 89670

LAS VEGAS NV 890  
13 MAY 2021PM 3 L



Clerk County District Courts

"Office of the Clerk"

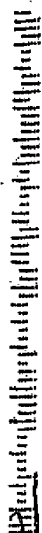
200 LAUREL AVE, 3RD FLOOR

Las Vegas, Nevada

89155-1160

LEAD  
Mail

951554501 0000



James H #1175072

CLARENCE

Google

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

"THE STATE OF NEVADA KNOWINGLY, INTENTIONALLY,

AFFIDAVIT OF: Categorically noted in "BAD FAITH"

Electronically Filed  
06/09/2021

STATE OF NEVADA )

CASE NO: A-19-793315-W

COUNTY OF CLARK )

SS: DEPT: 3

HEARING DATE: 5-10-2021

Stewart J. Hume  
CLERK OF THE COURT

TO WHOM IT MAY CONCERN:

HEARING REQUESTED

I, James H. Hayes

the undersigned, do hereby swear that.

all statements, facts and events within my foregoing Affidavit are true and correct of my own knowledge, information and belief, and as to those, I believe them to be True and Correct. Signed under the penalty of perjury, pursuant to, NRS. 29.010; 53.045; 208.165, and state the following:

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 redress this fundamentally unjust incarceration.

2. That, Preliminary hearing showed no criminal act of attempt grand larceny, the conduct upon which the plea was entered did not occur, and the alleged activities did not satisfy the statute to constitute the crime of attempt grand larceny, as the Justice Court magistrate dismissed the charge for lack of probable cause.<sup>2</sup>

3. That, State induce petitioner to plead "Alibi" to a non-committed crime by unwittingly convincing the petitioner that the non-criminal conduct for which he was convicted constituted a criminal offense. Knowing, that the elements of the crime was not proven. (Case 738F.2d m)

4. That, State failed to contest subject-matter jurisdiction and (WARR V. 8th Jud Dist Ct 427 P.2d 102)

FURTHER YOUR AFFIANT SAYETH NAUGHT.

EXECUTED At: Indian Springs, Nevada, this 19<sup>th</sup> Day Of April

2021.

BY: James H. Hayes

James H. Hayes # 1172076  
Post Office Box-208 (SDCC)  
Indian Springs, Nevada. 89070. /  
Affiant, In Propria Personam:

Footnote: 2. Boyle v. State 123 Nev. 194

CLERK OF THE COURT

MEH/NEO2021

INOCEN/NEO

CLERK OF THE COURT

1 to set forth true facts sufficient to constitute a public offense  
2 of attempt grand larceny as alleged in the state's filed amended  
3 information that was verbatim to the state's alleged conduct in  
4 its filed criminal complaint that had been dismissed at conclusion  
5 of preliminary hearing after presentation of all the evidence by  
6 magistrate for lack of probable cause that was initiated by the  
7 state. (Sessions v. Dimayuga 138 S.Ct. 1204)

8 5. That, state failed to adhere to the laws of the state  
9 NRS 174.085(a), NRS 178.562(a), and 178.391 which provides the legal  
10 authority that petitioner must have been immune from the state's  
11 malicious and vindictive prosecutions for the charge of attempt grand  
12 larceny in the 8th Judicial district court, Clark County, Nevada.<sup>1</sup>

13 6. That, state claims petitioner engaged in unlawful conduct,  
14 but the fact is that the state categorically knows that petitioner did not  
15 engage in such conduct and the conduct petitioner was engaged  
16 in did not reach the essential elements of the charged offense as  
17 they relate to fact and law. That's clear, convincing, and undisputed  
18 that petitioner was convicted by reason of the commission of an act  
19 which the law did not prohibit or penalize and the state has  
20 conceded that petitioner is not guilty, leaving no factual basis  
21 for accepting petitioner's "Alford" plea. (North Carolina v. Alford 400 U.S. 34)

22 7. That, state's assertion that preliminary hearing results  
23 are irrelevant is an omission inconsistent with the rudimentary  
24 demands of law and fair procedure and state's contentions  
25 are categorically made in "BAD FAITH" to once again deprive  
26 this honorable court of its ability to pass judgment based  
27 on true and accurate information, laws, and facts, as  
28 violation of DUE PROCESS OF LAW. (United States v. Lujan - Part 2 747 F.2d 219)

Footnote 1. Thompson v. State 221 P.2d 708 (See Supreme Court Justice Cherry Jurisprudence)

1 B. That state from the inception of the case has knowingly  
2 and blatantly violated petitioner's constitutional rights as the  
3 most essential element in the criminal justice system is probable  
4 cause, which amounts to more than a mere suspicion. As Mr. Niles  
5 has categorically not exhibited dangerous behavior or activities  
6 indicating a likelihood of committing the alleged crime of  
7 attempt grand larceny and no specific evidence of a violation  
8 of state laws, exists. (Lyles v. State 775 P.2d. 219)

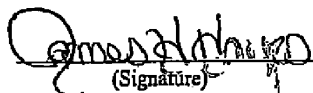
9 9. That, state acting in "BAD FAITH" has been displayed  
10 throughout the proceedings, and of note the state's continued  
11 attempts to enter prior bad acts during the criminal proceed-  
12 ings of the 2016 burglary conviction by unwittingly trying  
13 to convince the court that the 2016 occurring event was  
14 prior to the instant event that occurred in 2013 to once  
15 again insult this court's intelligence and deprive this  
16 court of its ability to pass judgment on accurate infor-  
17 mation and the true and correct facts.

18  
19 Footnote: 3 (Giese v. Chief of Police 489 P.2d. 1163)

1  
2 **DECLARATION UNDER PENALTY OF PERJURY**

3 I understand that a false statement or answer to any question in this declaration will subject me to  
4 penalties of perjury. I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF  
5 THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.  
6 See 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

7 Executed at Salt Lake Desert Correctional Center on 17<sup>th</sup> day of April 2021  
8 (Location) (Date)

9  
10   
(Signature)

1175077  
(Inmate prison number)

11  
12 "AS JUSTICE SO REQUIRES" - IT TAKES  
13  
14 A COMMON SENSE ARGUMENT  
15  
16 NOT A LEGAL ONE!!  
17

18  
19 PLEASE SEEK "JUSTICE" NOT  
20  
21 A RESULT...  
22  
23  
24  
25  
26  
27  
28

CERTIFICATE OF SERVICE

I, James H. Hayes, hereby certify that I am the  
Petitioner in this matter and I am representing myself *in propria persona*.

On this 19<sup>th</sup> day of April, 2021, I served copies of  
the Affidavit of "The State of Nevada knowingly, intelligently,  
categorically acted in "BAD FAITH"

in Case No. A-19-79215-IN, and placed said document(s) in the United States  
Mail, first-class postage prepaid, addressed as follows:

Clark County District Courts  
Office of the Clerk  
201 LAURA AVE. 3RD FL  
LAS VEGAS, NV  
89155-1160

Clark County District Attorney  
201 LAURA AVE  
LAS VEGAS, NEVADA  
89155-2212

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the Petitioner in the  
above-entitled action, and he has read this Certificate of Service and the information  
contained therein is true and correct.

Executed pursuant to 28 U.S.C. § 1746 and 18 U.S.C. § 1621 at  
Southern Desert Correctional Center on this 19<sup>th</sup> day of  
April, 2021

James H. Hayes  
Petitioner - *in propria persona*

HAYES #1175072  
JDC  
P.O. Box 208  
Indian Springs, NV  
89070

LAS VEGAS NV 890

20 MAY 2021 PM 4 L

Hasler

FIRST-CLASS MAIL

05/20/2021

US POSTAGE \$001.20

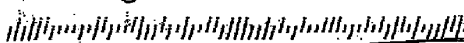


ZIP 89101  
011E12650516

Clark County District Courts  
"Office of the Clerk"  
200 LEWIS AVE; 3RD FLOOR  
LAS VEGAS, NEVADA  
89155-1160

Legal  
Mail

89155-1160



Subscribe and share "YouTube channel..."

UCANTGMLL

Google

**ORDER**  
STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
ERCAN E. ISCAN  
Chief Deputy District Attorney  
Nevada Bar #09592  
200 Lewis Avenue  
Las Vegas, NV 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant.

CASE NO: A-19-793315-W

DEPT NO: III

**ORDER DENYING DEFENDANT'S REPLY MOTION TO COMPEL JUDGMENT  
PURSUANT TO NEVADA REVISED STATUTES CHAPTER 34... FRCRP RULE  
12(C) FOR AMENDED PETITION FOR WRIT OF HABEAS CORPUS**

DATE OF HEARING: May 12, 2021  
TIME OF HEARING: 08:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 12th day of May, 2021, the Defendant being present, in proper person, the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through ERCAN E. ISCAN, Chief Deputy District Attorney, without argument, based on the pleadings and good cause appearing therefor,

//

//

//

//

1 IT IS HEREBY ORDERED that the Defendant's Reply Motion to Compel Judgment  
2 Pursuant to Nevada Revised Statutes Chapter 34... FRCP RULE 12(c) for "Amended Petition  
3 for Writ of Habeas Corpus, shall be, and it is DENIED.

4 DATED this \_\_\_\_\_ day of June, 2021. Dated this 21st day of June, 2021

5  
6   
DISTRICT JUDGE

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

F09 755 5334 D3EB  
Monica Trujillo  
District Court Judge

9  
10 BY  for  
11 ERCAN E. ISCAN  
12 Chief Deputy District Attorney  
13 Nevada Bar #09592

14 CERTIFICATE OF SERVICE

15 I certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 2021, I mailed a copy of the foregoing Order  
16 to:

17 JAMES H. HAYES, BAC #1175077  
18 SOUTHERN DESERT CORRECTIONAL CENTER  
19 P.O. BOX 208  
INDIAN SPRINGS, NV89070

20  
21 BY \_\_\_\_\_  
22 C. Garcia  
23 Secretary for the District Attorney's Office  
24  
25  
26  
27  
28

cg/L2

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 Order Denying Motion was served via the court's electronic eFile  
13 system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 6/21/2021

15 Melissa Boudreaux

mezama@clarkcountynv.gov



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

Petitioner,

-vs-

13 THE STATE OF NEVADA,

14 Respondent.

CASE NO: A-19-793315-W  
A-21-831979-W

DEPT NO: III

15 **STATE'S OPPOSITION TO PETITION FOR WRIT OF**  
16 **HABEAS CORPUS "COVID-19 (CORONAVIRUS)"**  
17 **and**  
18 **MOTION TO CONSOLIDATE**

18 DATE OF HEARING: JULY 19, 2021  
19 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 Writ of Habeas Corpus "COVID-19 (Coronavirus)."

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.

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 Expedient 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. After the Court's ruling on the matter,  
15 Petitioner filed an "Opposition to State's Response to Petitioner's Motion to Compel  
16 Judgment" on February 18, 2021. The Court issued its Findings of Fact, Conclusions of Law  
17 and Order reflecting its denial of Petitioner's Motion to Compel on March 17, 2021. Notice of  
18 Entry of that Order was filed on March 19, 2021.

19 On February 2, 2021, Petitioner filed a "Reply Motion to Compel Judgment Pursuant  
20 to Nevada Revised Statutes Chapter 34...FRCP Rule 12(c) for Amended Petition for Writ of  
21 Habeas Corpus." The State filed its Opposition to that "Reply Motion" on April 16, 2021. On  
22 May 12, 2021, the Court denied Petitioner's "Reply Motion."

23 On March 9, 2021, the Court filed its Findings of Fact, Conclusions of Law and Order  
24 denying Petitioner's Amended Petition. That entry was noticed on March 10, 2021. On March  
25 11, 2021, Petitioner filed a Petition to Reconsider that Order. He filed a subsequent Petition to  
26 Reconsider on March 17, 2021. On March 18, 2021, Petitioner filed a Notice of Appeal from  
27 the Court's denial of his Amended Petition. As of the date of the instant Opposition, no  
28 remittitur has issued from that appeal. On April 7, 2021, Petitioner filed a "Supplemental

1 Petition for Writ of Habeas Corpus” Petition (NRS 34.360-34.830). Petitioner filed a  
2 “Supplemental ‘Addendum’” on April 14, 2021.

3 The State filed its Opposition to Petitioner’s various Petitions to Reconsider on April  
4 9, 2021. On April 12, 2021, the Court denied Petitioner’s Petitions to Reconsider. Again, well  
5 after the Court’s ruling, Petitioner filed a Reply to the State’s Opposition on May 6, 2021. On  
6 May 12, 2021, the Court issued its Order Denying Petitioner’s Petition to Reconsider.

7 In the interim, Petitioner also filed the instant “Petition for Writ of Habeas Corpus  
8 COVID-19 (Coronavirus)” (his “instant Petition”). For some unknown reason, the instant  
9 Petition was filed under a new civil case number. The State now files its Opposition to the  
10 instant Petition, as follows:

### 11 ARGUMENT

#### 12 **I. THE POST-CONVICTION CASES SHOULD BE CONSOLIDATED**

13 NRS 34.780(1), explains that, to the extent they are not inconsistent with habeas  
14 statutes, the Nevada Rules of Civil Procedure apply to post-conviction proceedings. Directly  
15 on point, the Nevada Supreme Court has determined:

16  
17 NRCP 42(a) allows consolidation of pending actions that involve “a common  
18 question of law or fact.” Like under its identical federal counterpart, a district  
court enjoys “broad, but not unfettered, discretion in ordering consolidation.”

19 Nalder v. Eighth Judicial Dist. Court, 136 Nev. 200, 206-07, 462 P.3d 677, 684 (2020)  
20 (quoting Marcuse v. Del Webb Cmtys., Inc., 123 Nev. 278, 286, 163 P.3d 462, 468 (2007)).

21 Petitioner’s original post-conviction habeas proceeding was filed under Case No. A-  
22 19-793315-W. In that proceeding, Petitioner raised a number of challenges to his judgment of  
23 conviction in Case No. C315718, including allegations of Double Jeopardy, violations of Due  
24 Process, and Cruel and Unusual Punishment. See, Petition for Writ of Habeas Corpus, filed  
25 on April 15, 2019 (in Case No. A793315).

26 In the instant Petition, Petitioner again claims that his sentence amounts to Cruel and  
27 Unusual Punishment under the Eighth Amendment. See Instant Petition at 5. Therefore,  
28 because this action, and Petitioner’s separate post-conviction action, each involve a common

1 question – whether Petitioner’s judgment of conviction and sentence are constitutional – the  
2 two actions should be consolidated.

3 Moreover, judicial economy supports consolidation of the two actions. Petitioner  
4 continues to file pleadings – with or without permission of this Court – raising the same (or  
5 substantially similar) claims against his judgment of conviction. These numerous pleadings  
6 should be contained within the same action, so as to allow for uniform consideration and  
7 treatment, as they all center around the same underlying criminal case.

8 As such, the State requests that this Court consolidate the instant action into the pre-  
9 existing post-conviction case, A793315.

## 10 **II. THE INSTANT PETITION DOES NOT WARRANT RELIEF**

11 Petitioner’s instant Petition raises a single claim – that the COVID-19 pandemic has  
12 rendered Petitioner’s sentence of imprisonment cruel and unusual in violation of the Eighth  
13 Amendment. See Instant Petition at 5. However, this claim is not cognizable on habeas review.  
14 Further, the claim itself is procedurally defaulted pursuant to the time-bar of NRS 34.726. As  
15 such, Petitioner is not entitled to relief.

### 16 **A. Petitioner’s Claim is Not Cognizable in Habeas Review**

17 The Nevada Supreme Court has expressly excluded claims of cruel and unusual  
18 punishment from consideration in post-conviction habeas review. See Bowen v. Warden,  
19 Nevada State Prison, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984). The Bowen Court  
20 explained:

21 We have repeatedly held that a petition for writ of habeas corpus may challenge  
22 the validity of current confinement, but not the conditions thereof. See Director,  
23 Dep’t Prisons v. Arndt, 98 Nev. 84, 640 P.2d 1318 (1982); Rogers v. Warden,  
24 84 Neb. [sic] 539, 445 P.2d 28 (1968); Rainsberger v. Leypoldt, 77 Nev. 399,  
25 365 P.2d 489 (1961), cert. denied, 368 U.S. 516, 82 S.Ct. 530, 7 L.Ed.2d 522,  
26 (1962). In Rogers, we held that a claim of brutal treatment at the hands of prison  
27 officials was not cognizable on a habeas petition, because the claim spoke to the  
28 conditions and not the validity of confinement. In Arndt, we left open the  
specific question raised by this appeal, whether the imposition of a qualitatively  
more restrictive type of confinement within the prison, such as punitive  
segregation, may be challenged by a petition for writ of habeas corpus. We now  
hold that such a challenge speaks only to the conditions of confinement and  
therefore may not be raised by a habeas corpus petition. See Rogers v. Warden,  
supra.

//

1 Id. Thereafter, the Bowen Court affirmed the dismissal of a habeas petition challenging only  
2 the conditions of confinement. Id.

3 The United States Supreme Court has discussed a litany of claims alleging cruel and  
4 unusual punishments. In Wilson v. Seiter, 501 U.S. 294, 111 S.Ct. 2321 (1991), the Court  
5 dealt with claims alleging “overcrowding, excessive noise, insufficient locker storage space,  
6 inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms,  
7 unsanitary dining facilities and food preparation, and housing with mentally and physically ill  
8 inmates.” At 296, 111 S.Ct. at 2323. The Wilson Court characterized such claims as  
9 “conditions of confinement” claims, which required an allegation of “deliberate indifference”  
10 by prison officials. Id. at 297, 111 S.Ct. at 2323.

11 Petitioner raises one claim – which he labels as “Violation of United States Constitution  
12 8<sup>th</sup> Amendment ‘Cruel and Unusual Punishment’ (*Deliberate Indifference*). Instant Petition  
13 at 2 (emphasis added). Therefore, Petitioner seems to acknowledge that he is not challenging  
14 the validity of his judgment of conviction; rather, he is challenging the *conditions of his*  
15 *confinement*. See Wilson, 501 U.S. at 297, 111 S.Ct. at 2323. Indeed, Petitioner specifically  
16 alleges:

17       Petitioner’s “Deliberate Indifference” claim is established where the challenged  
18       deficiency is sufficiently serious and prison officials know that petitioner face a  
19       substantial risk of serious harm and disregard that risk by failing to take  
20       reasonable measures to abate it as describe herein, and the target of the petition  
21       is not what respondents have done but what they have refused to do.

22 Instant Petition at 4-5. Petitioner proceeds to claim that the COVID-19 pandemic somehow  
23 makes his sentence cruel and unusual because of his risk of contracting the virus in prison. Id.  
24 As such, Petitioner’s claim is not cognizable in habeas proceedings, and should be dismissed.  
25 See Farmer v. Brennan, 511 U.S. 825, 832, 114 S.Ct. 1970, 1976 (1994) (holding that the  
26 proper way to raise a claim that one’s lawful incarceration has exposed them to harm while  
27 incarcerated is to challenge the *conditions of confinement* under the Eighth Amendment); see  
28 also Bowen, 100 Nev. at 490, 686 P.2d at 250 (conditions of confinement claims are not  
cognizable in habeas review).

//

1 Because the Nevada Supreme Court has clearly and expressly precluded conditions of  
2 confinement claims from post-conviction habeas proceedings, the instant Petition is not the  
3 proper legal vehicle within which to raise Petitioner's claim. As such, this Court lacks the  
4 jurisdiction to grant habeas relief on the instant Petition, and the same should be dismissed.

5 **B. Petitioner's Instant Petition is Time-Barred**

6 The mandatory provision of NRS 34.726(1) states:

7 Unless there is good cause shown for delay, a petition that challenges the validity  
8 of a judgment or sentence must be filed *within 1 year after entry of the judgment*  
9 *of conviction or, if an appeal has been taken from the judgment, within 1 year*  
10 *after the Supreme Court issues its remittitur.* For the purposes of this subsection,  
11 good cause for delay exists if the petitioner demonstrates to the satisfaction of  
12 the court:

- 13 (a) That the delay is not the fault of the petitioner; and
- 14 (b) That dismissal of the petition as untimely will unduly prejudice the  
15 petitioner.

16 (emphasis added). "[T]he statutory rules regarding procedural default are mandatory and  
17 cannot be ignored when properly raised by the State." State v. Dist. Court (Riker), 121 Nev.  
18 225, 233, 112 P.3d 1070, 1075 (2005).

19 Per the language, the one-year time bar prescribed by NRS 34.726 begins to run from  
20 the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.  
21 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998); see Pellegrini v.  
22 State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be  
23 construed by its plain meaning).

24 In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada  
25 Supreme Court rejected a habeas petition that was filed two days late, pursuant to the "clear  
26 and unambiguous" mandatory provisions of NRS 34.726(1). Gonzales reiterated the  
27 importance of filing the petition with the District Court within the one-year mandate, absent a  
28 showing of "good cause" for the delay in filing. Gonzales, 118, Nev. at 593, 590 P.3d at 902.  
The one-year time bar is therefore strictly construed. In contrast with the short amount of time  
to file a notice of appeal, a prisoner has a full year to file a post-conviction habeas petition, so

//

1 there is no injustice in a strict application of NRS 34.726(1), despite any alleged difficulties  
2 with the postal system. Id. at 595, 53 P.3d at 903.

3 The Nevada Supreme Court has held that courts have a *duty* to consider whether a  
4 defendant's post-conviction petition claims are procedurally barred, noting:

5 Habeas corpus petitions that are filed many years after conviction are an  
6 unreasonable burden on the criminal justice system. The necessity for a  
7 workable system dictates that there must exist a time when a criminal conviction  
is final.

8 Riker, 121 Nev. at 231, 112 P.3d at 1074. The Nevada Supreme Court has granted no  
9 discretion to the district courts regarding whether to apply the statutory procedural bars; the  
10 rules *must* be applied.

11 Remittitur from the affirmance of Petitioner's Judgment of Conviction was filed on  
12 February 25, 2020. Therefore, Petitioner had until February 25, 2021, to file a timely post-  
13 conviction habeas petition. Dickerson, 114 Nev. at 1087, 967 P.2d at 1133-34. Petitioner's  
14 instant Petition was not filed until March 30, 2021, over a month past the statutory deadline.  
15 Therefore, absent a showing of good cause and prejudice, Petitioner's instant Petition must be  
16 dismissed as untimely. Riker, 121 Nev. at 233, 112 P.3d at 1075. Petitioner does not attempts  
17 to demonstrate good cause or prejudice. See generally, Instant Petition. Indeed, the State  
18 maintains that Petitioner could not successfully do so, as Petitioner's contention is without  
19 merit. See Section II(B), *infra*.

20 Because Petitioner's instant Petition is time-barred, with no good cause shown for the  
21 delay, the State respectfully submits that Petitioner's instant Petition *must* be dismissed  
22 pursuant to NRS 34.726(1).

23 **C. Petitioner Fails to Demonstrate Good Cause to Overcome His Procedural**  
24 **Defaults**

25 To avoid procedural default, under NRS 34.726, a defendant has the burden of pleading  
26 and proving specific facts that demonstrate good cause for his failure to present his claim in  
27 earlier proceedings or to otherwise comply with the statutory requirements, *and* that he will  
28 be unduly prejudiced if the petition is dismissed. See Hogan v. Warden, 109 Nev. 952, 959–

1 60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep’t of Prisons, 104 Nev. 656, 659, 764  
2 P.2d 1303, 1305 (1988).

3 Specifically, under NRS 34.726, a petitioner must demonstrate: (1) “[t]hat the delay is  
4 not the fault of the petitioner” and (2) that the petitioner will be “unduly prejudice[d]” if the  
5 petition is dismissed as untimely. NRS 34.726. To meet the first requirement, “a petitioner  
6 *must* show that an impediment external to the defense prevented him or her from complying  
7 with the state procedural default rules.” Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503,  
8 506 (2003) (emphasis added). “A qualifying impediment might be shown where the factual or  
9 legal basis for a claim was not reasonably available *at the time of default*.” Clem v. State, 119  
10 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Clem Court continued,  
11 “appellants cannot attempt to manufacture good cause[.]” Id. at 621, 81 P.3d at 526. To find  
12 good cause there must be a “substantial reason; one that affords a legal excuse.” Hathaway,  
13 119 Nev. at 252, 71 P.3d at 506 (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229,  
14 1230 (1989)). Examples of good cause include interference by State officials and the previous  
15 unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. 192, 197, 275 P.3d  
16 91, 95 (2012). Clearly, any delay in the filing of the petition must not be the fault of the  
17 petitioner. NRS 34.726(1)(a).

18 Further, a petitioner raising good cause to excuse procedural bars must do so within a  
19 *reasonable* time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34  
20 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see  
21 generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably  
22 available to the petitioner during the statutory time period did not constitute good cause to  
23 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good  
24 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446,  
25 453 120 S.Ct. 1587, 1592 (2000).

26 As stated *supra*, Petitioner does not attempt to address good cause. See generally,  
27 Instant Petition. However, even if Petitioner attempted to raise a “good cause” argument, he  
28 could not succeed, as COVID-19 is not a recently-arisen situation. Rather, the national

1 emergency declared due to the COVID-19 pandemic was declared on March 13, 2020.  
2 Petitioner's instant PWHC was filed on March 30, 2021, over a year after the national  
3 emergency was declared. As such, Petitioner could not successfully assert that his claim was  
4 raised within any "reasonable" time after the good cause arose. See Hathaway, 119 Nev. at  
5 252-53, 71 P.3d at 506-07. Instead, the COVID-19 pandemic was prevalent at the time  
6 Petitioner could have filed a *timely* petition; therefore, it is not a "qualifying impediment"  
7 sufficient to overcome the procedural bars. See Clem, 119 Nev. at 621, 81 P.3d at 525.

8 As the COVID-19 pandemic cannot constitute good cause, and as Petitioner fails to  
9 assert any other instance of good cause, Petitioner cannot demonstrate the requisite good cause  
10 to overcome the time-bar to his instant Petition.

11 **D. Petitioner Fails to Demonstrate Prejudice Sufficient to Overcome His**  
12 **Procedural Defaults**

13 In order to establish prejudice, the defendant must show "not merely that the errors of  
14 [the proceedings] created possibility of prejudice, but that they worked to his actual and  
15 substantial disadvantage, in affecting the state proceedings with error of constitutional  
16 dimensions." Hogan, 109 Nev. at 960, 860 P.2d at 716 (quoting United States v. Frady, 456  
17 U.S. 152, 170, 102 S.Ct. 1584, 1596 (1982)).

18 As set forth in Section II(A), *supra*, the instant Petition does not allege that "the state  
19 proceedings" were infected with any constitutional error. See Instant Petition at 4-5; Hogan,  
20 109 Nev. at 960, 860 P.2d at 716. Instead, Petitioner simply alleges that prison officials have  
21 improperly and/or insufficiently responded to the COVID-19 pandemic. Id. Because  
22 Petitioner's claim is clearly not cognizable in habeas review, it certainly cannot suffice to  
23 demonstrate prejudice sufficient to overcome Petitioner's procedural default. Hogan, 109 Nev.  
24 at 960, 860 P.2d at 716.

25 Because Petitioner does not allege any cognizable claim, much less any claim that could  
26 demonstrate prejudice, Petitioner fails to overcome the time-bar to the instant Petition, and the  
27 instant Petition should be dismissed.

28 //

1 CONCLUSION

2 For the foregoing reasons, the State respectfully requests that this Court consolidate the  
3 instant action into Petitioner's pre-existing post-conviction case.

4 Moreover, because the instant Petition does not warrant relief, the State submits that  
5 this Court should DENY the same as outside the scope of habeas review, or as procedurally  
6 defaulted.

7 DATED this 24th day of June, 2021.

8 Respectfully submitted,

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

11 BY BB for  
12 JONATHAN VANBOSKERCK  
13 Chief Deputy District Attorney  
Nevada Bar #06528

14  
15  
16 CERTIFICATE OF MAILING

17 I hereby certify that service of the above and foregoing was made this 24th day of  
18 June, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

19 JAMES H. HAYES, BAC #1175077  
20 SOUTHERN DESERT CORRECTIONAL CENTER  
21 20825 COLD CREEK ROAD  
LAS VEGAS, NV, 89166

22 BY Corina Garcia  
23 C. Garcia  
Secretary for the District Attorney's Office

24  
25  
26  
27  
28 JV/cg/L2

*Steven D. Grierson*

1 Hayes, James H. #1175077

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

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. HAYES

13 Defendant.

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. HAYES, 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 Supplemental Petition for writ of Habeas Corpus

22  
23 ruled on the 10th day of May, 2021.

24  
25 Dated this 23rd day of JUNE, 20 21.

Respectfully Submitted,

James H. Hayes

NOTE: SEE attach Exhibits  
# 2021, #2020

RECEIVED  
JUN 28 2021  
CLERK OF THE COURT

HAYES, JAMES H, 1175077  
Petitioner/In Propria Persona  
Post Office Box 208, SDCC  
Indian Springs, Nevada 89070-0208

Electronically Filed  
6/29/2021 3:07 PM  
Steven D. Grierson  
CLERK OF THE COURT

*Steven D. Grierson*

IN THE 8<sup>th</sup> 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:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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 \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

RESPECTFULLY SUBMITTED BY:

James H. Hayes  
JAMES H. HAYES # 1175077  
Plaintiff/In Propria Persona

**CERTIFICATE OF SERVICE BY MAILING**

I, JAMES H. HAYES, hereby certify, pursuant to NRCP 5(b), that on this 23<sup>rd</sup> day of JUNE, 2021, I mailed a true and correct copy of the foregoing, "Notice of Appeal for '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:

Clark County District Courts  
OFFICE OF THE CLERK  
200 LAUREL AVE. 3RD FLOOR  
LAS VEGAS, NEVADA  
89155-1160

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

SUPREME COURT OF NEVADA  
201 S. MORGAN ST. STE 201  
CARSON CITY, NV  
89701

CC:FILE

DATED: this 23 day of JUNE, 2021.

James H. Hayes  
JAMES H. HAYES # 1175072  
/In Propria Personam  
Post Office Box 208, S.D.C.C.  
Indian Springs, Nevada 89018  
**IN FORMA PAUPERIS:**

**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

PRINT DATE: 06/10/2021

Page 1 of 5

Minutes Date: March 08, 2021

EXHIBIT 2020

8th Judicial District **FILED** for the County of Clark

JUL 31 2020

DA  
PP  
HEARING  
REQUESTED

CLERK OF COURT  
AFFIDAVIT OF

27  
Jurisdiction of the subject matter is derived from the law; it neither can be waived nor conferred by contract of accused.

STATE OF NEVADA )

ss:

Motion to Vacate Sentence (conviction invalid)

COUNTY OF CLARK )

CASE NO: C-16-31548-1

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 marginal evidence to bind over charge. 2.) Grand Jury indictment 3.) Motion of leave of the Court to file information 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 for the charge of Attempt Grand Larceny.

JUL 20 2020

1 of 4

CLERK OF THE COURT

EXHIBIT # 2021

1 in the state's filed information dated June 17, 2016 that  
2 was based over on a 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 establish 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 Amended information for attempt grand larceny  
20 consistently with facts now known as the means was false  
21 confirm by magistrate after all sworn testimony

22 FURTHER, AFFIANT SAYETH NAUGHT.

23 EXECUTED AT

SAC

this 14 day of July 2020

24 IN FRONT OF:

BY Carolyn D. Pharo

NDOC # 1125024

3 of 4

1 constitutionally against Mr. Hayes

2 (3) That Mr. Hayes factually 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 establish sufficient factual innocence warranting  
10 granting Motion to Vacate.

11 (5) That to accept Affidavit 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 know 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 as the  
22 underlying criminal conduct that may have justified  
23 accepting Mr. Hayes Affidavit to a crime he did not  
24 commit, and the conduct upon which the Affidavit was  
25 entered was false.

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

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.

Excuted on the 22<sup>nd</sup> day of July, 2020

James H. Hayes # 1175077 James H. Hayes  
Name and Prison BAC#, printed

4 of 4





1 ASTA

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

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

JAMES H. HAYES,

Plaintiff(s),

vs.

STATE OF NEVADA; WARDEN JERRY  
HOWELL,

Defendant(s),

Case No: A-19-793315-W

Dept No: III

**CASE APPEAL STATEMENT**

1. Appellant(s): James H. Hayes

2. Judge: Monica Trujillo

3. Appellant(s): James H. Hayes

Counsel:

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

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

Counsel:

Steven B. Wolfson, District Attorney  
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: Yes

Supreme Court Docket Number(s): 73436, 75173, 77151, 78590, 78622, 80222, 81076,  
82202, 82734, 82962

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 30 day of June 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