IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Feb 22 2022 03:10 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: A-21-831979-W
Consolidated with A-19-793315-W
Related Case C-16-315718-1
Docket No: 84169

RECORD ON APPEAL

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

A-21-831979-W James Hayes, Plaintiff(s) vs. Nevada State of, Defendant(s)

I N D E X

A-21-831979-W James Hayes, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

I N D E X

A-21-831979-W James Hayes, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

I N D E X

Electronically Filed
3/30/2021 9:37 AM
Steven D. Grierson
CLERK OF THE COURT

James H. Hayes. #1175877
Petitioner/In Propia Persona
Post Office Box 208, SDCC
Indian Springs, Nevada 89070

CASE NO: A-21-831979-W
Department 8

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

James H. Hayes, Petitioner,	"Hearing Requested"
vs.	Case No. ______
State of Nevada, Nevada Dept of Corrections, Southern Desert Corr. Ctr.,	Dept. No. ______
Respondent(s).	Docket ______ "Coronavirus (COVID-19)"

PETITION FOR WRIT OF HABEAS CORPUS ~~(POST-CONVICTION)~~ COVID-19 (CORONAVIRUS).

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the institution. If you are not in a specific institution of the department within its custody, name the director of the department of corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction and sentence.

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MAR - 2 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: Violation of United States Constitution 8th Amendment "Cruel and Unusual Punishment" ("Deliberate Indifference)

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law): In the face of the COVID-19 pandemic, which took its greatest toll among older individuals and in congregate living situations, and in an aged facility with ventilation, space, and sanitation problems, it was morally indefensible and constitutionally untenable not to immediately adopt and implement measures designed to permit physical distancing among inmates, including eliminating double celling and dormitory style housing. Nevada Dept. of Corrections (Southern Desert Correctional Center) has continued to show deliberate indifference to the risk of substantial harm to Mr. Hayes (petitioner), whose age made him vulnerable to COVID-19. Even aside from preexisting and hereditary health conditions, Southern desert correctional center (NDOC) was and still not adequately prepared to respond to the outbreak of COVID-19 the disease caused by the novel coronavirus, as petitioner is still housed in a dormitory with over 115 other ~~that~~ inmates that at least 50% of whom have tested positive and the declaration states that protecting oneself from infection

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COVID-19 in this open dormitory is impossible because there is no opportunity to engage in social distancing. Petitioner alleges respondents acted with deliberate indifference to the risk of substantial harm to inmates by failing to immediately reduce the population of Southern Desert Correctional Center by releasing or transferring at least 50 percent of the inmate population of the prison, in accordance with the recommendation of public health experts who had been asked to advise NDOC on measures to combat COVID-19 considered necessary to protect the health of inmates the health of correctional facility staff, the health of health care staff, and the health of the community as a whole, that violates the prohibition against cruel and unusual punishment in the 8th Amendment to the United States Constitution. On the same basis, petitioner also seeks declaratory relief for other similarly situated Southern Desert Correctional Center inmates. The World Health Organization declared COVID-19 a pandemic March 11, 2020 noting "the alarming levels of spread and severity and the alarming levels of inaction in response to the virus," here at Southern Desert Correctional Center and entire NDOC the best way to slow and prevent spread of the virus is through social or physical distancing, which involves avoiding human contact, and staying at least six feet away from others. Consequently, most institutions in this country have either dramatically reduced the number of people in close quarters or closed entirely that Southern Desert Correctional facility have failed to follow. When physicians, public health officials, and the Centers for Disease control and prevention sounded the alarm that prisons and jails could become the epicenter of the COVID-19 pandemic if infection continues and that's why the CDC's lengthy and detailed guidance for correctional and detention facilities repeatedly emphasize the vital nature of social distancing for reducing transmission of the COVID-19 virus. When in fact, infections transmitted through droplets, like COVID-19, are particularly difficult to control in correctional facilities, as adequate physical distancing and decontamination of surfaces is usually impossible. By all accounts, the COVID-19 outbreak at Southern Desert Correctional Center and NDOC has been the worst epidemiological disaster in Nevada correctional history. And there is no assurance Southern Desert Correctional Center will not experience a second or even third spike so there is a failure to protect the lives of inmates, so it is inconceivable that petitioner is still in this dangerous environment. As petitioner exhibits eminent public health experts endorsed the conclusion that inmates of Southern Desert Correctional Center could be protected against the risks presented by COVID-19 only if the population of SDCC was drastically reduced, or the disaster at SDCC could only worsen since a substantial portion of the population could still get COVID-19, become seriously ill or die as SDCC remains unsafe for inmates, staff and others coming into the facility. Petitioner's "Deliberate Indifference" claim is established where the challenged deficiency is sufficiently serious and prison officials know that ~~[illegible]~~ petitioner face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it as ~~[illegible]~~ describe herein, and the target of the petition is not what respondents have done but what they have refused to do. ~~[illegible]~~ Which, in effect respondents maintain that prompt physical and social distancing is unnecessary a position at odds with experts opinion, that dormitories provide congregate living space, which is inimical to physical and social distancing. Petitioner contends that respondents failure to accompany the measures they are taking with a drastic reduction of Southern Desert Correctional Center (SDCC) population is not reasonable. Petitioner requests to grant declaratory relief requiring the release of petitioner being a non-violent inmate over the age of 50 whose age and health conditions put him at enhanced risk of death or grave illness from exposure to COVID-19. Petitioner seeking an injunction on the ground that there is a contemporary violation of a nature likely to continue, as respondents knowingly and unreasonably disregarding an objectively intolerable risk of harm, and they continue to do so. Petitioner's retain the essence of human dignity inherent in all persons, and respect for that dignity animates the 8th Amendment prohibition against cruel and unusual punishment. A prison that deprives inmates of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.

WHEREFORE, Mr. James H. Hayes, prays that the court grant any and all relief to which he may be entitled in this proceeding.

EXECUTED at Southern Desert Correctional Center on the 26 day of February, 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

Atttorney for Petitioner

-6-

CERTFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 26th day of February, 2021, I mailed a true and correct copy of the foregoing, "Petition For Writ of Habeas Corpus "COVID-19"" 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 Lewis Ave. 3rd fl
Las Vegas, NV
89155-1160

Clark County Dist. Attorney
200 Lewis Ave
Las Vegas, NV
89155-2212

Attorney General State of NV.
100 N. Carson
Carson City, NV
89701

CC:FILE

DATED: this 26th day of February, 2021.

James H Hayes
James H. Hayes #1145077
/In Propria Personam
Post Office Box 208,S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Petition for

Writ of Habeas Corpus "COVID-19"
(Title of Document)

filed in District Court Case number ______________________

☑ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

____
(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

James H. Hayes
Signature

2-26-2021
Date

James H. Hayes
Print Name

Pro Per
Title

-8-

Charles J #1175077
SDCC
P.O. Box 208
Indian Springs, NV
89070

Hasler
03/18/2021
US POSTAGE

B/S #
2491522

Clark County District Courts
"office of the clerk"
200 Lewis Ave; 3RD Floor
Las Vegas, Nevada
89155-1160

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THIS SEALED DOCUMENT, NUMBERED PAGE(S) 10 - 12 WILL FOLLOW VIA U.S. MAIL

THIS SEALED DOCUMENT, NUMBERED PAGE(S) 13 - 14 WILL FOLLOW VIA U.S. MAIL

Electronically Filed
3/30/2021 5:00 PM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
****

James Hayes, Plaintiff(s) vs. Nevada State of, Defendant(s)	Case No.: A-21-831979-W Department 8

NOTICE OF HEARING

Please be advised that the Petition for Writ of Habeas Corpus in the above-entitled matter is set for hearing as follows:

Date: May 04, 2021

Time: 10:00 AM

Location: Phoenix Building 11th Floor 116
Phoenix Building
330 S. 3rd Street
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/ Patricia Azucena-Preza
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/ Patricia Azucena-Preza
Deputy Clerk of the Court

THIS SEALED DOCUMENT, NUMBERED PAGE(S) 16 - 17 WILL FOLLOW VIA U.S. MAIL

Electronically Filed
5/6/2021 8:42 AM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
****

James Hayes, Plaintiff(s) vs. Nevada State of, Defendant(s)	Case No.: A-21-831979-W Department 3

NOTICE OF DEPARTMENT REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled action has been reassigned to Judge Monica Trujillo.

☒ This reassignment is due to: Minute Order Dated 05-05-2021.

ANY TRIAL DATE AND ASSOCIATED TRIAL HEARINGS STAND BUT MAY BE RESET BY THE NEW DEPARTMENT.

Any motions or hearings presently scheduled in the FORMER department will be heard by the NEW department as set forth below.

Petition for Writ of Habeas Corpus (Covid 19 Corona Virus) will commence on 05/17/2021, at 8:30 AM.

PLEASE INCLUDE THE NEW DEPARTMENT NUMBER ON ALL FUTURE FILINGS.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Salevao Asifoa
S.L. Asifoa, Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that this 6th day of May, 2021

☒ The foregoing Notice of Department Reassignment was electronically served to all registered parties for case number A-21-831979-W.

☒ I mailed, via first-class, postage fully prepaid, the foregoing Clerk of the Court, Notice of Department Reassignment to:

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

/s/ Salevao Asifoa
S.L. Asifoa, Deputy Clerk of the Court

Electronically Filed
6/24/2021 8:54 AM
Steven D. Grierson
CLERK OF THE COURT

OPPS

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #06528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES HOWARD HAYES, aka James Howard Hayes Jr., #2796708	
Petitioner,	CASE NO: A-19-793315-W A-21-831979-W
-vs-	
THE STATE OF NEVADA,	DEPT NO: III
Respondent.	

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

DATE OF HEARING: JULY 19, 2021
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JONATHAN VANBOSKERCK, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Petitioner's Petition for Writ of Habeas Corpus "COVID-19 (Coronavirus)."

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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

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

The terms of the GPA are as follows:

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

GPA at 1:22-24.

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

> I understand and agree that, if…an independent magistrate, by affidavit review, confirms probable cause against me for new criminal charges including reckless 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 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 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.

GPA at 2: 1-9.

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

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

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

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

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

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

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

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

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

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

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

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

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

On December 22, 2020, Petitioner filed a "Motion to Compel Judgment Pursuant to Nevada Revised Statutes Chapter 34 FRCP Rule 12(c) for Amended Petition for Writ of Habeas Corpus." The State filed its Response to that Motion on January 27, 2021. On February 1, 2021, the Court denied Petitioner's Motion to Compel. The Court also noted that no order had been filed regarding Petitioner's Amended Petition for Writ of Habeas Corpus; therefore, the Court denied the Amended Petition as well. After the Court's ruling on the matter, Petitioner filed an "Opposition to State's Response to Petitioner's Motion to Compel Judgment" on February 18, 2021. The Court issued its Findings of Fact, Conclusions of Law and Order reflecting its denial of Petitioner's Motion to Compel on March 17, 2021. Notice of Entry of that Order was filed on March 19, 2021.

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

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

Petition for Writ of Habeas Corpus" Petition (NRS 34.360-34.830). Petitioner filed a "Supplemental 'Addendum'" on April 14, 2021.

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

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

ARGUMENT

I. THE POST-CONVICTION CASES SHOULD BE CONSOLIDATED

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

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

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

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

In the instant Petition, Petitioner again claims that his sentence amounts to Cruel and Unusual Punishment under the Eighth Amendment. See Instant Petition at 5. Therefore, because this action, and Petitioner's separate post-conviction action, each involve a common question – whether Petitioner's judgment of conviction and sentence are constitutional – the two actions should be consolidated.

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

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

II. THE INSTANT PETITION DOES NOT WARRANT RELIEF

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

A. Petitioner's Claim is Not Cognizable in Habeas Review

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

> We have repeatedly held that a petition for writ of habeas corpus may challenge the validity of current confinement, but not the conditions thereof. See Director, Dep't Prisons v. Arndt, 98 Nev. 84, 640 P.2d 1318 (1982); Rogers v. Warden, 84 Neb. [sic] 539, 445 P.2d 28 (1968); Rainsberger v. Leypoldt, 77 Nev. 399, 365 P.2d 489 (1961), cert. denied, 368 U.S. 516, 82 S.Ct. 530, 7 L.Ed.2d 522, (1962). In Rogers, we held that a claim of brutal treatment at the hands of prison officials was not cognizable on a habeas petition, because the claim spoke to the 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*.

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

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

Petitioner raises one claim – which he labels as "Violation of United States Constitution 8th Amendment 'Cruel and Unusual Puinishment' (*Deliberate Indifference*). Instant Petition at 2 (emphasis added). Therefore, Petitioner seems to acknowledge that he is not challenging the validity of his judgment of conviction; rather, he is challenging the *conditions of his confinement*. See Wilson, 501 U.S. at 297, 111 S.Ct. at 2323. Indeed, Petitioner specifically alleges:

> Petitioner's "Deliberate Indifference" claim is established where the challenged deficiency is sufficiently serious and prison officials know that petitioner face a substantial risk of serious harm and disregard that risk by failing to take reasonable measues to abate it as describe herein, and the target of the petition is not what respondents have done but what they have refused to do.

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

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

B. Petitioner's Instant Petition is Time-Barred

The mandatory provision of NRS 34.726(1) states:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed *within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur*. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

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

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

In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late, pursuant to the "clear and unambiguous" mandatory provisions of NRS 34.726(1). Gonzales reiterated the importance of filing the petition with the District Court within the one-year mandate, absent a 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

//

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

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

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

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

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

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

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

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

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

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

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

As stated *supra*, Petitioner does not attempt to address good cause. See generally, Instant Petition. However, even if Petitioner attempted to raise a "good cause" argument, he could not succeed, as COVID-19 is not a recently-arisen situation. Rather, the national emergency declared due to the COVID-19 pandemic was declared on March 13, 2020. Petitioner's instant PWHC was filed on March 30, 2021, over a year after the national emergency was declared. As such, Petitioner could not successfully assert that his claim was raised within any "reasonable" time after the good cause arose. See Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07. Instead, the COVID-19 pandemic was prevalent at the time Petitioner could have filed a *timely* petition; therefore, it is not a "qualifying impediment" sufficient to overcome the procedural bars. See Clem, 119 Nev. at 621, 81 P.3d at 525.

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

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

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

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

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

//

CONCLUSION

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

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

DATED this 24th day of June, 2021.

Respectfully submitted,

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

BY RB for
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 24th day of June, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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

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

JV/cg/L2

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

Electronically Filed
07/08/2021
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

James H. Hayes (Petitioner)

v.

State of Nevada (Respondent)

"HEARING REQUESTED"

Case No. A-21-831979-W

Dept No. 3

Docket ________

NOTICE OF MOTION

YOU WILL PLEASE TAKE NOTICE, that ____, will come on for hearing before the above-entitled Court on the ___th day of ____________, 20___, at the hour of ____ o'clock ___. M. In Department ___, of said Court.

CC:FILE

DATED: this 28th day of June, 2021.

BY: James H. Hayes #1175077
/In Propria Personam

RECEIVED
JUL - 6 2021
CLERK OF THE COURT

Hayes, James #1175077
SDCC
P.O. BOX 208
INDIAN Springs, NV
89070

Clark County District Courts
"office of the clerk"
200 Lewis Ave; 3RD Floor
Las Vegas, Nevada
89155-1160

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07/08/2021
CLERK OF THE COURT

Hayes, James H

NDOC No. 1175077

In proper person

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

James H. Hayes)
Petitioner,)
v.)
State of Nevada)
Respondent.)

"HEARING REQUESTED"

Case No. A-21-831979-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 July 19, 2021 at 8:30 AM.

RECEIVED
JUL - 6 2021
CLERK OF THE COURT

In support of this Motion, I allege the following:

1. I am an inmate incarcerated at Southern Desert Correctional Center

My mandatory release date is October 1, 2025.

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

NRS 209.274 Transportation of Offender to Appear Before Court states:

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

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

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

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

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

3. My presence is required at the hearing because:

☑ I AM NEEDED AS A WITNESS.

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

☑ THE HEARING WILL BE AN EVIDENTIARY HEARING.

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

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

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

6. Southern Desert Correctional Ctr is located approximately 40 miles from Las Vegas, Nevada.

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

8. The rules of the institution prohibit me from placing telephone calls from the institution, except for collect calls, unless special arrangements are made with prison staff. Nev. Admin. Code DOC 718.01. However, arrangements for my telephone appearance can be made by contacting the following staff member at my institution: Warden Hutchings, ________________,
whose telephone number is 725-216-6500

Dated this 28th day of June, 2021.

[signature]

James H. Hayes #1175077

CERTIFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 28th day of June, 2021, I mailed a true and correct copy of the foregoing, "Motion and order for transportation of inmate..." 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 Lewis Ave; 3rd floor
Las Vegas, Nevada
89155-1160

Clark County District Atty.
200 Lewis Ave
Las Vegas Nevada
89155-2212

Attorney General of Nevada
100 N. Carson Street
Carson City, Nevada
89701

CC:FILE

DATED: this 28th day of June, 2021.

James H. Hayes
James H. Hayes #1175027
/In Propria Personam
Post Office Box 208,S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

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

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

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IN THE 8th JUDICIAL DISTRICT COURT OF THE

STATE OF NEVADA IN AND FOR THE

COUNTY OF Clark

James H. Hayes)

Petitioner,)

)

v.)

) Case No. A-21-831979-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 James H. Hayes is necessary for the hearing that is scheduled in this case on the 19th day of July, 2021, at 8:30 A.M..

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,

______________________________ is to be transported back to the above named institution.

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

Dated this _________ day of__________________, ___________.

____

District Court Judge

Electronically Filed
07/22/2021
[signature]
CLERK OF THE COURT

Hayes, James H, 1175077
Petitioner/In Propia Persona
Post Office Box 208, SDCC
Indian Springs, Nevada 89070

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

James H. Hayes,
Petitioner,

vs.

State of Nevada
Southern Desert Correctional Ctr
NDOC,
Respondent(s).

"HEARING REQUESTED"

Case No. A-21-831979-W
Dept. No. 3
Docket July 19, 2021 8:30AM

"OPPOSITION TO STATE'S OPPOSITION"

PETITION FOR WRIT OF HABEAS CORPUS CORONAVIRUS (COVID-19)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the institution. If you are not in a specific institution of the department within its custody, name the director of the department of corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction and sentence.

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JUL 21 2021
CLERK OF THE COURT

Points and Authorities
Statement of the Case

On March 30, 2021, James H. Hayes (hereinafter petitioner) filed the instant Petition for Writ of Habeas Corpus

On June 24, 2021, State filed its opposition to petitioner's Petition for Writ of habeas Corpus along with a motion to consolidate

On July 13, 2021 petitioner received the State's opposition and motion to consolidate here at Southern Desert Correctional Center

Argument:

I. Petitioner's instant petition for writ of habeas corpus is not a "post-conviction" writ and does not challenge petitioner's judgment of conviction and sentence nor does it involve a common question. whereas the instant petition contains only one issue "8th Amend violation cruel and unusual punishment "Deliberate Indifference'" that was not included in petitioner's "post-conviction" writ of habeas corpus or anything substantially similar to that claim.

II. Petitioner's claim is cognizable in habeas Review. the Court of Appeal of California granted prisoners petition for the same claim in petitioner's writ of habeas corpus "Deliberate Indifference of the Department of corrections and state prison to the risk of substantial harm amounting to cruel and unusual punishment under U.S. Const. 8th Amend." (In re Ivan Von Staich 56 Cal.App.5th 53). Petitioner never argued that his sentence was cruel and unusual but that his confinement was in violation of the 8th Amend. through the NDOC's deliberate indifference.

III Petitioners petition is not time-barred. The mandatory provisions of post-conviction petitions is not applicable in the instant proceedings when in fact the time for granting or denying review was extended in Von Staich, 2020 Cal. Lexis 7640. Furthermore, the California Court of Appeals held that "the pendency of a related action challenging actions of the Department of Corrections does not lessen a court's authority, and duty, to provide effective habeas corpus relief.

IV. The State offers nothing more in support of their claim than a general denial of "BARRED" then by alleging only a conclusionary statement of fact in their opposition have indicated a willingness to rely on the record and the merits of petitioner's claim can be reached without ordering an evidentiary hearing.

V. Petitioner has demonstrated sufficient prejudice because it was deliberate indifference, in violation of U.S Const, 8th Amend., for the NDOC to disregard the experts' conclusions that, because of COVID-19 it was essential to reduce the population to permit physical distancing among inmates, that was morally indefensible and constitutionally untenable.

WHEREFORE, James H. 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 14th day of July, 2021.

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.

Signature of Petitioner

PRO SE
Atttorney for Petitioner

-4-

CERTIFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 14th day of July, 2021, I mailed a true and correct copy of the foregoing, "Opposition to State's opposition to defendant's petition for writ..." 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 Dist. Courts
Office of the Clerk
200 Lewis Ave; 3rd Fl
Las Vegas, NV
89155-1160

Clark County Dist. Attorney
200 Lewis Ave
Las Vegas, NV
89155-2212

CC:FILE

DATED: this 14th day of July, 2021.

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

-5-

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

12B4A

LAS VEGAS NV 8
19 JUL 2021 PM 4

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Clark County District Courts
"office of the clerk"
200 Lewis Ave; 3rd floor
Las Vegas, Nevada
89155-1160

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8/12/2021 12:53 PM
Steven D. Grierson
CLERK OF THE COURT

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

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-21-831979-W

Dept. No. 3

Docket ______

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN, That the Petitioner/Defendant, James H. Hayes, in and through his proper person, hereby appeals to the Supreme Court of Nevada from the ORDER denying and/or dismissing the Petition for Writ of Habeas Corpus (COVID-19 Coronavirus) ruled on the 19th day of July, 2021.

Dated this 10th day of August, 2021.

Respectfully Submitted,

James H Hayes

1

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Case Number: A-21-831979-W

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

LAS VEGAS NV 890
11 AUG 2021 PM 5 L

FOREVER USA

Clark County District Courts
"office of the clerk"
200 Lewis Ave; 3rd floor
Las Vegas, Nevada
89155-1160

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Mail,

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Southern Desert
Correctional Center
AUG 1 1 2021
OUTGOING MAIL

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

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Steven D. Grierson
CLERK OF THE 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-21-831979-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

CERTFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 10th day of August, 2021, I mailed a true and correct copy of the foregoing, "Petition for Writ of habeas corpus (COVID-19; Coronavirus)" 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 Lewis Ave, 3rd Floor
Las Vegas, NV
89155-1160

Clark County District Attorney
200 Lewis Ave
Las Vegas, NV
89155-2212

CC:FILE

DATED: this 10th day of August, 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:

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8/13/2021 9:36 AM
Steven D. Grierson
CLERK OF THE COURT

ASTA

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; NEVADA DEPT. OF CORRECTIONS; SOUTHERN DESERT CORR. CTR.,

Defendant(s),

Case No: A-21-831979-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 20 8
Indain Springs, NV 89070

4. Respondent (s): State of Nevada; Nevada Dept. of Corrections; Southern Desert Corr. Ctr.

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**: Yes, March 21, 2021
   ***Expires 1 year from date filed*
   Appellant Filed Application to Proceed in Forma Pauperis: N/A
   Date Application(s) filed: N/A

9. Date Commenced in District Court: March 30, 2021

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 13 day of August 2021.

Steven D. Grierson, Clerk of the Court

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: James H. Hayes

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8/13/2021 9:49 AM
Steven D. Grierson
CLERK OF THE COURT

ASTA

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; NEVADA DEPT. OF CORRECTIONS; SOUTHERN DESERT CORR. CTR., Defendant(s),	Case No: A-21-831979-W *Consolidated with A-19-793315-W* Dept No: III **Amended**

AMENDED 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 20 8
Indain Springs, NV 89070

4. Respondent (s): State of Nevada; Nevada Dept. of Corrections; Southern Desert Corr. Ctr.

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**: Yes, March 21, 2021
   ***Expires 1 year from date filed*
   Appellant Filed Application to Proceed in Forma Pauperis: N/A
   Date Application(s) filed: N/A

9. Date Commenced in District Court: March 30, 2021

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 13 day of August 2021.

Steven D. Grierson, Clerk of the Court

/s/ Amanda Hampton

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

cc: James H. Hayes

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus **COURT MINUTES** **May 04, 2021**

A-21-831979-W James Hayes, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

May 04, 2021 **10:00 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Peterson, Jessica K. **COURTROOM:** Phoenix Building 11th Floor 116

COURT CLERK: Kory Schlitz

RECORDER: Nancy Maldonado

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- COURT ADVISED the Defendant is seeking relief due to COVID 19, adding the Defendant has a criminal companion case in Department Three with Judge Trujillo; Judge Bell will be issuing a Minute Order transferring this case to Department Three to be heard with Defendant's companion case.

DISTRICT COURT

CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**May 05, 2021**

A-21-831979-W James Hayes, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

May 05, 2021 **3:00 AM** **Minute Order**

HEARD BY: Bell, Linda Marie **COURTROOM:** No Location

COURT CLERK: Jill Chambers

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- Mr. Hayes filed a Petition for Writ of Habeas Corpus on March 30, 2021. The underlying criminal matter related to this case was adjudicated in Department 3. Pursuant to EDCR 1.30(b)(15), the Clerk of the Court shall re-assign this case to Department 3.

CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Jill Chambers, to all registered parties for Odyssey File & Serve. jmc 5/5/21

DISTRICT COURT

CLARK COUNTY, NEVADA

Writ of Habeas Corpus	COURT MINUTES	May 17, 2021

A-21-831979-W James Hayes, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

May 17, 2021 **8:30 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Kierny, Carli **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Grecia Snow

RECORDER: Rebeca Gomez

REPORTER:

PARTIES PRESENT: Zadrowski, Bernard B. Attorney

JOURNAL ENTRIES

- Court noted a response from the State was not filed. Mr. Zadrowski advised they had not received the Petition; requested 45 days to respond to the Petition. COURT ORDERED, request GRANTED; State's Response DUE 6/28/21; matter CONTINUED.

NDC

7/19/21 8:30 AM - PETITION FOR WRIT OF HABEAS CORPUS (COVID 19 CORONA VIRUS)

CLERK'S NOTE: The above minute order has been distributed to: James Hayes #1175077, P.O. Box 208, Indian Springs, Nevada 89070. 5/25/21 gs

DISTRICT COURT

CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**July 19, 2021**

A-21-831979-W James Hayes, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

July 19, 2021 **8:30 AM** **All Pending Motions**

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

COURT CLERK: Grecia Snow

RECORDER: Rebeca Gomez

REPORTER:

PARTIES PRESENT: Thomas, Morgan B.A. Attorney

JOURNAL ENTRIES

- PETITION FOR WRIT OF HABEAS CORPUS (COVID 19 CORONA VIRUS)...STATE'S OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS "COVID-19 (CORONAVIRUS)" AND MOTION TO CONSOLIDATE

COURT ORDERED, State's Motion to Consolidate GRANTED; case A-21-831979-W with case A-19-793315-W.

COURT FINDS the Petition is not an appropriate vehicle to challenge his conditions of confinement, cruel and unusual punishment is not appropriate for a post conviction Petition, and it is time barred, therefore, FURTHER ORDERED, Petition DENIED. State to prepare the Order consistent with the Opposition.

NDC

CLERK'S NOTE: The above minute order has been distributed to: James Hayes #1175077, P.O. Box 208, SDCC, Indian Springs, Nevada 89070. 8/4/21 gs

Certification of Copy and Transmittal of Record

State of Nevada
County of Clark } **SS:**

Pursuant to the Supreme Court order dated February 11, 2022, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 60.

JAMES H. HAYES,

Plaintiff(s),

vs.

STATE OF NEVADA; NEVADA DEPT OF CORRECTIONS; SOUTHERN DESERT CORR. CTR.,

Defendant(s),

Case No: A-21-831979-W
Consolidated with A-19-793315-W
Related Case C-16-315718-1
Dept. No: III

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 22 day of February 2022.

Steven D. Grierson, Clerk of the Court

Amanda Hampton, Deputy Clerk