# IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

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

vs.

THE STATE OF NEVADA,
Respondent(s),

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

# RECORD ON APPEAL
# VOLUME
# 1

**ATTORNEY FOR APPELLANT**
**JAMES HAYES, JR., #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-19-793315-W James Hayes, Plaintiff(s) vs. Nevada State of, Defendant(s)

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Case No. C-16-315718-1
Dept. No. XIX

FILED
APR 15 2019
CLERK OF COURT

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, Warden Brian Williams
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)

A-19-793315-W
Dept: XIX

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 but 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 or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: High Desert State Prison; Warden Williams

2. Name and location of court which entered the judgment of conviction under attack: Clark County Nevada District Court XIX

3. Date of judgment of conviction: 3-12-2019

4. Case number: C-16-315718-1

5. (a) Length of sentence: 60-174 months

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APR 15 2019
CLERK OF THE COURT

A-19-793315-W
IPWHC
Inmate Filed – Petition for Writ of Habeas
4830706

(b) If sentence is death, state any date upon which execution is scheduled:....

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes ...✓... No .....

If "yes," list crime, case number and sentence being served at this time: Burglary C-16-315125-1 21 to 72 months that expires May 3, 2019

7. Nature of offense involved in conviction being challenged: Attempt Grand Larceny less than $3500

8. What was your plea? (check one)

(a) Not guilty .....

(b) Guilty ...✓... Alford Plea

(c) Guilty but mentally ill .....

(d) Nolo contendere .....

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: Not guilty to the Burglary charge and guilty to the negotiated charge of Attempt Grand Larceny < $3500

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury .....

(b) Judge without a jury ...✓...

11. Did you testify at the trial? Yes .....No .....

12. Did you appeal from the judgment of conviction? Yes ..... No ...✓...

13. If you did appeal, answer the following:

(a) Name of court: .....

(b) Case number or citation: .....

(c) Result: .....

(d) Date of result: .....

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: Guilty Plea Agreement "Waiver of Rights"

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ✓ No .....

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: Clark County District Court, Nevada

(2) Nature of proceeding: Motion to Correct Illegal Sentence

(3) Grounds raised: Double Jeopardy 5th Amendment Violation; Incorrect PSI; 6 & 14th Amendment Violation "Due Process" for Illegal Sentence

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No ✓

(5) Result: .....

(6) Date of result: .....

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: .....

(2) Nature of proceeding: .....

(3) Grounds raised: .....

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No .....

(5) Result: .....

(6) Date of result: .....

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes ..... No ✓.....

Citation or date of decision: .....

(2) Second petition, application or motion? Yes ..... No .....

Citation or date of decision: .....

(3) Third or subsequent petitions, applications or motions? Yes ..... No .....

Citation or date of decision: .....

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.).....

.....

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: All Double Jeopardy; Incorrect PSI; Illegal Sentence

(b) The proceedings in which these grounds were raised: Motion to Correct an Illegal Sentence

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) No Response for submitted motion as of date Not even a date stamp filed copy.

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) Due Process Violation " No

Probable Cause to bound over to District Court"

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) .....

.....

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ..... No ✓

If yes, state what court and the case number: .....

.....

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Conviction: Michael Jantt

.....

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ..... No ✓

If yes, specify where and when it is to be served, if you know: .....

.....

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground ONE: U.S Constitution 5th Amendment and Nevada Constitution Article 1 Violations: Double Jeopardy

Supporting FACTS (Tell your story briefly without citing cases or law.): Appellant was prosecuted and/or punish twice for the same offense.

Wheres, the appellant was arrested on April 2, 2016 for the alleged event that occurred on April 9, 2013 and charged with the crime(s) of Burglary and Attempt Grand Larceny less than $3500 by the way of a Criminal Complaint in Justice Court. In which, the appellant posted Bond on both charges and released.

Wheres, the state proceeded to preliminary hearing in Justice Court for the crime(s) of Burglary and Attempt Grand Larceny less than $3500 and at the completion of the hearing only the charge of Burglary was bound over to District Court leaving the charge of Attempt Grand Larceny less than $3500 dismissed/dropped for No Corpus Delecti, slight or marginal evidence to bound over to District Court for the 1st time appellant was subjected to jeopardy and appellants bond for Attempt Grand Larceny less than $3500 exonerated.

Wheres, the appellant was subjected to jeopardy for the 2nd time when the state by the way of amended information in District Court drop the charge of Burglary and once again charge appellant with Attempt Grand Larceny less than $3500 that was filed in open court

"Double Jeopardy" GROUND ONE CONTINUE:

1. ON NOVEMBER 7, 2018
2. , WHEREAS, THE STATE FOR THE 3RD TIME SUBJECTED
3. APPELLANT TO FACE JEOPARDY ON FEBRUARY 4, 2019 BY A
4. REBOOK ON THE CHARGE OF ATTEMPT GRAND LARCENY LESS THAN
5. $3500 AND ISSUED A NO BOND.
6. FINALLY, THE STATE CONVICTED THE APPELLANT ON THE
7. CHARGE OF ATTEMPT GRAND LARCENY LESS THAN $3500 ON
8. MARCH 6, 2019 TO ONCE AGAIN FOR THE 4TH TIME SUBJECT
9. THE APPELLANT TO JEOPARDY FOR THE SAME OFFENSE THROUGH
10. PROSECUTION AND/OR PUNISHMENT. WITHOUT A GRAND
11. JURY INDICTMENT.
12.
13.
14.
15.
16.
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(b) Ground TWO: U.S Constitution 6 and 14th amendment Violation "Right to Due Process"

Supporting FACTS (Tell your story briefly without citing cases or law.): Appellant contends that it was "Lack of Probable Cause" to bound over to District Court.

Whereas, the State did not produce sufficient evidence to show that a crime was committed and the appellant committed it by slight or marginal evidence.

Whereas, the State did not have the 3 (three) female occupents of said room testify or give written statements that appellant did not have there permission or consent to be in said room. When in fact, one of the female occupents perform fellatio on appellant in bathroom of said room on the night in question. Futhermore, None of the female occupents made statements that any of there belongings were missing or tempered with, So No Loss or injury occurred.

Whereas, the victim Joshua Jervis testified at preliminary hearing that he had No valuables or property in said room only his Iphone that he had on his person.

Whereas, when the appellant won on the charge of Attempt Grand Larceny at prelim for No Corpus Delecti, slight or marginal evidence that the State predicated the intent on for the Burglary charge then the burglary charge should have been dismissed for No corpus delecti, slight or marginal evidence.

"DUE PROCESS" GROUND TWO CONTINUE:

1.
2. WHEREAS, THERE IS NO CORPUS DELECTI, CRIME IS A BREACH
3. OF LAWS OR GOVERNING AUTHORITY. WHILE THIS ALLEGED OFFENSE
4. WAS A VIOLATION OF THE LAW IT WAS NOT A CRIME. NOTWITH-
5. STANDING, PROOF OF THE CORPUS DELECTI IS REQUIRED IN ALL
6. CRIMINAL MATTERS. PROOF OF THE CORPUS DELECTI IS REQUIRED
7. IN ALL CRIMINAL CASES AND THERE ARE THREE BASIC ELEMENTS
8. IN THE PROOF OF A CRIME: (1) THE OCCURRENCE OF LOSS OR INJURY,
9. (2) CRIMINAL CAUSATION OF THAT LOSS OR INJURY AND (3) THE
10. IDENTITY OF THE DEFENDANT AS THE PERPETRATOR OF THE CRIME.
11. WHEREAS, LACK OF EVIDENCE & CHARGES FILED INFORMATION
12. WITH NO BOND ISSUE, OR CONVICTION ISSUE IS HEARSAY, AND
13. THEREFORE IRRELEVANT, AND IN LEGAL CONTEMPLATION AS INOPERATIVE,
14. AS THOUGH IT HAD NEVER BEEN ISSUED. FOR A CRIME TO EXIST,
15. THERE MUST BE AN INJURED PARTY. "THERE CAN BE NO SANCTION
16. OR PENALTY IMPOSED ON ONE BECAUSE OF THIS EXERCISE
17. OF CONSTITUTIONAL RIGHT." WHERE RIGHTS ARE SECURED BY THE
18. CONSTITUTION ARE INVOLVED THERE CAN BE NO RULEMAKING OR
19. LEGISLATION WHICH WOULD ABROGATE THEM. THE CLAIM AND
20. EXERCISE OF A CONSTITUTIONAL RIGHT CANNOT BE CONVERTED
21. INTO A CRIME.
22. WHEREAS, IF APPELLANT IS TO BE SUBJECT TO THE ALLEGED
23. CRIMINAL ACTS IT IS CONCLUDED THAT NO ACT WAS IN FACT
24. BROKEN. BECAUSE THERE IS NO RATIFICATION OF COMMENCEMENT,
25. THE COURTS LACK OF PERSONAM JURISDICTION AND NO CORPUS
26. DELECTI THUS NO JUSTICIABLE CONTROVERSY OR CAUSE OF

"DUE PROCESS" Ground Two Continue:

27.
28. action before the court. I motion the court to dismiss/
29. vacate the conviction against me and release me
30. forthwith and posthaste for I am being unlawfully
31. detained.
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(c) Ground THREE: U.S. Constitution 8th Amendment Violation "Cruel and Unusual Punishment" Illegal Sentence.

Supporting FACTS (Tell your story briefly without citing cases or law.): Appellant contends that being adjudicated as a habitual criminal is cruel and unusual punishment that shock the consience as being disproportionate to the crime charged Attempt Grand Larceny less than $3500 which is a miscarriage of Justice.

Whereas, appellants criminal history at the time was Credit Card Abuse and fraudulent use/poss. of Identifying Information that's a State Jail Crime in Texas that does not carry a prison term, mandatory supervision nor parole and is not a category A, B, C, D, E felony it's a State Jail Crime that carries only jail time equal to what Nevada considers a Gross Misdemeanor that appellant was convicted of in March 2007. In August 2011 appellant was convicted of a category E felony Attempt poss. of credit or debit card without cardholders consent here in Nevada.

Whereas, at the date the adjudicated charge of Attempt Grand Larceny less than $3500 occurred the appellant had never been to prison or ever had a violent [redacted] or serious crime charged against him.

Whereas, the state deemed the conviction in Texas

"Illegal Sentence" Ground Three Continue:

1.
2. as a felony. Is there any felony in the USA that does
3. Not carry a prison term, mandatory supervision or
4. parole? So at the very least you would have to accede
5. that its ambiguous as being a felony conviction so as
6. the light most favorable to the appellant it would Not
7. be a felony conviction for enhancement to adjudicate.
8. Wheres, appellant contends that the state breach
9. the Guilty Plea Agreement on impeachable and highly suspect
10. evidence that allegedly occurred in January 2019 that
11. greatly prejudice the appellant case Number 19701534X in
12. Dept No. 14. Whereby, the victim testified at preliminary
13. hearing under oath facing the penalty of perjury that the
14. appellant was NOT the perpetrator of the alleged event
15. and 100% sure Not 80%. So there was No corpus delecti,
16. slight, or marginal evidence leaving no causation for the
17. state to breach the terms and spirit of agreement that does
18. Not serve the intrests of Justice.
19. Wheres, appellant never violated a provision of a statute
20. that would have allowed the District Court to NOT stand
21. by the sentence agreed upon by the parties set forth
22. in the Guilty Plea Agreement. Furthermore, the appellant was
23. Never given Notice that the District Court would seek
24. habitual treatment if appellant violated a provision of a
25. statute making this an illegal sentence.
26. Wheres, consecutive sentences violates the legislature

"Illegal Sentence" Ground Three Continue:

27. intent of NRS 176.035 and does not serve the interests
28. of Justice
29. Whereas, the instant offense took place on or about
30. April 9, 2013 and was not subsequent to the Burglary
31. conviction that occurred April 2, 2016 but prior. So the
32. District Court erred by sentencing the appellant to consecutive
33. sentence rather than concurrent.
34. Whereas, the appellants bond for the instant offense
35. was exonorated at the conclusion of the preliminary
36. hearing for lack of probable cause {No Corpus Delecti, slight
37. or marginal evidence}. So the appellant should receive
38. time credit from that point to the present towards the
39. instant offense Attempt Grand Larceny.
40.
41.
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INCORRECT PSI GROUND FOUR: DUE PROCESS VIOLATION

1. Appellants Pre-Sentence Investigation report did have several material
2. facts in error that was objected to and untrue assumptions made by
3. State prosecutor M. Dickerson which work to the extreme detriment
4. of the appellant
5. Wherefore, M. Dickerson proffer was assumptions that was NOT
6. based on any facts or evidence as he stated appellant was a career
7. "Door Pusher" and not one of appellants crimes had any evidence
8. of "Door Pushing"
9. Wherefore, the appellants PSI had several material facts in error
10. as follows: Convictions should read Felony 1(one) NOT 4(four);
11. Misdemeanors 2(two) NOT 3(three)... Incarcerations should read
12. Prison 0(zero) NOT 1(one) Jail 3(three) NOT 5(five)... Supervisor
13. History should read Current 0(zero) NOT 1(one)... Instant offense
14. C-16-315718-1 INA 1. Burglary 1st (7) 2. Attempt Grand Larceny < $3500 (7)
15. should be dated 04-09-2013 NOT 04-02-2016... Texas convictions
16. 1083785 and 1083786 is 1(one) event NOT 2(two) and NOT
17. Felonies but state jail crime(s)... Case Number C-16-315125-1
18. should NOT be anywhere on appellants PSI for the instant
19. offense as it occurred sum 3(three) years to the latter.
20. Wherefore, based on the foregoing facts and constitutional
21. violations this Honorable Court is respectfully urged to
22. dismiss/vacate the appellants judgement against him.
23.
24. Dated this 10th day of April, 2019 I, James H Hayes, do solemnly swear
25. under penalty of perjury that the above Writ of Habeas Corpus is accurate
26. correct and true to the best of my knowledge James H Hayes #1175077

NAME: #1175042
N.D.S.P
P.O. BOX 650
INDIAN SPRINGS, NV.
89070

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FILED
MAY 02 2019
CLERK OF COURT

# DISTRICT COURT
# CLARK COUNTY, NEVADA

James H Hayes,

Petitioner,

vs.

Nevada State of,

Respondent,

Case No: A-19-793315-W
Department 19

**ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on April 15, 2019. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

**IT IS HEREBY ORDERED** that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

**IT IS HEREBY FURTHER ORDERED** that this matter shall be placed on this Court's Calendar on the 12T day of August, 2019, at the hour of 8:30 A.M. o'clock for further proceedings.

District Court Judge

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A-19-793315-W
OPWH
Order for Petition for Writ of Habeas Corpu
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CLERK OF COURT

Case No. A-19-793315
Dept. No. XIX

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; Warden Brian Williams
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION) "ADDENDUM"

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 but 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 or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: High Desert Prison; Clark County Nevada

2. Name and location of court which entered the judgment of conviction under attack: Clark County District Court; Dept XIX

3. Date of judgment of conviction: March 12, 2019

4. Case number: C-315718

5. Length of sentence: 60-174 months

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A-19-793315-W
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Addendum
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(b) If sentence is death, state any date upon which execution is scheduled:....

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes ..✓.... No .....

If "yes," list crime, case number and sentence being served at this time: Burglary C-315125 21-72 months

7. Nature of offense involved in conviction being challenged: Attempt Grand Larceny

8. What was your plea? (check one)

(a) Not guilty .....

(b) Guilty ..✓.... Alford Plea

(c) Guilty but mentally ill .....

(d) Nolo contendere .....

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: NOT GUILTY TO BURGLARY; Alford Plea to Attempt GRAND LARCENY

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury .....

(b) Judge without a jury ..✓....

11. Did you testify at the trial? Yes ..... No .....

12. Did you appeal from the judgment of conviction? Yes ..... No ..✓....

13. If you did appeal, answer the following:

(a) Name of court: .....

(b) Case number or citation: .....

(c) Result: .....

(d) Date of result: .....

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: Waiver of Rights which is a Equal Protection and Due Process Violation

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ✓ No .....

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: Clark County District Court

(2) Nature of proceeding: Motion to Correct Illegal Sentence/ Modify

(3) Grounds raised: Double Jeopardy; Due Process Violation; Illegal Sentence; Incorrect PSI

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No ✓

(5) Result: .....

(6) Date of result: .....

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

.....

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: .....

(2) Nature of proceeding: .....

(3) Grounds raised: .....

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No .....

(5) Result: .....

(6) Date of result: .....

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

.....

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes ..... No ✓.....

Citation or date of decision: .....

(2) Second petition, application or motion? Yes ..... No .....

Citation or date of decision: .....

(3) Third or subsequent petitions, applications or motions? Yes ..... No .....

Citation or date of decision: .....

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.).....

.....

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: .....

.....

(b) The proceedings in which these grounds were raised: .....

.....

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) Motion to correct Illegal sentence was sent back unfiled.

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) Lack of Probable cause;

District Court Did Not Divest Jurisdiction; Ineffective Asst. of Counsel

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) .....

.....

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ..... No ...✓...

If yes, state what court and the case number: .....

.....

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Conviction - Michael Jenft

.....

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ..... No ...✓...

If yes, specify where and when it is to be served, if you know: .....

.....

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground ONE: U.S Constitution Violation 6 and 14th Amendments "Ineffective Assistance of Counsel"

Supporting FACTS (Tell your story briefly without citing cases or law.): Counsel failed to provide zealous and quality representation.

Whereas, counsel failed to investigate the facts of the case; failed to identify defects in the prosecution & ie Double Jeopardy, Equal Protection; as counsel failed to fully explain to petitioner the rights waived by entering into and signing the Guilty Plea Agreement. When in fact, counsel told petitioner that the agreement was for a gross misdemeanor not felony. Counsel failed to file motion challenging the defects in the charging document and Guilty Plea Agreement. Counsel failed to protect petitioner's rights by waiver or procedural default. Counsel failed to protect the record for collateral review. Counsel failed to investigate and study the case before petitioner's acceptance of the plea agreement. Counsel failed to meet with petitioner in a confidential setting to make sure that petitioner understands the rights he would waive by entering the plea agreement and that it was knowing, voluntary, and intelligent. Counsel failed to completely inform petitioner of the maximum punishment and consequences that he would be exposed to as petitioner was suprised when sentence to Habitual offender.

(b) Ground TWO: DUE PROCESS VIOLATION

Supporting FACTS (Tell your story briefly without citing cases or law.): NO NOTICE to SEEK Habitual TREATMENT

WHEREAS, THE STATE did NOT GIVE WRITTEN NOTICE AND NO AGREEMENT by both parties that they would SEEK habitual treatment for the charge of Attempt Grand Larceny less than $350. WHEN IN fact the petitioner was surprised at sentencing when adjudicated habitual as counsel had inform petitioner that the charge was negotiated to a Gross Misdemeanor. As petitioner has NEVER had a serious or violent charge held against him and the instant case there was NO LOSS OR INJURY, NO Corpus delecti, NO probable cause as the charge was dismissed in Justice Court at the conclusion of the preliminary hearing for NO probable cause and Lack of evidence. NO clear and convincing evidence.

WHEREAS, alleged victim Joshua Jarvis testified that he did NOT have any valuables in the said room only his iphone that was on his person and the state failed to present the three female occupants of room at prelim hearing or enter any written statements from any of the said female occupants of said room.

(c) Ground THREE: U.S Constitution 5th Amendment Violation and Due Process Violation

Supporting FACTS (Tell your story briefly without citing cases or law.): Double Jeoperdy applies to jeoperdy or risk stemming from the same offense.

Wherefore, the petitioner may not lawfully be subjected to the risk of twice being tried for the same offense or face multiple punishments for the same offense (NRS 174.085) In the instant case the charge for Attempt Grand Larceny less than $3500 was dismissed at the conclusion of the preliminary hearing after the state presented all their evidence and only the charge of Burglary was Bound over to District Court that was in error by Justice Court Judge. When in fact, as the state used the the Att. Grand Larceny charge for the intent for the Burglary charge so when the Att. Grand Larceny charge was dismissed it made the Burglary charge fatal and it to should have been dismissed leaving no causation and no jurisdiction for District Court to proceed. No substantial Evidence and No clear and convincing evidence for the charge of Burglary to be bound over to District Court that was dismissed by the state for the way of Amended Information to once again charge petitioner with Attempt Grand Larceny less than $3500.

THEREFORE, petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

EXECUTED at **High Desert State Prison** on the 17 day of the month of April, 2019.

James H Hayes
*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

**VERIFICATION**

Under penalty of perjury, the undersigned declares that the undersigned is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

James H Hayes
*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

**AFFIRMATION (Pursuant to NRS 239B.030)**

The undersigned does hereby affirm that the preceeding PETITION FOR WRIT OF HABEAS CORPUS filed in District Court Case Number 315718 Does not contain the social security number of any person.

James H Hayes
*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

**CERTIFICATE OF SERVICE BY MAIL**

I, James H. Hayes, hereby certify pursuant to N.R.C.P. 5(b), that on this 17 day of the month of April, 2019, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

D.W. Neven, Warden High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070

Attorney General of Nevada
100 North Carson Street
Carson City, Nevada 89701

Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155

James H Hayes #1175077
*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

* Print your name and NDOC back number and sign

Hayes #1125029
H.D.S.P
P.O. Box 650
Indian Springs, NV
89070

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Clark County District Courts
ATTN: Clerk of the Courts
200 Lewis Ave; 3rd Floor
Las Vegas, Nevada
89155

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26

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MAY 09 2019
CLERK OF COURT

Case No. A-19-793315
Dept. No. XIX

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 Warden
Respondent. Brian Williams

PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION) ADDENDUM II (Two)

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 but 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 or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: High Desert State Prison, Nevada

2. Name and location of court which entered the judgment of conviction under attack: Clark County Nevada District Court XIX

3. Date of judgment of conviction: March 12, 2019

4. Case number: C-16-315718-1

5. (a) Length of sentence: 60 to 174 months

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(b) If sentence is death, state any date upon which execution is scheduled:....

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes ..✓..... No .....

If "yes," list crime, case number and sentence being served at this time: C-16-315125

21 to 72 months

7. Nature of offense involved in conviction being challenged: Attempt Grand Larceny

less than $1 3500

8. What was your plea? (check one)

(a) Not guilty .....

(b) Guilty ..✓..... Alford Plea

(c) Guilty but mentally ill .....

(d) Nolo contendere .....

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: Not Guilty to Burglary ; Alford Plea to Attempt Grand Larceny less than $1 3500

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury .....

(b) Judge without a jury ..✓.....

11. Did you testify at the trial? Yes .....No .....

12. Did you appeal from the judgment of conviction? Yes ..... No .....

13. If you did appeal, answer the following:

(a) Name of court: .....

(b) Case number or citation: .....

(c) Result: .....

(d) Date of result: .....

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: Waiver of Rights

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ✓ No .....

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: Clark County District Court, Nevada

(2) Nature of proceeding: Motion to Correct Illegal Sentence / Modification

(3) Grounds raised: Double Jeopardy, Illegal Sentence, Incorrect PSI, Due Process Violations

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No ✓

(5) Result: .....

(6) Date of result: .....

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: .....

(2) Nature of proceeding: .....

(3) Grounds raised: .....

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No .....

(5) Result: .....

(6) Date of result: .....

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes ..... No ✓.....

Citation or date of decision: .....

(2) Second petition, application or motion? Yes ..... No .....

Citation or date of decision: .....

(3) Third or subsequent petitions, applications or motions? Yes ..... No .....

Citation or date of decision: .....

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.).....

.....

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: Double Jeopardy, Illegal Sentence Incorrect PSI, Due Process Violations

(b) The proceedings in which these grounds were raised: Motion to Correct Illegal Sentence / Modification

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) Motion to Correct Illegal Sentence / Modification was return unfiled

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) Lack of probable cause; Due Process;

Ineffective assistance of counsel, Equal protection

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) .....

.....

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ..... No ✓

If yes, state what court and the case number: .....

.....

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Conviction Michael Senft

.....

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ..... No ✓

If yes, specify where and when it is to be served, if you know: .....

.....

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground ONE: United States and Nevada Constitution violation Ineffective Assistance of Counsel that prejudice the petitioner and is a Miscarriage of Justice that does not serve the intrests of Justice

Supporting FACTS (Tell your story briefly without citing cases or law.): Whereas, there is a reasonable probability that, but for counsel's failures and unprofessional errors, the result would have been different. As this was surely inadequate legal representation, when in fact, petitioner has always maintain actual innocence

(b) Ground TWO: U.S and Nevada Constitution violations Double Jeopardy that prejudice the petitioner and is a miscarriage of justice that does not serve the interests of Justice.

Supporting FACTS (Tell your story briefly without citing cases or law.): Wherefore the petitioner suffered irreparable injury through prosecutions unprofessional and grossly unethical conduct as they maliciously failed to proceed on the facts and the law.

(c) Ground THREE: U.S Constitution violation Equal Protection and Due Process. Inappropriate Personal attack and a Judicial Violation.

Supporting FACTS (Tell your story briefly without citing cases or law.): Whereas, at sentencing hearing for the instant offense District Court Judge William Kephart made prejudical comments about petitioner as he stated that "petitioner is smart but will you be able to overcome prior bad acts" referring to a criminal case that is pending in said Judge's court room thats due to go to trial May 13, 2019, that petitioner made reference to because the State use this ispe dixit case to breach the Guilty Plea Agreement entered into by both parties for the instant offense. When in fact, this is impeachable and highly suspect evidence as the victim in-court identification was not of the petitioner and he stated he's 100% sure that petitioner was not the perpetrator of said alleged event and this shows Judge William Kephart's Bias and Prejudice towards the petitioner and this is a Miscarriage of Justice that does not serve the intrests of Justice.

Whereas, the court transcripts and in camera review of said day in question March 6, 2019 would show clear and convincing evidence of Judge Kephart's prejudice and bias displayed towards petitioner throughout the proceedings as he predetermine a Petrocelli Hearing ruling instead of proceeding on the facts and the law that hasn't been presented before this Judge for such a ruling at this time and this is egregious.

THEREFORE, petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

EXECUTED at **High Desert State Prison** on the 26 day of the month of April, 2019.

James H Hayes
*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

**VERIFICATION**

Under penalty of perjury, the undersigned declares that the undersigned is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

James H Hayes
*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

**AFFIRMATION (Pursuant to NRS 239B.030)**

The undersigned does hereby affirm that the preceeding PETITION FOR WRIT OF HABEAS CORPUS filed in District Court Case Number C-16-315718-1 Does not contain the social security number of any person.

James H Hayes
*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

**CERTIFICATE OF SERVICE BY MAIL**

I, James H. Hayes, hereby certify pursuant to N.R.C.P. 5(b), that on this 26 day of the month of April, 2019, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

D.W. Neven, Warden High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070

Attorney General of Nevada
100 North Carson Street
Carson City, Nevada 89701

Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155

James H Hayes #1175077
*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

* Print your name and NDOC back number and sign

Hedges #1175077
HDSP
P.O. Box 650
Indian Springs, NV
89070

Hasler
05/06/2019
US POSTAGE $001.15[0]
FIRST-CLASS MAIL

ZIP 89101
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Clark County District Courts
ATTN: Clerk of the Courts
200 Lewis Ave; 3rd Floor
Las Vegas, Nevada
89155

INTAKE
NSF 3763

Legal Mail

891018300 C075

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FILED
MAY 2 0 2019
CLERK OF COURT

District Court
Clark County, Nevada

James H. Hayes
Petitioner

vs.

State of Nevada
Respondent

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

A-19-793315-W
MOT
Motion
4837646

Motion of Notice
"Peremptory Challenge of Judge"

Comes Now, James H. Hayes, in Proper Person requests that Clark County District Court Judge William "Bill" Kephart be disqualified and transfer the above titled action to ~~another~~ another District Court Judge due to inappropriate personal attack and a judicial violation that occurred on March 6, 2019 that showed Judge's bias and prejudice.

Whereas, the petitioner is concerned that the Judge may be biased or unfair for some reason as he has shown in the past that would not serve the interests of Justice.

Wherefore, petitioner requests that the court grant such relief to which petitioner may be entitled.

James H. Hayes
James H. Hayes #1175077

RECEIVED
MAY 2 0 2019
CLERK OF THE COURT



4

## CERTFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 15 day of May, 2019, I mailed a true and correct copy of the foregoing, "Motion of Notice "Peremptory Challenge of Judge"" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Clerk of the Court
200 Lewis Ave., 3rd Fl
Las Vegas, NV
89155-1160

CC:FILE

**DATED:** this 15 day of March, 2019.

James H Hayes # 1175077
/In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Motion of Notice "Peremptory Challenge of Judge"
(Title of Document)

filed in District Court Case number A-19-793315-W

☑ 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

5-15-19
Date

James H. Hayes
Print Name

Petitioner / Proper Person
Title

J. Hayes # 1125077
H.D.S.P.
P.O Box 650
Indian Springs, NV
89070

$000.45

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

INTAKE
NSF 3763

Legal Mail

33 DRDFNMP 89155

40

HIGH DESERT STATE PRISON
MAY 15 2019
UNIT 2 C/D

Electronically Filed
6/26/2019 3:17 PM
Steven D. Grierson
CLERK OF THE COURT

**RSPN**
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
CHARLES W. THOMAN
Chief Deputy District Attorney
Nevada Bar #012649
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| THE STATE OF NEVADA,<br>Plaintiff,<br>-vs-<br>JAMES HOWARD HAYES, #2796708<br>Defendant. | CASE NO: A-19-793315-W<br>DEPT NO: XIX |

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: AUGUST 12, 2019
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through CHARLES W. THOMAN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Petition For Writ Of Habeas Corpus (Post-Conviction).

This response 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

The relevant procedural history is as follows. In a June 17, 2016 Information, the State charged Petitioner with Burglary (Category B Felony). It filed a Notice of Intent to Seek Punishment as a Habitual Criminal on November 21, 2016. It filed an Amended Notice on August 29, 2017.

On November 7, 2018, Petitioner pleaded guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to Attempt Grand Larceny (Category D Felony/Gross Misdemeanor). The State agreed to make no recommendation at the time of sentencing. GPA at 1. It did, however, reserve the right to argue for habitual treatment if "an independent magistrate, by affidavit review, confirms probable cause against [Petitioner] for new criminal charges." Id. at 2.

On January 29, 2019, Justice of the Peace De La Garza found probable cause existed that Petitioner had committed another count of Burglary in what eventually became Case No. C-19-338412-1, which is currently before this Court.

Based on that finding of probable cause, the State filed a Motion to Revoke Bail on January 31, 2019. Further, as contemplated in the Guilty Plea Agreement, it argued for habitual treatment in a March 6, 2019 sentencing. This Court found that the State met the statutory requirements of NRS 207.010 and accordingly sentenced Petitioner to between sixty and one hundred seventy-four months in the Nevada Department of Corrections.

The Judgment of Conviction was filed on March 12, 2019. On March 28, 2019, Petitioner filed a Notice of Appeal. That appeal is currently pending before the Supreme Court.

Petitioner filed the instant post-conviction habeas petition on April 15, 2019. The State herein responds.

## ARGUMENT

### I. PETITIONER'S SUBSTANTIVE CLAIMS ARE PROCEDURALLY BARRED.

NRS 34.810(1)(a) reads:

> The court shall dismiss a petition if the court determines that:

> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings...[A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

Here, Petitioner does not challenge the effectiveness of his counsel or the validity of his guilty plea. Instead, Petitioner raises four claims which are suitable only for direct appeal. His failure to raise them at that juncture waives them for purposes of this petition. Moreover, each claim is meritless. It is well established that jeopardy does not attach until either the jury is sworn or, in a bench trial, the first witness is called. Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033 (1963); Wheeler v. District Court, 82 Nev. 225, 415 P.2d 63 (1966); Hylton v. Eighth Judicial Dist. Court of State of Nev., Dep't IV, 103 Nev. 418, 421 n.1, 743 P.2d 622, 624 n.1 (1987); Crist v. Bretz, 437 U.S. 28, 37 n.15, 98 S. Ct. 2156, 2162 n.15 (1978) ("In nonjury trials jeopardy does not attach until the first witness is sworn."). Here, no jury was ever sworn and no witness was ever called in a non-jury trial. Ground 1, which alleges a Double Jeopardy violation, necessarily fails because jeopardy never attached. Pet. 6-7.

Ground 2, the probable clause claim similarly fails. Although Petitioner's motion to dismiss was originally granted in Justice Court regarding that ground, the Amended Information which reintroduced the count was only filed after Petitioner agreed to plead guilty to the charge. In similar circumstances, the Nevada Supreme Court has declined to find error when a fair trial resulted in a conviction for a crime after inadequacies in the grand-jury

proceedings. Hill v. State, 124 Nev. 546, 552, 188 P.3d 51, 54–55 (2008). Here, Petitioner pleaded guilty to Attempt Grand Larceny, thereby nullifying any potential probable-cause related issue at the preliminary hearing. Even if the State lacked probable cause at the time of the hearing, there is no colorable argument that it lacks it now. Petitioner admitted that he committed the crime. GPA at 1.

In Ground 3, Petitioner claims that the Cruel and Unusual Punishment Clause of the Eighth Amendment was violated when he was sentenced as a habitual criminal, but his sentence is appropriate considering his criminal history. The Eighth Amendment to the United States Constitution, as well as Article 1, Section 6 of the Nevada Constitution, prohibits the imposition of cruel and unusual punishment. The Nevada Supreme Court has stated that "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Allred v. State, 120 Nev. 410, 420, 92 P.2d 1246, 1253 (2004) (quoting Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).

Additionally, the Nevada Supreme Court has granted district courts "wide discretion" in sentencing decisions, and these are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred, 120 Nev. at 410, 92 P.2d at 1253 (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). A sentencing judge is permitted broad discretion in imposing a sentence and absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993) (citing Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)). As long as the sentence is within the limits set by the legislature, a sentence will normally not be considered cruel and unusual. Glegola v. State, 110 Nev. 344, 871 P.2d 950 (1994).

Here, NRS 207.010(1)(a) governs the sentencing of habitual criminals:

> 1. Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted in this State of:

(a) Any felony, who has previously been two times convicted, whether in this State or elsewhere, of any crime which under the laws of the situs of the crime 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.

In its Notice of Intent to Seek Punishment as a Habitual Criminal,[1] the State alleged that Petitioner had been previously convicted of two counts of Fraudulent Use/Possession of Personal Identification Information, two counts of Credit Card Abuse, and one count of Attempt Possession of Credit or Debit Card Without Cardholder's Consent. Notice (Nov. 21, 2016) at 2. Each of those counts is a felony in the State where the crime was committed.

Then, in an Amended Notice of Intent to Seek Punishment as a Habitual Criminal, the State alleged that Petitioner had been convicted of Credit Card Abuse, a Texas felony, Attempt Possession of Credit or Debit Card Without Cardholder's Consent (Category E Felony), and Burglary (Category B Felony). At sentencing, this Court found that the State carried its burden of proving each. Accordingly, the State was free to argue for habitual treatment under NRS 207.010(1)(a).

Petitioner argues that the State breached the guilty plea agreement, but the agreement itself contemplated that the State would be free to argue for habitual treatment if a magistrate found probable cause that he committed another crime. Pet. 12; GPA at 1-2. Justice of the Peace De La Garza found probable cause[2] that he committed another Burglary on January 29,

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[1] Because the State filed its Notice, Petitioner's claim that his sentence was illegal because he was never given notice is belied by the record. Pet. 12. "Bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

[2] Petitioner argues that this was based on impalpable and highly suspect evidence, but this ignores the full reason why probable cause was ultimately found, as not only was Petitioner identified with 80% certainty initially, but he also had a hotel key that did not belong to him in his pocket when he was detained. See State's Notice of Motion and Motion to Revoke Bail (Jan. 31, 2019) at Exhibit 3; Tr. Preliminary Hearing, 19F01534X (Feb. 26, 2019) at 25, 31 (filed on Odyssey as case C-19-338412-1).

2019. Accordingly, the State was free to argue for habitual treatment. That case, C-19-338412-1, is currently pending before this Court. Once probable cause was found, the State was free to argue for habitual treatment under the plain terms of the GPA. Because Petitioner's ultimate sentence fell within the parameters of the small habitual statute, the Eighth Amendment was not violated.

Finally, in Ground 4, Petitioner's claim that his Presentence Investigation Report contained errors is nothing more than a bare and naked allegation. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Further, challenges to the Presentence Investigation Report are not cognizable after sentencing. NRS 176.135(1) requires the Division of Parole and Probation to prepare a Presentence Investigation Report for any defendant who pleads guilty of a felony. This Court has previously addressed the importance of a factually accurate PSI at sentencing:

> A PSI contains information about the defendant's prior criminal record, the circumstances affecting the defendant's behavior and the offense, and the impact of the offense on the victim. NRS 176.145(1). Because the sentencing court will rely on a defendant's PSI, the PSI must not include information based on "impalpable or highly suspect evidence." *Goodson v. State,* 98 Nev. 493, 495–96, 654 P.2d 1006, 1007 (1982).

Stockmeier v. Bd. of Parole Comm'rs, 127 Nev. 243, 248, 255 P.3d 209, 212–13 (2011).

If a PSI does have errors, a defendant can object. He cannot, however, object in perpetuity. Instead, this Court has limited the time in which a defendant can object to factual or methodological errors in a presentence investigation report. A defendant can only object to errors "so long as he or she objects before sentencing." Sasser v. State, 130 Nev. 387, 394, 324 P.3d 1221, 1226 (2014). Once sentencing has occurred, neither the "Division of Parole and Probation nor the district court" have the "authority to amend ... [a] PSI." Stockmeier, 127 Nev. at 245, 255 P.3d at 211 (2011).

Petitioner claims that an objection was raised about the alleged errors in his PSI, and he enumerates those errors without any attempt to support his bare and naked claims. Pet. 14. Accordingly, this claim lacks merit.

///

In sum, each of Petitioner's claims has been waived for purposes of the instant petition under NRS 34.810 and is otherwise meritless. The petition should be denied.

## II. BY ENTERING A GUILTY PLEA AGREEMENT, PETITIONER WAIVED ANY PRIOR CONSTITUTIONAL DEFECTS.

In this case, Petitioner entered a guilty plea. By doing this, he "waived all constitutional claims based on events occurring prior to the entry of the pleas, except those involving the voluntariness of the pleas themselves." Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984); Kirksey v. State, 112 Nev. 980, 1002, 923 P.2d 1102, 1116 (1996).

Petitioner raises two claims which occurred prior to the entry of his guilty plea in the instant petition. First, he claims that the State violated the Double Jeopardy Clause by adding a charge of Attempt Grand Larceny at district court after it had been dismissed in justice court. Second, he claims that there was no probable cause to bind his case over. Petitioner's guilty plea waived both of those claims.

For these reasons, Petitioner waived Grounds 1 and 2 when he entered his guilty plea, and they are barred by the plea in addition to NRS 34.810.

## III. THIS COURT SHOULD STRIKE PETITIONER'S ADDENDA.

After filing his first Petition for Writ of Habeas Corpus on April 15, 2019, Petitioner filed two addenda to his petition without first requesting leave of this Court. Each should be stricken.

NRS 34.750(3) allows appointed counsel to file a supplemental petition after appointment. "No further pleadings may be filed except as ordered by the court." Id. (5). The Nevada Supreme Court has addressed when the district courts can allow a litigant to file a supplemental petition, holding that leave can be granted only if the petitioner shows good cause to explain the delay in raising a claim. Barnhart v. State, 122 Nev. 301, 303-04, 130 P.3d 650, 652 (2006). Any finding of good cause must be made "explicitly on the record" and enumerate "the additional issues which are to be considered." Id. at 303, 130 P.3d at 652. Barnhart affirmed a district court's decision to deny leave to expand the issues because

"[c]ounsel for petitioner provided no reason why that claim *could* not have been pleased in the supplemental petition. Id. at 304, 130 P.3d at 652 (emphasis added).

This Court should strike each of the addenda filed by Petitioner in proper person. Petitioner never sought leave from this court to file supplements to his timely first petition. Although counsel would be entitled to file a supplement by NRS 34.750(3), that entitlement to file a supplement is explicitly a right of appointed counsel.

Furthermore, none of Petitioner's pro-per addenda make any attempt to show good cause for failing to raise the issue in the initial petition. Barnhart precludes Petitioner from filing supplemental petitions in perpetuity without good cause for neglecting to include the new claims in the initial petition, and the record is void of any explicit findings of this court to allow for the rogue filings.

Because Petitioner was not entitled to supplement his initial petition and never sought this Court's leave, his two addenda should each be stricken.[3]

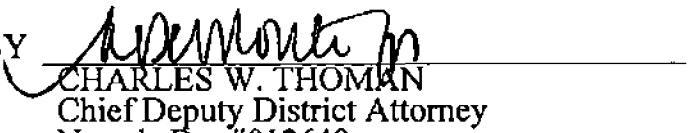
## CONCLUSION

For these reasons, the instant petition should be denied.

DATED this 26th day of June, 2019.

Respectfully submitted,

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

BY 
CHARLES W. THOMAN
Chief Deputy District Attorney
Nevada Bar #012649

[3] To the extent that this Court decides to address the issues raised in the addenda, the State reserves the right to respond to each on the merits.

## CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 26th day of June, 2019, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JAMES HOWARD HAYES, BAC #1175077
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV, 89070

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

CWT/jp/cg/L-2

Hayes, James H ID NO. 1175077

HIGH DESERT STATE PRISON
22010 COLD CREEK ROAD
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89018

FILED
JUL 05 2019
CLERK OF COURT

8th Judicial District Court
Clark County, Nevada

James H. Hayes
Petitioner,

v.

State of Nevada, Warden B. Williams
respondent.

CASE NO.: A-19-793315-W
DEPT. NO.: XIX
DOCKET:

Motion for "Judgement of Default" Against the Respondents and Enforce Procedural Default.

COMES NOW, petitioner, James H. Hayes, herein above respectfully moves this Honorable Court for an Judgement of Default and/or Enforce procedural Default

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

DATED: this 1 day of July, 2019

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

RECEIVED
JUL 05 2019
CLERK OF THE COURT

A-19-793315-W
MDFJ
Motion for Default Judgment
4847097

Procedural Background on Case: Petitioner filed a Writ of Habeas Corpus on April 15, 2019 under case No C-16-315718-1. And subsequently, this court ordered that the respondent "SHALL" have 45 days to reply to the Writ of Habeas Corpus. The court has set a date of August 12, 2019 for the parties to appear in court for a hearing on this matter. However;

The allowed 45 day deadline has passed, and petitioner Hayes has not received a response to the Habeas Corpus, and one hasn't been filed as of June 21, 2019 at 10:45 A.M

## Points and Authorities

U.S Constitution 5th Amend - Due Process of Law
U.S. Constitution 14th Amend. - Equal protection of Law
U.S. Constitution 1st Amend - Right to Petition
U.S Constitution Article 1 Section 9 - Anti-Suspension Clause
State, Emp. Sec. Dept. vs. Weber, 100 Nev. 121 (1984)
E.D.C.R # 3.40 (c)
E.D.C.R # 3.80
Hillis vs. State
Dezeni vs. Kern Assoc (2018) Lexis 14
Bates vs Chronister, 100 Nev. 625
NRS 34.770
NRS. 34.390
NRS 34.380
Polk vs State 233 P.3d 357 (2010)

## Legal Argument(s)

Failure to respond to an argument within the Litigation will be taken as "Confession of Error."

Failure to reply to any Litigation within a case is a Procedural Bar to that Issue. Also known as "Default" or "Procedural Default"

Failure to Comply with a Court Order is "Contempt of Court" and Disobedience of Order (Writ)

"SHALL" the word shall means Mandatory!! It is a must, and is Not a discretionary word.

Failure for any party to respond to an argument within the litigation of a case will be taken as a "Confession of Error; The Nevada Supreme Court ruled that, "We elect to treat the chronister failure to respond to this argument in the 3pgs or Arguments in there Answering brief as Confession of Error.

Also, under N.R.A.P # 31 - The Court shall not grant additional extensions or Time except upon a showing or Extra-ordinary circumstances and extreme need and Respondent has Not shown any extreme need.

Failure of any party to Reply to any litigation within a case is a Procedural Bar to that Issue, also known as "Default" or "Procedural Default". A writ of habeas corpus is a writ civil in nature, because it is a petition. And under U.S. constitution Art 1 sec 9 = The Writ of Habeas Corpus shall not be suspended, and under U.S constitution

1st Amend. Hayes, has the right to petition the gov't for a redress of grievances. And for the petition to be adjudicated based on the merits. And so, since the respondent(s), didn't reply within the Court ordered 45 day time frame then it is apparent that the State of Nevada and the N.D.O.C can't justify imprisoning Hayes, And Hayes, confinement is illegal and unconstitutional. Whereas, had it been justifiable then the respondent(s) would've justified it, instead the respondent(s) had No rebuttal to Hayes meritorious claims and voluntarily chose to go into Default.

Therefore, James H. Hayes, urges this Honorable court to grant his Petition for Writ of Habeas Corpus, and release Hayes, Immediately. Pursuant To: 34.380 and 34.390. Also, under Hillis vs. State if a party fails to object then that party has waived any opposition. Wells vs. Brewster failure to respond is treated as consent to grant motion Polk vs. State 233 P.3d 357

Failure to comply with a Court Order is considered a "Contempt of Court". Pursuant to: State Emp. Sec Dept. vs. Weber. So, Now Hayes urges this Court to actually hold respondent(s) in Contempt of Court for violating the court's order to respond to Mr. Hayes, Petition for a Writ of Habeas Corpus. And so, Never in history has a litigant ever been rewarded or decided in their favor, When the litigant whom is the party in Default, and is in Contempt of a court order. This is Judicial principles outlined

1 in the CJC and NRS Chapter 1. And Hayes, urges that
2 Pursuant to: Hillis vs State, respondent(s) is procedurally
3 barred to try and respond now to this Petition for writ
4 of Habeas corpus based on Hillis vs. State.
5 Inherens, it is well established in Anglo-Saxon Law,
6 that the word "SHALL" means must. And it puts a
7 mandate on the context of the subject. As opposed to
8 if the word "May" is used. And in the Court's Order it
9 expressly states that: "It is hereby ordered that respondent
10 "SHALL" within 45 days after the date of this order, Answer
11 or otherwise respond to the Petition and file a return in
12 accordance with the provisions of NRS 34.360 to 34.830
13 inclusive".
14
15 Under Penalty of Perjury
16 I, James H. Hayes the undersigned, certify, declare,
17 or state that the foregoing is true and correct, to
18 the best of my knowledge and belief, in
19 accordance with NRS 208.165 and 28 USCA
20 § 1746.
21 Executed on the 1st day of July, 2019.
22
23 James H. Hayes #1175077
24 James H Hayes
25 Wherefore, petitioner requests that the court grant petitioner
26 such relief to which petitioner may be entitled.
27 -6-
28 54

## CERTIFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 1st day of July, 2019, I mailed a true and correct copy of the foregoing, "Judgement of Default and/or Enforce Procedural Default" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Clerk of the Courts
200 Lewis Ave: 3rd Fl
Las Vegas, NV 89155-1160

Atty General of Nevada
"Office of the Clerk"
100 North Carson Street
Carson City, NV 89701

CC:FILE

**DATED:** this 1st day of July, 2019.

James H. Hayes #1175274
/In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Judgement of Default and/or Enforce Procedural Default
(Title of Document)

filed in District Court Case number A-19-793315-W

☑ 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.

Signature

7-1-19
Date

James H Hayes
Print Name

Petitioner / pro se
Title

July 1, 2019

Dear Clerk of the Courts,

Can you please file the following enclosed Exhibit(s): Exhibit 1 - Amended Information
Exhibit 2 - Information
Exhibit 7 - Criminal Complaint
Exhibit 8 - NRS 174.085
Exhibit 5 - Judgment of Convictions

Case No. A-19-793315-W
Court. Dept. 19

Thanks...

RECEIVED
JUL 05 2019
CLERK OF THE COURT

James H. Hayes #1125099
James H. Hayes
Defendent/ In pro se

AINF
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MICHAEL DICKERSON
Deputy District Attorney
Nevada Bar #013476
200 Lewis Avenue
Las Vegas, Nevada 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. C-16-315718-1

DEPT NO. XIX

AMENDED

INFORMATION

STATE OF NEVADA )
) ss:
COUNTY OF CLARK )

STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That JAMES HOWARD HAYES, aka, James Howard Hayes Jr., the Defendant(s) above named, having committed the crime of **ATTEMPT GRAND LARCENY (Category D Felony/Gross Misdemeanor - NRS 205.220.1, 205.222.2, 193.330 - NOC 56025/56026)**, on or about the 9th day of April, 2013, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada, did willfully, unlawfully, feloniously, and intentionally, with intent to deprive the owner permanently thereof, attempt to steal, take and carry away lawful money of the United States in an amount of $650.00, or greater, owned by another

///

///

EXHIBIT "1"

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person, to wit: JOSHUA JARVIS, by attempting to steal lawful money of the United States, an iPhone and other personal items from the said JOSHUA JAVIS.

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

BY _____
MICHAEL DICKERSON
Deputy District Attorney
Nevada Bar #013476

DA#13F10723X /cmj/L2
LVMPD EV#1304090843
(TK3)

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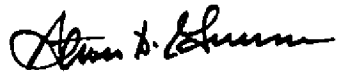

CLERK OF THE COURT

INFM
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MICHAEL DICKERSON
Deputy District Attorney
Nevada Bar #013476
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

I.A. 6/23/16
10:00 AM
PD

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| THE STATE OF NEVADA,<br>Plaintiff,<br>-vs-<br>JAMES HOWARD HAYES,<br>aka James Howard Hayes, Jr., #2796708<br>Defendant. | CASE NO: C-16-315718-1<br>DEPT NO: XII<br><br>INFORMATION |

STATE OF NEVADA )
} ss.
COUNTY OF CLARK )

STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That JAMES HOWARD HAYES, aka James Howard Hayes, Jr., the Defendant(s) above named, having committed the crime of BURGLARY (Category B Felony - NRS 205.060 - NOC 50424), on or about the 9th day of April, 2013, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada, did then and there wilfully, unlawfully, and feloniously enter, with intent to commit larceny, Room No. 17151, of the

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W:\2013\2013F\107\23\13F10723-INFM-(HAYES_JAMES)-001.DOCX

EXHIBIT 2

EXCALIBUR HOTEL & CASINO, located at 3850 South Las Vegas Boulevard, Las Vegas, Clark County, Nevada, occupied by JOSHUA JARVIS.

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

BY M.A. Dickerson
MICHAEL DICKERSON
Deputy District Attorney
Nevada Bar #013476

JUSTICE COURT, LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant.

JUSTICE COURT
LAS VEGAS NEVADA

CASE NO: 13F10723X

DEPT NO: 3

CRIMINAL COMPLAINT

The Defendant above named having committed the crimes of BURGLARY (Category B Felony - NRS 205.060) and ATTEMPT GRAND LARCENY (Category D Felony/Gross Misdemeanor - NRS 205.220.1, 205.222.2, 193.330), in the manner following, to-wit: That the said Defendant, on or about the 9th day of April, 2013, at and within the County of Clark, State of Nevada,

COUNT 1 - BURGLARY

did then and there wilfully, unlawfully, and feloniously enter, with intent to commit larceny, Room No. 17151, of the EXCALIBUR HOTEL & CASINO, located at 3850 South Las Vegas Boulevard, Las Vegas, Clark County, Nevada, occupied by JOSHUA JARVIS.

COUNT 2 - ATTEMPT GRAND LARCENY

did then and there wilfully, unlawfully, feloniously and intentionally, with intent to deprive the owner permanently thereof, attempt to steal, take and carry away, lead away or drive away personal property of a value of $650.00 or more, lawful money of the United States, belonging to JOSHUA JARVIS, to-wit: lawful money of the United States, an iPhone and other personal items, by taking and/or moving items within the room, but was stopped before he could take all the items.

///

///

///

///

EXHIBIT 7

P:\WPDOCS\CO...

All of which is contrary to the form, force and effect of Statutes in such cases made and provided and against the peace and dignity of the State of Nevada. Said Complainant makes this declaration subject to the penalty of perjury.

S Benedick

7/23/2013

13F10723X/cb
LVMPD EV# 1304090843
(TK3)



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HDSP CHECK OUT
LAW LIBRARY
RETURN AFTER 10 DAYS

**174.085. Proceedings not constituting acquittal; effect of acquittal on merits; proceedings constituting bar to another prosecution; retrial after discharge of jury; effect of voluntary dismissal.**

**1.** If a defendant was formerly acquitted on the ground of a variance between the indictment, information or complaint and proof, or the indictment, information, or complaint was dismissed upon an objection to its form or substance, or in order to hold a defendant for a higher offense without a judgment of acquittal, it is not an acquittal of the same offense.

**2.** If a defendant is acquitted on the merits, the defendant is acquitted of the same offense, notwithstanding a defect in the form or substance in the indictment, information, or complaint on which the trial was had.

**3.** When a defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment, information or complaint, except as otherwise provided in subsections 5 and 6, the conviction, acquittal or jeopardy is a bar to another indictment, information or complaint for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which the defendant might have been convicted under that indictment, information or complaint.

**4.** In all cases where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged during the progress of the trial or after the cause is submitted to them, the cause may be again tried.

**5.** The prosecuting attorney, in a case that the prosecuting attorney has initiated, may voluntarily dismiss a complaint:

**(a)** Before a preliminary hearing if the crime with which the defendant is charged is a felony or gross misdemeanor; or

**(b)** Before trial if the crime with which the defendant is charged is a misdemeanor,

without prejudice to the right to file another complaint, unless the State of Nevada has previously filed a complaint against the defendant which was dismissed at the request of the prosecuting attorney. After the dismissal, the court shall order the defendant released from custody or, if the defendant is released on bail, exonerate the obligors and release any bail.

**6.** If a prosecuting attorney files a subsequent complaint after a complaint concerning the same matter has been filed and dismissed against the defendant:

NRS 174.085



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EXHIBIT 8

(a) The case must be assigned to the same judge to whom the initial complaint was assigned; and

(b) A court shall not issue a warrant for the arrest of a defendant who was released from custody pursuant to subsection 5 or require a defendant whose bail has been exonerated pursuant to subsection 5 to give bail unless the defendant does not appear in court in response to a properly issued summons in connection with the complaint.

7. The prosecuting attorney, in a case that the prosecuting attorney has initiated, may voluntarily dismiss an indictment or information before the actual arrest or incarceration of the defendant without prejudice to the right to bring another indictment or information. After 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.

**HISTORY:**
1967, p. 1416; 1971, p. 596; 1997, ch. 504, § 1, p. 2391.

**NOTES TO DECISIONS**

**Robbery convictions of defendants who entered guilty pleas did not bar subsequent prosecution for murder** committed during the robbery when victim died from his injuries on double jeopardy grounds; robbery and murder are separate and distinct offenses. Carmody v. Seventh Judicial Dist. Court, 81 Nev. 83, 398 P.2d 706, 1965 Nev. LEXIS 205 (Nev. 1965) (decision under former similar statute).

**A void conviction is not a bar to a second conviction.**

Where the initial complaint was fatally defective, the municipal court never acquired jurisdiction over the defendant, since the court was without jurisdiction, the defendant's conviction was void; therefore, the prior conviction is not a bar to the present proceedings, and double jeopardy has not attached. Williams v. Municipal Judge of Las Vegas, 85 Nev. 425, 456 P.2d 440, 1969 Nev. LEXIS 391 (Nev. 1969).

**The beating administered to a robbery victim with an empty firearm** after all the elements of the crime of robbery were complete, constituted a separate offense from the offense of robbery, and trying defendant for assault with intent to kill by virtue of said beating did not constitute double jeopardy. State v. Feinzilber, 76 Nev. 142, 350 P.2d 399, 1960 Nev. LEXIS 91 (Nev. 1960) (decision under former similar statute).

**Where a defendant has been placed in jeopardy in a trial which is terminated** prior to an acquittal or a conviction, retrial is not automatically barred; retrial is not prohibited by the double jeopardy bar if a prosecutor demonstrates "manifest necessity" for the mistrial. There was a manifest necessity for the mistrial, where the record established that the witness' own conduct was the sole reason for her failure to appear and the witness' absence would have effectively prevented the state from presenting its case.



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3/12/2019 9:03 AM
Steven D. Grierson
CLERK OF THE COURT

JOCP

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

THE STATE OF NEVADA,

*Plaintiff,*

-vs-

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

*Defendant.*

CASE NO: C-16-315718-1

DEPT NO: XIX

**JUDGMENT OF CONVICTION**
(PLEA OF GUILTY-ALFORD)

The Defendant previously appeared before the Court with counsel and entered a plea of guilty pursuant to Alford Decision to the crime of ATTEMPT GRAND LARCENY (Category D Felony/Gross Misdemeanor) in violation of NRS 205.220.1, 205.222.2 193.330; thereafter, on the 6th day of March, 2019, the Defendant was present in court for sentencing with counsel MICHAEL W. SANFT, ESQ., and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense under the felony statute and SMALL HABITUAL Criminal Statute and, in addition to $25.00 Administrative Assessment Fee plus the $3.00 DNA Collection Fee, the Defendant is sentenced to - a MAXIMUM of ONE HUNDRED SEVENTY-FOUR (174) MONTHS and a MINIMUM of SIXTY (60) MONTHS in the Nevada Department of Corrections (NDC), CONSECUTIVE to C315125; with TEN (10) DAYS credit for time served. As the $150.00 DNA Analysis Fee and Genetic Testing have been previously imposed, the Fee and Testing in the current case are WAIVED.

DATED this 12th day of March, 2019.

WILLIAM D. KEPHART
DISTRICT COURT JUDGE

| | |
|---|---|
| ☐ Nolle Prosequi (before trial) | Bench (Non-Jury) Trial |
| ☐ Dismissed (after diversion) | ☐ Dismissed (during trial) |
| ☐ Dismissed (before trial) | ☐ Acquittal |
| ☒ Guilty Plea with Sent (before trial) | ☐ Guilty Plea with Sent. (during trial) |
| ☐ Transferred (before/during trial) | ☐ Conviction |
| ☐ Other Manner of Disposition | |

EXHIBIT 5

#1175077
H.D.S.P
P.O. Box 650
Indian Springs, NV
89070

Hasler
07/02/2019
US POSTAGE $003.66[0]

ZIP 89101
011E12650516

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

LEGAL Mail

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HIGH DESERT STATE PRISON
JUN 30 2019
UNIT 6 C/D

Hayes, James H 1175077
/ In Propria Personam
Post Office Box 650 [HDSP]
Indian Springs, Nevada 89018

FILED
JUL 05 2019
CLERK OF COURT

8th Judicial District Court
Clark County, Nevada

James H. Hayes
Petitioner

vs.

State of Nevada; Warden B. Williams
Respondent

Case No. A-19-793315-W
Dept No. XIX
Docket

## NOTICE OF MOTION

**YOU WILL PLEASE TAKE NOTICE,** that _____

_____,

will come on for hearing before the above-entitled Court on the ____ day of _____, 20___,

at the hour of ____ o'clock ___. M. In Department ___, of said Court.

CC:FILE

**DATED**: this 1 day of July, 2019.

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

RECEIVED
JUL 05 2019
CLERK OF THE COURT

A-19-793315-W
NOTM
Notice of Motion
4847098

FILED

JUL 05 2019

CLERK OF COURT

Case No. A-19-793315-W
Dept. No. XIX

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; Warden B. Williams
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)

"Reply to STATE'S RESPONSE"

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 but 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 or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: High Desert State Prison

2. Name and location of court which entered the judgment of conviction under attack: Clark County District Court Dept 19; Clark County, Nevada

3. Date of judgment of conviction: March 12, 2019

4. Case number: C-16-315718-1

5. (a) Length of sentence: 60-274 months

A-19-793315-W
RPLY
Reply
4847109

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(a) Ground ONE: Violation of United States and Nevada Constitution & Federal and State Constitutional Violations & NRS Violations...

Supporting FACTS (Tell your story briefly without citing cases or law.): The State's ENTIRE response filed 6-26-19 is meritless and each claim fails because the charge of Attempt Grand Larceny was dismissed at the conclusion of the preliminary hearing in Justice Court for lack of evidence, No corpus delecti, No slight or marginal evidence for the charge to be bound over to District court. Leaving the District court to never have jurisdiction for the charge of Attempt Grand larceny or the ground(s) to proceed on the said charge against petitioner and all the state's claims are belied by the ~~record~~, Record, the law, and the facts.

Wherefore, it is black letter law in the State of Nevada as stated in NRS 174.085 that once the petitioner was placed in jeperdy upon the filed criminal complaint in Justice Court and proceeded to preliminary hearing on the said charge and charge dismissed at the conclusion of the hearing that said charge is barred from any subsequent proceedings and the law is clear and unambiguous.

Wherefore, the State's own admission that the charge Attempt Grand larceny was dismissed in Justice Court at the conclusion of the preliminary hearing (Page 3 at 24-25). So without a doubt it is clear and uncontridicted that petitioner was place in jeperdy at the preliminary hearing under the charge criminal complaint for the charge of Attempt grand larceny. Leaving the charge of Attempt Grand

CONTINUE: (b) [redacted] Violation of United States and Nevada Constitution & Federal and State Constitutional Violations & NRS Violations...

Supporting FACTS (Tell your story briefly without citing cases or law.): larceny barred from any subsequent proceedings. Moreover, from the Amended information filed in open court November 7, 2018 making the Guilty Plea invalid, involuntary, unknowingly, and unintelligently that was actual prejudice to petitioner.

Whereas, the state knowingly and voluntarily filed a fraudulent unconstitutional amended information in open court to deprive and mislead petitioner to his prejudice, that was malicious, unprofessional, and grossly unethical. As to deprive the petitioner of the protections that the constitution was designed to protect him of and denied him due process of law. The amended information left the petitioner without knowledge as to the nature of the charge upon which he pleaded that he could not plead the crime with certainty as the said charge attempt grand larceny was dismissed at the conclusion of preliminary hearing in Justice court leaving no causation or jurisdiction for District court to proceed. When in fact, the character of the material evidence in the Amended information is false, Due process inevitably been denied the petitioner and the proceedings was constitutionally inadequate.

Whereas, when the charge of Attempted Grand larceny was dismissed that the state predicated its intent on for the charge of Burglary in the filed criminal complaint in Justice Court,

Continue: (c) Violation of United States and Nevada Constitution & Federal and State constitutional Violations & NRS Violations...

Supporting FACTS (Tell your story briefly without citing cases or law.): Then the Burglary charge was fatal and it to must be dismissed leaving no charge and no jurisdiction for the District Court to proceed at all. Making the Guilty Plea invalid, involuntary, unknowingly, and unintelligently that was actual prejudice to the petitioner.

Wheres, petitioner is not schooled in the letter of the law that's why counsel is a must and had counsel not been ineffective by failing to investigate the facts of the case he would have known that the charge of attempted grand larceny was barred from all proceedings in District Court per NRS 174.085 and inform petitioner of such. But due to the fact, counsel failed to adequately investigate the law and the facts relevent to the case it left petitioner ignorant and with no plausible options that has greatly prejudice the petitioner and left him with irreperable injury. When in fact, a adequate investigation would have lead to a more favorable outcome and petitioner would not have entered a Alford Plea to attempt grand larceny as it would have lead to information for a better outcome as there was no evidence slight or marginal that petitioner committed the crime of att grand larceny and no more evident than the charge being dismissed at the conclusion of the preliminary hearing in Justice court. So it's without question that counsel failed to inform petitioner regarding the details of the GPA. As petitioner still maintains Actual Innocence as he had permission

CONTINUE: Violation of United States and Nevada Constitution & Federal and State Constitutional Violations & NRS Violations...

Supporting FACTS (Tell your story briefly without citing cases or law.): to be in said room on night in question and there was no loss or injury, no causation of that loss or injury and no reasonable jury would have convicted petitioner of attempt grand larceny nor the charge of Burglary. So this is a clear and convincing showing that petitioners plea was involuntarily and unknowingly that was actual prejudice to petitioner and a miscarriage of Justice.

Whereas, the sentence imposed was unreasonably disproportionate to the charge crime Att grand larceny that easily shock the conscience as it was based on impalpable and highly suspect evidence. As the State's amended notice to seek punishment as a habitual criminal was for the charge of burglary (2nd offense) not att. grand larceny a wobbler. In addition, the credit card abuse in Texas was one count not ~~two~~ two and a state jail crime that doesn't carry any prison time, mandatory supervision, nor parole not a category A, B, C, D, or E felony, but a state jail crime that is only punishable by jail time as a gross misdemeanor here in Nevada so its trivial and shall not have been used in adjudication and the Burglary conviction used was not a prior felony as it occurred in 2016 and the instant offense Att. grand larceny occurred in 2013. Furthermore, petitioner did object to validity of felony convictions used to adjudicate. So this is a clear and convincing showing that the guilty plea was involuntarily and unknowingly that was actual prejudice.

[redacted]

CONTINUE:

WHEREAS, PETITIONER AND HIS COUNSEL OBJECTED TO ERRORS IN THE PSI PRIOR TO SENTENCING. WHEN IN FACT, PETITIONER'S COUNSEL MADE ORAL MOTION TO THE COURT TO CONTINUE SENTENCING HEARING UNTIL CORRECTIONS WHERE MADE TO PETITIONERS PSI TO NO AVAIL.

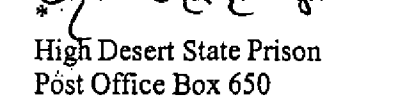
WHEREAS, THE PETITIONER MUST UNDERSTAND THE CONSEQUENCES OF A GUILTY PLEA AND THE RECORD MUST AFFIRMATIVELY SHOW THAT THE PETITIONER UNDERSTANDS THAT A HABITUAL CRIMINAL DETERMINATION MAY BE A CONSEQUENCE OF HIS PLEA. IN THE INSTANT CASE PETITIONER WAS NEVER CANVASS ON THE POSSIBILITY OF A HABITUAL SENTENCE AND WAS SURPRISED BY THE HABITUAL TREATMENT AS THERE WAS NO WRITTEN NOTICE FOR THE NEGOTIATED CHARGE OF AFF. GRAND LARCENY THAT THE STATE WOULD SEEK HABITUAL TREATMENT AND THE JUDGE INFORM PETITIONER THAT THE MAXIMUM PUNISHMENT WOULD BE 19 TO 48 MONTHS. AND PETITIONERS COUNSEL INFORM PETITIONER THAT HE HAD IT NEGOTIATED TO GROSS-MISDEMEANOR WITH TIME CREDIT SERVED.

WHEREFORE, PETITIONER REQUESTS THAT DUE TO THE INVALID GUILTY PLEA AND THE GUILTY PLEA BEING INVOLUNTARILY AND UNKNOWINGLY ENTERED AND COUNSEL INEFFECTIVE ASSISTANCE THAT THIS HONORABLE COURT GRANT PETITIONERS WRIT OF HABEAS CORPUS AND ALLOW SUCH RELIEF TO WHICH PETITIONER IS ENTITLED. AS A WRIT MUST ISSUE: WHEN THE JURISDICTION OF THE COURT HAS BEEN EXCEEDED AND WHEN THE PROCESS IS DEFECTIVE IN SOME MATTER OF SUBSTANCE REQUIRED BY LAW NRS 34.500

[redacted]

THEREFORE, petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

EXECUTED at **High Desert State Prison** on the 2nd day of the month of July, 2019.

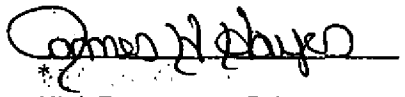


*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

**VERIFICATION**

Under penalty of perjury, the undersigned declares that the undersigned is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

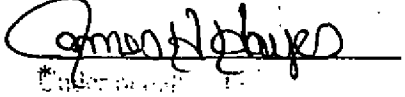


*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

**AFFIRMATION (Pursuant to NRS 239B.030)**

The undersigned does hereby affirm that the preceeding PETITION FOR WRIT OF HABEAS CORPUS filed in District Court Case Number A-19-793315-W Does not contain the social security number of any person.



*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

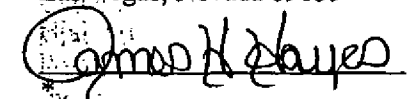
**CERTIFICATE OF SERVICE BY MAIL**

I, James H. Hayes, hereby certify pursuant to N.R.C.P. 5(b), that on this 2nd day of the month of July, 2019, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

Warden High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070

Attorney General of Nevada
100 North Carson Street
Carson City, Nevada 89701

Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155



*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

* Print your name and NDOC back number and sign

Hayes #1175022
H.D.S.P
P.O. Box 650
Indian Springs, NV
89070

HIGH DESERT STATE PRISON
JUL 02 2019
UNIT 6 C/D

LAS VEGAS
NV 890
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Clark County District Courts
"office of the clerk"
200 Lewis Ave; 3RD Floor
3762 Las Vegas, Nevada
89155-1160

Legal Mail

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FILED
JUL 12 2019
CLERK OF COURT

AFFIDAVIT OF Issuence of Writ of Habeas Corpus

STATE OF NEVADA )
) ss: District Court Case No: A-19-793315-W
COUNTY OF CLARK )

Dept: 19

TO WHOM IT MAY CONCERN:

I, James H. Hayes, the undersigned, do hereby swear that all the following statements and descrition 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 H.D.S.P brings cause that this Honorable court issue writ of habeas corpus for affiant James Hayes (petitioner).

Whereas, the Clerk County District courts did not have subject matter jurisdiction for the offense charged Attempt Grand Larceny.

Whereas, Neither NRS 173.095, NRS 174.145, NRS 174.085(3) Nor this section permits the court the amend of an information to restate a charge that has been dismissed by the magistrate at the preliminary examination. Once a judicial officer has determined that probable cause does not exist it would be the most naked deprivation of Due Process and an intolerable interference with the privilege of the writ to retain petitioner in custody.

Whereas, the state knowingly and intelligently filed a fraudulent unconstitutional GPA and Amended Info. and its unconscionable for the state to attempt to insulate a conviction from collateral constitutional review by conditioning its willingness to enter into

A-19-793315-W
AFFT
Affidavit
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JUL 12 2019
CLERK OF THE COURT

plea negotiations on a defendant's "waiver of the rights"

Wherefore, the GPA was violative of constitutional safeguards and NRS 174.085 violation when the charge of Attempt Grand Larceny was dismissed at the conclusions of preliminary hearing in Justice court for lack of evidence, no corpus delecti, slight or marginal evidence to proceed to District court. Thus, District court had no power to pronounce the sentence and its judgment was void for lack of subject matter jurisdiction. So this court acquired no jurisdiction of the petitioner or the cause and on its own motion should search the record and take notice that this jurisdictional defect is apparent, and vacate because it is a nullity.

Wherefore, there was no asportation to support the Att. grand larceny charge and this mistake of fact worked to the extreme detriment of the petitioner. As the guilty plea was the product of ignorance that was discovered after judgment and now the petitioner stands convicted of a crime he did not commit and a conviction upon a charge not made and the judgment shall be collaterally impeached.

FURTHER, AFFIANT SAYETH NAUGHT.

EXECUTED AT High Desert State Prison this 8th day of July 2019

IN FRONT OF: Penalty of Perjury BY James H. Hayes

NDOC #1175077

I, James H. Hayes, 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 8th day of July, 2019

Hayes #1175077
H.D.S.P
P.O. Box 650
Indian Springs, NV
89070

LAS VEGAS
NV 890
10 JUL '19
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US POSTAGE $000.50º

FIRST-CLASS MAIL

ZIP 89101
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Clerk County District Courts
"office of the clerk"
200 Lewis Ave; 3RD Floor
Las Vegas, Nevada
89155-1160

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Legal Mail

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HIGH DESERT STATE PRISON
JUL 09 2019
UNIT 6 CD

27

FILED
JUL 24 2019
CLERK OF COURT

James H. Hayes #1175077
/In Propria Personam
Post Office ~~Box 650 [HDSP]~~ P.O. Box 509 (PCC)
~~Indian Springs~~, Nevada ~~89018~~
Pioche 89043

State of Nevada,
Respondent,
vs.
James H. Hayes,
petitioner,

Case No. A-19-793315-W
Dept. No. 19
Docket

## NOTICE OF CHANGE OF ADDRESS

COMES NOW, petitioner, James H. Hayes, in Proper Person, hereby gives notice to the above-entitled court, that due to Nevada Department of Corrections action, Mr. Hayes has been transferred from H.D.S.P to: Pioche Conservation Camp (PCC).

Therefore, petitioner, James H. Hayes, prays that this Honorable Court will henceforth, send all documents/paperwork concerning the above-cited case number to the new address.

CC: FILE

DATED: this 10 day of July, 2019.

Respectfully submitted,

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

RECEIVED
JUL 24 2019
CLERK OF THE COURT

A-19-793315-W
NCOA
Notice of Change of Address
4863913

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Notice of Change of Address
(Title of Document)

filed in District Court Case number A-19-793315-W

☑ 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.

Signature

7-10-19
Date

JAMES H. HAYES
Print Name

PETITIONER
Title

Hayes #1175072
PCC
P.O. Box 509
Roche, NV 89043 —

LAS VEGAS NV 890
15 JUL 2019 PM 3 L

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

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Steven D. Grierson
CLERK OF THE COURT

NOH

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

| | |
|---|---|
| James Hayes, Plaintiff(s)<br>vs.<br>Nevada State of, Defendant(s) | Case No.: A-19-793315-W<br>Dept: Department 19 |

**AMENDED**
**NOTICE OF HEARING FOR**
**PETITION OF WRIT OF HABEAS CORPUS**

PLEASE TAKE NOTICE that this matter is set for Review on **August 19, 2019**, at the hour of **8:30 a.m.**, in District Court Department 19 in the Regional Justice Center, 200 Lewis Avenue, 16th Floor Floor, Courtroom 16B, Las Vegas, Nevada. Your presence is required.

DATED: July 29, 2019

William D. Kephart
District Court Judge
Department 19

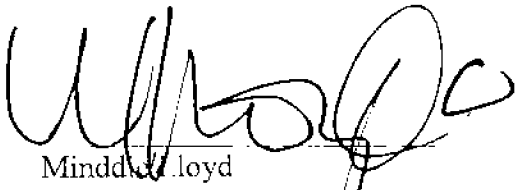
am D. Kephart
istrict Judge
partment 19
EGAS, NV 89155

## CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, this document was copied through e-mail, placed in the attorney's folder in the Regional Justice Center or mailed to the proper person as follows:

James H Hayes
#1175077
P.O.Box 650
Indian Springs, NV 89070

Steven B Wolfson
Juvenile Division - District Attorney's Office
601 N Pecos Road
Las Vegas, NV 89101



Minddu Lloyd
Judicial Executive Assistant
Department 19

FILED

AUG 0 9 2019

CLERK OF COURT

AFFIDAVIT OF facial legality

STATE OF NEVADA )
) SS: 8th Judicial District Court
COUNTY OF CLARK ) Case # A-19-793315-W

TO WHOM IT MAY CONCERN:

I, James H. Hayes, the undersigned, do hereby swear that all the following statements and descrition 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, petitioner, is currently incarcerated at Pioche Conservation Camp (PCC) allege the following facts supporting a Miscarriage of Justice.

Wherefore, the state knowingly and voluntarily filed a fraudulent unconstitutional amended information in open court Clark County District Court XIX, to deprive and mislead petitioner to his prejudice that was malicious, unprofessional, and in BAD FAITH.

Wherefore, a criminal complaint was filed in Justice Court, Las Vegas Township case # 13F10723X on 7-23-2013 charging petitioner having committed the crime(s) Burglary and Attempt Grand Larceny on or about the 9th day of April 2013.

Wherefore, on or about the 14th day of June 2016 the petitioner face jeopardy on the charge(s) of Burglary and Attempt Grand Larceny by the way of preliminary hearing in Justice Court Dept #3 and at the conclusion of the prelim examination the Burglary charge was bound over to District Court and the charge of Attempt Grand Larceny was dismissed for lack of evidence, no corpus delecti, slight or marginal evidence to proceed to district court and petitioner tried for Attempt Grand Larceny

A-19-793315-W
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CLERK OF THE COURT

was exonerated.

Whereas, it is Black Letter Law in the State of Nevada as stated in NRS 174.085 that once the appellant was placed in jeopardy upon the filed criminal complaint in Justice Court and proceeded to preliminary hearing on the said charge and charge dismissed by Justice court Judge at the conclusion of the hearing that said charge is barred from any subsequent proceedings and the law is clear and unambiguous

Whereas, Neither NRS 173.095 or NRS 174.145 permits the court the amend of an information to restate a charge that has been dismissed by the Justice Court Magistrate at the preliminary examination.

Whereas, when the charge of attempted Grand Larceny was dismissed that the State predicated its intent on for the charge of Burglary in the filed criminal complaint in Justice Court, then the Burglary charge was fatal and it to must have been dismissed leaving no charge(s) and no jurisdiction for the District court to proceed at all.

Whereas, it is unconscionable for the State to attempt to insulate a conviction from collateral constitutional review by conditioning its willingness to enter into

FURTHER, AFFIANT SAYETH NAUGHT.

EXECUTED AT PCC this 26th day of July 2019

IN FRONT OF: BY James H Phillips

NDOC # 1175077

plea negotiations on appellant's waiver of the rights to pursue post-conviction remedies.

Wherefore, the state's amended notice to seek punishment as a habitual criminal was for the charge of Burglary not the negotiated charge attempt grand larceny a wobbler. In addition the Credit Card Abuse conviction in Texas is a state jail crime that doesn't carry any prison term, mandatory supervision, nor parole and is not a category A, B, C, D, or E felony but a state jail crime that is only punishable by jail time so at best its trivial and shall not been used in adjudication and the Burglary conviction used was not a prior felony as it occurred in 2016 sum three years after the said attempt grand larceny that occurred in 2013. Leaving appellant deemed a habitual criminal on his first time being sentence to prison with one prior felony conviction.

Wherefore, consecutive sentence imposed by the district court violates the legislative intent of NRS 176.035 and does not serve the interests of justice, as the instant offense attempt grand larceny took place on or about April 9, 2013 and was not subsequent to Burglary conviction that occurred April 2, 2016 but prior. In addition, appellant should have been given credit for time served from the date the attempted grand larceny charge was dismissed and bond exonerated at the conclusion of the preliminary hearing June 14, 2016 to the present towards his sentence.

## 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.

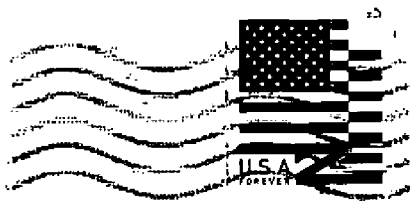
Excuted on the 26th day of July, 2019

James H Hayes James H. Hayes #1175077

Name and Prison BAC#, printed

Hayes # 1175077
P.C.C
P.O. Box 509
Hoche, NV 89043

LAS VEGAS NV 890
07 AUG 2019 PM 4 L




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

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**EIGHTH JUDICIAL DISTRICT COURT**
**CLERK OF THE COURT**
REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3rd Floor.
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554

Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Acting Court Division Administrator


October 4, 2019

Case #: A-19-793315-W
James H. Hayes
Vs.

State of Nevada

Mr. Hayes,

The Clerk's Office is in receipt of your "Preemptory Challenge of Judge." The Clerk's office is unable to process your document(s) due to the following:

There is a required Court a filing fee of $450.00 for Preemptory Challenge in this civil matter, this fee needs to be collected upon this filing. All originals documents are being returned and request that you please resubmit with payment of the required filing fee, (in a form of a money order or Cashier's check, made out to the Clerk of the Court), or *If you are needing to request fee waiver then submit / mail an Application and Order to Proceed in Forma Pauperis Packet, these documents can be located on the District Court website at* www.clarkcountycourts.us- forms - under civil /criminal /probate forms.

Pursuant to Nevada Statute we are not able to provide legal advice or assistance filling out your forms. For help with your pleadings, please consult local law library for information.

TO ENSURE THAT THE DOCUMENTS ARE PROPERLY PROCESSED, PLEASE RETURN THIS LETTER WITH THE REQUESTED CORRECTIONS OR ADDITIONAL DOCUMENTS/FORMS.

Thank you,
Deputy Clerk #27

A-19-793315-W
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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/Plaintiff,

v.

State of Nevada
Respondent/Defendant

Case No. A-19-793315-W; C-16-315718-1

Dept. No. 19

Docket No.

**PREEMPTORY CHALLENGE OF JUDGE**

COMES NOW, Petitioner/Plaintiff, James H. Hayes, pro per, and in Forma Pauperis, pursuant to Supreme Court Rule 48.1, wishes to exercise the right to change Judge.

The current Judge in the above-entitled action is William D. Kephart.

DATED this 26 day of September, 2019

Respectfully submitted,

James H Hayes

Petitioner/Plaintiff

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CLERK OF THE COURT

## AFFIRMATION PURSUANT TO NRS 239B.030

I, James H. Hayes, NDOC# 1175077,

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE ATTACHED DOCUMENT ENTITLED Preemptory Challenge of Judge,

DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSONS, UNDER THE PAINS AND PENALTIES OF PERJURY.

DATED THIS 26 DAY OF September, 20 19.

SIGNATURE: James H Hayes

INMATE PRINTED NAME: James H. Hayes

INMATE NDOC # 1175077

INMATE ADDRESS: ~~ELY STATE PRISON~~
~~P. O. BOX 1989~~
~~ELY, NV 89301~~
PCC
P.O. Box 509
Pioche, NV 89043

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Steven D. Grierson
CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #05734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| THE STATE OF NEVADA,<br>Plaintiff,<br>-vs-<br>JAMES HOWARD HAYES,<br>aka James Howard Hayes Jr.,<br>#2796708<br>Defendant. | CASE NO: A-19-793315-W<br>DEPT NO: XIX |

**STATE'S RESPONSE TO DEFENDANT'S FIRST AND SECOND ADDENDUM TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**

DATE OF HEARING: NOVEMBER 18, 2019
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through TALEEN PANDUKHT, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's First and Second Addendum to Petition for Writ of Habeas Corpus.

This Response 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.

///

///

///

## POINTS AND AUTHORITIES

## STATEMENT OF THE CASE

On or about July 23, 2013, James H. Hayes (hereinafter, "Defendant") 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 Defendant 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"), Defendant 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. An Amended Information reflecting the new charge of ATTEMPT GRAND LARCENY was filed in conjunction with the GPA. Defendant 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 Defendant 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 Defendant should be punished under NRS 207.010 (the "Small Habitual Statute"). The Court agreed, and Defendant was sentenced to sixty (60) to one hundred seventy-four (174) months in the Nevada Department of Corrections (NDOC), consecutive to Defendant's sentence in another case (C315125). The Court also awarded Defendant ten (10) days credit for time served. The Judgment of Conviction in this case was filed on March 12, 2019.

Defendant filed a Notice of Appeal on March 28, 2019. Defendant's Case Appeal Statement was filed on August 9, 2019. Defendant's Appeal of the instant case is still pending before the Nevada Supreme Court (Case Number 78590).

On April 15, 2019, Defendant 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 Defendant 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 responds to the Addenda as follows:

## ARGUMENT

The Nevada Supreme Court has explained:

> "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."

Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (quoting Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608 (1973)). An entry of a guilty plea "waive[s] all

constitutional claims based on events occurring prior to the entry of the plea[], except those involving voluntariness of the plea[] [itself]." Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 431, 683 P.2d 505 (1984); see also Kirksey v. State, 112 Nev. 980, 999, 923 P.2d 1102, 1114 (1996) ("Where the defendant has pleaded guilty, the only claims that may be raised thereafter are those involving the voluntariness of the plea itself and the effectiveness of counsel."). Under NRS 34.810,

> 1. The court *shall* dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.
>
> ...
>
> unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

(emphasis added). Furthermore, the Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved of on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001), overruled on other grounds by Lisle v. State, 131 Nev. 356, 351 P.3d 725 (2015). Additionally, substantive claims are beyond the scope of habeas and waived. NRS 34.724(2)(a); see also Evans, 117 Nev. at 646-47, 29 P.3d 498 at 523; Franklin, 110 Nev. at 752, 877 P.2d 1058 at 1059.

A proper petition for post-conviction relief must set forth specific factual allegations that would entitle the petitioner to relief. NRS 34.735(6) states, in pertinent part, "[Petitioner] must allege specific facts supporting the claims in the petition [he] file[s] seeking relief from

any conviction or sentence. Failure to raise specific facts rather than just conclusions may cause the petition to be dismissed." "Bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

## I. DEFENDANT'S FIRST ADDENDUM DOES NOT PROVIDE GROUNDS FOR RELIEF

### A. Defendant's Claims of Ineffective Assistance of Counsel are Belied by the Record

Defendant's first claim alleges that his counsel, Michael Sanft, Esq. ("Mr. Sanft") failed to provide "zealous and quality representation." First Addendum to Petition for Writ of Habeas Corpus ("1 Add.") at 6. However, this claim is belied by both the GPA and the record of Defendant's entry of plea.

The text of the GPA includes the following (labeled "VOLUNTARINESS OF PLEA"), in pertinent part:

> I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.
>
> ...
>
> I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.
>
> All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.
>
> ...
>
> I am signing this agreement voluntarily, after consultation with my attorney...
>
> ...
>
> My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

///

///

GPA at 5-6. Defendant affirmed that he had read the GPA. Recorder's Transcript of Hearing: November 7, 2018 ("Transcript") at 2:24-25, 3:21-22. Defendant affirmed that Mr. Sanft answered any questions regarding the GPA. Transcript at 3:1-3, 3:23-4:6. Defendant affirmed that he understood the charge in the Amended Information. Id. at 3:4-6, 4:7-9. Defendant affirmed that he signed the GPA. Id. at 3:16-20. Contrary to Defendant's assertion that he was told he was agreeing to a gross misdemeanor, when asked by the Court about his understanding, Defendant acknowledged two possible sentencing outcomes:

> THE COURT: Okay. Can you tell me what your understanding is that you're facing as a form of punishment for the charge of attempt grand larceny here in the State of Nevada?
> THE DEFENDANT: One to four in the Nevada Department of Corrections.
> THE COURT: Okay.
> THE DEFENDANT: Or a gross misdemeanor of 364 days.
> THE COURT: Okay. You can also be fined up to $5,000 if I treat it as a felony. And you could be fined up to $2,000 if I treat it as a gross misdemeanor?
> THE DEFENDANT: Yes, sir.
> THE COURT: You understand that?
> THE DEFENDANT: Yes, sir.

Id. at 4:16-5:3. Defendant affirmed, both verbally to the court and by signing the GPA, that he knew the terms of the GPA, the potential outcomes of his plea, and that Mr. Sanft answered all the questions Defendant had to Defendant's satisfaction. Therefore, pursuant to Hargrove and Mann, Defendant is not entitled to relief on these claims.

Because Defendant's first allegation is belied by the record, this Court should deny Defendant's Petition, and the Addenda thereto.

**B. Defendant's Claim Regarding Notice of Intent to Seek Habitual Treatment was Waived and is Belied by the Record**

Defendant's second claim is that the State failed to properly notice its intent to seek habitual treatment at sentencing. 1 Add. at 7. This claim is not cognizable in a Petition for Writ of Habeas Corpus and was waived by Defendant's failure to raise it on direct appeal.

Defendant's second claim does not relate to the voluntariness of Defendant's plea, or the effectiveness of Defendant's counsel. This claim was more appropriate for a direct appeal,

and Defendant should have pursued it thus. NRS 34.810(1); Franklin, 110 Nev. at 752, 977 P.2d at 1059. In the instant Petition and the Addenda thereto, Defendant fails to show any instance of good cause or prejudice for not bringing these claims on a direct appeal and raising them for the first time only in these habeas proceedings. Indeed, Defendant cannot establish good cause, because Defendant unconditionally waived his right to a direct appeal, "including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings." GPA at 5:3-7. This claim has been affirmatively waived and, therefore, must be summarily denied.

Furthermore, Defendant's allegation is belied by the record. A review of the District Court record reveals that the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal on November 21, 2016. The State further filed an Amended Notice of Intent to Seek Punishment as a Habitual Criminal on August 29, 2017. At the sentencing hearing, the Court found that the State had not only properly noticed but had met its burden to seek punishment as a habitual criminal. See Court Minutes – March 6, 2019 ("Sentencing Minutes"). Pursuant to Hargrove and Mann, Defendant is not entitled to relief on this claim.

Because Defendant affirmatively waived this claim, and furthermore because this claim is belied by the record, this Court should Deny Defendant's Petition and the Addenda thereto.

### C. Defendant's Claim Regarding Double Jeopardy Does Not Entitle Defendant to Relief

Defendant's final claim is that his conviction is invalid because the charge of Attempt Grand Larceny, as alleged in the original Criminal Complaint, was not bound over to the District Court. 1 App. at 8. Like Defendant's second claim, this claim is not cognizable in a Petition for Writ of Habeas Corpus and was waived by Defendant's failure to raise it on direct appeal.

This claim does not challenge the voluntariness of Defendant's guilty plea, nor does it allege ineffective assistance of counsel. Therefore, this claim should have been pursued on direct appeal, rather than for the first time in a petition. NRS 34.810(1); Franklin, 110 Nev. at 752, 977 P.2d at 1059. Defendant does not attempt to argue good cause or prejudice for raising

this claim for the first time in the instant proceedings. Such an argument would be meritless, as Defendant specifically and unconditionally waived his right to a direct appeal on this issue, as discussed in Section I(B), *supra*. GPA at 5:9-13. Therefore, this claim has been affirmatively waived and must be summarily denied.

## II. DEFENDANT'S SECOND ADDENDUM DOES NOT PROVIDE GROUNDS FOR RELIEF

### A. Defendant Does Not Adequately Claim Ineffective Assistance of Counsel

In Defendant's Petition for Writ of Habeas Corpus, Addendum Two ("2 Add."), Defendant first claims that he received ineffective assistance of counsel. 2 Add. at 6. However, Defendant makes only a bare and naked allegation, which, pursuant to Hargrove does not entitle Defendant to relief.

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64. See also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323. Under Strickland, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; see also Lyons, 100 Nev. at 432, 683 P.2d at 505 (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The Court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). The role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State,

94 Nev. 671, 675, 584 P.2d 708, 711 (1978). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068). This portion of the test is slightly modified when the convictions occurs due to a guilty plea. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988 (1996). For a guilty plea, a defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Kirksey, 112 Nev. at 998 (quoting Hill, 474 U.S. at 59).

Defendant simply states, "there is a reasonable probability that, but for counsel's failures and unprofessional errors, the result would have been different." 2 Add. at 6:5-8. Defendant fails to provide any specific instance of Mr. Sanft's perceived ineffectiveness, and Defendant does not attempt to show how, exactly, the results would have been different had Mr. Sanft acted differently. Therefore, Defendant's allegation amounts to a bare and naked conclusory statement that does not entitle Defendant to relief under Hargrove and does not meet Defendant's burden under Strickland.

Because Defendant does not meet his burden, this Court should deny Defendant's Petition and the Addenda thereto.

**B. Defendant's Second and Third Claims Do Not Entitle Defendant to Relief**

Defendant claims that his conviction is a violation of the prohibition against double jeopardy. 2 Add. at 7. Defendant also claims that he was the subject of an "inappropriate personal attack and a judicial violation." 2 Add. at 8:2-3. Like the claims in Defendant's first

///

Addendum, these claims are not properly raised for the first time in a Petition for Writ of Habeas Corpus and were waived by Defendant's failure to raise them on direct appeal.

Neither of these two claims challenge the validity of Defendant's guilty plea or allege ineffective assistance of counsel. These claims were appropriate for a direct appeal, and Defendant should have pursued them thus. NRS 34.810(1); Franklin, 110 Nev. at 752, 977 P.2d at 1059. In the instant Petition, Defendant fails to show any instance of good cause or prejudice for not bringing these claims on a direct appeal and raising them for the first time only in these habeas proceedings. Indeed, he cannot establish good cause, because in his Guilty Plea Agreement, Defendant specifically agreed that he understood he was "unconditionally waiving [his] right to a direct appeal of this conviction, including any challenges based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4)." GPA at 5:4-7. These claims have been affirmatively waived and, therefore, must be summarily denied.

## CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court DENY Defendant's Petition for Writ of Habeas Corpus, and the First and Second Addendum thereto, in their entirety.

DATED this 10 day of October, 2019.

Respectfully submitted,

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

BY [signature]
TALEEN PANDUKHT
Deputy District Attorney
Nevada Bar #05734



W:\2013\2013F\107\23\13F10723-RSPN-(HAYES__JAMES)-002.DOCX

## CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 10th day of October, 2019, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JAMES H. HAYES, BAC #1175077
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV, 89070

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

TP/jj/cg/L2

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

FILED
NOV 04 2019
CLERK OF COURT

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,
Respondent(s).

Case No. A-19-793315-W
Dept. No. 19
Docket

"Petitioner's Reply"

## 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
NOV 04 2019
CLERK OF THE COURT

A-19-793315-W
RPLY
Reply
4874161

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

23. (a) GROUND ONE: "PETITIONER'S REPLY" and its worthwhile Noting that petitioner has Not recieved the State's response as of the date of this reply. the 1st day of November 2019...

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law):

I have explicitly reserved my right Not to be compelled to perform under any contract or agreement that I have Not entered into knowingly, voluntarily, and intentionally and that my valid reservation of Rights has perserved all my Rights and prevented the loss of any such Rights by application of the concepts of waiver or Estoppel.

Whereas, it is unconscionable for the State to attempt to insulate a conviction from collateral constitutional review by conditioning its willingness to enter into plea negotiations on petitioner's "waiver of the Rights" to pursue post-conviction remedies.

Whereas, the petitioner is entitled to habeas corpus if there is no material dispute as to a mistake of fact relating to his conviction (7 R.C.P 32d) and set aside the judgment of conviction after sentence in order to correct manifest injustice. Where, as here, both parties agree to the fact that the charge of Attempt Grand Larceny was dismissed at the conclusion of the preliminary examination

23. (b) ~~GROUND TWO~~ PETITIONER'S REPLY "CONTINUE"

23. (b) SUPPORTING FACTS (Tell your story briefly without citing cases or law): by magistrate for lack of evidence, no corpus delecti slight or marginal evidence, and this is clear and convincing dismissal of an action.

Whereas, the state did violate NRS 178.562(1) by bringing another prosecution following dismissal of an action to constitute "another prosecution" without another pending vehicle for the prosecution of the charge of Attempt Grand Larceny that runs afoul of the provisions of NRS 178.562(1) and BARS further prosecution of the petitioner on that charge. Where, as here, the state's guilty plea agreement filed in open court November 7, 2018 was a subsequent prosecution for the same offense "Attempt Grand Larceny" that was dismissed at the conclusion of preliminary examination by magistrate without another pending vehicle for prosecution. leaving the charge barred from all district court proceedings, and this jurisprudence set forth is perfectly clear and unambiguous.

Whereas the state did violate NRS 174.085(3) when the petitioner was once placed in jeopardy upon the criminal complaint and proceeded

23. (c) [redacted] PETITIONER'S REPLY CONTINUE

23. (c) SUPPORTING FACTS (Tell your story briefly without citing cases or law): to the preliminary examination and at the conclusion of the examination the charge of "Attempt Grand Larceny" was dismissed by magistrate for lack of evidence, No corpus delecti, slight or marginal evidence that is a bar to another indictment, information or complaint for the offense charged in the former. Thus the state triggered the protections of NRS 174.085(3)(5) to bar the subsequent prosecution of the charge of "Attempt Grand Larceny" against the petitioner in all district court proceedings when the dismissal occurred before the subsequent form of prosecution was obtained and no good cause shown to the court or court order. Where as here, there is no material dispute of fact that the charge of Attempt Grand Larceny was dismissed against petitioner at the conclusion of preliminary examination and barred from any subsequent proceedings leaving the district court with no subject matter jurisdiction against petitioner for the charge of "Attempt Grand Larceny"

Wherefore, the fact remains that courts, [redacted] which make a mistake in rendering

23. (d) ~~GROUND FOUR~~: PETITIONER'S REPLY CONTINUE

23. (d) SUPPORTING FACTS (Tell your story briefly without citing cases or law): a judgment which works to the extreme detriment of the petitioner will not allow it to stand uncorrected as justice requires that when a court errs in its adjudication of petitioner the vacation of that judgment of conviction must occur.

WHEREFORE, James H. Hayes, prays that the court grant Writ of habeas Corpus relief to which he may be entitled in this proceeding.

EXECUTED at SDCC

on the 2 day of November, 2019.

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

PRO PER
Atttorney for Petitioner

## CERTFICATE OF SERVICE BY MAILING

I, James H Hayes, hereby certify, pursuant to NRCP 5(b), that on this 1 day of November, 2019, I mailed a true and correct copy of the foregoing, "Petitioner'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 of the Court
200 Lewis Ave. 3rd Fl
Las Vegas, NV 89155-1160

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

CC:FILE

**DATED:** this 1 day of November, 2019.

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:

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding PETITIONER'S

REPLY
(Title of Document)

filed in District Court Case number A-19-793315-W

☑ 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

11-1-19
Date

JAMES H. HAYES
Print Name

PROPER
Title

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

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11/01/2019
US POSTAGE $000.94[9]
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ZIP 89101
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"office of the clerk"
200 Lewis Ave; 3rd Floor
Las Vegas, Nevada
89155-1160

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112

Electronically Filed
12/04/2019
CLERK OF THE COURT

COA

DISTRICT COURT

CLARK COUNTY, NEVADA

State of Nevada
Plaintiff(s),

-vs-

James D. Hayes
Defendant(s).

CASE NO. C-16-315718-1; A-19-799315-W

DEPT. NO. 19

**NOTICE OF CHANGE OF ADDRESS**

To: Clerk of Court; and

To: Opposing Counsel or Litigant

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE THAT:

☑ Plaintiff or ☑ Defendant has a new mailing address.

New address: SDCC, P.O. Box 208, Indian Springs, NV 89070

Telephone number: N/A

DATED this 26 day of Nov., 2019.

James D Hayes #1175097
Name

RECEIVED
DEC 04 2019
CLERK OF THE COURT

NCOA[1]/10/3/2012

SDCC Law Library
Southern Desert Correctional Center
P.O.Box 208
Indian Springs, Nevada 89070 -0208

Date: Nov. 26 ,2019.

To: Clerk, 8th . Judicial District Court
200 Lewis Ave. 3rd Fl
Las Vegas, Nevada
89155-1160

From: James H. Hayes # 1175077
Southern Desert Correctional Ctr.
P.O. Box 208
Indian Springs, Nevada 89070 -0208

Subject: ***REQUEST FOR RECORDS/COURT CASE DOCUMENTS***

**Case No.** C-16-315718-1

**Dept.No.** 19

The above named Inmate has requested the assistance of the SDCC Law Library while he is incarcerated here. But in order to better assist him, we are in need of the following Court Case Documents.

~~**1). JUDGMENT OF CONVICTION**~~

**2). CRIMINAL COURT MINUTES**

James H Hayes
**Inmate**

**Special Instructions:** Transcript for Nov. 7, 2017 court proceedings

**Please send a correspondence *directly* to Inmate**

Hayes #1175022
SDCC
P.O. Box 208
Indian Springs, NV
89070

LEGAL MAIL

LAS VEGAS NV 890

02 DEC 2019 PM 4 L

~~Attorney General of Nevada~~
~~100 North Carson Street~~
~~Carson City, Nevada~~
~~89701~~

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

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

FILED
DEC 20 2019
CLERK OF COURT

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,
Respondent(s).

Case No. A-19-793315-W
Dept. No. 19
Docket

Petitioner's Reply "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
DEC 20 2019
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 and Nevada Constitution & Federal and State Constitutional violations & NRS violations... and its worthwhile noting petitioner still have not received a copy of state's response filed 10-10-19...

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law): On or about the 7th day of November 2018 the state knowingly, intelligently, and voluntarily filed in open court a fraudulent amended information and Guilty Plea Agreement, and the very initiation of the proceedings against Mr. Hayes (petitioner) operated to deprive petitioner of Due Process of Law (94 S.Ct 2098). In this Due process violation "No Real party in Interest" as the state has not been harm by petitioner's alleged actions and there is neither an injured party nor trespass. When in fact, the charge crime of Attempt Grand Larceny was dismissed at the conclusion of the preliminary examination not prior for lack of evidence, no corpus delecti, slight nor marginal evidence. (Lack of Admissable Evidence). The state has committed fraud upon the court by prosecuting its case without first establishing that jurisdiction personam or subject-matter exists. The law blatantly shows the state's lack of jurisdiction over petitioner as NRS 174.085(3) and NRS 178.562(1). Rule 11 FRCP provides the authority by which petitioner is immune from prosecution of this case and the charge Attempt

CONTINUE:

23. (b) [redacted]: _____

23. (b) SUPPORTING FACTS (Tell your story briefly without citing cases or law): GRAND LARCENY. THE STATE MAY NOT CONVICT PETITIONER NO MATTER HOW VALIDLY HIS FACTUAL GUILT IS ESTABLISH WITHOUT SUBJECT MATTER JURISDICTION AND THE COURT THAT RENDERED THE JUDGMENT LACKED JURISDICTION AND HAD NO POWER TO ENTER THE CONVICTION OR IMPOSE THE SENTENCE. HERE SUBJECT MATTER JURISDICTION IS NOT WAIVABLE AS THE STATE CONTENDS AS JURISDICTION OF THE SUBJECT MATTER IS DERIVED FROM THE LAW AND IT NEITHER CAN BE WAIVED NOR CONFERRED BY CONSENT OF ACCUSED. LEAVING THE STATE WITH NO COLORABLE ARGUMENT TO OVERCOME THE LACK OF PERSONAM AND SUBJECT MATTER JURISDICTION.

WHEREAS, THIS MANIFEST INJUSTICE AND MISCARRIAGE OF JUSTICE IS A DIRECT RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL {K. SAUTER; T. ABBATENGELO; MS. MURPHY; M. SANFE} THAT HAS GREATLY PREJUDICE PETITIONER AND LEFT HIM WITH IRREPARABLE INJURY AS A RESULT. HERE, THE PETITIONER WILL SATISFY THE TWO PRONG TEST OF STRICKLAND THAT REQUIRES THE PETITIONER TO SHOW THAT 1) COUNSEL'S PERFORMANCE WAS DEFICIENT. WHERE, AS HERE, COUNSEL'S REPRESENTATION FELL BELOW THE OBJECTIVE STANDARD OF REASONABLENESS AS COUNSEL FAILED TO INVESTIGATE THE LAW AND FACTS WHEN IN FACT, COUNSEL NEVER CHALLENGE THE LACK

23. (c) CONTINUE [redacted]:

23. (c) SUPPORTING FACTS (Tell your story briefly without citing cases or law): of personam or subject matter jurisdiction that was ~~plain~~ plainly shown on the face of the record as the charge of Attempt Grand Larceny was dismissed by Justice court magistrate for lack of evidence, no corpus delecti, slight nor marginal evidence to proceed to District Court. that had counsel use any due diligence this egregious mistake would have been known and would have let petitioner know that said charge was BARRED from District court and the state's amended information and Guilty Plea Agreement for lack of jurisdiction. furthermore had counsel challenge probable cause the charge of Burglary would have been dismissed. When in fact the state had used larceny as its intent for the Burglary charge as stated in the filed information dated 6-17-2016. so, when the Attempt Grand Larceny was dismissed it left the Burglary charge fatal and it to must have been dismissed once again leaving no jurisdiction for the District court to proceed against petitioner.

2) Counsel's deficient performance prejudiced petitioner to his extreme detriment, and if for not counsel's

CONTINUE:

23. (d) [redacted]: _____

23. (d) SUPPORTING FACTS (Tell your story briefly without citing cases or law): _____

UNprofessional errors and lack of Due Diligence to investigate the facts and the law, the result of the proceedings would have been different. Where, as here, petitioner would not have entered a "Alford Plea" as the charge of Attempt Grand larceny was BARRED from District court for lack of jurisdiction and lack of Admissable evidence. When in fact, No reasonable jury would have convicted petitioner of Attempt Grand larceny nor the charge of Burglary as the states intent for the burglary charge of larceny had been dismissed at preliminary examination for No slight nor marginal evidence and No corpus delecti. As counsel's failures are shown by a preponderance of the evidence, the record, and the law. In addition, counsel failed to file a Notice of appeal and perfect the appeal failed to inform petitioner of the right to appeal, failed to communicate with petitioner on meritorious grounds to proceed on and there's No colorable argument that would allow counsel to overcome his blatant failures that have left petitioner with irreparable injury. Moreover, petitioner stands convicted of a crime he did Not commit due to counsel failures!!

WHEREFORE, James H. Hayes, prays that the court grant "Writ of habeas corpus" relief to which he may be entitled in this proceeding.

EXECUTED at SDCC

on the 12 day of December, 2011.

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 per

Attorney for Petitioner

-6-

## CERTFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 12th day of December, 2019, I mailed a true and correct copy of the foregoing, "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
200 Lewis Ave. 3rd Floor
Las Vegas, Nevada
89155-1160

Nevada Atty General
100 North Carson St
Carson City, Nevada
89701

CC:FILE

**DATED:** this 12 day of December, 2019.

James H. Hayes # 1175077
/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 Writ of Habeas Corpus
(Title of Document)

filed in District Court Case number A-19-793315-W

☑ 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

12-12-19
Date

James H. Hayes
Print Name

Pro per
Title

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

LAS VEGAS NV 890

18 DEC 2019 PM 5

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Las Vegas, Nevada
89155-1160

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Hayes, James H 1175022
Petitioner/In Propia Persona
Post Office Box 208, SDCC
Indian Springs, Nevada 89070

FILED
FEB 12 2020
CLERK OF COURT

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
Warden, Jerry Howell,
Respondent(s).

"Hearing Requested"

Case No. A-19-793315-W
Dept. No. Dept. XIX
Docket

"AMENDED PETITION"

## PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

INSTRUCTIONS:

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(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
FEB 12 2020
CLERK OF THE COURT

A-19-793315-W
PWHC
Petition for Writ of Habeas Corpus
4895574

Failure to raise all grounds I this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) If your petition challenges the validity of your conviction or sentence, the original and one copy must be filed with the clerk of the district court for the county in which the conviction occurred. Petitions raising any other claim must be filed with the clerk of the district court for the county in which you are incarcerated. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

## PETITION

1. Name of institution and county in which you are presently imprisoned or where and who you are presently restrained of your liberty: Southern Desert Correctional Center

2. Name the location of court which entered the judgment of conviction under attack: Clark County, Nevada 8th Jud. District

3. Date of judgment of conviction: March 12, 2019

4. Case number: C-16-315718-1

5. (a) Length of sentence: 60 months to 174 months

(b) If sentence is death, state any date upon which execution is scheduled: _____

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion:

Yes ____ No ✓ If "Yes", list crime, case number and sentence being served at this time: ____

7. Nature of offense involved in conviction being challenged: Attempt Grand Larceny (Category D felony)

8. What was your plea? (Check one)

(a) Not guilty ____

(b) Guilty _____

(c) Nolo contendere ✓ Alford Plea

9. If you entered a guilty plea to one count of an indictment or information, and a not guilty plea to another count of an indictment or information, or if a guilty plea was negotiated, give details: ____

Negotiated pursuant to North Carolina v Alford

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury ____

(b) Judge without a jury ____

11. Did you testify at trial? Yes ____ No ____

12. Did you appeal from the judgment of conviction?

Yes ✓ No ____

13. If you did appeal, answer the following:

(a) Name of court: Supreme Court of Nevada

(b) Case number or citation: 78590

(c) Result: Affirm

(d) Date of appeal: Notice of Appeal filed March 28, 2019

(Attach copy of order or decision, if available).

14.) If you did not appeal, explain briefly why you did not: _____

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ✓ No ____

16. If your answer to No 15 was "Yes", give the following information:

(a) (1) Name of court: 8th Judicial District Court: Clark County.

(2) Nature of proceedings: Petition for Writ of Habeas Corpus

(3) Grounds raised: Double Jeopardy {NRS 124.085(3) Violation}; Lack of probable cause; Cruel and Unusual punishment; Errors in PSI

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ✓

(5) Result: Taken off calendar for lack of Jurisdiction

(6) Date of result: N/A

(7) If known, citations of any written opinion or date of orders entered pursuant to each result: N/A

(b) As to any second petition, application or motion, give the same information:

(1) Name of Court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations or any written opinion or date of orders entered pursuant to each result: _____

(c) As to any third or subsequent additional application or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion?

Yes ✓ No ✓

Citation or date of decision:_____.

(2) Second petition, application or motion?

Yes ____ No ____

Citation or date of decision:_____.

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You may relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). _____

_____.

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion or application or any other post-conviction proceeding? If so, identify:

(a) Which of the grounds is the same: Ineffective Asst. of counsel, Cruel and unusual punishment, Mistakes in PSI

(b) The proceedings in which these grounds were raised: Petition for writ of Habeas corpus,.

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). ____

grounds were never ruled on the petition was taken off calender for lack of jurisdiction

18. If any of the grounds listed in Nos. 23(a), (b), (c), and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). Ineffective assistance of Appellate counsel order of affirmance handed down on January 14, 2020.

19. Are you filing this petition more than one (1) year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). _____

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ✓ No ____

If "Yes", state what court and the case number: Supreme Court of Nevada

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Michael Janeff for both but was dismissed prior to completion of appellate process leaving petitioner with no counsel throughout direct appeal proceedings

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack?

Yes ____ No ✓ If "Yes", specify where and when it is to be served, if you know: ____

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

23. (a) GROUND ONE: MR. Hayes (petitioner) was denied his Constitutionally guaranteed "right to effective assistence of counsel" {Federal and State Constitutional rights} 6th and 14th Amendment Violation:

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law):

Wherefore, trial counsel failed to provide zealous and quality representation at all stages of the criminal process. Counsel's performance was deficient and representation fell below the objective standard of reasonableness as counsel failed to do appropriate investigation and study of the case, including an analysis of controlling law {NRS 174.085(3); NRS 178.562} and had counsel use due diligence and investigated the facts and the law he would have known that the charge of Attempt Grand Larceny was Barred from District Court against the petitioner as NRS. 174.085(3) and NRS 178.562 provides the authority that made petitioner immune from prosecution on charge of Attempt Grand Larceny in District court. Counsel failed to make certain that the petitioner fully and completely understood the conditions and limits of the plea agreement and the maximum punishment and other consequences the petitioner would be exposed to by entering his "Alford plea" as petitioner was surprised by the habitual criminal sentence. When in fact, even though petitioner signed

the guilty plea agreement he was ignorant to the potential outcome as counsel had informed petitioner that he was agreeing to a gross-misdemeanor with time served credit and concurrent to case no C-16-715125-1. Counsel failed to file a motion to withdraw guilty plea pre-sentencing and post-sentencing when sentencing was not in accordance with the negotiated agreement and a determination of habitual criminal was adjudicated. When in fact, when alleged Attempt Grand Larceny occurred on or about April 8, 2013 petitioner had never served a prison term or been to prison and had only one prior felony conviction for a Class E felony "Attempt possession of Credit or Debit Card without cardholder's consent" as texas crime was one event for Credit Card Abuse and fraudulent use/possession of identifying information that did not and does not carry a prison term, mandatory supervision, nor parole. Counsel failed to challenge alleged breach that was founded on impeachable and highly suspect evidence as the Burglary charge used was dismissed and the finding of probable cause was misplaced as alleged victim testified under oath that petitioner was not the perpetrator of allege event and he was 100% sure and further testified that alleged perpetrator did not enter said room only stood in doorway said "Sorry" and closed door without incident so this is a clear and convincing showing that no probable cause existed against petitioner. Counsel failed to challenge probable cause and subject matter jurisdiction for

the Burglary charge in case no C-16-315718-1 that had counsel challenge the Burglary charge, was fatal as the state's intent for the charge of Burglary of Attempt Grand Larceny was dismissed following a preliminary hearing in Justice Court, Las Vegas Township on June 14, 2016 and the Burglary charge also must have been dismissed leaving no jurisdiction for the district court to proceed with the filed information dated June 17, 2016, nor the amended information of Attempt Grand Larceny filed November 7, 2018. Where, as here, counsel failures are a clear and convincing showing of prong ONE of the two prong test of Strickland that has greatly prejudice petitioner and that petitioner's Alford plea was not knowingly, intelligently or voluntarily entered.

Wherefore, counsel's deficient performance prejudiced petitioner to his extreme detriment causing irreparable injury, and if not for counsel's unprofessional errors and lack of Due Diligence of failure to investigate the facts and the law, the results of the proceedings would have been different. Where as here, petitioner would not have entered an "Alford Plea" as the charge(s) of Attempt Grand Larceny was Barred from District Court for lack of jurisdiction, lack of Admissible evidence, and violation of state law pursuant to NRS 174.085(3) and NRS 178.562 and the Burglary charge case no. C-16-315718-1 was fatal as the state had no intent.

When in fact, no reasonable jury would have convicted petitioner of Attempt Grand Larceny nor the charge

of Burglary as the State's intent for the Burglary charge of larceny in the filed information on June 17, 2016. was dismissed following preliminary hearing for no slight or marginal evidence, no corpus delecti, and lack of admissable evidence. As counsel's failures are shown by a preponderence of the evidence, the record, and state law. In addition, counsel failed to file a Notice of appeal and failed to inform petitioner of the right to appeal. Wherefore, this is a clear and convincing showing of prong two of the two prong test of Strickland that has greatly prejudiced petitioner and a valid showing that petitioners Alford plea to the charge of Attempt Grand Larceny was not knowingly, intelligently, or voluntarily entered. When in fact, the petitioner stands convicted of a crime he did not commit!! due to counsel failures. Furthermore this is an affront to justice and due process to hold petitioner to his Alford plea when the conduct upon which the plea was entered did not occur. Finally, for the above reasons, but for counsel's errors and failures petitioner would not have not entered an Alford plea and went to trial on the charge of Burglary and been Acquitted.

Wherefore, appellate counsel failed to provide zealous and quality representation at all stages of appeal process. Counsel's performance was deficient and representation fell below the objective standard of reasonableness as appellate counsel failed to do appropriate investigation of potentially meritorious claims of error and assert

claims of error that are supported by facts and the law and failed to assert claims that were complex, unique, and issues of first impression. Counsel did not thoroughly research the issues in the case and set forth all viable issues in his prepared and sanction "fast track" statement. Appellate counsel failed to raise meritorious claims of failure of the state to properly notice its intent to seek habitual treatment at sentencing for the wobbler charge of Attempt Grand Larceny. When in fact, State's Amended Notice of intent to seek punishment as a habitual criminal was for the charge of Burglary. Counsel failed to raise the claim that District Court lacked jurisdiction for the charge of Attempt Grand Larceny, when in fact, jurisdiction is derived by the law and Nevada State law NRS 174.085(3) and NRS 178.562 is the authority that State's amended information for the charge of Attempt Grand Larceny was without subject matter jurisdiction and was BARRED from district court proceedings against petitioner. Counsel did not challenge the habitual criminal adjudication pursuant to NRS 207.010. When in fact, petitioner is not a habitual criminal and his prior criminal history proves it as petitioner had only the Texas state jail crime(s) that was one event and not felonies as they did not carry any prison term and not any category of felony and only carries jail time and the

Burglary conviction was not a prior, so in essence petitioners first time in prison and with one prior felony has been treated as a habitual criminal that is easily deemed cruel and unusual punishment, and violates the legislative intent of NRS 207.010. In addition, petitioner was deprived of effective assistance of counsel on direct appeal when district court Judge William Kephart dismissed petitioner's appellate counsel on July 15, 2019 pursuant to motion to withdraw counsel that was granted as District court Judge William Kephart stated his reason for granting and dismissing counsel was that the Supreme Court of Nevada had issued a remittitur.

Where, as here, counsel failures are a clear and convincing showing of the prejudice prong of Strickland.

Wherefore, petitioner requested many times over that counsel file appeal and express to counsel on several occassion his dissatisfaction with the conviction and sentence and counsel failed to do so that easily satisfys the deficient performance of Strickland and shows the prejudice against petitioner cause had counsel use the diligence and raised the meritorious claims and not been withdrawn as counsel prior to the perfection of the appeal petitioner appeal (Direct) would have been successful.

23. (b) GROUND TWO: The state violated Mr. Hayes right to Due Process as guaranteed by both the Due Process Clause of the United States Constitution and the Nevada Constitution. "Breach of guilty plea agreement on impeachable evidence"

23. (b) SUPPORTING FACTS (Tell your story briefly without citing cases or law): Whereas, the breach at issue was not material nor volitional, when in fact, the court was required to hold an evidentiary hearing on the alleged breach which has resulted in dire consequences to petitioner and an additional five(5) to fourteen and a half (14½) years in prison in violation of the bargained for stipulations. That the state entered in bad faith with petitioner as the agreement was unconstitutional, malicious, and a manifest injustice. Indeed, in relating the factual and procedural history of the case, the state has taken great liberties to continue the sort of narrative that has likely fueled inconsistent and unfair mass incarceration in Nevada.

Whereas, the petitioner knows the record and has tried to contextualize this actual record to reveal that an manifest injustice was done in his specific case. Although his counsel's presented a very uncompelling argument worthy of sanctions and a Bar complaint and is blatant ineffective assistance of counsel that has greatly prejudice petitioner to his extreme detriment causing petitioner irreparable injury.

Whereas, in other words, the state's claim of breach that petitioner was found to have probable cause for

a New Burglary charge is absurd when the allege victim of alleged Burglary testified under oath facing the penalty of perjury that he was 100% sure petitioner was not the perpetrator of the ISPE dirit crime and that this alleged charge crime was without probable cause against petitioner as the Justice court Judge ruling of probable cause was misplace and eventually the charge was dismissed in the first district court appearance. Furthermore, the guilty plea agreement in this case did not explicitly provide for the abdication of stipulation for a mere run into the law for a allege crime he had no part of, let alone for a charge that was dismissed to further solidify his non-participation in the ISPE dirit Burglary charge lodged against him without due process considerations.

Wherefore, petitioner's case of "Attempt Grand Larceny" is the one ostensibly before us in this petition which allegedly occurred on April 6, 2013 and was formally charged by way of Criminal complaint on July 23, 2013 that was dismissed following a preliminary hearing in Justice court, Las Vegas township on June 14, 2016 for lack of admissable evidence, No corpus delecti, No slight or marginal evidence to proceed to district court leaving the District Court 8th Judicial District with no subject matter jurisdiction for the charge of Attempt Grand Larceny as it was BARRED from subsequent prosecution against petitioner as mandated by state law pursuant to NRS 174.085(3) and NRS 178.562

Making the State's amended information for Attempt Grand Larceny unconstitutional, in BAD FAITH, and fraud upon the court by not first establishing jurisdiction before prosecution that has prejudice petitioner to his extreme detriment causing petitioner irreparable injury.

Whereas the unconstitutional guilty plea agreement at issue here for the "Nobbler" charge of Attempt Grand Larceny indicated that there was a stipulated sentence of probation with the only condition to be 30 days in the Clark County Detention Center with 30 days credit for time served with no suspended prison term and no time period of probation to be served that solidifys petitioners position that the agreement was for gross misdemeanor treatment and further stipulated that it was to run concurrently to case no C-16-315125-1. This stipulation is unique to this case and do not contain any boilerplate language and do not explicitly rely upon or even reference the loss of stipulation in there language.

Where, as here, indeed, the boilerplate language regarding "Magistrate to find probable cause" does not explicitly refer to loss of stipulation, but only that "the State will have the unqualified right to argue for any legal sentence and term of confinement allowable for the crime to which I am pleading guilty, including the use of any prior convictions I may have to increase my sentence as an habitual criminal to five (5) to twenty (20) years. Which in fact, there could not

be a legal sentence in the instant offense as the charge of Attempt Grand Larceny was BARRED from subsequent prosecution against petitioner and the District court had no subject matter jurisdiction for instant offense Attempt Grand Larceny. In addition, the 2016 Burglary charge used in adjudication was not a prior conviction as the instant offense occurred in 2013.

Where, as here, it is also undisputed that the boilerplate language does not explicitly refer to a right to argue for consecutive sentence. It should also be noted that the boilerplate language of the guilty plea agreement does not refer in any way to what would constitute (or not constitute) an evaluable ruling of probable cause by magistrate or make any reference to any ability for a "Due Process" to challenge an evernment of a material breach. Furthermore, petitioner received no consideration whatsoever in exchange for his "Alford plea" to a crime that petitioner did not commit.

23. (c) GROUND THREE: State violated Mr. Hayes Right to "Due Process", when it failed to adhere to State law (NRS. 174.085(3) and NRS 178.562) making conviction invalid and unconstitutional

23. (c) SUPPORTING FACTS (Tell your story briefly without citing cases or law): Wheres, petitioner has explicitly reserved his right not to be compelled to perform under any contract or agreement that I have not entered into knowingly, voluntarily, and intelligently and that my valid reservation of Rights has perserved all my Rights and prevented the loss of any such Rights by application of the concepts of waiver or estoppel as in the instant case.

Wheres, it is unconscionable for the State to attempt to insulate a conviction from collateral constitutional review by conditioning its willingness to enter into plea negotiations on petitioners "Waiver of the Rights" to pursue post-conviction remedies.

Where as here, petitioner is entitled to habeas corpus if there is no material dispute as to a mistake of fact relating to his conviction (F.R.C.P 32(d)) and this court must set aside the judgment of conviction after sentence in order to correct this manifest injustice. As here, both parties agree to the mistake of fact that the charge of Attempt Grand Larceny was dismissed following preliminary

hearing by Justice Court Magistrate for lack of admissable evidence, No corpus delecti, No slight or marginal evidence to be further prosecuted in District court, and this is clear and convincing showing of dismissal of an action.

Wherefore, the state did violate NRS 178.562(4) by bringing another prosecution following dismissal of an action to constitute "another prosecution" without another pending vehicle for the prosecution of the charge of Attempt Grand Larceny that runs afoul of the provisions of NRS 178.562(4), and BARS further prosecution of the petitioner on that charge. When in fact the state held the preliminary hearing June 14, 2016 pursuant to the filed criminal complaint as the vehicle for prosecution of the instant offense and no other vehicle was filed for the instant offense Attempt Grand Larceny until November 7, 2018 by the way of an amended information ~~that~~ and there is no colorable argument that would allow them to overcome the violation of state law NRS 178.562.

Where as here, the state's amended information filed in open court November 7, 2018 was a subsequent prosecution for the same offense in the former "Attempt Grand Larceny that was dismissed following preliminary hearing by magistrate without another pending vehicle for prosecution leaving the instant offense barred from all district court proceedings against petitioner and this jurisprudence set forth is perfectly clear

and unambiguous.

Whereas, the state did violate NRS 174.085(3) when the petitioner was once placed in jeopardy upon the criminal complaint and proceeded to the preliminary hearing and following the preliminary hearing the charge of Attempt grand larceny was dismissed by magistrate, that is a BAR to another indictment, information or complaint for the offense charged in the former. Thus the state triggered the protections of NRS 174.085(3) to bar the subsequent prosecution of the instant offense Attempt grand larceny against the petitioner in all district court proceedings [redacted]

Where, as here, there is no material dispute of fact that the charge in the instant offense Attempt grand larceny was dismissed following the preliminary examination and BARRED from any subsequent prosecution against petitioner in district court leaving no subject matter jurisdiction for prosecution in district court. In addition, the state may not convict petitioner no matter how validly his factual guilt is establish without subject matter jurisdiction and the court that rendered the judgment had no subject matter jurisdiction and left the court with no power to enter the conviction or impose the sentence.

Whereas, subject matter jurisdiction is not waivable as the state has contend as jurisdiction is derived from the law and it neither can be waived nor conferred by consent of the petitioner. As there is no colorable argument to overcome the lack of subject matter jurisdiction.

23. (d) GROUND FOUR: Violation of Mr. Hayes right to "Due Process" Material mistakes of fact regarding criminal record in PSI that work to his extreme detriment.

23. (d) SUPPORTING FACTS (Tell your story briefly without citing cases or law):

Whereas, the court made material mistakes of fact about petitioner's criminal record, as the petitioner's PSI had several material facts in error that work to his extreme detriment.

Where, as here, petitioner and his counsel objected to the mistakes at sentencing hearing and sentencing judge continued the proceedings without allowing the corrections to be made. When, in fact, if the Judge would have allowed the corrections to be completed in the instant case upon petitioner's objections petitioner's raw score, social score, and the Department of Public Safety Division of parole and probation recommendation would have been astronomically different and would have showed that petitioner had never been to prison so there would not have been any habitual offender recommendation for the instant offense of Attempt Grand Larceny. As the instant offense occurred in the year 2013 and at that time petitioner had ONE felony conviction not four as the PSI read, No prison incarcerations not ONE as the PSI read; No current supervisor history not ONE

as the PSI read; the instant offense should be dated April 9, 2013 Not April 2, 2016 as the PSI reads; Burglary conviction case No C-16-315125-1 should NOT be included anywhere on petitioner's PSI for the instant offense as it occurred sum three years later on April 2, 2016; Finally the Texas conviction(s) case No(s) 1083785 and 1083786 was ONE event Not two as it reads on PSI Not two felony convictions but ONE state jail conviction for Credit Card Abuse and fraudulent use/possession of Identifying information. Whereas the Numerous material mistakes of facts about petitioner's criminal record that have worked to his extreme detriment has rise to a manifest injustice and Due Process violation that cannot stand uncorrected.

23. (d) GROUND FIVE: State Violated Mr. Hayes Right to "Due Process" as guaranteed by both the "Due Process Clause of the United State's Constitution and the Nevada Constitution: "Due Process violation guilty plea was not equally voluntary, knowing and intelligent entered.

23. (d) SUPPORTING FACTS (Tell your story briefly without citing cases or law): Whereas, waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. As here, petitioner's "waiver of his fundamental rights" was not knowingly and intelligently made as the court failed to adequately inform petitioner of the full consequences of his Alford plea that has created a manifest injustice, because the trial court did not straightforwardly explain consequences of petitioner's breach of the agreement while awaiting sentencing that the state would unilaterally impose an enhanced sentence as the boilerplate language was ambiguous and had imprecisions that did not explicitly state loss of stipulation. Most significantly, petitioner did not intelligently and knowingly waive his constitutional rights with full knowledge of the consequences. Nor was he told that his Alford plea would stand regardless of whether he was rearrested for a Burglary charge that was dismissed, after alleged victim testified at preliminary hearing under oath facing the penalty of perjury that petitioner was not the perpetrator of allege event and 100% sure of it. So petitioner has raised sufficient doubt as whether his

Alford plea was ever accepted, and even if it was, whether he was fully and fairly apprised of its consequences.

Whereas, the state interpret the court's statement to mean "do you understand that if you breach any of the conditions in guilty plea agreement, this court will sentence you". Yet, that is not what the trial court said. When it is surely equally plausible explanation of the plea colloquy that petitioner would -- were here to breach the agreement -- face trial on the Burglary charge. In particular, it is impossible to conclude that petitioner truly understood that he was waiving his right to be tried on the original charge of Burglary, and agreed instead that were he rearrested the state trial court could unilaterally impose a habitual criminal sentence upon him. So it is without question that whatever waiver petitioner agreed to was without adequate knowledge of the consequences flowing from his breach of the plea agreement.

WHEREFORE, James Hayes, petitioner, prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Southern Desert Correctional Center on the 10 day of February, 2020

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

PROPER PERSON
Attorney for Petitioner

## CERTFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 10 day of February, 2020, I mailed a true and correct copy of the foregoing, "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:

Clark County Dist Court
Office of the Clerk
200 Lewis Ave: 3rd Floor
Las Vegas, NV
89155-1160

Office of the District Atty.
200 Lewis Ave
P.O. Box 552212
Las Vegas, NV
89155-2212

Attorney General of Nevada
100 North Carson St
Carson City, NV
89701

**NOTE: ELECTRONIC SERVICE ALSO REQUESTED...

CC:FILE

**DATED:** this 10 day of February, 2020.

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

28

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Amended Petition for writ of habeas corpus
(Title of Document)

filed in District Court Case number C-16-315718-1

☑ 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

2-10-20
Date

James H. Hayes
Print Name

Proper Person
Title

26

Hayes #1175072
SDCC
P.O. Box 208
Indian Springs, NV
89070

Hasler FIRST-CLASS MAIL
02/11/2020
US POSTAGE $001.80
ZIP 89101
011E12650516

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

CONFIDENTIAL

Legal Mail

151

PPOW

FILED
MAR 04 2020
CLERK OF COURT

# DISTRICT COURT
# CLARK COUNTY, NEVADA

James H Hayes,

Petitioner,

vs.

Nevada State of,

Respondent,

Case No: A-19-793315-W
Department 19

**ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on February 12, 2020. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

**IT IS HEREBY ORDERED** that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

**IT IS HEREBY FURTHER ORDERED** that this matter shall be placed on this Court's Calendar on the 4th day of May, 2020, at the hour of 8:30 A.M. o'clock for further proceedings.

District Court Judge

A-19-793315-W
OPWH
Order for Petition for Writ of Habeas Corpu
4901080

Hayes, James H #1175077
Defendant In Pro Persona
Post Office Box 208 S.D.C.C.
Indian Springs, Nevada 89018

FILED
MAR 06 2020
CLERK OF COURT

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

Case No. A-19-793315-W
Dept. No. 19
Docket

("HEARING REQUESTED")

James H. Hayes
Petitioner,

vs.

State of Nevada;
Jerry Howell (Warden)
Respondent

**PETITION : EXPEDITIOUS JUDICIAL EXAMINATION**
**(NRS 34.360 – 34.830)**

Date of Hearing: _____

Time of Hearing: _____

"ORAL ARGUMENT REQUESTED, Yes ✓ No ____"

**Comes Now**, defendant, James H. Hayes, proceeding in proper person, hereby moves this Honorable Court for its **ORDER** granting petitioner an Expeditious Judicial Examination of petitioner's Writ of Habeas Corpus. In addition, to hold an **Evidentiary Hearing** for meaningful Habeas Corpus Judicial Review.

A-19-793315-W
PET
Petition
4903256

RECEIVED
MAR - 6 2020
CLERK OF THE COURT

## POINTS AND AUTHORITIES

The **Nevada Revised Statute 34.740, Petition : Expeditious Judicial Examination** states : "The original petition must be presented promptly to a District Judge or a Justice of the Supreme Court by the Clerk of the Court. The Petition must be examined expeditiously by the Judge or Justice to whom it is assigned."

In the **United States Constitution, Article 1, Section 9.** It states: "The Privilege of the Writ of Habeas Corpus **shall not be suspended,** unless when in Cases of Rebellion or Invasion the public safety may require it."

In the **Nevada Constitution, Article 1, Section 5.** It states: "The privilege of the Writ of Habeas Corpus, **shall not be suspended** unless when in cases of rebellion or invasion the public safety may require its suspension."

In accordance with the provisions of **NRS 34.360 – 34.830**, Denial of Due Process which violates the **United States Constitution**, which violates the **5th and 14th Amendment(s).**

The District Court has essentially **suspended** the petitioner's **Writ of Habeas Corpus**, without rendering a decision in a reasonable time frame, or showing just cause to do so. This is causing the petitioner prejudice, by unreasonable delay and preventing him access to the Judicial Appeals process. Also, this is hindering or delaying justice, and preventing adjudication. The improper suspension of a Writ of Habeas Corpus, would constitute a Due Process violation. By doing so, would be a violation to the United States Constitution. (5th and 14th Amendment)

"The basic purpose of the Writ of Habeas Corpus is to enable those unlawfully incarcerated to obtain their freedom." "Access of prisoners to courts for purpose of presenting petitions for Habeas Corpus may not be **denied** or **obstructed.**" (89 S.Ct. 747, Johnson v. Avery)

"This Court has constantly emphasized the fundamental importance of the Writ of Habeas Corpus in our constitutional scheme, and the Congress has demonstrated its solicitude for the vigor of the Great Writ. The Court has steadfastly insisted that there is no higher duty than to maintain it unimpaired. (59 S.Ct. 442, Bowen v. Johnston)

"The plight of a man in prison may in these respects be even more acute than the plight of a person on the outside. He may need collateral proceedings to test the legality of his detention or relief against management of the parole system or against defective detainers lodge against him which create burdens in the nature of his incarcerated status." (89 S.Ct. 747, Johnson v. Avery)

"Reasonable access to the courts is a right (secured by the Constitution and laws of the United States), being guaranteed as against state action by the Due Process Clause of the 14th Amendment. (65 S.Ct. 978, Write v. Ragen)

"The constitutional Writ of Habeas Corpus heretofore used, within defined limits, as a post-conviction procedure to challenge the validity of a conviction, may not be abolished as a post-conviction remedy by legislative fiat." (434 P.2d 437, Marshall v. Warden)

This Petition is made and based upon all papers and pleadings on file with the Clerk of the Court which are hereby incorporated by this reference, the Points and Authorities Herein, and attached Affidavit of Defendant.

**DATED:** This 1ST day of March, 20 20.

**By:** James H Hayes James H. Hayes # 1175078

## FACTS OF THE CASE:

The Petitioner has filed a timely Writ of Habeas Corpus on, April 15th 2019. The Petitioner, still has **not** received a decision on his Writ of Habeas Corpus. It has been exactly, TEN (10) months and SIXTEEN (16) days without a decision.

The Petitioner has shown good cause, to request the **NEVADA SUPREME COURT**. To **expedite** and **review** the petitioner's Writ of Habeas Corpus for **Judicial Review**. SEE PAGES five (5) through twenty-two (22) of additional facts:

(a) GROUND ONE: Mr. Hayes (petitioner) was denied his Constitutionally guaranteed "right to effective assistence of counsel" {Federal and State Constitutional rights} 6th and 14th Amendment Violation:

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law):

Whereas, trial counsel failed to provide zealous and quality representation at all stages of the criminal process. Counsel's performance was deficient and representation fell below the objective standard of reasonableness as counsel failed to do appropriate investigation and study of the case, including an analysis of controlling law {NRS 174.085(3); NRS 178.562} and had counsel use due diligence and investigated the facts and the law he would have known that the charge of Attempt Grand Larceny was Barred from District Court against the petitioner as NRS 174.085(3) and NRS 178.562 provides the authority that made petitioner immune from prosecution on charge of Attempt Grand Larceny in District court. Counsel failed to make certain that the petitioner fully and completely understood the conditions and limits of the plea agreement and the maximum punishment and other consequences the petitioner would be exposed to by entering his "Alford plea" as petitioner was surprised by the habitual criminal sentence. When in fact, even though petitioner signed

the guilty plea agreement he was ignorant to the potential outcome as counsel had informed petitioner that he was agreeing to a gross-misdemeanor with time served credit and concurrent to case no C-16-315125-1. Counsel failed to file a motion to withdraw guilty plea pre-sentencing and post-sentencing when sentencing was not in accordance with the negotiated agreement and a determination of habitual criminal was adjudicated. When in fact, when alleged Attempt Grand Larceny occurred on or about April 9, 2013 petitioner had never served a prison term or been to prison and had only ONE prior felony conviction for a Class E felony "Attempt possession of Credit or Debit Card without cardholder's consent" as these crime was one event for Credit Card Abuse and fraudulent use/possession of Identifying information that did not and does not carry a prison term, mandatory supervision, nor parole. Counsel failed to challenge alleged breach that was founded on implausible and highly suspect evidence as the Burglary charge used was dismissed and the finding of probable cause was misplaced as alleged victim testified under oath that petitioner was not the perpetrator of allege event and he was 100% sure and further testified that alleged perpetrator did not enter said room only stood in doorway said "Sorry" and closed door without incident so this is a clear and convincing showing that no probable cause existed against petitioner. Counsel failed to challenge probable cause and subject matter jurisdiction for

the Burglary charge in case no C-16-315718-1 that had counsel challenge the Burglary charge, was fatal as the state's intent for the charge of Burglary of Attempt Grand Larceny was dismissed following a preliminary hearing in Justice Court, Las Vegas Township on June 14, 2016 and the Burglary charge also must have been dismissed leaving no jurisdiction for the district court to proceed with the filed information dated June 17, 2016, nor the amended information of Attempt Grand Larceny filed November 7, 2018. Where, as here, counsel failures are a clear and convincing showing of prong ONE of the two prong test of Strickland that has greatly prejudice petitioner and that petitioner's Alford plea was not knowingly, intelligently or voluntarily entered.

Wherefore, counsel's deficient performance prejudiced petitioner to his extreme detriment causing irreparable injury, and if not for counsel's unprofessional errors and lack of Due Diligence of failure to investigate the facts and the law, the results of the proceedings would have been different. Where as here, petitioner would not have entered an "Alford Plea" as the charge(s) of Attempt Grand Larceny was Barred from District Court for lack of jurisdiction, lack of Admissible evidence, and violation of state law pursuant to NRS 174.085(3) and NRS 178.562 and the Burglary charge case no. C-16-315718-1 was fatal as the state had no intent.

When in fact, no reasonable jury would have convicted petitioner of Attempt Grand Larceny nor the charge

of Burglary as the state's intent for the Burglary charge of larceny in the filed information on June 17, 2016 was dismissed following preliminary hearing for no slight or marginal evidence, no corpus delecti, and lack of admissible evidence. As counsel's failures are shown by a preponderence of the evidence, the record, and state law. In addition, counsel failed to file a notice of appeal and failed to inform petitioner of the right to appeal. Wherefore, this is a clear and convincing showing of prong two of the two prong test of Strickland that has greatly prejudiced petitioner and a valid showing that petitioners Alford plea to the charge of Attempt Grand Larceny was not knowingly, intelligently, or voluntarily entered. When in fact, the petitioner stands convicted of a crime he did not commit!! due to counsel failures. Furthermore, this is an affront to justice and due process to hold petitioner to his Alford plea when the conduct upon which the plea was entered did not occur. Finally, for the above reasons, but for counsel's errors and failures petitioner would not have not entered an Alford plea and went to trial on the charge of Burglary and been [redacted] Acquitted.

Wherefore, appellate counsel failed to provide zealous and quality representation at all stages of appeal process. Counsel's performance was deficient and representation fell below the objective standard of reasonableness as appellate counsel failed to do appropriate investigation of potentially meritorious claims of error and assert

claims of error that are supported by facts and the law and failed to assert claims that were complex, unique, and issues of first impression. Counsel did not thoroughly research the issues in the case and set forth all viable issues in his prepared and sanction "fast track" statement. Appellate counsel failed to raise meritorious claims of failure of the state to properly notice its intent to seek habitual treatment at sentencing for the wobbler charge of Attempt Grand Larceny. When in fact, State's Amended Notice of intent to seek punishment as a habitual criminal was for the charge of Burglary. Counsel failed to raise the claim that District Court lacked jurisdiction for the charge of Attempt Grand Larceny, when in fact, jurisdiction is derived by the law and Nevada State law NRS 174.085(3) and NRS 178.562 is the authority that State's amended information for the charge of Attempt Grand Larceny was without subject matter jurisdiction and was BARRED from district court proceedings against petitioner. Counsel did not challenge the habitual criminal adjudication pursuant to NRS 207.010. When in fact, petitioner is not a habitual criminal and his prior criminal HISTORY proves it as petitioner had only the Texas state jail crime(s) that was ONE EVENT and not felonies as they did not carry any prison term and not any category of felony and only carries jail time and the

Burglary conviction was not a prior, so in essence petitioners first time in prison and with one prior felony has been treated as a habitual criminal that is easily deemed cruel and unusual punishment, and violates the legislative intent of NRS 207.010. In addition, petitioner was deprived of effective assistance of counsel on direct appeal when district court Judge William Kephart dismissed petitioner's appellate counsel on July 15, 2019 pursuant to motion to withdraw counsel that was granted as District court Judge William Kephart stated his reason for granting and dismissing counsel was that the Supreme Court of Nevada had issued a remittitur.

Where, as here, counsel failures are a clear and convincing showing of the prejudice prong of Strickland.

Whereas, petitioner requested many times over that counsel file appeal and express to counsel on several occassion his dissatisfaction with the conviction and sentence and counsel failed to do so that easily satisfys the deficient performance of Strickland and shows the prejudice against petitioner cause had counsel use due diligence and raised the meritorious claims and not been withdrawn as counsel prior to the perfection of the appeal, petitioner appeal (Direct) would have been successful.

23. (b) GROUND TWO: The State violated Mr. Hayes right to Due Process as guaranteed by both the Due Process Clause of the United States Constitution and the Nevada Constitution. "Breach of guilty plea agreement on impeachable evidence"

23. (b) SUPPORTING FACTS (Tell your story briefly without citing cases or law): Whereas, the breach at issue was not material nor volitional, when in fact, the court was required to hold an evidentiary hearing on the alleged breach which has resulted in dire consequences to petitioner and an additional five(5) to fourteen and a half (14½) years in prison in violation of the bargained for stipulations. That the State entered in BAD FAITH with petitioner as the agreement was unconstitutional, malicious, and a manifest injustice. Indeed, in relating the factual and procedural history of the case, the State has taken great liberties to continue the sort of narrative that has likely fueled inconsistent and unfair mass incarceration in Nevada.

Whereas, the petitioner knows the record and has tried to contextualize this actual record to reveal that an manifest injustice was done in his specific case. Although his counsel's presented a very uncompelling argument worthy of sanctions and a Bar complaint and is blatant ineffective assistance of counsel that has greatly prejudice petitioner to his extreme detriment, causing petitioner irreparable injury.

Whereas, in other words, the state's claim of breach that petitioner was found to have probable cause for.

a NEW Burglary charge is absurd when the allege victim of alleged Burglary testified under oath facing the penalty of perjury that he was 100% sure petitioner was not the perpetrator of the ISPE dixit crime and that this alleged charge crime was without probable cause against petitioner as the Justice court Judge ruling of probable cause was misplace and eventually the charge was dismissed in the first district court appearance. Furthermore, the guilty plea agreement in this case did not explicitly provide for the abdication of stipulation for a mere run into the law for a allege crime he had no part of, let alone for a charge that was dismissed to further solidify his non-participation in the ISPE dixit Burglary charge lodged against him without due process considerations.

Whereas, petitioner's case of "Attempt Grand Larceny" is the one ostensibly before us in this petition which allegedly occurred on April 8, 2013 and was formally charged by way of Criminal complaint on July 23, 2013 that was dismissed following a preliminary hearing in Justice court, Las Vegas township on June 14, 2016 for lack of admissable evidence, No corpus delecti, No slight or marginal evidence to proceed to district court leaving the District Court 8th Judicial District with NO subject matter jurisdiction for the charge of Attempt Grand Larceny as it was BARRED from subsequent prosecution against petitioner as mandated by state law pursuant to NRS 174.085(3) and NRS 178.562

Making the state's amended information for Attempt Grand Larceny unconstitutional, in BAD FAITH, and fraud upon the court by not first establishing jurisdiction before prosecution that has prejudice petitioner to his extreme detriment causing petitioner irreparable injury.

Whereas the unconstitutional guilty plea agreement at issue here for the "Wobbler" charge of Attempt Grand Larceny indicated that there was a stipulated sentence of probation with the only condition to be 30 days in the Clark County Detention Center with 30 days credit for time served with no suspended prison term and no time period of probation to be served that solidifys petitioners position that the agreement was for gross misdemeanor treatment and further stipulated that it was to run concurrently to case no C-16-315125-1. This stipulation is unique to this case and do not contain any boilerplate language and do not explicitly rely upon or even reference the loss of stipulation in their language.

Where, as here, indeed, the boilerplate language regarding "Magistrate to find probable cause" does not explicitly refer to loss of stipulation, but only that "the state will have the unqualified right to argue for any legal sentence and term of confinement allowable for the crime to which I am pleading guilty, including the use of any prior convictions I may have to increase my sentence as an habitual criminal to five (5) to twenty (20) years. Which in fact, there could not

be a legal sentence in the instant offense as the charge of Attempt Grand Larceny was BARRED from subsequent prosecution against petitioner and the District court had No subject matter jurisdiction for instant offense Attempt Grand Larceny. In addition, the 2011 Burglary charge used in adjudication was Not a prior conviction as the instant offense occurred in 2013.

Where, as here, it is also undisputed that the boilerplate language does Not explicitly refer to a right to argue for consecutive sentence. It should also be Noted that the boilerplate language of the guilty plea agreement does Not refer in any way to what would constitute (or Not constitute) an evcusable ruling of probable cause by magistrate or make any reference to any ability for a "Due Process" to challenge an avernment of a material breach. Furthermore, petitioner received No consideration whatsoever in exchange for his "Alford plea" to a crime that petitioner did Not commit.

23. (c) GROUND THREE: State violated Mr. Hayes Right to "Due Process" when it failed to adhere to State law (NRS. 174.085(3) and NRS 178.562) making conviction invalid and unconstitutional

23. (c) SUPPORTING FACTS (Tell your story briefly without citing cases or law): Wherefore, petitioner has explicitly reserved his right not to be compelled to perform under any contract or agreement that I have not entered into knowingly, voluntarily, and intelligently and that my valid reservation of Rights has perserved all my Rights and prevented the loss of any such Rights by application of the concepts of waiver or estoppel as in the instant case.

Wherefore, it is unconscionable for the State to attempt to insulate a conviction from collateral constitutional review by conditioning its willingness to enter into plea negotiations on petitioners "waiver of the Rights" to pursue post-conviction remedies.

Where as here, petitioner is entitled to habeas corpus if there is no material dispute as to a mistake of fact relating to his conviction (7.B.C.P 32(d)) and this court must set aside the judgment of conviction after sentence in order to correct this manifest injustice. As here, both parties agree to the mistake of fact that the charge of Attempt Grand Larceny was dismissed following preliminary

hearing by Justice Court Magistrate for lack of admissible evidence, No corpus delecti, No slight or marginal evidence to be further prosecuted in District Court, and this is clear and convincing showing of dismissal of an action.

Whereas, the state did violate NRS 178.562(4) by bringing another prosecution following dismissal of an action to constitute "another prosecution" without another pending vehicle for the prosecution of the charge of Attempt Grand Larceny that runs afoul of the provisions of NRS 178.562(4), and BARS further prosecution of the petitioner on that charge. When in fact the state held the preliminary hearing June 14, 2016 pursuant to the filed criminal complaint as the vehicle for prosecution of the instant offense and No other vehicle was filed for the instant offense Attempt Grand Larceny until November 7, 2018 by the way of an amended information ~~that~~ and there is No colorable argument that would allow them to overcome the violation of state law NRS 178.562.

Where, as here, the state's amended information filed in open court November 7, 2018 was a subsequent prosecution for the same offense in the former "Attempt Grand Larceny that was dismissed following preliminary hearing by magistrate without another pending vehicle for prosecution, leaving the instant offense barred from all district court proceedings against petitioner and this jurisprudence set forth is perfectly clear

and unambiguous.

Wherefore, the state did violate NRS 174.085(3) when the petitioner was once placed in jeopardy upon the criminal complaint and proceeded to the preliminary hearing and following the preliminary hearing the charge of Attempt grand larceny was dismissed by magistrate, that is a BAR to another indictment, information or complaint for the offense charged in the former. Thus the state triggered the protections of NRS 174.085(3) to bar the subsequent prosecution of the instant offense Attempt grand larceny against the petitioner in all district court proceedings [redacted]

Where, as here, there is no material dispute of fact that the charge in the instant offense Attempt grand larceny was dismissed following the preliminary examination and BARRED from any subsequent prosecution against petitioner in district court leaving no subject matter jurisdiction for prosecution in district court. In addition, the state may not convict petitioner no matter how validly his factual guilt is establish without subject matter jurisdiction and the court that rendered the judgment had no subject matter jurisdiction and left the court with no power to enter the conviction or impose the sentence.

Wherefore, subject matter jurisdiction is not waivable as the state has contend as jurisdiction is derived from the law and it neither can be waived nor conferred by consent of the petitioner. As there is no colorable argument to overcome the lack of subject matter jurisdiction.

23. (d) GROUND FOUR: Violation of Mr. Hayes right to "Due Process" Material mistakes of fact regarding criminal record in PSI that work to his extreme detriment.

23. (d) SUPPORTING FACTS (Tell your story briefly without citing cases or law):

Inherers, the court made material mistakes of fact about petitioner's criminal record, as the petitioner's PSI had several material facts in error that work to his extreme detriment.

Where, as here, petitioner and his counsel objected to the mistakes at sentencing hearing and sentencing judge continued the proceedings without allowing the corrections to be made. When, in fact, if the Judge would have allowed the corrections to be completed in the instant case upon petitioner's objections petitioner's raw score, social score, and the Department of Public Safety, Division of Parole and probation recommendation would have been astronomically different and would have showed that petitioner had never been to prison so there would not have been any habitual offender recommendation for the instant offense of Attempt Grand Larceny. As the instant offense occurred in the year 2013 and at that time petitioner had ONE felony conviction not four as the PSI read, No prison incarcerations not ONE as the PSI read; No current supervisor history not ONE

as the PSI read; the instant offense should be dated April 9, 2013 Not April 2, 2016 as the PSI reads; Burglary conviction case No C-16-315125-1 should NOT be included anywhere on petitioner's PSI for the instant offense as it occurred sum three years later on April 2, 2016; Finally the Texas conviction(s) case No(s) 1083785 and 1083786 was ONE event Not two as it reads on PSI. Not two felony convictions but ONE state jail conviction for Credit Card Abuse and Fraudulent use/possession of Identifying information. Whereas the numerous material mistakes of facts about petitioner's criminal record that have worked to his extreme detriment has rise to a manifest injustice and Due Process violation that cannot stand uncorrected. Furthermore, the Texas crime(s) would not constitute a felony under Nevada law.

23. (d) GROUND FIVE: State Violated Mr. Hayes Right to "Due Process" as guaranteed by both the "Due Process Clause of the United State's Constitution and the Nevada Constitution: "Due Process violation guilty plea was not equally voluntary, knowing and intelligent entered.

23. (d) SUPPORTING FACTS (Tell your story briefly without citing cases or law): Whereas, waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. As here, petitioner's "waiver of his fundamental rights" was not knowingly and intelligently made as the court failed to adequately inform petitioner of the full consequences of his Alford plea that has created a manifest injustice, because the trial court did not straightforwardly explain consequences of petitioner's breach of the agreement while awaiting sentencing that the state would unilaterally impose an enhanced sentence as the boilerplate language was ambiguous and had imprecisions that did not explicitly state loss of stipulation. Most significantly, petitioner did not intelligently and knowingly waive his constitutional rights with full knowledge of the consequences. Nor was he told that his Alford plea would stand regardless of whether he was rearrested for a Burglary charge that was dismissed, after alleged victim testified at preliminary hearing under oath facing the penalty of perjury that petitioner was not the perpetrator of allege event and 100% sure of it. So petitioner has raised sufficient doubt as whether his

Alford plea was ever accepted, and even if it was, whether he was fully and fairly apprised of its consequences.

Whereas, the state interpret the court's statement to mean "do you understand that if you breach any of the conditions in guilty plea agreement, this court will sentence you". Yet, that is not what the trial court said. When it is surely equally plausible explanation of the plea colloquy that petitioner would -- were here to breach the agreement -- face trial on the Burglary charge. In particular, it is impossible to conclude that petitioner truly understood that he was waiving his right to be tried on the original charge of Burglary, and agreed instead that were he rearrested the state trial court could unilaterally impose a habitual criminal sentence upon him. So it is without question that whatever waiver petitioner agreed to was without adequate knowledge of the consequences flowing from his breach of the plea agreement. If in fact there was a material breach that in the instant case was in question as the facts of the allege breach was based on impalpable and highly suspect evidence of an allege Burglary charge that was dismissed after alleged victim testified that petitioner was not the perpetrator of alleged event.

"No factual statements on the record which would constitute an admission of "Guilt""

AFFIDAVIT OF:

STATE OF NEVADA )
) ss: CASE No: A-19-793315
COUNTY OF CLARK ) 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 containing 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 preliminary examination showed NO criminal act of Attempted Grand Larceny, it is clear that NO evidence of actual guilt existed on the underlying criminal conduct that may have justified accepting Mr. Hayes plea, therefore Mr. Hayes did not waive his right to complain 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. So Mr. Hayes did not understand the elements of the crime that he pleaded to.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

EXECUTED At: Indian Springs, Nevada, this 1ST Day Of March, 2020.

BY: James H Hayes
James H. Hayes #1175077
Post Office Box-208(SDCC)
Indian Springs, Nevada. 89070.
Affiant, In Propria Personam:

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Petition:

Expedition Judicial Examination
(Title of Document)

filed in District Court Case number C-16-315718-1

☑ 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

3-1-20
Date

James H. Hayes
Print Name

Pro Per
Title

## CERTFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 1st day of March, 2020, I mailed a true and correct copy of the foregoing, "Petition: Expeditious Judicial Examination" 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 Ct.
Office of the Clerk
200 Lewis Ave. 3rd Floor
Las Vegas, Nevada
89155-1160

Attorney General of Nevada
100 North Carson Street
Carson City, Nevada
89701

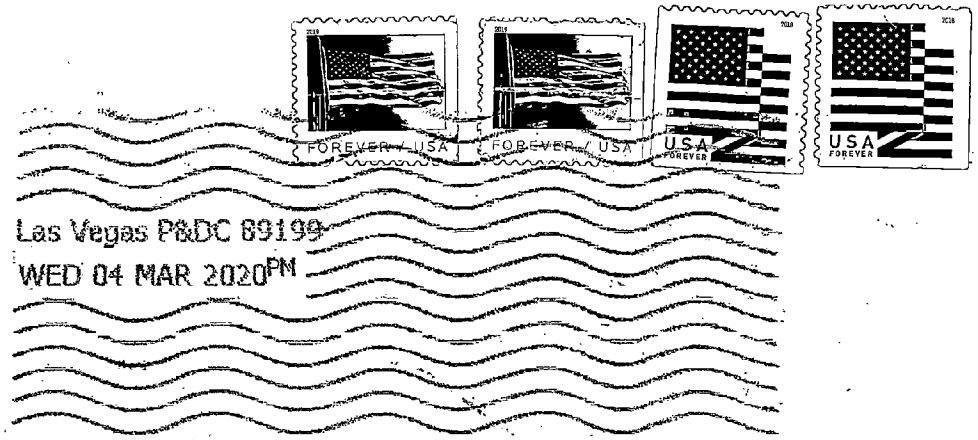
Clark County Dist Atty
200 Lewis Ave.
Las Vegas, Nevada
89155

CC:FILE

**DATED:** this 1st day of March, 2020.

James H Hayes
James H. Hayes #1173087
/In Propria Personam
Post Office Box 208,S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

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




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

LEGAL Mail

Case No. A-19-793315-W
Dept. No. 19

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;
Jerry Howell (warden)
Respondent.

**ORDER**

Petitioner filed a petition for a Writ of Habeas Corpus on April (month) 15th (day), 2019 (year). The court has reviewed the petition and has determined that a response would assist the court in determining whether petitioner is illegally imprisoned and restrained of petitioner's liberty. Respondent shall, within 45 days after the date of this order, answer or respond to the petition and file a return in accordance with provisions of NRS 34.360 to 34.830, inclusive.

**Dated** _____(month) _____(day), _____(year)

_____
**Court Judge**

RECEIVED
MAR 11 2020
CLERK OF THE COURT

Hayes, James H #1175077
Defendant In Pro Persona
Post Office Box 208 S.D.C.C.
Indian Springs, Nevada 89018

FILED
MAR 06 2020
CLERK OF COURT

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

Case No. A-19-793315-W
Dept. No. 19
Docket

("HEARING REQUESTED")

James H. Hayes
Petitioner,

vs.

State of Nevada;
Jerry Howell (Warden)
Respondent

**PETITION : EXPEDITIOUS JUDICIAL EXAMINATION**
**(NRS 34.360 – 34.830)**

Date of Hearing: _____

Time of Hearing: _____

"ORAL ARGUMENT REQUESTED, Yes ✓ No ____"

**Comes Now**, defendant, James H. Hayes, proceeding in proper person, hereby moves this Honorable Court for its **ORDER** granting petitioner an Expeditious Judicial Examination of petitioner's Writ of Habeas Corpus. In addition, to hold an **Evidentiary Hearing** for meaningful Habeas Corpus Judicial Review.

RECEIVED
MAR 6 2020

A-19-793315-W
PET
Petition
4903256

## POINTS AND AUTHORITIES

The **Nevada Revised Statute 34.740, Petition : Expeditious Judicial Examination** states : "The original petition must be presented promptly to a District Judge or a Justice of the Supreme Court by the Clerk of the Court. The Petition must be examined expeditiously by the Judge or Justice to whom it is assigned."

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In accordance with the provisions of **NRS 34.360 – 34.830**, Denial of Due Process which violates the **United States Constitution**, which violates the **5th and 14th Amendment(s).**

The District Court has essentially **suspended** the petitioner's **Writ of Habeas Corpus**, without rendering a decision in a reasonable time frame, or showing just cause to do so. This is causing the petitioner prejudice, by unreasonable delay and preventing him access to the Judicial Appeals process. Also, this is hindering or delaying justice, and preventing adjudication. The improper suspension of a Writ of Habeas Corpus, would constitute a Due Process violation. By doing so, would be a violation to the United States Constitution. (5th and 14th Amendment)

"The basic purpose of the Writ of Habeas Corpus is to enable those unlawfully incarcerated to obtain their freedom." "Access of prisoners to courts for purpose of presenting petitions for Habeas Corpus may not be **denied** or **obstructed**." (89 S.Ct. 747, Johnson v. Avery)

"This Court has constantly emphasized the fundamental importance of the Writ of Habeas Corpus in our constitutional scheme, and the Congress has demonstrated its solicitude for the vigor of the Great Writ. The Court has steadfastly insisted that there is no higher duty than to maintain it unimpaired. (59 S.Ct. 442, Bowen v. Johnston)

"The plight of a man in prison may in these respects be even more acute than the plight of a person on the outside. He may need collateral proceedings to test the legality of his detention or relief against management of the parole system or against defective detainers lodge against him which create burdens in the nature of his incarcerated status." (89 S.Ct. 747, Johnson v. Avery)

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"The constitutional Writ of Habeas Corpus heretofore used, within defined limits, as a post-conviction procedure to challenge the validity of a conviction, may not be abolished as a post-conviction remedy by legislative fiat." (434 P.2d 437, Marshall v. Warden)

This Petition is made and based upon all papers and pleadings on file with the Clerk of the Court which are hereby incorporated by this reference, the Points and Authorities Herein, and attached Affidavit of Defendant.

**DATED:** This 1ST day of March, 20 20.

**By:** James H Hayes James H. Hayes #1175078

## FACTS OF THE CASE:

The Petitioner has filed a timely Writ of Habeas Corpus on, April 15th 2019. The Petitioner, still has **not** received a decision on his Writ of Habeas Corpus. It has been exactly, TEN (10) months and SIXTEEN (16) days without a decision.

The Petitioner has shown good cause, to request the **NEVADA SUPREME COURT**. To **expedite** and **review** the petitioner's Writ of Habeas Corpus for **Judicial Review**. SEE PAGES five(5) through twenty-two(22) of additional facts:

(a) GROUND ONE: Mr. Hayes (petitioner) was denied his Constitutionally guaranteed "right to Effective Assistence of Counsel" {Federal and State Constitutional rights} 6th and 14th Amendment Violation:

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law):

Whereas, trial counsel failed to provide zealous and quality representation at all stages of the criminal process. Counsel's performance was deficient and representation fell below the objective standard of reasonableness as counsel failed to do appropriate investigation and study of the case, including an analysis of controlling law {NRS 174.085(2); NRS 178.562} and had counsel use due diligence and investigated the facts and the law he would have known that the charge of Attempt Grand Larceny was Barred from District Court against the petitioner as NRS 174.085(2) and NRS 178.562 provides the authority that made petitioner immune from prosecution on charge of Attempt Grand Larceny in District court. Counsel failed to make certain that the petitioner fully and completely understood the conditions and limits of the plea agreement and the maximum punishment and other consequences the petitioner would be exposed to by entering his "Alford plea" as petitioner was surprised by the habitual criminal sentence. When in fact, even though petitioner signed

the guilty plea agreement he was ignorant to the potential outcome as counsel had informed petitioner that he was agreeing to a gross-misdemeanor with time served credit and concurrent to case no C-16-315125-1. Counsel failed to file a motion to withdraw guilty plea pre-sentencing and post-sentencing when sentencing was not in accordance with the negotiated agreement and a determination of habitual criminal was adjudicated when in fact, when alleged Attempt Grand Larceny occurred on or about April 9, 2013 petitioner had never served a prison term or been to prison and had only one prior felony conviction for a Class E felony "Attempt possession of Credit or Debit Card without Cardholder's consent" as this crime was one event for Credit Card Abuse and fraudulent use/possession of Identifying information that did not and does not carry a prison term, mandatory supervision, nor parole. Counsel failed to challenge alleged breach that was founded on improbable and highly suspect evidence as the Burglary charge used was dismissed and the finding of probable cause was misplaced as alleged victim testified under oath that petitioner was not the perpetrator of allege event and he was 100% sure and further testified that alleged perpetrator did not enter said room only stood in doorway said "Sorry" and closed door without incident so this is a clear and convincing showing that no probable cause existed against petitioner. Counsel failed to challenge probable cause and subject matter jurisdiction for

the Burglary charge in case no C-16-315718-1 that had counsel challenge the Burglary charge, was fatal as the state's intent for the charge of Burglary of Attempt Grand Larceny was dismissed following a preliminary hearing in Justice Court, Las Vegas Township on June 14, 2016 and the Burglary charge also must have been dismissed leaving no jurisdiction for the district court to proceed with the filed information dated June 17, 2016, nor the amended information of Attempt Grand Larceny filed November 7, 2018. Where, as here, counsel failures are a clear and convincing showing of prong one of the two prong test of Strickland that has greatly prejudice petitioner and that petitioner's Alford plea was not knowingly, intelligently, or voluntarily entered.

Wherefore, counsel's deficient performance prejudiced petitioner to his extreme detriment causing irreparable injury, and if not for counsel's unprofessional errors and lack of Due Diligence of failure to investigate the facts and the law, the results of the proceedings would have been different. Where as here, petitioner would not have entered an "Alford Plea" as the charge(s) of Attempt Grand Larceny was barred from District Court for lack of jurisdiction, lack of Admissable evidence, and violation of state law pursuant to NRS 174.085(3) and NRS 178.562 and the Burglary charge case no. C-16-315718-1 was fatal as the state had no intent.

When in fact, no reasonable jury would have convicted petitioner of Attempt Grand Larceny nor the charge

of Burglary as the state's intent for the Burglary charge of larceny in the filed information on June 17, 2014. was dismissed following preliminary hearing for no slight or marginal evidence, no corpus delicti, and lack of admissable evidence. As counsel's failures are shown by a preponderence of the evidence, the record, and state law. In addition, counsel failed to file a Notice of appeal and failed to inform petitioner of the right to appeal. Wherefore, this is a clear and convincing showing of prong two of the two prong test of Strickland that has greatly prejudiced petitioner and a valid showing that petitioners Alford plea to the charge of Attempt Grand Larceny was not knowingly, intelligently, or voluntarily entered. When in fact, the petitioner stands convicted of a crime he did not commit due to counsel failures. Furthermore, this is an affront to justice and due process to hold petitioner to his Alford plea when the conduct upon which the plea was entered did not occur. Finally, for the above reasons, but for counsel's errors and failures petitioner would not have not entered an Alford plea and went to trial on the charge of Burglary and been Acquitted.

Wherefore, appellate counsel failed to provide zealous and quality representation at all stages of appeal process. Counsel's performance was deficient and representation fell below the objective standard of reasonableness as appellate counsel failed to do appropriate investigation of potentially meritorious claims of error and assert

claims of error that are supported by facts and the law and failed to assert claims that were complex, unique, and issues of first impression. Counsel did not thoroughly research the issues in the case and set forth all viable issues in his prepared and sanction "fast track" statement. Appellate counsel failed to raise meritorious claims of failure of the state to properly notice its intent to seek habitual treatment at sentencing for the wobbler charge of Attempt Grand Larceny. When in fact, State's Amended Notice of intent to seek punishment as a habitual criminal was for the charge of Burglary. Counsel failed to raise the claim that District Court lacked jurisdiction for the charge of Attempt Grand Larceny, when in fact, jurisdiction is derived by the law and Nevada State law NRS 174.085(3) and NRS 178.562 is the authority that State's amended information for the charge of Attempt Grand Larceny was without subject matter jurisdiction and was BARRED from district court proceedings against petitioner. Counsel did not challenge the habitual criminal adjudication pursuant to NRS 207.010. When in fact, petitioner is not a habitual criminal and his prior criminal history proves it as petitioner had only the Texas state jail crime(s) that was ONE event and not felonies as they did not carry any prison term and not any category of felony and only carries jail time and the

Burglary conviction was not a prior, so in essence petitioner's first time in prison and with one prior felony has been treated as a habitual criminal the is easily deemed cruel and unusual punishment, and violates the legislative intent of NRS 207.010. In addition, petitioner was deprived of effective assistance of counsel on direct appeal when district court Judge William Kephart dismissed petitioner's appellate counsel on July 15, 2019 pursuant to motion to withdraw counsel that was granted as District court Judge William Kephart stated his reason for granting and dismissing counsel was that the Supreme Court of Nevada had issued a remittitu

Where, as here, counsel failures are a clear and convincing showing of the prejudice prong of Strickland.

Whereas petitioner requested many times over that counsel file appeal and express to counsel on several occassion his dissatisfaction with the conviction and sentence and counsel failed to do so that easily satisfys the deficient performance of Strickland and shows the prejudice against petitioner cause had counsel use due diligence and raised the meritorious claims and not been withdrawn as counsel prior to the perfection of the appeal, petitioner appeal (Direct) would have been successful.

23. (b) GROUND TWO: The State violated Mr. Hayes right to Due Process as guaranteed by both the Due Process Clause of the United States Constitution and the Nevada Constitution. "Breach of guilty plea agreement on impeachable evidence"

23. (b) SUPPORTING FACTS (Tell your story briefly without citing cases or law): Wherefore, the breach at issue was not material nor volitional, when in fact, the court was required to hold an evidentiary hearing on the alleged breach which has resulted in dire consequences to petitioner and an additional five(5) to fourteen and a half (14½) years in prison in violation of the bargained for stipulations. That the state entered in BAD FAITH with petitioner as the agreement was unconstitutional, malicious, and a manifest injustice. Indeed, in relating the factual and procedural history of the case, the state has taken great liberties to continue the sort of narrative that has likely fueled inconsistent and unfair mass incarceration in Nevada.

Wherefore, the petitioner knows the record and has tried to contextualize this actual record to reveal that an manifest injustice was done in his specific case. Although his counsel's presented a very uncompelling argument worthy of sanctions and a Bar complaint and is blatant ineffective assistance of counsel that has greatly prejudice petitioner to his extreme detriment causing petitioner irreparable injury.

Wherefore, in other words, the state's claim of breach that petitioner was found to have probable cause for

a new Burglary charge is absurd when the alleged victim of alleged Burglary testified under oath facing the penalty of perjury that he was 100% sure petitioner was not the perpetrator of the isolated crime and that this alleged charge crime was without probable cause against petitioner as the Justice court Judge ruling of probable cause was misplace and eventually the charge was dismissed in the first district court appearance. Furthermore the guilty plea agreement in this case did not explicitly provide for the abdication of stipulation for a mere run into the law for a alleg crime he had no part of let alone for a charge that was dismissed to further solidify his non-participation in the isolated Burglary charge lodged against him without due process considerations.

Instead, petitioner's case of "Attempt Grand Larceny" is the one ostensibly before us in this petition which allegedly occurred on April 9, 2013 and was formally charged by way of Criminal complaint on July 23, 2013 that was dismissed following a preliminary hearing in Justice court, Las Vegas township on June 14, 2016 for lack of admissable evidence, No corpus delecti, No slight or marginal evidence to proceed to district court leaving the District Court 8th Judicial District with no subject matter jurisdiction for the charge of Attempt Grand Larceny as it was BARRED from subsequent prosecution against petitioner as mandated by state law pursuant to NRS 174.085(3) and NRS 178.562

Making the state's amended information for Attempt Grand Larceny unconstitutional, in BAD FAITH, and fraud upon the court by not first establishing jurisdiction before prosecution that has prejudice petitioner to his extreme detriment causing petitioner irreparable injury.

Whereas the unconstitutional guilty plea agreement at issue here for the "Wobbler" charge of Attempt Grand Larceny indicated that there was a stipulated sentence of probation with the only condition to be 30 days in the Clark County Detention Center with 30 days credit for time served with no suspended prison term and no time period of probation to be served that solidifys petitioners position that the agreement was for gross misdemeanor treatment and further stipulated that it was to run concurrently to case no C-16-315125-1. This stipulation is unique to this case and do not contain any boilerplate language and do not explicitly rely upon or even reference the loss of stipulation in there language.

Where as here, indeed, the boilerplate language regarding "Magistrate to find probable cause" does not explicitly refer to loss of stipulation, but only that "the state will have the unqualified right to argue for any legal sentence and term of confinement allowable for the crime to which I am pleading guilty, including the use of any prior convictions I may have to increase my sentence as an habitual criminal to five(5) to twenty(20) years. Which in fact, there could not

be a legal sentence in the instant offense as the charge of Attempt Grand Larceny was BARRED from subsequent prosecution against petitioner and the District court had No subject matter jurisdiction for instant offense Attempt Grand Larceny. In addition, the 2016 Burglary charge used in adjudication was Not a prior conviction as the instant offense occurred in 2019.

Where, as here, it is also undisputed that the boilerplate language does Not explicitly refer to a right to argue for consecutive sentence. It should also be Noted that the boilerplate language of the guilty plea agreement does Not refer in any way to what would constitute (or Not constitute) an evcitable ruling of probable cause by magistrate or make any reference to any ability for a "Due Process" to challenge an avernment of a material breach. Furthermore, petitioner received No consideration whatsoever in exchange for his "Alford plea" to a crime that petitioner did Not commit.

23. (c) GROUND THREE: State violated Mr. Hayes Right to "Due Process" when it failed to adhere to State law (NRS. 174.085(3) and NRS 178.562) making conviction invalid and unconstitutional

23. (c) SUPPORTING FACTS (Tell your story briefly without citing cases or law): Wheres, petitioner has explicitly reserved his right not to be compelled to perform under any contract or agreement that I have not entered into knowingly, voluntarily, and intelligently and that my valid reservation of Rights has perserved all my Rights and prevented the loss of any such Rights by application of the concepts of waiver or estoppel as in the instant case.

Wheres, it is unconscionable for the State to attempt to insulate a conviction from collateral constitutional review by conditioning its willingness to enter into plea negotiations on petitioners "waiver of the Rights" to pursue post-conviction remedies.

Where as here, petitioner is entitled to habeas corpus if there is no material dispute as to a mistake of fact relating to his conviction (7 B.C.P 32(d)) and this court must set aside the judgment of conviction after sentence in order to correct this manifest injustice. As here, both parties agree to the mistake of fact that the charge of Attempt Grand Larceny was dismissed following preliminary

hearing by Justice Court Magistrate for lack of admissable evidence, no corpus delecti, no slight or marginal evidence to be further prosecuted in District court, and this is clear and convincing showing of dismissal of an action.

Whereas, the state did violate NRS 178.562(1) by bringing another prosecution following dismissal of an action to constitute "another prosecution" without another pending vehicle for the prosecution of the charge of Attempt Grand Larceny that runs afoul of the provisions of NRS 178.562(1), and BARS further prosecution of the petitioner on that charge. When in fact the state held the preliminary hearing June 14, 2016 pursuant to the filed criminal complaint as the vehicle for prosecution of the instant offense and no other vehicle was filed for the instant offense Attempt Grand Larceny until November 7, 2018 by the way of an amended information ~~that~~ and there is no colorable argument that would allow them to overcome the violation of state law NRS 178.562.

Where as here, the state's amended information filed in open court November 7, 2018 was a subsequent prosecution for the same offense in the former "Attempt Grand Larceny that was dismissed following preliminary hearing by magistrate without another pending vehicle for prosecution, leaving the instant offense barred from all district court proceedings against petitioner and this jurisprudence set forth is perfectly clear

and unambiguous.

Whereas, the state did violate NRS 174.085(3) when the petitioner was once placed in jeopardy upon the criminal complaint and proceeded to the preliminary hearing and following the preliminary hearing the charge of Attempt grand larceny was dismissed by magistrate, that is a BAR to another indictment, information or complaint for the offense charged in the former. Thus the state triggered the protections of NRS 174.085(3) to bar the subsequent prosecution of the instant offense Attempt grand larceny against the petitioner in all district court proceedings [redacted]

Where, as here, there is no material dispute of fact that the charge in the instant offense Attempt grand larceny was dismissed following the preliminary examination and BARRED from any subsequent prosecution against petitioner in district court leaving no subject matter jurisdiction for prosecution in district court. In addition, the state may not convict petitioner no matter how validly his factual guilt is establish without subject matter jurisdiction and the court that rendered the judgment had no subject matter jurisdiction and left the court with no power to enter the conviction or impose the sentence.

Whereas, subject matter jurisdiction is not waivable as the state has contend as jurisdiction is derived from the law and it neither can be waived nor conferred by consent of the petitioner. As there is no colorable argument to overcome the lack of subject matter jurisdiction.

23. (d) GROUND FOUR: Violation of Mr. Hayes right to "Due Process" Material mistakes of fact regarding criminal record in PSI that work to his extreme detriment.

23. (d) SUPPORTING FACTS (Tell your story briefly without citing cases or law):

Inherers, the court made material mistakes of fact about petitioner's criminal record, as the petitioner's PSI had several material facts in error that work to his extreme detriment.

Where, as here, petitioner and his counsel objected to the mistakes at sentencing hearing and sentencing judge continued the proceedings without allowing the corrections to be made. When, in fact, if the Judge would have allowed the corrections to be completed in the instant case upon petitioner's objections petitioner's raw score, social score, and the Department of Public Safety Division of Parole and Probation recommendation would have been astronomically different and would have showed that petitioner had never been to prison so there would not have been any habitual offender recommendation for the instant offense of Attempt Grand Larceny. As the instant offense occurred in the year 2013 and at that time petitioner had ONE felony conviction not four as the PSI read, No prison incarcerations not ONE as the PSI read; No current supervisor history not ONE

as the PSI reed; the instant offense should be dated April 9, 2013 not April 2, 2016 as the PSI reads; Burglary conviction case no C-16-315125-1 should NOT be included anywhere on petitioner's PSI for the instant offense as it occurred sum three years later on April 2, 2016; Finally the Texas conviction(s) case no(s) 1081785 and 1083786 was ONE event not two as it reads on PSI, not two felony convictions but ONE state jail conviction for Credit Card Abuse and Fraudulent use/possession of Identifying information. Wherefore the numerous material mistakes of facts about petitioner's criminal record that have worked to his extreme detriment has rise to a manifest injustice and Due Process violation that cannot stand uncorrected. Furthermore, the Texas crime(s) would not constitute a felony under Nevada law.

23. (d) GROUND FIVE: State Violated Mr. Hayes Right to Due Process as guaranteed by both the "Due Process Clause of the United State's Constitution and the Nevada Constitution: "Due Process violation guilty plea was not equally voluntary, known and intelligent entered.

23. (d) SUPPORTING FACTS (Tell your story briefly without citing cases or law): Inherent, waivers of constitutional rights not only must be volunter but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. As here, petitioner's "waiver of his fundamental rights" was not knowingly and intelligently made as the court failed to adequately inform petitioner of the full consequences of his Alford plea that has created a manifest injustice, because the trial court did not straightforwardly explain consequences of petitioner's breach of the agreement while awaiting sentencing that the state would unilaterally impose an enhanced sentence as the boilerplate language was ambiguous and had imprecisions that did not explicitly state loss of stipulation. Most significantly, petitioner did not intelligently and knowingly waive his constitutional rights with full knowledge of the consequences. Nor was he told that his Alford plea would stand regardless of whether he was rearrested for a Burglary charge that was dismissed, after alleged victim testified at preliminary hearing under oath facing the penalty of perjury that petitioner was not the perpetrator of allege event and 100% sure of it. So petitioner has raised sufficient doubt as whether his

Alford plea was ever accepted, and even if it was, whether he was fully and fairly apprised of its consequences.

Whereas, the state interpret the court's statement to mean "do you understand that if you breach any of the conditions in guilty plea agreement, this court will sentence you". Yet, that is not what the trial court said. When it is surely equally plausible explanation of the plea colloquy that petitioner would -- were here to breach the agreement -- face trial on the Burglary charge. In particular, it is impossible to conclude that petitioner truly understood that he was waiving his right to be tried on the original charge of Burglary, and agreed instead that were he accepted the state trial court could unilaterally impose a habitual criminal sentence upon him. So it is without question that whatever waiver petitioner agreed to was without adequate knowledge of the consequences flowing from his breach of the plea agreement. If in fact there was a material breach that in the instant case was in question as the facts of the alleg breach was based on improbable and highly suspect evidence of an allege Burglary charge that was dismissed after alleged victim testified that petitioner was not the perpetrator of alleged event.

"No factual statements on the record whic

AFFIDAVIT OF: would constitute an admission of "Guilt"

STATE OF NEVADA )
) ss: CASE No: A-19-793315
COUNTY OF CLARK ) DEPT: 19

TO WHOM IT MAY CONCERN:

I, James N. 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 contai 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 cri of Attempted Grand Larceny, as the sentencing Judge and the State k Mr. Hayes had NO involvement in such a crime. Moreover, when and 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. H plea, therefore Mr. Hayes did not waive his right to complain of th acceptance of an unconstitutional plea. Mr. Hayes neither made fa statements regarding an admission to the attempted grand larceny charge nor admitted facts constituting the elements of attempted gr larceny. So Mr. Hayes did not understand the elements of the crime that he pleaded to.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

EXECUTED At: Indian Springs, Nevada, this 1ST Day Of March 2020.

BY: James N Hayes
James N. Hayes #1120078
Post Office Box-208(SDCC)
Indian Springs, Nevada, 89070.
Affiant, In Propria Personam:

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Petition:

Expedited Judicial Examination
(Title of Document)

filed in District Court Case number C-16-315718-1

☑ 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

3-1-20
Date

James H. Hayes
Print Name

Pro Per
Title

## CERTFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 1st day of March, 2020, I mailed a true and correct copy of the foregoing, "Petition: Expeditious Judicial Examination", 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 Ct
Office of the Clerk
200 Lewis Ave. 3rd Floor
Las Vegas, Nevada
89155-1160

Attorney General of Nevada
100 North Carson Street
Carson City, Nevada
89701

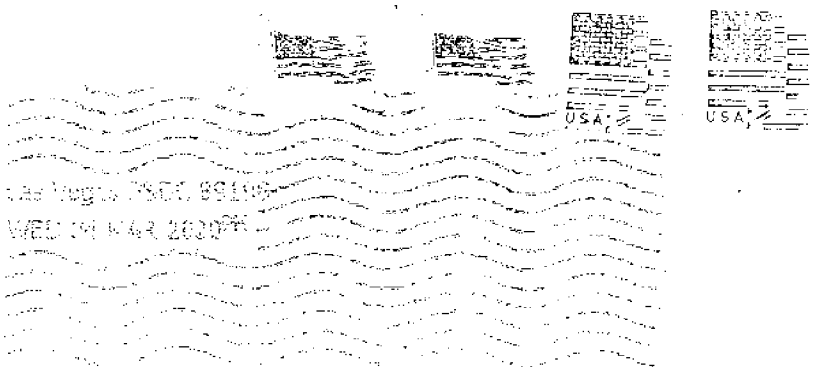
Clark County Dist Atty
200 Lewis Ave
Las Vegas, Nevada
89155

CC:FILE

**DATED:** this 1st day of March, 2020.

James H. Hayes # 1173074
/In Propria Personam
Post Office Box 208,S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

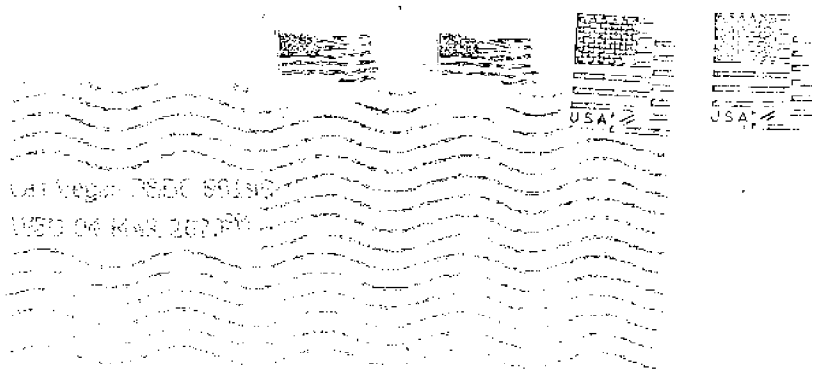
Hayes, J # 1125024
SDCC
P.O. Box 208
Indian Springs, Nevada
89070




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

Legal Mail

Hayes, J # 1125077
JDCC
P.O. Box 208
Indian Springs, Nevada
89070




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

Legal Mail

204

Electronically Filed
4/17/2020 8:33 AM
Steven D. Grierson
CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #05734
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<br><br>Plaintiff,<br><br>-vs-<br><br>THE STATE OF NEVADA,<br><br>Defendant. | CASE NO: A-19-793315-W<br><br>DEPT NO: XIX |

**STATE'S RESPONSE TO PETITIONER'S AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND PETITION: EXPEDITIOUS JUDICIAL EXAMINATION NRS 34.360-34.830**

DATE OF HEARING: MAY 4, 2020
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through TALEEN PANDUKHT, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Amended Petition for Writ of Habeas Corpus and "Petition: Expeditious Judicial Examination NRS 34.360-34.830."

This Response 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.

//

## 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. 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 80222). As of the date of this Response, Petitioner's appeal was still outstanding.

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, and out of an abundance of caution, the State responds to both the Amended Petition and the Petition: EJE, as follows:

## ARGUMENT

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

As a preliminary matter, the State respectfully submits that the instant pleadings must be stricken pursuant to statute. 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 fids 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, 497-98 (1991). Application of NRS 34.810(2) is *mandatory*. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) (noting, "[h]abeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system.") The Riker Court further determined that district courts have no discretion regarding application of statutory procedural bars, and such bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233.

In the instant case, Petitioner continues to file supplemental pleadings in the form of multiple addenda as well as the instant "Amended Petition." However, under NRS 34.750, the right to file supplements lies exclusively with appointed counsel. Furthermore, the factual bases for Petitioner's claims existed at the time Petitioner filed his first Petition. Therefore, Petitioner's pleadings are successive and subject to dismissal absent a showing of good cause and prejudice. NRS 34.810(2). Petitioner does not argue good cause nor prejudice. See generally, Amended Petition. Thus, pursuant to statute, Petitioner's pleadings "*must be dismissed*." NRS 34.810(2) (emphasis added).

## II. PETITIONER'S AMENDED PETITION DOES NOT ENTITLE HIM TO RELIEF

The Nevada Supreme Court has explained:

> "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."

Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (quoting Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608 (1973)). An entry of a guilty plea "waive[s] all constitutional claims based on events occurring prior to the entry of the plea[], except those involving voluntariness of the plea[] [itself]." Warden, Nevada State Prison v. Lyons, 100

Nev. 430, 431, 683 P.2d 505 (1984); see also Kirksey v. State, 112 Nev. 980, 999, 923 P.2d 1102, 1114 (1996) ("Where the defendant has pleaded guilty, the only claims that may be raised thereafter are those involving the voluntariness of the plea itself and the effectiveness of counsel."). Under NRS 34.810,

> I. The court *shall* dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.
>
> ...
>
> unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

(emphasis added). Furthermore, the Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved of on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001), overruled on other grounds by Lisle v. State, 131 Nev. 356, 351 P.3d 725 (2015). Additionally, substantive claims are beyond the scope of habeas and waived. NRS 34.724(2)(a); see also Evans, 117 Nev. at 646-47, 29 P.3d 498 at 523; Franklin, 110 Nev. at 752, 877 P.2d 1058 at 1059.

A proper petition for post-conviction relief must set forth specific factual allegations that would entitle the petitioner to relief. NRS 34.735(6) states, in pertinent part, "[Petitioner] must allege specific facts supporting the claims in the petition [he] file[s] seeking relief from any conviction or sentence. Failure to raise specific facts rather than just conclusions may cause the petition to be dismissed." "Bare" and "naked" allegations are not sufficient to

warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

**A. Petitioner's Claims of Ineffective Assistance of Counsel are Belied by the Record**

Petitioner first claims that his counsel, Mr. Michael Sanft, Esq. ("Mr. Sanft") was ineffective for 1) failing to appropriately investigate; 2) failing to ensure Petitioner fully understood the conditions of the GPA; 3) failing to file a Motion to Withdraw Guilty Pea; and 4) failing to file a Notice of Appeal and/or informing Petitioner of his right to appeal. However, Petitioner's claims are belied by the record.

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under Strickland, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

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The Court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). Further, a defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State,

108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, she must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068). This portion of the test is slightly modified when the convictions occurs due to a guilty plea. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988 (1996). For a guilty plea, a defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Kirksey, 112 Nev. at 998 (quoting Hill, 474 U.S. at 59).

The text of the GPA includes the following (labeled "VOLUNTARINESS OF PLEA"), in pertinent part:

> I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.
>
> ...
>
> I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.
>
> All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.
>
> ...
>
> I am signing this agreement voluntarily, after consultation with my attorney...
>
> ...
>
> My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

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GPA at 5-6. Petitioner affirmed that he had read the GPA. Recorder's Transcript of Hearing: November 7, 2018 ("Transcript") at 2:24-25, 3:21-22. Petitioner affirmed that Mr. Sanft answered any questions regarding the GPA. Transcript at 3:1-3, 3:23-4:6. Petitioner affirmed that he understood the charge in the Amended Information. Id. at 3:4-6, 4:7-9. Petitioner affirmed that he signed the GPA. Id. at 3:16-20. Contrary to Petitioner's assertion that he was told he was agreeing to a gross misdemeanor, when asked by the Court about his understanding, Petitioner acknowledged two possible sentencing outcomes:

> THE COURT: Okay. Can you tell me what your understanding is that you're facing as a form of punishment for the charge of attempt grand larceny here in the State of Nevada?
> THE DEFENDANT: One to four in the Nevada Department of Corrections.
> THE COURT: Okay.
> THE DEFENDANT: Or a gross misdemeanor of 364 days.
> THE COURT: Okay. You can also be fined up to $5,000 if I treat it as a felony. And you could be fined up to $2,000 if I treat it as a gross misdemeanor?
> THE DEFENDANT: Yes, sir.
> THE COURT: You understand that?
> THE DEFENDANT: Yes, sir.

Id. at 4:16-5:3. Petitioner affirmed, both verbally to the court and by signing the GPA, that he knew the terms of the GPA, the potential outcomes of his plea, and that Mr. Sanft answered all the questions Petitioner had to Petitioner's satisfaction.

A review of the record easily belies Petitioner's claim regarding his appeal. As stated *supra*, Petitioner timely filed a notice of appeal on March 12, 2019. Therefore, Petitioner cannot demonstrate prejudice sufficient to satisfy Strickland, as his appellate rights were not infringed upon.

Furthermore, to the extent that Petitioner argues Mr. Sanft was ineffective in his investigation, Petitioner fails to allege, much less show, what a proper investigation would have uncovered, much less how that information would have led Petitioner to reject guilty plea negotiations and proceed to trial. See, Amended Petition at 10-11. Instead, Petitioner merely relies upon the vague allegation that Mr. Sanft "failed to do appropriate 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, and suitable only for summary dismissal. 100 Nev. at 502, 686 P.2d at 225.

Because each of Petitioner's arguments in support of his claim of ineffective assistance of counsel is belied by the record, pursuant to Hargrove and Mann, Petitioner is not entitled to relief on this claim. 100 Nev. at 502, 686 P.2d at 225; 118 Nev. at 354, 46 P.3d at 1230.

**B. Petitioner's Claim Against his Breach of the Guilty Plea Agreement is Belied by the Record**

Petitioner goes on to claim that the State violated his right to Due Process in arguing that Petitioner had surrendered the stipulated sentence in the GPA. Amended Petition at 13. This claim is likewise belied by the record.

In the GPA, Petitioner expressly agreed to the clause:

> I understand and agree that, if I fail to interview with the Department of Parole and Probation (P&P), faile to appear at any subsequent hearings in this case, or 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 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.

GPA at 2 (emphasis added). Later in the GPA, Petitioner also expressly agreed: "the sentencing judge has the discretion to order the sentences served concurrently or consecutively." Id. at 3.

As stated *supra*, a Justice of the Peace found *probable cause* to charge Petitioner with Burglary in Las Vegas Justice Court case 19F01534X. Therefore, pursuant to the the express language of the GPA, the State regained the *unqualified* right to argue for any legal sentence. GPA at 2. Petitioner seeks to limit the language of the GPA, where no such language is present.

See, Amended Petition at 16 ("the boilerplate language does not explicitly refer to a right to argue for consecutive sentence").

Furthermore, Petitioner's representations that the probable cause in the other case had been erroneously found is also belied by the record. In District Court case C338412, in which the Information was filed after probable cause had been found, there was no dismissal or other acquittal of Petitioner. In fact, Petitioner *pled guilty* in that case to reduced charges.

Because Petitioner's claim consists of arguments that are belied by the record, Petitioner is not entitled to relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

**C. Petitioner's Conviction Does Not Implicate Double Jeopardy**

Petitioner's third ground for relief essentially alleges that his conviction is invalid because it violates statutory prohibitions against "Double Jeopardy." See, Amended Petition at 17-19. However, this claim is not cognizable in a Petition for Writ of Habeas Corpus and was waived by Petitioner's failure to raise it on direct appeal.

The Nevada Supreme Court has explained:

> "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."

Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (quoting Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608 (1973)). An entry of a guilty plea "waive[s] all constitutional claims based on events occurring prior to the entry of the plea[], except those involving voluntariness of the plea[] [itself]." Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 431, 683 P.2d 505 (1984); see also Kirksey v. State, 112 Nev. 980, 999, 923 P.2d 1102, 1114 (1996) ("Where the defendant has pleaded guilty, the only claims that may be raised thereafter are those involving the voluntariness of the plea itself and the effectiveness of counsel."). Under NRS 34.810,

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I. The court *shall* dismiss a petition if the court determines that:

> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.
>
> ...
>
> unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

(emphasis added). Furthermore, the Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved of on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001), overruled on other grounds by Lisle v. State, 131 Nev. 356, 351 P.3d 725 (2015). Additionally, substantive claims are beyond the scope of habeas and waived. NRS 34.724(2)(a); see also Evans, 117 Nev. at 646-47, 29 P.3d 498 at 523; Franklin, 110 Nev. at 752, 877 P.2d 1058 at 1059.

This claim does not challenge the voluntariness of Petitioner's guilty plea, nor does it allege ineffective assistance of counsel. Therefore, this claim should have been pursued on direct appeal, rather than for the first time in a petition. NRS 34.810(1); Franklin, 110 Nev. at 752, 977 P.2d at 1059. Petitioner does not attempt to argue good cause or prejudice for raising this claim for the first time in the instant proceedings. Such an argument would be meritless, as Petitioner specifically and unconditionally waived his right to a direct appeal on this issue. GPA at 5. Furthermore, Petitioner waived any potential constitutional defect by entering his guilty plea. Lyons, 100 Nev. at 431, 683 P.2d at 505.

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Because Petitioner waived all constitutional issues prior to the entry of his plea, and because his claim does not challenge the voluntariness of Petitioner's plea, this claim must be summarily denied.

**D. Petitioner's Claim Regarding his PSI Does Not Warrant Relief**

Petitioner then claims that his sentence was based on multiple mistakes regarding his criminal history in his PSI. Amended Petition at 20. However, Petitioner fails to demonstrate that he properly raised this claim before the Court at sentencing. Further, Petitioner's assertions are belied by a reading of the controlling authority regarding his sentence.

When imposing a sentence on a defendant, the district court must base its sentence on accurate information contained in a PSI. Stockmeier v. Bd. of Parole Comm'rs, 127 Nev. 243, 247, 255 P.3d 209, 212 (2011). "[I]t is important for a defendant to object to his PSI at the time of sentencing because 'Nevada law does not provide any administrative or judicial scheme for amending a PSI after the defendant is sentenced.'" Sasser v. State, 130 Nev. 387, 390, 324 P.3d 1221, 1223 (2014) (quoting Stockmeier, 127 Nev. at 249, 255 P.3d at 213). Furthermore, "if not resolved in the defendant's favor, the objections [to the PSI] *must be raised on direct appeal.*" Stockmeier, 127 Nev. at 250, 255 P.3d at 213 (emphasis added).

Pursuant to Stockmeier, Petitioner should have raised his claims regarding the misinformation in his PSI to the Court at sentencing, then upon direct appeal. 127 Nev. at 250, 255 P.3d at 213. Petitioner did neither. Therefore, pursuant to Franklin, Petitioner waived these claims. 110 Nev. at 752, 877 P.2d at 1059. Petitioner does not argue good cause or prejudice to overcome the procedural bars, and could not successfully do so, as these alleged incorrections were available at the time Petitioner pursued his direct appeal.

Furthermore, to the extent Petitioner claims that the timing of his separate claims was misinterpreted by the sentencing court, his claim is belied by the statute governing treatment as a habitual criminal. Pursuant to NRS 207.010, the analysis of prior convictions occurs at the time of *conviction, not at the time the crime was alleged.* See NRS 207.010(1). At the time of sentencing, the State argued in support of habitual criminal treatment, and the Court determined that the State had met its burden pursuant to statute.

Because Petitioner waived this claim, and because it is further belied by the record and by applicable laws, this claim must be summarily denied.

**E. Petitioner's Claim Against Entry of his Guilty Plea is Belied by the Record**

Petitioner's final claim is that his guilty plea was not knowingly and voluntarily entered, as he alleges that he did not understand the consequences of a breach of the agreement. Amended Petition at 22. Again, Petitioner's claim is belied by the record.

Contrary to Petitioner's assertion that he believed he would simply go to trial if he violated the terms of the GPA (see, Amended Petition at 23), the plain language of the GPA sets forth that, upon a breach, "the State will have the unqualified right to argue for any legal sentence and term of confinement..." GPA at 2. As stated *supra*, the Court thoroughly canvassed Petitioner and determined that Petitioner understood the terms of the GPA. See, Section II(A), *supra.* Furthermore, Petitioner's claim that he was unaware that a sentence as a habitual criminal was possible is belied, as the State Noticed its Intent to Seek Habitual Criminal Treatment on August 29, 2017, and the GPA expressly included the possibility of habitual criminal treatment as a result of Petitioner's breach of the terms of the GPA. GPA at 2.

Because Petitioner's claim is expressly belied by the record, he is not entitled to relief on the same and his claim should be summarily denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

## II. PETITIONER'S PETITION: EJE DOES NOT SET FORTH ANY INDEPENDENT GROUNDS FOR RELIEF

A review of Petitioner's Petition: EJE reveals that it is, essentially, a request for a ruling on Petitioner's various Petitions and Addenda. See, Petition: EJE at 2. However, beyond the boilerplate language of Petitioner's Petition: EJE, it appears that Petitioner has affixed mere copies of his five (5) grounds for relief, as alleged in his earlier Petitions and Addenda. See, id. at 4-22. As this new Petition: EJE fails to raise any new grounds for relief, for the sake of judicial economy the State hereby incorporates its arguments in its Response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), filed on June 16, 2019, its Response to

Petitioner's First and Second Addendum to Petition for Writ of Habeas Corpus (Post-Conviction), filed on October 10, 2019, and its Response to Petitioner's Amended Petition, contained *supra*.

Because Petitioner waived certain claims by entering his guilty plea, others by failing to raise them on direct appeal, and because his other claims are belied by the record, Petitioner's Petition and all supplemental pleadings thereto should be dismissed in their entireties and the claims thereof should be denied.

## CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court DENY Petitioner's Amended Petition for Writ of Habeas Corpus in its entirety.

DATED this 17th day of April, 2020.

Respectfully submitted,

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

BY BB
TALEEN PANDUKHT
Deputy District Attorney
Nevada Bar #05734

## CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 17th day of April, 2020, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JAMES HAYES, BAC #1175077
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV, 89070

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

TP/cg/L2

Electronically Filed
4/30/2020 12:08 AM
Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

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| | |
|---|---|
| JAMES HAYES, PLAINTIFF(S) | CASE NO: A-19-793315-W |
| VS. | |
| NEVADA STATE OF, DEFENDANT(S) | DEPARTMENT 19 |

NOTICE OF RESCHEDULING HEARING

Please be advised that the date and time of a hearing set before the **Honorable William D. Kephart** has been changed. The **Petition for Writ of Habeas Corpus,** presently scheduled for **May 04, 2020** at **8:30 AM** , has been **rescheduled** to **June 15, 2020**, at **8:30 AM. Please note this date change on your calendar(s).**

By: /s/ Minddie Lloyd
Minddie Lloyd
Judicial Executive Assistant
To Judge William D. Kephart
Department 19

William D. Kephart
DISTRICT JUDGE
Department 19
LAS VEGAS, NV 89155

## CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this Notice was electronically served to all registered parties in the Eighth Judicial District Court Electronic Filing Program and/or placed in the attorney's folder maintained by the Clerk of the Court and/or transmitted via facsimile and/or mailed, postage prepaid, by United States mail to the proper parties as follows:

James H Hayes
Bernard B. Zadrowski
Taleen R Pandukht
Steven B Wolfson
Charles W. Thoman
Melanie H. Marland

By: /s/ Minddie Lloyd
Minddie Lloyd
Judicial Executive Assistant
To Judge William D. Kephart
Department 19

HEARING REQUESTED!!

"8th Judicial District Court for the County of Clark"

CASE NO: A-19-793315-W

Dept: 19

AFFIDAVIT OF actual INNOCENCE Not mere legal insufficiency but "factual INNOCENCE"

STATE OF NEVADA )
) ss: Amended Petition for Writ of Habeas Corpus
COUNTY OF CLARK )

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

FILED
MAY 15 2020
CLERK OF THE COURT

TO WHOM IT MAY CONCERN:

I, James H. Hayes, the undersigned, do hereby swear that the following statements and descrition 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 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 shown at preliminary examination when magistrate dismissed the charge for lack of evidence, No corpus delecti, 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 sentencing Judge and the State knew Mr. Hayes had No

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MAY - 1 2020
CLERK OF THE COURT

involvement in such a crime, as it is clear that no evidence of actual guilt existed on the underlying criminal conduct that may have justified accepting Mr. Hayes Alford plea to a crime he did not commit, and sentence was based on speculation, not based on the acts Mr. Hayes committed. So here Mr. Hayes has made a colorable showing of cause and prejudice to overcome a procedural default and to ensure fundamental fairness that is the central concern of the writ of habeas corpus. As the instant case, is an extraordinary case, where a constitutional violation has resulted in the conviction of Mr. Hayes who is actually innocent, and it would be an affront to justice and due process to hold Mr. Hayes to his plea when the conduct upon which the plea was entered did not occur. Furthermore, Mr. Hayes received no consideration whatsoever in exchange for his Alford plea to a crime he did not commit as he was induced by the state to plead to a crime not committed and Mr. Hayes agreement to this unconstitutional guilty plea was predicated on his belief of time credit served for a gross-misdemeanor sentence and did not explicitly agree to a period of imprisonment in exchange for a plea.

That this court is fully aware Mr. Hayes was not properly advised or canvassed as to the defects he may have waived as part of the negotiations, when in fact, Mr. Hayes never agreed to waive any and all defects in the pleadings so Mr. Hayes never waived claims to "Defects" voluntarily, nor did Mr. Hayes waive right to complain of the acceptance of an unconstitutional plea. Furthermore, Mr. Hayes guilty

plea agreement did not explicitly specify waiver to defects and Mr. Hayes was not well-aware of the charge(s) against him nor the surrounding negotiations and the plea canvass is unambiguous evidence of this and confirms Mr. Hayes did not explicitly understand the plea negotiations. Moreover, there is clear and convincing evidence Mr. Hayes did not commit the crime of Attempted Grand Larceny and the charge of Burglary was fatal without the state's intent of Attempt Grand Larceny that's a colorable showing that no jury would have convicted Mr. Hayes of Attempted grand larceny nor the underlying crime of Burglary leaving the sentencing Judge no factual basis for acceptance of Mr. Hayes Alford Plea as he never admitted in open court to committing the acts underlying the offense for which he entered his plea, and the prosecutors knew that the evidence was false and without probable cause.

That, the record shows without doubt that Mr. Hayes has pleaded Alford to a crime that he did not commit, and this court must hesitate to apply technical rules to prevent Mr. Hayes from obtaining relief. When infact, the cause and prejudice formula of Wainwright v. Sykes is not dispositive when the fundamental fairness of a prisoner's conviction is at issue as in the instant case, that appellate procedural default should not foreclose habeas corpus review of a meritorious constitutional claim that will establish Mr. Hayes innocence. As this is an extraordinary case, where a constitutional violation has resulted in the conviction of one who is actually innocent and this court shall grant the

writ even if the absence of a showing of cause and prejudice for the procedural default, when counsel's failure to raise a particular claim on appeal is to be scrutinized under the cause and prejudice standard when that failure is treated as a procedural default would deny Mr. Hayes fundamental fairness and continue this manifest injustice. When the writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action and its well-known history bears repetition. As it has been given explicit protection in our constitution, and the very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected that must occur in the instant case, as there is no rigid procedural rules that prevented the writ's fundamental mission-serving justice from being realized and must yield to the imperative of correcting a fundamentally unjust incarceration and prevent illegal imprisonments.

That, the state breached the guilty plea agreement on impalpable and highly suspect evidence as the evidence used was false and the state was well aware that the alleged victim at preliminary examination for the isp dirit Burglary charge (case no: 19701534X) testified under oath facing the penalty of perjury that Mr. Hayes was not the perpetrator of alleged event and 100% sure of it and further stated that alleged perpetrator did not enter room only stood in doorway said sorry and close door and left without

incident, so Mr. Hayes has showed detrimental reliance since there was no breach and no fault of Mr. Hayes as the Burglary charge was dismissed and Justice court magistrate ruling of probable cause was misplaced as alleged victim testified Mr. Hayes was not perpetrator and Mr. Hayes had a valid room hotel key issued to him from an authorized registered hotel guest, so this is a manifest impropriety in permitting the state to breach the agreement when they knew Mr. Hayes did not breach his promise making the state estopped from asserting right to argue for a different sentence. When there was in essence no substantial breach that warrants releasing state of its promises. Was in fact, the agreement did not contain explicit language conditionally releasing the state from its promise for an excusable ruling of probable cause by magistrate as we have in the instant case. Whereby had the sentencing Judge held an evidentiary hearing as required to determine if there was a breach per the rulings of the Nevada Supreme Court and the 9th Circuit this fundamental miscarriage of justice would not have occurred as Mr. Hayes has clear and convincing evidence he did not breach his promise and no breach occurred on his behalf. That habitual adjudication was not just and proper for Mr. Hayes to be punished and segregated as a habitual criminal and the court abused its discretion as crimes use was nonviolent and not a felony under the sins and laws of Nevada {Credit Card Abuse in Texas} and not prior {Burglary in Nevada 2016}. As the sentencing Judge

violated legislation intent of NRS 207.010 and failed to serve the purposes of the statute or the interests of justice. When infact, Mr. Hayes did not warrant the harsh sanction under the habitual criminal statute though past conduct reprehensible simply does not warrant habitual treatment.

That, the court that rendered the judgment and sentence lack subject matter jurisdiction per NRS 174.085 and NRS 178.562. Whereby jurisdiction of the subject matter is derived from the law; it neither can be waived nor conferred by consent of Mr. Hayes

FURTHER, AFFIANT SAYETH NAUGHT.

EXECUTED AT Southern Desert Correctional Center this 27 day of April 2020

IN FRONT OF:

BY Simon H Hayes

NDOC # 1175077

## UNDER PENALTY OF PERJURY

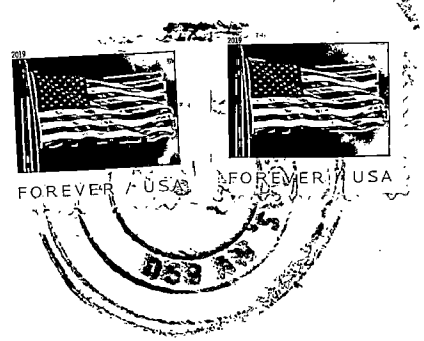
I, the undersigned, certify, declare, or state that the foregoing is true and correct, to the best of my knowledge and belief, in accordance with NRS 208.165 and 28 USCA § 1746.

Excuted on the 27 day of April, 2020

James H. Hayes #1175077 James H. Hayes

Name and Prison BAC#, printed

Hales #1175022
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

Important Notice Enclosed!!

LEGAL Mail

89101 88300 C075

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Southern Desert Correctional Center
APR 27 2020
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CANCELLED

Google:

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

FILED
MAY 15 2020
CLERK OF COURT

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
Warden Jerry Howell,
Respondent(s).

HEARING REQUESTED

Case No. A-19-793315-W
Dept. No. 19
Docket

## 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
MAY - 4 2020
CLERK OF THE COURT

Reply to State's Response to Petitioner's Amended Petition for Writ of Habeas Corpus and Expeditious Judicial Examination

It's worthwhile noting that petitioner received the State's response on April 28, 2020 and the hearing date is May 4, 2020 making it impossible for petitioner to have his reply filed prior to hearing.

Hopefully, this court will not be persuaded by this grossly incorrect application of law or facts to law argued by the state in its response, and adhere to the Nevada Rules of professional responsibility 3.3 allowing "Justice" to prevail and redress this fundamental miscarriage of Justice.

Petitioner was coerced into entering plea agreement by counsel and state, thereby inducing petitioner to plead to a crime not committed saying and agreeing it would be a gross-misdemeanor with probation, no suspended prison term, no time period of probation and only one condition 30 days in Clark County Detention Center with 30 days credit for time served.

Petitioner's plea was constitutionally infirm through ignorance or omission, defense counsel caused or permitted the loss or lack of a crucial defense as in the instant case is in effect denial of counsel, infecting the convictions

Petitioner has not waived right to complain of the acceptance of an unconstitutional plea (105 Nev. 317)

That the "cause and prejudice" formula of Wainwright v.

Sykes is not dispositive when the fundamental fairness of a prisoner's conviction is at issue that appellate procedural default should not foreclose Habeas Corpus review of meritorious constitutional claims that may establish a prisoner's innocence. As petitioner many times over have made claim to "actual innocence" not mere legal insufficiency but "factual innocence"!!

A guilty plea and any plea bargain which underlying it, does not waive any constitutional attack upon a subsequent sentence merely because that sentence accords with petitioner's agreement (Bennett v. Hopper 548 F.2d 550)

Petitioner's agreement to this unconstitutional condition was predicated on his belief of time credit served for a gross-misdemeanor sentence and did not explicitly agree to a period of imprisonment in exchange for Alford plea.

Petitioner's guilty plea agreement did not specify waiver to defects and he was not well-aware of the charges against him when the charge Attempt Grand Larceny was dismissed at conclusion of preliminary examination nor the surrounding negotiations and the plea canvass is unambiguous evidence of this and confirms petitioner did not explicitly understand the plea negotiations or voluntarily enter Alford plea.

District court never confirmed that petitioner understood the state could seek habitual criminal treatment so the state did not sufficiently provide notice of its intent to punish as a habitual criminal, and court never confirmed petitioner understood he was not promised probation with time served credit (Gray v. State 124 Nev. 110)

"No factual statements on the record which would constitute an admission of "Guilt"

AFFIDAVIT OF:

STATE OF NEVADA )
) ss: CASE No: A-19-793315
COUNTY OF CLARK ) DEPT: 19

TO WHOM IT MAY CONCERN:

I, James N. 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 contain 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 crim of Attempted Grand Larceny, as the sentencing Judge and the State k Mr. Hayes had NO involvement in such a crime. Moreover, when preli 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. H plea, therefore Mr. Hayes did not waive his right to complain of th acceptance of an unconstitutional plea. Mr. Hayes neither made fac statements regarding an admission to the attempted grand larceny charge nor admitted facts constituting the elements of attempted gra larceny. So Mr. Hayes did not understand the elements of the crime that he pleaded to.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

EXECUTED At: Indian Springs, Nevada, this 1ST Day Of March, 2020.

BY: James N Hayes
James N. Hayes #1125077
Post Office Box-208(SDCC)
Indian Springs, Nevada. 89070.
Affiant, In Propria Personam:

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

23. (a) GROUND ONE: Mr. Hayes (petitioner) was denied his Constitutionally guaranteed right to effective assistance of counsel & federal and state Constitutional rights & 6th and 14th Amendment violation.

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law):

Petitioner's claim of ineffective assistance of counsel was not belied by the record contrary to state's argument when in fact, had counsel appropriately investigated he would have known that Attempt Grand Larceny was barred from District court proceedings against petitioner as state law(s) NRS 174.085(3); NRS 178.562(1); NRS 178.391 provides the authority that made petitioner immune from prosecution on said charge Attempt Grand Larceny leaving District Court with having NO subject matter jurisdiction to render convictions nor sentence. When subject-matter jurisdiction is not waiveable as the state may contend as jurisdiction is derived from the law and it neither can be waived nor conferred by consent of the petitioner.

Petitioner's counsel failed to ensure petitioner fully understood the conditions of the guilty plea agreement when counsel many times over stated to petitioner that he would receive probation for a gross-misdemeanor with the only condition of the probation being 30 days in CCDC with 30 days credit time served with no suspended prison term and no term(yes) of probation to be served.

Petitioner's counsel failed to afford the petitioner opportunity to withdrew the plea when sentencing was not in accordance with the agreement and was based on speculation, not based on the acts he committed (115 Nev. 207 Lee v. State) and never admitted in open court to committing the acts underlying the offense for which he entered his plea.

Petitioner's counsel failed his duty of informing petitioner of the procedures for filing appeal and its advantages and disadvantages. In Lozada and the instant case trial counsel acted unreasonably in failing to perfect appeal without petitioner's consent and 9th Circuit implicitly held counsel has duty to discuss petitioner's appeal rights. When in fact, counsel failed to play the role that is critical to the ability of the adversarial system to produce a just result.

Wherefore, counsel's performance was deficient and counsel's deficient performance prejudiced the petitioner through the lack of a thorough investigation of the law and facts as the charge of Attempt Grand Larceny was barred and had already been dismissed by magistrate for no slight or marginal evidence and the charge of Burglary was fatal without the state's intent of larceny so there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different and petitioner would not have entered Alford plea and would have insisted on going to trial on the Burglary charge and been acquitted as no reasonable jury would have convicted petitioner without

1. Violates the law

intent being the element of the crime of Burglary that is essential.

Hete's claim regarding ineffective assistance of appellate counsel is a grossly incorrect application of law or facts to law as prejudice need not be shown when dismissal of appellate counsel leaves appellant completely without representation as we have here as district court Judge Kephart dismissed petitioners appellate counsel on July 15, 2019 pursuant to motion to withdraw counsel stating that the Supreme Court of Nevada had issued its remittitur that is belied by the record leaving petitioner without appellate counsel to perfect his appeal and raise issues appropriate for direct appeal; petitioner's direct appeal would have been successful if not for this egregious lack of counsel cause by no fault of petitioner.

# PLEADING CONTINUES IN NEXT VOLUME