

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERICK MARQUIS BROWN,
Appellant(s),

vs.

WILLIAM HUTCHINGS, WARDEN,
SOUTHERN DESERT CORRECTIONAL
CENTER; AND THE STATE OF
NEVADA,
Respondent(s),

Electronically Filed
Mar 17 2022 02:15 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No: A-21-834478-W

Docket No: 84322

RECORD ON APPEAL

ATTORNEY FOR APPELLANT
ERICK BROWN #92713,
PROPER PERSON
P.O. BOX 208
INDIAN SPRINGS, NV 89070

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

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

I N D E X

VOLUME: **PAGE NUMBER:**

1 1 - 131

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER:</u>
1	3/1/2022	Case Appeal Statement	128 - 129
1	3/17/2022	Certification of Copy and Transmittal of Record	
1	2/28/2022	Designation of Record on Appeal	127 - 127
1	3/17/2022	District Court Minutes	130 - 131
1	2/16/2022	Findings of Fact, Conclusions of Law and Order	79 - 100
1	2/28/2022	Notice of Appeal	124 - 126
1	11/29/2021	Notice of Department Reassignment	37 - 38
1	2/25/2022	Notice of Entry of Findings of Fact, Conclusions of Law and Order	101 - 123
1	11/23/2021	Notice of Hearing	36 - 36
1	11/19/2021	Notice of Motion "Evidentiary Hearing" Hearing Requested	17 - 17
1	5/12/2021	Petition for Writ of Habeas Corpus; Due to the Corona Virus, Global Pandemic; Covid-19 "Emergency Evidentiary" "Hearing Requested"	1 - 16
1	2/15/2022	Plaintiff Response to the State's Fraudulent; Deceptive and Corrupt Motion to Dismiss.	62 - 78
1	2/15/2022	Request for Submission	60 - 61
1	11/19/2021	Request for Submission "Emergency Evidentiary Hearing" Hearing Request	18 - 35
1	1/5/2022	State's Response and Motion to Dismiss Petition for Writ of Habeas Corpus Due to the Coronavirus Global Pandemic	39 - 59

Steven D. Grierson

Erick M. Brown
SDCC ID# 92713
P.O. BOX 208
Indian Springs, NV 89070

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

DISTRICT COURT
CLARK COUNTY, NEVADA

Erick M. Brown
Petitioner,

Case No. C189658-1
Dep't. No. _____

VS.

William Hutchings, Warden
of SDCC; The State of Nevada et al.
Respondent.(s)

COVID-19

**"EMERGENCY EVIDENTIARY"
"HEARING REQUESTED"**

PETITION FOR WRIT OF HABEAS CORPUS; DUE
TO THE CORONA VIRUS, GLOBAL PANDEMIC

Petitioner, ERICK M. BROWN, in his proper person, Now
Petitions this court to issue a Writ of Habeas Corpus.

This is "NOT" a Post Conviction Writ; nor a second and
successive Petition.

Petitioner is not challenging his judgment of conviction or
sentence, rather Petitioner is requesting "Immediate Relief",
via Habeas Corpus, because there is no other plain, speedy or
adequate remedy through any other plain legal vehicle.

This Petition is filed pursuant to, In re Von Von Staich,
on Habeas Corpus, 56 Cal App 5th 53 (2020); Former v.
Brennan, 511 U.S. 825, 128 L Ed 2d 811, 114 S. Ct. (1994),

APR 21 2021

CLERK OF THE COURT

RECEIVED
MAY 11 2021

1 and is made and based upon the Memorandum of Points
2 and Authorities, exhibits attached hereto, and any oral argu-
3 ments this Court may entertain.

4 POINTS And AUTHORITIES

5 The Supreme Court of Nevada (Sup. Ct. of Nev.) requires
6 that the petitioner of the Habeas relief be present at any
7 evidentiary hearing conducted concerning the merits of the
8 claim asserted in the Writ. See Gebbers v. Nevada, 50 P.3d 1092
9 (2002).

10 My presence is required at the hearing, due to the fact
11 that I am needed as a witness.

12 The pleading to which this Motion does accompany, does
13 specifically request an "**Evidentiary Hearing**"; that the
14 pleading raises substantial issues of fact, not belied by
15 the record as concerns events in which I participated in,
16 and about which only I can testify. Compare: U.S. v. Hayman,
17 342 U.S. 205 (1942).

18 While Petitioner's pleading does not contain any claims of
19 ineffective assistance of counsel, this Court too would err
20 should it make findings about issues contained in Petitioner's
21 pleadings, as the Court should fail to allow Petitioner to set
22 such restrictions as are expressly placed upon the legislature
23 by the Constitution of the State of Nevada (Const. of Nev.). See:
24 Mathews v. State ex rel. Nevada Tax Comm'n, 83 Nev. 266,
25 268, 428 P.2d 371 (1967); Moore v. Humboldt County, 48 Nev. 397,
26 405, 232 Pac. 1078 (1925); County of Pershing v. Sixth Judicial
27 Dist. Court, 43 Nev. 78, 93, 181 Pac. 960, (1919) (citing Gibson v.
28 Mason, 5 Nev. 283 (1869))

Fact's : Petitioner (Brown) is currently housed at the Southern Desert Correctional Center (SDCC) - P.O. Box 208 Indian Springs, NV 89070. (Brown) humbly files this "Emergency Petition For Writ of Habeas Corpus" with "Legal Equilibrium" and respectfully ask this Honorable Court to treat this as an urgent matter, and to treat it with the weight that it warrants. Petitioner (Brown), humbly, request immediate relief.

Petitioner (Brown) contends that this "Emergency" Petition For Writ of Habeas Corpus, is based upon the Deadly Corona virus, i.e. Covid-19 Global Pandemic, the measures that America has taken to protect its citizens from contracting Covid-19, and how NDOC/SDCC Admin. et al. has blatantly ignored Federal mandates, and "State" Covid-19 directives, to prevent the spread of the deadly Covid-19 virus as well as saving human life.

The NDOC/SDCC et al., refused to implement Covid-19 guidelines. Prisons and Jails have long been associated with inordinately high transmission probabilities for infectious diseases. Early on physicians, public health officials, and the national Centers for Disease Control and Prevention (C.D.C.) sounded the alarm that prisons and Jails could become the "Epicenter of the [Covid-19] pandemic." (E.g. Klonsky, An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues, N.Y. Times (Mar. 16, 2020) <-> [as of Oct. 20, 2020].) The CDC's lengthy and detailed "Guidance for Correctional & Detention Facilities" repeatedly emphasizes the vital nature of Social Distancing for reducing the virus.

Specifically (Brown) contends that he can unequivocally provide factual material evidence of NDOC /SDCC et.al. complete disregard for Petitioner's pre-existing medical conditions, in the face of the Pandemic, which took it's greatest toll among African American's, such as (Brown) whom suffer's from; High Blood Pressure; Diabetes; and poor nutrition. Compounded with congregate living situations at NDOC /SDCC et.al. and the aged dilapidated facility with (POOR) ventilation and sanitation problems, It is morally indefensible and Constitutionally untenable not to immediately adopt and implement measures designed to permit physical distancing among inmates, including eliminating double celling and Dormitory housing.

It is deliberate indifference, in violation of U.S. Const. 8th Amendment and Nevada State Constitution (Nev. Const.) Article (Art.) Art. 1, § 8 for NDOC /SDCC et.al., to disregard the (Scientist) medical experts, Opinion, (Findings; report); Guidelines; State Directives etc...

Prison officials may not be deliberately indifferent to the exposure /contraction of a serious, deadly communicable disease as Covid-19, and the placement of prisoner's in places to which infectious diseases could easily spread constitutes a Constitutional violation. Deliberate indifference may be proven by circumstantial evidence and it may be inferred from the very fact that the risk was obvious.

In a life-threatening "EMERGENCY" like that posed by Covid-19, NDOC /SDCC et.al., has the power to remove all persons incarcerated at SDCC /NDOC, not just non-violent

1 offender's. An Eighth Amendment claimant need not show
2 a prison official acted or failed to act believing that harm
3 actually would befall an inmate; it is enough that the
4 official acted or failed to act despite knowledge of a
5 substantial risk of serious harm, in Petitioner (Brown's)
6 Case, Covid-19 pose a threat of imminent "DEATH"
7 to (Brown's) pre-existing health conditions. Whether
8 a prison official had the requisite knowledge of a
9 substantial risk is a question of fact subject to
10 demonstration in the usual ways, including inference
11 from circumstantial evidence, citation, and a factfinder
12 may conclude that a prison official knew of a substan-
13 tial risk from the very fact that the risk was obvious.

14 Prisoners retain the essence of human dignity
15 inherent in the power to issue of all persons. Human
16 dignity animates the 8th Amend. U.S. Const. (Nev. Const.)
17 Art. 1, § 8 and prohibits cruel and unusual punishment
18 as well as Due Process of Law. The basic concept
19 underlying U.S. Const. 8th Amend., is nothing less than
20 the dignity of people. A prison that deprives prisoners of
21 basic sustenance, including adequate medical care, is
22 incompatible with the concept of human dignity and
23 has no place in civilized society.

24 Petitioner maintains NDOC/SDOC et al. rejections of
25 the views of the World Health Organization, and the
26 Centers for Disease Control and prevention recommend-
27 ations; Guidelines, Scientist conclusion; Gov. Sisolak's

1 Covid-19 directives, constitutes the "deliberate
2 indifference" necessary to sustain claims under the
3 cruel and/or usual custody provisions of the State
4 and Federal Constitution. Estelle v. Gamble (1976)
5 429 U.S. 97, 103 [50 L. Ed. 2d 251, 97 S. Ct. 285].
6 Inmates of the Riverside County Jail v. Clark (1983)
7 144 Cal. App. 3d 850, 859 [92 Cal. Rptr. 823]; Hutto
8 v. Finney (1978) 437 U.S. 678, 682 [57 L. Ed. 2d 522, 98
9 S. Ct. 2565].

10 Petitioner argues the risk to (Brown's) health and
11 life were well known to NDOC/SDCC et.al. and obvious,
12 rejection/non-compliance, of Scientist; W.H.O.;
13 C.D.C.; State of Nevada Covid-19 (directives) restric-
14 tions, social distancing etc... Must be deemed reckless
15 under the analysis prescribed by the United States
16 Supreme Court in Farmer v. Brennan (1994) 511 U.S.
17 825 [128 L. Ed. 2d 811, 114 S. Ct. 1970] (Farmer).

18 Despite (2020) being a Global Pandemic, dominated by
19 Covid-19, the situation at (SDCC) is clearly exigent,
20 as human lives are at stake, and the prompt response, by
21 this court is warranted.

22 "Deliberate indifference" is established where the
23 challenged deficiency is "sufficiently serious" and prison
24 officials "know[] that Petitioner face a substantial risk
25 of serious harm, and disregard that risk by failing to
26 take reasonable measures to abate it" (Farmer Supra)

27 NDOC/SDCC et.al. treated Petitioner (Brown) with

1 "deliberate indifference to serious medical needs."
2 (Estelle at p. 104). Petitioner, (Brown) whom is a
3 Covid-19 survivor, has suffered a great ordeal at
4 the hands of these corrupt State officials, this disaster is
5 not over yet. A 75% infection rate indicates that a
6 substantial portion of the population could still get Covid-19,
7 become seriously ill or die. At present NDOC/SDOC et al.
8 Southern Desert Correctional Center remains unsafe for
9 (Petitioner), staff, and other's entering the facility.

10 Petitioner further contends, "NO" health treatment
11 was provided to Covid-19 survivor (Brown), Prior; during;
12 Post; outbreak. No medication was provided to Petitioner,
13 while (Brown) was suffering from the long list of Covid-
14 19 symptoms. Furthermore these corrupt State officials,
15 placed (Brown) in greater Danger, by moving Petitioner
16 inside a one (1) man cell in Unit No. 2 with another
17 offender that tested positive for Covid-19 and displayed
18 different ailments than Petitioner, placing (Brown) in the
19 path of imminent "DEATH".

20 Petitioner (Brown), has to live in fear of re-infection,
21 or "DEATH" at the hands of these incompetant NDOC/SDOC
22 et al. medical personnel, statistics, show that (Brown) is at a
23 heightened risk of "DEATH" from Covid-19, these facts are
24 supported by NDOC/SDOC et al. medical records.

25 NDOC/SDOC et al., refusal to "RELEASE," consider any
26 offender who have committed violent offenses, as part of it's
27 Covid-19 response is at odds with judicial, legislative and
28 ACADEMIC recognition of this correlation.

1 In a life threatening emergency liked that posed by
2 Covid-19; NDOC/SDOC et. al, Gov. Sisolak and the
3 "Department of Health and Human Services", Memo
4 dated Jan. 4, 2021, attempts to defraud Petitioner
5 (Brown), by asserting on pg. 3 of 4, "Southern Desert
6 Correctional Center".

7 (1). Equipment not sanitized

8 (the pot wash high temperature dish machine was
9 disrepair and not sanitizing).

10 (2). Equipment not sanitized

11 (the chow hall high temperature dish machine was
12 in dispair and not sanitizing).

13 Petitioner, through "EYEWITNESS"

14 testimony upon, years; upon year's; upon year's of
15 operation of the Corrupt practices of NDOC/SDOC et. al
16 and Justin "Oswald" Reyes Culinary on has unlawfully,
17 without legal authority "Fresh Milk" Non-fat Milk, from the
18 NDOC, C.M.O. approved menu, and SDOC exc. staff,
19 blatantly turn a blind eye, their just inmates, well
20 I was always taught "Bullie's" steal Milk \$\$, NDOC
21 allocates funds for fresh Milk, and the C.M.O. approved menu
22 mandates fresh non-fat milk, "NOT" non-Dairy creamer
23 and call it dry milk. NDOC/SDOC et. al. refuse to adequately
24 feed me during this Global Pandemic, (Post, Prior, during)
25 causing me to always maintain a weak immune system,
26 in un-sanitary conditions five (5) years prior to the
27 Corona Virus outbreak by operating the SDOC culinary

1 with "NO" Hot Water, creating an unhealthy, deadly
2 encounter everytime (Brown) enters the SDC
3 culinary for his daily meals. This fraudulent Health
4 dept. Memorandum, is false, misleading, created to
5 further violate Petitioner's State and Federal Constit-
6 tutional rights. Instead of stating the truth, the
7 report, asserts "Fraud" and misrepresentations of
8 the "FACT", there is "NO" HOT WATER, so how does
9 SDC/NDCC past inspection when there is no way
10 to properly sanitize a kitchen that feeds thousands of
11 human beings (3) meals a day (7) day a week, 365
12 days a year for (5) years (Prior, during, Post)
13 Covid-19, these Barbarians do not care about human
14 life, and should not be in control of any Penal System.

15 NDOC/SDCC et al placed me in danger of imminent
16 DEATH, by operating the culinary with "NO" Hot Water and
17 compromising my immune system, by not providing
18 my body with fresh Milk instead of "Poison" non-dairy
19 Creamer.

20 CONCLUSION

21 Petitioner (Brown), prays that this Court will
22 hold these NDOC/SDCC et al. accountable for their un-
23 lawfull actions, deliberate indifference to the
24 "Highly Contagious" and Deadly Corona-Virus, i.e.
25 Covid-19, Constituting a violation of (Brown's) 8th Amend.
26 against cruel and unusual punishment, 14th Amend.
27 Violations of Due Process as well countless other violations

1 to be later addressed.

2 Facts: Some time in Dec. 2020 Petitioner (Brown)
3 was infected with the deadly Covid-19, while being
4 unlawfully housed at NDOC/SDOC et al dilapidated facility,
5 with little to "NO" ventilation, no proper nutrition added
6 to assist Petitioner's immune system against this deadly
7 virus, that has exacerbated my already pre-existing
8 conditions, that places me in imminen risk of death.

9 Petitioner has been physically forced to watch another
10 human die, causing sever depression und physico trauma
11 and other mental health issues.

12 Petitioner contends these action taken by NDOC/SDOC
13 et al, to protect Petitioner fall well below the thresh hold
14 of In re Van Staich, on Habeas Corpus, or Farmer v. Brennan
15 and constitute a violation of my 8th Amend rights, by
16 not providing social distancing, double man celling,
17 Dormitory style housing, adequate medical; proper ventilation,
18 adequate sanitation, adequate nutrition etc... Remedy:
19 immediate Release !!!

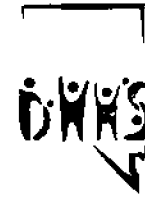
20 Dated this 10, of April 2021 Eric M. Brown
21 Petitioner.

Steve Sisolak
Governor

Richard Whitley, MS
Director



DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Division of Public and Behavioral Health
Helping people. It's who we are and what we do.



Lisa Sherych
Administrator

Ihsan Azzam, Ph.D., M.D.
Chief Medical Officer

January 04, 2021

MEMORANDUM

To: Charles Daniels, Director
Nevada Department of Corrections

Through: Ihsan Azzam, PhD, MD
Chief Medical Officer, DPBH

From: Vincent Valiente, REHS, EHS III
For Paul Shubert, Chief, DPBH

Subject: Prison Commission Meeting

As required by the Nevada Revised Statutes (NRS) 209.382, NRS 444.330 and NRS 446.885, the Division of Public and Behavioral Health (DPBH) conducts regular inspections of State Correctional Facilities. These inspections include:

- a) **Medical and Dental Services** based upon *Standards for Medical Facilities* as provided in Chapter 449 of NRS.
- b) **Nutritional Adequacy of Diet** based on *National Dietary Guidelines*. Inspections of diet adequacy take in consideration religious and/or medical dietary recommendations for individual offenders, and adjustments of dietary allowances for age, sex, and level of activity.
- c) **Sanitation, Healthfulness, Cleanliness and Safety** of various institutions and correctional facilities which include a focus on food safety practices.

DIETARY INSPECTIONS (Table 1) "Critical Violations Identified During Annual Dietary Inspections of State Prisons." Summarizes information obtained during the inmate nutritional adequacy verification process in 2020. Additionally, it summarizes critical violations identified during annual dietary inspections conducted at each state correctional facility starting from 2014 to the present time.

MEDICAL SURVEYS (Table 2) "Deficiencies Identified During Medical Surveys Conducted" Two state correctional facilities are medically inspected each year. This survey summarizes deficiencies or violations identified since the start medical inspections.

Note: The letter "X" in Table 1 and Table 2 signifies a critical violation, or a deficiency identified during inspections and surveys.



Based on CDC guidelines, the DPBH continues to support the Nevada Department of Corrections (NDOC), and provide up-to-date recommendations specific to correctional facilities and detention centers in order to contain many ongoing COVID-19 widespread outbreaks among staff and inmates in several prison facilities in Nevada.

Public health inspectors from the DPBH conducted site visits to correctional facilities that continue to experience COVID-19 outbreaks, and provided several detailed step-by-step advices to help the NDOC contain outbreaks and ensure continuation of essential public services to protect the health and safety of incarcerated and detained persons, prison guards, staff, and visitors during the ongoing COVID-19 Pandemic.

Recommendations provided by the DPBH to the NDOC included the following:

- Enhanced cleaning/disinfecting and hygiene practices.
- Improve ventilation in correctional facilities.
- Social distancing strategies to increase space between individuals in the facility.
- Strategies to limit and prevent COVID-19 transmission from staff and visitors.
- Infection control, including recommended personal protective equipment (PPE) and potential alternatives during PPE shortages.
- Screening for symptoms; history of exposure, and temperature check protocols for transferred/incoming incarcerated/detained individuals, staff, and visitors.
- Regular testing considerations for SARS-CoV-2.
- Medical isolation of individuals with confirmed and suspected COVID-19, and quarantine of close contacts, including considerations for cohorting when individual spaces are limited.
- Timely healthcare evaluation and testing for individuals with suspected COVID-19.
- Ongoing monitoring of symptoms and providing necessary care for individuals with confirmed and suspected COVID-19.
- Considerations for individuals (staff and inmates) who are at increased risk for severe illness from COVID-19.
- Timely vaccination of NDOC staff as a state public health priority.

For additional information please check the following link.

<https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/index.html>

Included Attachments

1. Table 1. DIETARY INSPECTIONS – Critical Violation Identified During Annual Dietary Inspections of State Prison.
2. Table 2. MEDICAL SURVEYS – Deficiencies Identified During Medical Surveys.
3. Table 3. INMATE NUTRITIONAL ADEQUACY INSPECTION SUMMARY 2020 & EXPANDED SUMMARY.

Should you have any questions regarding the Biannual Prison Commission Meeting Update, please do not hesitate to contact me at 775-684-1061.

DIETARY INSPECTIONS (TABLE 1)

Critical Violations Identified During Annual Dietary Inspections of State Prisons

YEAR	Ely				Florence McClure				High Desert				Lovelock				Northern Nevada				Southern Desert				Warm Springs			
	14'	15'	16'	17'	18'	19'	20'	14'	15'	16'	17'	18'	19'	20'	14'	15'	16'	17'	18'	19'	20'	14'	15'	16'	17'	18'	19'	20'
Presence of Insects/rodents	X																											
Handwash sinks not fully operational																												
Dented cans of food																												
Improper food temperatures																												
Refrigeration at improper temperature																												
Improperly labelled/stored chemicals																												
Potential for cross-contamination																												
Expired/spoiled food																												
Equipment not sanitized																												
Handwashing sinks not accessible																												
Culinary staff hygiene practices cited																												
Hot holding equipment at improper temperature																												
Person-in-Charge not knowledgeable																												
Sub Total of Critical Violations/Year:																												
Total Critical Violations Per Prison 14' - 20'																												
Total Critical Violation Cited All Prisons 14' - 20'																												
Total Critical Violations 2020																												

EXHIBIT "B"



Southern Desert Correctional Center Three Lakes Valley Conservation Camp and Three Lakes Valley Boot Camp



NDOC Home > Correctional Facilities > Southern Desert Correctional Center

Home

- [NDOC Home](#)
- [Administrative Regulations](#)
- [Board of Prison Commissioners](#)
- [Conservation Camps](#)
- [Contact Us](#)
- [Correctional Facilities](#)
 - [Ely State Prison](#)
 - [Florence McClure Women's CC](#)
 - [High Desert State Prison](#)
 - [Lovelock Correctional Center](#)
 - [Maricopa State Prison](#)
 - [Northern Nevada Correctional Center](#)
 - [Northern Nevada Reinstitution Center](#)
 - [Southern Desert Correctional Center](#)
 - [Warm Springs Correctional Center](#)
- [Director Howard Skoink](#)
- [Education Services](#)
- [Escapes/Walk-away Inmates](#)
- [Family Services Division](#)
- [Information Services \(MIS\)](#)
- [Inmate Banking Services](#)
- [Inmate Information](#)
- [Medical Division](#)
- [NOTIS \(Offender Records\)](#)
- [Offender Search](#)
- [Personnel Division](#)
- [Psych Panel Agendas](#)
- [Puppies up for Parole](#)
- [Re-Entry Task Force](#)
- [Restoration of Civil Rights](#)
- [Sentence Estimates \(PDF\)](#)
- [Silver State Prison Industries](#)
- [Statistics](#)
- [Victims' Information](#)
- [Visiting Information](#)
- [Volunteer Information](#)

State of Nevada Links

- [State of Nevada Home Page](#)
- [State Purchasing - RFP Opportunities](#)
- [Silver Source Forms Portal](#)
- [Governor's Executive Budget for 2007-2009 \(Adobe PDF Format\)](#)
- [Click here to download Adobe Acrobat Reader](#)

Southern Desert Correctional Center,
20825 Cold Creek Rd.
P. O. Box 208
Indian Springs, NV 89070
702-879-5472 ext 201



Administrative Staff:

Brian E. Williams Sr., Warden

Jerry Howell, Associate Warden for Operations

Cheryl Burson, Associate Warden for Programs

Historical:

Located in Clark County, just North of Las Vegas, Southern Desert Correctional Center, the department's fourth major institution, was opened in February 1982 with seven 102 cell housing units, one of which housed federal prisoners but was added to the state's population in 1987. Each 60 square foot cell housed one inmate at that time. A new 200 cell housing unit was opened in 1989 and, most recently, two 240 bed dormitory style housing units were opened in March of 2008 bringing the population capacity from 714 in 1982 to the present day population capacity of 2106.

Staffing:

In addition to our staff of 192 Protective Service staff, Southern Desert Correctional Center employs a number of professional and skilled staff:

- 31 Program Staff (including Education Principal, AA and Braille)
- 12 Skilled Maintenance Personnel
- 4 Warehouse Employees
- 4 Correctional Cooks
- 1 Laundry/Dry Cleaning Specialist
- 1 Recreation Specialist
- 9 Administrative/Clerical
- 1 Institutional Chaplain

Friday 7:30 am - 8:30 am ends @ 10:30 am
12:00 pm - 2:00 pm ends @ 4 pm

92713-

Fax 702-879-1304
Cathy Roshanka Smith R.
Fri Sat Sun
Afternoon

CERTIFICATE OF SERVICE BY MAILING

I, ERICK M. BROWN, hereby certify, pursuant to NRCP 5(b), that on this 10
day of April, 2021, I mailed a true and correct copy of the foregoing, "Writ
of Habeas Corpus Covid-19- Concerns"
by placing document in a sealed pre-postage paid envelope and deposited said envelope in the
United State Mail addressed to the following:

Clock of The Court
200 Lewis Ave 3rd Fl.
LV, NV 89155

CC: FILE

DATED: this 10 day of April, 2021.

Erick M. Brown
ERICK M. BROWN # 92712
/In Propria Personam
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

ERICK M. BROWN # 92713
P.O. Box 208
Indian Springs, Nevada
89070

CLERK of The Court
200 Lewis Ave. 3rd FL.
LAS VEGAS, Nevada
89155



1024



89155

U.S. POSTAGE PA
FOR LOEWY
LOS ANGELES, CA
90047
MAY 08, 21
AMOUNT
\$1.60
R2305124816-12

Heather J. Smith
CLERK OF THE COURT

Case No. A-21-834478-W

Dept. No. 14

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

ERICK M. BROWN
Plaintiff,

vs.

Warden, William Hutchings,
et al. Defendants.

Case No. A-21-834478-W

Dept No. 14

Docket _____

"EMERGENCY EVIDENTIARY"
HEARING REQUESTED

NOTICE OF MOTION

YOU WILL PLEASE TAKE NOTICE, that Petition for Writ of Habeas
Corpus, due to the Corona Virus, Global Pandemic

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

CC:FILE

DATED: this 20 day of October, 2021.

BY: Erick M. Brown
ERICK M. BROWN #92713
/In Propria Personam

RECEIVED

OCT 26 2021

CLERK OF THE COURT

Heather L. Hume
CLERK OF THE COURT

CODE: 3860

Name: ERICK M. BROWN

Address: P.O. BOX 208
Indian Springs, NV 89070

Telephone: 0 N/A

Acting in Proper Person

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

ERICK M. BROWN

Plaintiff (Petitioner),

Case No. A-21-834478-W

vs.

Dept. No. 14

Warden, William Hutchings et.al.

Defendant (Respondent).

EMERGENCY EVIDENTIARY
HEARING REQUEST

REQUEST FOR SUBMISSION

I, ERICK M. BROWN, acting in Proper Person, request that the
Covid-19; Writ of Habeas Corpus filed on 5/12/2021
be submitted to the Court for consideration and determination.

I hereby certify that a copy of this Request has been mailed to all parties or their counsel.

DATE: 10/20/2021

Erick M. Brown
(Signature)

ERICK M. BROWN
(Name)

P.O. BOX 208
(Address)

Indian Springs, NV 89070

N/A
(Telephone Number)

RECEIVED

Doc. 700

CLERK OF THE COURT

OCT 26 2021

1 and is made and based upon the Memorandum of Points
2 and Authorities; exhibit's attached hereto, and any oral argu-
3 ments this Court may entertain.

4 POINTS And AUTHORITIES

5 The Supreme Court of Nevada (Sup. Ct. of Nev.) requires
6 that the petitioner of the Habeas relief be present at any
7 evidentiary hearing conducted concerning the merits of the
8 claim asserted in the Writ. See Gebers v. Nevada, 50 P.3d 1092
9 (2002).

10 My presence is required at the hearing, due to the fact
11 that I am needed as a witness.

12 The pleading to which this Motion does accompany, does
13 specifically request an "Evidentiary Hearing", that the
14 pleading raises substantial issues of fact, not belied by
15 the record as concerns events in which I participated in,
16 and about which only I can testify. Compare: U.S. v. Hayman,
17 342 U.S. 205 (1942).

18 While Petitioner's pleading does not contain any claims of
19 ineffective assistance of counsel, this Court too would err
20 should it make findings about issues contained in Petitioner's
21 pleadings, as the Court should fail to allow Petitioner to set
22 such restrictions as are expressly placed upon the legislature
23 by the Constitution of the State of Nevada (Const. of Nev.). See:
24 Mathews v. State ex rel. Nevada Tax Comm'n, 83 Nev. 266,
25 268 428 P.2d 371 (1967); Moore v. Humboldt County, 48 Nev. 397,
26 405, 232 Pac. 1078 (1925); County of Pershing v. Sixth Judicial
27 Dist. Court, 43 Nev. 78, 93, 181 Pac. 966, (1919) (citing Gibson v.
28 Mason, 5 Nev. 283 (1869))

Fact's: Petitioner (Brown), is currently housed at the Southern Desert Correctional Center (SDCC); P.O. Box 208 Indian Springs, NV 89070. (Brown) humbly files this "Emergency Petition For Writ of Habeas Corpus" with "Legal Equilibrium" and respectfully ask this Honorable Court to treat this as an urgent matter, and to treat it with the weight that it warrants. Petitioner (Brown), humbly request immediate relief.

Petitioner (Brown) contends that this "Emergency" Petition For Writ of Habeas Corpus, is based upon the Deadly Corona virus, i.e. Covid-19 Global Pandemic, the measures that America has taken to protect its citizens from contracting Covid-19, and how NDOC/SDCC Admn. et al. has blatantly ignored Federal mandates, and "State" Covid-19 directives, to prevent the spread of the deadly Covid-19 virus as well as saving human life.

The NDOC/SDCC et al., refused to implement Covid-19 guidelines; Prisons and Jails have long been associated with inordinately high transmission probabilities for infectious diseases. Early on physicians, public health officials, and the national Centers for Disease Control and Prevention (C.D.C.) sounded the alarm that prisons and Jails could become the "Epicenter of the [Covid-19] pandemic." (E.g. Klonsky, An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues, N.Y. Times (Mar. 16, 2020) <=> [as of Oct. 20, 2020].) The CDC's lengthy and detailed "Guidance for Correctional & Detention Facilities" repeatedly emphasizes the vital nature of Social Distancing for reducing the virus.

Specifically (Brown) contends that he can unequivocally provide factual material evidence of NDOC/SDOC et al. complete disregard for Petitioner's pre-existing medical conditions, in the face of the Pandemic, which took it's greatest toll among African American's, such as (Brown) whom suffer's from; High Blood Pressure; Diabeties and poor nutrition. Compounded with congregate living situations at NDOC/SDOC et al. and the aged dilapidated facility with (POOR) ventilation and sanitation problems, It is morally indefensible and Constitutionally untenable not to immediately adopt and implement measures designed to permit physical distancing among inmates, including eliminating double celling and Dormitory housing.

It is deliberate indifference, in violation of U.S. Const. 8th Amendment and Nevada State Constitution (Nev. Const.) Article (Art.) Art. 1, § 8 for NDOC/SDOC et al., to disregard the (Scientist) medical experts, Opinion, (findings; report), Guidelines; State Directives etc...

Prison officials may not be deliberately indifferent to the exposure/contraction of a serious, deadly communicable disease as Covid-19, and the placement of prisoner's in places to which infectious diseases could easily spread constitutes a Constitutional violation. Deliberate indifference may be proven by circumstantial evidence and it may be inferred from the very fact that the risk was obvious.

In a life-threatening "EMERGENCY" like that posed by Covid-19, NDOC/SDOC et al., has the power to remove all persons incarcerated at SDOC/NDOC, not just non-violent

1 offender's. An Eighth Amendment claimant need not show
2 a prison official acted or failed to act believing that harm
3 actually would befall an inmate; it is enough that the
4 official acted or failed to act despite knowledge of a
5 substantial risk of serious harm, in Petitioner (Brown's)
6 Case, Covid-19 pose a threat of imminent "DEATH"
7 to (Brown's) pre-existing health conditions. Whether
8 a prison official had the requisite knowledge of a
9 substantial risk is a question of fact subject to
10 demonstration in the usual ways, including inference
11 from circumstantial evidence, citation, and a factfinder
12 may conclude that a prison official knew of a substan-
13 tial risk from the very fact that the risk was obvious.

14 Prisoners retain the essence of human dignity
15 inherent in the power to issues of all persons. Human
16 dignity animates the 8th Amend. U.S. Const. (Nev. const.)
17 Art. 1, § 8 and prohibits cruel and unusual punishment
18 as well as Due Process of Law. The basic concept
19 underlying U.S. Const. 8th Amend., is nothing less than
20 the dignity of people. A prison that deprives prisoners of
21 basic sustenance, including adequate medical care, is
22 incompatible with the concept of human dignity and
23 has no place in civilized society.

24 Petitioner maintains NDOC/SACC et.al. rejections of
25 the views of the World Health Organization, and the
26 Centers for Disease Control and prevention recommend-
27 ations; Guidelines, Scientist conclusion; Gov. Sisolak's

1 Covid-19 directives, constitutes the "deliberate
2 indifference" necessary to sustain claims under the
3 cruel and/or usual custody provisions of the State
4 and Federal Constitution. Estelle v. Gamble (1976)
5 429 U.S. 97, 103 [50 L. Ed. 2d 251, 97 S. Ct. 285];
6 Inmates of the Riverside County Jail v. Clark (1983)
7 144 Cal. App. 3d 850, 859 [92 Cal. Rptr. 823]; Hutto
8 v. Finney (1978) 437 U.S. 678, 682 [57 L. Ed. 2d 522, 98
9 S. Ct. 2565].)

10 Petitioner argues the risk to (Brown's) health and
11 life were well known to NDOC/SDCC et.al. and obvious,
12 rejection/non-compliance, of Scientist; W.H.O.;
13 C.D.C.; state of Nevada Covid-19 (directives) restric
14 tions, social distancing etc... Must be deemed reckless
15 under the analysis prescribed by the United States
16 Supreme Court in Farmer v. Brennan (1994) 511 U.S.
17 825 [128 L. Ed. 2d 811, 114 S. Ct. 1970] (Farmer).

18 Despite (2020) being a Global Pandemic, dominated by
19 Covid-19, the situation at (SDCC) is clearly exigent,
20 as human lives are at stake, and the prompt response, by
21 this court is warranted.

22 "Deliberate indifference" is established where the
23 challenged deficiency is "sufficiently serious" and prison
24 officials "know[] that Petitioner face a substantial risk
25 of serious harm, and disregard that risk by failing to
26 take reasonable measures to abate it" (Farmer Supra)

27 NDOC/SDCC et.al. treated Petitioner (Brown) with

1 "deliberate indifference to serious medical needs."
2 (Estelle at p. 10⁴). Petitioner (Brown) whom is a
3 Covid-19 survivor, has suffered a great ordeal at
4 the hands of these corrupt state officials, this disaster is
5 not over yet. A 75% infection rate indicates that a
6 substantial portion of the population could still get Covid-19,
7 become seriously ill or die. At present NDOC/SDCC et al.
8 Southern Desert Correctional Center remains unsafe for
9 (Petitioner), staff, and other's entering the facility.

10 Petitioner further contends, "NO" health treatment
11 was provided to Covid-19 survivor (Brown), Prior; during;
12 Post: outbreak. No medication was provided to Petitioner,
13 while (Brown) was suffering from the long list of Covid-
14 19 symptoms. Furthermore these corrupt state officials,
15 placed (Brown) in greater danger, by moving Petitioner
16 inside a one (1) man cell in Unit No. 2 with another
17 offender that tested positive for Covid-19 and displayed
18 different ailments than Petitioner, placing (Brown) in the
19 path of imminent "DEATH."

20 Petitioner (Brown), has to live in fear of re-infection,
21 or "DEATH" at the hands of these incompetent NDOC/SDCC
22 et al. medical personnel, statistics, show that (Brown) is at a
23 heightened risk of "DEATH" from Covid-19, these facts are
24 supported by NDOC/SDCC et al. medical records.

25 NDOC/SDCC et al., refusal to "RELEASE", consider any
26 offender who have committed violent offenses, as part of it's
27 Covid-19 response is at odds with judicial, legislative and
28 ACADEMIC recognition of this correlation.

1 In a life threatening emergency liked that posed by
2 Covid-19; NDOC/SDOC et. al, Gov. Sisolak and the
3 "Department of Health and Human Services", Memo
4 dated Jan. 4, 2021, attempts to defraud Petitioner
5 (Brown), by asserting on pg. 3 of 4, "Southern Desert
6 Correctional Center."

7 (1). Equipment not sanitized

8 (the pot wash high temperature dish machine was
9 disrepair and not sanitizing).

10 (2). Equipment not sanitized

11 (the chow hall high temperature dish machine was
12 in dispair and not sanitizing).

13 Petitioner, through "EYEWITNESS?"

14 testimony upon, years; upon year's; upon year's of
15 operation of the Corrupt practices of NDOC/SDOC et. al
16 and Justin "Oswald" Reyes Culinary on has unlawfully,
17 without legal authority "Fresh Milk" Non-fat Milk, from the
18 NDOC, C.M.O. approved menu, and SDOC exc. staff,
19 blatantly turn a blind eye, their just inmates, well
20 I was always taught "Bullie's" steal Milk \$\$, NDOC
21 allocates funds for fresh Milk, and the C.M.O. approved menu
22 mandates fresh non-fat milk, "NOT" non-Dairy creamer
23 and call it dry milk. NDOC/SDOC et. al. Refuse to adequately
24 feed me during this Global Pandemic, (Post, Prior, during)
25 causing me to always maintain a weak immune system,
26 in un-sanitary conditions five (5) years prior to the
27 Corona Virus outbreak by operating the SDOC culinary

1 with "NO" Hot Water, creating an unhealthy, deadly
2 encounter everytime (Brown) enters the SDCC
3 culinary for his daily meals. This fraudulent Health
4 dept. Memorandum, is false, misleading, created to
5 further violate Petitioner's State and Federal Consti-
6 tutional rights. Instead of stating the truth, the
7 report, asserts "Fraud" and misrepresentations of
8 the "FACT", there is "NO" HOT WATER, so how does
9 SDCC/NDOC past inspection when there is no way
10 to properly sanitize a kitchen that feeds thousands of
11 human beings (3) meals a day (7) day a week, 365
12 days a year for (5) years (Prior, during, Post)
13 Covid-19, these Barbarians do not care about human
14 life, and should not be in control of any Penal System.

15 NDOC/SDCC et. al. placed me in danger of imminent
16 DEATH, by operating the culinary with "NO" Hot Water and
17 compromising my immune system, by not providing
18 my body with fresh Milk instead of "Poison" non-dairy
19 Creamer.

20 CONCLUSION

21 Petitioner, (Brown), prays that this Court will
22 hold these NDOC/SDCC et. al. accountable for their un-
23 lawfull actions, deliberate indifference to the
24 "Highly Contagious" and Deadly Corona-Virus, i.e.
25 Covid-19, Constituting a violation of (Browns), 8th Amend.
26 against cruel and unusual punishment, 14th Amend.
27 Violations of Due Process as well countless other violations

1 to be later addressed.

2 Facts: Some time in Dec. 2020 Petitioner (Brown)
3 was infected with the deadly Covid-19, while being
4 unlawfully housed at NDOC/SOCC et al dilapidated facility,
5 with little to "NO" ventilation, no proper nutrition added
6 to assist Petitioner's immune system against this deadly
7 virus, that has exacerbated my already pre-existing
8 conditions, that places me in imminent risk of death.

9 Petitioner has been physically forced to watch another
10 human die, causing severe depression and physical trauma
11 and other mental health issues.

12 Petitioner contends these action taken by NDOC/SOCC
13 et al, to protect Petitioner fall well below the threshold
14 of In re Von Steich, on Habeas Corpus, or Farmer v. Brennan
15 and constitute a violation of my 8th Amend rights, by
16 not providing social distancing, double man celling,
17 Dormitory style housing, adequate medical, proper ventilation,
18 adequate sanitation, adequate nutrition etc... Remedy:
19 immediate Release!!!

20 Dated this 10, of April 2021 Erik M. Brown
21 Petitioner.
22
23
24
25
26
27
28

Siege Sisolak
Governor

Richard Whitley, MS
Director



DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Division of Public and Behavioral Health
Helping people. It's who we are and what we do.



Lisa Sherych
Administrator

Ihsan Azzam, Ph.D., M.D.
Chief Medical Officer

January 04, 2021

MEMORANDUM

To: Charles Daniels, Director
Nevada Department of Corrections

Through: Ihsan Azzam, PhD, MD
Chief Medical Officer, DPBH

From: Vincent Valiente, REHS, EHS III
For Paul Shubert, Chief, DPBH

Subject: Prison Commission Meeting

(Deceptive; Fraudulent; Misleading)

As required by the Nevada Revised Statutes (NRS) 209.382, NRS 444.330 and NRS 446.885, the Division of Public and Behavioral Health (DPBH) conducts regular inspections of State Correctional Facilities. These inspections include:

- a) Medical and Dental Services based upon *Standards for Medical Facilities* as provided in Chapter 449 of NRS.
- b) Nutritional Adequacy of Diet based on *National Dietary Guidelines*. Inspections of diet adequacy take in consideration religious and/or medical dietary recommendations for individual offenders, and adjustments of dietary allowances for age, sex, and level of activity.
- c) Sanitation, Healthfulness, Cleanliness and Safety of various institutions and correctional facilities which include a focus on food safety practices.

DIETARY INSPECTIONS (Table 1) "Critical Violations Identified During Annual Dietary Inspections of State Prisons." Summarizes information obtained during the inmate nutritional adequacy verification process in 2020. Additionally, it summarizes critical violations identified during annual dietary inspections conducted at each state correctional facility starting from 2014 to the present time.

MEDICAL SURVEYS (Table 2) "Deficiencies Identified During Medical Surveys Conducted" Two state correctional facilities are medically inspected each year. This survey summarizes deficiencies or violations identified since the start medical inspections.

Note: The letter "X" in Table 1 and Table 2 signifies a critical violation, or a deficiency identified during inspections and surveys.

- Ely State Prison
 1. Handwashing sink not operational
(A handwashing sink near the dishwashing area was in disrepair).
 2. Holding equipment at improper temperature
(An electric hot and cold holding box was not at the required temperature).
- Southern Desert Correctional Center
 1. Equipment not sanitized
(The pot wash high temperature dish machine was in disrepair and not sanitizing).
 2. Equipment not sanitized
(The chow hall high temperature dish machine was in disrepair and not sanitizing).

MEDICAL/DENTAL INSPECTIONS (Table 2)

- ELY STATE PRISON (ESP) inspected on (10/14/20).
 1. Life Safety Code
(Fire rated, self-closing doors were observed held open by door chocks. The door chocks were preventing the doors from operating as designed).
 2. Infection Control
(Damage to the vinyl upholstery covering of four wheelchairs were observed).
 3. Nursing Services; Laboratory Testing
(Quality Control logs lacked documented evidence quality controls were completed for the blood glucose machines).
- WARM SPRINGS CORRECTIONAL CENTER (WSCC) inspected on 10/22/20:
 1. Sterilizer testing, maintenance, and training
(The "Sterilization of Medical and Dental Instruments" policy was not being followed at time of survey. Biological testing of the facilities autoclave was not occurring once a week as per policy).
 2. Pharmaceutical Services
(Multiple expired medications/medical supplies/biologicals were observed at time of survey).


*The NDOC Compliance Enforcement Officer ensured corrective actions will be promptly taken by the facility for critical violations which could not be corrected by the end of each inspection.

Critical Violations Identified During Annual Dietary Inspections of State Prisons


30

EXHIBIT "B"

Nevada Department of Corrections		About NDOC	Contact Us	FAQ	Search
----------------------------------	--	------------	------------	-----	--------



**Southern Desert Correctional Center
Three Lakes Valley Conservation Camp
and Three Lakes Valley Boot Camp**

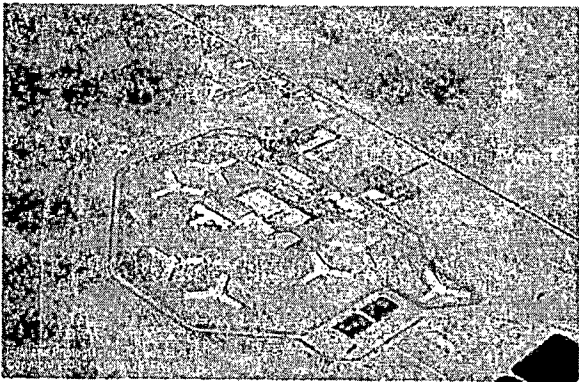


NDOC Home > Correctional Facilities > Southern Desert Correctional Center

Home

- [NDOC Home](#)
- [Administrative Regulations](#)
- [Board of Prison Commissioners](#)
- [Conservation Camps](#)
- [Contact Us](#)
- [Correctional Facilities](#)
 - [Elv State Prison](#)
 - [Florence McClure Women's CC](#)
 - [High Desert State Prison](#)
 - [Lovelock Correctional Center](#)
 - [Nevada State Prison](#)
 - [Northern Nevada Correctional Center](#)
 - [Northern Nevada Reinstitution Center](#)
 - [Southern Desert Correctional Center](#)
 - [Warm Springs Correctional Center](#)
- [Director Howard Skolnik](#)
- [Education Services](#)
- [Escapes/Walk-away Inmates](#)
- [Family Services Division](#)
- [Information Services \(MIS\)](#)
- [Inmate Banking Services](#)
- [Inmate Information](#)
- [Medical Division](#)
- [NOTIS \(Offender Records\)](#)
- [Offender Search](#)
- [Personnel Division](#)
- [Psych Panel Agendas](#)
- [Puppies up for Parole](#)
- [Re-Entry Task Force](#)
- [Restoration of Civil Rights](#)
- [Sentence Estimates \(PDF\)](#)
- [Silver State Prison Industries](#)
- [Statistics](#)
- [Victims' Information](#)
- [Visiting Information](#)
- [Volunteer Information](#)

Southern Desert Correctional Center,
20825 Cold Creek Rd.
P. O. Box 208
Indian Springs, NV 89070
702-879-5472 ext 201



Administrative Staff:

Brian E. Williams Sr., Warden

Jerry Howell, Associate Warden for Operations

Cheryl Burson, Associate Warden for Programs

Historical:

Located in Clark County, just North of Las Vegas, Southern Desert Correctional Center, the department's fourth major institution, was opened in February 1982 with seven 102 cell housing units, one of which housed federal prisoners but was added to the state's population in 1987. Each 60 square foot cell housed one inmate at that time. A new 200 cell housing unit was opened in 1989 and, most recently, two 240 bed dormitory style housing units were opened in March of 2008 bringing the population capacity from 714 in 1982 to the present day population capacity of 2106.

Staffing:

In addition to our staff of 192 Protective Service staff, Southern Desert Correctional Center employs a number of professional and skilled staff:

- 31 Program Staff (including Education Principal, AA and Braille)
- 12 Skilled Maintenance Personnel
- 4 Warehouse Employees
- 4 Correctional Cooks
- 1 Laundry/Dry Cleaning Specialist
- 1 Recreation Specialist
- 9 Administrative/Clerical
- 1 Institutional Chaplain

State of Nevada Links

- [State of Nevada Home Page](#)
- [State Purchasing - RFP Opportunities](#)
- [Silver Source Forms Portal](#)
- [Governor's Executive Budget for 2007-2009 \(Adobe PDF Format\)](#)
- [Click here to download Adobe Acrobat Reader](#)

92713 -

Friday 7:30 - 12:00 ends @ 4:30

Sax 702-879-1204

Dan Roskanda Smith

Fri Sat Sun
afternoon

11/2/2010

Exhibit "C"

NAME ERICK BROWN ID# 92713 Unit/Cell#: 12-B-2 X

FACILITY SDCC DATE 12/27/20 SIGNATURE Erik

Request

I need my results from All (4)
of my Covid-19 test and I need a
cold set up

INMATES - DO NOT WRITE IN AREA BELOW
ASSIGNED TO

☐ Medical ☐ Dental ☐ Psychiatry ☐ Nursing ☐ Other _____

Response to request

According to the list, you tested POSITIVE on 12/21/2020
~ Cold Pack with next pull call

- ☐ Appointment scheduled/rescheduled for: _____
☐ No visit necessary
☐ No show for appointment
☐ Refused to be seen. DOC 2523 Release of Liability signed

PRESCRIPTIONS

☐ KOP ☐ NON-KOP
☐ Order date _____

PLAN

☐ Follow-up appointment _____ ☐ Return if needed
☐ No follow-up required

Signature of practitioner/responder [Signature]

Date 12/29/2020

NEVADA DEPARTMENT OF CORRECTIONS
MEDICAL KITE and SERVICE REPORT

CERTIFICATE OF SERVICE BY MAILING

I, ERICK M. BROWN, hereby certify, pursuant to NRCP 5(b), that on this 20
day of October, 2021, I mailed a true and correct copy of the foregoing, "~~Not~~ Petition
For Writ of Habeas Corpus, Due to the Global Pandemic"
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 20 day of October, 2021.

Erick M. Brown
ERICK M. BROWN # 92713
/In Propria Personam
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Petition for
Writ of Habeas Corpus, due to the Global Pandemic
(Title of Document)

filed in District Court Case number A-21-834478-W

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

-OR-

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

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

(State specific law)

-or-

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

Erick M. Brown
Signature

10/20/2021
Date

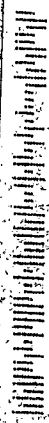
ERICK M. BROWN
Print Name

Pro Se
Title

ERICK M. BROWN-992713

P.O. BOX 208

Indian Springs, NY 89070



Clerk of The Court
200 Lewis Ave 3rd Fl
Las Vegas, NY 89155

recipient

FIRST-CLASS MAIL

10/22/2021

USPS001.76



ZIP 89101
041W12254121

DISTRICT COURT
CLARK COUNTY, NEVADA

Electronically Filed
11/23/2021 9:34 AM
Steven D. Grierson
CLERK OF THE COURT



Erick Brown, Plaintiff(s)

Case No.: A-21-834478-W

vs.

William Hutchings, Defendant(s)

Department 14

NOTICE OF HEARING

Please be advised that the Plaintiff's Request for Submission (Covid 19;Writ of Habeas Corpus) in the above-entitled matter is set for hearing as follows:

Date: January 13, 2022

Time: 10:00 AM

Location: RJC Courtroom 14C
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

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

STEVEN D. GRIERSON, CEO/Clerk of the Court

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

CERTIFICATE OF SERVICE

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

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



DISTRICT COURT
CLARK COUNTY, NEVADA

* * * *

ERICK BROWN, PLAINTIFF(S)	Case No.: A-21-834478-W
VS.	
WILLIAM HUTCHINGS,	DEPARTMENT 25
DEFENDANT(S)	

NOTICE OF DEPARTMENT REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled action has been reassigned to Judge Kathleen E. Delaney.

☒ This reassignment is due to: Administrative Reassignment

1-19-22 1:30pm Plaintiff's Request for Submission

ANY TRIAL DATE AND ASSOCIATED TRIAL HEARINGS STAND BUT MAY BE RESET BY THE NEW DEPARTMENT. PLEASE INCLUDE THE NEW DEPARTMENT NUMBER ON ALL FUTURE FILINGS.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Allison Behrhorst

Allison Behrhorst,
Deputy Clerk of the Court

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

CERTIFICATE OF SERVICE

I hereby certify that this 29th day of November, 2021

☒ The foregoing Notice of Department Reassignment was electronically served to all registered parties for case number A-21-834478-W.

/s/ Allison Behrhorst
Allison Behrhorst
Deputy Clerk of the Court



RSPN
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

DEPT NO: XXV

**STATE'S RESPONSE AND MOTION TO DISMISS PETITION FOR WRIT OF
HABEAS CORPUS DUE TO THE CORONAVIRUS GLOBAL PANDEMIC**

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

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through TALEEN PANDUKHT, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petition for Writ of Habeas Corpus Due to the Coronavirus Global Pandemic and Motion to Dismiss Pursuant to Laches.

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

//

//

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On 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. The State's Response now follows.

5 ARGUMENT

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

7 *A. Application of Procedural Bars is Mandatory*

8
9 The Nevada Supreme Court has held that the district court has a *duty* to consider
10 whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth
11 Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court
12 found that "[a]pplication of the statutory procedural default rules to post-conviction habeas
13 petitions is mandatory," noting:

14
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
time when a criminal conviction is final.

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

22 This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013).
23 There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of
24 the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307
25 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's
26 petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The
27 procedural bars are so fundamental to the post-conviction process that they must be applied
28 by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

1 *B. This Fifth Petition is Time-Barred*

2 This Fifth Petition is time-barred. The instant petition was not filed within the one-year
3 statutory limit after the date of Remittitur. Thus, this Petition is time-barred pursuant to NRS
4 34.726(1):

5 Unless there is good cause shown for delay, a petition that
6 challenges the validity of a judgment or sentence must be filed
7 within 1 year of the entry of the judgment of conviction or, if an
8 appeal has been taken from the judgment, within 1 year after the
9 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:

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

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

17 The one-year time limit for preparing petitions for post-conviction relief under NRS
18 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002),
19 the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite
20 evidence presented by the defendant that he purchased postage through the prison and mailed
21 the petition within the one-year time limit.

22 This is not a case wherein the Judgment of Conviction was, for example, not final. See,
23 e.g., Johnson v. State, 133 Nev. 571, 402 P.3d 1266 (2017) (holding that the defendant's
24 judgment of conviction was not final until the district court entered a new judgment of
25 conviction on counts that the district court had vacated); Whitehead v. State, 128 Nev. 259,
26 285 P.3d 1053 (2012) (holding that a judgment of conviction that imposes restitution in an
27 unspecified amount is not final and therefore does not trigger the one-year period for filing a
28 habeas petition).

1 Given that Petitioner's Judgment of Conviction was never vacated, there is no legal
2 basis for running the one-year time-limit from anything but the date of Remittitur. Remittitur
3 issued on October 9, 2007. Thus, Petitioner had one year from October 9, 2007, to file this
4 Petition. Petitioner did not file the instant Petition until May 12, 2021, over thirteen (13) years
5 late. Absent a showing of good cause to excuse this delay, this Petition must be denied.

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

7 Under NRS 34.810(2) "[a] second or successive petition must be dismissed if the judge
8 or justice determines that it fails to allege new or different grounds for relief and that the prior
9 determination was on the merits or, if new and different grounds are alleged, the judge or
10 justice finds that the failure of the petitioner to assert those grounds in a prior petition
11 constituted an abuse of the writ." Second or successive petitions will only be decided on the
12 merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State,
13 110 Nev. 349, 358, 871 P.2d 944, 950 (1994). The Nevada Supreme Court has stated: "Without
14 such limitations on the availability of post-conviction remedies, prisoners could petition for
15 relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive
16 and untimely petitions clog the court system and undermine the finality of convictions."
17 Lozada, 110 Nev. at 358, 871 P.2d at 950.

18 The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly
19 require a careful review of the record, successive petitions may be dismissed based solely on
20 the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In
21 other words, if the claim or allegation was previously available with reasonable diligence, it is
22 an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467,
23 497-498 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112
24 P.3d at 1074.

25 Here, Petitioner filed his First Petition on October 10, 2008. This Court denied the
26 Petition and filed its Findings of Fact, Conclusions of Law and Order on February 13, 2012.
27 On October 17, 2013, Petitioner filed his Second Petition. This Court denied Petitioner's
28 Second Petition on January 8, 2014. On April 16, 2018, Petitioner filed his Third Petition. On

1 April 30, 2018, Petitioner filed his Fourth Petition. On May 30, 2018, this Court denied
2 Petitioner's Third Petition. On June 27, 2018, this Court denied Petitioner's Fourth Petition.

3 To the extent that any claims raised were raised previously, and denied on the merits,
4 said claims are successive and would be governed by res judicata and/or law of the case.¹ To
5 the extent that Petitioner is raising new claims, this is an abuse of the Writ. Therefore, absent
6 a showing of good cause and prejudice, Petitioner's claims are procedurally barred.

7 *D. The State Affirmatively Pleads Laches*

8 Certain limitations exist on how long a defendant may wait to assert a post-conviction
9 request for relief. Consideration of the equitable doctrine of laches is necessary in determining
10 whether a defendant has shown 'manifest injustice' that would permit a modification of a
11 sentence. Hart v. State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000), overruled on other
12 grounds by Harris v. State, 130 Nev. 435, 329 P.3d 619 (2014). In Hart, the Nevada Supreme
13 Court stated: "Application of the doctrine to an individual case may require consideration of
14 several factors, including: (1) whether there was an inexcusable delay in seeking relief; (2)
15 whether an implied waiver has arisen from the defendant's knowing acquiescence in existing
16 conditions; and (3) whether circumstances exist that prejudice the State. See Buckholt v.
17 District Court, 94 Nev. 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

18 NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period
19 exceeding five years [elapses] between the filing of a judgment of conviction, an order
20 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of
21 conviction and the filing of a petition challenging the validity of a judgment of conviction..."
22 The Nevada Supreme Court has observed, "[P]etitions that are filed many years after
23 conviction are an unreasonable burden on the criminal justice system. The necessity for a
24 workable system dictates that there must exist a time when a criminal conviction is final."
25 Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the
26 statute requires the State plead laches. NRS 34.800(2).

27
28 ¹ See Excc. Mgmt. v. Ticor Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998); Scalfon 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 Here, over five (5) years have passed since remittitur issued in this case. Accordingly,
2 the State would be prejudiced by the filing of this document. Therefore, Petitioner's claim is
3 barred pursuant to the doctrine of laches.

4 *E. Petitioner Fails to Demonstrate, or Even Address, Good Cause*

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

10 “To establish good cause, appellants *must* show that an impediment external to the
11 defense prevented their compliance with the applicable procedural rule.” Clem v. State, 119
12 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev.
13 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external
14 impediment could be “that the factual or legal basis for a claim was not reasonably available
15 to counsel, or that ‘some interference by officials’ made compliance impracticable.”
16 Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106
17 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v.
18 Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition
19 must not be the fault of the petitioner. NRS 34.726(1)(a).

20 The Nevada Supreme Court clarified that a defendant cannot attempt to manufacture
21 good cause. See Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a
22 “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at 251, 71 P.3d at
23 506; (quoting Colley v. State, 105 Nev. at 236, 773 P.2d at 1230). Excuses such as the lack of
24 assistance of counsel when preparing a petition, as well as the failure of trial counsel to forward
25 a copy of the file to a petitioner have been found not to constitute good cause. See Phelps, 104
26 Nev. at 660, 764 P.2d at 1306, superseded by statute on other grounds as recognized in Nika
27 v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890
28 P.2d 797 (1995).

1 Further, a petitioner raising good cause to excuse procedural bars must do so within a
2 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34
3 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see
4 generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably
5 available to the petitioner during the statutory time period did not constitute good cause to
6 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good
7 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446,
8 453 120 S. Ct. 1587, 1592 (2000).

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

15 Additionally, Petitioner’s entire claim relies upon his exposure to COVID-19 while in
16 prison. He argues that he has pre-existing conditions but has not provided documentation from
17 certified medical professionals that he is personally at a heightened risk for COVID-19, or that
18 the NDOC is incapable of addressing his medical needs should he contract COVID-19.
19 Moreover, while Petitioner claims to have diabetes, he has not established that those with high
20 blood pressure are at a higher risk of suffering from COVID-19. Given that there is no evidence
21 that Petitioner’s health issues place his at greater risk than any other inmate, or that the NDOC
22 is incapable of appropriately addressing and managing his health issues, he has not
23 demonstrated that he is at a higher risk of contracting COVID-19.

24 Further, Petitioner has not established that the NDOC is incapable of managing and
25 treating any health issues he may currently have or could develop. Petitioner has not
26 established that he has access to health insurance or a doctor available to prescribe medication
27 needed if he should be released. Petitioner has not even established that he would have the
28 same access to a face mask, which the NDOC has provided to their inmates. COVID-19 has

1 placed increased strain on all aspects of society, not simply the prison system. Even if released,
2 Petitioner would still need treatment due to his high blood pressure and diabetes. As such,
3 Petitioner has not established that he is more at risk of contracting COVID-19 in prison.

4 Petitioner's argument is merely speculation that the NDOC are not taking the proper
5 measures against COVID-19. Such speculation is insufficient to overcome the procedural bars
6 of establishing good cause. As such, this Court should find that Petitioner fails to demonstrate
7 good cause.

8 *F. Petitioner Cannot Establish Prejudice*

9 In order to establish prejudice, Petitioner must show “not merely that the errors of [the
10 proceedings] created possibility of prejudice, but that they worked to his actual and substantial
11 disadvantage, in affecting the state proceedings with error of constitutional dimensions.”
12 Hogan v. Warden, 109 Nev. at 960, 860 P.2d at 716 (1993) (quoting United States v. Frady,
13 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). Petitioner's procedural defaults cannot be
14 excused because his underlying claim is meritless.

15 In this case, Petitioner cannot establish prejudice to ignore the procedural defaults
16 because his claims are without merit and belied by the record, as will be further discussed in
17 more detail below. “Bare” and “naked” allegations are not sufficient to warrant post-conviction
18 relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502,
19 686 P.2d 222, 225 (1984). “A claim is ‘belied’ when it is contradicted or proven to be false by
20 the record as it existed at the time the claim was made.” Mann v. State, 118 Nev. 351, 354, 46
21 P.3d 1228, 1230 (2002). As Petitioner cannot satisfy the basis of his claims, he cannot
22 demonstrate sufficient prejudice to ignore the procedural defaults.

23 **II. A PETITION FOR WRIT OF HABEAS CORPUS IS NOT THE CORRECT** 24 **LEGAL VEHICLE TO BRING THIS CHALLENGE**

25 It is well established that “a petition for writ of habeas corpus may challenge the validity
26 of current confinement, but not the conditions thereof.” Bowen v. Warden of Nevada State
27 Prison, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984). The rise of COVID-19 does not relate
28 to the validity of his confinement. Like other adverse aspects of being incarcerated that are

1 unrelated to a defendant's sentence (such as an increased risk of experiencing inmate
2 violence), Petitioner's risk of exposure to COVID-19 is a condition of his confinement. See
3 Farmer v. Brennan, 511 U.S. 825, 833–34, 114 S. Ct. 1970, 1976–77 (1994) (discussing inmate
4 violence as a condition of confinement). As such, Petition is challenging the conditions of his
5 confinement, and not the constitutionality of his sentence.

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

8 **We have repeatedly held that a petition for writ of habeas**
9 **corpus may challenge the validity of current confinement, but**
10 **not the conditions thereof.** See Director, Dep't Prisons v. Arndt,
11 98 Nev. 84, 640 P.2d 1318 (1982); Rogers v. Warden, 84 Neb.
12 539, 445 P.2d 28 (1968); Rainsberger v. Leypoldt, 77 Nev. 399,
13 365 P.2d 489 (1961), cert. denied, 368 U.S. 516, 82 S.Ct. 530, 7
14 L.Ed.2d 522 (1962). In Rogers, we held that a claim of brutal
15 treatment at the hands of prison officials was not cognizable on a
16 habeas petition, because the claim spoke to the conditions and not
17 the validity of confinement. In Arndt, we left open the specific
18 question raised by this appeal, whether the imposition of a
19 qualitatively more restrictive type of confinement within the
20 prison, such as punitive segregation, may be challenged by a
21 petition for writ of habeas corpus. We now hold that such a
22 challenge speaks only to the conditions of confinement and
23 therefore may not be raised by a habeas corpus petition. See
24 Rogers v. Warden, *supra*.

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

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

1 Accordingly, the appropriate vehicle to challenge a condition of confinement would be
2 to file a 42 U.S.C. § 1983 claim and argue that an individual's lawful incarceration has exposed
3 them to certain harms while incarcerated.² Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct.
4 1970, 1976, 128 L. Ed. 2d 811 (1994) ("The Constitution 'does not mandate comfortable
5 prisons,' Rhodes v. Chapman, 452 U.S. 337, 349, 101 S.Ct. 2392, 2400, 69 L.Ed.2d 59 (1981),
6 but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner
7 receives in prison and the conditions under which she is confined are subject to scrutiny under
8 the Eighth Amendment,' Helling, 509 U.S. at 31, 113 S.Ct. at 2480.").

9 A review of both this State's and the Supreme Court's jurisprudence shows that issues
10 such as: excessive force used by prison officials (see Farmer v. Brennan, 511 U.S. 825, 832,
11 114 S. Ct. 1970, 1976, 128 L. Ed. 2d 811 (1994)); lack of access to appropriate medical care
12 (Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251 (1976)); the use of
13 cruel punishments within a prison (Hope v. Pelzer, 536 U.S. 730, 737–38, 122 S. Ct. 2508,
14 2514, 153 L. Ed. 2d 666 (2002)); the danger of inmate on inmate violence (Butler ex rel. Biller
15 v. Bayer, 123 Nev. 450, 459, 168 P.3d 1055, 1062 (2007)); and the use of punitive segregation
16 (Bowen v. Warden of Nevada State Prison, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984)), are
17 all addressed under a conditions of confinement analysis (or a similar analysis considering
18 whether the conduct of the prison staff was indifferent). This Court should therefore decline
19 Petitioner's invitation to walk away from United States Supreme Court and Nevada Supreme
20 Court precedent.

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

26
27
28 ² Compare to McConnell v. State, 125 Nev. 243, 249, footnote 5, 212 P.3d 307, 311, footnote
5 (2009) (The correct way to challenge the mode of execution is a separate and independent
42 U.S.C. §1983 action.).

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

5 **III. PETITIONER CANNOT DEMONSTRATE THAT HIS SENTENCE**
6 **VIOLATES THE NEVADA AND UNITED STATE CONSTITUTIONS'**
7 **PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT**

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

12 The United States Supreme Court has addressed claims regarding conditions of
13 confinement, and whether such conditions, though not pronounced as “punishments” by
14 statute or by the sentencing court, could violate the Eighth Amendment. In Wilson v. Seiter,
15 501 U.S. 294, 111 S.Ct. 2321 (1991), the Court dealt with a complaint that prison conditions
16 constituted cruel and unusual punishment. Such conditions included “overcrowding, excessive
17 noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation,
18 unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and
19 housing with mentally and physically ill inmates.” Id. at 296, 111 S.Ct. at 2323. The Court
20 explained: “a prisoner advancing such a claim must, at a minimum, allege ‘deliberate
21 indifference’” on the part of prison officials. Id. at 297, 111 S.Ct. at 2323; accord Estelle v.
22 Gamble, 429 U.S. 97, 97 S.Ct. 285 (1976). The Wilson Court clarified, however, that mere
23 “allegations of ‘inadvertent failure to provide adequate medical care’ . . . *simply fail to*
24 *establish the requisite culpable state of mind.*” Id. (emphasis added). The United States
25 Supreme Court has since adopted a “subjective recklessness” standard for “deliberate
26 indifference” analyses regarding Eighth Amendment claims. Farmer v. Brennan, 511 U.S. 825,
27 837-40, 114 S.Ct. 1970, 1979-80 (1994) (expressly rejecting the adoption of some objective
28

1 standard, opting instead for a standard accounting for the risks involved and officials' efforts
2 – or lack thereof – to alleviate such risks).

3 Accordingly, in determining whether the conditions of confinement constitute cruel and
4 unusual punishment, the question is whether prison officials have displayed a deliberate
5 indifference to Petitioner's safety; or failed to undertake reasonable measures to ensure the
6 safety of prisoners. See Farmer, 511 U.S. at 829, 114 S. Ct. at 1974; see also Hudson v. Palmer,
7 468 U.S. 517, 526–527, 104 S.Ct. 3194, 3200, 82 L.Ed.2d 393 (1984). The United States
8 Supreme Court has analogized displaying a deliberate indifference with recklessly
9 disregarding a risk. Farmer, 511 U.S. at 836, 114 S. Ct. at 1978. “[I]t is enough that the official
10 acted or failed to act despite a knowledge of a substantial risk of serious harm.” Id. at 842, 114
11 S. Ct. at 198-81.

12 Recently, in U.S. v. Dade, the Ninth Circuit held in that the COVID-19 pandemic and
13 risk of contracting the virus in prison does not warrant release if the risks are being adequately
14 addressed. 959 F.3d 1136, 1139 (9th Cir. 2020). The Court further explained that even if the
15 risks are not being adequately addressed, transferring the defendant to a different facility, as
16 opposed to release, would be more appropriate. Id. The Ninth Circuit has further explained
17 that granting release is appropriate only after a defendant establishes that they have serious
18 health issues and that the prison is incapable of treating those health concerns. In re Roe, 257
19 F.3d 1077, 1081 (9th Cir. 2001).

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

- 26 1. Running modified operations that limit travel between facilities
27 and restricted visitation at all facilities. This will be in-place until
28 corrections and medical experts at NDOC, working alongside
local and state government agencies, determine that the health and

1 safety of staff and offenders are no longer threatened by COVID-
2 19.

3 2. Each morning, all employees are being screened for symptoms of the
4 virus, including having their temperature taken. Anyone found with one
5 of the cardinal symptoms (fever of 100 degrees F or greater, shortness of
6 breath, dry cough, chills, muscle pain, new loss of taste or smell) are sent
7 home where they must obtain medical clearance or test negative for
8 COVID-19 before returning to work.

9 3. All personnel who do enter a secure facility are required to wear a face
10 covering.

11 4. Testing new arrivals at the intake units at High Desert State Prison and
12 Northern Nevada Correctional Center for COVID-19, and isolating
13 offenders who test positive in negative airflow cells.

14 5. The dissemination of the latest CDC guidance for staff and offenders,
15 including the Center of Disease Control's Stop the Spread of Germs
16 poster, in highly visible areas.

17 6. Surface Sanitation Teams, using a 10% bleach concentration,
18 thoroughly clean surfaces at all facilities.

19 7. Hand soap is readily available at every facility, both in cells and in
20 common areas. NDOC encourages all persons to frequently wash their
21 hands using warm soap and water for at least 20 seconds.

22 8. Prison Industries is manufacturing hand sanitizer, medical gowns, and
23 face coverings to ensure NDOC staff have access to these critical
24 supplies. PI is also manufacturing alcohol-free hand sanitizer and face
25 coverings for offenders.

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

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

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

Simple cloth face masks are no longer authorized for any
staff members/inmates/visitors at any time while on NDOC
property or sanctioned off-property movements except for
staff/inmates/visitors that have an underlying respiratory

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

condition. Exceptions to the mask requirement still include while eating/drinking (during this time ensure at least 6 feet of social distancing between yourself and other staff members) and while alone in your enclosed office or workspace away from inmates and/or other staff.⁴

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

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

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

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/.

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

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>.

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

8 Petitioner seems to imply that his risk of death from COVID-19 elevates his once
9 constitutional sentence to a death decree. As of the filing of this Response, there have been
10 three (3) deaths at Southern Desert Correctional Center where the inmates had COVID-19.¹⁰
11 Thus, allegations that a sentence of incarceration is akin to a sentence of death are hyperbolic.
12 For the foregoing reasons, the conditions of Petitioner's confinement cannot constitute cruel
13 and unusual punishment. As such, Petitioner's claim is meritless and should be denied.

14 **IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

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

- 16 1. The judge or justice, upon review of the return, answer and all
17 supporting documents which are filed, shall determine whether
18 an evidentiary hearing is required. A petitioner must not be
19 discharged or committed to the custody of a person other than the
20 respondent *unless an evidentiary hearing is held*.
- 21 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.
- 22 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.

23 (emphasis added).

24 The Nevada Supreme Court has held that if a petition can be resolved without
25 expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev.

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

28 ¹⁰STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF ANALYTICS,
Facilities with Reported Covid-19 Cases,
<https://app.powerbigov.us/view?r=cyJrIjoiNDMwMDI0YmQtNmUyYS00ZmFjLWl0MGltZDM0OTY1Y2Y0YzNhlwiwCI6ImU0YTM0MGU2LWI4OWU0tNGU2OC04ZWFlLTE1NDRkMjcwMzk4MCI9>.

1 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A
2 defendant is entitled to an evidentiary hearing if his petition is supported by specific factual
3 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled
4 by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100
5 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that “[a] defendant seeking post-conviction
6 relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the
7 record”). “A claim is ‘belied’ when it is contradicted or proven to be false by the record as it
8 existed at the time the claim was made.” Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

9 It is improper to hold an evidentiary hearing simply to make a complete record. *See*
10 State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) (“The
11 district court considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted
12 ‘to make as complete a record as possible.’ This is an incorrect basis for an evidentiary
13 hearing.”). Further, the United States Supreme Court has held that an evidentiary hearing is
14 not required simply because counsel’s actions are challenged as being unreasonable strategic
15 decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge
16 post hoc rationalization for counsel’s decision making that contradicts the available evidence
17 of counsel’s actions, neither may they insist counsel confirm every aspect of the strategic basis
18 for his or her actions. *Id.* There is a “strong presumption” that counsel’s attention to certain
19 issues to the exclusion of others reflects trial tactics rather than “sheer neglect.” *Id.* (*citing*
20 Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the
21 *objective* reasonableness of counsel’s performance, not counsel’s *subjective* state of mind. 466
22 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

23 Here, Petitioner seeks an evidentiary hearing. However, there is no reason to expand
24 the record as Petitioner’s claims are meritless. As discussed supra, Section II, Petitioner’s
25 assertions are improperly pled and thus should not even be heard by this Court. Even if a
26 Petition for Writ of Habeas Corpus were the proper way to address this issue, Petitioner is
27 unable to establish prison officials acted with deliberate indifference to his safety. As such, an
28

1 evidentiary hearing is not warranted. Therefore, Petitioner's request for an evidentiary hearing
2 should be denied.

3 **CONCLUSION**

4 Based on the foregoing, the State requests that this Court dismiss or deny the Petition
5 for Writ of Habeas Corpus Due to the Coronavirus Global Pandemic.

6 DATED this 5th day of October, 2022.

7 Respectfully submitted,

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

10
11 BY /s/ Taleen Pandukht

12 TALEEN PANDUKHT
13 Chief Deputy District Attorney
Nevada Bar #005734

14
15 **CERTIFICATE OF MAILING**

16 I hereby certify that service of the above and foregoing was made this 5th day of
17 January, 2022, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

18 ERICK BROWN, #92713
19 S.D.C.C.
20 PO BOX 208
INDIAN SPRINGS, NV 89070

21 BY /s/ E. Del Padre

22 E. DEL PADRE
23 Secretary for the District Attorney's Office
24
25
26
27

28 TRP/ee/ed/GCU

Heather S. Smith
CLERK OF THE COURT

CODE: 3860

Name: ERICK M. BROWN 92713

Address: P.O. Box 208 Indian
Springs, NV 89070

Telephone: N/A

Acting in Proper Person

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

ERICK M. BROWN

Plaintiff (Petitioner),

Case No. A-21-834478-W

vs.

Dept. No. XXV

William Hutchings (Warden)

SBOC et al. Defendant (Respondent),

REQUEST FOR SUBMISSION

I, ERICK M. BROWN, acting in Proper Person, request that the
Response To The States Fraudulent filed on _____
be submitted to the Court for consideration and determination.

I hereby certify that a copy of this Request has been mailed to all parties or their counsel.

DATE: Jan. 17, 2022

Erick M. Brown
(Signature)

ERICK M. BROWN
(Name)

P.O. Box 28
(Address)

Indian Springs, NV 89070

N/A
(Telephone Number)

RECEIVED
JAN 26 2022
CLERK OF THE COURT

CERTIFICATE OF SERVICE BY MAILING

I, ERICK M. BROWN, hereby certify, pursuant to NRCP 5(b), that on this 17
day of Jan, 2022, I mailed a true and correct copy of the foregoing, "Request
for Submission"

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

District Attorney
200 Lewis Ave
LV NV 89155

CC:FILE

DATED: this 17 day of Jan, 2022.

Erick M. Brown
ERICK M. BROWN # 92713
/In Propria Personam
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

Heather L. Smith
CLERK OF THE COURT

ERICK M. BROWN
P.O. BOX 208
Indian Springs, NV 89070

DISTRICT COURT
CLARK COUNTY, NEVADA

ERICK M. BROWN

Plaintiff,

VS.

William Hutchings, Warden,
SDCC et.al.; and The State
of Nevada et.al.

Defendant.

Case No. A-21-834478-W

03C/89658-1

Dept. No. XXV

Hearing Date :

Hearing Time :

PLAINTIFF RESPONSE TO THE STATE'S
FRAUDULENT; DECEPTIVE AND CORRUPT
MOTION TO DISMISS.

COMES NOW, Plaintiff, ERICK M. BROWN,
in proper person, and hereby submits the
attached Points and Authorities, in response to
The States "fraudulent"; "Deceptive"; Motion to
Dismiss Petition for Writ of Habeas Corpus, Due
to the Corona Virus Global Pandemic.

This Response is made and based upon all the
paper's and pleadings on file herein, the attached
points and authorities in support hereof, and oral

RECEIVED

JAN 26 2022

CLERK OF THE COURT

argument/evidentiary hearing, at the time of hearing, if deemed necessary by this court.

POINTS AND AUTHORITIES

The chief deputy district attorney; Taleen Pandukht, does not know the law; or follow the law; and Manifestly abused the law, in the fraudulent response submitted on behalf of Case No. A-21-834178-W, Petition for Writ of Habeas Corpus, Due to the Corona Virus Global Pandemic.

Again, the core challenge of the Writ, is the severe 8th Amendment Violation, and deliberate indifference as well as Discrimination/Fraud, on behalf of these highly corrupt White Nationalist; White Supremacist, Jim Crow practitioner's ways in Nevada and The Nevada Dept. of Corrections, (NDOC et. al.).

That, pursuant to Nevada Rules of Civil Procedure (NRCPP) Rule 9(b), Plaintiff makes claims of acts of "Fraud; Systemic Racism", by the Defendant's officer's of the tripartite government of the State of Nevada, and the (NDOC et. al.).

Defendant's fraudulent response, seek's to assert procedural barr's and laches, when the Writ presents "FACTS", that are not belied by the record. *Doggett*, 91 Nev. at 771, 542 P. 2d at 1068; *Berry*, 363, OP. 3d at 1155. (C.D.D.A) Pandukht, in no uncertain terms attempt's to commit fraud upon the court and fraud against Plaintiff, by deliberately and willfully with

wanton aforethought, methodically refused to address the vital facts of the Writ, such as the "food fraud scheme" within the (SDCC et. al.) culinary in which Plaintiff, was infected with the Covid-19 virus, by food being prepared in unsanitary conditions, and delivered to Plaintiff at unsafe temperatures, or the "FACT", that (SDCC et. al.) Culinary Supervisor, Oswald Justin Reyes, is Mass Poisoning the entire Southern Desert Correctional Center, inmate population, with "COFFEE CREAMER", instead of the Chief Medical Officer, i.e. (C.M.O.) approved 16 oz of Non-fat fresh Milk, which would have protected Plaintiff immune system against Covid-19.

This blatant disregard for the truth has become a culture within the State of Nevada, justice is not served by inflicting injustice. The ends do not justify the means, there is no "Robin Hood" defense to illegal and wrongful conduct. The un-official current public number of Covid-19 inmate deaths in Nevada is (53). This number, which is "factually", un-official gives the highly corrupt State of Nevada the worst death rate in the country.

At Southern Desert Correctional Center, (SDCC et. al.) where Plaintiff, (Brown) is illegally, unconstitutionally housed, over 35% of the prisoner population has tested positive for Covid-19. That is: over 556 inmates in a prison whose capacity is less than 2,000 inmates.

ARGUMENT

Plaintiff (Brown) is entitled to Habeas relief because "COVID-19" renders his sentence grossly disproportionate.

The outbreak of multiple Covid-19, variants in the highly corrupt (NDOC et al.) with its "High Risk", of infecting and killing, Plaintiff (Brown), whom is a documented "Chronic Care" inmate, with known underlying health deficiency's, i.e. Diabeties; High Blood pressure; Mental Health etc..., have rendered his sentence disproportionate, and Habeas Corpus is an appropriate vehicle for this challenge.

However (C.D.D.A) Taleen Pandukht distorted perception of the facts of The Writ, is ludicrous and show's the blatant culture of systemic oppression, and systemic racism, within the Nevada Judicial Arena, attempting to commit fraud upon Plaintiff, as well as the court, by intentionally and deliberately refusing to address all the claims of The Writ, such as the (SDCC et al.) "Food Fraud Scheme", which permits Oswald Justin Reyes, to use off the shelf accounting software, to avoid, state auditor's detection of the embezzlement of Tax payer's funds, by unlawfully purchasing Coffee Creamer, instead of fresh milk, further harming (Brown) and causing serious medical issues.

Furthermore (C.D.D.A.) Pandukht fraudulent motion to dismiss intentionally forgot to address the highly Corrupt and deceptive "Department of Health and

Human Services", Memo dated Jan. 4, 2021, which attempts to deceive and defraud the public into thinking that the "inspection", performed by NRS 209.382, NRS 444.330 and NRS 446.885, LEGALLY, passed Lawfully, because Thousands of Human Beings are at risk Harm; Jeopardy, etc...

Sadly corrupt and Systemic Racism will reign Supreme in Nevada because the Court will not hold and Evidentiary, to ascertain the facts that are out of the record, which is why Plaintiff, does not need to show good cause, or procedural Bars apply.

For a sentence within the statutory range, this court will only find a sentence cruel or unusual if "The sentence is so unreasonably disproportionate to the offense as to shock the conscience". Dunham v. State, 134 Nev. 563, 569, 426 P.3d 11, 15 (2018) (quoting Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 283 (1996)); see also Harte v. State, 132 Nev. 410, 415, 373 P.3d 98, 102 (2016). Here Plaintiff punishment suffers two constitutional defects.

First, his exposure to the greater "RISK", of contracting Covid-19 and the attendant risk of death - by being incarcerated do not qualify as a legitimate sentence within the prescribed statutory range because the statute does not contemplate that a prison sentence includes such a high risk of infection or death. See Nev. Rev. Stat. § 193.130(d) ("shall a sentence a convicted person to imprisonment in the state prison").

without mention of Covid-19 RISK); See also NRS 207.010 (Same); NRS 193.01215 (definition of prison not including Covid-19 RISK). Second, the risk of Covid-19 exposure — again, which includes the risk of death, is so unreasonably disproportionate as to shock the conscience. Forty one percent of the prisoners in the Custody and Neglect of the highly corrupt Nevada Dept. of Corrections (NDOC et. al.) have tested positive for Covid-19; For the record un-officially (53) have died. Under these extreme circumstances Plaintiff (BROWN) sentence is not Constitutional.

In addition to the Eighth Amendment violation under the Federal Constitution, these fraudulent acts of the (NDOC et. al.) and its corrupt officer's, violate's the State Constitution's prohibition against Cruel or unusual punishment. State v. Kincaid, 129 Nev. 953, 956, 317 P.3d 206, 208 (2013) ("States are permitted to provide broader protections and rights than provided by the U.S. Constitution."). Indeed, the State Constitutional prohibition is broader because it is stated in the disjunctive. See Anderson v. State, 109 Nev. 1129, 1134, 865 P.2d 318, 321 (1993) (noting that use of disjunctive indicated requiring one or the other but not both); See also Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts, 116, 119 (describing Conjunctive/disjunctive Canon, and specifically using an example the federal "cruel and unusual" prohibition).

To determine a constitutional provision's meaning

[The Nevada Supreme Court]: i.e. SCOTSON, turn[is] first to the provision's language. Miller v. Burk, 124 Nev. 579, 590, 188 P.3d 1142, 1149 (2008). If the language is ambiguous, then this court looks to the provision's history, public policy, and reason to determine what the voter's intended. *Id.* Here, the language is not ambiguous: Subjecting a person to the heightened risk of Covid-19 infection or death due to the nature of incarceration is both cruel and unusual. However, even assuming the provision is ambiguous, the provision's history, public policy, and reason all support that Plaintiff (BROWN), current imprisonment is cruel and unusual.

History reflects that this punishment is cruel and unusual. As Justice Gorsuch recently explained, punishment's were "CRUEL" and "UNUSUAL" if they involved being [p]leased with hurting others; inhuman; hard-hearted; void of pity; wanting compassion; savage; barbarous; un-renting, ... or [d]isposed to give pain to other's, in body and mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness, Bucklew v. Precythe, 139 S. Ct. 1112, 1123 (2019) (quoting 1 S. Johnson, *A Dictionary of the English Language* (4th ed. 1773) and 1 N. Webster, *An American Dictionary of English Language* (1828)). And, because such cruel punishments were no longer inflicted, they had become unusual. Bucklew, 139 S. Ct. at 1123. Under this definition, indeed any definition, of "Cruel", heightened exposure to Covid-19 solely as a result of

1 the nature of incarceration is cruel. Nor can it be said
2 to be "usual" to inflict such punishment upon prisoner's.

3 Public policy also reflects that this is cruel and unusual.

4 The penological goals of punishment are traditionally
5 listed as incapacitation, deterrence, retribution, and
6 rehabilitation. See Ewing v. California, 538 U.S. 11, 25

7 (2003). None of these purposes are served by Plaintiff
8 (BROWN's) confinement in a Covid "Hot Zone". Though

9 Plaintiff is "incapacitated" in the sense that he is in
10 prison, this goal can be just as served with an adequate

11 release plan, which Plaintiff (BROWN), has. Indeed, that
12 he is eligible for parole shows that incapacitation is no

13 longer a major factor in Plaintiff's punishment. Deter-
14 rence similarly is not aided: neither he nor anyone

15 else in prison could have predicted the added risk or
16 vulnerability to Covid-19 before Plaintiff was incarcerated.

17 Thus, this new punishment serves no deterrent effect.
18 Retribution is not served because his added punishment

19 is not justly imposed on him. Finally, rehabilitation is
20 not served because if (BROWN), dies in prison from

21 Covid-19 he will be the opposite of rehabilitated.

22 Finally, reason also shows that this punishment
23 is cruel and unusual. Reason dictates that a

24 sentence of imprisonment is not a sentence of death.
25 And an unusually high risk of death must be cruel

26 and unusual. Plaintiff (BROWN), is in a prison that
27 has had, well over (600) positive inmate cases;

28 this, un-sanitary, dilapidated facility is budgeted

for 2,149 offender's. No rational prison sentence can include such a high risk of exposure to a disease so deadly as Covid-19 and its multiple deadly variants.

Plaintiff, (BROWN) did not challenge the functioning of the highly corrupt (NDOC/SBCC et.al.) prison management. Indeed, he is challenging the unlawful additional punishment (BROWN) is subject to because of the Covid-19 pandemic, "NOT THE PRISON'S RESPONSE TO IT".

Pursuant to (C.D.D.A) Pandukht fraudulent reasoning, courts could not resolve cruel and unusual punishment challenges to prison practices or criminal sentences. However, courts have the right to review and remedy unconstitutional executive actions, see, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), unconstitutional prison practices, see, e.g., *Hope v. Pelzer*, 536 U.S. 730 (2002), and unconstitutional criminal sentences, see, e.g., *Solem v. Helm* 463 U.S. 277 (1983). It is appropriate for the Court to determine whether Plaintiff (BROWN) incarceration is unconstitutional.

Plaintiff, is "NOT" challenging the conditions of the prison or the way the prison is managing the Covid-19 pandemic. The SCOTSON recognizes the principle that "a petition for Writ of Habeas Corpus may challenge the validity of the current confinement, but not the conditions thereof." *Bowen v. Warden*, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984); see also *Dotson v. State*, 114

1 Nev. 582, 585 n.3, 958 P.2d 81, 82 n.3 (1998). McConnell v.
2 State, 125 Nev. 243, 248, 212 P.3d 307, 310-11 (2009).
3 But these are cases where the challenge was, without
4 ambiguity, to the conditions themselves and not to the
5 conviction or sentence. For example, in Bowen, the
6 petitioner challenged the disciplinary proceedings
7 that led to his placement in punitive segregation.
8 Bowen, 100 Nev. at 490, 686 P.2d at 280. In McConnell,
9 the petitioner challenged the manner of execution, but
10 not his conviction related to it. McConnell, 124 Nev. at
11 248, 212 P.3d at 310-11.

12 Plaintiff (BROWN), situation is different. His challenge
13 is that the exposure and risk to Covid-19 is additional
14 punishment render's his unconstitutional sentence
15 disproportionate. This is a challenge to his sentence
16 based upon how Covid-19, and its associated risk
17 of death, adds to the punishment he receives.

18 Furthermore there is another reason this is an
19 appropriate Habeas action. The SCOTUS, has also
20 recognized that "Habeas Corpus relief is available
21 'to allow the presentation of questions of law that
22 cannot otherwise be reviewed, or that are so important
23 as to render ordinary procedure inadequate and
24 justify the extraordinary remedy.'" Boatwright v.
25 Director, Dept. of Prisons, 109 Nev. 318, 320-21, 849
26 P.2d 274, 276 (1993) (quoting Director, Dept. of Prisons
27 v. Arndt, 98 Nev. 84, 85, 640 P.2d 1318, 1319 (1982).
28 This is consistent with the important role of Habeas Corpus,

a Writ "throwing its root into the genius of our common law," and one of the few rights mentioned within the body of the Federal Constitution. Rasul v. Bush, 542 U.S. 466, 473 (2004) (quoting Williams v. Kaiser, 323 U.S. 471, 484 n.2 (1945); U.S. Const. art. I, § 9, cl. 2. Indeed, the COTSON goes farther, explicitly recognizing and cementing Nevada Courts Jurisdiction and authority to issue Writs of Habeas Corpus. See Nev. Const. art. 6, § 4; Nev. Const. art. 6, § 6.

The legal question presented here both presents "questions of law that cannot otherwise be reviewed," and "that are so important as to render ordinary procedure inadequate and justify the extraordinary remedy." Boatwright, 109 Nev. at 320-21, 849 P.2d at 276.

Plaintiff has no other redress for his claim under the State Constitution; the exponentially increasing death toll of Covid-19 in the highly corrupt (NSOC/SDCC et.al.) generally raises a question so important as to render ordinary procedure inadequate, that justifies this extraordinary remedy.

CONCLUSION

Wherefore, based upon the above and foregoing, Plaintiff does respectfully request this court uphold the COTSON, its articles, and the COIUS, its Amendments, the rule of law, by GRANTING the Writ.

Dated this 17th day of Jan. 2022; Eric Brown
Plaintiff, Pro Se

CERTIFICATE OF SERVICE BY MAILING

I, ERICK M. BROWN, hereby certify, pursuant to NRCP 5(b), that on this 17
day of Jan, 2022 I mailed a true and correct copy of the foregoing, "Response
to The States Fraudulent; Deceptive And Corrupt"
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 17 day of Jan, 2022.

Erick M. Brown
ERICK M. BROWN # 92713
/In Propria Personam
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Response To

The States Fraudulent, Deceptive and Corrupt Motion
(Title of Document)

filed in District Court Case number A-21-834478-W/C189658-1

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

-OR-

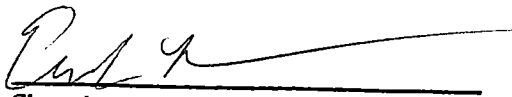
☐ Contains the social security number of a person as required by:

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

(State specific law)

-or-

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


Signature

Jan. 17, 2022
Date

ERICK BROWN
Print Name

Pro Se
Title

Exhibit

NAME ERICK BROWN ID# 92713 Unit/Cell#: 12-B-2 X

FACILITY SDCC DATE 12/27/20 SIGNATURE Eub

Request

I need my results from All (4)
of my Covid-19 test and I need a
cold set up

INMATES - DO NOT WRITE IN AREA BELOW
ASSIGNED TO

☐ Medical ☐ Dental ☐ Psychiatry ☐ Nursing ☐ Other

Response to request

According to the list, you tested POSITIVE on 12/21/2020
~ Cold Pack with next pill call

- ☐ Appointment scheduled/rescheduled for: _____
☐ No visit necessary
☐ No show for appointment
☐ Refused to be seen. DOC 2523 Release of Liability signed

PRESCRIPTIONS

☐ KOP ☐ NON-KOP
☐ Order date _____

PLAN

☐ Follow-up appointment _____ ☐ Return if needed
☐ No follow-up required

Signature of practitioner/responder [Signature]

Date 12/29/2020

NEVADA DEPARTMENT OF CORRECTIONS
MEDICAL KITE and SERVICE REPORT



~~10/02~~

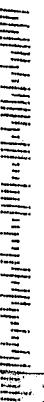
1282x

ERICK M. BROWN-92713
P.O. BOX 208
Indian Springs, NV 89070

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

CONFIDENTIAL

CLASSIFIED
DATE 10-15-95 BY 100176
818
203900 ZIP 89101
203900 2414125-102



CONFIDENTIAL

Southern Desert
Correctional Center
JAN 20 2022
OUTGOING MAIL

Southern Desert
Correctional Center
JAN 20 2022
OUTGOING MAIL

CONFIDENTIAL

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
13 subsection, good cause for delay exists if the petitioner
14 demonstrates to the satisfaction of the court:

- 15
16 (a) That the delay is not the fault of the petitioner; and
17 (b) That dismissal of the petition as untimely will unduly
18 prejudice the petitioner.
19

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

25 The one-year time limit for preparing petitions for post-conviction relief under NRS
26 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002),
27 the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite
28 evidence presented by the defendant that he purchased postage through the prison and mailed
the petition within the one-year time limit.

This is not a case wherein the Judgment of Conviction was, for example, not final. See,
e.g., Johnson v. State, 133 Nev. 571, 402 P.3d 1266 (2017) (holding that the defendant’s
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 Excc. Mgmt. v. Ticor Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998); Scalfon 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
28 ² Compare to McConnell v. State, 125 Nev. 243, 249, footnote 5, 212 P.3d 307, 311, footnote
5 (2009) (The correct way to challenge the mode of execution is a separate and independent
42 U.S.C. §1983 action.).

1 2514, 153 L. Ed. 2d 666 (2002)); the danger of inmate on inmate violence (Butler ex rel. Biller
2 v. Bayer, 123 Nev. 450, 459, 168 P.3d 1055, 1062 (2007)); and the use of punitive segregation
3 (Bowen v. Warden of Nevada State Prison, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984)), are
4 all addressed under a conditions of confinement analysis (or a similar analysis considering
5 whether the conduct of the prison staff was indifferent). This Court therefore declines
6 Petitioner's invitation to walk away from United States Supreme Court and Nevada Supreme
7 Court precedent.

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

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

17 **III. PETITIONER CANNOT DEMONSTRATE THAT HIS SENTENCE**
18 **VIOLATES THE NEVADA AND UNITED STATE CONSTITUTIONS'**
19 **PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT**

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

24 The United States Supreme Court has addressed claims regarding conditions of
25 confinement, and whether such conditions, though not pronounced as "punishments" by
26 statute or by the sentencing court, could violate the Eighth Amendment. In Wilson v. Seiter,
27 501 U.S. 294, 111 S.Ct. 2321 (1991), the Court dealt with a complaint that prison conditions
28 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=cyJrIjoiNDMwMDI0YmQtNmUyYS00ZmFjLWI0MGltZDM0OTY1Y2Y0YzNhlwiwCl6ImU0YTM0MGU2LWI4OWU0tNGU2OC04ZWZhLTE1NDRkMjcwMzk4MCIJ9>.

1 **IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

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

- 3 1. The judge or justice, upon review of the return, answer and all
4 supporting documents which are filed, shall determine whether
5 an evidentiary hearing is required. A petitioner must not be
6 discharged or committed to the custody of a person other than the
7 respondent *unless an evidentiary hearing is held*.
8 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.
9 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.

9 (emphasis added).

10 The Nevada Supreme Court has held that if a petition can be resolved without
11 expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev.
12 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A
13 defendant is entitled to an evidentiary hearing if his petition is supported by specific factual
14 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled
15 by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100
16 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that “[a] defendant seeking post-conviction
17 relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the
18 record”). “A claim is ‘belied’ when it is contradicted or proven to be false by the record as it
19 existed at the time the claim was made.” Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

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

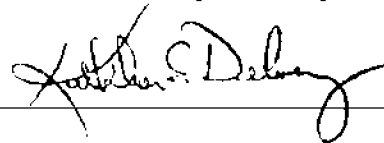
1 for his or her actions. Id. There is a “strong presumption” that counsel’s attention to certain
2 issues to the exclusion of others reflects trial tactics rather than “sheer neglect.” Id. (*citing*
3 Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the
4 *objective* 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
23 Nevada Bar #001565

24 BY /s/ Taleen Pandukht
25 TALEEN PANDUKHT
26 Chief Deputy District Attorney
27 Nevada Bar #005734
28

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
INDIAN SPRINGS, NV 89070

7 BY /s/ E. Del Padre
8 E. DEL PADRE
Secretary for the District Attorney's Office
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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



1 NEFF

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

5 ERICK BROWN,

6 Petitioner,

Case No: A-21-834478-W

Dept No: XXV

7 vs.

8 WILLIAM HUTCHINGS; ET AL.,

9 Respondent,

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 /s/ Heather Ungermann

28 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:

//

//

//

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
13 subsection, good cause for delay exists if the petitioner
14 demonstrates to the satisfaction of the court:

- 15
16 (a) That the delay is not the fault of the petitioner; and
17 (b) That dismissal of the petition as untimely will unduly
18 prejudice the petitioner.
19

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

25 The one-year time limit for preparing petitions for post-conviction relief under NRS
26 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002),
27 the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite
28 evidence presented by the defendant that he purchased postage through the prison and mailed
the petition within the one-year time limit.

This is not a case wherein the Judgment of Conviction was, for example, not final. See,
e.g., Johnson v. State, 133 Nev. 571, 402 P.3d 1266 (2017) (holding that the defendant’s
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 Excc. Mgmt. v. Ticor Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998); Scalfon 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
28 ² Compare to McConnell v. State, 125 Nev. 243, 249, footnote 5, 212 P.3d 307, 311, footnote
5 (2009) (The correct way to challenge the mode of execution is a separate and independent
42 U.S.C. §1983 action.).

1 2514, 153 L. Ed. 2d 666 (2002)); the danger of inmate on inmate violence (Butler ex rel. Biller
2 v. Bayer, 123 Nev. 450, 459, 168 P.3d 1055, 1062 (2007)); and the use of punitive segregation
3 (Bowen v. Warden of Nevada State Prison, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984)), are
4 all addressed under a conditions of confinement analysis (or a similar analysis considering
5 whether the conduct of the prison staff was indifferent). This Court therefore declines
6 Petitioner's invitation to walk away from United States Supreme Court and Nevada Supreme
7 Court precedent.

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

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

17 **III. PETITIONER CANNOT DEMONSTRATE THAT HIS SENTENCE**
18 **VIOLATES THE NEVADA AND UNITED STATE CONSTITUTIONS'**
19 **PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT**

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

24 The United States Supreme Court has addressed claims regarding conditions of
25 confinement, and whether such conditions, though not pronounced as "punishments" by
26 statute or by the sentencing court, could violate the Eighth Amendment. In Wilson v. Seiter,
27 501 U.S. 294, 111 S.Ct. 2321 (1991), the Court dealt with a complaint that prison conditions
28 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=cyJrIjoiNDMwMDI0YmQtNmUyYS00ZmFjLWI0MGltZDM0OTY1Y2Y0YzNhlwiwCl6ImU0YTM0MGU2LWI4OWU0tNGU2OC04ZWZhLTE1NDRkMjcwMzk4MCIJ9>.

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

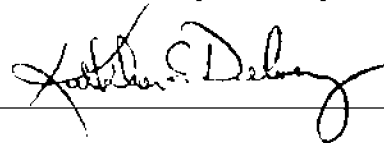
1 for his or her actions. Id. There is a “strong presumption” that counsel’s attention to certain
2 issues to the exclusion of others reflects trial tactics rather than “sheer neglect.” Id. (*citing*
3 Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the
4 *objective* 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
23 Nevada Bar #001565

24 BY /s/ Taleen Pandukht
25 TALEEN PANDUKHT
26 Chief Deputy District Attorney
27 Nevada Bar #005734
28

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
INDIAN SPRINGS, NV 89070

7 BY /s/ E. Del Padre
8 E. DEL PADRE
Secretary for the District Attorney's Office
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

Heather L. Smith
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

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

8 ERICK M. BROWN

9 Plaintiff,

10 vs.

11 William Hutchings, (Warden)

12 Defendant.

Case No. A-21-834478-W

Dept. No. 15B

Docket _____

13
14
15
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

24
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

IN FORMA PAUPERIS:

ERICK M. BROWN-42110
P.O. BOX 208
Indian Springs, NV 89070

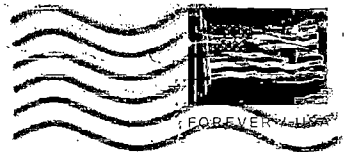
CLERK OF THE COURT

LAS VEGAS NV 890

FEB 28 2022

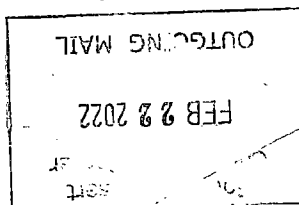
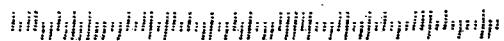
22 FEB 2022 PM 4 L

RECEIVED



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

0000039-10168



Heather L. Smith
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



1 ASTA

2
3
4
5
6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**
9

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

**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)**

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

PRINT DATE: 01/27/2022

Page 1 of 2

Minutes Date: January 19, 2022

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 and Transmittal of Record

State of Nevada }
County of Clark } SS:

Pursuant to the Supreme Court order dated March 8, 2022, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 131.

ERICK M. BROWN,

Plaintiff(s),

vs.

WILLIAM HUTCHINGS, WARDEN OF
SDCC; STATE OF NEVADA,

Defendant(s),

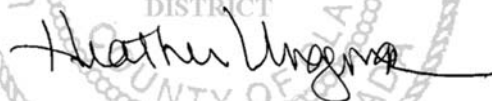
Case No: A-21-834478-W

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 17 day of March 2022.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk

