

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

vs.

THE STATE OF NEVADA,
Respondent(s),

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

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 2

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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23. (b) GROUND TWO: State Violated Mr. Hayes (petitioner) right to Due Process as guaranteed by both the Due Process Clause of the United States Constitution and the Navaho Constitution
"Breach of Guilty Plea Agreement on Impalpable Evidence"

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

Whereas, Justice of the Peace ruling to have found probable cause is misplaced when in fact, the alleged victim of the ispe dixit Burglary charge testified under oath facing the penalty of perjury that petitioner was not the perpetrator of allege event and that the allege perpetrator never entered room only stood in doorway said "Sony" and close door without incident, leaving no slight or marginal evidence, no corpus delicti for a just and fair ruling of probable cause for the charge of Burglary and this is clear and convincing evidence that petitioner took no part in the commission of allege event. (Burglary Case No: 19701534X)

Petitioner has showed detrimental reliance since there was no breach and no fault of petitioner as the Burglary charge was dismissed (there was no admissible evidence of petitioner in commission of allege event) so the state was estopped from asserting right to argue for different sentence. In fact, at best, it read as a contract - even if petitioner's non-participation in ispe dixit Burglary was deemed to have allowed "a right to argue" any legal sentence, the terms of the agreement themselves do not also claim that all

1 stipulations are automatically invalidated, in the light
2 most favorable to the state, if the excusable misplace
3 ruling of probable cause are found by this court, the stipulations
4 must still remain intact given the requirements and policy
5 of Gamble (604 P.2d 335) and its progeny. ~~is inapposite to~~
6 ~~the process and the rules of law in Alaska.~~ When in fact,
7 the state received the benefit of the substantial compliance
8 of petitioner throughout and beyond the plea negotiations
9 process and cannot point to any harm when petitioner
10 excusably did not breach agreement as he played no part
11 in the ispe civil Burglary and the one ultimately has been
12 denied fair process and a victim of a fundamental
13 miscarriage of Justice.

23. (c) GROUND THREE: 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 when it failed to
adhere to State law (NRS 174.085(a) and NRS 178.562)

23. (c) SUPPORTING FACTS (Tell your story briefly without citing cases or law):
State's argument that this claim is waived for failure
to raise on direct appeal is without merit when official
interference made compliance with the procedural
requirement impracticable as petitioner was completely
without representation when dismissal of counsel
occurred on July 15, 2020 prior to perfection of petitioner's
direct appeal by District Court Judge Kephart granting of
motion to dismiss counsel. (Pellegrini 34 P.3d 532) so, hopefully
this court will not be persuaded by the state's grossly
incorrect application of law or facts to law, as failure to
consider the claim would result in a fundamental
miscarriage of justice anything short of a ruling on
the merits would offend fundamental notions of
human dignity. Moreover this is a jurisdictional defect
that is not waivable and involuntary, where prejudice
need not be shown (Brosnan v. Wainwright 422 P.2d 392)
Finally, where the record shows without doubt that
petitioner has pleaded Affirm to a crime that he did not
commit, this court should hesitate to apply technical
rules to prevent petitioner from obtaining relief (In re
Griggs 45 Cal. App. 3d 290)

23. (d) GROUND FOUR: State violated Mr. Ames right to Due Process
as guaranteed by both the Due Process clause of the United
States constitution and the Nevada constitution when 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): _____

Hopefully, this court will not be persuaded by the
state's grossly incorrect application of law or ~~facts~~ facts
to law when petitioner and his counsel noted to
sentencing Judge that the 2016 Burglary charge should not
be NO WHERE ON petitioner's PSI for a crime that
occurred in 2013 and the state's contrivances that
this challenge is waived for not raising it on Direct
Appeal falls short when official interference made
compliance with the procedural requirement impracticable
when petitioner was completely without counsel for
preparation of his direct appeal when District Court Judge
Keeney dismiss counsel on July 15, 2019 due to his
misrepresentation that the Supreme Court of Nevada had
issued its remittitur that is belied by the record when
remittitur did not issue until January 2020. So failure
to consider the claim would result in a fundamental
miscarriage of Justice and offend fundamental notions
of human dignity. What is fact, the court made material
mistakes of fact about the ~~petitioner's~~ petitioner's criminal record,
and the mistakes worked to the petitioner's extreme
detriment. As the Texas crime(s) was one event and not
severals in the State of Nevada under the laws and situs

1 of the state Nor the State of Texas and the 2016 Burglary
2 conviction was not prior to the 2013 conviction.
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23. (d) GROUND ^{FIVE} ~~FOUR~~: STATE VIOLATED MR. NELSON'S Right to DUE PROCESS as guaranteed by both the DUE PROCESS Clause of the U.S. constitution and the Nevada constitution; "Guilty plea was NOT equally voluntary, knowing, and intelligently entered"

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

Contrary to state's assertion, petitioner was NOT properly advised or conversed as to the defects he waived as part of the negotiations when petitioner NEVER agreed to waive any and all defects in the pleadings. In fact, at best, the language of the CPA "the state will have the unquestioned right to argue for any legal sentence and term of confinement" if read as a contract the terms of the agreement themselves do not also claim that all stipulations are automatically invalidated, even in the light most favorable to the state, if this court found that state's assertions true the stipulations must remain intact. If in fact, there was a material breach that in the instant case is in question as the facts of the alleged breach was based on impalpable and highly suspect evidence of an alleged Burglary charge that was dismissed (petitioner NEVER convicted on Burglary charge) after alleged victim testified that petitioner was NOT perpetrator of ispe drit Burglary so I pray that this court will NOT be persuaded by this grossly incorrect application of law or facts to law. The state further argue that petitioner was given sentence as a habitual criminal was possible through the Notice of its intent

1 to seek habitual criminal treatment dated August 29, 2017.
2 This argument is meritless for the following reasons: The
3 Notice was for the charge of Burglary not the wobbler
4 charge of attempt grand larceny; The Texas crime(s) was one
5 event not two and not felonies in the state of Nevada
6 under the laws and rules of this state nor the state of
7 Texas as it carries no prison term, mandatory supervision, nor
8 parole nor any category, degree, or class of felony; The
9 2011 Burglary conviction was not a prior to the instant
10 case a 2013 Attempt Grand Larceny, so the state failed to
11 serve the purposes of the statute NRS 207.010 as
12 petitioner's past conduct, may be reprehensible, he simply
13 does not warrant the harsh sanction available under
14 habitual criminality statute. When in fact, petitioner has
15 never been convicted of a violent offense and has only one
16 felony conviction from 1994 to 2015, as the instant offense
17 occurred in 2013.

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

3 EXECUTED at SDCC
4 on the 28 day of April, 2020.

5
6 James H. Hayes
7 Signature of Petitioner

8 VERIFICATION

9 Under penalty of perjury, pursuant to N.R.S. 208.165 et seq., the undersigned declares that he is
10 the Petitioner named in the foregoing petition and knows the contents thereof; that the pleading is
11 true and correct of his own personal knowledge, except as to those matters based on information and
12 belief, and to those matters, he believes them to be true.

13
14 James H. Hayes
15 Signature of Petitioner

16
17 PRO PER
18 Attorney for Petitioner

CERTIFICATE OF SERVICE BY MAILING

I, James H. Houges, hereby certify, pursuant to NRCP 5(b), that on this 28th
day of April, 2020, I mailed a true and correct copy of the foregoing, "Reply to
State's opposition "Amended petition of writ of habeas"
by placing document in a sealed pre-postage paid envelope and deposited said envelope in the
United State Mail addressed to the following:

Clerk County Dist. Courts
Office of the Clerk
200 Lewis Ave. 3rd Fl
Las Vegas, NV
89155-1160

Office of Dist. Attorney
200 Lewis Ave
Las Vegas, NV
89155-2212

CC:FILE

DATED: this 28 day of April, 2020

James H. Houges
James H. Houges # 1175079
/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 Reply to

State's opposition
(Title of Document)

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

☒ 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

4-28-20
Date

JAMES H. HAYES
Print Name

PRO PER
Title

-12-

EXHIBIT 502

1 AINF
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 MICHAEL DICKERSON
6 Deputy District Attorney
7 Nevada Bar #013476
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

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

14 Defendant.

CASE NO. C-16-315718-1

DEPT NO. XIX

AMENDED
INFORMATION

15 STATE OF NEVADA }
16 COUNTY OF CLARK } ss:

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

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

27 ///

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EXHIBIT " L "

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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)


CLERK OF THE COURT

1 INFM
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 MICHAEL DICKERSON
6 Deputy District Attorney
7 Nevada Bar #013476
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

12 I.A. 6/23/16
13 10:00 AM
14 PD

DISTRICT COURT
CLARK COUNTY, NEVADA

15 THE STATE OF NEVADA,

16 Plaintiff,

17 -vs-

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

20 Defendant.

CASE NO: C-16-315718-1

DEPT NO: XII

INFORMATION

21 STATE OF NEVADA }
22 COUNTY OF CLARK } ss.

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

25 That JAMES HOWARD HAYES, aka James Howard Hayes, Jr., the Defendant(s)
26 above named, having committed the crime of BURGLARY (Category B Felony - NRS
27 205.060 - NOC 50424), on or about the 9th day of April, 2013, within the County of Clark,
28 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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EXHIBIT 2

W:\2013\2013F\107\23\13F10723-BNFM-HAYES_JAMES-001.DOCX

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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

CASE SUMMARY**CASE NO. C-16-315718-1**

DEFT. HAYES ADJUDGED GUILTY of ATTEMPT GRAND LARCENY (F). Matter argued and submitted. Exhibits presented. (see worksheets). Court FINDS State has sufficiently met the requirements of NRS 207.010. COURT ORDERED, in addition to the \$25.00 Administrative Assessment fee and a \$3.00 DNA Collection fee; Deft. SENTENCED UNDER the SMALL HABITUAL STATUTE to a MINIMUM of SIXTY (60) MONTHS and a MAXIMUM of ONE HUNDRED SEVENTY-FOUR (174) MONTHS in the Nevada Department of Corrections (NDC); CONSECUTIVE to case number C315125; with TEN (10) DAYS credit for time served. FURTHER ORDERED, \$150.00 DNA Analysis fee including testing to determine genetic markers WAIVED as previously ordered. NDC;

06/03/2019

 **Motion** (8:30 AM) (Judicial Officer: Kephart, William D.)

06/03/2019, 07/15/2019

Defendant's Pro Per Motion to Withdraw Counsel

Matter Continued;

Granted;

Journal Entry Details:

Court noted Defendant not present and in custody with the Nevada Department of Corrections. COURT ORDERED, Motion GRANTED as a Remittitur has been filed by the Supreme Court. NDC ;

Matter Continued;

Granted;

Journal Entry Details:

Mr. Sanft advised he does not believe the motion can be granted as he must file the appeal pursuant to a Supreme Court Order, COURT ORDERED, matter CONTINUED thirty days. NDC CONTINUED TO: 7/15/2019 8:30 AM;

10/07/2019

Motion (8:30 AM) (Judicial Officer: Bonaventure, Joseph T.)

Defendant's Pro Per Motion In the Nature of a Writ of Coram Nobis

DATE

FINANCIAL INFORMATION

Defendant Hayes, James Howard

Total Charges

28.00

Total Payments and Credits

0.00

Balance Due as of 10/4/2019

28.00

Exhibit 4

PAGE 1 OF 1 ☐ UCF ☐ BODY CAM
*ID/CASE# 2796708 ☐ NEW ID
☐ AVENUE ☐ DNA SAMPLE TAKEN ☒ DNA NOT REQ'D

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
TEMPORARY CUSTODY RECORD
(* DENOTES OFFICER REQUIRED FIELD)

*ARREST DATE: 2/4/2018 *ARREST TIME: 1624

CO. SGT APPROVAL

☒ REBOOK ☐ ABSENTIA ☐ FORM 6 ☐ MDOC

☐ EXT TO LAS VEGAS

☐ LVC

☐ HND

☐ NLY

*CO-DET: N

☐ COURTESY HOLD ☐ DETAINER

*INITIAL NAME (MAY, ALIAS, ETC.)

LAST

HAYES

FIRST

JAMES

MIDDLE

HOWARD

LAST

HAYES

FIRST

JAMES

MIDDLE

*HOME ADDRESS (STREET & AND STREET NAME)

4736 E DECKOV

BLD/LAFT: 21

CITY

LAS VEGAS

STATE

NV

ZIP

89169

*PLACE OF BIRTH

TOLEDO, OHIO

*DATE OF BIRTH

02/02/1970

RACE

B

HEIGHT

5'10"

WEIGHT

220

HAIR

BLK

EYES

BRO

*SOCIAL SECURITY #

*LOCATION OF CRIME (STREET ADDRESS, CITY, STATE, ZIP)

REMIAND DC 19 LAS VEGAS, NV 89101

☒ CC ☐ LV

*LOCATION OF ARREST (STREET ADDRESS, CITY, STATE, ZIP)

CCDC LAS VEGAS, NV 89101 > NV-2E-91-L

*ARREST TYPE

PC - PROBABLE CAUSE

BS - BONDSMAN SURRENDER

BM - BENCH WARRANT

AW - ARREST WARRANT

RM - REMAND

GA - GRAND JURY INDICTMENT

*CHARGE LITERAL

ATT GRAND LARCENY, LESS THAN \$3600

208.222.2

NO BAIL

TAPP 03/06/19 @ 0830 DCF 19 FOR SENT

*OTHER JURISDICTION:

*ARREST TYPE

PC - PROBABLE CAUSE

BS - BONDSMAN SURRENDER

BM - BENCH WARRANT

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BS - BONDSMAN SURRENDER

BM - BENCH WARRANT

AW - ARREST WARRANT

RM - REMAND

GA - GRAND

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.

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13F10723X
CCH
Criminal Complaint
2796708

PAWPOCS/CO

EXHIBIT 17

1 All of which is contrary to the form, force and effect of Statutes in such cases made
2 and provided and against the peace and dignity of the State of Nevada. Said Complainant
3 makes this declaration subject to the penalty of perjury.
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S. Dandick
7/23/2013

27 13F10723X/cb
28 LVMPD EV# 1304090843
(TK3)



**EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT**

REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3rd FL.
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554

Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Court Division Administrator

April 15, 2019

Attorney: Michael W. Sanft
Sanft Law
Attn Michael W Sanft
324 South 3rd Street - 2nd Floor
Las Vegas NV 89101

Case Number: C-16-315718-1
Department: Department 19

Defendant: James Howard Hayes

Attached are pleadings received by the Office of the District Court Clerk which are being forwarded to your office pursuant to Rule 3.70.

Pleadings: **Motion To Modify And Correct Illegal Sentence**

Rule 3.70. Papers which May Not be Filed

Except as may be required by the provisions of NRS 34.730 to 34.830, inclusive, all motions, petitions, pleadings or other papers delivered to the clerk of the court by a defendant who has counsel of record will not be filed but must be marked with the date received and a copy forwarded to the attorney for such consideration as counsel deems appropriate. This rule does not apply to applications made pursuant to Rule 7.40(b)(2)(ii).

Cordially yours,

DC Criminal Desk # 7

Deputy Clerk of the Court

Exhibit 7

EXHIBIT 8



**EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT**

REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3rd FL.
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554

Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Court Division Administrator

June 18, 2019

Attorney: Michael W. Sanft
Sanft Law
Attn Michael W Sanft
324 South 3rd Street - 2nd Floor
Las Vegas NV 89101

Case Number: C-16-315718-1
Department: Department 19

Defendant: James Howard Hayes

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Pleadings: **Motion To Modify And Or Correct Illegal Sentence**

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Cordially yours,
DC Criminal Desk # 7
Deputy Clerk of the Court



EXHIBIT 9

**EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT**

REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3RD FL.
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554

Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Court Division Administrator

July 15, 2019

Attorney: Michael W. Sanft
Sanft Law
Attn Michael W Sanft
324 South 3rd Street - 2nd Floor
Las Vegas NV 89101

Case Number: C-16-315718-1
Department: Department 19

Defendant: James Howard Hayes

Attached are pleadings received by the Office of the District Court Clerk which are being forwarded to your office pursuant to Rule 3.70.

Pleadings: **Motion To Withdraw Plea**

Rule 3.70. Papers which May Not be Filed

Except as may be required by the provisions of NRS 34.730 to 34.830, inclusive, all motions, petitions, pleadings or other papers delivered to the clerk of the court by a defendant who has counsel of record will not be filed but must be marked with the date received and a copy forwarded to the attorney for such consideration as counsel deems appropriate. This rule does not apply to applications made pursuant to Rule 7.40(b)(2)(ii).

Cordially yours,
DC Criminal Desk # 7
Deputy Clerk of the Court

Exhibit 19

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

THE STATE OF NEVADA,
Plaintiff

v.

JAMES H HAYES
Defendant.

CASE NO. C-16-315718-1

DEPT. NO. 19

MOTION TO WITHDRAW PLEA "Alford Plea"

COMES NOW, Defendant, James H Hayes -, proceeding in proper
person, and moves this Honorable Court for an Order granting him permission to withdrawal his Plea
Agreement in the the case number C-16-315718-1, on the date of 6th in the month
of March in the year 2019, where defendant was then represented by Michael Jentz as
counsel. This Motion is based on all papers and pleadings on file with the Clerk of the Court which are
hereby incorporated by this reference, and Points and Authorities herein and attached Affidavit of
Defendant.

Dated this 8th day of July, 2019

Respectfully submitted,

James H Hayes
Defendant in Proper Person

RECEIVED
JUL 12 2019
CLERK OF THE COURT

EXHIBIT
10



**EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT**

REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3rd FL.
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554

Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Court Division Administrator

June 04, 2019

Attorney: Michael W. Sanft
Sanft Law
Attn Michael W Sanft
324 South 3rd Street - 2nd Floor
Las Vegas NV 89101

Case Number: C-16-315718-1
Department: Department 19

Defendant: James Howard Hayes

Attached are pleadings received by the Office of the District Court Clerk which are being forwarded to your office pursuant to Rule 3.70.

Pleadings: Motion To Modify And Or Correct Illegal Sentence

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Cordially yours,
DC Criminal Desk # 7
Deputy Clerk of the Court

1 THE COURT: Anything else?
 2 MR. SANFT: No, Your Honor.
 3 THE COURT: All right. Officer, thank you
 4 for your testimony. You're free to go. Just don't
 5 discuss it with anyone.
 6 THE WITNESS: Thank you. Yes, ma'am.
 7 MR. ROWLES: Your Honor, the State's next
 8 witness would be James McGrath.
 9 THE COURT: Come on up, sir.
 10 Whereupon,
 11 JAMES MCGRATH,
 12 having been first duly sworn to testify to the truth,
 13 the whole truth and nothing but the truth, was examined
 14 and testified as follows:
 15 THE CLERK: Go ahead and have a seat. State
 16 your first and last name and spell it for the record.
 17 THE WITNESS: James McGrath. McGrath is
 18 M-c-G-r-a-t-h.
 19 THE COURT: Go ahead.
 20 DIRECT EXAMINATION
 21 BY MR. ROWLES: Thank you, Your Honor.
 22 Q. Sir, I would like to turn your attention to the
 23 weekend of January 25th, 2019, into the weekend of
 24 January 26th or the day of January 26th. Were you at
 25 the Mirage Hotel & Casino?

1 A. Yes.
 2 Q. Were you here for a business trip?
 3 A. Yes.
 4 Q. Did you bring anybody with you during that
 5 business trip?
 6 A. No.
 7 Q. Did you have any other guests or any occupants of
 8 the hotel room that you stayed in at the Mirage?
 9 A. No.
 10 Q. Do you know a person by the name of James Howard
 11 Hayes?
 12 A. No.
 13 Q. Have you ever given an individual by the name of
 14 James Howard Hayes permission to enter one of your hotel
 15 rooms?
 16 A. No.
 17 Q. If you could look around the entire courtroom and
 18 see, have you ever given anyone in this courtroom
 19 permission to enter the hotel room that you were at in
 20 the Mirage that weekend?
 21 A. No.
 22 Q. I want to talk a little bit about what happened
 23 on January 26, 2019, in the morning hours of that date
 24 when you were at the Mirage. Can you walk us through
 25 what happened in the morning hours?

1 A. I went to sleep somewhere around midnight. At
 2 2:00 in the morning I heard my door open, and I sat up
 3 in bed and looked over at the door. At the door I left
 4 the lights on to illuminate kind of the bathroom/closet
 5 area, and I saw the door open with a person standing
 6 there that I did not recognize. And he looked a little
 7 bit startled. I was startled. He quickly left the
 8 room.
 9 Q. Do you see that person here in court today?
 10 A. Yes.
 11 Q. Could you point to him and describe an article of
 12 clothing that he's wearing today?
 13 A. An article of clothing? Blue.
 14 Q. Can you point to him?
 15 THE COURT: Where are you pointing?
 16 MR. ROWLES:
 17 Q. Do you -- take another look.
 18 MR. SANFT: Your Honor, just for the
 19 record, he has identified somebody -- I'm sorry, can you
 20 describe something about what the person wearing blue,
 21 please?
 22 THE WITNESS: He has a bracelet on his right
 23 arm. No, wait. Never mind.
 24 MR. ROWLES:
 25 Q. Can you take another look around, sir?

1 THE COURT: Hold on. Just for the record,
 2 he's identifying an in-custody who is sitting down.
 3 THE WITNESS: Third one from the right.
 4 THE COURT: Third one from the right. That
 5 would be this defendant with the beard on him?
 6 THE WITNESS: Yes.
 7 THE COURT: Okay. Go ahead.
 8 MR. ROWLES:
 9 Q. How positive are you, sir?
 10 A. Apparently not very positive at this point.
 11 Q. Do you see anyone else in the courtroom --
 12 MR. SANFT: Objection, Your Honor. I don't
 13 understand why we're going with this line of questioning
 14 now. He's already identified who he believes is the
 15 person standing in the doorway. Now the State wants to
 16 have another shot at the ring here. So I think he's
 17 already identified who he believed was the person.
 18 MR. ROWLES: That's fine, Judge. I'll move
 19 on.
 20 THE COURT: Yeah, it's sustained. I think
 21 we've established that.
 22 MR. ROWLES:
 23 Q. At that point in time you said the individual
 24 left the courtroom -- left the house?
 25 A. Yes.

1 Q. Or room. Did you eventually make contact with
2 security?

3 A. Yes.

4 Q. When you made contact with security, did they
5 bring you to a holding area?

6 A. Yes, they did.

7 Q. Did they show you the individual that they had in
8 custody?

9 A. Yes.

10 Q. Was Metro there as well?

11 A. Yes. There were approximately six Metro
12 officers.

13 Q. Did you identify the person that they had
14 detained as the individual in your room?

15 A. Yes, and I identified him for a number of ways --
16 now I'm obviously questioning it -- but he was wearing
17 the same clothing that I saw in my room. It was kind of
18 a white jacket or a white fleece maybe or something like
19 that.

20 Q. And did you give a specific percentage as to
21 positive you were?

22 A. At the time I said I was about 80 percent.

23 MR. ROWLES: Nothing further, Your Honor.

24 THE COURT: Cross?

25 CROSS-EXAMINATION

1 BY MR. SANFT:

2 Q. Sir, what were you doing in Las Vegas at the
3 time?

4 A. I was on a business trip.

5 Q. Like a conference of some sort?

6 A. Yes.

7 Q. And when I say conference, is it one of the ones
8 where you go with other people in your industry and you
9 meet and talk about kinds of --

10 A. Yes. It was a furniture show. It's actually the
11 furniture -- it's the marketplace near here.

12 Q. So the marketplace that's right down here?

13 A. Yeah.

14 Q. And on this particular night you were in your
15 hotel room. You were there about midnight. Somewhere
16 around between that and 2:00 you went to sleep?

17 A. Yes.

18 Q. So prior to that were you out having a good time,
19 enjoying the Strip?

20 A. No, I was on business. And, no, I was not.

21 Q. So what were you doing prior to midnight between
22 the hours --

23 A. Oh, well, I mean, I had -- I went out to dinner.
24 Actually, no, I didn't. I'm trying to think. I hadn't
25 thought about that until just now. I had just gotten

1 in --

2 MR. ROWLES: Your Honor, I'm going to object
3 as to relevance.

4 THE COURT: That's okay. Overruled.

5 THE WITNESS: I met probably four or five
6 people from my company at the hotel.

7 MR. ROWLES:

8 Q. Do you know where at the hotel you were meeting
9 your people?

10 A. Various places. I don't remember specifically,
11 no.

12 Q. Did you, during the time that you were with the
13 people from your group, have drinks and --

14 A. Yes, I did.

15 Q. What were you drinking that night?

16 A. It was Maker's Mark 46.

17 Q. Okay.

18 THE COURT: I don't know what that is. What
19 is that?

20 THE WITNESS: It's a bourbon.

21 MR. SANFT: Maker's Mark.

22 THE COURT: Oh, okay.

23 MR. SANFT:

24 Q. Now, with regards to Maker's Mark, how are you
25 drinking it? Do you drink that neat? Do you drink it

1 on the rocks?

2 A. On the rocks.

3 Q. Okay. On the rocks. Do you recall how many
4 drinks that you had that night prior to going to bed?

5 A. Maybe three or four.

6 Q. Okay. Now, when --

7 A. Let's go with three.

8 Q. Three is good. Now, in terms of that night, you
9 go to bed and you're laying in bed and then you say you
10 leave the light on. Is that the light in the hallway of
11 the room or is it the one in the bathroom?

12 A. So it's the light in the hallway. As I remember,
13 it was sort of in front of the door. And I think there
14 was a closet there and also the bathroom. So just right
15 in that area, but it was not the bathroom light.

16 Q. And the room that you were in, was that a single
17 bed or was it --

18 A. Double bed.

19 Q. Double bed. And when you were sleeping in your
20 room on this night, which bed did you choose, one closer
21 to the bathroom or the one closest to the window?

22 A. Closest to the window.

23 Q. Okay. So you said you heard basically at some
24 point the door open, and you looked over and you could
25 see someone standing there?

1 **A. Direct line of sight.**

2 **Q.** Right. So you said that he opened the door and
3 he looked startled that you were there?

4 **A. Yes.**

5 **Q.** He didn't say anything to you?

6 **A. I thought he said "I'm sorry" or something like**
7 **that.**

8 MR. ROWLES: Objection. Hearsay. Move to
9 strike.

10 THE COURT: I think he's just saying I
11 thought. I'm going to overrule it for right now.

12 MR. SANFT:

13 **Q.** So whatever was said in the room, did he take a
14 step into the room?

15 **A. I thought he took a step in, but it was not very**
16 **far. It was right at the doorway and --**

17 **Q.** Was that before or after he said what he said to
18 you?

19 **A. It would have been before.**

20 **Q.** And then he turned around and walked out?

21 **A. Yes, and he closed the door.**

22 MR. SANFT: Okay. I have no further
23 questions.

24 THE COURT: Anything else, State?

25 REDIRECT EXAMINATION

1 ~~BY MR. ROWLES:~~

2 **Q.** Sir, do you wear glasses?

3 **A. No.**

4 MR. ROWLES: Nothing further.

5 THE COURT: Sir, thank you very much for
6 your testimony. You're free to go. Just don't discuss
7 it with anyone. Okay?

8 THE WITNESS: Okay.

9 THE COURT: Thank you, sir.

10 MR. ROWLES: Judge, I'll rest.

11 THE COURT: Okay.

12 MR. SANFT: Your Honor, I've spoken to my
13 client. He will respectfully decline his right to
14 testify at this preliminary hearing, and we will also
15 rest at this time.

16 THE COURT: All right. Sir, do you
17 understand that by not testifying today, I will not use
18 that against you in any way? Do you understand?

19 THE DEFENDANT: Yes, ma'am.

20 THE COURT: All right. And it's my
21 understanding that you are seeking -- you're listening
22 to the advice of counsel and not going to be testifying
23 today, right?

24 THE WITNESS: Correct.

25 THE COURT: All right. The State rests.

1 Defense rests.

2 MR. ROWLES: Submit for rebuttal, Your
3 Honor.

4 THE COURT: Submit.

5 MR. SANFT: Your Honor, we'll submit as
6 well.

7 THE COURT: All right. Sir, the purpose of
8 today is for preliminary hearing. It's slight or
9 marginal evidence that a crime was committed or that
10 these crimes were committed and that you committed it.

11 Based upon the testimony today with the
12 guest, even though he identified the wrong person, he
13 identified someone that night that came into his room
14 without permission..

15 A person was later detained. That person
16 was you. And you had the Mirage key in the pocket. So
17 I find that the State has than met its burden.

18 So it appears to me from the Complaint on
19 file that the following crimes were committed, to-wit:
20 Count 1, burglary; Count 2, unlawful use of hotel key.

21 I hereby order the said defendant to be held
22 to answer to said charges in the Eighth Judicial
23 District Court, County of Clark, State of Nevada, at the
24 following date and time.

25 THE CLERK: February 28th, 10:00 a.m., lower

1 level arraignment.

2 THE COURT: We'll remand him on Count 2 so
3 he gets his credit.

4 MR. SANFT: Thank you, Your Honor.

5 MR. ROWLES: Thank you, Judge.

6 -oOo-

7 ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF
8 PROCEEDINGS.

9

10

11

/S/Kristine Fluker

12

13

KRISTINE A. FLUKER, CCR NO. 403

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Murphy v. State 871 P.2d 916 (1994)

/s/ Douglas, J.

Douglas

/s/ Gibbons, J.

Gibbons

/s/ Pickering, J.

Pickering

EXHIBIT 22

Concur

Concur by: CHERRY

CHERRY, J., concurring:

I just want to make it perfectly clear how I view the jurisprudence set forth in *Turpin v. Sheriff*, 87 Nev. 236, 484 P.2d 1083 (1971), and the amendment identified as NRS 174.085 as an exception to bar another prosecution for the same offense following dismissal of an action where there is no other information or indictment pending for that offense.

The big distinction between using *Turpin* to allow the State to prosecute a defendant when it has elected, between two pending forms of prosecution and not allowing the State to pursue an election between two pending forms of prosecution in accordance with NRS 174.085 is when the dismissal occurs either before the subsequent form of prosecution is obtained or after the subsequent form of prosecution is obtained by the State.

If the State files a criminal complaint or information, then dismisses the case, and subsequently indicts the defendant on the same charge or charges, NRS 174.085 comes into play to bar the subsequent prosecution for the same offense or offenses, unless good cause is shown to the court and upon written findings and a court order to that effect. However, if the dismissal occurs when {125 Nev. 818} both forms of prosecution are still pending NRS 174.085 is not applicable.

Finally, I want prosecutors and criminal defense attorneys to know that if a criminal complaint or information is filed and then the defendant is indicted on the same charges and additional charges, *Turpin* applies if the criminal complaint or information is dismissed and NRS 174.085 would not be applicable {221 P.3d 716} nor would dismissal by the court of the indictment be proper.

/s/ Cherry, J.

Cherry

Footnotes

1

Judge Joseph T. Bonaventure signed Thompson's judgment of conviction; however, Judge Lee A. Gates signed the order denying Thompson's motion to dismiss.

2

Judge Lee A. Gates also signed the order denying Thompson's motion to suppress identification.

3

NRS 174.085 governs, among other things, the effect of a voluntary dismissal and states that "[a]fter 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

All is well, when it all ends well

upon good cause shown to the court and upon written findings and a court order to that effect." NRS 174.085(7).

4

NRS 178.554 allows the State to dismiss a criminal complaint or indictment at any time prior to trial.

5

NRS 178.556 permits a court to dismiss an indictment, information, or criminal complaint for unnecessary delay.

6

Because we conclude that the district court properly found that Coppola was not testifying as an expert, we need not reach Thompson's argument that he was not given notice of the alleged expert testimony.

7

From this it follows that it was not an abuse of discretion for the district court to deny Thompson's pretrial motion in limine to exclude the photographs. Thompson also argues on appeal that the district court should have excluded the photographs because their probative value was substantially outweighed by the danger of unfair prejudice. See NRS 48.035(1). Thompson did not object to the photographs on this ground below, and he cannot assert new grounds for objection on appeal. *Geer v. State*, 92 Nev. 221, 224, 548 P.2d 946, 947 (1976). Thompson also has not demonstrated plain error in this respect. See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); *Moore v. State*, 122 Nev. 27, 36-37, 126 P.3d 508, 514 (2006) (explaining that failure to object generally precludes appellate review unless the defendant demonstrates plain error).

~~XXXX~~

NRS 178.562(2) is a safeguard against egregious error by a magistrate in determining probable cause, not a device to be used by a prosecutor to satisfy deficiencies in evidence at a prelim hearing through affidavit

Jurisdiction

Actual innocent

Strickland v Washington 466 U.S. 668

EXHIBIT 27

A superseding indictment charging an offense that is a lesser included offense of an offense contained in the original indictment does not broaden or substantially amend the original charges. *Benitez v. State*, 111 Nev. 1363, 904 P.2d 1036, 111 Nev. Adv. Rep. 154, 1995 Nev. LEXIS 153 (Nev. 1995).

The justice court had no authority to sua sponte amend a felony complaint to a misdemeanor. *Parsons v. Fifth Judicial Dist. Court ex rel. County of Nye*, 110 Nev. 1239, 885 P.2d 1316, 1994 Nev. LEXIS 165 (1994).

An information cannot be amended so as to charge an offense not shown by the evidence taken at the preliminary examination. *Hanley v. Zenoff*, 81 Nev. 9, 398 P.2d 241, 1965 Nev. LEXIS 195 (1965), superseded by statute, *Snyder v. State*, 103 Nev. 275, 738 P.2d 1303, 1987 Nev. LEXIS 1633 (1987) (decision under former similar statute).

Information properly amended to conform with preliminary hearing testimony.

State was properly permitted to amend the information on the first day of trial because defendant's rights were not prejudiced and the charges remained same; the information was amended to conform to the victim's testimony at the preliminary hearing. *Viray v. State*, 121 Nev. 159, 111 P.3d 1079, 121 Nev. Adv. Rep. 19, 2005 Nev. LEXIS 23 (Nev. 2005).

An amendment cannot prejudice the defendant.

Although amendment of an information is usually within the trial court's discretion, that discretion is abused if an additional or different offense is charged or the substantial rights of the defendant are prejudiced. *Green v. State*, 94 Nev. 176, 576 P.2d 1123, 1978 Nev. LEXIS 516 (Nev. 1978).

Defendant's substantial rights were prejudiced by an amendment of the information that added felony murder, alleging that defendant kidnapped victim prior to murdering him, because defendant had already testified, had no notice prior to testifying of any allegations of facts that would support a charge of felony murder and thus had no opportunity to defend the charge. *Jennings v. State*, 116 Nev. 488, 998 P.2d 557, 116 Nev. Adv. Rep. 56, 2000 Nev. LEXIS 61 (Nev. 2000).

Amendment prejudiced substantial rights.

The trial court did not abuse its discretion in determining that defendant's substantial rights were prejudiced by the amended information alleging aiding and abetting as an additional theory of murder where State did not offer this amended information until the day of trial and there was no indication that prior to the morning of trial defendant received adequate actual notice of the State's theory that he aided and abetted the murder of victim. *State v. Eighth Judicial Dist. Court*, 116 Nev. 374, 997 P.2d 126, 116 Nev. Adv. Rep. 40, 2000 Nev. LEXIS 36 (Nev. 2000).

A charge already dismissed may not be added by amendment.

Neither NRS 174.145, 34.520, nor this section permit the court to order the amendment of an information to restate a charge that has been dismissed by the magistrate at the preliminary examination, even though the magistrate's order was clearly erroneous. *Martin v. Sheriff, Clark County*, 88 Nev. 303, 496 P.2d 754, 1972 Nev. LEXIS 453 (Nev. 1972).

Clerical change is not prejudicial.

NRS. 174.085 Annotations

EXHIBIT 28

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:

(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 hearing 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 hearing did not constitute double jeopardy. *State v. Feinhaber*, 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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State v. Connery, 100 Nev. 256, 679 P.2d 1266, 1984 Nev. LEXIS 364 (Nev. 1984).

The offense of assault and battery was not "an offense necessarily included" in the crime of statutory rape, thus, merely because the defendant was placed in jeopardy on a charge of assault did not preclude a trial and conviction of statutory rape. *State v. Holm*, 55 Nev. 468, 37 P.2d 821, 1935 Nev. Lexis 3 (Nev. 1934) (decision under former similar statute).

No good cause prerequisite for voluntary dismissal by prosecuting attorney. Revised subsection 5 removes any good cause prerequisite for a prosecutor dismissing a complaint before a misdemeanor. Sheriff, Washoe County v. Marcus, 116 Nev. 188, 995 P.2d 1016, 116 Nev. Adv. Rep. 19, 2000 Nev. LEXIS 19 (Nev. 2000).

Prosecuting attorney's right to voluntarily dismiss a complaint is constitutional and does not violate the Equal Protection Clause because it is rationally related to the legitimate government interest of allowing prosecutors a qualified right to dismiss and refile charges so that evidence may be more fully developed before trial and the burdensome grand jury process may be avoided before reinstatement of charges. Sheriff, Washoe County v. Marcus, 116 Nev. 188, 985 P.2d 1016, 116 Nev. Adv. Rep. 19, 2000 Nev. LEXIS 19 (Nov. 2000).

New case filed after dismissal of complaint concerning same matter.

Subsequent complaint filed by a prosecuting attorney may be filed in the same case number as the original complaint under a plain reading of this statute as it refers to the filing of "another" complaint and a "subsequent" complaint, and makes no mention of a new case number. A city was not required to file a new complaint with a new case number when it voluntarily dismissed a complaint after a complaint concerning the same matter had been filed and dismissed against defendant; the municipal court had established the procedure of filing a subsequent complaint in the same case to ensure the case was established to the same judge as required by this section and defendant was not prejudiced. *City of Henderson v. Amado*, 396 P.3d 798, 133 Nev. Adv. Rep. 36, 2017 Nev. Lexis 48 (Nov. 2017).

Cited in:

State v. Kirkpatrick, 94 Nev. 628, 584 P.2d 670, 1978 Nev. LEXIS 636 (1978).

Research References and Practice Aids

Cross References

As to defense of foreign conviction or acquittal, see NRS 193.280.

As to defense of conviction or acquittal in another county, NRS 193.290.

ALR

Conviction or acquittal of one offense, in court having no jurisdiction to try offense arising out of same set of facts, later charged in another court, as putting accused in jeopardy of later offense. 4 A.L.R.3d 874.

Subsequent trial, after stopping former trial to try accused for greater offense, as constituting double jeopardy. 6 A.L.R.3d 905.

Earlier prosecution for offense during which homicide was committed as bar to prosecution for

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homicide. 11 A.L.R.3d 834.

Propriety of increased punishment on new trial for same offense. 12 A.L.R.3d 978.

Discharge on habeas corpus of one held in extradition proceedings as precluding subsequent extradition proceedings, 33 A.L.R.3d 1443.

When does jeopardy attach in a nonjury trial. 49 A.L.R.3d 1039.

Prosecution for robbery of one person as bar to subsequent prosecution for robbery committed of another person at the same time. 51 A.L.R.3d 693.

Acquittal in criminal proceeding as precluding revocation of probation on same charge. 76 A.L.R.3d 564.

Acquittal in criminal proceeding as precluding revocation of parole on same charge. 76 A.L.R.3d 578.

Propriety of trial court's declaration of mistrial or discharge of jury, without accused's consent, on ground of prosecution's disclosure of prejudicial matter, or making prejudicial remarks in presence of jury. 77 A.L.R.3d 1143.

Acquittal of criminal charges other than contempt as precluding contempt proceedings relating to same transaction. 88 A.L.R.3d 1089.

Acquittal as bar to prosecution of accused for perjury committed at trial. 89 A.L.R.3d 1098.

Appeal by state of order granting new trial in criminal case. 95 A.L.R.3d 596.

Double jeopardy as bar to retrial after grant of defendant's motion for mistrial. 98 A.L.R.3d 997.

Propriety of court's dismissing indictment or prosecution because of failure of jury to agree after successive trials. 4 A.L.R.4th 1274.

Applicability of double jeopardy to juvenile court proceedings. 5 A.L.R.4th 234.

Single act affecting multiple victims as constituting multiple assaults or homicides. 8 A.L.R.4th 960.

Right of municipal corporation to review of unfavorable decision in action or prosecution for violation of ordinance — Modern status, 11 A.L.R.4th 399.

Retrial on greater offense following reversal of plea-based conviction of lesser offense. 14 A.L.R.4th 270.

What constitutes "manifest necessity" for state prosecutor's dismissal of action, allowing subsequent trial despite jeopardy's having attached. 14 A.L.R.4th 1014.

Solicitation to commit crime against more than one person or property, made in single conversation, as single or multiple crimes. 24 A.L.R.4th 1324.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense. 25 A.L.R.4th 934.

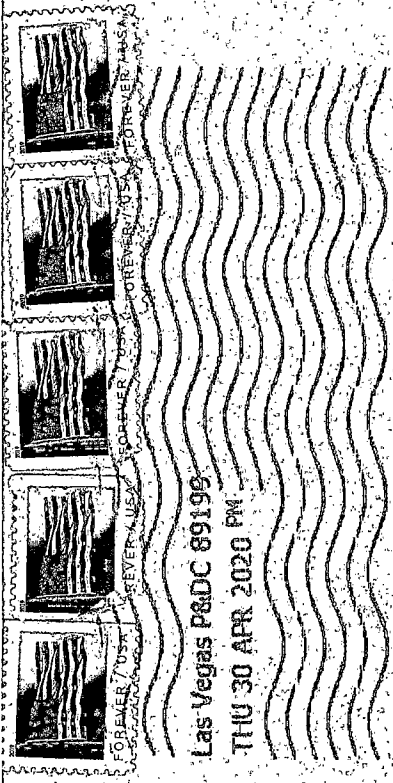
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2nd. 1st. 38.57.28V

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FILED

MAY 27 2020

John D. Johnson
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 _____

"Supplemental Petition"

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.

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MAY 13 2020

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: State violated Mr. Hayes (petitioner) right to Equal Protection of law as guaranteed by both the Equal protection clause of the fourteenth Amendment of the U.S constitution and Nevada Constitution Art 4 § 2.

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

As Justice so requires to redress this fundamental miscarriage of Justice, as petitioner has been singled out for prosecution on the more serious offense for a reason which is offensive to the Equal protection clause of the United States constitution and Nevada constitution Article 4 § 2. Here, this is a constitutional challenge to the validity of a statute (Attempt Grand larceny Category D felony) / Gross Misdemeanor - NRS 205.220.1, 205.222.2, 193.3303 under which petitioner is incarcerated. Petitioner claims the statute(s) governing the offense with which he was charged allow for arbitrary enforcement in violation of his equal protection rights. In the instant case, petitioner was charged with violating NRS 205.220.1, 205.222.2, 193.330 a felony and under the statutory scheme, however, petitioner could also have been charged with a gross-misdemeanor, ~~the~~ the statute requires proof of essentially the same elements.

Petitioner contends the 2 forementioned statutes require essentially the same elements of proof, thereby giving the district attorney and/or Judge unbridled

ADDITIONAL FACTS OF THE CASE:

discretion to prosecute the crime as a gross-misdemeanor or felony.

Whereas, a state may not prescribe different penalties for the same offense without violating the equal protection clause of the fourteenth Amendment (Spillers v. State 436 P.2d 18) likewise, where a statute prescribes "different punishments or different degrees of punishment for the same acts committed under the same circumstances by persons in like situations the equal protection clause is violated (State v. Rutherford 552 P.2d 202)

Here the statute(s) in question mandate different punishments for what appear to be the same act. The penalty as a felony imposes a sentence of one to four years in NDOC with the possibility of a fine not to exceed \$5,000.00; whereas, the penalty as a gross-misdemeanor imposes a sentence of up to 364 days in the county jail with the possibility of a fine not to exceed \$2,000.00. Nevertheless, petitioner was charged under the felony statute rather than the gross-misdemeanor statute, as a comparison of the elements contained in the statute(s) does not establish an intelligent standard for distinguishing the conduct proscribed by the statute(s). As the offense appear to prescribe different degrees of punishment for acts committed under the same circumstances by persons in like situations (Lapinski v. State 446 P.2d 645), therefore, this was unconstitutional because it allowed the district attorney and/or Judge discretion to decide whether the petitioner should be charged with felony or gross-

1 misdemeanor here the guide is too indefinite as it affords
2 no basis to determine whether the proper penalty is imposed,
3 it gives the district attorney and/or judge the legislative
4 power to determine punishment. The power to define crimes
5 and penalties lies exclusively in the legislature, and only
6 the legislature can promulgate the law that will apply to
7 what must be a clearly designated state of facts.

CERTIFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 1st
day of May, 2020, I mailed a true and correct copy of the foregoing, "Petition for
writ of habeas corpus "Supplemental petition""
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 LOUIS AVE. 31041
INDIAN SPRINGS, NV
89155-1160

Clerk County Dist Att'y
200 LOUIS AVE
INDIAN SPRINGS, NV
89155-2212

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

CC:FILE

DATED: this 1st day of May, 2020.

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 Petition for writ

of habeas corpus "Supplemental Petition"
(Title of Document)

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

☒ 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

5-1-20
Date

JAMES H. HAYES
Print Name

PRO PER
Title

278

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279 - 281
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U.S. MAIL**

FILED

JUN 04 2020

CLERK OF COURT

Hayes, James H. # 1175072

/ In Propria Personam
Post Office Box 208 S.D.C.C.
Indian Springs, Nevada 89018 70

DISTRICT COURT
CLARK COUNTY, NEVADA

State of Nevada
(Respondent)

v.

James H. Hayes
(Petitioner)

HEARING REQUESTED !!

Case No. A-19-793315-W

Dept No. 19

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 18 day of May, 2020.

BY: James H. Hayes
JAMES H. HAYES #1175072
/In Propria Personam

CLERK OF THE COURT

MAY 22 2020

RECEIVED

27
Hayes, James H ID NO. 1175077

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

FILED

JUN 04 2020

Ch. Williams
CLERK OF COURT

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

State of Nevada
RESPONDENT

v.

James H. Hayes
PETITIONER

HEARING REQUESTED !!

CASE NO.: A-19-793315-IN

DEPT. NO.: 19

DOCKET:

Motion for "Peremptory Challenge of Judge" and
to "Disqualify Judge William "Bill" Kephart"

COMES NOW, ~~Petitioner~~, James H. Hayes, herein above respectfully
moves this Honorable Court for an granting of Motion for "Peremptory
challenge of Judge" to be afforded a fair and
Just criminal proceeding without bias or prejudice

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

DATED: this 18 day of May, 2020

BY:

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

RECEIVED
MAY 22 2020
CLERK OF THE COURT

ADDITIONAL FACTS OF THE CASE:

1 COMES NOW JAMES H. HAYES PETITIONER IN PROPER
2 PERSON REQUESTS THAT CLACK COUNTY DISTRICT COURT, DEPT.
3 19 JUDGE WILLIAM "BILL" KEPHERT BE DISQUALIFIED AND
4 TRANSFER THE ABOVE TITLED ACTION TO ANOTHER CLACK
5 COUNTY DISTRICT COURT JUDGE (CHIEF JUDGE) DUE TO
6 INAPPROPRIATE PERSONAL ATTACK, PREJUDICE, AND BIAS,
7 FAILURE TO SEEK JUSTICE THAT RESULTED IN A JUDICIAL
8 VIOLATION THAT OCCURRED ON MARCH 6, 2019. AS IT IS
9 THE JUDGE HAS FAILED IN HIS DUTY TO REFRAIN FROM
10 IMPROPER METHODS CALCULATED TO PRODUCE A WRONGFUL
11 CONVICTION IN THE INSTANT CASE. MR. HAYES (PETITIONER)
12 WAS PREJUDICED AND DISCRIMINATED AGAINST FOR BEING
13 OF THE NEGRO RACE AS IT TOOK LESS EVIDENCE TO CONVICT
14 HIM THAN IT HAS TO CONVICT A WHITE PERSON, AND
15 MR. HAYES RECEIVED THE GREATER PUNISHMENT (FELONY
16 TREATMENT) THAN THE WHITE PERSON, EVEN AFTER MR. HAYES
17 CHARGE HAD PREVIOUSLY BEEN DISMISSED BY JUSTICE
18 COURT MAGISTRATE AT THE CONCLUSION OF PRELIMINARY
19 EXAMINATION FOR LACK OF ADMISSIBLE EVIDENCE, NO
20 CORPUS DELICTI, AND NO SLIGHT NOR MARGINAL EVIDENCE
21 OF ACTUAL GUILT

22 WHEREAS, MR. HAYES (PETITIONER) IS EXTREMELY CONCERNED
23 THAT THE JUDGE WILLIAM KEPHERT WILL CONTINUE TO BE
24 BIASSED OR UNFAIR FOR SOME REASON AS HE HAS SHOWN
25 IN THE PAST THAT WOULD NOT SERVE THE INTERESTS OF
26 JUSTICE. (SEE FOOTNOTES)

1 Wherefore Mr. Hayes requests that the court
2 grant such relief to which Mr. Hayes may be entitled,
3 As justice so requires...

4
5 *Footnotes: The equal protection clause of the 14th
6 Amendment of the U.S. Const. prohibits Mr. Hayes
7 from being treated differently than others similarly
8 situated (Cleburne v. Cleburne Living Center, 473 U.S. 432)

9 the Due Process clause of the U.S. Const.
10 provides Mr. Hayes the protection of the individual
11 against arbitrary action of Government (Daniel v.
12 Williams 424 U.S. 322)

13 The court has violated its duty, thereby abused
14 its discretion. A manifest abuse of discretion is "a
15 clearly erroneous interpretation of the law or a clearly
16 erroneous application of a law or rule

17 in which are deemed fundamental to the
18 American scheme of Justice, as a Judge (William
19 Keefe) shall comply with the law, including the
20 code of Judicial Conduct (NCJC 1.1)

CERTIFICATE OF SERVICE BY MAILING

I, JAMES H. HAYES, hereby certify, pursuant to NRCP 5(b), that on this 18
day of May, 2020, I mailed a true and correct copy of the foregoing, "Motion For
Peremptory Challenge of Judge"
by placing document in a sealed pre-postage paid envelope and deposited said envelope in the
United State Mail addressed to the following:

Clerk County Dist Ct
CLERK OF THE COURT
200 LEWIS AVE 3RD FLOOR
LAS VEGAS, NV
89155-1160

Clerk County Dist. Attorney
200 LEWIS AVE
LAS VEGAS, NV
89155

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

CC:FILE

DATED: this 18 day of May, 2020.

James H. Hayes
JAMES H. HAYES #1175087
/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 Motion for

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

5-18-20
Date

JAMES H. HAYES
Print Name

PRO PER
Title

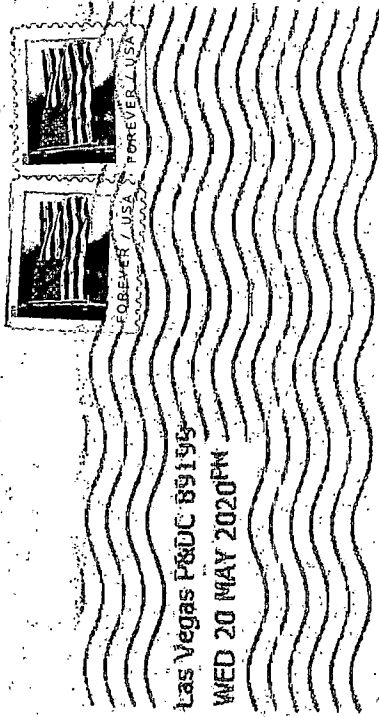
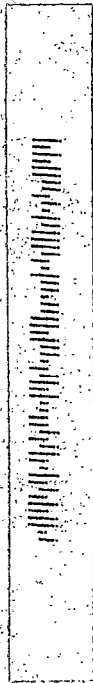
Stamp # 1175072

SDCC

P.O. Box 208

Indian Springs, NV

89020



Clark County District Courts

"Office of the Clerk"

200 LEWIS AVE; 3RD FLOOR

Las Vegas, Nevada

89155-1160

LEGAL

Mail

Boyle

MCANZ
SOUTHERN DISTRICT
CORRECTIONAL CENTER
MAY 20 2020
OUTGOING MAIL
ME LLC

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DISTRICT COURT
CLARK COUNTY, NEVADA

Electronically Filed
6/5/2020 9:43 AM
Steven D. Grierson
CLERK OF THE COURT



James Hayes, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

Case No.: A-19-793315-W

Department 19

NOTICE OF HEARING

Please be advised that the Plaintiff's Motion for Peremptory Challenge of Judge and to Disqualify Judge William "Bill" Kephart in the above-entitled matter is set for hearing as follows:

Date: July 07, 2020

Time: 9:00 AM

Location: RJC Courtroom 17A
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court



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

Plaintiff,

-vs-

THE STATE OF NEVADA,

Defendant.

CASE NO: A-19-793315-W

DEPT NO: XIX

**STATE'S RESPONSE AND MOTION TO STRIKE PETITIONER'S AFFIDAVIT OF
ACTUAL INNOCENCE NOT MERE LEGAL INSUFFICIENCY BUT "FACTUAL
INNOCENCE"**

DATE OF HEARING: JUNE 15, 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 State's Response to Petitioner's Affidavit of Actual Innocence not Mere Legal Insufficiency but "Factual Innocence," and in support of the State's Motion to Strike the same.

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.

///

///

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On or about July 23, 2013, James H. Hayes (hereinafter, "Petitioner") was charged by
4 way of Criminal Complaint with one count of BURGLARY (Category B Felony – NRS
5 205.060) and one count of ATTEMPT GRAND LARCENY (Category D Felony/Gross
6 Misdemeanor – NRS 205.220.1, 205.222.2, 193.330). Following a Preliminary Hearing in
7 Justice Court, Las Vegas Township on June 14, 2016, the charge of BURGLARY was bound
8 over to District Court, and the charge of ATTEMPT GRAND LARCENY was dismissed.

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

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

18 GPA at 1:22-24. The GPA further includes, in pertinent part, the following acknowledgement:

19 I understand and agree that, if...an independent magistrate, by affidavit review,
20 confirms probable cause against me for new criminal charges including reckless
21 driving or DUI, but excluding minor traffic violations, the State will have the
22 unqualified right to argue for any legal sentence and term of confinement
23 allowable for the crime(s) to which I am pleading guilty, including the use of
24 any prior convictions I may have to increase my sentence as a habitual criminal
to five (5) to twenty (20) years, Life without the possibility of parole, Life with
the possibility of parole after ten (10) years, or a definite twenty-five (25) year
term with the possibility of parole after ten (10) years.

25 GPA at 2: 1-9. An Amended Information reflecting the new charge of ATTEMPT GRAND
26 LARCENY was filed in conjunction with the GPA. Petitioner was adjudged Guilty pursuant
27 to Alford that same day, and the sentencing hearing was scheduled for March 6, 2019.

28 ///

1 On January 31, 2019, the State filed a State's Notice of Motion and Motion to Revoke
2 Bail, asserting that in Las Vegas Justice Court case number 19F01534X, a Justice of the Peace
3 had found probable cause to charge Petitioner with Burglary for acts committed on or around
4 January 26, 2019. The State's Motion to Revoke Bail was granted after a hearing on February
5 4, 2019.

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

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

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

23 On November 19, 2019, Petitioner filed another Notice of Appeal, appealing the denial
24 of his Coram Nobis motion. His Case Appeal Statement was filed on December 11, 2019 (SCN
25 80222). As of the date of this Response, Petitioner's appeal was still outstanding.

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

28 ///

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

7 On May 15, 2020, Petitioner also filed the instant “Affidavit of Actual Innocence not
8 Mere Legal Insufficiency but ‘Factual Innocence’” (his “Affidavit”).

9 ARGUMENT

10 **I. PETITIONER’S AFFIDAVIT IS A ROGUE FILING**

11 NRS 34.750(3) provides that supplemental pleadings and documents may only be filed
12 by appointed counsel for a petitioner, within 30 days of counsel’s appointment. NRS 34.750(5)
13 is clear: “No further pleadings may be filed except as ordered the court.”

14 Petitioner acknowledges that he executed and submitted his Affidavit in proper person.
15 Affidavit at 6. Petitioner does not assert that this Court ordered the filing of such an affidavit,
16 or of any supplemental pleading or document. See, id. at 1-6. Instead, Petitioner simply
17 recycles the same arguments as raised in his Amended Petition, and in his Reply to the State’s
18 Response. Id. Therefore, Petitioner’s Affidavit is improper, and constitutes a rogue filing that
19 should be stricken by this Court.

20 **II. PETITIONER HAS FAILED TO MAKE AN ADEQUATE SHOWING OF** 21 **“ACTUAL INNOCENCE”**

22 The United States Supreme Court has held that a petitioner claiming “actual innocence”
23 bears the burden of proving that “it is more likely than not that no reasonable juror would have
24 convicted him in light of the *new evidence* presented in habeas proceedings.” Calderon v.
25 Thompson, 523 U.S. 538, 560, 118 S.Ct. 1489, 1503 (1998) (quoting Schlup v. Delo, 513 U.S.
26 298, 327, 115 S.Ct. 851, 867 (1995)) (emphasis added).

27 Petitioner does not claim that there is any new evidence that would undermine his
28 voluntary plea of guilty pursuant to Alford. See, Affidavit at 1-7. Instead, Petitioner merely

1 recycles and summarizes the claims that he already raised in his Amended Petition for Writ of
2 Habeas Corpus. Id. Because Petitioner fails to allege, much less prove, any new exculpatory
3 evidence, his claim is bare and naked, and inadequate to demonstrate “actual innocence.” See,
4 Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

5 **CONCLUSION**

6 For the foregoing reasons, the State respectfully requests that this Court STRIKE
7 Petitioner’s Affidavit of “Actual Innocence” in its entirety, or otherwise, that this Court make
8 a finding that Petitioner’s Affidavit is insufficient to warrant relief.

9 DATED this 10th day of June, 2020.

10 Respectfully submitted,

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

13
14 BY /s/ TALEEN PANDUKHT
15 TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #05734

16 **CERTIFICATE OF MAILING**

17
18 I hereby certify that service of the above and foregoing was made this 10th day of June,
19 2020, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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

23 BY /s/ J. MOSLEY
24 Secretary for the District Attorney's Office

DISTRICT COURT
CLARK COUNTY, NEVADA

CASE NO: A-19-793315-W

-VS-

DEPT NO: XIX

Defendant.

DATE OF HEARING: JUNE 15, 2020
TIME OF HEARING: 8:30 AM

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5 order, the State filed its Response to both filings on April 17, 2020. Petitioner replied to the
6 State’s Response on May 15, 2020.

7 On May 15, 2020, Petitioner also filed an “Affidavit of Actual Innocence not Mere
8 Legal Insufficiency but ‘Factual Innocence.’” The State has filed, contemporaneously with
9 the instant Response, a Response and Motion to Strike Petitioner’s Affidavit.

10 On May 27, 2020, Petitioner filed the instant Supplemental Petition.

11 **ARGUMENT**

12 **I. PETITIONER’S SUPPLEMENTAL PETITION WARRANTS DISMISSAL**

13 NRS 34.750(3) provides that supplemental pleadings and documents may only be filed
14 by appointed counsel for a petitioner, within 30 days of counsel’s appointment. NRS 34.750(5)
15 is clear: “No further pleadings may be filed except as ordered the court.” The Nevada Supreme
16 Court has addressed when courts can allow litigants to file supplemental petitions, holding that
17 leave may only be granted if the petitioner shows good cause to explain the delay in raising a
18 claim. Barnhart v. State, 122 Nev. 301, 303-04, 130 P.3d 650, 652 (2006). Any finding of
19 good cause must be made “explicitly on the record” and enumerate “the additional issues
20 which are to be considered.” Id. at 303, 130 P.3d at 652.

21 The record demonstrates that Petitioner failed to seek leave to file the instant
22 supplemental pleading. Moreover, Petitioner does not acknowledge his default, much less
23 argue or demonstrate good cause to explain his delay in raising the instant claim. Therefore,
24 pursuant to Barnhart, there is no just reason to recognize Petitioner’s Supplemental Petition,
25 and the same should be dismissed pursuant to the procedural bars.

26 **II. PETITIONER’S SINGULAR CLAIM LACKS MERIT**

27 Petitioner’s singular claim alleges that the statutes under which he was charged are
28 unconstitutional, as they allow for punishment as either a felony or a gross misdemeanor.

1 Supplement at 2. Petitioner fails to acknowledge that his guilty plea waived all constitutional
2 claims arising before entry of his plea. He furthermore fails to support his assertion that the
3 two potential sentencing outcomes render the cited-to statutes unconstitutional.

4 The Nevada Supreme Court has previously explained that entry of a guilty plea results
5 in a waiver of constitutional claims arising prior to the plea, except claims regarding the plea's
6 voluntariness. Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 431, 683 P.2d 505
7 (1984); see also Kirksey v. State, 112 Nev. 980, 999, 923 P.2d 1102, 1114 (1996) ("Where the
8 defendant has pleaded guilty, the *only claims* that may be raised thereafter are those involving
9 the voluntariness of the plea itself and the effectiveness of counsel." (Emphasis added)). The
10 Nevada Supreme Court has elaborated:

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

15 Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (quoting Tollet v. Henderson, 411
16 U.S. 258, 267, 93 S.Ct. 1602, 1608 (1973)).

17 Petitioner entered his guilty plea on November 7, 2018, which the district court found
18 to be freely and voluntarily entered. Recorder's Transcript of Hearing: November 7, 2018
19 ("Transcript") at 8:8. Furthermore, at the entry of his plea, Petitioner acknowledged that his
20 crime could be punished as either a felony or a gross misdemeanor:

21 THE COURT: Okay. Can you tell me what your understanding is that you're
22 facing as a form of punishment for the charge of attempt grand larceny here in
the State of Nevada?

23 THE DEFENDANT: One to four in the Nevada Department of Corrections.

24 THE COURT: Okay.

25 THE DEFENDANT: *Or a gross misdemeanor of 364 days.*

26 Id. at 4:16-22 (emphasis added). Still, Petitioner asserted that he wished to proceed with his
27 entry of guilty plea. Id. at 5:13-15. Petitioner proceeded to acknowledge the factual basis that
28 provided the grounds for the charge against him, and entered his plea. Id. at 6:7-7:16.

Therefore, Petitioner solemnly entered his plea in open court and, pursuant to Webb and Lyons, waived any claim of constitutional defects in the charging of his crimes.

Furthermore, Petitioner fails to support his claim with any relevant legal authority. The Nevada Supreme Court has expressly relieved district courts of any burden to consider issues lacking citation to relevant legal authority. Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (“...without citation to authority, there was no reason for the district court to have considered [appellant’s] argument.”).

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court summarily dismiss Petitioner's Supplemental Petition in its entirety.

DATED this 10th day of June, 2020.

Respectfully submitted,

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

BY /s/ TALEEN PANDUKHT
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #05734

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 10th day of June, 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 /s/ J. MOSLEY
Secretary for the District Attorney's Office

District Court 8th Judicial District
Clerk County, Nevada

FILED
JUN 29 2020

Shirley
CLERK OF COURT

JAMES H. HAYES (petitioner)

v.

State of Nevada (defendant)

CASE NO: A-19-793315-W

DEPT NO: 19

Reply to state's motion to strike petitioner's affidavit
of actual INNOCENCE NOT mere legal insufficiency but
"FACTUAL INNOCENCE"

Comes now, petitioner, JAMES H. HAYES, herein above
respectfully moves this Honorable Court for a finding that
petitioner's affidavit "actual INNOCENCE NOT mere legal
insufficiency but "FACTUAL INNOCENCE" is sufficient
to warrant relief.

This pleading is made and based upon the
accompanying Memorandum of points and authorities,

Dated: this 16th day of JUNE, 2020

By: James H. Hayes

JAMES H. HAYES #1175077

Points and Authorities
Statement of the Case

On May 15 2020 petitioner filed his reply to the state's
response to petitioner's Amended petition along with his Affidavit
of Actual INNOCENCE NOT mere legal insufficiency but "FACTUAL
INNOCENCE"

RECEIVED

JUN 22 2020

Argument:

I. Petitioner's Affidavit is NOT a Rogue Filing

Whereas, petitioner's affidavit is not a supplemental pleading and not improper contrary to the state's argument when it was filed on the same day as petitioner's reply to the state's response on May 15, 2020 and the state has filed a response prior to this court's ruling on petitioner's amended petition. Hopefully, this court will not be persuaded by the state's grossly incorrect application of law or facts to law provided by NRS chapter 34. Therefore petitioner's affidavit must not be stricken by this court to redress this fundamental miscarriage of justice as justice so requires. As relief is warranted...

II. Petitioner has sufficiently made an adequate showing of "Actual Innocence" not mere legal insufficiency but "FACTUAL INNOCENCE"

Whereas, contrary to the state's argument in its response and motion to strike petitioner's affidavit petitioner's claim to ACTUAL INNOCENCE is new exculpatory evidence that was not known to the petitioner at the entry of his Affad plea or at the sentencing hearing based on the following...

1) Ineffective assistance of counsel as counsel

1 failed to make petitioner aware of the elements of the
2 crime of Attempt Grand Larceny that the state could
3 not prove as the alleged victim did not have the
4 value threshold of \$650.00 or more on his person or
5 in said room on night in question through evidence
6 of his sworn testimony at the preliminary hearing in
7 Justice Court Las Vegas Township on June 14, 2016 and
8 not one of the (3) three female occupants of said room
9 gave testimony that petitioner did not have permission
10 to be in said room on night in question. When in fact,
11 petitioner had fellatio performed on him in bathroom
12 of room on said night. Where as here counsel failed to
13 advise petitioner that conduct by petitioner did not
14 constitute Attempt Grand Larceny rendered guilty plea
15 unknowingly and involuntary. Constructive denial of
16 counsel as counsel was not familiar with the facts and
17 law relevant to petitioner's case (Herring v. Estelle 491 U.S.
18 242 125)... 2.) Ineffective assistance of counsel as
19 counsel failed to inform petitioner that Clark County
20 District Court did not have subject-matter jurisdiction
21 for the charge of Attempt Grand Larceny against the
22 petitioner per Nevada State law NRS 174.085(3) and
23 NRS 178.562 that made petitioner immune from
24 prosecution of Attempt Grand Larceny in Clark County
25 District Court (Waters v. 8th Judicial District Court 427
26 P.3d 1033). Whereby, Supreme Court of the United States
27 has long held that where an illegal substance has occurred,
28 as here, there is a core lack of jurisdiction and holding

1 that procedural rules cannot deny the priority of giving
2 relief from an illegal sentence (TOLSON V. BURKE 334 U.S.
3 736; WARD V. BERRY 429 P.2d 549). Furthermore, this
4 court must reject the federal standard and articulate
5 the state standard under which jeopardy attached
6 (NRS 174.085(3)) and eliminate the federal-required
7 showing and this court must rule jeopardy had
8 attached for constitutional purposes by the state law
9 standard. 3.) Ineffective assistance of counsel as
10 counsel failed to inform petitioner that the statute for
11 Attempt Grand Larceny was unconstitutional for
12 vagueness and arbitrary enforcement. Whereby the
13 statute permitted unfettered prosecutorial discretion in
14 selection of penalties when the constitution prohibits
15 selective enforcement of criminal laws. As the statute
16 for Attempt Grand Larceny gives alternative interpretations
17 that allows the prosecution unfettered discretion in
18 selecting which penalty to apply that have implicated
19 important constitutional protections. What in fact, any
20 unconstitutional law, is no law at all, it has no force or
21 effect, it is void and no legal consequence in criminal
22 penalty may flow from it. Where as here, petitioner was
23 prejudiced and discriminated against for being of the NBER
24 race as it took less evidence to convict him than it would
25 have to convict a white person, and petitioner received the
26 greater punishment (felony treatment) than the white person,
27 even after petitioner's charge of Attempt Grand Larceny had
28 previously been dismissed at the conclusion of preliminary

1 EXAMINATION by Justice Court magistrate for lack of
2 ADMISSIBLE EVIDENCE, NO CORPUS DELICTI and NO SLIGHT
3 or MARGINAL EVIDENCE OF GUILT. (Equal Protection Clause violation)

4 WHEREAS, THE FOREMENTION IS PROOF OF NEW
5 EXCULPATORY EVIDENCE PETITIONER WAS UNAWARE OF AT
6 THE TIME OF SENTENCING AND THE ENTRY OF HIS ALFORD
7 PLEA THAT DEMONSTRATES ACTUAL INNOCENCE AND
8 UNDERMINES THAT HIS ALFORD PLEA WAS KNOWINGLY,
9 INTELLIGENTLY, AND VOLUNTARILY ENTERED

10 CONCLUSION

11 FOR THE FOREGOING REASONS, THE PETITIONER
12 RESPECTFULLY REQUESTS THAT THIS COURT GRANTS
13 PETITIONER THE RELIEF THAT IS WARRANTED TO REDRESS
14 THIS FUNDAMENTAL MISDETERMINATION OF JUSTICE, AS JUSTICE
15 SO REQUIRES
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SDCC Law Library
Southern Desert Correctional Center
P.O.Box 208
Indian Springs, Nevada 89070 - 0208

Date: JUNE 16, 2020.

To: Clerk, 8th Judicial District Court
200 LOUIS AVE. 3RD FLOOR
LAS VEGAS, NV
89155-1160

From: JAMES H. HOPES # 1175672
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

RECEIVED

JUN 22 2020

James H. Hopes
Inmate

CLERK OF THE COURT

Special Instructions: PLEASE SEND COURT SUMMARY AND
COURT MINUTES FOR CASE NO C-16-315718-1 END
A-19-793315-W THANKS

Please send a correspondence directly to Inmate

CERTIFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 16th day of JUNE, 2020, I mailed a true and correct copy of the foregoing, "Reply to State motion to strike petitioner's affidavit of actual innocence" by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

Clerk County Dist Court
OFFICE OF THE CLERK
200 LEWIS AVE. 3RD FLOOR
LAS VEGAS, NV
89155-1160

Clerk County District Atty
200 LEWIS AVE
LAS VEGAS, NV
89155-2212

Atty General of Nevada
100 RUTH GORDON ST
CARSON CITY, NV
89401

CC:FILE

DATED: this 16th day of JUNE, 2020.

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

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 16 day of JUNE, 2020

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

6 of 6

6 of 6

50cc
P.O. Box 208
Indian Springs, NV
89020

Clerk County District Courts
"Office of the Clerk"

200 Lewis Ave; 3rd Floor
Las Vegas, Nevada

89155-1160

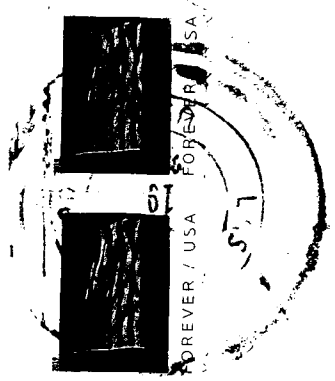
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1 AFFT

2
3 DISTRICT COURT

4 CLARK COUNTY, NEVADA

5
6 THE STATE OF NEVADA,

7 Plaintiff,

CASE NO. A-793315-W

8 -vs-

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

DEPT. NO. VII

Date of Hearing: 7/7/2020

11 Defendant.

Time of Hearing: 11:00 A.M.

12
13
14
15 **AFFIDAVIT IN RESPONSE TO DEFENDANT JAMES HOWARD HAYES' MOTION**
16 **FOR "PEREMPTORY CHALLENGE OF JUDGE" AND TO DISQUALIFY JUDGE**

17 **WILLIAM "BILL" KEPHART**

18
19 STATE OF NEVADA)
20) ss.
21 COUNTY OF CLARK)

22 WILLIAM DAVID KEPHART, ESQ., DECLARE AND SAY:

- 23
24 1. I am a District Court Judge, presiding in Department XIX of the Eighth Judicial District
25 Court, in Clark County, Nevada.
- 26 2. I make this affidavit in response to Defendant James Howard Hayes, aka James Howard
27 Hayes, Jr.'s Motion for "Peremptory Challenge of Judge" and to "Disqualify Judge
28 William "Bill" Kephart ("Motion") file-stamped June 4, 2020. For the convenience of
the reviewing Judge, this entire Affidavit is to be reviewed for the purposes of NRS

1 §1.235 demonstrating that the Court can and will fairly and impartially preside over the
2 instant matter.

- 3 3. I am currently assigned to preside over case A-19-793315-W, James Howard Hayes, aka
4 James Howard Hayes, Jr.', which is an inmate filed Petition for Writ of Habeas Corpus
5 filed on April 15, 2019. The companion criminal case is C-16-315715-1, State of Nevada
6 v. James Hayes.
- 7 4. The Court has no pre-conceived bias toward any of the parties involved in this law suit;
8 nor does it have any vested interest in any outcome. This Court feels absolutely certain
9 that it is free from any bias and can be fair and impartial to all parties in all phases of this
10 litigation. Moreover, I have a duty to sit and "preside to the conclusion of all proceedings,
11 in the absence of some statute, rule of court, ethical standard, or other compelling reason
12 to the contrary." Millen v. Eighth Dist. ex. rel. County of Clark, 122 Nev. 1245, 1253
13 (2006), City of Las Vegas Downtown Redev. v. Dist. Ct., 116 Nev. 640, 643, 5P. 3d
14 1059, 1061 (2000) (quoting Ham v. Eighth Judicial Dist. Court, In & For Clark Cnty., 93
15 Nev. 409, 415, 566 P.2d 420, 424 (1977)). See Also NCJC Canon 3(B)(1) ("a Judge shall
16 hear and decide matters assigned to the judge except those in which disqualification is
17 required.") Further, a judge is presumed to be impartial, and the party asserting a
18 challenge carries the burden of establishing sufficient factual and legal grounds
19 warranting disqualification. See Hogan v. Warden, 112 Nev. 553, 559-60, 916 P.2d 805,
20 809 (1996). A judge is presumed to be unbiased. Millen v. Eighth Dist. ex. rel. County of
21 Clark, 122 Nev. 1245, 1253 (2006). Further, the burden is on the party asserting the
22 challenge to establish sufficient factual and legal grounds warranting disqualification.
23 City of Las Vegas Downtown Redev. v. Dist. Ct., 116 Nev. 640, 643, 5P. 3d 1059, 1061
24 (2000). Pursuant to NCJC 2.11(A) a judge shall disqualify himself or herself in any
25 proceeding in which the Judge's impartiality might be reasonably be questioned. Ybarra
26 v. State, 127 Nev. 47 (2011). The test for whether a judge's impartiality might reasonably
27 be questioned is objective and courts must decide whether a reasonable person, knowing
28 all the facts, would harbor reasonable doubts about a judge's impartiality. "Any
disqualification of a judge or justice because of bias against an attorney for a party should
be restricted to those cases where malice is obvious and there is little question that the
judge or justice cannot be fair and impartial." City of Las Vegas Downtown
Redevelopment Agency v. Hecht, 113 Nev. 644 (1997).
5. I have no ill will or impartiality towards Defendant James Howard Hayes, aka James
Howard Hayes, Jr. I wish to honor my duty to sit in the absence of any rule, statute, case
law, ethical duty or otherwise. If I were to remain on the case, I would continue to rule
fairly and impartially as I have done in every matter. As a Judge, I am also tasked with
ensuring that each party have their case heard without distraction or concern that a party
may raise an issue to attempt to delay the case.

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5 Dated this 30th Day of June, 2020.

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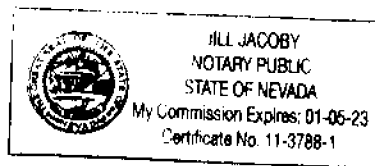
William Kephart

William D. Kephart

District Court Judge, Department XIX

Subscribed and sworn before me
this 30 day of June, 2019.

Jill Jacoby
Notary Public

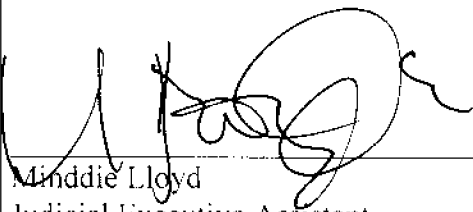


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5 **CERTIFICATE OF SERVICE**
6

7 I hereby certify that on or about the date electronically filed, this document was copied through
8 email, placed in the attorney's folder at the Regional Justice Center or mailed to the proper
9 persons as follows:

10 Steven B. Wolfson, Esq.
11 Clark County District Attorney
12 Nevada Bar #001565
13 Taleen Pandukht, Esq.
14 Deputy District Attorney
15 Nevada Bar # 05734
16 200 Lewis Avenue
17 Las Vegas, Nevada 89155-2212

18 James Howard Hayes, aka James Howard Hayes, Jr.
19 ID# 1175077
20 Southern Desert Correctional CTN.
21 20825 Cold Creek Road
22 P.O. Box 208
23 Indian Springs, Nevada 89070
24
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21 
22 Minddie Lloyd
23 Judicial Executive Assistant
24
25
26
27
28

1 **DAO**

2 **EIGHTH JUDICIAL DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4
5 JAMES HAYES,

6 Plaintiff,

7 vs.

Case No. A-19-793315-W

8 THE STATE OF NEVADA,

Dept. No. 19

9 Defendant.

10
11 **DECISION AND ORDER**

12 James Hayes filed a motion to disqualify Judge Kephart. Mr. Hayes moves for
13 disqualification based on Judge Kephart's rulings and actions in Mr. Hayes's criminal case. The
14 Court now rules based solely on the papers pursuant to EDCR 2.23(c). After review of Mr. Hayes's
15 motion, the Court denies Mr. Hayes's request to disqualify Judge Kephart.

16 **I. Factual and Procedural Background**

17 Mr. Hayes entered an Alford plea in criminal case C-16-315718-1 and Judge Kephart
18 sentenced Mr. Hayes on March 6, 2019. Six days later, a judgment of conviction was filed into the
19 criminal case. On appeal, the Nevada Court of Appeals affirmed the judgment of conviction on
20 January 14, 2020. Mr. Hayes has since filed a second appeal which is still pending before the
21 appellate court.

22 On April 15, 2019, Mr. Hayes filed a Petition for Writ of Habeas Corpus challenging his
23 conviction in case C-16-315718-1. Petition case A-19-793315-W was assigned to Judge Kephart as
24 the original sentencing judge. On June 4, 2020, Mr. Hayes filed into the writ case a "Motion for
25 Peremptory Challenge of Judge and to Disqualify Judge William 'Bill' Kephart." Mr. Hayes alleges
26 that Judge Kephart is biased based on Judge Kephart's rulings and actions in the criminal case.
27
28

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

Judge Kephart filed an affidavit in response on July 2, 2020, categorically denying any bias or prejudice towards Mr. Hayes.

II. Discussion

A. Legal Standard

Nevada Revised Statute 1.230 provides the statutory grounds for disqualifying district Court judges. The statute in pertinent part provides:

1. A judge shall not act in an action or proceeding when the judge entertains actual bias or prejudice for or against one of the parties to the action.
2. A judge shall not act as such in an action or proceeding when implied bias exists in any of the following respects:
 - (a) When the judge is a party to or interested in the action or proceeding.
 - (b) When the judge is related to either party by consanguinity or affinity within the third degree.
 - (c) When the judge has been attorney or counsel for either of the parties in the particular action or proceeding before the court.
 - (d) When the judge is related to an attorney or counselor for either of the parties by consanguinity or affinity within the third degree. This paragraph does not apply to the presentation of ex parte or contested matters, except in fixing fees for an attorney so related to the judge.

The Revised Nevada Code of Judicial Conduct provides substantive grounds for judicial disqualification. Pursuant to NCJC 2.11(A):

- (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
 - (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might be reasonably questioned. Ybarra v. State, 247 P.3d 269, 271 (Nev. 2011). The test for whether a judge's impartiality might be reasonably questioned is objective and courts must decide whether a reasonable person, knowing all the facts, would harbor reasonable doubts about a judge's impartiality. Id. at 272.

The burden is on the party asserting the challenge to establish sufficient factual and legal grounds warranting disqualification. Las Vegas Downtown Redevelopment Agency v. District Court, 5 P.3d 1059, 1061 (Nev. 2000). A judge has a duty to preside to the conclusion of all

1 proceedings, in the absence of some statute, rule of court, ethical standard, or compelling reason
2 otherwise. Id. A judge is presumed to be unbiased. Millen v. District Court, 148 P.3d 694, 701
3 (Nev. 2006). A judge is presumed to be impartial, and the burden is on the party asserting the
4 challenge to establish sufficient factual grounds warranting disqualification. Yabarra, 247 P.3d at
5 272. Additionally, the Court must give substantial weight to a judge's determination that the judge
6 may not voluntarily disqualify themselves, and the judge's decision cannot be overturned in the
7 absence of clear abuse of discretion. In re Pet. To recall Dunleavy, 769 P.2d 1271, 1274 (Nev.
8 1988).

9 The Nevada Supreme Court has stated "rulings and actions of a judge during the course of
10 official judicial proceedings do not establish legally cognizable grounds for disqualifications." Id. at
11 1275. The personal bias necessary to disqualify must 'stem from an extrajudicial source and result
12 in an opinion on the merits on some basis other than what the judge learned from participation in the
13 case." Id. "To permit an allegation of bias, partially founded upon a justice's performance of his [or
14 her] constitutionally mandated responsibilities, to disqualify that justice from discharging those
15 duties would nullify the court's authority and permit manipulation of justice, as well as the court."
16 Id.

17 The Nevada Supreme Court has noted that while the general rule is that what a judge learns
18 in his or her official capacity does not result in disqualification, "an opinion formed by a judge on
19 the basis of facts introduced or events occurring in the course of the current proceedings, or of prior
20 proceedings, constitutes a basis for a bias or partiality motion where the opinion displays 'a deep-
21 seated favoritism or antagonism that would make fair judgment impossible.'" Kirksey v. State, 923
22 P.2d 1102, 1107 (Nev. 1996). However, "remarks of a judge made in the context of a court
23 proceeding are not considered indicative of improper bias or prejudice unless they show that the
24 judge has closed his or her mind to the presentation of all the evidence." Cameron v. State, 968 P.2d
25 1169, 1171 (Nev. 1998).

26 ///

B. Disqualification is not warranted because Mr. Hayes has not established sufficient factual and legal grounds for disqualification.

Mr. Hayes alleges that Judge Kephart allowed Mr. Hayes to be wrongfully convicted on marginal evidence. Mr. Hayes further alleges that Judge Kephart's sentencing was racially motivated and that Judge Kephart made an unspecified, inappropriate comment at sentencing. Mr. Hayes argues that his allegations are evidence that Judge Kephart is biased against Mr. Hayes. Mr. Hayes does not provide any evidence in support of the allegations. Judge Kephart responds that he has ruled fairly and impartially in Mr. Hayes's criminal case and will continue to do so in the writ case. Judge Kephart asserts that he has no ill will or bias towards Mr. Hayes.

The rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification. In re Pet. To recall Dunleavy, 769 P.2d 1271, 1275 (Nev. 1988). Also, a judge's remarks during a court proceeding suggest improper bias or prejudice when the remarks show that the judge has closed their mind to the presentation of evidence. Cameron v. State, 968 P.2d 1169, 1171 (Nev. 1998). But, as the party seeking disqualification, Mr. Hayes has the burden to establish sufficient factual grounds to warrant disqualification. Las Vegas Downtown Redevelopment Agency v. District Court, 5 P.3d 1059, 1061 (Nev. 2000).

Here, there is no basis to disqualify Judge Kephart because Mr. Hayes has not met his burden. Mr. Hayes allegation that he was wrongfully convicted on marginal evidence contradicts the Alford plea entered by Mr. Hayes. The judgment of conviction was also affirmed by the Nevada Court of Appeals earlier this year. Mr. Hayes provides no evidence to support his allegations, nor does Mr. Hayes provide specifics of any alleged inappropriate conduct by Judge Kephart. The Court has reviewed minutes of the March 6, 2019, sentencing hearing and there is no indication that Judge Kephart made any inappropriate comments. Finally, Judge Kephart's rulings do not establish a cognizable ground for disqualification on their own. Therefore, Mr. Hayes's request to disqualify Judge Kephart on these grounds is denied.

///

III. Conclusion

Mr. Hayes has not demonstrated sufficient grounds to support the disqualification of Judge Kephart. Thus, Mr. Hayes's request to disqualify Judge Kephart is denied.

Dated this 8th day of July, 2020



LINDA MARIE BELL
DISTRICT COURT JUDGE

3BA 12C 4582 2DC3
Linda Marie Bell

1 **CSERV**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5
6 James Hayes, Plaintiff(s)

CASE NO: A-19-793315-W

7 vs.

DEPT. NO. Department 19

8 Nevada State of, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Decision and Order was served via the court's electronic eFile system
13 to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 7/8/2020

15 Melissa Boudreaux

mezama@clarkcountynv.gov

16
17 If indicated below, a copy of the above mentioned filings were also served by mail
18 via United States Postal Service, postage prepaid, to the parties listed below at their last
known addresses on 7/9/2020

19 James Hayes

Southern Desert Correctional Center
#1175077
PO Box 208
Indian Springs, NV, 89070

22 Steven Wolfson

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

DISTRICT COURT
CLARK COUNTY, NEVADA

Electronically Filed
7/23/2020 9:25 AM
Steven D. Grierson
CLERK OF THE COURT



James Hayes, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

Case No.: A-19-793315-W

Department 19

NOTICE OF HEARING

Please be advised that the Plaintiff's Motion for Ruling For Rule 60b Motion for Relief ; Motion to Vacate; Amend Petition for Writ of Habeas Corpus in the above-entitled matter is set for hearing as follows:

Date: August 27, 2020

Time: Chambers

Location:

Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

27
HAYES JAMES H. 1175077

Petitioner/In Propria Persona
Post Office Box 208, SDCC
Indian Springs, Nevada 89070

FILED

JUL 23 2020

CLERK OF COURT

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

JAMES A. HAYES

Petitioner,

vs.

State of Nevada
Warden Jerry Howell

Respondent(s).

"Hearing Requested"

Case No. A-19-793315-W

Dept. No. 19

Docket

Reply to State's Response
"Supplemental Petition for Writ of Habeas"

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

JUL 10 2020

CLERK OF THE COURT

-1 of 6-

Points and Authorities

STATEMENT OF THE CASE:

ON April 15, 2019, petitioner filed a "Petition for Writ of HABEAS CORPUS"

ON April 17, 2019, petitioner's "Notice of Appeal" was filed in the Supreme Court of Nevada (Emphasis added) PRO SE as trial counsel failed to do so. Whereby, petitioner in the instant case filed the "Petition for Writ of HABEAS CORPUS" prior to the filing of his "Notice of Appeal" contrary to state's assertions (Emphasis added)

ARGUMENT:

I. STATE'S ARGUMENT IS UNTENABLE FOR SEVERAL REASONS: 1.) THE UNDERLYING CHARGE OF BURGLARY WAS TOTAL WHAT THE STATE'S INSTANT OF LARCENY WAS DISMISSED AT THE CONCLUSION OF PRELIMINARY HEARING THAT BEING THE INSTANT CHARGE OF ATTEMPT GRAND LARCENY FOR LACK OF ADMISSIBLE EVIDENCE, NO CORPUS DELICT, NO MENS REA, AND NO SLIGHT OR MARGINAL EVIDENCE. SO THE STATE COULD NOT PLEAD THE BURGLARY CHARGE WITH CERTAINTY, AS THEY FAILED TO SET FORTH THE MANNER OR MEANS BY WHICH THE BURGLARY WAS COMMITTED. WHEREBY, PETITIONER HAS GLEAN THE STATE'S THEORY OF MEANS FROM THE EVIDENCE PRESENTED AT PRELIMINARY HEARING WHEN MAGISTRATE RULED NO PROBABLE CAUSE WAS SHOWN FOR STATE'S INSTANT OF ATTEMPT GRAND LARCENY.

1 2.) Clark County District Court lack "SUBJECT MATTER
2 JURISDICTION" for the charge of Attempt Grand
3 Larceny against petitioner per State Law of Nevada
4 NRS 174.085(3), NRS 178.562 and this court must avoid
5 a statutory interpretation that would render language
6 meaningless or superfluous, as the ~~the~~ language is
7 clear and unambiguous and must be enforced as
8 written and as our legislature intended.

9 3.) The character of material evidence in the state's
10 amended information is false that inevitably denied
11 petitioner due process. When the charged offense attempt
12 grand larceny did constitute part of the same offense
13 concerning which petitioner had been tried for at
14 preliminary hearing that was dismissed for lack of
15 admissible evidence, no corpus delicti, no mens rea, no
16 slight or marginal evidence. When in fact, the amended
17 information was a new charge for the same crime
18 and a continuing proceeding of the original dismissed
19 charge. Whereby in Nevada, a criminal prosecution is
20 commenced by criminal complaint.

21 4.) A fundamental vice of indefinite charge is that it
22 permit prosecutors to try theories totally different from
23 those propounded earlier in proceedings before this
24 magistrate. As here, it denies fundamental rights our
25 legislature intended a definite information to secure,
26 as the state is statutorily required to draft a
27 coherent information. Moreover, in this case, the

1 indefinite information obscures the reality that the
2 prosecution was unable to frame a proper amended
3 information for Attempt Grand Larceny consistently with
4 facts now known as the means and manner was
5 false deemed by Justice Court magistrate after all
6 sworn testimony. So this challenge is not with matters
7 of pleading etiquette or esthetics but with substantial
8 rights of the most essential kind. Furthermore, counsel
9 failed to advise petitioner that conduct alleged did not
10 constitute Attempt Grand Larceny and advised petitioner
11 to plea bargain to an offense he was not familiar
12 with the facts and the relevant law.

13 5.) Where a statute prescribes different punishments or
14 different degrees of punishment for the same acts committed
15 under the same circumstances by persons in like
16 ~~the~~ situations and in the instant case, the petitioner
17 being of the Negro race was prejudiced and discriminated
18 against as it took less evidence to convict him than it
19 would have to convict a white person, and petitioner
20 received the greater punishment (felony treatment) than
21 the white person, even after petitioner charge for Attempt
22 grand larceny had previously been dismissed by magistrates
23 for lack of evidence. No corpus delicti, no mens rea, and
24 no slight or marginal evidence of guilt. This is a colorable
25 showing that prosecution had unbridled discretion to prescribe
26 different punishments for the same act and thereby purports to
27 authorize the prosecutor to charge the Negro with a felony and
28 the white person with a gross-misdemeanor when the Negro was
29 actually innocent and the white person having evidence of actual
30 guilt. ~~convicted~~

1 WHEREFORE, JAMES H. HAYES, prays that the court grant PETITIONER'S
2 relief to which he may be entitled in this proceeding.

3 EXECUTED at SDCC
4 on the 22 day of JUNE, 2020.

5
6 BY: James H. Hayes
7 Signature of Petitioner

8 VERIFICATION

9 Under penalty of perjury, pursuant to N.R.S. 208.165 et seq., the undersigned declares that he is
10 the Petitioner named in the foregoing petition and knows the contents thereof; that the pleading is
11 true and correct of his own personal knowledge, except as to those matters based on information and
12 belief, and to those matters, he believes them to be true.

13 * Per NRS 239B.030, I certify
14 this legal pleading does not
15 contain the social security
16 number of any person.

17 BY: James H. Hayes
18 Signature of Petitioner

19 PRO SE
20 Attorney for Petitioner

21
22
23
24
25
26 5 of 6
27
28

CERTIFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 22nd day of JUNE, 2020, I mailed a true and correct copy of the foregoing, "Reply to State's Response to Supplemental Petition for Writ of Habeas" by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

Clerk County Dist. Courts
OFFICE OF THE CLERK
200 LAWS AVE. 3RD FL
LEES VEGAS, NV
89155-1160

Clerk County Dist. Attorney
200 LAWS AVE
LEES VEGAS, NEVADA
89155

Attorney General of Nevada
100 N. Carson St
Carson City, NV
89401

CC:FILE

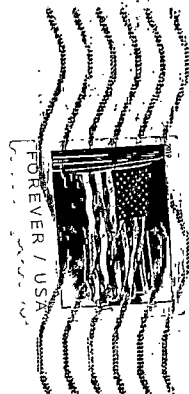
DATED: this 22 day of JUNE, 2020.

BY: Carmon D. Shuko
JAMES H. HAYES # 1175022
/In Propria Personam
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

6 of 6

HALES, J #1125022
JDEC.
P.O. Box 208
Indian Springs, NV
89020

LAS VEGAS, NV 890
09 JUL 2020 PM 5 L



Clerk County District Court
"Office of the clerk"

200 Lewis Ave, 3rd Floor

Las Vegas, Nevada

89155-1160

Legal Mail

6910136300 COTS



Code:

WANTZCME LLC

OUTER

JUL 09 2019

SOUTHERN DESERT
CORRECTIONAL CENTER

FILED

JUL 23 2020

CLERK OF COURT

Hayes, James H ID NO. 1175077

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

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

State of Nevada
Plaintiff

v.

JAMES H. HAYES
Defendant

HEARING REQUESTED!

CASE NO.: C-16-315718-1; A-19-293315-4

DEPT. NO.:

DOCKET:

"Motion for Ruling" for "Rule 60b Motion for Relief";
"Motion to Vacate"; Amended Petition for Writ of
Habeas Corpus

COMES NOW, ~~defendant~~, JAMES H. HAYES, herein above respectfully
moves this Honorable Court for an granting of this "Motion for Ruling"
to redress this fundamental miscarriage of Justice and to
OVERCOME this criminal injustice; and order an expeditious ruling...

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

DATED: this 1st day of July, 2020

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

RECEIVED
JUL 19 2020
CLERK OF THE COURT

ADDITIONAL FACTS OF THE CASE:

Points and Authorities
Statement of the Case

ON JUNE 15, 2020, Judge William Kephart took defendant's motion for "Rule 60b Motion for relief" and "Amended petition for writ of Habeas Corpus" off calendar prior to issue of ruling.

ON JUNE 22, 2020, Judge William Kephart took defendant's "Motion to Vacate" off calendar prior to issue of ruling.

Argument:

I. Defendant's preliminary challenge of judge William Kephart has been decided by the Clark County Chief Judge, and there is no jurisdictional issues in question.

Conclusion

For the foregoing reasons, the defendant respectfully requests that this court grant defendant's James H. Hayes "Motion for Ruling".

Respectfully submitted,
James H. Hayes # 1175077

JACC

P.O. Box 208

Indian Springs, NV 89070

CERTIFICATE OF SERVICE BY MAILING

I, JAMES H. HAYES, hereby certify, pursuant to NRCP 5(b), that on this 1st day of July, 2020, I mailed a true and correct copy of the foregoing, "Motion for Ruling"

by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

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

Clark County Dist. Attorney
200 LOUIS AVE
LAS VEGAS, NV
89155

CC:FILE

DATED: this 1st day of July, 2020.

James H. Hayes
/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 Motion

for Paulino
(Title of Document)

filed in District Court Case number C-16-315718-1; A-19-293315-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

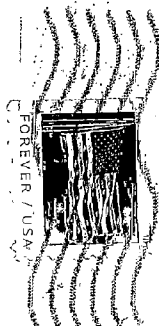
7-1-2020
Date

JAMES H. HAYES
Print Name

PRO SE
Title

Pages #11756822
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P.O. Box 208
Indian Springs, NV
89020

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

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SOUTHERN DESERT
CORRECTIONAL CENTER



1 NOCH

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 ****

6 James Hayes, Plaintiff(s)

Case No.: A-19-793315-W

7 vs.

Department 19

8 Nevada State of, Defendant(s)

9
10 **NOTICE OF CHANGE OF HEARING**

11
12 The hearing on the Plaintiff's Motion for Ruling For Rule 60b Motion for Relief ; Motion to
13 Vacate; Amend Petition for Writ of Habeas Corpus, presently set for August 27, 2020, In
14 Chambers, has been moved to the 9th day of September, 2020, at 8:30 AM and will be heard
15 by Judge William D. Kephart.

16 STEVEN D. GRIERSON, CEO/Clerk of the Court

17 By: /s/ Salevao Asifoa

18 S.L. Asifoa, Deputy Clerk of the Court

19
20 **CERTIFICATE OF SERVICE**

21
22 I hereby certify that this 26th day of August, 2020

23 ☒ The foregoing Notice of Change of Hearing was electronically served to all registered
24 parties for case number A-19-793315-W.

25 /s/ Salevao Asifoa

26 S.L. Asifoa, Deputy Clerk of the Court

Steven B. Wolfson

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

Plaintiff,

-vs-

THE STATE OF NEVADA,

Defendant.

CASE NO: A-19-793315-W

DEPT NO: XIX

STATE'S RESPONSE TO PETITIONER'S MOTION FOR RULING

DATE OF HEARING: SEPTEMBER 9, 2020
TIME OF HEARING: 10:15 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 "Motion for Ruling" for "Rule 60b Motion for Relief"; "Motion to Vacate"; Amended 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.

//

//

//

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On or about July 23, 2013, James H. Hayes (hereinafter, "Petitioner") was charged by
4 way of Criminal Complaint with one count of BURGLARY (Category B Felony – NRS
5 205.060) and one count of ATTEMPT GRAND LARCENY (Category D Felony/Gross
6 Misdemeanor – NRS 205.220.1, 205.222.2, 193.330). Following a Preliminary Hearing in
7 Justice Court, Las Vegas Township on June 14, 2016, the charge of BURGLARY was bound
8 over to District Court, and the charge of ATTEMPT GRAND LARCENY was dismissed.

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

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

18 GPA at 1:22-24. The GPA further includes, in pertinent part, the following acknowledgement:

19 I understand and agree that, if...an independent magistrate, by affidavit review,
20 confirms probable cause against me for new criminal charges including reckless
21 driving or DUI, but excluding minor traffic violations, the State will have the
22 unqualified right to argue for any legal sentence and term of confinement
23 allowable for the crime(s) to which I am pleading guilty, including the use of
24 any prior convictions I may have to increase my sentence as a habitual criminal
to five (5) to twenty (20) years, Life without the possibility of parole, Life with
the possibility of parole after ten (10) years, or a definite twenty-five (25) year
term with the possibility of parole after ten (10) years.

25 GPA at 2: 1-9. An Amended Information reflecting the new charge of ATTEMPT GRAND
26 LARCENY was filed in conjunction with the GPA. Petitioner was adjudged Guilty pursuant
27 to Alford that same day, and the sentencing hearing was scheduled for March 6, 2019.

28 //

1 On January 31, 2019, the State filed a State's Notice of Motion and Motion to Revoke
2 Bail, asserting that in Las Vegas Justice Court case number 19F01534X, a Justice of the Peace
3 had found probable cause to charge Petitioner with Burglary for acts committed on or around
4 January 26, 2019. The State's Motion to Revoke Bail was granted after a hearing on February
5 4, 2019.

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

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

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

23 On November 19, 2019, Petitioner filed another Notice of Appeal, appealing the denial
24 of his Coram Nobis motion. His Case Appeal Statement was filed on December 11, 2019 (SCN
25 80222). As of the date of this Response, Petitioner's appeal was still outstanding.

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

28 //

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

7 On May 15, 2020, Petitioner also filed an "Affidavit of Actual Innocence not Mere
8 Legal Insufficiency but 'Factual Innocence.'" The State has filed, contemporaneously with
9 the instant Response, a Response and Motion to Strike Petitioner's Affidavit.

10 On May 27, 2020, Petitioner filed a Supplemental Petition. While Petitioner's
11 numerous pleadings were pending, Petitioner filed a Motion for Peremptory Challenge of
12 Judge and to Disqualify Judge William Bill Kephart. Thereafter, the State filed its Responses
13 to Petitioner's Affidavit of Actual Innocence and Petitioner's Supplemental Petition on June
14 10, 2020. As a result of Petitioner's Peremptory Challenge, Petitioner's pending matters were
15 taken off calendar on June 15, 2020. On June 29, 2020, Petitioner filed his Reply to the State's
16 Response to Petitioner's Affidavit of Actual Innocence.

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

20 On July 23, 2020, Petitioner filed his Reply to the State's Response to Petitioner's
21 Supplemental Petition. Petitioner, that same day, filed the instant Motion for Ruling for Rule
22 60b Motion for Relief; Motion to Vacate; Amended Petition for Writ of Habeas Corpus

23 ARGUMENT

24 **I. PETITIONER'S INSTANT PLEADING FAILS TO STATE GROUNDS FOR** 25 **RELIEF**

26 Petitioner's instant filing simply states that this Court previously took the pending
27 matters off calendar, and that there are "no jurisdictional issues in question." Instant Motion
28 at 2. To the extent that Petitioner is requesting that this Court place the pending matters back

1 on calendar, now that Petitioner's Motion for Peremptory Challenge has been denied, it
2 appears that those matters were on calendar before Petitioner filed the instant Motion. Such a
3 request, then, is moot, and it is unclear what relief Petitioner seeks by filing the instant Motion.

4 Furthermore, pursuant to Eighth Judicial District Court Rule 2.20(c):

5 A party filing a motion must also serve and file with it a memorandum of points
6 and authorities in support of each ground thereof. The absence of such
7 memorandum may be construed as an admission that the motion is not
8 meritorious, as cause for its denial or as a waiver of all grounds not so supported.

9 Petitioner's lack of any clear statement of grounds for relief is compounded by Petitioner's
10 failure to properly include points and authorities that would clarify the relief requested,
11 identify this Court's jurisdiction to grant such relief, and/or present cogent argument in support
12 of those requests. Therefore, the State respectfully submits that Petitioner's filing fails to
13 comport with EDCR 2.20(c), thus constituting cause for the denial of the instant Motion.

14 CONCLUSION

15 For the foregoing reasons, the State respectfully requests that this Court summarily
16 DENY Petitioner's instant Motion as moot and/or as failing to meet the requirements of EDCR
17 2.20.

18 DATED this 2nd day of September, 2020.

19 Respectfully submitted,

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

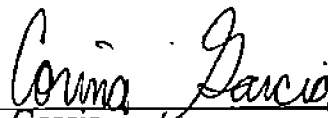
21 BY

22 BB for
TALEEN PANDUKHTI
Deputy District Attorney
Nevada Bar #05734

1 **CERTIFICATE OF MAILING**

2 I hereby certify that service of State's Response to Petitioner's Motion for Ruling, was
3 made this 2nd day of September, 2020, by Mailing to:

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

8 
9 C. Garcia
10 Secretary for the District Attorney's Office
11
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28 TP/jj/cg/L2

DISTRICT COURT
CLARK COUNTY, NEVADA

Electronically Filed
9/25/2020 8:41 AM
Steven D. Grierson
CLERK OF THE COURT



James Hayes, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

Case No.: A-19-793315-W

Department 19

NOTICE OF HEARING

Please be advised that the Plaintiff's Motion for Expeditious Ruling for "Amended Petition for Writ of Habeas Corpus" 3rd Request in the above-entitled matter is set for hearing as follows:

Date: November 05, 2020

Time: Chambers

Location:

Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

Hayes, James H #1175077

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

FILED

SEP 25 2020

John J. Hume
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES H. HAYES
Petitioner

HEARING REQUESTED!!

State of Nevada
Respondent

Case No. A-19-713315-IN

Dept No. 19

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 14 day of September 2020.

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

RECEIVED

SEP 23 2020

CLERK OF THE COURT

27
FILED

SEP 25 2020

John L. Williams
CLERK OF COURT

Hayes, James H ID NO. 1175077

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

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

James H. Hayes

Petitioner

v.

State of Nevada

Respondent

HEARING REQUESTED!!

CASE NO.: A-19-793315-W

DEPT. NO.: 19

DOCKET:

Motion for Expeditions Ruling for "Amended
Petition for Writ of Habeas Corpus" 3RD REQUEST!!

COMES NOW, ~~petitioner~~ James H. Hayes, herein above respectfully
moves this Honorable Court for an granting of this motion for ruling to
redress this fundamental miscarriage of justice and overcome this
Judicial misconduct and racial and criminal injustice...

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

DATED: this 14 day of September, 2020

BY:

James H. Hayes
Hayes, James H # 1175077

Defendant In Proper Personam

RECEIVED

SEP 23 2020

CLERK OF THE COURT
350

Points and Authorities

Statement of the Case:

ON April 15, 2019, Mr. Hayes filed his Petition for writ of Habeas Corpus

ON June 15, 2020, Judge William Kephart took petitioner's Amended petition for writ of habeas corpus off calendar prior to issue of ruling

ON August 27, 2020 a hearing was held in chambers by Judge William Kephart for petitioner's writ of habeas corpus with no ruling being ordered and hearing reset til September 9, 2020.

ON September 9, 2020, Judge Kephart denied motion for ruling without making a ruling on Petitioner's writ of habeas corpus legally cognizable grounds to continue his blatant manipulation of Justice and failure to adhere to his constitutionally mandated responsibilities as justice so requires.

Argument:

I. IN relating the factual and procedural history of the instant case, the state has taken great liberties to continue the sort of narrative that has fueled inconsistent and unfair mass incarceration of Negroes in Nevada. Mr. Hayes knowing all the facts and the record has tried to contextualize this actual record to reveal categorically this fundamental miscarriage

1 of Justice and that he is a victim of this fundamental
2 miscarriage of Justice through judicial bias and prejudice
3 whereas in fact, Mr. Hayes is actually innocent of ~~attempted~~
4 grand larceny and not mere legal insufficiency but
5 factual innocence.

6 II Petitioner has no pending appeals in the
7 Nevada Supreme Court nor the Nevada Court of Appeals
8 so there is no jurisdictional issues in question to
9 deny Mr. Hayes a ruling on his legally cognizable
10 grounds of his amended petition for writ of habeas
11 corpus and granting relief. This fundamental mis-
12 carriage of Justice as justice so requires...

13 III The state and this court knows the record in
14 the instant case does not disclose that Mr. Hayes
15 understood the elements of the attempted grand
16 larceny charge, whereas the charge had been dismissed
17 by the Justice Court magistrate after the presentation
18 of all the evidence at the conclusion of the preliminary
19 hearing for lack of admissible evidence, no corpus
20 detect, no mens rea, and no slight or marginal evidence
21 of guilt. Nor did Mr. Hayes make factual statements
22 constituting an admission to the attempted grand
23 larceny charge. Therefore, Mr. Hayes conviction to the
24 attempted grand larceny must be set aside and
25 justice vacated. SEE NAS 174.035(1); NRS 174.085; NRS
26 178.562

ADDITIONAL FACTS OF THE CASE:

Conclusion:

For the foregoing reasons, the petitioner MR
JOHN respectfully requests that this court grant
petitioner's "Motion for Expedient Ruling for
"Amended Petition for writ of Habeas Corpus" 3rd
request!!

CERTIFICATE OF SERVICE BY MAILING

I, JAMES H. HAYES, hereby certify, pursuant to NRCP 5(b), that on this 14th
day of September, 2020 I mailed a true and correct copy of the foregoing, "Motion for
Expeditionary Ruling for "Amended Petitioner for Writ of Habeas"
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
200 LEWIS AVE, 3RD FLOOR
LAS VEGAS, NV 89055-1160

Clark County District Atty
200 LEWIS AVE
LAS VEGAS NV
89155-2212

CC:FILE

DATED: this 14th day of September, 2020.

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

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Motion for

Expedition's Ruling for "Amended 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

9-14-2020
Date

JAMES H. HAYES
Print Name

PRO PER
Title

Label # 1175034
50cc
P.O. Box 208
Indian Springs, NV
89670

Hasler
LAS VEGAS, NV 890
US POSTAGE \$000.15
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ZIP 89101
01E12650764
REVER / USA

Clark County District Courts 3763
"Office of the Clerk"
200 Lewis Ave, 3rd Floor
Las Vegas, Nevada
89155-1160
15251
Mel

077EIN-21-NX77

SEP 16 2020
INCOMING MAIL

DISTRICT COURT
CLARK COUNTY, NEVADA

Electronically Filed
10/7/2020 2:45 PM
Steven D. Grierson
CLERK OF THE COURT



James Hayes, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

Case No.: A-19-793315-W

Department 19

NOTICE OF HEARING

Please be advised that the Plaintiff's Motion to Set Evidentiary Hearing and Issue Transport Order in the above-entitled matter is set for hearing as follows:

Date: December 03, 2020

Time: Chambers

Location:

Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

27

1 Hayes, James H #1175072
2 / In Propria Personam
3 Post Office Box 208 S.D.C.C.
4 Indian Springs, Nevada 89018

FILED
OCT - 7 2020
[Signature]
CLERK OF COURT

5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 James H. Hayes
8 Petitioner
9 v.
10 State of Nevada
11 Respondent
12

HEARING REQUESTED !!
Case No. A-19-293315-W
Dept No. 19
Docket _____

13
14 NOTICE OF MOTION

15 YOU WILL PLEASE TAKE NOTICE, that _____

16
17 will come on for hearing before the above-entitled Court on the _____ day of _____, 20____
18 at the hour of _____ o'clock ____ M. In Department _____, of said Court.

19
20 CC:FILE

21
22 DATED: this 29 day of September, 2020.

23
24 BY: James H. Hayes
25 James H. Hayes #1175072
26 /In Propria Personam

RECEIVED
OCT 06 2020
CLERK OF THE COURT

FILED

OCT - 7 2020

CLERK OF COURT

Hayes, James H ID NO. 1175077

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

IN THE 8th Judicial District Court for the
County of Clark

JAMES H. HAYES

Petitioner

v.

State of Nevada

Respondent

HEARING REQUESTED!!

CASE NO.: A-19-293315-W

DEPT. NO.: 19

DOCKET:

Motion to Set Evidentiary Hearing and Issue
Transport Order...

COMES NOW, petitioner, JAMES H. HAYES, herein above respectfully
moves this Honorable Court for an proper and just granting of this
motion for an evidentiary hearing allowing Mr. Hayes to
redress this fundamental miscarriage of justice.

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

DATED: this 29 day of September, 2020

BY: James H. Hayes

JAMES H. HAYES

1175077

Defendant In Proper Personam

RECEIVED

CLERK OF THE COURT
OCT 7 11 56 2020

1 Mr. James H. Hayes, Petitioner, prose, pursuant to
2 NRS Chapter 34, moves this court to set a expeditious
3 hearing in this case, and to order the Petitioner's
4 presence at the hearing. In support, Petitioner would
5 show the following:

6 1. Petitioner filed a petition for Post-conviction
7 relief on 15th day of April, 2019.

8 2. An Evidentiary hearing is NECESSARY BECAUSE
9 the issues in the case are complex and issues of
10 first impression that petitioner's legal submissions
11 factually establish (see exhibits 7 & 8 attached)

12 3. Probable cause must be established at the
13 preliminary hearing, since the very reason for the hearing
14 is to weed out groundless or unsupported charges, so
15 that the accused may be relieved of the degradation
16 of a criminal trial and the deprivation of his liberty.
17 To suggest that evidence deficiencies in the prelim.
18 hearing may later be cured by offering new
19 evidence would only emascuate the purpose
20 of the prelim. hearing. Moreover, when a defendant
21 has been discharged of a charge at conclusion of
22 preliminary hearing, a judicial officer has affirmatively
23 found that the charge was not pursuing any further,
24 because the state lacked enough evidence to even
25 constitute probable cause. Furthermore when the state
26 seeks to file an amended information after a

1 defendant has already been discharged of the charge,
2 it effectively seeks to have one judicial officer over-
3 rule another and reinstate charge that have already
4 been dismissed.

5 4. Any offenses of "attempt" are never
6 permitted to be consecutive sentences in any
7 criminal proceeding and in this case Mr. Hayes
8 should receive jail time credits from the day that
9 the charge was dismissed at conclusion of prelim.
10 hearing and bond exonerated to the day of
11 sentencing.

12 5. The possibility of being charged as an habitual
13 criminal should not weigh heavily if Mr. Hayes were
14 not guilty of the primary offense, since proof of
15 guilt of the primary charge is a precondition to a
16 subsequent habitual hearing (Stacks v. Worden 476 P.2d
17 469 (1990)).

18 6. State failed to offer what it could prove if
19 defendant choose to proceed to trial and failed to
20 advise the elements of the crime. Judge failed to
21 seek to resolve the conflict between Mr. Hayes
22 waiver of trial and claim of innocence (Tiger v.
23 State 654 P.2d 1031). Due process demands that the
24 face of the record reveal that Mr. Hayes knew at the
25 time of entry of the "Alford" plea that he will be
26 serving actual prison time, as he was surprised that
27 he would serve an actual prison term.

ADDITIONAL FACTS OF THE CASE:

2. The state's evidence was false and without probable cause!! Mr. Hayes knowledge of the elements was lacking because of false evidence, and his awareness was not sufficient for his plea to be voluntary.² Where the petitioner plead guilty to a crime without having been informed of the elements of the crime, his plea was involuntary (Brookshaw v. Stumpf 545 U.S. 175, 125 S.Ct. 2389 (2005))

Wherefore, petitioner Mr. Hayes respectfully requests this court schedule a hearing in this case, and that petitioner's presence be ordered.

Respectfully submitted this 29th day of September, 2020.

Footnote: ¹ See Rule 11 F.R.Crim.P

² There's no greater evidence than the victims own testimony and in this case the victim in the 1995 direct Burglary case NO: 19F01534X testified that Mr. Hayes was not the perpetrator of alleged event that the state used to breach guilty plea agreement, that has failed the interests of justice and created this fundamental miscarriage of justice through the state's malicious and vindictive prosecution.

EXHIBIT "F"

HEARINGS
REQUESTED!!

CASE NO: A-19-793315-W

DEPT: 19

8th Judicial District Court for the County of Clark

AFFIDAVIT OF ACTUAL INNOCENCE NOT MERELY LEGAL INSUFFICIENCY
BUT "ACTUAL INNOCENCE"

STATE OF NEVADA)

SS:

COUNTY OF CLARK)

Amended Petition for Writ of Habeas Corpus

CASE NO: A-19-793315-W

DEPT: 19

TO WHOM IT MAY CONCERN:

MAY 15 2020

I, James H. Hayes, the undersigned, do hereby swear that the following statements and description of events, are true and correct, of my own knowledge, information, and belief, and to those I believe to be true and correct. Signed under penalty of perjury pursuant to NRS 208.165.

(1) THAT James H. Hayes is the affiant in this affidavit and is currently incarcerated at Southern District Correctional Center, a victim of a fundamental miscarriage of justice trying to overcome a fundamentally unjust incarceration, and all procedural bars against the ruling on the merits of his Amended petition for Writ of Habeas Corpus. When in fact a fundamental miscarriage of justice would continue from the failure to consider Mr. Hayes claims for relief on the merits.

WHEREAS, Mr. Hayes is actually innocent of the crime of Attempted Grand Larceny through clear and convincing evidence shown at preliminary examination when magistrate dismissed the charge for lack of evidence, no corpus delicti, no slight or marginal evidence. Moreover, this is a colorable showing that it is more likely than not that no reasonable juror would have convicted Mr. Hayes absent a constitutional violation. Where as here, there was, of course, no evidence of actual guilt of the crime of Attempted Grand Larceny, as the sentencing judge and the state knew Mr. Hayes had no

1 involvement in such a crime, as it is clear that no evidence
2 of actual guilt existed on the underlying criminal conduct
3 that may have justified accepting Mr. Hayes' Afford Plea
4 to a crime he did not commit, and sentence was based
5 on speculation, not based on the acts Mr. Hayes committed
6 So here Mr. Hayes has made a colorable showing of cause
7 and prejudice to overcome a procedural default and to
8 ensure fundamental fairness that is the central concern
9 of the writ of habeas corpus. As the instant case, is an
10 extraordinary case, where a constitutional violation has
11 resulted in the conviction of Mr. Hayes who is actually
12 innocent, and it would be an affront to justice and due
13 process to hold Mr. Hayes to his plea when the conduct upon
14 which the plea was entered did not occur. Furthermore,
15 Mr. Hayes received no consideration whatsoever in exchange
16 for his Afford Plea to a crime he did not commit as he was
17 induced by the state to plead to a crime not committed and
18 Mr. Hayes' agreement to this unconstitutional guilty plea was
19 predicated on his belief of time credit served for a gross
20 misdemeanor sentence and did not explicitly agree to a
21 period of imprisonment in exchange for a plea.

22 That, this court is fully aware Mr. Hayes was not properly
23 advised or conversed as to the defects he may have waived
24 as part of the negotiations. When in fact, Mr. Hayes never
25 agreed to waive any and all defects in the pleadings so
26 Mr. Hayes never waived claims to "Defects" voluntarily, nor
27 did Mr. Hayes waive right to complain of the acceptance
28 of an unconstitutional plea. Furthermore, Mr. Hayes guilty

1 plea agreement did not explicitly specify waiver to defects and
2 Mr. Hayes was not well-aware of the charges against him
3 nor the surrounding negotiations and the plea canvass is
4 unambiguous evidence of this and confirms Mr. Hayes did
5 not explicitly understand the plea negotiations. Moreover,
6 there is clear and convincing evidence Mr. Hayes did not
7 commit the crime of Attempted Grand Larceny and the
8 charge of Burglary was fatal without the state's intent of
9 Attempt Grand Larceny that's a colorable showing that no
10 jury would have convicted Mr. Hayes of Attempted Grand
11 Larceny nor the underlying crime of Burglary leaving the
12 sentencing Judge no factual basis for acceptance of Mr.
13 Hayes Afford Plea as he never admitted in open court to
14 committing the acts underlying the offense for which he
15 entered his plea, and the prosecution knew that the evidence
16 was false and without probable cause.

17 That, the record shows without doubt that Mr. Hayes has
18 pleaded Afford to a crime that he did not commit, and this
19 court must hesitate to apply technical rules to prevent Mr.
20 Hayes from obtaining relief. When in fact, the cause and
21 prejudice formula of *Weinwright v. Sykes* is not dispositive
22 when the fundamental fairness of a prisoner's conviction
23 is at issue as in the instant case, that appellate procedural
24 default should not foreclose habeas corpus review of a
25 meritorious constitutional claim that will establish Mr.
26 Hayes innocence. As this is an extraordinary case, where
27 a constitutional violation has resulted in the conviction of
28 one who is actually innocent and this court shall grant the

1 writ even if the absence of a showing of cause and prejudice
2 for the procedural default, when counsel's failure to raise a
3 particular claim on appeal is to be scrutinized under the
4 cause and prejudice standard when that failure is treated
5 as a procedural default would deny Mr. Hayes fundamental
6 fairness and continue this manifest injustice. When the
7 writ of habeas corpus is the fundamental instrument for
8 safeguarding individual freedom against arbitrary and
9 lawless state action and its well-known history bears
10 repetition. As it has been given explicit protection in our
11 constitution, and the very nature of the writ demands
12 that it be administered with the initiative and flexibility
13 essential to insure that miscarriages of justice within its
14 reach are surfaced and corrected that must occur in the
15 instant case, as there is no rigid procedural rules that
16 prevented the writ's fundamental mission - serving justice
17 from being realized and must yield to the imperative of
18 correcting a fundamentally unjust incarceration and
19 prevent illegal imprisonments.

20 That the state breached the guilty plea agreement on
21 impeachable and highly suspect evidence as the evidence used
22 was false and the state was well aware that the alleged victim
23 at preliminary examination for the 1st degree Burglary
24 charge (case no: 19701534X) testified under oath facing the
25 penalty of perjury that Mr. Hayes was not the perpetrator
26 of alleged event and 100% sure of it and further stated
27 that alleged perpetrator did not enter room only stood in
28 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 break the agreement when they knew Mr. Hayes did not break 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. What 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 break 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 were nonviolent and not a felony under the state and laws of Nevada. Court Abuse in Texas and not prior Burglary in Nevada 2016. As the sentencing judge

1 violated legislation intent of NRS 207.010 and failed
2 to serve the purposes of the statute or the interests
3 of justice. In fact, Mr. Hayes did not warrant
4 the harsh sanction under the habitual criminal statute
5 though past conduct reprehensible simply does not
6 warrant habitual treatment.

7 That the court that rendered the judgment and
8 sentence lack subject matter jurisdiction per NRS 174.085
9 and NRS 178.562. Whereby jurisdiction of the subject
10 matter is derived from the law; it neither can be
11 waived nor conferred by consent of Mr. Hayes
12
13
14
15
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17
18
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20
21

22 FURTHER, AFFIANT SAYETH NAUGHT.

23 EXECUTED AT Southern Desert Correctional Center this 27 day of April 2020

24 IN FRONT OF:

BY Simon H. Hayes
NDOC # 1175077

25
26
27
28 6 of 7

EXHIBIT “G”

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

STATE OF NEVADA)

COUNTY OF CLARK)

SS: CASE No: A-19-793315
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: Wherein, 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 prelim.
examination showed no criminal act of Attempted Grand Larceny,
it is clear that no evidence of actual guilt existed on the under-
lying criminal conduct that may have justified accepting Mr. Hayes
plea, therefore Mr. Hayes did not waive his right to 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.

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

2020.

BY:

James N. Hayes
James N. Hayes # 1183049
Post Office Box-203 (SDCC)
Indian Springs, Nevada 89070
Affiant, In Propria Personam:

CERTIFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 29th
day of September, 2020 I mailed a true and correct copy of the foregoing, "Motion to Set
Evidentiary hearing and Issue transport order"
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 FL
LAS VEGAS, NV
89155-1160

Clark County Dist. Atty
200 LEWIS AVE
LAS VEGAS, NV
89155-2212

Atty General of Nevada
103 N. Carson Street
Carson City, NV
89401

CC:FILE

DATED: this 29 day of September, 2020.

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:

6

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Motion to Set

Evidentiary hearing and Issue Transport Order
(Title of Document)

filed in District Court Case number A-19-793815-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

9-29-2020
Date

James H. Hayes
Print Name

pro per
Title

Pages # 1175077
Joc
P.O. Box 208
Tandem Springs, NV
89070

Clark County District Courts
"Office of the Clerk"

200 Lewis Ave; 3rd Floor

Las Vegas, Nevada

89155-1160

Las Vegas P&DC 89199
TUE 29 SEP 2020 PM



Legal
Mail

Google:

SEP 29 2020

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DISTRICT COURT
CLARK COUNTY, NEVADA

Electronically Filed
10/14/2020 4:22 PM
Steven D. Grierson
CLERK OF THE COURT



James Hayes, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

Case No.: A-19-793315-W

Department 19

NOTICE OF HEARING

Please be advised that the Plaintiff's Motion to Reconsider Order Denying Motion for Ruling for Rule 60 (b) Motion for Relief; Motion to Vacate; Amended Petition for Writ of Habeas Corpus in the above-entitled matter is set for hearing as follows:

Date: November 16, 2020

Time: 8:30 AM

Location: RJC Courtroom 16B
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

1 HOYES James #1175077

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

27
FILED

OCT 14 2020

Ch. H. H.
CLERK OF COURT

5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 James A. Hoyes
8 defendant

9 v.
10 State of Nevada
11 Plaintiff

"HEARING REQUESTED"

Case No. C-16-315718-1

Dept No. 19

Docket _____

12
13
14 NOTICE OF MOTION

15 YOU WILL PLEASE TAKE NOTICE, that _____

16
17 will come on for hearing before the above-entitled Court on the _____ day of _____, 20____,
18 at the hour of _____ o'clock ____ M. In Department _____, of said Court.

19
20 CC:FILE

21
22 DATED: this 1 day of October, 2020.

23
24 BY:

James A. Hoyes
James A. Hoyes #1175077
/In Propria Personam

RECEIVED

OCT 08 2020

CLERK OF THE COURT

FILED

OCT 14 2020

CLERK OF COURT

Hayes, James H ID NO. 1175077

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

A-19-793315-W
Dept: XIX

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

JAMES H. HAYES
defendant

v.

State of Nevada
plaintiff

"HEARING REQUESTED"

CASE NO.: C-16-315718-1

DEPT. NO.: 19

DOCKET:

Motion to Reconsider Order Denying Motion for Ruling
for Rule 60B Motion for Relief; Motion to Vacate; Amended
Petition for Writ of Habeas Corpus

COMES NOW ~~defendant~~ James H. Hayes, herein above respectfully
moves this Honorable Court for an order and ruling on defendant's
motion to vacate and Rule 60B Motion for Relief to redress
this fundamental miscarriage of Justice as Justice so requires

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

DATED: this 1 day of October, 2020

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

CLERK OF THE COURT

OCT 08 2020

RECEIVED

Points and Authorities

Statement of the Case

ON May 4, 2020, James H. Hayes (defendant) filed his pro se "Rule 60b Motion" for Relief.
ON June 1, 2020, defendant filed his pro se "Motion to Vacate"

ON June 15, 2020 this said court 8th Judicial District Court Department 19 set the matters for hearing and ruling. However the matters were taken off calendar pending result of defendant's preemptory challenge of District Court Judge William Kephart.

ON July 23, 2020 defendant filed another Motion for Ruling for Rule 60b Motion for Relief, Motion to Vacate, and Amended Petition for Writ of Habeas Corpus.

ON July 31, 2020 defendant filed an affidavit "Jurisdiction of the Subject matter is derived from the Law; it NEITHER CAN BE WRIVED NOR CONFERRED BY CONSENT OF ACCUSED" in support of Motion to Vacate and Rule 60b motion for Relief.

ON September 9, 2020 defendant's motion for ruling was set for hearing and ruling that this court denied.

Argument

1. This court's order electronically filed on September 23, 2020 denying defendant's motion for ruling for Rule 60b motion for relief and Motion to Vacate was categorically and incorrect application of law and facts to law pursuant to Nevada Revised Statutes and Revised Nevada Code of Judicial conduct 2.3 that provides that reasonable accommodations to ensure self represented litigants the opportunity to have their matters fairly heard, as justice so requires.

2. Defendant will establish sufficient factual grounds that Judge William Kephart has closed his mind to the presentation of defendant's legally cognizable grounds for relief that has permitted his continued manipulation of justice in this case.

A. This court and Judge William Kephart is well aware that defendant MR. HAYES is not schooled in the letter of law and has that defendant many times over have ask for wide latitude in this court's ruling as technical defaults against defendant to ensure that justice prevails over defects and his ignorance of technical rules.

B. Defendant filed a pre-trial petition for writ of habeas corpus challenging lack of probable cause for the charge of Burglary that this court denied on the ground that it was untimely not meeting the 21 day

ADDITIONAL FACTS OF THE CASE:

1 requirement of pre-trial writs that failed the defendant
2 a ruling on his legally cognizable grounds for relief.
3 When in fact, the state and this court is well aware
4 that the filed information for the charge of Burglary
5 against defendant was without probable cause as one
6 cannot have committed Burglary in this state without
7 an intent and the state's intent was dismissed at
8 the conclusion of preliminary hearing after the
9 presentation of all the evidence of Attempt grand larceny
10 leaving the Burglary charge ~~set~~ and ^{it} must have been
11 dismissed for lack of probable cause lack of admissible
12 evidence, no corpus delicti, no mens rea, and no
13 slight nor marginal evidence that defendant committed
14 the ipse dixit charge of Burglary. However, Judge Kephart
15 manipulated justice in his failure to construe the
16 self represented defendant pre-trial writ into a
17 cognizable petition as justice so required. As the state
18 and Judge William Kephart knows that defendant is
19 actually ~~innocent~~ innocent of the charge of Burglary
20 and Attempt grand larceny.

21 C. The state committed FRAUD upon the court:
22 The evidence was false and without probable cause
23 for the charge of Attempt Grand Larceny to intentionally
24 deceive the court and cheat the defendant, obviously
25 so. Whereas, if a party commits fraud while negotiating
26 a contract, the contract is void as if it never
27 existed (Godly v. US 573d 1473 (2d Cir. 1995)) "A contract

1 tainted by fraud is void ab initio. Additionally, when the
2 state places a collateral attack waiver, intrinsic or
3 extrinsic, in the plea agreement, it creates a conflict of
4 interest that is FRAUD because the defendant has an
5 underlying right to be correctly informed of the facts.
6 Fraud occurred when the state had a duty to speak but
7 failed to disclose the whole truth. When in fact, it is
8 constructive fraud when the state knowingly remain
9 silent in that issue, when it places a provision in the
10 contract it knows will create a conflict of interest
11 between defense counsel and the defendant, that a
12 collateral attack waiver creates. This conflict of interest
13 between client and attorney is an egregious prejudice
14 which irreparably tainted the defendant. In which,
15 deprived the defendant of his civil rights to contract
16 provided in 42 U.S.C § 1981, all in violation of his 1st
17 5th, and 6th amendment rights.

18 D. The plea agreement is voidable because it was
19 engineered and executed as a misleading device
20 intended to defraud the court, the defendant, and the
21 public's interest in justice. In this case the charge of
22 attempt grand larceny was dismissed against defendant
23 at conclusion of preliminary hearing by Justice Court
24 magistrate for lack of probable cause, lack of evidence, no
25 corpus delicti, no mens rea, and no slight or marginal
26 evidence of guilt. Judge Kappert should have refused to
27 accept the plea from defendant who had asserted facts
28 inconsistent with guilt or was unable to recount facts

Establishing guilt. To wit: defendant must also admit facts consistent with the guilt of the offense to which he pleads and there has to be a factual basis for the plea. When determining whether the factual basis for a guilty plea is sufficient, the district court must compare the conduct which defendant admits and the elements of the offense. Moreover, the guilty plea agreement in question was based upon omissions of fact and law (see FRCP Rule 11; NRS 174.085(3); NRS 178.562 and preliminary hearing transcripts) whereby defendant avers that his guilt or innocence was never an issue or concern of this court. Finally, as a pro se litigant, defendant has tried to raise his contention that he was not duly informed by the court or counsel as to all the actual effects of the plea agreement the defendant entered into under duress.

E. The most compelling yet ignored issue concerning plea agreements is the incarceration of a person who is actually innocent. Such an act is a direct violation of the most overlooked due process amendment, the 13th Amendment to the Constitution of the United States, is clear in its meaning that the incarceration of the innocent is prohibited under the constitution, and the laws of the United States. Thus, any court, prosecutor, or defense attorney who knowingly aids in the incarceration of an innocent person is in fact subject to a criminal conviction under the laws of the United States (18 U.S.C. § 242).

7. The charge of Attempt Grand Larceny against defendant was based on prosecutorial vindictiveness. Where the state

1 successfully moved to dismiss the charge at the conclusion
2 of the preliminary when they had not presented any
3 evidence to support the charge or show probable cause
4 to bind the charge over to district court against the
5 defendant. The prosecutor then filed amended information
6 to restate the charge that violated due process and
7 Nevada Revised Statutes 174.085(3) and 178.262 to
8 penalize the defendant for the exercise of his right
9 to preliminary hearing, and this action gives rise to
10 the realistic likelihood of vindictiveness. In addition,
11 the prosecutor time and time again filed motions to
12 use prior bad acts namely a 2016 Burglary conviction
13 that was not prior as the instant case occurred in
14 the year 2013 that the prosecutor acted in BAD FAITH
15 and maliciously in seeking a Petrocelli hearing in
16 their favor when knowing that the event that
17 occurred in 2016 could not be prior to the event in 2013.

18 Conclusion:

19 For the foregoing reasons, the defendant MR.
20 Hayes, respectfully requests that this court grant
21 defendant's "Motion to Reconsider Order denying Motion
22 for ruling for Rule 60b Motion for Relief; Motion to
23 Vacate; Amended Petition for Writ of Habeas Corpus"
24 to redress this fundamental miscarriage of Justice
25 and issue relief as justice so requires...

CERTIFICATE OF SERVICE BY MAILING

I, James H. Hayes, hereby certify, pursuant to NRCP 5(b), that on this 15th
day of October, 2020, I mailed a true and correct copy of the foregoing, "Motion to
Reconsider Order Denying Motion for Ruling"

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
205 LAUIS AVE. 3RD FL
Las Vegas, NV
89155-1160

Clark County Dist. Appy.
205 LAUIS AVE
Las Vegas, NV
89155-2212

Nevada Atty. General
100 N. Carson St
Carson City, NV
89701

CC:FILE

DATED: this 15th day of October, 2020

James H. Hayes
James H. Hayes # 1195022
/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 Motion to

RECONSIDER ORDER DENYING Motion for Rulings
(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

10-1-2020
Date

JAMES H. HAYES
Print Name

PRO PER
Title

424125 #1125072
JVC
P.O. Box 208
Indian Springs, NV
89026

SOUTHERN DESERT
CORRECTIONAL CENTER

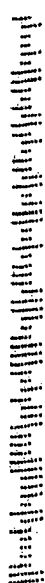
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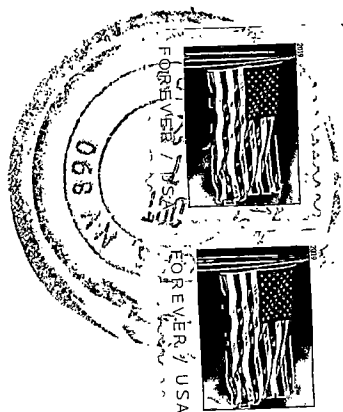
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CLANETT JEWELL

09155-1160



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





1 NOCH

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 *****

6 James Hayes, Plaintiff(s)

Case No.: A-19-793315-W

7 vs.

Department 19

8 Nevada State of, Defendant(s)
9

10 **NOTICE OF CHANGE OF HEARINGS**

11
12 The hearings on both the Plaintiff's Motion for Expeditious Ruling for "Amended Petition
13 for Writ of Habeas Corpus" 3rd Request and Plaintiff's Motion to Set Evidentiary Hearing
14 and Issue Transport Order, presently set for November 05, 2020, In Chambers & December
15 03, 2020, In Chambers, have been moved to the 16th day of November, 2020, at 10:15 AM
16 and will be heard by Judge William D. Kephart.

17 STEVEN D. GRIERSON, CEO/Clerk of the Court

18 By: /s/ Salevao Asifoa

19 S.L. Asifoa, Deputy Clerk of the Court

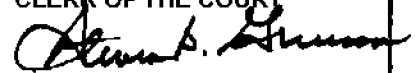
20
21 **CERTIFICATE OF SERVICE**

22 I hereby certify that this 3rd day of November, 2020

23
24 ☒ The foregoing Notice of Change of Hearings was electronically served to all
25 registered parties for case number A-19-793315-W.

26 /s/ Salevao Asifoa

27 S.L. Asifoa, Deputy Clerk of the Court
28



1 **OPPS**

2 **STEVEN B. WOLFSON**
3 Clark County District Attorney
4 Nevada Bar #001565
5 **TALEEN PANDUKHT**
6 Chief Deputy District Attorney
7 Nevada Bar #05734
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

9 **JAMES HOWARD HAYES,**
10 **aka James Howard Hayes Jr.,**
11 **#2796708**

11 Plaintiff,

CASE NO: A-19-793315-W

12 -vs-

DEPT NO: XIX

13 **THE STATE OF NEVADA,**

14 Defendant.

15 **STATE'S OPPOSITION TO PETITIONER'S MOTION TO RECONSIDER ORDER**
16 **DENYING MOTION FOR RULING FOR RULE 60b MOTION FOR RELIEF;**
17 **MOTION TO VACATE; AMENDED PETITION FOR WRIT OF HABEAS CORPUS**

18 **DATE OF HEARING: NOVEMBER 16, 2020**
19 **TIME OF HEARING: 10:15 AM**

20 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
21 District Attorney, through TALEEN PANDUKHT, Chief Deputy District Attorney, and
22 hereby submits the attached Points and Authorities in Response to Petitioner's Motion to
23 Reconsider Order Denying Motion for Ruling for Rule 60b Motion for Relief; Motion to
24 Vacate; Amended Petition for Writ of Habeas Corpus.

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

28 //

//

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On or about July 23, 2013, James H. Hayes (hereinafter, "Petitioner") was charged by
4 way of Criminal Complaint with one count of BURGLARY (Category B Felony – NRS
5 205.060) and one count of ATTEMPT GRAND LARCENY (Category D Felony/Gross
6 Misdemeanor – NRS 205.220.1, 205.222.2, 193.330). Following a Preliminary Hearing in
7 Justice Court, Las Vegas Township on June 14, 2016, the charge of BURGLARY was bound
8 over to District Court, and the charge of ATTEMPT GRAND LARCENY was dismissed.

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

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

18 GPA at 1:22-24. The GPA further includes, in pertinent part, the following acknowledgement:

19 I understand and agree that, if...an independent magistrate, by affidavit review,
20 confirms probable cause against me for new criminal charges including reckless
21 driving or DUI, but excluding minor traffic violations, the State will have the
22 unqualified right to argue for any legal sentence and term of confinement
23 allowable for the crime(s) to which I am pleading guilty, including the use of
24 any prior convictions I may have to increase my sentence as a habitual criminal
to five (5) to twenty (20) years, Life without the possibility of parole, Life with
the possibility of parole after ten (10) years, or a definite twenty-five (25) year
term with the possibility of parole after ten (10) years.

25 GPA at 2: 1-9. An Amended Information reflecting the new charge of ATTEMPT GRAND
26 LARCENY was filed in conjunction with the GPA. Petitioner was adjudged Guilty pursuant
27 to Alford that same day, and the sentencing hearing was scheduled for March 6, 2019.

28 //

1 On January 31, 2019, the State filed a State's Notice of Motion and Motion to Revoke
2 Bail, asserting that in Las Vegas Justice Court case number 19F01534X, a Justice of the Peace
3 had found probable cause to charge Petitioner with Burglary for acts committed on or around
4 January 26, 2019. The State's Motion to Revoke Bail was granted after a hearing on February
5 4, 2019.

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

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

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

23 On November 19, 2019, Petitioner filed another Notice of Appeal, appealing the denial
24 of his Coram Nobis motion. His Case Appeal Statement was filed on December 11, 2019 (SCN
25 80222). On August 31, 2020, the Nevada Court of Appeals affirmed the Court's denial of his
26 Coram Nobis motion. Remittitur issued on October 12, 2020.

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

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

7 On May 15, 2020, Petitioner also filed an "Affidavit of Actual Innocence not Mere
8 Legal Insufficiency but 'Factual Innocence.'" The State has filed, contemporaneously with
9 the instant Response, a Response and Motion to Strike Petitioner's Affidavit.

10 On May 27, 2020, Petitioner filed a Supplemental Petition. While Petitioner's
11 numerous pleadings were pending, Petitioner filed a Motion for Peremptory Challenge of
12 Judge and to Disqualify Judge William Bill Kephart. Thereafter, the State filed its Responses
13 to Petitioner's Affidavit of Actual Innocence and Petitioner's Supplemental Petition on June
14 10, 2020. As a result of Petitioner's Peremptory Challenge, Petitioner's pending matters were
15 taken off calendar on June 15, 2020. On June 29, 2020, Petitioner filed his Reply to the State's
16 Response to Petitioner's Affidavit of Actual Innocence.

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

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

25 On September 25, 2020, Petitioner filed a Motion for Expeditious Ruling for "Amended
26 Petition for Writ of Habeas Corpus" 3rd Request. The State has filed, contemporaneously with
27 the instant Response, a Response to that Motion.

28 //

1 On October 7, 2020, Petitioner filed a Motion to Set Evidentiary Hearing and Issue
2 Transport Order. The State has filed, contemporaneously with the instant Response, an
3 Opposition to that Motion.

4 On October 14, 2020, Petitioner filed the instant Motion to Reconsider Order Denying
5 Motion for Ruling for Rule 60b Motion for Relief; Motion to Vacate; Amended Petition for
6 Writ of Habeas Corpus.

7 ARGUMENT

8 **I. PETITIONER FAILS TO MEET THE STANDARD FOR** 9 **RECONSIDERATION**

10 Petitioner's instant Motion to Reconsider requests that this Court reconsider its denial
11 of Petitioner's Motion for Ruling for Rule 60b Motion for Relief; Motion to Vacate; Amended
12 Petition for Writ of Habeas Corpus. Motion to Reconsider at 7 (erroneously labeled "Page 8").
13 However, Petitioner fails to set forth the standard for reconsideration, much less meet that
14 standard.

15 The Nevada Supreme Court has explained: "A district court may reconsider a
16 previously decided issue if substantially different evidence is subsequently introduced or the
17 decision is clearly erroneous." Masonry and Tile Contractors Ass'n of S. Nev. v. Jolley, Urga
18 & Wirth, Ltd., 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (citing Little Earth of United
19 Tribes v. Dep't of Housing, 807 F.2d 1433, 1441 (8th Cir. 1986). The Nevada Supreme Court
20 has expressed that the granting of reconsideration or rehearing should be extremely infrequent.
21 Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) ("Only in very rare
22 instances in which *new issues of fact or law* are raised supporting a ruling contrary to the ruling
23 already reached should a motion for rehearing be granted." (Emphasis in original)).

24 A review of the instant Motion to Reconsider reveals that Petitioner does not allege any
25 new issues, and does not present any new evidence. See Motion to Reconsider at 3-7
26 (erroneously labeled "Page 4"- "Page 8"). Instead, Petitioner continues his repetition of claims
27 from earlier pleadings, with additional criticisms of the State and this Court. Id. Therefore, the

28 //

1 requisite "substantially different evidence" has not been presented to support reconsideration
2 of this Court's earlier decision. Masonry, 113 Nev. at 741, 941 P.2d at 489.

3 Furthermore, Petitioner fails to demonstrate that this Court's denial of the earlier
4 Motion was "clearly erroneous." Masonry, 113 Nev. at 741, 941 P.2d at 489. Petitioner simply
5 argues "...the State and Judge William Kephart knows [sic] that defendant is actually innocent
6 of the charge of Burglary and Attempt Grand Larceny." Motion to Reconsider at 4
7 (erroneously labeled "Page 5"). He also continues to argue that his "plea agreement is
8 voidable." Id. at 5 (erroneously labeled "Page 6"). Because Petitioner's Motion to Reconsider
9 consists of repeated claims and arguments, Petitioner fails to demonstrate that this Court's
10 denial of his earlier Motion was "clearly erroneous" sufficient to warrant reconsideration.
11 Masonry, 113 Nev. at 741, 941 P.2d at 489.

12 **CONCLUSION**

13 Because Petitioner fails to demonstrate that reconsideration is warranted, the State
14 respectfully requests that this Court DENY Petitioner's instant "Motion to Reconsider Order
15 Denying Motion for Ruling for Rule 60b Motion for Relief; Motion to Vacate; Amended
16 Petition for Writ of Habeas Corpus" in its entirety.

17 DATED this _____ day of November, 2020.

18 Respectfully submitted,

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

21 BY  for

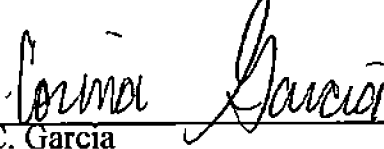
22 TALEEN PANDUKHT
23 Deputy District Attorney
24 Nevada Bar #05734
25
26
27
28

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 10th day of November, 2020, 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
LAS VEGAS, NV, 89070

BY



C. Garcia

Secretary for the District Attorney's Office

TP/jj/cg/L2



1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 TALEEN PANDUKHT
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10 (702) 671-2500
11 Attorney for Plaintiff

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

9 JAMES HOWARD HAYES,
10 aka James Howard Hayes Jr.,
11 #2796708

11 Plaintiff,

CASE NO: A-19-793315-W

12 -vs-

DEPT NO: XIX

13 THE STATE OF NEVADA,

14 Defendant.

15 **STATE'S OPPOSITION TO PETITIONER'S MOTION TO SET EVIDENTIARY**
16 **HEARING AND ISSUE TRANSPORT ORDER**

17 DATE OF HEARING: NOVEMBER 16, 2020
18 TIME OF HEARING: 10:15 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
20 District Attorney, through TALEEN PANDUKHT, Chief Deputy District Attorney, and
21 hereby submits the attached Points and Authorities in opposition to Petitioner's Motion for
22 Expeditious Ruling for "Amended Petition for Writ of Habeas Corpus" 3rd Request.

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

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27 On January 14, 2020, the Nevada Supreme Court AFFIRMED Petitioner's Judgment
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21 Supplemental Petition. Petitioner, that same day, filed a Motion for Ruling for Rule 60b
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24 for Ruling was denied on September 9, 2020.

25 On September 25, 2020, Petitioner filed a Motion for Expeditious Ruling for "Amended
26 Petition for Writ of Habeas Corpus" 3rd Request. The State has filed, contemporaneously with
27 the instant Opposition, a Response to that Motion.

28 //

1 On October 7, 2020, Petitioner filed the instant Motion to Set Evidentiary Hearing and
2 Issue Transport Order.

3 ARGUMENT

4 **I. PETITIONER FAILS TO DEMONSTRATE THE NEED FOR AN** 5 **EVIDENTIARY HEARING**

6 The Nevada Supreme Court has held that if a petition can be resolved without
7 expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev.
8 1328, 885 P.2d 603 (1994); Mann, 118 Nev. at 356, 46 P.3d at 1231. A defendant is entitled
9 to an evidentiary hearing if his petition is supported by specific factual allegations, which, if
10 true, would entitle him to relief unless the factual allegations are repelled by the record.
11 Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove, 100 Nev. at 503, 686 P.2d at
12 225 (holding that “[a] defendant seeking post-conviction relief is not entitled to an evidentiary
13 hearing on factual allegations belied or repelled by the record”).

14 It is improper to hold an evidentiary hearing simply to make a complete record. See
15 State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) (“The
16 district court considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted
17 ‘to make as complete a record as possible.’ This is an incorrect basis for an evidentiary
18 hearing.”).

19 While Petitioner asserts the need for an evidentiary hearing, he fails to acknowledge,
20 much less address, the grounds for allowing such a proceeding. See, Instant Petition at 2-4
21 (erroneously labeled “Page 3”-“Page 5”). Instead, Petitioner repeats numerous claims that
22 have already been raised, even including as exhibits certain previously-filed motions
23 containing those same grounds. See, Exhibits “F” and “G” to the Instant Petition. Petitioner
24 does not demonstrate any grounds for expanding the record. See generally, Instant Motion;
25 see also, Marshall, 110 Nev. 1328, 885 P.2d 603. As Petitioner merely accompanies his request
26 with allegations that are either belied by the record, or insufficient to entitle Petitioner to relief,
27 an evidentiary hearing is unnecessary. Id. at 1331, 885 P.2d at 605.

28 //

1 Further, Petitioner's failure to demonstrate the need for an evidentiary hearing renders
2 Petitioner's request for a transport order moot.

3 **CONCLUSION**

4 For the foregoing reasons, the State respectfully requests that this Court summarily
5 DENY Petitioner's Motion to Set Evidentiary Hearing and Issue Transport Order.

6 DATED this _____ day of November, 2020.

7 Respectfully submitted,

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

10 BY

11 
12 TALEEN PANDUKHT
13 Deputy District Attorney
14 Nevada Bar #05734

15 for

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 10th day of November, 2020, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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HIGH DESERT STATE PRISON
P.O. BOX 650
LAS VEGAS, NV, 89070

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

TP/jj/cg/L2



1 **RSPN**
2 **STEVEN B. WOLFSON**
3 **Clark County District Attorney**
4 **Nevada Bar #001565**
5 **TALEEN PANDUKHT**
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7 **Nevada Bar #05734**
8 **200 Lewis Avenue**
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10 **(702) 671-2500**
11 **Attorney for Plaintiff**

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

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11 **#2796708**

11 **Plaintiff,**

CASE NO: A-19-793315-W

12 **-vs-**

DEPT NO: XIX

13 **THE STATE OF NEVADA,**

14 **Defendant.**

15 **STATE'S RESPONSE TO PETITIONER'S MOTION FOR EXPEDITIOUS RULING**
16 **FOR AMENDED PETITION FOR WRIT OF HABEAS CORPUS 3RD REQUEST**

17 **DATE OF HEARING: NOVEMBER 16, 2020**
18 **TIME OF HEARING: 10:15 AM**

18 **COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County**
19 **District Attorney, through TALEEN PANDUKHT, Chief Deputy District Attorney, and**
20 **hereby submits the attached Points and Authorities in Response to Petitioner's Motion for**
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23 **attached points and authorities in support hercof, and oral argument at the time of hearing, if**
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25 **//**

26 **//**

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28 **//**

1 **POINTS AND AUTHORITIES**

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19 I understand and agree that, if...an independent magistrate, by affidavit review,
20 confirms probable cause against me for new criminal charges including reckless
21 driving or DUI, but excluding minor traffic violations, the State will have the
22 unqualified right to argue for any legal sentence and term of confinement
23 allowable for the crime(s) to which I am pleading guilty, including the use of
24 any prior convictions I may have to increase my sentence as a habitual criminal
to five (5) to twenty (20) years, Life without the possibility of parole, Life with
the possibility of parole after ten (10) years, or a definite twenty-five (25) year
term with the possibility of parole after ten (10) years.

25 GPA at 2: 1-9. An Amended Information reflecting the new charge of ATTEMPT GRAND
26 LARCENY was filed in conjunction with the GPA. Petitioner was adjudged Guilty pursuant
27 to Alford that same day, and the sentencing hearing was scheduled for March 6, 2019.

28 //

1 On January 31, 2019, the State filed a State's Notice of Motion and Motion to Revoke
2 Bail, asserting that in Las Vegas Justice Court case number 19F01534X, a Justice of the Peace
3 had found probable cause to charge Petitioner with Burglary for acts committed on or around
4 January 26, 2019. The State's Motion to Revoke Bail was granted after a hearing on February
5 4, 2019.

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

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

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

23 On November 19, 2019, Petitioner filed another Notice of Appeal, appealing the denial
24 of his Coram Nobis motion. His Case Appeal Statement was filed on December 11, 2019 (SCN
25 80222). On August 31, 2020, the Nevada Court of Appeals affirmed the Court's denial of his
26 Coram Nobis motion. Remittitur issued on October 12, 2020.

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

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

7 On May 15, 2020, Petitioner also filed an "Affidavit of Actual Innocence not Mere
8 Legal Insufficiency but 'Factual Innocence.'" The State has filed, contemporaneously with
9 the instant Response, a Response and Motion to Strike Petitioner's Affidavit.

10 On May 27, 2020, Petitioner filed a Supplemental Petition. While Petitioner's
11 numerous pleadings were pending, Petitioner filed a Motion for Peremptory Challenge of
12 Judge and to Disqualify Judge William Bill Kephart. Thereafter, the State filed its Responses
13 to Petitioner's Affidavit of Actual Innocence and Petitioner's Supplemental Petition on June
14 10, 2020. As a result of Petitioner's Peremptory Challenge, Petitioner's pending matters were
15 taken off calendar on June 15, 2020. On June 29, 2020, Petitioner filed his Reply to the State's
16 Response to Petitioner's Affidavit of Actual Innocence.

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

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

25 On September 25, 2020, Petitioner filed the instant Motion for Expeditious Ruling for
26 "Amended Petition for Writ of Habeas Corpus" 3rd Request.

27 //

28 //

ARGUMENT

I. PETITIONER'S INSTANT PLEADING FAILS TO STATE GROUNDS FOR RELIEF

Petitioner's instant filing consists of multiple indictments of the State and this Court, alleging that Petitioner "is a victim of this fundamental miscarriage of justice." Instant Motion at 3 (erroneously labeled "Page 4"). A review of Petitioner's pleading reflects that Petitioner simply seeks to challenge the State's various "Statement of Facts" sections in response to Petitioner's various motions. Id. at 2 (erroneously labeled "Page 3"). Petitioner also continues to raise single-sentence summaries of entreaties for relief that have previously been raised. See id. at 3. Notably absent from Petitioner's instant Motion is a cognizable request for relief, much less support for that request. Eighth Judicial District Court Rule 2.20(c). Instead, Petitioner concludes by requesting that this Court "grant [the instant Motion]." Id. at 4 (erroneously labeled "Page 4").

Petitioner's continued lack of any clear statement of grounds for relief is compounded by Petitioner's failure to properly include points and authorities that would clarify the relief requested, identify this Court's jurisdiction to grant such relief, and/or present cogent argument in support of those requests. Therefore, the State respectfully submits that Petitioner's filing fails to comport with EDCR 2.20(c), thus necessitating denial of the instant Motion.

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1 CONCLUSION

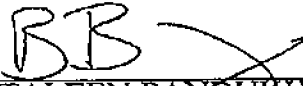
2 For the foregoing reasons, the State respectfully requests that this Court summarily
3 DENY Petitioner's instant Motion as failing to meet the requirements of EDCR 2.20, or, in
4 the alternative, for failing to sufficiently state a claim for relief.

5 DATED this _____ day of November, 2020.

6 Respectfully submitted,

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

10 BY

11 
12 TALEEN PANDUKHT
13 Deputy District Attorney
14 Nevada Bar #05734

15 for

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 10th day of November, 2020, 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
LAS VEGAS, NV, 89070

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

TP/jj/cg/L2

Heather L. Hume

CLERK OF THE COURT

ORDR

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

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant.

CASE NO: A-19-793315-W

DEPT NO: XIX

**ORDER DENYING PLAINTIFF'S MOTION FOR EXPEDITIOUS RULING FOR
AMENDED PETITION FOR WRIT OF HABEAS CORPUS - 3RD REQUEST,
PLAINTIFF'S MOTION TO SET EVIDENTIARY HEARING AND ISSUE
TRANSPORT ORDER, AND PLAINTIFF'S MOTION TO RECONSIDER ORDER
DENYING MOTION FOR RULING FOR RULE 60 (B) MOTION FOR RELIEF;
MOTION TO VACATE; AMENDED PETITION FOR WRIT OF HABEAS
CORPUS**

DATE OF HEARING: November 16, 2020

TIME OF HEARING: 08:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the
16th day of November, 2020, the Defendant not being present, in proper person, the Plaintiff
being represented by STEVEN B. WOLFSON, District Attorney, through ERCAN E.
ISCAN, Chief Deputy District Attorney, without argument, based on the pleadings and good
cause appearing therefor,

//

//

1 IT IS HEREBY ORDERED that Plaintiff's Motion for Expeditious Ruling for
2 Amended Petition for Writ Of Habeas Corpus - 3rd Request, shall be, and it is DENIED.

3 IT IS HEREBY ORDERED that Plaintiff's Motion to Set Evidentiary Hearing and
4 Issue Transport Order, shall be, and it is DENIED.

5 LASTLY, IT IS HEREBY ORDERED that Plaintiff's Motion to Reconsider Order
6 Denying Motion for Ruling for Rule 60 (B) Motion For Relief; Motion To Vacate; Amended
7 Petition For Writ Of Habeas Corpus, shall be, and it is DENIED as a reconsideration is not
8 warranted.

9 DATED this _____ day of November, 2020.

Dated this 21st day of November, 2020




DISTRICT JUDGE

209 16B 8146 134B
William D. Kephart
District Court Judge

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

15 BY


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

18 **CERTIFICATE OF SERVICE**

19 I certify that on the _____ day of _____, 2020, I mailed a copy of the foregoing Order
20 to:

21 JAMES HOWARD HAYES, BAC #1175077
22 HIGH DESERT STATE PRISON
23 P.O. BOX 650
LAS VEGAS, NV 89070

25 BY


C. Garcia
Secretary for the District Attorney's Office

28 cg/L2

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 James Hayes, Plaintiff(s)

CASE NO: A-19-793315-W

7 vs.

DEPT. NO. Department 19

8 Nevada State of, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 11/21/2020

15 Melissa Boudreaux

mezama@clarkcountynv.gov

Heather Hemin
CLERK OF THE COURT

Hayes, James H ID NO. 1175077

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

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

JAMES H. HAYES
(Petitioner)

v.

State of Nevada
(Respondent)

"MEETING REQUESTED"

CASE NO.: A-19-793315-W

DEPT. NO.: 19

DOCKET: _____

Motion To Compel Judgement Pursuant to Nevada
Revised Statutes Chapter 34... & NRS Rule 12(c) for
Amended petition for writ of habeas corpus...

COMES NOW, petitioner, JAMES H. HAYES, herein above respectfully
moves this Honorable Court for an good faith ruling on petitioner's
denied petition for writ of habeas corpus in petitioner's
favor as justice so requires.

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

DATED: this 1 day of DECEMBER, 2020

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

RECEIVED

DEC - 7 2020

CLERK OF THE COURT

Points and Authorities
Statement of the Case:

ON April 15, 2019, petitioner, MR. JAMES H. HOYES, filed his Petition for Writ of Habeas Corpus

ON June 15, 2020, Clark County District Court Judge William Kephart set date for hearing petitioner's "Amended petition for Writ of Habeas Corpus" that he took off calendar prior to issuing a ruling on petitioner's legally cognizable grounds for relief

ON August 27, 2020, a hearing was held in chambers by Judge William Kephart for petitioner's "amended writ of habeas corpus" with NO ruling being made on petitioner's legally cognizable grounds for relief and hearing reset til September 9, 2020.

ON September 9, 2020, Judge William Kephart denied petitioner's motion for ruling on petitioner's "Amended petition for writ of habeas corpus" to continue his blatant manipulation of Justice and failure to adhere to his constitutionally mandated responsibilities as justice so requires, by making a good faith ruling on petitioner's legally cognizable grounds for relief.

ON September 25, 2020, petitioner filed his "Motion for Expeditions ruling" for "Amended petition for writ of habeas Corpus" 3RD REQUEST that was scheduled for a chambers ruling ON November 5, 2020, that was rescheduled to November 16, 2020.

Argument:

Comes Now the petitioner, Mr. James H. Hayes in pro se, in necessity, and hereby moves this Honorable Court to rule on his "Amended Petition for Writ of habeas corpus." The petitioner, herein avers that all pleadings are closed-out and that this case is ripe for judgment in the petitioner's favor. This Court has jurisdiction to rule upon the petitioner's "Amended petition for writ of habeas corpus" pursuant to this. The petitioner's request in hopes of restoring enough integrity in the heart of the presiding Judge William Kenney as to bring about a fair proceeding in favor of the petitioner, NRS Chapter 34, and Federal Rules of Civil Procedure, Rule 12(c). In support, the petitioner shows this honorable court the following:

1. On or about April 15, 2019, the petitioner filed an instant Petition for Writ of Habeas Corpus.
2. On or about April 17, 2019, petitioner's pro se Notice of Appeal was filed in the Supreme Court of Nevada (Emphasis added) as trial counsel failed to do so.
3. On or about February 12, 2020, petitioner filed his Amended petition for Writ of habeas corpus.
4. On or about April 17, 2020, the state filed its response to petitioner's Amended petition for Writ of habeas corpus.
5. On or About May 15, 2020, petitioner filed his ~~response~~ reply to the state's response and his affidavit.

of "Actual INNOCENCE NOT mere legal insufficiency but Factual INNOCENCE."

6) Petitioner is entitled to habeas if there is no material dispute as to the facts relating to his conviction that the charge of attempt grand larceny was dismissed at the conclusion of preliminary hearing for lack of evidence, No corpus delicti, No mens rea, No slight or marginal evidence of guilt, and if it appears that the statute under which he was convicted did not prohibit his conduct. So the Justice Court Magistrate dismissal of the charge of attempt grand larceny is clear and undisputed that petitioner was convicted by reason of the commission of an act, which the law did not prohibit or penalize. In which, shows all parties agree that the petitioner is not guilty of the offense to which he pleaded Afford.

7) The state has conceded that petitioner was improperly charged and sentenced for a crime he did not in fact commit. The answer to this is that petitioner stands convicted of and is incarcerated for a crime he did not commit, the fact that petitioner pleaded Afford to the crime is besides the question. Obviously, he did not know that the Amended information which was filed in district court was ERRONEOUS.

8) Petitioner is wrongfully imprisoned because he was convicted under a statute, which did not prohibit his behavior, and no crime was committed that is furthered to be true by Justice Court Magistrate dismissal of charge after all evidence presented at preliminary hearing.

II. STATEMENT OF FACTS

It is clear that petitioner has suffered prejudice. He has been imprisoned for conduct that did not violate NRS 205.220.1; 205.222.2; 193.330, and the Supreme Court has found that such imprisonment violates the Due Process clause of the 14th Amendment.

9.) To deny petitioner relief would be an unreasonable application of clearly established federal law, and would be an unreasonable determination of the facts in light of the evidence presented at preliminary hearing in Justice Court.

10.) Double Jeopardy violation; the evidence used by the Judge to reach verdict was evidence relating solely to a previously dismissed charge.

11.) Petitioner's conviction can not stand because it resulted specifically and directly from the consequences of the state's denying him the right to effective counsel in violation of petitioner's right to counsel under the 14th Amendment. In practical terms, a constitutionally effective counsel would have made to dismiss the information and amended information and the state court would have been required to dismiss prosecution against petitioner with prejudice. Thus, if petitioner had been provided effective counsel as the state was required to do, petitioner would never have been prosecuted, convicted, and sentenced all for the reason that the state failed to adhere to state law 174.085(3); 178.562 in violation of due process and double jeopardy.

12.) United States Supreme Court has held that because a guilty plea is an admission of all the elements of a formal criminal charge. It cannot be truly voluntary

1 UNLESS THE PETITIONER ~~PROVES~~ POSSESSES AN UNDERSTANDING OF
2 THE LAW IN RELATION TO THE FACTS. A PLEA CANNOT BE VOLUNTARY
3 WHERE THE TRIAL COURT PROVIDES A PETITIONER WITH AN INCORRECT
4 UNDERSTANDING OF THE LAW IN RELATION TO THE FACTS OF HIS
5 CASE. THE CHARGE OF ATTEMPTED GRAND LARCENY WAS DISMISSED
6 AT THE CONCLUSION OF PRELIMINARY HEARING FOR LACK OF EVIDENCE.
7 NO CORPUS DELICTI, NO MENS REA, AND NO SLIGHT OR MARGINAL
8 EVIDENCE OF GUILT.

9 13.) INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN
10 VIOLATION OF 6TH AMENDMENT BECAUSE PETITIONER DEMONSTRATED
11 PREJUDICE FROM COUNSEL'S DECISION TO BRING A FUTILE CRUEL AND
12 UNUSUAL PUNISHMENT CLAIM OVER A SOLID CLAIM THAT CHALLENGE
13 THE VALIDITY OF THE AMENDED INFORMATION, ~~AND~~ DOUBLE
14 JEOPARDY, AND INSUFFICIENT EVIDENCE CLAIMS. WHEN THESE
15 SOLIDLY BASED CLAIMS WOULD HAVE BEEN OBVIOUS AT THE TIME
16 OF PETITIONER'S DIRECT APPEAL WAS BEYOND QUESTION, BUT
17 APPELLATE COUNSEL OPTED FOR THE HOPELESS CRUEL AND UNUSUAL
18 CHALLENGE.

19 14.) HERE NOW, THE PETITIONER MOVES THIS COURT TO
20 RENDER ITS RULING IN GOOD FAITH.

21 WHEREFORE NOW, ABOVE PREMISES CONSIDERED, THE
22 PETITIONER MOVES THIS COURT TO RENDER JUDGMENT IN
23 HIS "AMENDED PETITION FOR WRIT OF HABEAS CORPUS." THE
24 PETITIONER RESPECTFULLY MOVES THIS COURT TO ENTER JUDGMENT
25 AS REQUIRED BY LAW, LIBERTY, AND JUSTICE!!
26
27
28

CERTIFICATE OF SERVICE BY MAILING

I, JAMES H. HAYES, hereby certify, pursuant to NRCP 5(b), that on this 1st
day of December, 2020, I mailed a true and correct copy of the foregoing, "Motion to Compel
Judgement pursuant to Nevada Revised Statutes Chapter 34..."
by placing document in a sealed pre-postage paid envelope and deposited said envelope in the
United State Mail addressed to the following:

Clark County Dist. Courts
OFFICE OF THE CLERK
200 LEWIS AVE. 2ND FL
LAS VEGAS, NEVADA
89155-1160

Clark County Dist. Attorney
200 LEWIS AVE
LAS VEGAS, NEVADA
89155-2212

Nevada Atty General
100 N. Carson St
Carson City, NV
89401

CC:FILE

DATED: this 1st day of December, 2020.

James H. Hayes
JAMES H. HAYES # 1176077
/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 Motion to Compel

Judgement pursuant to NRS Chapter 34... 22RCP Rule 12(c)(3)
(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

12-01-2020
Date

JAMES H. HAYES
Print Name

PRO SE
Title

HEARINGS

REQUESTED!!

CASE NO: A-19-793315-W

DEPT: 19

STATE OF NEVADA

COUNTY OF CLARK

AFFIDAVIT OF actual INNOCENCE Not mere legal insufficiency
but "actual INNOCENCE"

SS: Amended Petition for Writ of Habeas Corpus

CASE NO: A-19-793315-W

DEPT: 19

TO WHOM IT MAY CONCERN:

MAY 15 2020

I, James H. Hayes, the undersigned, do hereby swear that the following statements and description of events, are true and correct, of my own knowledge, information, and belief, and to those I believe to be true and correct. Signed under penalty of perjury pursuant to NRS 208.165.

(1) THAT James H. Hayes is the affiant in this affidavit and is currently incarcerated at Southern 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 delicti, no slight or marginal evidence. Moreover, this is a colorable showing that it is more likely than not that no reasonable juror would have convicted Mr. Hayes absent a constitutional violation. Where as has, there was, of course, no evidence of actual guilt of the crime of Attempted Grand Larceny, as the sustaining Judge and the State knew Mr. Hayes had no

1 of 2

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MAY - 1 2020

CLERK OF THE COURT

1 involvement in such a crime as it is clear that no evidence
2 of actual guilt existed on the underlying criminal conduct
3 that may have justified accepting Mr. Hayes' Alford plea
4 to a crime he did not commit, and sentence was based
5 on speculation, not based on the acts Mr. Hayes committed.
6 So here Mr. Hayes has made a colorable showing of cause
7 and prejudice to overcome a procedural default and to
8 ensure fundamental fairness that is the central concern
9 of the writ of habeas corpus. As the instant case, is an
10 extraordinary case, where a constitutional violation has
11 resulted in the conviction of Mr. Hayes who is actually
12 innocent, and it would be an affront to justice and due
13 process to hold Mr. Hayes to his plea when the conduct upon
14 which the plea was entered did not occur. Furthermore,
15 Mr. Hayes received no consideration whatsoever in exchange
16 for his Alford plea to a crime he did not commit as he was
17 induced by the state to plead to a crime not committed and
18 Mr. Hayes' agreement to this unconstitutional guilty plea was
19 predicated on his belief of time credit served for a gross
20 misdemeanor sentence and did not explicitly agree to a
21 period of imprisonment in exchange for a plea.

22 That this court is fully aware Mr. Hayes was not properly
23 advised or conversed as to the defects he may have waived
24 as part of the negotiations. What is fact, Mr. Hayes never
25 agreed to waive any and all defects in the pleadings so
26 Mr. Hayes never waived claims to "Defects" voluntarily, nor
27 did Mr. Hayes waive right to complain of the acceptance
28 of an unconstitutional plea. Furthermore, Mr. Hayes guilty

1 plea agreement did not explicitly specify waiver to defects and
2 Mr. Hayes was not well aware of the charges against him
3 nor the surrounding negotiations and the plea process is
4 unambiguous evidence of this and confirms Mr. Hayes did
5 not explicitly understand the plea negotiations. Moreover,
6 there is clear and convincing evidence Mr. Hayes did not
7 commit the crime of Attempted Grand Larceny and the
8 charge of Burglary was fatal without the state's intent of
9 Attempt Grand Larceny that's a colorable showing that no
10 jury would have convicted Mr. Hayes of Attempted Grand
11 Larceny nor the underlying crime of Burglary leaving the
12 sentencing Judge no factual basis for acceptance of Mr.
13 Hayes' Alford Plea as he never admitted in open court to
14 committing the acts underlying the offense for which he
15 entered his plea, and the prosecution knew that the evidence
16 was false and without probable cause.

17 That, the record shows without doubt that Mr. Hayes has
18 pleaded Alford to a crime that he did not commit, and this
19 court must hesitate to apply technical rules to prevent Mr.
20 Hayes from obtaining relief when in fact, the cause and
21 prejudice formula of *Weinwright v. Sikes* is not dispositive
22 when the fundamental fairness of a prisoner's conviction
23 is at issue as in the instant case, that appellate procedural
24 default should not foreclose habeas corpus review of a
25 meritorious constitutional claim that will establish Mr.
26 Hayes' innocence. As this is an extraordinary case, where
27 a constitutional violation has resulted in the conviction of
28 one who is actually innocent and this court shall grant the

1 won't even if the absence of a showing of cause and prejudice
2 for the procedural default, when counsel's failure to raise a
3 particular claim on appeal is to be scrutinized under the
4 cause and prejudice standard what that failure is treated
5 as a procedural default would deny Mr. Hayes fundamental
6 fairness and continue this manifest injustice. What the
7 writ of habeas corpus is the fundamental instrument for
8 safeguarding individual freedom against arbitrary and
9 lawless state action and its well-known history bears
10 repetition. As it has been given explicit protection in our
11 constitution, and the very nature of the writ demands
12 that it be administered with the initiative and flexibility
13 essential to insure that miscarriages of justice within its
14 reach are surfaced and corrected that must occur in the
15 instant case, as there is no rigid procedural rules that
16 prevented the writ's fundamental mission - securing justice
17 from being realized and must yield to the imperative of
18 correcting a fundamentally unjust incarceration and
19 prevent illegal imprisonments.

20 That the state breached the guilty plea agreement on
21 unimpeachable and highly suspect evidence as the evidence used
22 was false and the state was well aware that the alleged victim
23 at preliminary examination for the ispe dixit Burglary
24 charge (case no: 19701534X) testified under oath facing the
25 penalty of perjury that Mr. Hayes was not the perpetrator
26 of alleged B&E and 100% sure of it and further stated
27 that alleged perpetrator did not enter room only stood in
28 doorway said sorry and close door and left without

1 incident, so Mr. Hayes has showed detrimental reliance since
2 there was no breach and no fault of Mr. Hayes as the
3 Burglary charge was dismissed and Justice court magistrate
4 ruling of probable cause was misplaced as alleged victim
5 testified Mr. Hayes was not perpetrator and Mr. Hayes
6 had a valid room hotel key issued to him from an
7 authorized registered hotel guest, so this is a manifest
8 impropriety in permitting the state to break the agreement
9 when they know Mr. Hayes did not break his promise making
10 the state estopped from asserting right to argue for a
11 different sentence. When there was in essence no substantial
12 breach that warrants releasing state of its promises. What
13 in fact, the agreement did not contain explicit language
14 conditionally releasing the state from its promise for an
15 excusable ruling of probable cause by magistrate as was
16 here in the instant case. Whereby had the sentencing
17 judge held an evidentiary hearing as required to determine
18 if there was a breach per the rulings of the Nevada
19 Supreme Court and the 9th Circuit this fundamental mis-
20 carriage of justice would not have occurred as Mr. Hayes
21 has clear and convincing evidence he did not break
22 his promise and no breach occurred on his behalf.
23 That habitual adjudication was not just and proper for
24 Mr. Hayes to be punished and segregated as a habitual
25 criminal and the court abused its discretion as crimes
26 were nonviolent and not a felony under the state
27 and laws of Nevada. Court and Abuse in Terms and not
28 prior. (Burglary in Nevada 2016). As the sentencing Judge

1 violated legislation intent of NRS 207.010 and failed
2 to serve the purposes of the statute or the interests
3 of justice. What in fact, Mr. Hayes did not warrant
4 the harsh sanction under the habitual criminal statute
5 though past conduct reprehensible simply does not
6 warrant habitual treatment.

7 That the court that rendered the judgment and
8 sentence lack subject matter jurisdiction per NRS 140.085
9 and NRS 178.562. Whose jurisdiction of the subject
10 matter is derived from the law; it neither can be
11 waived nor conferred by consent of Mr. Hayes

22 FURTHER, AFFLIANT SAYETH NAUGHT.

23 EXECUTED AT Southern Desert Correctional Center this 27 day of April 2020

24 IN FRONT OF:

BY Simon Nicholas

NDCC # 1175077

6 of 7

JUL 31 2020

DA
pp
HEARING
REQUESTED !!

CLERK OF COURT
AFFIDAVIT OF

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

STATE OF NEVADA

ss:

Motion to Vacate Sentence (Conviction Invalid)

COUNTY OF CLARK

CASE No: C-16-315749-1

DEPT No: 19

TO WHOM IT MAY CONCERN:

I, JAMES H. HAYES, the undersigned, do hereby swear that all the following statements and description of events, are true and correct, of my own knowledge, information, and belief, and to those I believe to be true and correct. Signed under penalty of perjury pursuant to NRS 208.165.

(1) THAT JAMES H. HAYES is the affiant in this affidavit and is currently incarcerated at Southern Desert Correctional Center a victim of a fundamental miscarriage of justice trying to overcome a fundamentally unjust incarceration and all procedural bars against the ruling on the merits of his Motion to Vacate (Conviction Invalid). When in fact categorically a fundamental miscarriage of justice would continue and permit manipulation of justice from this court's failure to consider Mr. Hayes claim for relief on its merit.

(2) That it is Black Letter Law in the State of Nevada that Subject Matter Jurisdiction can only be established by the District Court at the conclusion of preliminary hearing by one of the following: 1.) Magistrate finds slight or marginal evidence to bound over charge. 2.) Grand Jury indictment 3.) Motion of leave of the court to file information by affidavit. Here, after the presentation of all the evidence at preliminary hearing and conclusion of hearing Mr. Hayes charge of Attempted Grand Larceny was dismissed. So the District Court categorically lack Subject Matter Jurisdiction for the charge of Attempted Grand Larceny.

1 of 1

JUL 20 2020

CLERK OF THE COURT

1 Constitutionally against Mr. Hayes

2 (3) That Mr. Hayes factually and legally never waived
3 his preliminary hearing for the instant charge of
4 attempt grand larceny. Moreover at conclusion of preliminary
5 hearing after state's presentation of all the evidence
6 the magistrate dismissed the charge for no slight or
7 marginal evidence of guilt.

8 (4) That no evidence of guilt = innocence Mr. Hayes
9 has establish sufficient factual innocence warranting
10 granting Motion to Vacate.

11 (5) That to accept Afford plea by Judge the record
12 before the judge must contain strong evidence of guilt,
13 actual guilt. (North Carolina v. Alford 400 U.S. at 37). Here Mr.
14 Hayes is actually innocent of the crime of attempt grand
15 larceny through clear and convincing evidence shown
16 at preliminary examination when magistrate dismissed
17 the charge for lack of evidence, No corpus delicti, No mens
18 rea, and no slight or marginal evidence.

19 (6) That Judge and the state know Mr. Hayes had no
20 involvement in the crime of attempt grand larceny as it
21 is clear that no evidence of actual guilt existed as the
22 underlying criminal conduct that may have justified
23 accepting Mr. Hayes Afford plea to a crime he did not
24 commit, and the conduct upon which the plea was
25 entered was false.

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

1 in the state's filed information dated June 17, 2016 that
2 was based over on a misplaced ruling of probable cause
3 by magistrates. What in fact one can not have Burglary
4 without intent, so the state failed to sufficiently
5 establish facts for slight or marginal evidence that
6 Mr. Hayes committed the crime of Burglary after the
7 presentation of all the evidence at preliminary hearing
8 (8) That Mr Hayes has establish sufficient factual
9 grounds and a colorable showing of actual innocence
10 and that no jury would have convicted Mr. Hayes of
11 Attempt Grand Larceny nor the crime of Burglary
12 based on facts introduced or events occurring during
13 the course of the proceedings leaving the sentencing
14 Judge no factual basis for his constitutionally
15 mandated responsibility for acceptance of Mr. Hayes
16 Affidavit.

17 (9) That the indefinite information obscures the reality that
18 the prosecution was unable to frame a proper information for
19 Burglary and Amended information for attempt grand larceny
20 consistently with facts now known as the means was false
21 confirmed by magistrate after all sworn testimony

22 FURTHER, AFFIANT SAYETH NAUGHT.

23 EXECUTED AT SAC

this 14 day of July 2020

24 IN FRONT OF:

BY [Signature]

NDOC # 1175022

25
26
27 3 of 4
28

UNDER PENALTY OF PERJURY

I, the undersigned, certify, declare, or state that the foregoing is true and correct, to the best of my knowledge and belief, in accordance with NRS 208.165 and 28 USCA § 1746.

Excuted on the 22nd day of April, 2020

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

4 of 4



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

STATE OF NEVADA)

COUNTY OF CLARK)

ss:

CASE No: A-19-793315

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: Wherein, In Alford, the court held a plea contains
a protestation of innocence was constitutionally acceptable
when "a defendant intelligently concludes that his interests
require entry of guilty plea and the record before the judge
contains strong evidence of guilt" (400 U.S. at 37). In the instant
case, there was, of course, no evidence of actual guilt of the crime
of Attempted Grand Larceny, as the sentencing judge and the state knew
Mr. Hayes had no involvement in such a crime. Moreover, when prelim.
examination showed no criminal act of Attempted Grand Larceny,
it is clear that no evidence of actual guilt existed on the under-
lying criminal conduct that may have justified accepting Mr. Hayes
plea, therefore Mr. Hayes did not waive his right to 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:

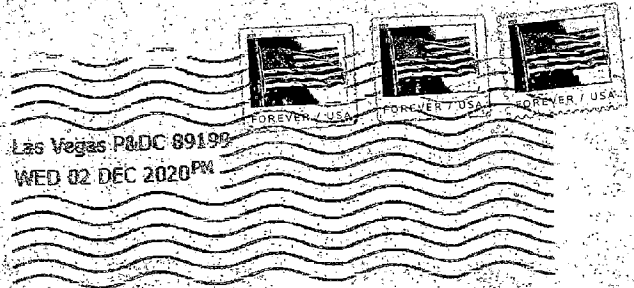
James N. Hayes
Post Office Box-203 (SDCC)
Indian Springs, Nevada 89070.
Affiant, In Propria Personam:

Pages #1175077

SDCC

P.O. Box 208

Indian Springs, NV
89070



Clerk County District Courts
"Office of the Clerk"

200 LEWIS AVE; 3RD FLOOR

LAS VEGAS, NEVADA

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12/22/2020

Alvin S. Hume
CLERK OF THE COURT

1 Hayes, James H #1175077
/ In Propria Personam
2 Post Office Box 208 S.D.C.C.
3 Indian Springs, Nevada 89018
4

5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 James H. Hayes
8 (Petitioner)
9 v.
10 State of Nevada
11 (Respondent)
12

"HEARING REQUESTED"

Case No. A-19-793315-W

Dept No. 19

Docket _____

13
14 NOTICE OF MOTION

15 YOU WILL PLEASE TAKE NOTICE, that _____
16 _____

17 will come on for hearing before the above-entitled Court on the _____ day of _____, 20____,
18 at the hour of _____ o'clock ____ M. In Department _____, of said Court.
19

20 CC:FILE

21
22 DATED: this 1 day of DECEMBER, 2020.

23
24 BY: James H. Hayes #1175077
25 James H. Hayes
/ In Propria Personam
26
27
28

RECEIVED

DEC - 7 2020

CLERK OF THE COURT



DISTRICT COURT

CLARK COUNTY, NEVADA

James Hayes, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

Case No.: A-19-793315-W

Department 19

NOTICE OF HEARING

Please be advised that the Plaintiff's - Motion to Compel Judgment Pursuant to Nevada Revised Statutes Chapter 34 FRCP Rule 12(c) for Amended Petition for Writ of Habeas Corpus in the above-entitled matter is set for hearing as follows:

Date: January 28, 2021

Time: Chambers

Location:

Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court



**DISTRICT COURT
CLARK COUNTY, NEVADA**

James Hayes, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

Case No.: A-19-793315-W

C-16-315718-1

Department 3

NOTICE OF DEPARTMENT REASSIGNMENT

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

☒ This reassignment is due to: Per Administrative Order 20-25.

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

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

Motion to Compel, on 02/01/2021, at 8:30 AM

PLEASE INCLUDE THE NEW DEPARTMENT NUMBER ON ALL FUTURE FILINGS.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Heather Kordenbrock

Heather Kordenbrock, Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that this 15th day of January, 2021

☒ The foregoing Notice of Department Reassignment was electronically served to all registered parties for case number A-19-793315-W.

/s/ Heather Kordenbrock

Heather Kordenbrock, Deputy Clerk of the Court



1 **RSPN**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JONATHAN VANBOSKERCK
6 Chief Deputy District Attorney
7 Nevada Bar #06528
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

12 JAMES HOWARD HAYES,
13 aka James Howard Hayes Jr.,
14 #2796708

Plaintiff,

CASE NO: A-19-793315-W

-vs-

DEPT NO: III

THE STATE OF NEVADA,

Defendant.

**STATE'S RESPONSE TO PETITIONER'S MOTION TO COMPEL JUDGMENT
PURSUANT TO NEVADA REVISED STATUTES CHAPTER 34 FRCP RULE 12(C)
FOR AMENDED PETITION FOR WRIT OF HABEAS CORPUS**

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

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JONATHAN VANBOSKERCK, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Motion to Reconsider Order Denying Motion for Ruling for Rule 60b Motion for Relief; Motion to Vacate; Amended Petition for Writ of Habeas Corpus.

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.

//

//

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On or about July 23, 2013, James H. Hayes (hereinafter, "Petitioner") was charged by
4 way of Criminal Complaint with one count of BURGLARY (Category B Felony – NRS
5 205.060) and one count of ATTEMPT GRAND LARCENY (Category D Felony/Gross
6 Misdemeanor – NRS 205.220.1, 205.222.2, 193.330). Following a Preliminary Hearing in
7 Justice Court, Las Vegas Township on June 14, 2016, the charge of BURGLARY was bound
8 over to District Court, and the charge of ATTEMPT GRAND LARCENY was dismissed.

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

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

18 GPA at 1:22-24. The GPA further includes, in pertinent part, the following acknowledgement:

19 I understand and agree that, if...an independent magistrate, by affidavit review,
20 confirms probable cause against me for new criminal charges including reckless
21 driving or DUI, but excluding minor traffic violations, the State will have the
22 unqualified right to argue for any legal sentence and term of confinement
23 allowable for the crime(s) to which I am pleading guilty, including the use of
24 any prior convictions I may have to increase my sentence as a habitual criminal
to five (5) to twenty (20) years, Life without the possibility of parole, Life with
the possibility of parole after ten (10) years, or a definite twenty-five (25) year
term with the possibility of parole after ten (10) years.

25 GPA at 2: 1-9. An Amended Information reflecting the new charge of ATTEMPT GRAND
26 LARCENY was filed in conjunction with the GPA. Petitioner was adjudged Guilty pursuant
27 to Alford that same day, and the sentencing hearing was scheduled for March 6, 2019.

28 //

1 On January 31, 2019, the State filed a State's Notice of Motion and Motion to Revoke
2 Bail, asserting that in Las Vegas Justice Court case number 19F01534X, a Justice of the Peace
3 had found probable cause to charge Petitioner with Burglary for acts committed on or around
4 January 26, 2019. The State's Motion to Revoke Bail was granted after a hearing on February
5 4, 2019.

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

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

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

23 On November 19, 2019, Petitioner filed another Notice of Appeal, appealing the denial
24 of his Coram Nobis motion. His Case Appeal Statement was filed on December 11, 2019 (SCN
25 80222). On August 31, 2020, the Nevada Court of Appeals affirmed the Court's denial of his
26 Coram Nobis motion. Remittitur issued on October 12, 2020.

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

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

7 On May 15, 2020, Petitioner also filed an "Affidavit of Actual Innocence not Mere
8 Legal Insufficiency but 'Factual Innocence.'" On May 27, 2020, Petitioner filed a
9 Supplemental Petition. While Petitioner's numerous pleadings were pending, Petitioner filed
10 a Motion for Peremptory Challenge of Judge and to Disqualify Judge William Bill Kephart.
11 Thereafter, the State filed its Responses to Petitioner's Affidavit of Actual Innocence and
12 Petitioner's Supplemental Petition on June 10, 2020. As a result of Petitioner's Peremptory
13 Challenge, Petitioner's pending matters were taken off calendar on June 15, 2020. On June
14 29, 2020, Petitioner filed his Reply to the State's Response to Petitioner's Affidavit of Actual
15 Innocence.

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

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

24 On September 25, 2020, Petitioner filed a Motion for Expeditious Ruling for "Amended
25 Petition for Writ of Habeas Corpus" 3rd Request. On October 7, 2020, he filed a Motion to
26 Set Evidentiary Hearing and Issue Transport Order. On October 14, 2020, Petitioner filed a
27 Motion to Reconsider Order Denying Motion for Ruling for Rule 60b Motion for Relief;
28 Motion to Vacate; Amended Petition for Writ of Habeas Corpus. The State filed responsive

1 pleadings to each of Petitioner's respective filings on November 10, 2020. On November 16,
2 2020, the Court considered, and denied, Petitioner's three Motions. The Court's Order was
3 filed on November 21, 2020.

4 On December 22, 2020, Petitioner filed the instant "Motion to Compel Judgment
5 Pursuant to Nevada Revised Statutes Chapter 34 FRCP Rule 12(c) for Amended Petition for
6 Writ of Habeas Corpus.

7 ARGUMENT

8 **I. NO FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER HAS BEEN** 9 **FILED REGARDING PETITIONER'S AMENDED PETITION**

10 As recounted in the State's Statement of Facts, *supra*, Petitioner's Amended Petition
11 was filed on February 2, 2020. While Petitioner's panoply of other filings have been
12 considered – and rejected – since that date, it appears to the State that no Court Order has
13 issued regarding Petitioner's Amended Petition itself. Therefore, pursuant to NRS 34.470(2),
14 the State respectfully submits that Petitioner's Amended Petition must be "dispose[d] of...as
15 justice may require."

16 As such, the State respectfully requests that this Court consider, and DENY,
17 Petitioner's Amended Petition for Writ of Habeas Corpus. See, State's Response to
18 Petitioner's Amended Petition for Writ of Habeas Corpus and Petition: Expeditious Judicial
19 Examination NRS 34.360-34.830, filed on April 17, 2020.

20 **II. PETITIONER'S RELIANCE UPON THE FEDERAL RULES OF CIVIL** 21 **PROCEDURE IS INAPPROPRIATE**

22 In support of his instant Motion, Petitioner cites to Federal Rule of Civil Procedure
23 12(c). Instant Motion at 1, 3. However, Petitioner's reliance upon that Rule is improper, as
24 Nevada law clearly details that even the *Nevada* Rules of Civil Procedure only apply in the
25 instant proceedings to the extent that they are not inconsistent with Nevada statutes guiding
26 habeas proceedings. See, NRS 34.780(1); State v. Powell, 122 Nev. 751, 757, 138 P.3d 453,
27 457 (2006); Mazzan v. State, 109 Nev. 1067, 1072, 863 P.2d 1035, 1038 (1993). Petitioner
28 has not offered any rational, much less justification, for his reliance upon the Federal Rule.

1 **III. PETITIONER'S DECISION TO ENTER A GUILTY PLEA RENDERED THE**
2 **PRELIMINARY HEARING RESULT IRRELEVANT**

3 Pursuant to Petitioner's various filings, it appears that Petitioner is simply challenging
4 his conviction on the grounds that he was not bound over to District Court on the original
5 charge of Attempt Grand Larceny. See, e.g., Instant Motion at 4:3-15. Petitioner's singular
6 argument lacks merit.

7 The Nevada Supreme Court has explained that objections to the filing of an Amended
8 Information are waived when they are not asserted in pretrial motions, nor on direct appeal
9 from conviction. Roseneau v. State, 90 Nev. 161, 521 P.2d 369 (1974); NRS 174.105. A
10 review of Petitioner's entry of plea demonstrates that not only did Petitioner fail to object to
11 the Amended Information (charging Petitioner with Attempt Grand Larceny), but Petitioner
12 requested that the Court accept that filing, and Petitioner's guilty plea to the charge contained
13 therein:

14 THE COURT: Mr. Hayes, I've been handed a copy of an amended
15 information in this case. Have you received a copy of that?

16 THE DEFENDANT: Yes sir.

17 THE COURT: Do you have any objection of it being filed here today?

18 THE DEFENDANT: No, sir.

19 ...

20 THE COURT: ...So how do you plead to the amended information that
21 charges you with attempt grand larceny that took place on or about the 9th day
22 of April, 2013 while you're here in Las Vegas, Clark County, Nevada, where
23 you willfully and lawfully and feloniously and intentionally deprived the owner
24 permanently, thereof, by attempting to steal, take or carry away lawful money
of the United States, \$650 or greater, owned by a Joshua Jarvis. And you -- by
doing this you were attempting to steal lawful money and an iPhone from Joshua
Jarvis. How do you plead to that?

25 THE DEFENDANT: Guilty by the way of *Alford*.

26 Recorder's Transcript of Hearing, dated November 7, 2018 (filed September 25, 2019 in Case
27 No. C-16-315718-1), at 2, 5.

28 //

1 Because Petitioner not only understood the Amended Information, and the charge
2 contained therein, but further asked the Court to accept the same, he waived any future
3 challenge to that charge and document. As such, the State respectfully requests that this Court
4 DENY Petitioner's Amended Petition in its entirety.

5 **CONCLUSION**

6 Based on the above, and on the State's Response (filed on April 17, 2020), the State
7 respectfully requests that this Court issue a Findings of Fact, Conclusions of Law and Order
8 to DENY Petitioner's Amended Petition in its entirety.

9 DATED this 27th day of January, 2021.

10 Respectfully submitted,

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

14 BY

BB
15 JONATHAN VANBOSKERCK
16 Chief Deputy District Attorney
17 Nevada Bar #06528

for

18 **CERTIFICATE OF ELECTRONIC FILING**

19 I hereby certify that service of State's Response To Petitioner's Motion to Compel
20 Judgment Pursuant to Nevada Revised Statutes Chapter 34 Frqp Rule 12(C) For Amended
21 Petition for Writ of Habeas Corpus, was made this 27th day of January, 2021, by Electronic
22 Filing to:

23 DEPUTY PUBLIC DEFENDER
24 pdclerk@clarkcountynv.gov

25 Corina Garcia
26 C. Garcia
27 Secretary for the District Attorney's Office

28 cg/L2

Heather H. Hume
CLERK OF THE COURT

Hayes, James H ID NO. 1175077

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

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

James H. Hayes
(Petitioner)

v.

State of Nevada
(Respondent)

HEARING REQUESTED

CASE NO.: A-19-293315-W

DEPT. NO.: 19

DOCKET: _____

"Reply" Motion to Compel Judgment Pursuant to Nevada
Revised Statutes Chapter 34... & FRCP Rule 12(c) for
"Amended Petition for Writ of Habeas Corpus"...

COMES NOW, petitioner James H. Hayes, herein above respectfully
moves this Honorable Court for an ruling in favor of petitioner on
Amended Petitioner for Writ of Habeas Corpus in the
interest of justice, law and liberty

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

Authorities,

DATED: this 12 day of JANUARY, 2021

BY: James H. Hayes

James H. Hayes # 1175077
Defendant In Proper Personam

RECEIVED

JAN 25 2021

CLERK OF THE COURT

ADDITIONAL FACTS OF THE CASE:

Points and Authorities
Statement of the Case

ON DECEMBER 7, 2020, THE CLERK OF THE COURT
FOR CLARK COUNTY DISTRICT COURTS RECEIVED PETITIONER'S
"MOTION TO COMPEL JUDGMENT PURSUANT TO NEVADA
REVISED STATUTES CHAPTER 34... § 4RCP RULE 12(c) § FOR
AMENDED PETITION FOR WRIT OF HABEAS CORPUS..."

ON DECEMBER 22, 2020, PETITIONER'S "MOTION TO
COMPEL JUDGMENT PURSUANT TO NEVADA REVISED STATUTES
CHAPTER 34 § 4RCP RULE 12(c) § FOR AMENDED PETITION FOR
WRIT OF HABEAS CORPUS" WAS FILED AND SET FOR
HEARING ON JANUARY 28, 2021

Argument:

COMES NOW THE PETITIONER, MR. JAMES H. JONES IN PROPER PERSON, IN NECESSITY, AND HEREBY MOVES THIS HONORABLE COURT TO ENFORCE EDCR 3.20 WHEREAS HERE THE STATE BEING DULY SERVED WITH A COPY OF THE "Motion to Compel Judgement pursuant to Nevada Revised Statutes Chapter 34... & FRCP Rule 12(c)" for "Amended petition for writ of habeas corpus" ON OR ABOUT THE 22ND DAY OF DECEMBER, 2020, MORE THAN 10 DAYS EXCLUSIVE OF THE DAY OF SERVICE HAVING EXPIRED SINCE SERVICE UPON THE STATE THAT NO ANSWER BEEN FILED AND NO FURTHER TIME HAVING BEEN GRANTED THE STATE'S FAILURE IS AN ADMISSION THAT PETITIONER'S MOTION IS MERITORIOUS, AND CONSENT TO THE GRANTING THEREOF. BECAUSE THIS COURT HAS JURISDICTION TO ADDRESS THE SUBSTANCE OF PETITIONER'S MOTION THIS COURT SHOULD GRANT THE SAME.

WHEREAS HERE THERE IS NO CREDIBLE ARGUMENT THAT THE STATE CAN MAKE TO OVERCOME THE FACT THAT THEY FAILED TO COMPLY TO EDCR 3.20 ~~AND~~ AND ANY OTHER CLAIM WOULD BE BELIED AND REPELLED BY THE RECORD.

IN SUPPORT, THE PETITIONER SHOWS THIS HONORABLE COURT THE FOLLOWING:

2. THE PETITIONER HEREBY FILES THIS REPLY WITHOUT THE STATE'S ANSWER

2. THE PETITIONER HEREBY SWEARS THAT HE STANDS

1 firmly on all points raised in his initial "Motion to
2 compel judgement." The petitioner therefore files this
3 reply in GOOD FAITH as it will serve the truly
4 useful purpose of preserving judicial resources.
5 The petitioner has presented to this court the
6 TRUE FACTS of this case and supporting evidence
7 thereto.

8 3. The state, has by its assertions of waiver
9 to appeal premised upon ineffective assistance of
10 counsel, has effectively withdrawn negotiated
11 consideration of Plea agreement and thereby
12 VOIDS the binding contract. The petitioner has
13 been deprived of essential rights under agreed
14 upon contract; precious resources, time, sleep, peace
15 of mind that the state would honor its own
16 contract, and has suffered other irreparable damages
17 and harms that are better particularized in the
18 petitioner's Amended petition for writ of habeas
19 corpus

20 4. The petitioner contends that the state has
21 withdrawn its considerations in the plea agreement
22 and therefore VOIDS the agreement knowingly
23 breaching the contract.

24 5. The petitioner has consistently, from the
25 inception of this case, asserted his FACTUAL
26 INNOCENCE. Petitioner has submitted to this court
27 an affidavit that expressly asserts his FACTUAL

1 INNOCENCE

2 6. STATE'S recital of factual basis was
3 INSUFFICIENT to satisfy requirement that petitioner
4 understand nature of charge. When in fact, the
5 charge of Attempt Grand Larceny against petitioner
6 was dismissed by Justice Court magistrate at
7 conclusion of preliminary hearing after presentation
8 of all the evidence for lack of evidence, NO
9 corpus delicti, NO MENS REA, AND NO slight nor
10 marginal evidence of GUILT... SEE NRS 174.085(3),
11 NRS 178.056, United States v. Lujano-Perez 274 F.3d
12 219.

13 Wherefore now, above premises considered the
14 petitioner MOVES this court to render judgment in
15 his Motion to Compel Judgment and Annul petition
16 for writ of habeas corpus. The petitioner respectfully
17 MOVES this court to enter judgment as required by
18 law, liberty, and justice...

CERTIFICATE OF SERVICE BY MAILING

I, JAMES A. HAYES, hereby certify, pursuant to NRCP 5(b), that on this 12th day of JANUARY, 2021, I mailed a true and correct copy of the foregoing, "Reply Motion to Compel Judgment pursuant to NRS Chapter 34" by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

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

Clark County District Attorney
200 LAUREL AVE
125 VEEB, NEVADA
89155-2212

Attorney General of Nevada
100 N. PERSON STREET
PERSON CITY, NEVADA 89701

CC:FILE

DATED: this 12 day of JANUARY, 2021.

James A. Hayes
JAMES A. 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 Reply Motion
to Compel Judgment pursuant to NRS Chapter 34
(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

1-12-2021
Date

JAMES H. HAYES
Print Name

PROPER PERSONS
Title

Notes #1175077
JDEC
P.O. Box 208
Indian Springs, NV
89101

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CLARK COUNTY, NEVADA

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James Hayes, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

Case No.: A-19-793315-W

Department 3

NOTICE OF HEARING

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

Date: March 08, 2021

Time: 8:30 AM

Location: RJC Courtroom 11C
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

02/18/2021

Heinrich Shuman

CLERK OF THE COURT

Hayes, James H ID NO. 1175077

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

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

JAMES H. HAYES

(PETITIONER)

v.

State of Nevada

(RESPONDENT)

CASE NO.: A-19-793315-WDEPT. NO.: 3

DOCKET: _____

Opposition to State's Response to Petitioner's Motion to Compel
Judgment pursuant to Nevada Revised Statutes Chapter 34,
TRCP Rule 12(c) for Amended petition for Writ of Habeas Corpus

COMES NOW, petitioner James H. Hayes, herein above respectfully
moves this Honorable Court for an GOOD FAITH ruling in favor of petitioner
on his Amended petition for Writ of Habeas Corpus and Motion
to Compel Judgment in the interest of Justice, Law, and Liberty...

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

DATED: this 9 day of February, 2021

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

FEB 18 2021

ADDITIONAL FACTS OF THE CASE:

Points and Authorities
Statement of the Case

ON December 7, 2020, the clerk of the court for
Clark County district courts received petitioner's "Motion to Compel
Judgment pursuant to Nevada Revised Statutes Chapter 34; FRCP
rule 12(c) for Amended petition for writ of habeas corpus"

ON December 22, 2020, petitioner's "Motion to Compel
Judgment pursuant to Nevada Revised Statutes Chapter 34; FRCP rule
12(c) for Amended petition for writ of habeas corpus"

ON January 20, 2021, Clerk of the court received
petitioner's "Reply" Motion to Compel Judgment pursuant to Nevada
Revised Statutes Chapter 34; FRCP Rule 12(c) for Amended petition for
writ of habeas corpus that was filed on February 2, 2021

ON January 27, 2021, state's response to petitioner's
Motion to Compel Judgment pursuant to Nevada Revised Statutes
Chapter 34; FRCP Rule 12(c) for Amended petition for writ of
habeas corpus that petitioner ~~is~~ received on February 3, 2021
at SDCC

Argument:

Comes now the petitioner, Mr. James H. Hayes in proper person, in Necessity, and hereby MOVES, this Honorable Court for a GOOD FAITH ruling as Justice so Requires on Amended petition for writ of Habeas Corpus and Motion to Compel judgment in favor of petitioner. In support, the petitioner shows this honorable court the following:

1. I, James H. Hayes, depose and state that the following FACTS are true and correct under penalty of perjury

2. The state's contentions are clearly made in BAD FAITH to once again deprive this court of its ability to pass judgment based on accurate information and facts.

3. The state is now attempting to once again violate "DUE PROCESS" based upon asserted facts that the state knows to be FALSE. When in fact, after all the evidence presented at preliminary hearing it was proven that the ESSENTIAL ELEMENTS of the charged offense of Attempt Grand LARCENY was not proven as they relate to fact and Nevada Revised Statutes (LAW) so the state's assertion that preliminary hearing results are irrelevant is an omission inconsistent with the rudimentary demands of LAW and fair procedure. NO PROBABLE CAUSE against petitioner for the charge of Attempt grand larceny to

1 proceed to District Court.

2 4. that the court that determined and delivered the
3 criminal judgment lacked SUBJECT-MATTER jurisdiction
4 and the challenge of jurisdiction of convicting court
5 not waived by failure to raise in direct appeal.

6 5. Challenge to plea which petitioner is ACTUALLY
7 INNOCENT is not waived by failure to raise on
8 direct appeal, and the petitioner seeks relief based on
9 a state law (NRS 174.085(3)) and constitutional violation
10 that has resulted in a fundamental miscarriage of justice,
11 such as the conviction of this INNOCENT NEERO...

12 6. The petitioner hereby avers that the state's
13 contention, that entering the plea agreement serves as
14 waiver to the right to challenge the conviction, is
15 tantamount to conclusive NEW EVIDENCE of ineffective
16 ASSISTANCE OF COUNSEL during plea negotiations. The state's
17 response serves as an unconditional stipulation that
18 counsel was in fact constitutionally ineffective, and
19 this ~~issue~~ issue alone would serve as sufficient
20 grounds for this honorable court to exercise sound judicial
21 prudence by issuing a writ of HABEAS CORPUS to have
22 petitioner before it, that petitioner be discharged from
23 his UNCONSTITUTIONAL CONFINEMENT and restraint.

24 7. The Amended information is clearly based upon
25 Nevada state law as an essential element. However, the
26 Nevada state law, in which the state relies requires an
27 value threshold of \$650.00 or greater be involved to

1 constitute a criminal offense of Attempt Grand Larceny
2 when in fact the alleged victim Joshua Jarvis testified
3 ~~under oath~~ under oath fearing the penalty of perjury that
4 he had no personal property in said room only a used
5 I-phone & all his property and valuables were in his
6 vehicle parked at hotel. where as here the records in the
7 petitioner's case clearly show his **FACTUAL INNOCENCE**
8 **EVEN** when reviewed by laymen of law, and that he
9 is held HOSTAGE in violation of the constitution and
10 LAWS passed in pursuance thereof.

11 8. Due process clause of the U.S constitution requires
12 that an accused may not be convicted unless each fact
13 necessary to constitute the crime with which he is
14 charged has been proven beyond a reasonable doubt.
15 (Bose v. State of Nevada 123 Nev. 194). The quintessential
16 miscarriage of justice is the conviction of a person who
17 is entirely innocent.

18 9. It will be held that accused will be entitled to
19 a hearing on the merits if the accused makes the necessary
20 showing of actual innocence to relieve any procedural
21 default in failing to contest his guilty plea in his prior
22 direct appeal (Bosley v. United States 118 S. Ct. 1604)

23 10. The petitioner must understand not only the
24 nature of the charge against him, but also that his
25 conduct actually falls within the charge (True 738 F.2d 199)

26 11. One of the principal functions of habeas corpus is
27 to assure that no person has been incarcerated under a
28

1 procedure which creates an impermissibly large risk that the
2 innocent will be convicted.

3 12. The petitioner has presented ample evidence
4 and matters of LAW to support all requested relief.

5 13. Therefore the petitioner MOVES this court to
6 render its ruling in GOOD FAITH

7
8 Wherefore now, above premises considered the
9 petitioner MOVES this court to render judgment in
10 his Amended petition for writ of habeas corpus. The
11 petitioner respectfully MOVES this court to enter
12 judgment as required by LAW, LIBERTY, and JUSTICE.

CERTIFICATE OF SERVICE BY MAILING

I, JAMES H. HOLLES, hereby certify, pursuant to NRCP 5(b), that on this 9th day of February, 2021, I mailed a true and correct copy of the foregoing, "Opposition to STATE'S RESPONSE TO PETITIONER'S Motion to Compel Judgment" by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

Clark County District Courts
CLARK COUNTY DISTRICT COURTS
200 LEWIS AVE. 3RD FLOOR
LAS VEGAS, NEVADA
89155-1160

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

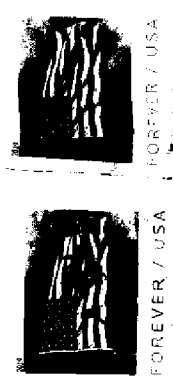
Attorney General of Nevada
100 N. Carson Street
Carson City, Nevada
89701

CC:FILE

DATED: this 9th day of February, 2021.

James H. Holles
JAMES H. HOLLES #1175277
/In Propria Personam
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

3 HALLS #1175277
5 DEC
P.O. Box 200
Indian Springs, NV
89070



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

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FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-19-793315-W

C-16-315718-1

DEPT NO: III

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

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

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

FINDINGS OF FACT, CONCLUSIONS OF LAW

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

1 205.060) and one count of ATTEMPT GRAND LARCENY (Category D Felony/Gross
2 Misdemeanor – NRS 205.220.1, 205.222.2, 193.330). Following a Preliminary Hearing in
3 Justice Court, Las Vegas Township on June 14, 2016, the charge of BURGLARY was bound
4 over to District Court, and the charge of ATTEMPT GRAND LARCENY was dismissed.

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

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

14 GPA at 1:22-24. The GPA further includes, in pertinent part, the following acknowledgement:

15 I understand and agree that, if...an independent magistrate, by affidavit review,
16 confirms probable cause against me for new criminal charges including reckless
17 driving or DUI, but excluding minor traffic violations, the State will have the
18 unqualified right to argue for any legal sentence and term of confinement
19 allowable for the crime(s) to which I am pleading guilty, including the use of
20 any prior convictions I may have to increase my sentence as a habitual criminal
to five (5) to twenty (20) years, Life without the possibility of parole, Life with
the possibility of parole after ten (10) years, or a definite twenty-five (25) year
term with the possibility of parole after ten (10) years.

21 GPA at 2: 1-9. An Amended Information reflecting the new charge of ATTEMPT GRAND
22 LARCENY was filed in conjunction with the GPA. Petitioner was adjudged Guilty pursuant
23 to Alford that same day, and the sentencing hearing was scheduled for March 6, 2019.

24 On January 31, 2019, the State filed a State’s Notice of Motion and Motion to Revoke
25 Bail, asserting that in Las Vegas Justice Court case number 19F01534X, a Justice of the Peace
26 had found probable cause to charge Petitioner with Burglary for acts committed on or around
27 January 26, 2019. The State’s Motion to Revoke Bail was granted after a hearing on February
28 4, 2019.

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

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

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

18 On November 19, 2019, Petitioner filed another Notice of Appeal, appealing the denial
19 of his Coram Nobis motion. His Case Appeal Statement was filed on December 11, 2019 (SCN
20 80222). On August 31, 2020, the Nevada Court of Appeals affirmed the Court's denial of
21 Petitioner's Coram Nobis motion. Remittitur issued on October 12, 2020.

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

24 On February 12, 2020, Petitioner filed an "Amended Petition for Writ of Habeas
25 Corpus" (his "Amended Petition"). This Court ordered a Response to that Amended Petition
26 on March 4, 2020. The State filed its Response to Petitioner's Amended Petition on April 17,
27 2020. Petitioner replied to the State's Response on May 15, 2020.

28 //

1 On May 15, 2020, Petitioner also filed an "Affidavit of Actual Innocence not Mere
2 Legal Insufficiency but 'Factual Innocence.'" On May 27, 2020, Petitioner filed a
3 Supplemental Petition. While Petitioner's numerous pleadings were pending, Petitioner filed
4 a Motion for Peremptory Challenge of Judge and to Disqualify Judge William Bill Kephart.
5 Thereafter, the State filed its Responses to Petitioner's Affidavit of Actual Innocence and
6 Petitioner's Supplemental Petition on June 10, 2020. As a result of Petitioner's Peremptory
7 Challenge, Petitioner's pending matters were taken off calendar on June 15, 2020. On June
8 29, 2020, Petitioner filed his Reply to the State's Response to Petitioner's Affidavit of Actual
9 Innocence.

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

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

18 On September 25, 2020, Petitioner filed a Motion for Expeditious Ruling for "Amended
19 Petition for Writ of Habeas Corpus" 3rd Request. On October 7, 2020, he filed a Motion to
20 Set Evidentiary Hearing and Issue Transport Order. On October 14, 2020, Petitioner filed a
21 Motion to Reconsider Order Denying Motion for Ruling for Rule 60b Motion for Relief;
22 Motion to Vacate; Amended Petition for Writ of Habeas Corpus. The State filed responsive
23 pleadings to each of Petitioner's respective filings on November 10, 2020. On November 16,
24 2020, the Court considered, and denied, Petitioner's three Motions. The Court's Order was
25 filed on November 21, 2020.

26 On December 22, 2020, Petitioner filed a "Motion to Compel Judgment Pursuant to
27 Nevada Revised Statutes Chapter 34 FRCP Rule 12(c) for Amended Petition for Writ of
28 Habeas Corpus." The State filed its Response to the instant Motion to Compel on January 27,

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

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

ANALYSIS

I. PETITIONER'S AMENDED PETITION IS BARRED AS SUCCESSIVE

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

A second or successive petition *must be dismissed* if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that *the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.*

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

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes, "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions *may be dismissed based solely on the fact of the petition.*" Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995) (emphasis added). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467,

1 497-98 (1991). Application of NRS 34.810(2) is *mandatory*. State v. Eighth Judicial Dist.
2 Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) (noting, “[h]abeas corpus
3 petitions that are filed many years after conviction are an unreasonable burden on the criminal
4 justice system.”) The Riker Court further determined that district courts have no discretion
5 regarding application of statutory procedural bars, and such bars “cannot be ignored [by the
6 district court] when properly raised by the State.” Id. at 233.

7 This Court finds that, in the instant case, Petitioner continues to file supplemental
8 pleadings in the form of multiple addenda as well as the instant “Amended Petition.” However,
9 under NRS 34.750, the right to file supplements lies exclusively with appointed counsel.
10 Furthermore, this Court finds that the factual bases for Petitioner’s claims existed at the time
11 Petitioner filed his first Petition. Therefore, this Court concludes that Petitioner’s pleadings
12 are successive and subject to dismissal absent a showing of good cause and prejudice. NRS
13 34.810(2). Petitioner does not argue good cause nor prejudice. See generally, Amended
14 Petition. Thus, this Court further concludes that Petitioner’s Amended Petition does not entitle
15 Petitioner to relief.

16 **II. PETITIONER’S AMENDED PETITION DOES NOT ENTITLE HIM TO** 17 **RELIEF**

18 The Nevada Supreme Court has explained:

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

23 Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (quoting Tollett v. Henderson, 411
24 U.S. 258, 267, 93 S.Ct. 1602, 1608 (1973)). An entry of a guilty plea “waive[s] all
25 constitutional claims based on events occurring prior to the entry of the plea[], except those
26 involving voluntariness of the plea[] [itself].” Warden, Nevada State Prison v. Lyons, 100
27 Nev. 430, 431, 683 P.2d 505 (1984); see also Kirksey v. State, 112 Nev. 980, 999, 923 P.2d
28 1102, 1114 (1996) (“Where the defendant has pleaded guilty, the only claims that may be

1 raised thereafter are those involving the voluntariness of the plea itself and the effectiveness
2 of counsel.”). Under NRS 34.810,

3 I. The court *shall* dismiss a petition if the court determines that:

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

7 ...
8 unless the court finds both cause for the failure to present the grounds and actual
prejudice to the petitioner.

9 (emphasis added). Furthermore, the Nevada Supreme Court has held that “challenges to the
10 validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must
11 first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a
12 direct appeal must be pursued on direct appeal, or they will be *considered waived in*
13 *subsequent proceedings.*” Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994)
14 (emphasis added) (disapproved of on other grounds by Thomas v. State, 115 Nev. 148, 979
15 P.2d 222 (1999)). “A court must dismiss a habeas petition if it presents claims that either were
16 or could have been presented in an earlier proceeding, unless the court finds both cause for
17 failing to present the claims earlier or for raising them again and actual prejudice to the
18 petitioner.” Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001), overruled on other
19 grounds by Lisle v. State, 131 Nev. 356, 351 P.3d 725 (2015). Additionally, substantive claims
20 are beyond the scope of habeas and waived. NRS 34.724(2)(a); see also Evans, 117 Nev. at
21 646-47, 29 P.3d 498 at 523; Franklin, 110 Nev. at 752, 877 P.2d 1058 at 1059.

22 A proper petition for post-conviction relief must set forth specific factual allegations
23 that would entitle the petitioner to relief. NRS 34.735(6) states, in pertinent part, “[Petitioner]
24 must allege specific facts supporting the claims in the petition [he] file[s] seeking relief from
25 any conviction or sentence. Failure to raise specific facts rather than just conclusions may
26 cause the petition to be dismissed.” “Bare” and “naked” allegations are not sufficient to
27 warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v.
28 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “A claim is ‘belied’ when it is contradicted

1 or proven to be false by the record as it existed at the time the claim was made.” Mann v. State,
2 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

3 **A. Petitioner’s Claims of Ineffective Assistance of Counsel are Belied by the Record**

4 Petitioner first claims that his counsel, Mr. Michael Sanft, Esq. (“Mr. Sanft”) was
5 ineffective for 1) failing to appropriately investigate; 2) failing to ensure Petitioner fully
6 understood the conditions of the GPA; 3) failing to file a Motion to Withdraw Guilty Plea; and
7 4) failing to file a Notice of Appeal and/or informing Petitioner of his right to appeal. However,
8 this Court finds that Petitioner’s claims are belied by the record.

9 The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal
10 prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his
11 defense.” The United States Supreme Court has long recognized that “the right to counsel is
12 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,
13 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
14 (1993).

15 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
16 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of
17 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865
18 P.2d at 323. Under Strickland, a defendant must show first that his counsel's representation
19 fell below an objective standard of reasonableness, and second, that but for counsel's errors,
20 there is a reasonable probability that the result of the proceedings would have been different.
21 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100
22 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). “[T]here is
23 no reason for a court deciding an ineffective assistance claim to approach the inquiry in the
24 same order or even to address both components of the inquiry if the defendant makes an
25 insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

26 The Court begins with the presumption of effectiveness and then must determine
27 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
28 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel

1 does not mean errorless counsel, but rather counsel whose assistance is “[w]ithin the range of
2 competence demanded of attorneys in criminal cases.” Jackson v. Warden, 91 Nev. 430, 432,
3 537 P.2d 473, 474 (1975).

4 Counsel cannot be ineffective for failing to make futile objections or arguments. See
5 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
6 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
7 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
8 (2002). Further, a defendant who contends his attorney was ineffective because he did not
9 adequately investigate must show how a better investigation would have rendered a more
10 favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

11 Based on the above law, the role of a court in considering allegations of ineffective
12 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
13 whether, under the particular facts and circumstances of the case, trial counsel failed to render
14 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
15 (1978). This analysis does not mean that the court should “second guess reasoned choices
16 between trial tactics nor does it mean that defense counsel, to protect himself against
17 allegations of inadequacy, must make every conceivable motion no matter how remote the
18 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
19 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
20 cannot create one and may disserve the interests of his client by attempting a useless charade.”
21 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

22 “There are countless ways to provide effective assistance in any given case. Even the
23 best criminal defense attorneys would not defend a particular client in the same way.”
24 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
25 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
26 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
27 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel's

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1 challenged conduct on the facts of the particular case, viewed as of the time of counsel's
2 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

3 Even if a defendant can demonstrate that his counsel’s representation fell below an
4 objective standard of reasonableness, she must still demonstrate prejudice and show a
5 reasonable probability that, but for counsel’s errors, the result of the trial would have been
6 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
7 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
8 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-
9 89, 694, 104 S. Ct. at 2064-65, 2068). This portion of the test is slightly modified when the
10 convictions occurs due to a guilty plea. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v.
11 State, 112 Nev. 980, 988 (1996). For a guilty plea, a defendant “must show that there is a
12 reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and
13 would have insisted on going to trial.” Kirksey, 112 Nev. at 998 (quoting Hill, 474 U.S. at 59).

14 The text of the GPA includes the following (labeled “VOLUNTARINESS OF PLEA”),
15 in pertinent part:

16 I have discussed the elements of all of the original charge(s) against me with
17 my attorney and I understand the nature of the charge(s) against me.

18 ...

19 I have discussed with my attorney any possible defenses, defense strategies
20 and circumstances which might be in my favor.

21 All of the foregoing elements, consequences, rights, and waiver of rights
22 have been thoroughly explained to me by my attorney.

23 ...

24 I am signing this agreement voluntarily, after consultation with my
25 attorney...

26 ...

27 My attorney has answered all my questions regarding this guilty plea
28 agreement and its consequences to my satisfaction and I am satisfied with the
services provided by my attorney.

26 GPA at 5-6. Petitioner affirmed that he had read the GPA. Recorder’s Transcript of Hearing:
27 November 7, 2018 (“Transcript”) at 2:24-25, 3:21-22. Petitioner affirmed that Mr. Sanft
28 answered any questions regarding the GPA. Transcript at 3:1-3, 3:23-4:6. Petitioner affirmed

1 that he understood the charge in the Amended Information. Id. at 3:4-6, 4:7-9. Petitioner
2 affirmed that he signed the GPA. Id. at 3:16-20. Contrary to Petitioner's assertion that he was
3 told he was agreeing to a gross misdemeanor, when asked by the Court about his
4 understanding, Petitioner acknowledged two possible sentencing outcomes:

5 THE COURT: Okay. Can you tell me what your understanding is that you're
6 facing as a form of punishment for the charge of attempt grand larceny here in
7 the State of Nevada?

8 THE DEFENDANT: One to four in the Nevada Department of Corrections.

9 THE COURT: Okay.

10 THE DEFENDANT: Or a gross misdemeanor of 364 days.

11 THE COURT: Okay. You can also be fined up to \$5,000 if I treat it as a felony.
12 And you could be fined up to \$2,000 if I treat it as a gross misdemeanor?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: You understand that?

15 THE DEFENDANT: Yes, sir.

16 Id. at 4:16-5:3. Therefore, this Court finds that Petitioner affirmed, both verbally to the court
17 and by signing the GPA, that he knew the terms of the GPA, the potential outcomes of his
18 plea, and that Mr. Sanft answered all the questions Petitioner had to Petitioner's satisfaction.

19 This Court further finds that a review of the record belies Petitioner's claim regarding
20 his appeal. Petitioner timely filed a notice of appeal on March 12, 2019. Therefore, this Court
21 concludes that Petitioner cannot demonstrate prejudice sufficient to satisfy Strickland, as his
22 appellate rights were not infringed upon.

23 Furthermore, to the extent that Petitioner argues Mr. Sanft was ineffective in his
24 investigation, this Court finds that Petitioner fails to allege, much less show, what a proper
25 investigation would have uncovered, much less how that information would have led
26 Petitioner to reject guilty plea negotiations and proceed to trial. See, Amended Petition at 10-
27 11. Instead, Petitioner relies upon the vague allegation that Mr. Sanft "failed to do appropriate
28 investigation of potentially meritorious claims." Id. at 10. Such vague allegations are
insufficient to warrant relief under Molina. 120 Nev. at 192, 87 P.3d at 538. Furthermore,
Petitioner's lack of specific factual support for his claim leaves the same bare and naked under
Hargrove. 100 Nev. at 502, 686 P.2d at 225.

1 This Court concludes, therefore, that because each of Petitioner's arguments in support
2 of his claim of ineffective assistance of counsel is belied by the record, Petitioner is not entitled
3 to relief on this claim.

4 **B. Petitioner's Claim Against his Breach of the Guilty Plea Agreement is Belied by**
5 **the Record**

6 Petitioner goes on to claim that the State violated his right to Due Process in arguing
7 that Petitioner had surrendered the stipulated sentence in the GPA. Amended Petition at 13.
8 This claim is likewise belied by the record.

9 In the GPA, Petitioner expressly agreed to the clause:

10 I understand and agree that, if I fail to interview with the Department of Parole
11 and Probation (P&P), fail to appear at any subsequent hearings in this case, or
12 an independent magistrate, by affidavit review, confirms *probable cause* against
13 me for new criminal charges including reckless driving or DUI, but excluding
14 minor traffic violations, the State will have *the unqualified right to argue for any*
15 *legal sentence* and term of confinement allowable for the crime(s) to which I am
16 pleading guilty, including the use of any prior convictions I may have to increase
17 my sentence as an habitual criminal to five (5) to twenty (20) years, Life without
the possibility of parole, Life with the possibility of parole after ten (10) years,
or a definite twenty-five (25) year term with the possibility of parole after ten
(10) years.

18 GPA at 2 (emphasis added). Later in the GPA, Petitioner also expressly agreed: "the
19 sentencing judge has the discretion to order the sentences served concurrently or
20 consecutively." *Id.* at 3.

21 As stated *supra*, a Justice of the Peace found *probable cause* to charge Petitioner with
22 Burglary in Las Vegas Justice Court case 19F01534X. Therefore, pursuant to the express
23 language of the GPA, this Court agrees that the State regained the *unqualified* right to argue
24 for any legal sentence. GPA at 2.

25 Furthermore, this Court finds that Petitioner's representations that the probable cause
26 in the other case had been erroneously found are also belied by the record. In District Court
27 case C338412, in which the Information was filed after probable cause had been found, there
28 //

1 was no dismissal or other acquittal of Petitioner. In fact, Petitioner *pled guilty* in that case to
2 reduced charges.

3 Because Petitioner's claim consists of arguments that are belied by the record,
4 Petitioner is not entitled to relief.

5 **C. Petitioner's Conviction Does Not Implicate Double Jeopardy**

6 Petitioner's third ground for relief alleges that his conviction is invalid because it
7 violates statutory prohibitions against "Double Jeopardy." See, Amended Petition at 17-19.
8 However, this Court concludes that this claim is not cognizable in a Petition for Writ of Habeas
9 Corpus and was waived by Petitioner's failure to raise it on direct appeal.

10 The Nevada Supreme Court has explained:

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

15 Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (quoting Tollett v. Henderson, 411
16 U.S. 258, 267, 93 S.Ct. 1602, 1608 (1973)). An entry of a guilty plea "waive[s] all
17 constitutional claims based on events occurring prior to the entry of the plea[], except those
18 involving voluntariness of the plea[] [itself]." Warden, Nevada State Prison v. Lyons, 100
19 Nev. 430, 431, 683 P.2d 505 (1984); see also Kirksey v. State, 112 Nev. 980, 999, 923 P.2d
20 1102, 1114 (1996) ("Where the defendant has pleaded guilty, the only claims that may be
21 raised thereafter are those involving the voluntariness of the plea itself and the effectiveness
22 of counsel."). Under NRS 34.810,

23 I. The court *shall* dismiss a petition if the court determines that:

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

27 ...

28 unless the court finds both cause for the failure to present the grounds and actual
prejudice to the petitioner.

(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 Court finds that 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. This Court further finds that 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.

Therefore, 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 Court concludes that this claim must be 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, this Court finds that Petitioner

**PLEADING
CONTINUES
IN NEXT
VOLUME**