

Elizabeth A. Brown
CLERK OF THE COURT

1 ERICK M. BROWN
2 92713 In Propria Personam
3 Post Office Box 208, S.D.C.C.
4 Indian Springs, Nevada 89018

Electronically Filed
Mar 03 2022 10:56 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

5 IN THE 8TH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF CLARK

8
9 ERICK M. BROWN

10 Plaintiff,

11 vs.

12 William Hutchings, (Warden)

13 Defendant.

Case No. A-21-834478-W

Dept. No. 15B

Docket _____

16 **NOTICE OF APPEAL**

17 NOTICE IS HEREBY GIVEN, That the Petitioner/Defendant,
18 ERICK M. BROWN, in and through his proper person, hereby
19 appeals to the Supreme Court of Nevada from the ORDER denying and/or
20 dismissing the

21 Covid-19 Writ of Habeas Corpus

22
23 ruled on the 19 day of January, 20 22

25 Dated this 18 day of February, 20 22

26 Respectfully Submitted,

27 Erick M. Brown

28 RECEIVED

FEB 28 2022

CLERK OF THE COURT

CERTIFICATE OF SERVICE BY MAILING

I, ERICK M. BROWN, hereby certify, pursuant to NRCP 5(b), that on this 18
day of February, 2022 I mailed a true and correct copy of the foregoing, "Covid-19 - Writ of Habeas Corpus"
by placing document in a sealed pre-postage paid envelope and deposited said envelope in the
United State Mail addressed to the following:

/

Clerk of the Court
200 Lewis Ave 3rd FL
Las Vegas, NV 89155

/

/

CC:FILE

DATED: this 18 day of February, 2022.

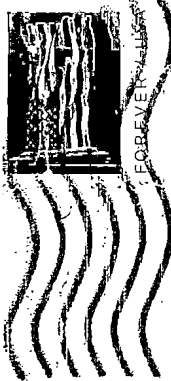
ERICK M. BROWN

Erick M. Brown # 92713

In Propria Personam

Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018

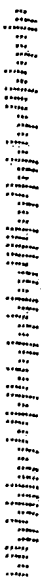
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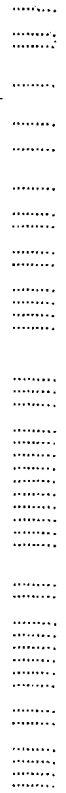
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 CLERK OF THE COURT

RECEIVED

Clerk of The Court
 200 Lewis Ave 3rd FL,
 Las Vegas, NV 89155

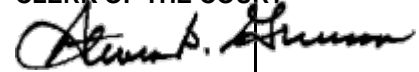


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 808 BOX 208
 RICK M. BROWN



1 ASTA

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5
6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**
9

10 ERICK M. BROWN,

11 Plaintiff(s),

12 vs.

13 WILLIAM HUTCHINGS, WARDEN OF SDCC;
14 STATE OF NEVADA,

15 Defendant(s),
16

Case No: A-21-834478-W

Dept No: XXV

17 **CASE APPEAL STATEMENT**
18

19 1. Appellant(s): Erick M. Brown

20 2. Judge: Kathleen E. Delaney

21 3. Appellant(s): Erick M. Brown

22 Counsel:

23 Erick M. Brown #92713
24 P.O. Box 208
25 Indian Springs, NV 89070

26 4. Respondent (s): William Hutchings, Warden of SDCC; State of Nevada

27 Counsel:

28 Steven B. Wolfson, District Attorney
200 Lewis Ave.

Las Vegas, NV 89155-2212

5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A

Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A

6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
***Expires 1 year from date filed*

Appellant Filed Application to Proceed in Forma Pauperis: No
Date Application(s) filed: N/A

9. Date Commenced in District Court: May 12, 2021

10. Brief Description of the Nature of the Action: Civil Writ

Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus

11. Previous Appeal: No

Supreme Court Docket Number(s): N/A

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 1 day of March 2022.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann

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

cc: Erick M. Brown

Stewart S. Hemin
CLERK OF THE COURT

ERICK M. BROWN

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

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

ERICK M. BROWN

Plaintiff,

vs.

William Hutchings
Defendant.

CASE No. A-21-834478-W
DEPT. No. 15B

DESIGNATION OF RECORD ON APPEAL

TO: Clerk of The Court

200 LEAH'S AVE 3rd FL.
LAS VEGAS, NV 89155

The above-named Plaintiff hereby designates the entire record of the above-entitled case, to include all the papers, documents, pleadings, and transcripts thereof, as and for the Record on Appeal.

DATED this 18th day of February, 2022.

RESPECTFULLY SUBMITTED BY:

ERICK M. BROWN

Erick M. Brown # 92713

Plaintiff/In Propria Persona

RECEIVED

FEB 28 2021

CLERK OF THE COURT

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-21-834478-W

Erick Brown, Plaintiff(s)
vs.
William Hutchings, Defendant(s)

§
§
§
§
§

Location: **Department 25**
 Judicial Officer: **Delaney, Kathleen E.**
 Filed on: **05/12/2021**
 Case Number History:
 Cross-Reference Case Number: **A834478**

CASE INFORMATION

Related Cases
 03C189658-1 (Writ Related Case)

Case Type: **Writ of Habeas Corpus**
 Case Flags: **Appealed to Supreme Court**

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number A-21-834478-W
 Court Department 25
 Date Assigned 11/29/2021
 Judicial Officer Delaney, Kathleen E.







PARTY INFORMATION

Plaintiff	Brown, Erick M	<i>Lead Attorneys</i>
		Pro Se
Defendant	Hutchings, William	Jones, Jr., John T. <i>Retained</i> 702-455-5320(W)
	Nevada State of	Jones, Jr., John T. <i>Retained</i> 702-455-5320(W)

DATE









EVENTS & ORDERS OF THE COURT

INDEX

05/12/2021	 Inmate Filed - Petition for Writ of Habeas Corpus <i>[1] Petition for Writ of Habeas Corpus</i>
11/19/2021	 Request Filed by: Plaintiff Brown, Erick M <i>[2] Request for Submission (Covid 19;Writ of Habeas Corpus)</i>
11/19/2021	 Notice of Motion Filed By: Plaintiff Brown, Erick M <i>[3] Notice of Motion</i>
11/23/2021	 Clerk's Notice of Hearing <i>[5] Notice of Hearing</i>
11/29/2021	 Notice of Department Reassignment <i>[6] Notice of Department Reassignment</i>
01/05/2022	 Response <i>[7] State's Response and Motion to Dismiss Petition for Writ of Habeas Corpus Due to the Coronavirus Global Pandemic</i>

CASE SUMMARY

CASE NO. A-21-834478-W

01/19/2022	 Request (1:30 PM) (Judicial Officer: Delaney, Kathleen E.) <i>Plaintiff's Request for Submission (Covid 19;Writ of Habeas Corpus)</i>
02/15/2022	 Request Filed by: Plaintiff Brown, Erick M <i>[8] Request for Submission</i>
02/15/2022	 Response Filed by: Plaintiff Brown, Erick M <i>[9] Plaintiff Response to the State's Fraudulent; Deceptive and Corrupt Motion to Dismiss</i>
02/16/2022	 Findings of Fact, Conclusions of Law and Order <i>[10] Findings of Fact, Conclusions of Law and Order</i>
02/25/2022	 Notice of Entry of Findings of Fact, Conclusions of Law <i>[11] Notice of Entry of Findings of Fact, Conclusions of Law and Order</i>
02/28/2022	 Notice of Appeal Filed By: Plaintiff Brown, Erick M <i>[12] Notice of Appeal</i>
02/28/2022	 Designation of Record on Appeal Filed By: Plaintiff Brown, Erick M <i>[13] Designation of Record on Appeal</i>
03/01/2022	 Case Appeal Statement <i>Case Appeal Statement</i>

DATE

FINANCIAL INFORMATION

Plaintiff Brown, Erick M
Total Charges
Total Payments and Credits
Balance Due as of 3/1/2022

270.00
270.00
0.00

DISTRICT COURT CIVIL COVER SHEET

CASE NO: A-21-834478-W
Department 14

County, Nevada

Case No. _____

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):

ERICK M Brown # 92713
SPCC
PO Box 208
Indian Springs NV 89070

Defendant(s) (name/address/phone):

William Hutchings
State of Nevada

Attorney (name/address/phone):

Attorney (name/address/phone):

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ <input checked="" type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

Prepared by the Clerk

Signature of initiating party or representative

Date

See other side for family-related case filings.

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

ERICK BROWN,
#1895908

Petitioner,

-vs-

WILLIAM HUTCHINGS, Warden,
Southern Desert Correctional Center, and
The State of Nevada

Respondent.

CASE NO: A-21-834478-W

03C189658-1

DEPT NO: XXV

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: JANUARY 19, 2022
TIME OF HEARING: 1:30 PM

THIS CAUSE having come on for hearing before the Honorable KATHLEEN DELANEY, District Judge, on the 19th day of January 2022, Petitioner not being present, the State being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through JOHN JONES, Chief 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:

//

//

//

1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

3 On January 28, 2003, the State filed an Information charging ERICK BROWN, aka
4 Erick Marquis Brown (hereinafter "Petitioner") with: Count 1 – Burglary While in Possession
5 of a Firearm; Count 2 – First Degree Kidnapping with Use of a Deadly Weapon, Victim 65
6 Years of Age or Older Resulting in Substantial Bodily Harm; Count 3 – First Degree
7 Kidnapping with Use of a Deadly Weapon Resulting in Substantial Bodily Harm; Count 4 –
8 Robbery with Use of a Deadly Weapon, Victim 65 Years of Age; and Count 5 – Robbery with
9 Use of a Deadly Weapon.

10 On June 30, 2006, the jury returned a verdict of guilty on all counts. On August 8, 2006,
11 the District Court sentenced Petitioner to the Nevada Department of Corrections (hereinafter
12 "NDC") as follows: Count 1 – a maximum of one hundred twenty (120) months with a
13 minimum parole eligibility of twenty-six (26) months; Count 2 – a maximum term of forty
14 (40) years with a minimum parole eligibility after fifteen (15) years, plus an equal and
15 consecutive term for a victim of sixty-five (65) years or older, Count 2 to run concurrent to
16 Count 1; Count 3 – a maximum of forty (40) years with a minimum parole eligibility after
17 fifteen (15) years, plus an equal and consecutive term for the deadly weapon enhancement,
18 Count 3 to run consecutive to Count 2, and \$143,327.00 19 restitution; Count 4 – a maximum
19 term of one hundred twenty (120) months with a minimum parole eligibility of twenty-six (26)
20 months, plus an equal and consecutive term for a victim of sixty-five (65) years or older, Count
21 4 to run concurrent to Count 3; and Count 5 – a maximum of one hundred twenty (120) months
22 with a minimum parole eligibility of twenty-six (26) months, plus an equal and consecutive
23 term for the deadly weapon enhancement, Count 5 to run concurrent with Count 4, with one
24 thousand three hundred forty-nine (1,349) days credit for time served.

25 The Judgment of Conviction was filed on August 16, 2006.

26 Petitioner filed three (3) Notices of Appeal from the Judgment of Conviction on August
27 11, 15, and 28, 2006. On September 13, 2007, the Nevada Supreme Court affirmed Petitioner's
28 conviction and filed its Order of Affirmance. On October 9, 2007, Remittitur was issued.

1 On October 10, 2008, Petitioner filed his First Petition for Writ of Habeas Corpus (Post-
2 Conviction) (hereinafter “First Petition”) and on May 22, 2009, he filed a Supplement to his
3 Petition. On July 17, 2009, the State filed its Opposition to Petitioner’s Petition. On December
4 4, 2009, the Court ordered an evidentiary hearing. On January 27, 2012, the District Court
5 conducted the evidentiary hearing wherein Michael Cristalli, Petitioner’s prior attorney, was
6 sworn and testified. The District Court subsequently denied Petitioner’s Petition. On February
7 13, 2012, the District Court filed its Findings of Fact, Conclusions of Law and Order. On
8 February 16, 2012, the District Court filed its Notice of Entry of Order. On February 7, 2012,
9 Petitioner filed a Notice of Appeal from the denial of his Petition. On January 16, 2013, the
10 Nevada Supreme Court filed its Order of Affirmance. On February 11, 2013, Remittitur was
11 issued.

12 On June 27, 2013, Petitioner filed an “Accused Motion to Dismiss for Lack of Subject
13 Matter Jurisdiction,” Notice of Motion and Motion to Appoint Counsel, and “Caveat.” On
14 July 12, 2013, the State filed its Opposition. On July 22, 2013, the District Court denied
15 Petitioner’s Motions. On August 9, 2013, the District Court filed its Orders denying
16 Petitioner’s Motions.

17 On August 6, 2013, Petitioner filed a “Motion for Re-Hearing, and an Accused Request
18 for Leave to File Motion for Re-Hearing based upon State and Federal Constitutional
19 Deprivation in Prior Proceedings.” The State filed its Opposition on August 16, 2013. On
20 August 6, 2013, before the District Court could hear Petitioner’s Motion for Re-Hearing,
21 Petitioner also filed an “Accused Request for Leave to File Motion for Re-Hearing based upon
22 State and Federal Constitutional Deprivation in Prior Proceedings.” On August 16, 2013, the
23 State filed its Opposition. On August 15, 2013, Petitioner filed a Supplemental Motion entitled
24 “Accused Supplemental to His Motion for Re-Hearing / And / Or Reply to State’s Opposition
25 And Or Courts Denial Of Accused File Motion For Lack Of Subject Matter Jurisdiction And
26 Accused Motion To Strike States Opposition For Good Legal Cause Showing.” On August
27 28, 2013, the District Court denied Petitioner’s Motion and Request. On September 9, 2013,
28 the District Court denied Petitioner’s Supplemental Motion. On November 4, 2013, the District

1 Court filed its Order denying Petitioner's Motions and Requests. On November 14, 2013,
2 Petitioner filed a Notice of Appeal from the order denying his Motion for Rehearing and his
3 Request for Leave. On January 16, 2014, the Nevada Supreme Court dismissed the appeal for
4 lack of jurisdiction and filed its Order Dismissing Appeal. On April 7, 2014, Remittitur was
5 issued.

6 On September 23, 2013, Petitioner filed a "Motion for Order for the Accused Immediate
7 Release; Due to State's Failure to Oppose the Accused Motion to Strike State's Opposition for
8 Good Legal Cause Showing." On October 9, 2013, the State filed its Opposition. On October
9 14, 2013, the District Court denied Petitioner's Motion. On December 4, 2013, the District
10 Court filed its Order of Denial. On December 12, 2013, Petitioner filed a Notice of Appeal.
11 On January 21, 2014, the Nevada Supreme Court dismissed the appeal for lack of jurisdiction
12 and filed its Order Dismissing Appeal. On February 20, 2014, Remittitur was issued.

13 On October 17, 2013, Petitioner filed a Second Pro Per Petition for Writ of Habeas
14 Corpus (Post-Conviction) (hereinafter "Second Petition"). On December 9, 2013, the State
15 filed its Response and Motion to Dismiss Petitioner's Petition. On January 8, 2014, the District
16 Court denied Petitioner's Petition. On January 24, 2014, Petitioner filed a Notice of Appeal
17 from the District Court's order. On February 12, 2014, the District Court filed its Findings of
18 Fact, Conclusions of Law and Order. On June 11, 2014, the Nevada Supreme Court affirmed
19 the District Court, and filed its Order of Affirmance. On July 8, 2014, Remittitur was issued.

20 On November 8, 2013, Petitioner filed an "Accused Motion for Decision on the Merits
21 of Invalid Laws of the State of Nevada causing the District Court to be Divested of Subject
22 Matter Jurisdiction Ab Initio." On November 22, 2013, the State filed its Opposition. On
23 December 2, 2013, the District Court denied Petitioner's Motion. On January 10, 2014, the
24 District Court filed its Order denying Petitioner's Motion. On January 27, 2014, Petitioner
25 filed a Notice of Appeal. On March 13, 2014, the Nevada Supreme Court dismissed the appeal
26 and filed its Order Dismissing Appeal. On August 24, 2014, Remittitur was issued.

27 On March 24, 2014, Petitioner filed a "Motion to Compel Court to Correct Its Own
28 'Errors and Omissions' with Their 'Presumption' of the (NRS); Is Now Challenged with the

1 'Knowledge of Law' and 'White Paper' with Attached 'Prima facie' Evidence as Proof of the
2 Unconstitutional Invalid (NRS)." On April 15, 2014, the State filed its Opposition to 5
3 Petitioner's Motion. On April 16, 2014, the District Court denied Petitioner's Motion. On May
4 1, 2014, the District Court filed its Order denying Petitioner's Motion. On May 15, 2014,
5 Petitioner filed a Notice of Appeal. On June 12, 2014, the Nevada Supreme Court dismissed
6 the appeal and filed its Order Dismissing Appeal. On July 11, 2014, Remittitur was issued.

7 On August 28, 2014, Petitioner filed a Motion/Request for Eighth Judicial District Court
8 Judge Kathleen E. Delaney to Recuse Herself from Petitioner's Case; for "Due Process
9 Violations" Constitutional Violations; Bias and Prejudice; Failure to Protect and Uphold the
10 Nevada State Constitution, i.e. the Paramount Law. The State filed its Response on September
11 17, 2014. On September 22, 2014, the District Court denied Petitioner's Motion. The Order
12 Denying Petitioner's Motion was filed on September 29, 2014.

13 On April 16, 2018, Petitioner filed a Petition for Writ of Mandamus (hereinafter "Third
14 Petition"). On May 30, 2018, the Court denied Petitioner's Third Petition finding that it failed
15 to contain a legal issue relevant to his case. On April 30, 2018, Petitioner filed a Fourth Petition
16 for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Fourth Petition"). The State filed
17 its Response on June 21, 2018. On June 27, 2018, the Fourth Petition was denied. The Order
18 Denying the Fourth Petition was filed on July 26, 2018. On February 22, 2019, Petitioner filed
19 a Notice of Appeal. On May 15, 2019, the Nevada Supreme Court affirmed the judgment of
20 the District Court and Remittitur issued on June 12, 2019.

21 On February 11, 2019, Petitioner filed a Motion to Recuse 8th Judicial Dist. Ct. Judge
22 Kathleen E. Delaney. On March 5, 2019, Petitioner's Motion was denied. The Decision and
23 Order denying the Motion was filed on March 7, 2019.

24 On May 17, 2021, Petitioner filed a Petition for Writ of Prohibition. The State filed an
25 Opposition on May 25, 2021. On June 30, 2021, the Court denied the Petitioner for Writ of
26 Prohibition. The Order Denying the Petition for Writ of Prohibition was filed on July 16, 2021.

27 On May 12, 2021, Petitioner filed a Fifth Petition for Writ of Habeas Corpus Due to the
28 Coronavirus Global Pandemic (hereinafter "Fifth Petition") and Request for Emergency

1 Evidentiary Hearing. The State was not served, and the Fifth Petition was not calendared by
2 the District Court. On November 19, 2021, Petitioner filed the instant Request for Submission
3 of Covid-19 Writ of Habeas Corpus filed on May 12, 2021, the contents of which were the
4 same as his May 12, 2021, Fifth Petition. On January 5, 2022, the State filed its Response.

5 On January 19, 2022, this Court denied the Petition, finding as follows.

6 ANALYSIS

7 **I. THIS FIFTH PETITION IS PROCEDURALLY BARRED**

8 *A. Application of Procedural Bars is Mandatory*

9
10 The Nevada Supreme Court has held that the district court has a *duty* to consider
11 whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth
12 Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court
13 found that "[a]pplication of the statutory procedural default rules to post-conviction habeas
14 petitions is mandatory," noting:

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

19 Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court]
20 when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court
21 has granted no discretion to the district courts regarding whether to apply the statutory
22 procedural bars; the rules *must* be applied.

23 This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013).
24 There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of
25 the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307
26 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's
27 petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The
28

1 procedural bars are so fundamental to the post-conviction process that they must be applied
2 by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

3 *B. This Fifth Petition is Time-Barred*
4

5 This Court finds that this Fifth Petition is time-barred. The instant petition was not filed
6 within the one-year statutory limit after the date of Remittitur. Thus, this Petition is time-barred
7 pursuant to NRS 34.726(1):

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

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

16 The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain
17 meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the
18 language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from
19 the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.
20 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

21 The one-year time limit for preparing petitions for post-conviction relief under NRS
22 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002),
23 the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite
24 evidence presented by the defendant that he purchased postage through the prison and mailed
25 the petition within the one-year time limit.

26 This is not a case wherein the Judgment of Conviction was, for example, not final. See,
27 e.g., Johnson v. State, 133 Nev. 571, 402 P.3d 1266 (2017) (holding that the defendant’s
28 judgment of conviction was not final until the district court entered a new judgment of

conviction on counts that the district court had vacated); Whitehead v. State, 128 Nev. 259, 285 P.3d 1053 (2012) (holding that a judgment of conviction that imposes restitution in an unspecified amount is not final and therefore does not trigger the one-year period for filing a habeas petition).

Given that Petitioner's Judgment of Conviction was never vacated, there is no legal basis for running the one-year time-limit from anything but the date of Remittitur. Remittitur issued on October 9, 2007. Thus, Petitioner had one year from October 9, 2007, to file this Petition. Petitioner did not file the instant Petition until May 12, 2021, over thirteen (13) years late. Given Petitioner's failure to demonstrate good cause and prejudice, this Petition is denied as time-barred.

C. This Fifth Petition is Successive and/or an Abuse of the Writ

Under NRS 34.810(2) "[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." Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994). 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 that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). 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,

1 497-498 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112
2 P.3d at 1074.

3 Here, Petitioner filed his First Petition on October 10, 2008. This Court denied the
4 Petition and filed its Findings of Fact, Conclusions of Law and Order on February 13, 2012.
5 On October 17, 2013, Petitioner filed his Second Petition. This Court denied Petitioner's
6 Second Petition on January 8, 2014. On April 16, 2018, Petitioner filed his Third Petition. On
7 April 30, 2018, Petitioner filed his Fourth Petition. On May 30, 2018, this Court denied
8 Petitioner's Third Petition. On June 27, 2018, this Court denied Petitioner's Fourth Petition.

9 To the extent that any claims raised were raised previously, and denied on the merits,
10 said claims are successive and would be governed by res judicata and/or law of the case.¹ To
11 the extent that Petitioner is raising new claims, this is an abuse of the Writ. Given Petitioner's
12 failure to demonstrate good cause and prejudice, this Petition is denied as successive.

13 *D. Petitioner Fails to Demonstrate, or Even Address, Good Cause*

14 To avoid procedural default under NRS 34.726 and NRS 34.810, a defendant has the
15 burden of pleading and proving specific facts that demonstrate good cause for his failure to
16 present his claim in earlier proceedings or comply with the statutory requirements. Hogan v.
17 Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Dir. Nev. Dep't of
18 Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988).

19 “To establish good cause, appellants *must* show that an impediment external to the
20 defense prevented their compliance with the applicable procedural rule.” Clem v. State, 119
21 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev.
22 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external
23 impediment could be “that the factual or legal basis for a claim was not reasonably available
24 to counsel, or that ‘some interference by officials’ made compliance impracticable.”
25 Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106
26 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v.
27

28 ¹ See Exec. Mgmt. v. Ticor Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998); Sealfon v. United States, 332
U.S. 575, 578, 68 S. Ct. 237, 239 (1948); Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975)

1 Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition
2 must not be the fault of the petitioner. NRS 34.726(1)(a).

3 The Nevada Supreme Court clarified that a defendant cannot attempt to manufacture
4 good cause. See Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a
5 “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at 251, 71 P.3d at
6 506; (quoting Colley v. State, 105 Nev. at 236, 773 P.2d at 1230). Excuses such as the lack of
7 assistance of counsel when preparing a petition, as well as the failure of trial counsel to forward
8 a copy of the file to a petitioner have been found not to constitute good cause. See Phelps, 104
9 Nev. at 660, 764 P.2d at 1306, superseded by statute on other grounds as recognized in Nika
10 v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890
11 P.2d 797 (1995).

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

20 In the instant Fifth Petition, Petitioner fails to include any argument for good cause.
21 Failure to address good cause amounts to an admission that he is unable to do so. DCR 13(2);
22 EDCR 3.20(b); Polk v. State, 126 Nev. 180, 186, 233 P.3d 357, 360-61 (2010). Nowhere in
23 his Petition does Petitioner address the issue of good cause. He fails to allege any impediments
24 that necessitated bringing a claim outside of the one-year timeline. Thus, Petitioner’s silence
25 is read as an admission that no good cause exists.

26 Additionally, Petitioner’s entire claim relies upon his exposure to COVID-19 while in
27 prison. He argues that he has pre-existing conditions but has not provided documentation from
28 certified medical professionals that he is personally at a heightened risk for COVID-19, or that

1 the NDOC is incapable of addressing his medical needs should he contract COVID-19.
2 Moreover, while Petitioner claims to have diabetes, he has not established that those with high
3 blood pressure are at a higher risk of suffering from COVID-19. Given that there is no evidence
4 that Petitioner's health issues place him at greater risk than any other inmate, or that the NDOC
5 is incapable of appropriately addressing and managing his health issues, he has not
6 demonstrated that he is at a higher risk of contracting COVID-19.

7 Further, Petitioner has not established that the NDOC is incapable of managing and
8 treating any health issues he may currently have or could develop. Petitioner has not
9 established that he has access to health insurance or a doctor available to prescribe medication
10 needed if he should be released. Petitioner has not even established that he would have the
11 same access to a face mask, which the NDOC has provided to their inmates. COVID-19 has
12 placed increased strain on all aspects of society, not simply the prison system. Even if released,
13 Petitioner would still need treatment due to his high blood pressure and diabetes. As such,
14 Petitioner has not established that he is more at risk of contracting COVID-19 in prison.

15 Petitioner's argument is merely speculation that the NDOC are not taking the proper
16 measures against COVID-19. Such speculation is insufficient to overcome the procedural bars
17 of establishing good cause. The Court finds that the NDOC has taken every precaution it can
18 to address the risk imposed by the Covid-19 pandemic. As such, this Court finds that Petitioner
19 failed to demonstrate good cause.

20 *E. Petitioner Cannot Establish Prejudice*

21 In order to establish prejudice, Petitioner must show “not merely that the errors of [the
22 proceedings] created possibility of prejudice, but that they worked to his actual and substantial
23 disadvantage, in affecting the state proceedings with error of constitutional dimensions.”
24 Hogan v. Warden, 109 Nev. at 960, 860 P.2d at 716 (1993) (quoting United States v. Frady,
25 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). Petitioner's procedural defaults cannot be
26 excused because his underlying claim is meritless.

27 In this case, Petitioner cannot establish prejudice to ignore the procedural defaults
28 because his claims are without merit and belied by the record, as will be further discussed in

1 more detail below. “Bare” and “naked” allegations are not sufficient to warrant post-conviction
2 relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502,
3 686 P.2d 222, 225 (1984). “A claim is ‘belied’ when it is contradicted or proven to be false by
4 the record as it existed at the time the claim was made.” Mann v. State, 118 Nev. 351, 354, 46
5 P.3d 1228, 1230 (2002). As Petitioner cannot satisfy the basis of his claims, this Court finds
6 that he failed demonstrate sufficient prejudice to ignore the procedural defaults.

7 **II. A PETITION FOR WRIT OF HABEAS CORPUS IS NOT THE CORRECT** 8 **LEGAL VEHICLE TO BRING THIS CHALLENGE**

9 It is well established that “a petition for writ of habeas corpus may challenge the validity
10 of current confinement, but not the conditions thereof.” Bowen v. Warden of Nevada State
11 Prison, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984). The rise of COVID-19 does not relate
12 to the validity of his confinement. Like other adverse aspects of being incarcerated that are
13 unrelated to a defendant’s sentence (such as an increased risk of experiencing inmate
14 violence), Petitioner’s risk of exposure to COVID-19 is a condition of his confinement. See
15 Farmer v. Brennan, 511 U.S. 825, 833–34, 114 S. Ct. 1970, 1976–77 (1994) (discussing inmate
16 violence as a condition of confinement). As such, Petitioner is challenging the conditions of
17 his confinement, and not the constitutionality of his sentence.

18 Challenges to conditions of confinement are not cognizable claims in habeas
19 proceedings. Bowen, 100 Nev. at 490. The Nevada Supreme Court stated as much in Bowen:

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

1 challenge speaks only to the conditions of confinement and
2 therefore may not be raised by a habeas corpus petition. See
3 Rogers v. Warden, *supra*.

4 The district court correctly ruled that the instant claim for relief
5 was not cognizable in a habeas corpus proceeding.

6 Id. (emphasis added). In fact, the Nevada Supreme Court has recently declined to grant relief
7 to a petitioner alleging that the dangers of COVID-19 required his release from prison. See
8 Kerkorian v. Sisolak, 462 P.3d 256 (Nev. 2020) (unpublished disposition). Other courts have
9 similarly held that claims that COVID-19 makes an otherwise constitutional sentence cruel
10 and unusual are actually challenges to the conditions of confinement. See, inter alia, People
11 ex rel. Coleman v. Brann, No. 260252/20, 2020 WL 1941972, at *6 (N.Y. Sup. Ct. Apr. 21,
12 2020); Foster v. Comm'r of Correction, 484 Mass. 698, 717, 146 N.E.3d 372, 390 (2020).

13 Accordingly, the appropriate vehicle to challenge a condition of confinement would be
14 to file a 42 U.S.C. § 1983 claim and argue that an individual's lawful incarceration has exposed
15 them to certain harms while incarcerated.² Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct.
16 1970, 1976, 128 L. Ed. 2d 811 (1994) ("The Constitution 'does not mandate comfortable
17 prisons,' Rhodes v. Chapman, 452 U.S. 337, 349, 101 S.Ct. 2392, 2400, 69 L.Ed.2d 59 (1981),
18 but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner
19 receives in prison and the conditions under which she is confined are subject to scrutiny under
20 the Eighth Amendment,' Helling, 509 U.S. at 31, 113 S.Ct. at 2480.").

21 A review of both this State's and the Supreme Court's jurisprudence shows that issues
22 such as: excessive force used by prison officials (see Farmer v. Brennan, 511 U.S. 825, 832,
23 114 S. Ct. 1970, 1976, 128 L. Ed. 2d 811 (1994)); lack of access to appropriate medical care
24 (Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251 (1976)); the use of
25 cruel punishments within a prison (Hope v. Pelzer, 536 U.S. 730, 737–38, 122 S. Ct. 2508,
26

27 ² Compare to McConnell v. State, 125 Nev. 243, 249, footnote 5, 212 P.3d 307, 311, footnote
28 5 (2009) (The correct way to challenge the mode of execution is a separate and independent
42 U.S.C. §1983 action.).

2514, 153 L. Ed. 2d 666 (2002)); the danger of inmate on inmate violence (Butler ex rel. Biller v. Bayer, 123 Nev. 450, 459, 168 P.3d 1055, 1062 (2007)); and the use of punitive segregation (Bowen v. Warden of Nevada State Prison, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984)), are all addressed under a conditions of confinement analysis (or a similar analysis considering whether the conduct of the prison staff was indifferent). This Court therefore declines Petitioner’s invitation to walk away from United States Supreme Court and Nevada Supreme Court precedent.

Petitioner also contends that his claims are appropriate for habeas review because “there is no other plain, speedy, or adequate remedy through any other legal vehicle.” Petition, at 1. As explained above, the appropriate way for Petitioner to raise his claims would have been to file a 42 U.S.C. § 1983 claim. See Farmer, 511 U.S. at 832. As such, it cannot be said that Petitioner’s claims are otherwise unreviewable.

Given that the Nevada Supreme Court has clearly stated that this type of claim is not cognizable in a petition for writ of habeas corpus, this Court does not have the jurisdiction to address this claim when brought through such a legal vehicle. Accordingly, this Court denies the Petition.

III. PETITIONER CANNOT DEMONSTRATE THAT HIS SENTENCE VIOLATES THE NEVADA AND UNITED STATE CONSTITUTIONS’ PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

Petitioner claims that his sentence is cruel and usual because prison officials acted with deliberate indifference to his safety. His argument revolves around prison officials not taking the necessary steps to protect him from COVID-19. Even if this claim was properly before this Court, Petitioner cannot demonstrate that his Eighth Amendment Rights were violated.

The United States Supreme Court has addressed claims regarding conditions of confinement, and whether such conditions, though not pronounced as “punishments” by statute or by the sentencing court, could violate the Eighth Amendment. In Wilson v. Seiter, 501 U.S. 294, 111 S.Ct. 2321 (1991), the Court dealt with a complaint that prison conditions constituted cruel and unusual punishment. Such conditions included “overcrowding, excessive

1 noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation,
2 unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and
3 housing with mentally and physically ill inmates.” Id. at 296, 111 S.Ct. at 2323. The Court
4 explained: “a prisoner advancing such a claim must, at a minimum, allege ‘deliberate
5 indifference’” on the part of prison officials. Id. at 297, 111 S.Ct. at 2323; accord Estelle v.
6 Gamble, 429 U.S. 97, 97 S.Ct. 285 (1976). The Wilson Court clarified, however, that mere
7 “allegations of ‘inadvertent failure to provide adequate medical care’ . . . *simply fail to*
8 *establish the requisite culpable state of mind.*” Id. (emphasis added). The United States
9 Supreme Court has since adopted a “subjective recklessness” standard for “deliberate
10 indifference” analyses regarding Eighth Amendment claims. Farmer v. Brennan, 511 U.S. 825,
11 837-40, 114 S.Ct. 1970, 1979-80 (1994) (expressly rejecting the adoption of some objective
12 standard, opting instead for a standard accounting for the risks involved and officials’ efforts
13 – or lack thereof – to alleviate such risks).

14 Accordingly, in determining whether the conditions of confinement constitute cruel and
15 unusual punishment, the question is whether prison officials have displayed a deliberate
16 indifference to Petitioner’s safety; or failed to undertake reasonable measures to ensure the
17 safety of prisoners. See Farmer, 511 U.S. at 829, 114 S. Ct. at 1974; see also Hudson v. Palmer,
18 468 U.S. 517, 526–527, 104 S.Ct. 3194, 3200, 82 L.Ed.2d 393 (1984). The United States
19 Supreme Court has analogized displaying a deliberate indifference with recklessly
20 disregarding a risk. Farmer, 511 U.S. at 836, 114 S. Ct. at 1978. “[I]t is enough that the official
21 acted or failed to act despite a knowledge of a substantial risk of serious harm.” Id. at 842, 114
22 S. Ct. at 198-81.

23 Recently, in U.S. v. Dade, the Ninth Circuit held in that the COVID-19 pandemic and
24 risk of contracting the virus in prison does not warrant release if the risks are being adequately
25 addressed. 959 F.3d 1136, 1139 (9th Cir. 2020). The Court further explained that even if the
26 risks are not being adequately addressed, transferring the defendant to a different facility, as
27 opposed to release, would be more appropriate. Id. The Ninth Circuit has further explained
28 that granting release is appropriate only after a defendant establishes that they have serious

1 health issues and that the prison is incapable of treating those health concerns. In re Roe, 257
2 F.3d 1077, 1081 (9th Cir. 2001).

3 Petitioner's claim is meritless because NDOC has been undertaking various measures
4 to protect not just him, but all inmates from the risk imposed by COVID-19. Petitioner has not
5 established that NDOC would be incapable of addressing his health issues. According to
6 NDOC's official website, they have taken active steps towards maintaining a safe and healthy
7 environment for both the inmates and NDOC staff. The following protocols have been
8 instituted thus far in response to COVID-19:

- 9 1. Running modified operations that limit travel between facilities
10 and restricted visitation at all facilities. This will be in-place until
11 corrections and medical experts at NDOC, working alongside
12 local and state government agencies, determine that the health and
13 safety of staff and offenders are no longer threatened by COVID-
14 19.
- 15 2. Each morning, all employees are being screened for symptoms
16 of the virus, including having their temperature taken. Anyone
17 found with one of the cardinal symptoms (fever of 100 degrees F
18 or greater, shortness of breath, dry cough, chills, muscle pain, new
19 loss of taste or smell) are sent home where they must obtain
20 medical clearance or test negative for COVID-19 before returning
21 to work.
- 22 3. All personnel who do enter a secure facility are required to wear
23 a face covering.
- 24 4. Testing new arrivals at the intake units at High Desert State
25 Prison and Northern Nevada Correctional Center for COVID-19,
26 and isolating offenders who test positive in negative airflow cells.
- 27 5. The dissemination of the latest CDC guidance for staff and
28 offenders, including the Center of Disease Control's Stop the
Spread of Germs poster, in highly visible areas.
6. Surface Sanitation Teams, using a 10% bleach concentration,
thoroughly clean surfaces at all facilities.
7. Hand soap is readily available at every facility, both in cells and
in common areas. NDOC encourages all persons to frequently
wash their hands using warm soap and water for at least 20
seconds.
8. Prison Industries is manufacturing hand sanitizer, medical
gowns, and face coverings to ensure NDOC staff have access to
these critical supplies. PI is also manufacturing alcohol-free hand
sanitizer and face coverings for offenders.

1 9. If an offender is suspected of having an illness, or if they self-
2 report feeling ill, NDOC medical staff immediately assess and
3 place them in that facility's infirmary or medically observes them
4 in their cell. NDOC also alerts Culinary so meals are delivered to
5 the offenders while they're in the infirmary or their cell.³

6 On January 5, 2021, NDOC officials instituted the following:

7 Effective January 5, 2021, ALL NDOC Staff
8 /Inmates/Visitors will be required to wear an N95 mask at
9 all times while on NDOC property or sanctioned off-
10 property movements (ie court visits, NDF firecrews,
11 firecrews, inmate porters, etc).

12 Simple cloth face masks are no longer authorized for any
13 staff members/inmates/visitors at any time while on NDOC
14 property or sanctioned off-property movements except for
15 staff/inmates/visitors that have an underlying respiratory
16 condition. Exceptions to the mask requirement still include
17 while eating/drinking (during this time ensure at least 6 feet
18 of social distancing between yourself and other staff
19 members) and while alone in your enclosed office or
20 workspace away from inmates and/or other staff.⁴

21 Petitioner also could receive a vaccination if he desires to reduce his risk of becoming
22 seriously ill.⁵ Petitioner did not reveal whether he is fully vaccinated. NDOC reported on May
23 4, 2021, that almost half of the offenders in NDOC facilities had received at least their first
24 dose of the vaccine.⁶ This percentage is higher at Southern Desert Correctional Center where
25 Petitioner is currently located. As such, not only has NDOC prioritized the safety of inmates
26 by establishing protocols, but they also provide the opportunity for inmates to reduce their risk
27 of becoming seriously ill.

28 Given the litany of ways in which NDOC is attempting to protect prisoners from this
virus, there can be no legitimate assertion that officials are failing to act despite knowledge of
a substantial risk of serious harm or that the prison is incapable of mitigating the risk of the

³ STATE OF NEVADA DEPARTMENT OF CORRECTIONS: NDOC COVID-19 UPDATES 11/06/2020, https://doc.nv.gov/About/Press_Release/covid19_updates/.

⁴ STATE OF NEVADA DEPARTMENT OF CORRECTIONS: NDOC COVID-19 UPDATES 01/05/2021, http://doc.nv.gov/About/Press_Release/covid19_updates/.

⁵ CENTERS FOR DISEASE CONTROL AND PREVENTION, *Key things To know About Covid-19 Vaccines*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>

⁶ STATE OF NEVADA DEPARTMENT OF CORRECTIONS: PRESS RELEASE May 4, 2021, *Vaccinations climb in Nevada Prisons as visitation reopens*, https://doc.nv.gov/About/Press_Release/News/.

1 spread or treatment of Petitioner should he contract COVID-19. Further, under Petitioner's
2 theory every single sentence of incarceration being served in the State of Nevada would be
3 unconstitutional and in violation of the Eighth Amendment. The ultimate outcome of
4 Petitioner's logic shows its absurdity. The existence of a pandemic is not a get out of jail free
5 card for Petitioner or anyone else.

6 The potential to be exposed to coronavirus is now an aspect of every single person's
7 daily life. There is a potential for exposure at grocery stores, places of employment, and
8 medical facilities, just to name a few.⁷ The CDC published information regarding the stress
9 caused by the pandemic, so inmates are not alone in those aspects.⁸ As such, even if released,
10 Petitioner would face exposure to COVID-19.

11 Petitioner is also unable to establish that his risk of contracting COVID-19 is
12 substantially greater while incarcerated than it would be if he were released. This is especially
13 true in light of the fact that almost half of the inmates in NDOC have received at least their
14 first dose of the vaccine, and more than half have received it where Petitioner is currently
15 located.⁹ In addition, Petitioner fails to allege that he would have access to the same protections
16 that NDOC has provided for its inmates, such as N95 masks, or even that he would have access
17 to healthcare if released.

18 Petitioner seems to imply that his risk of death from COVID-19 elevates his once
19 constitutional sentence to a death decree. As of the filing of this Response, there have been
20 three (3) deaths at Southern Desert Correctional Center where the inmates had COVID-19.¹⁰
21 Thus, allegations that a sentence of incarceration is akin to a sentence of death are hyperbolic.
22 For the foregoing reasons, the conditions of Petitioner's confinement cannot constitute cruel
23 and unusual punishment. As such, this Court denies the Petition as any claim is meritless.

24 ⁷ New York Post, *COVID-19 risks ranked: Grocery stores among least-likely places to contract virus*,
25 <https://nypost.com/2020/06/13/experts-rank-most-likely-places-to-contract-coronavirus/>.

26 ⁸ CENTERS FOR DISEASE CONTROL AND PREVENTION, *Stress and Coping: Adults Experiencing Stress from COVID-19*, <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/managing-stress-anxiety.html>.

27 ⁹ STATE OF NEVADA DEPARTMENT OF CORRECTIONS: PRESS RELEASE May 4, 2021, *Vaccinations climb in Nevada Prisons as visitation reopens*, https://doc.nv.gov/About/Press_Release/News/.

28 ¹⁰ STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF ANALYTICS, *Facilities with Reported Covid-19 Cases*, <https://app.powerbigov.us/view?r=eyJrIjoiaNDMwMDI0YmQtNmUyYS00ZmFjLWI0MGltZDM0OTY1Y2Y0YzNhlwiidCI6ImU0YTMT0MGU2LWI4OWUtNGU2OC04ZWZhLTE1NDRkMjcwMzk4MCI9>.

IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held*.
2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

(emphasis added).

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that “[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record”). “A claim is ‘belied’ when it is contradicted or proven to be false by the record as it existed at the time the claim was made.” Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) (“The district court considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted ‘to make as complete a record as possible.’ This is an incorrect basis for an evidentiary hearing.”). Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel’s actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel’s decision making that contradicts the available evidence of counsel’s actions, neither may they insist counsel confirm every aspect of the strategic basis

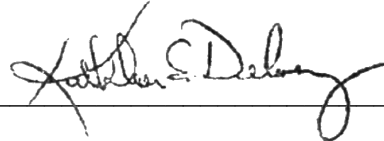
1 for his or her actions. Id. There is a “strong presumption” that counsel’s attention to certain
2 issues to the exclusion of others reflects trial tactics rather than “sheer neglect.” Id. (*citing*
3 Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the
4 *objective* reasonableness of counsel’s performance, not counsel’s *subjective* state of mind. 466
5 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

6 Here, Petitioner seeks an evidentiary hearing. However, there is no reason to expand
7 the record as Petitioner’s claims are meritless. As discussed supra, Section II, Petitioner’s
8 assertions are improperly pled and thus should not even be heard by this Court. Even if a
9 Petition for Writ of Habeas Corpus were the proper way to address this issue, Petitioner is
10 unable to establish prison officials acted with deliberate indifference to his safety. As such, an
11 evidentiary hearing is not warranted. Therefore, Petitioner’s request for an evidentiary hearing
12 is denied.

13 **ORDER**

14 Based on the foregoing, IT IS HEREBY ORDERED that the Petition for Writ of Habeas
15 Corpus Due to the Coronavirus Global Pandemic and Request for Emergency Evidentiary
16 Hearing shall be, and is, hereby denied.

Dated this 16th day of February, 2022

17 
18 _____

19 719 7E0 C72B BDB6
20 Kathleen E. Delaney
District Court Judge

21 STEVEN WOLFSON
22 Clark County District Attorney
Nevada Bar #001565

23
24 BY /s/ Taleen Pandukht
25 TALEEN PANDUKHT
26 Chief Deputy District Attorney
Nevada Bar #005734

1 CERTIFICATE OF MAILING

2 I hereby certify that service of the above and foregoing was made this 8th day of
3 February, 2022, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

4 ERICK BROWN, #92713
5 S.D.C.C
6 PO BOX 208
7 INDIAN SPRINGS, NV 89070

8 BY /s/ E. Del Padre
9 E. DEL PADRE
10 Secretary for the District Attorney's Office
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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Erick Brown, Plaintiff(s)

CASE NO: A-21-834478-W

7 vs.

DEPT. NO. Department 25

8 William Hutchings, Defendant(s)

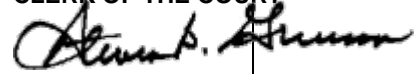
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10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 2/16/2022

15 Dept Law Clerk

dept25lc@clarkcountycourts.us



1 NEFF

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

5 ERICK BROWN,

6 Petitioner,

Case No: A-21-834478-W

Dept No: XXV

7 vs.

8 WILLIAM HUTCHINGS; ET AL.,

9 Respondent,
10

NOTICE OF ENTRY OF FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

11 PLEASE TAKE NOTICE that on February 16, 2022, the court entered a decision or order in this matter,
12 a true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed
to you. This notice was mailed on February 25, 2022.

15 STEVEN D. GRIERSON, CLERK OF THE COURT

16 /s/ Heather Ungermann

17 Heather Ungermann, Deputy Clerk
18

19 CERTIFICATE OF E-SERVICE / MAILING

20 I hereby certify that on this 25 day of February 2022, I served a copy of this Notice of Entry on the
21 following:

22 ☒ By e-mail:

23 Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

24 ☒ The United States mail addressed as follows:

25 Erick Brown # 92713
26 P.O. Box 208
Indian Springs, NV 89070
27

28 /s/ Heather Ungermann

Heather Ungermann, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

ERICK BROWN,
#1895908

Petitioner,

-vs-

WILLIAM HUTCHINGS, Warden,
Southern Desert Correctional Center, and
The State of Nevada

Respondent.

CASE NO: A-21-834478-W

03C189658-1

DEPT NO: XXV

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: JANUARY 19, 2022
TIME OF HEARING: 1:30 PM

THIS CAUSE having come on for hearing before the Honorable KATHLEEN DELANEY, District Judge, on the 19th day of January 2022, Petitioner not being present, the State being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through JOHN JONES, Chief 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:

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1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

3 On January 28, 2003, the State filed an Information charging ERICK BROWN, aka
4 Erick Marquis Brown (hereinafter "Petitioner") with: Count 1 – Burglary While in Possession
5 of a Firearm; Count 2 – First Degree Kidnapping with Use of a Deadly Weapon, Victim 65
6 Years of Age or Older Resulting in Substantial Bodily Harm; Count 3 – First Degree
7 Kidnapping with Use of a Deadly Weapon Resulting in Substantial Bodily Harm; Count 4 –
8 Robbery with Use of a Deadly Weapon, Victim 65 Years of Age; and Count 5 – Robbery with
9 Use of a Deadly Weapon.

10 On June 30, 2006, the jury returned a verdict of guilty on all counts. On August 8, 2006,
11 the District Court sentenced Petitioner to the Nevada Department of Corrections (hereinafter
12 "NDC") as follows: Count 1 – a maximum of one hundred twenty (120) months with a
13 minimum parole eligibility of twenty-six (26) months; Count 2 – a maximum term of forty
14 (40) years with a minimum parole eligibility after fifteen (15) years, plus an equal and
15 consecutive term for a victim of sixty-five (65) years or older, Count 2 to run concurrent to
16 Count 1; Count 3 – a maximum of forty (40) years with a minimum parole eligibility after
17 fifteen (15) years, plus an equal and consecutive term for the deadly weapon enhancement,
18 Count 3 to run consecutive to Count 2, and \$143,327.00 19 restitution; Count 4 – a maximum
19 term of one hundred twenty (120) months with a minimum parole eligibility of twenty-six (26)
20 months, plus an equal and consecutive term for a victim of sixty-five (65) years or older, Count
21 4 to run concurrent to Count 3; and Count 5 – a maximum of one hundred twenty (120) months
22 with a minimum parole eligibility of twenty-six (26) months, plus an equal and consecutive
23 term for the deadly weapon enhancement, Count 5 to run concurrent with Count 4, with one
24 thousand three hundred forty-nine (1,349) days credit for time served.

25 The Judgment of Conviction was filed on August 16, 2006.

26 Petitioner filed three (3) Notices of Appeal from the Judgment of Conviction on August
27 11, 15, and 28, 2006. On September 13, 2007, the Nevada Supreme Court affirmed Petitioner's
28 conviction and filed its Order of Affirmance. On October 9, 2007, Remittitur was issued.

1 On October 10, 2008, Petitioner filed his First Petition for Writ of Habeas Corpus (Post-
2 Conviction) (hereinafter “First Petition”) and on May 22, 2009, he filed a Supplement to his
3 Petition. On July 17, 2009, the State filed its Opposition to Petitioner’s Petition. On December
4 4, 2009, the Court ordered an evidentiary hearing. On January 27, 2012, the District Court
5 conducted the evidentiary hearing wherein Michael Cristalli, Petitioner’s prior attorney, was
6 sworn and testified. The District Court subsequently denied Petitioner’s Petition. On February
7 13, 2012, the District Court filed its Findings of Fact, Conclusions of Law and Order. On
8 February 16, 2012, the District Court filed its Notice of Entry of Order. On February 7, 2012,
9 Petitioner filed a Notice of Appeal from the denial of his Petition. On January 16, 2013, the
10 Nevada Supreme Court filed its Order of Affirmance. On February 11, 2013, Remittitur was
11 issued.

12 On June 27, 2013, Petitioner filed an “Accused Motion to Dismiss for Lack of Subject
13 Matter Jurisdiction,” Notice of Motion and Motion to Appoint Counsel, and “Caveat.” On
14 July 12, 2013, the State filed its Opposition. On July 22, 2013, the District Court denied
15 Petitioner’s Motions. On August 9, 2013, the District Court filed its Orders denying
16 Petitioner’s Motions.

17 On August 6, 2013, Petitioner filed a “Motion for Re-Hearing, and an Accused Request
18 for Leave to File Motion for Re-Hearing based upon State and Federal Constitutional
19 Deprivation in Prior Proceedings.” The State filed its Opposition on August 16, 2013. On
20 August 6, 2013, before the District Court could hear Petitioner’s Motion for Re-Hearing,
21 Petitioner also filed an “Accused Request for Leave to File Motion for Re-Hearing based upon
22 State and Federal Constitutional Deprivation in Prior Proceedings.” On August 16, 2013, the
23 State filed its Opposition. On August 15, 2013, Petitioner filed a Supplemental Motion entitled
24 “Accused Supplemental to His Motion for Re-Hearing / And / Or Reply to State’s Opposition
25 And Or Courts Denial Of Accused File Motion For Lack Of Subject Matter Jurisdiction And
26 Accused Motion To Strike States Opposition For Good Legal Cause Showing.” On August
27 28, 2013, the District Court denied Petitioner’s Motion and Request. On September 9, 2013,
28 the District Court denied Petitioner’s Supplemental Motion. On November 4, 2013, the District

1 Court filed its Order denying Petitioner's Motions and Requests. On November 14, 2013,
2 Petitioner filed a Notice of Appeal from the order denying his Motion for Rehearing and his
3 Request for Leave. On January 16, 2014, the Nevada Supreme Court dismissed the appeal for
4 lack of jurisdiction and filed its Order Dismissing Appeal. On April 7, 2014, Remittitur was
5 issued.

6 On September 23, 2013, Petitioner filed a "Motion for Order for the Accused Immediate
7 Release; Due to State's Failure to Oppose the Accused Motion to Strike State's Opposition for
8 Good Legal Cause Showing." On October 9, 2013, the State filed its Opposition. On October
9 14, 2013, the District Court denied Petitioner's Motion. On December 4, 2013, the District
10 Court filed its Order of Denial. On December 12, 2013, Petitioner filed a Notice of Appeal.
11 On January 21, 2014, the Nevada Supreme Court dismissed the appeal for lack of jurisdiction
12 and filed its Order Dismissing Appeal. On February 20, 2014, Remittitur was issued.

13 On October 17, 2013, Petitioner filed a Second Pro Per Petition for Writ of Habeas
14 Corpus (Post-Conviction) (hereinafter "Second Petition"). On December 9, 2013, the State
15 filed its Response and Motion to Dismiss Petitioner's Petition. On January 8, 2014, the District
16 Court denied Petitioner's Petition. On January 24, 2014, Petitioner filed a Notice of Appeal
17 from the District Court's order. On February 12, 2014, the District Court filed its Findings of
18 Fact, Conclusions of Law and Order. On June 11, 2014, the Nevada Supreme Court affirmed
19 the District Court, and filed its Order of Affirmance. On July 8, 2014, Remittitur was issued.

20 On November 8, 2013, Petitioner filed an "Accused Motion for Decision on the Merits
21 of Invalid Laws of the State of Nevada causing the District Court to be Divested of Subject
22 Matter Jurisdiction Ab Initio." On November 22, 2013, the State filed its Opposition. On
23 December 2, 2013, the District Court denied Petitioner's Motion. On January 10, 2014, the
24 District Court filed its Order denying Petitioner's Motion. On January 27, 2014, Petitioner
25 filed a Notice of Appeal. On March 13, 2014, the Nevada Supreme Court dismissed the appeal
26 and filed its Order Dismissing Appeal. On August 24, 2014, Remittitur was issued.

27 On March 24, 2014, Petitioner filed a "Motion to Compel Court to Correct Its Own
28 'Errors and Omissions' with Their 'Presumption' of the (NRS); Is Now Challenged with the

1 'Knowledge of Law' and 'White Paper' with Attached 'Prima facie' Evidence as Proof of the
2 Unconstitutional Invalid (NRS)." On April 15, 2014, the State filed its Opposition to 5
3 Petitioner's Motion. On April 16, 2014, the District Court denied Petitioner's Motion. On May
4 1, 2014, the District Court filed its Order denying Petitioner's Motion. On May 15, 2014,
5 Petitioner filed a Notice of Appeal. On June 12, 2014, the Nevada Supreme Court dismissed
6 the appeal and filed its Order Dismissing Appeal. On July 11, 2014, Remittitur was issued.

7 On August 28, 2014, Petitioner filed a Motion/Request for Eighth Judicial District Court
8 Judge Kathleen E. Delaney to Recuse Herself from Petitioner's Case; for "Due Process
9 Violations" Constitutional Violations; Bias and Prejudice; Failure to Protect and Uphold the
10 Nevada State Constitution, i.e. the Paramount Law. The State filed its Response on September
11 17, 2014. On September 22, 2014, the District Court denied Petitioner's Motion. The Order
12 Denying Petitioner's Motion was filed on September 29, 2014.

13 On April 16, 2018, Petitioner filed a Petition for Writ of Mandamus (hereinafter "Third
14 Petition"). On May 30, 2018, the Court denied Petitioner's Third Petition finding that it failed
15 to contain a legal issue relevant to his case. On April 30, 2018, Petitioner filed a Fourth Petition
16 for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Fourth Petition"). The State filed
17 its Response on June 21, 2018. On June 27, 2018, the Fourth Petition was denied. The Order
18 Denying the Fourth Petition was filed on July 26, 2018. On February 22, 2019, Petitioner filed
19 a Notice of Appeal. On May 15, 2019, the Nevada Supreme Court affirmed the judgment of
20 the District Court and Remittitur issued on June 12, 2019.

21 On February 11, 2019, Petitioner filed a Motion to Recuse 8th Judicial Dist. Ct. Judge
22 Kathleen E. Delaney. On March 5, 2019, Petitioner's Motion was denied. The Decision and
23 Order denying the Motion was filed on March 7, 2019.

24 On May 17, 2021, Petitioner filed a Petition for Writ of Prohibition. The State filed an
25 Opposition on May 25, 2021. On June 30, 2021, the Court denied the Petitioner for Writ of
26 Prohibition. The Order Denying the Petition for Writ of Prohibition was filed on July 16, 2021.

27 On May 12, 2021, Petitioner filed a Fifth Petition for Writ of Habeas Corpus Due to the
28 Coronavirus Global Pandemic (hereinafter "Fifth Petition") and Request for Emergency

1 Evidentiary Hearing. The State was not served, and the Fifth Petition was not calendared by
2 the District Court. On November 19, 2021, Petitioner filed the instant Request for Submission
3 of Covid-19 Writ of Habeas Corpus filed on May 12, 2021, the contents of which were the
4 same as his May 12, 2021, Fifth Petition. On January 5, 2022, the State filed its Response.

5 On January 19, 2022, this Court denied the Petition, finding as follows.

6 ANALYSIS

7 **I. THIS FIFTH PETITION IS PROCEDURALLY BARRED**

8 *A. Application of Procedural Bars is Mandatory*

9
10 The Nevada Supreme Court has held that the district court has a *duty* to consider
11 whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth
12 Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court
13 found that "[a]pplication of the statutory procedural default rules to post-conviction habeas
14 petitions is mandatory," noting:

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

19 Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court]
20 when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court
21 has granted no discretion to the district courts regarding whether to apply the statutory
22 procedural bars; the rules *must* be applied.

23 This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013).
24 There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of
25 the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307
26 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's
27 petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The
28

1 procedural bars are so fundamental to the post-conviction process that they must be applied
2 by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

3 *B. This Fifth Petition is Time-Barred*
4

5 This Court finds that this Fifth Petition is time-barred. The instant petition was not filed
6 within the one-year statutory limit after the date of Remittitur. Thus, this Petition is time-barred
7 pursuant to NRS 34.726(1):

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

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

16 The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain
17 meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the
18 language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from
19 the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.
20 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

21 The one-year time limit for preparing petitions for post-conviction relief under NRS
22 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002),
23 the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite
24 evidence presented by the defendant that he purchased postage through the prison and mailed
25 the petition within the one-year time limit.

26 This is not a case wherein the Judgment of Conviction was, for example, not final. See,
27 e.g., Johnson v. State, 133 Nev. 571, 402 P.3d 1266 (2017) (holding that the defendant’s
28 judgment of conviction was not final until the district court entered a new judgment of

conviction on counts that the district court had vacated); Whitehead v. State, 128 Nev. 259, 285 P.3d 1053 (2012) (holding that a judgment of conviction that imposes restitution in an unspecified amount is not final and therefore does not trigger the one-year period for filing a habeas petition).

Given that Petitioner's Judgment of Conviction was never vacated, there is no legal basis for running the one-year time-limit from anything but the date of Remittitur. Remittitur issued on October 9, 2007. Thus, Petitioner had one year from October 9, 2007, to file this Petition. Petitioner did not file the instant Petition until May 12, 2021, over thirteen (13) years late. Given Petitioner's failure to demonstrate good cause and prejudice, this Petition is denied as time-barred.

C. This Fifth Petition is Successive and/or an Abuse of the Writ

Under NRS 34.810(2) "[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." Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994). 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 that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). 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,

1 497-498 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112
2 P.3d at 1074.

3 Here, Petitioner filed his First Petition on October 10, 2008. This Court denied the
4 Petition and filed its Findings of Fact, Conclusions of Law and Order on February 13, 2012.
5 On October 17, 2013, Petitioner filed his Second Petition. This Court denied Petitioner's
6 Second Petition on January 8, 2014. On April 16, 2018, Petitioner filed his Third Petition. On
7 April 30, 2018, Petitioner filed his Fourth Petition. On May 30, 2018, this Court denied
8 Petitioner's Third Petition. On June 27, 2018, this Court denied Petitioner's Fourth Petition.

9 To the extent that any claims raised were raised previously, and denied on the merits,
10 said claims are successive and would be governed by res judicata and/or law of the case.¹ To
11 the extent that Petitioner is raising new claims, this is an abuse of the Writ. Given Petitioner's
12 failure to demonstrate good cause and prejudice, this Petition is denied as successive.

13 *D. Petitioner Fails to Demonstrate, or Even Address, Good Cause*

14 To avoid procedural default under NRS 34.726 and NRS 34.810, a defendant has the
15 burden of pleading and proving specific facts that demonstrate good cause for his failure to
16 present his claim in earlier proceedings or comply with the statutory requirements. Hogan v.
17 Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Dir. Nev. Dep't of
18 Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988).

19 “To establish good cause, appellants *must* show that an impediment external to the
20 defense prevented their compliance with the applicable procedural rule.” Clem v. State, 119
21 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev.
22 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external
23 impediment could be “that the factual or legal basis for a claim was not reasonably available
24 to counsel, or that ‘some interference by officials’ made compliance impracticable.”
25 Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106
26 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v.
27

28 ¹ See Exec. Mgmt. v. Ticor Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998); Sealfon v. United States, 332
U.S. 575, 578, 68 S. Ct. 237, 239 (1948); Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975)

1 Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition
2 must not be the fault of the petitioner. NRS 34.726(1)(a).

3 The Nevada Supreme Court clarified that a defendant cannot attempt to manufacture
4 good cause. See Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a
5 “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at 251, 71 P.3d at
6 506; (quoting Colley v. State, 105 Nev. at 236, 773 P.2d at 1230). Excuses such as the lack of
7 assistance of counsel when preparing a petition, as well as the failure of trial counsel to forward
8 a copy of the file to a petitioner have been found not to constitute good cause. See Phelps, 104
9 Nev. at 660, 764 P.2d at 1306, superseded by statute on other grounds as recognized in Nika
10 v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890
11 P.2d 797 (1995).

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

20 In the instant Fifth Petition, Petitioner fails to include any argument for good cause.
21 Failure to address good cause amounts to an admission that he is unable to do so. DCR 13(2);
22 EDCR 3.20(b); Polk v. State, 126 Nev. 180, 186, 233 P.3d 357, 360-61 (2010). Nowhere in
23 his Petition does Petitioner address the issue of good cause. He fails to allege any impediments
24 that necessitated bringing a claim outside of the one-year timeline. Thus, Petitioner’s silence
25 is read as an admission that no good cause exists.

26 Additionally, Petitioner’s entire claim relies upon his exposure to COVID-19 while in
27 prison. He argues that he has pre-existing conditions but has not provided documentation from
28 certified medical professionals that he is personally at a heightened risk for COVID-19, or that

1 the NDOC is incapable of addressing his medical needs should he contract COVID-19.
2 Moreover, while Petitioner claims to have diabetes, he has not established that those with high
3 blood pressure are at a higher risk of suffering from COVID-19. Given that there is no evidence
4 that Petitioner's health issues place him at greater risk than any other inmate, or that the NDOC
5 is incapable of appropriately addressing and managing his health issues, he has not
6 demonstrated that he is at a higher risk of contracting COVID-19.

7 Further, Petitioner has not established that the NDOC is incapable of managing and
8 treating any health issues he may currently have or could develop. Petitioner has not
9 established that he has access to health insurance or a doctor available to prescribe medication
10 needed if he should be released. Petitioner has not even established that he would have the
11 same access to a face mask, which the NDOC has provided to their inmates. COVID-19 has
12 placed increased strain on all aspects of society, not simply the prison system. Even if released,
13 Petitioner would still need treatment due to his high blood pressure and diabetes. As such,
14 Petitioner has not established that he is more at risk of contracting COVID-19 in prison.

15 Petitioner's argument is merely speculation that the NDOC are not taking the proper
16 measures against COVID-19. Such speculation is insufficient to overcome the procedural bars
17 of establishing good cause. The Court finds that the NDOC has taken every precaution it can
18 to address the risk imposed by the Covid-19 pandemic. As such, this Court finds that Petitioner
19 failed to demonstrate good cause.

20 *E. Petitioner Cannot Establish Prejudice*

21 In order to establish prejudice, Petitioner must show “not merely that the errors of [the
22 proceedings] created possibility of prejudice, but that they worked to his actual and substantial
23 disadvantage, in affecting the state proceedings with error of constitutional dimensions.”
24 Hogan v. Warden, 109 Nev. at 960, 860 P.2d at 716 (1993) (quoting United States v. Frady,
25 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). Petitioner's procedural defaults cannot be
26 excused because his underlying claim is meritless.

27 In this case, Petitioner cannot establish prejudice to ignore the procedural defaults
28 because his claims are without merit and belied by the record, as will be further discussed in

1 more detail below. “Bare” and “naked” allegations are not sufficient to warrant post-conviction
2 relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502,
3 686 P.2d 222, 225 (1984). “A claim is ‘belied’ when it is contradicted or proven to be false by
4 the record as it existed at the time the claim was made.” Mann v. State, 118 Nev. 351, 354, 46
5 P.3d 1228, 1230 (2002). As Petitioner cannot satisfy the basis of his claims, this Court finds
6 that he failed demonstrate sufficient prejudice to ignore the procedural defaults.

7 **II. A PETITION FOR WRIT OF HABEAS CORPUS IS NOT THE CORRECT** 8 **LEGAL VEHICLE TO BRING THIS CHALLENGE**

9 It is well established that “a petition for writ of habeas corpus may challenge the validity
10 of current confinement, but not the conditions thereof.” Bowen v. Warden of Nevada State
11 Prison, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984). The rise of COVID-19 does not relate
12 to the validity of his confinement. Like other adverse aspects of being incarcerated that are
13 unrelated to a defendant’s sentence (such as an increased risk of experiencing inmate
14 violence), Petitioner’s risk of exposure to COVID-19 is a condition of his confinement. See
15 Farmer v. Brennan, 511 U.S. 825, 833–34, 114 S. Ct. 1970, 1976–77 (1994) (discussing inmate
16 violence as a condition of confinement). As such, Petitioner is challenging the conditions of
17 his confinement, and not the constitutionality of his sentence.

18 Challenges to conditions of confinement are not cognizable claims in habeas
19 proceedings. Bowen, 100 Nev. at 490. The Nevada Supreme Court stated as much in Bowen:

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

1 challenge speaks only to the conditions of confinement and
2 therefore may not be raised by a habeas corpus petition. See
3 Rogers v. Warden, *supra*.

4 The district court correctly ruled that the instant claim for relief
5 was not cognizable in a habeas corpus proceeding.

6 Id. (emphasis added). In fact, the Nevada Supreme Court has recently declined to grant relief
7 to a petitioner alleging that the dangers of COVID-19 required his release from prison. See
8 Kerkorian v. Sisolak, 462 P.3d 256 (Nev. 2020) (unpublished disposition). Other courts have
9 similarly held that claims that COVID-19 makes an otherwise constitutional sentence cruel
10 and unusual are actually challenges to the conditions of confinement. See, inter alia, People
11 ex rel. Coleman v. Brann, No. 260252/20, 2020 WL 1941972, at *6 (N.Y. Sup. Ct. Apr. 21,
12 2020); Foster v. Comm'r of Correction, 484 Mass. 698, 717, 146 N.E.3d 372, 390 (2020).

13 Accordingly, the appropriate vehicle to challenge a condition of confinement would be
14 to file a 42 U.S.C. § 1983 claim and argue that an individual's lawful incarceration has exposed
15 them to certain harms while incarcerated.² Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct.
16 1970, 1976, 128 L. Ed. 2d 811 (1994) ("The Constitution 'does not mandate comfortable
17 prisons,' Rhodes v. Chapman, 452 U.S. 337, 349, 101 S.Ct. 2392, 2400, 69 L.Ed.2d 59 (1981),
18 but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner
19 receives in prison and the conditions under which she is confined are subject to scrutiny under
20 the Eighth Amendment,' Helling, 509 U.S. at 31, 113 S.Ct. at 2480.").

21 A review of both this State's and the Supreme Court's jurisprudence shows that issues
22 such as: excessive force used by prison officials (see Farmer v. Brennan, 511 U.S. 825, 832,
23 114 S. Ct. 1970, 1976, 128 L. Ed. 2d 811 (1994)); lack of access to appropriate medical care
24 (Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251 (1976)); the use of
25 cruel punishments within a prison (Hope v. Pelzer, 536 U.S. 730, 737–38, 122 S. Ct. 2508,
26

27 ² Compare to McConnell v. State, 125 Nev. 243, 249, footnote 5, 212 P.3d 307, 311, footnote
28 5 (2009) (The correct way to challenge the mode of execution is a separate and independent
42 U.S.C. §1983 action.).

2514, 153 L. Ed. 2d 666 (2002)); the danger of inmate on inmate violence (Butler ex rel. Biller v. Bayer, 123 Nev. 450, 459, 168 P.3d 1055, 1062 (2007)); and the use of punitive segregation (Bowen v. Warden of Nevada State Prison, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984)), are all addressed under a conditions of confinement analysis (or a similar analysis considering whether the conduct of the prison staff was indifferent). This Court therefore declines Petitioner’s invitation to walk away from United States Supreme Court and Nevada Supreme Court precedent.

Petitioner also contends that his claims are appropriate for habeas review because “there is no other plain, speedy, or adequate remedy through any other legal vehicle.” Petition, at 1. As explained above, the appropriate way for Petitioner to raise his claims would have been to file a 42 U.S.C. § 1983 claim. See Farmer, 511 U.S. at 832. As such, it cannot be said that Petitioner’s claims are otherwise unreviewable.

Given that the Nevada Supreme Court has clearly stated that this type of claim is not cognizable in a petition for writ of habeas corpus, this Court does not have the jurisdiction to address this claim when brought through such a legal vehicle. Accordingly, this Court denies the Petition.

III. PETITIONER CANNOT DEMONSTRATE THAT HIS SENTENCE VIOLATES THE NEVADA AND UNITED STATE CONSTITUTIONS’ PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

Petitioner claims that his sentence is cruel and usual because prison officials acted with deliberate indifference to his safety. His argument revolves around prison officials not taking the necessary steps to protect him from COVID-19. Even if this claim was properly before this Court, Petitioner cannot demonstrate that his Eighth Amendment Rights were violated.

The United States Supreme Court has addressed claims regarding conditions of confinement, and whether such conditions, though not pronounced as “punishments” by statute or by the sentencing court, could violate the Eighth Amendment. In Wilson v. Seiter, 501 U.S. 294, 111 S.Ct. 2321 (1991), the Court dealt with a complaint that prison conditions constituted cruel and unusual punishment. Such conditions included “overcrowding, excessive

1 noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation,
2 unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and
3 housing with mentally and physically ill inmates.” Id. at 296, 111 S.Ct. at 2323. The Court
4 explained: “a prisoner advancing such a claim must, at a minimum, allege ‘deliberate
5 indifference’” on the part of prison officials. Id. at 297, 111 S.Ct. at 2323; accord Estelle v.
6 Gamble, 429 U.S. 97, 97 S.Ct. 285 (1976). The Wilson Court clarified, however, that mere
7 “allegations of ‘inadvertent failure to provide adequate medical care’ . . . *simply fail to*
8 *establish the requisite culpable state of mind.*” Id. (emphasis added). The United States
9 Supreme Court has since adopted a “subjective recklessness” standard for “deliberate
10 indifference” analyses regarding Eighth Amendment claims. Farmer v. Brennan, 511 U.S. 825,
11 837-40, 114 S.Ct. 1970, 1979-80 (1994) (expressly rejecting the adoption of some objective
12 standard, opting instead for a standard accounting for the risks involved and officials’ efforts
13 – or lack thereof – to alleviate such risks).

14 Accordingly, in determining whether the conditions of confinement constitute cruel and
15 unusual punishment, the question is whether prison officials have displayed a deliberate
16 indifference to Petitioner’s safety; or failed to undertake reasonable measures to ensure the
17 safety of prisoners. See Farmer, 511 U.S. at 829, 114 S. Ct. at 1974; see also Hudson v. Palmer,
18 468 U.S. 517, 526–527, 104 S.Ct. 3194, 3200, 82 L.Ed.2d 393 (1984). The United States
19 Supreme Court has analogized displaying a deliberate indifference with recklessly
20 disregarding a risk. Farmer, 511 U.S. at 836, 114 S. Ct. at 1978. “[I]t is enough that the official
21 acted or failed to act despite a knowledge of a substantial risk of serious harm.” Id. at 842, 114
22 S. Ct. at 198-81.

23 Recently, in U.S. v. Dade, the Ninth Circuit held in that the COVID-19 pandemic and
24 risk of contracting the virus in prison does not warrant release if the risks are being adequately
25 addressed. 959 F.3d 1136, 1139 (9th Cir. 2020). The Court further explained that even if the
26 risks are not being adequately addressed, transferring the defendant to a different facility, as
27 opposed to release, would be more appropriate. Id. The Ninth Circuit has further explained
28 that granting release is appropriate only after a defendant establishes that they have serious

1 health issues and that the prison is incapable of treating those health concerns. In re Roe, 257
2 F.3d 1077, 1081 (9th Cir. 2001).

3 Petitioner's claim is meritless because NDOC has been undertaking various measures
4 to protect not just him, but all inmates from the risk imposed by COVID-19. Petitioner has not
5 established that NDOC would be incapable of addressing his health issues. According to
6 NDOC's official website, they have taken active steps towards maintaining a safe and healthy
7 environment for both the inmates and NDOC staff. The following protocols have been
8 instituted thus far in response to COVID-19:

- 9 1. Running modified operations that limit travel between facilities
10 and restricted visitation at all facilities. This will be in-place until
11 corrections and medical experts at NDOC, working alongside
12 local and state government agencies, determine that the health and
13 safety of staff and offenders are no longer threatened by COVID-
14 19.
- 15 2. Each morning, all employees are being screened for symptoms
16 of the virus, including having their temperature taken. Anyone
17 found with one of the cardinal symptoms (fever of 100 degrees F
18 or greater, shortness of breath, dry cough, chills, muscle pain, new
19 loss of taste or smell) are sent home where they must obtain
20 medical clearance or test negative for COVID-19 before returning
21 to work.
- 22 3. All personnel who do enter a secure facility are required to wear
23 a face covering.
- 24 4. Testing new arrivals at the intake units at High Desert State
25 Prison and Northern Nevada Correctional Center for COVID-19,
26 and isolating offenders who test positive in negative airflow cells.
- 27 5. The dissemination of the latest CDC guidance for staff and
28 offenders, including the Center of Disease Control's Stop the
Spread of Germs poster, in highly visible areas.
6. Surface Sanitation Teams, using a 10% bleach concentration,
thoroughly clean surfaces at all facilities.
7. Hand soap is readily available at every facility, both in cells and
in common areas. NDOC encourages all persons to frequently
wash their hands using warm soap and water for at least 20
seconds.
8. Prison Industries is manufacturing hand sanitizer, medical
gowns, and face coverings to ensure NDOC staff have access to
these critical supplies. PI is also manufacturing alcohol-free hand
sanitizer and face coverings for offenders.

1 9. If an offender is suspected of having an illness, or if they self-
2 report feeling ill, NDOC medical staff immediately assess and
3 place them in that facility's infirmary or medically observes them
4 in their cell. NDOC also alerts Culinary so meals are delivered to
5 the offenders while they're in the infirmary or their cell.³

6 On January 5, 2021, NDOC officials instituted the following:

7 Effective January 5, 2021, ALL NDOC Staff
8 /Inmates/Visitors will be required to wear an N95 mask at
9 all times while on NDOC property or sanctioned off-
10 property movements (ie court visits, NDF firecrews,
11 firecrews, inmate porters, etc).

12 Simple cloth face masks are no longer authorized for any
13 staff members/inmates/visitors at any time while on NDOC
14 property or sanctioned off-property movements except for
15 staff/inmates/visitors that have an underlying respiratory
16 condition. Exceptions to the mask requirement still include
17 while eating/drinking (during this time ensure at least 6 feet
18 of social distancing between yourself and other staff
19 members) and while alone in your enclosed office or
20 workspace away from inmates and/or other staff.⁴

21 Petitioner also could receive a vaccination if he desires to reduce his risk of becoming
22 seriously ill.⁵ Petitioner did not reveal whether he is fully vaccinated. NDOC reported on May
23 4, 2021, that almost half of the offenders in NDOC facilities had received at least their first
24 dose of the vaccine.⁶ This percentage is higher at Southern Desert Correctional Center where
25 Petitioner is currently located. As such, not only has NDOC prioritized the safety of inmates
26 by establishing protocols, but they also provide the opportunity for inmates to reduce their risk
27 of becoming seriously ill.

28 Given the litany of ways in which NDOC is attempting to protect prisoners from this
virus, there can be no legitimate assertion that officials are failing to act despite knowledge of
a substantial risk of serious harm or that the prison is incapable of mitigating the risk of the

³ STATE OF NEVADA DEPARTMENT OF CORRECTIONS: NDOC COVID-19 UPDATES 11/06/2020, https://doc.nv.gov/About/Press_Release/covid19_updates/.

⁴ STATE OF NEVADA DEPARTMENT OF CORRECTIONS: NDOC COVID-19 UPDATES 01/05/2021, http://doc.nv.gov/About/Press_Release/covid19_updates/.

⁵ CENTERS FOR DISEASE CONTROL AND PREVENTION, *Key things To know About Covid-19 Vaccines*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>

⁶ STATE OF NEVADA DEPARTMENT OF CORRECTIONS: PRESS RELEASE May 4, 2021, *Vaccinations climb in Nevada Prisons as visitation reopens*, https://doc.nv.gov/About/Press_Release/News/.

1 spread or treatment of Petitioner should he contract COVID-19. Further, under Petitioner's
2 theory every single sentence of incarceration being served in the State of Nevada would be
3 unconstitutional and in violation of the Eighth Amendment. The ultimate outcome of
4 Petitioner's logic shows its absurdity. The existence of a pandemic is not a get out of jail free
5 card for Petitioner or anyone else.

6 The potential to be exposed to coronavirus is now an aspect of every single person's
7 daily life. There is a potential for exposure at grocery stores, places of employment, and
8 medical facilities, just to name a few.⁷ The CDC published information regarding the stress
9 caused by the pandemic, so inmates are not alone in those aspects.⁸ As such, even if released,
10 Petitioner would face exposure to COVID-19.

11 Petitioner is also unable to establish that his risk of contracting COVID-19 is
12 substantially greater while incarcerated than it would be if he were released. This is especially
13 true in light of the fact that almost half of the inmates in NDOC have received at least their
14 first dose of the vaccine, and more than half have received it where Petitioner is currently
15 located.⁹ In addition, Petitioner fails to allege that he would have access to the same protections
16 that NDOC has provided for its inmates, such as N95 masks, or even that he would have access
17 to healthcare if released.

18 Petitioner seems to imply that his risk of death from COVID-19 elevates his once
19 constitutional sentence to a death decree. As of the filing of this Response, there have been
20 three (3) deaths at Southern Desert Correctional Center where the inmates had COVID-19.¹⁰
21 Thus, allegations that a sentence of incarceration is akin to a sentence of death are hyperbolic.
22 For the foregoing reasons, the conditions of Petitioner's confinement cannot constitute cruel
23 and unusual punishment. As such, this Court denies the Petition as any claim is meritless.

24 ⁷ New York Post, *COVID-19 risks ranked: Grocery stores among least-likely places to contract virus*,
25 <https://nypost.com/2020/06/13/experts-rank-most-likely-places-to-contract-coronavirus/>.

26 ⁸ CENTERS FOR DISEASE CONTROL AND PREVENTION, *Stress and Coping: Adults Experiencing Stress from COVID-19*, <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/managing-stress-anxiety.html>.

27 ⁹ STATE OF NEVADA DEPARTMENT OF CORRECTIONS: PRESS RELEASE May 4, 2021, *Vaccinations climb in Nevada Prisons as visitation reopens*, https://doc.nv.gov/About/Press_Release/News/.

28 ¹⁰ STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF ANALYTICS, *Facilities with Reported Covid-19 Cases*, <https://app.powerbigov.us/view?r=eyJrIjoibNDMwMDI0YmQtNmUyYS00ZmFjLWI0MGltZDM0OTY1Y2Y0YzNhlwiidCI6ImU0YTMT0MGU2LWI4OWUtNGU2OC04ZWZhLTE1NDRkMjcwMzk4MCI9>.

IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held*.
2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

(emphasis added).

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that “[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record”). “A claim is ‘belied’ when it is contradicted or proven to be false by the record as it existed at the time the claim was made.” Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) (“The district court considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted ‘to make as complete a record as possible.’ This is an incorrect basis for an evidentiary hearing.”). Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel’s actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel’s decision making that contradicts the available evidence of counsel’s actions, neither may they insist counsel confirm every aspect of the strategic basis

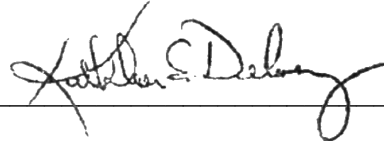
1 for his or her actions. Id. There is a “strong presumption” that counsel’s attention to certain
2 issues to the exclusion of others reflects trial tactics rather than “sheer neglect.” Id. (*citing*
3 Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the
4 *objective* reasonableness of counsel’s performance, not counsel’s *subjective* state of mind. 466
5 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

6 Here, Petitioner seeks an evidentiary hearing. However, there is no reason to expand
7 the record as Petitioner’s claims are meritless. As discussed supra, Section II, Petitioner’s
8 assertions are improperly pled and thus should not even be heard by this Court. Even if a
9 Petition for Writ of Habeas Corpus were the proper way to address this issue, Petitioner is
10 unable to establish prison officials acted with deliberate indifference to his safety. As such, an
11 evidentiary hearing is not warranted. Therefore, Petitioner’s request for an evidentiary hearing
12 is denied.

13 **ORDER**

14 Based on the foregoing, IT IS HEREBY ORDERED that the Petition for Writ of Habeas
15 Corpus Due to the Coronavirus Global Pandemic and Request for Emergency Evidentiary
16 Hearing shall be, and is, hereby denied.

Dated this 16th day of February, 2022

17 
18 _____

19 719 7E0 C72B BDB6
20 Kathleen E. Delaney
District Court Judge

21 STEVEN WOLFSON
22 Clark County District Attorney
Nevada Bar #001565

23
24 BY /s/ Taleen Pandukht
25 TALEEN PANDUKHT
26 Chief Deputy District Attorney
Nevada Bar #005734

1 CERTIFICATE OF MAILING

2 I hereby certify that service of the above and foregoing was made this 8th day of
3 February, 2022, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

4 ERICK BROWN, #92713
5 S.D.C.C
6 PO BOX 208
7 INDIAN SPRINGS, NV 89070

8 BY /s/ E. Del Padre
9 E. DEL PADRE
10 Secretary for the District Attorney's Office
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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Erick Brown, Plaintiff(s)

CASE NO: A-21-834478-W

7 vs.

DEPT. NO. Department 25

8 William Hutchings, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 2/16/2022

15 Dept Law Clerk

dept25lc@clarkcountycourts.us

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

January 19, 2022

A-21-834478-W	Erick Brown, Plaintiff(s)
	vs.
	William Hutchings, Defendant(s)

January 19, 2022	1:30 PM	Plaintiff's Request for Submission (Covid 19;Writ of Habeas Corpus)
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HEARD BY: Delaney, Kathleen E.

COURTROOM: RJC Courtroom 15B

COURT CLERK: April Watkins

REPORTER: Dana J. Tavaglione

PARTIES

PRESENT: Jones, Jr., John T.

Attorney for Defts'

JOURNAL ENTRIES

- Court noted the underlying criminal case is C189658. Petitioner is not present, will make determination on the briefs and will not take additional argument. After full review of all the briefs and consideration of all arguments, COURT ORDERED, petition DENIED as procedurally barred and substantively meritless. The procedural bar as identified by the State that is the fifth Petition for Writ of Habeas Corpus filed by Mr. Brown. To the extent that it was not filed within one year which is the statutory limit after remittitur then it is time barred pursuant to NRS 34.726(1). To the extent claims were raised previously and denied on those merits then these claims would also be successive and governed by either Res Judicata or the law of the case. To the extent Petitioner is raising new claims then that is not appropriate absent the showing of good cause and prejudice. Further, what we have here is a lack of good cause, Petitioner did not attempt to address good cause argument but what the argument is, is one hundred percent reliant on an argument that there is potential for Covid-19 exposure while in prison, that he has a pre-existing condition and do not see documentation to support that but even if we take that at face value, this is not a basis that is appropriate for the Court to consider. The Petitioner having established a cognizable basis for habeas proceedings. Challenges to conditions of confinement are not cognizable claims in habeas proceedings pursuant to the Bone case cited by the State and the appropriate vehicle to challenge that would be a 1983 claim, if any. What we know from what we understand publicly Nevada Department of Corrections is taken every precaution it can to address the risk imposed by the Covid-19 pandemic. There is no basis for

an evidentiary hearing because the Court can see that as a matter of law, there is no basis for the petition to be granted. FURTHER ORDERED, petition and request of evidentiary hearing DENIED. State to prepare the order.

CLERK'S NOTE: The above minute order has been distributed to: Erick Brown, #92713, S.D.C.C., P.O. Box 208, Indian Springs, NV 89070. aw

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DESIGNATION OF RECORD ON APPEAL; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; DISTRICT COURT MINUTES

ERICK M. BROWN,

Plaintiff(s),

vs.

WILLIAM HUTCHINGS, WARDEN OF
SDCC; STATE OF NEVADA,

Defendant(s),


Case No: A-21-834478-W

Dept No: XXV

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 1 day of March 2022.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk

