

No. 86112

IN THE NEVADA SUPREME COURT

Electronically Filed
Jul 07 2023 01:29 PM
Elizabeth A. Brown
Clerk of Supreme Court

James Howard Hayes,

Appellant,

v.

State of Nevada,

Respondent.

On Appeal from the Order Denying
Motion to Correct Illegal Sentence
Eighth Judicial District, Clark County (C-16-315718-1)
Honorable Monica Trujillo, District Court Judge

**Petitioner-Appellant's Appendix
Volume 3 of 3**

Rene Valladares
Federal Public Defender,
District of Nevada
*Martin L. Novillo
Assistant Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Martin_Novillo@fd.org

*Counsel for James E. Hayes

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Order Denying Motion to Modify or Correct Illegal Sentence	02/13/2023	499
Notice of Appeal	02/14/2023	503

Dated July 7, 2023.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ Martin L. Novillo

Martin L. Novillo
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

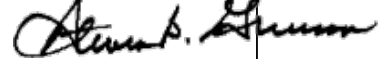
I hereby certify that on July 7, 2023, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Alexander Chen, Alexander.Chen@clarkcountynyda.com, Motions@clarkcountynyda.com.

I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, or have dispatched it to a third-party commercial carrier for delivery within three calendar days, to the following people:

James H. Hayes, #1175077 Southern Desert Correctional Center P.O. Box 208 Indian Springs, NV 89070	Jaime Stilz Office of the Attorney General 555 E. Washington Ave. Las Vegas, NV 89101 jstilz@ag.nv.gov
---	--

/s/ Kaitlyn O'Hearn
An Employee of the
Federal Public Defender
District of Nevada



1 RTRAN

2
3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA
7

8 THE STATE OF NEVADA,) CASE NO.: C-16-315718-1
9 Plaintiff,) DEPT. XIX
10 vs.)
11 JAMES HAYES,)
12 Defendant.)
13

14 BEFORE THE HONORABLE WILLIAM D. KEPHART, DISTRICT COURT JUDGE
15 MONDAY, JULY 15, 2019

16 ***RECORDER'S TRANSCRIPT OF HEARING RE:***
17 ***DEFENDANT'S PRO PER MOTION TO WITHDRAW COUNSEL***

18 APPEARANCES:

19 For the Plaintiff: FRANK R. LOGRIPPO, ESQ.
20 Deputy District Attorney

21 For the Defendant: NO APPEARANCE
22
23
24

25 RECORDED BY: CHRISTINE ERICKSON, COURT RECORDER

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Las Vegas, Nevada; Monday, July 15, 2019

[Proceeding commenced at 10:40 a.m.]

THE COURT: Page 6, page 7. State of Nevada versus James Hayes. This is C315718 and C338412.

Mr. Hayes has asked that Mr. Sanft be allowed to withdraw on this matter or be withdrawn from the case. The concern is, though, is that Mr. Sanft is -- has indicated to the Court that -- let's see here.

Oh -- okay. In case C315718, there's a remittitur.

So, I'll grant his request.

THE CLERK: Okay.

THE COURT: Grant his request to allow Mr. Sanft to be withdrawn.

THE CLERK: Remittitur was filed in both cases?

THE COURT: Right.

[Proceeding concluded at 10:42 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Brittany Amprosio
Court Recorder/Transcriber



SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
ELIZABETH A. BROWN, CLERK
201 SOUTH CARSON STREET, SUITE 201
CARSON CITY, NEVADA 89701-4702

Telephone
(775) 684-1600

July 17, 2019

James H. Hayes #1175077
High Desert State Prison
PO Box 650
Indian Springs, NV 89018

Re: HAYES, JR. (JAMES) VS. STATE, Supreme Court Case No. 78590

Dear Mr. Hayes:

We are returning, unfiled, your "Memorandum to the Court" received in this office on July 15, 2019 in the above Supreme Court case number. You are represented by an attorney in this appeal. Because of this, we can only file documents from your attorney. Please contact your attorney with any further questions or concerns you may have regarding your appeal.

Please do not resubmit these documents to the Supreme Court as no action will be taken on them.

Sincerely,

J. Hendricks
Deputy Clerk

19-30258

APP397

Supreme Court of the State of Nevada

RETURNED
UNFILED

AFFIDAVIT OF Memorandum to the Court

JUL 17 2019

STATE OF NEVADA)

COUNTY OF CLARK)

ss: Fast Track Criminal Appeal

ELIZABETH A. BROWN
CLERK OF SUPREME COURT

BY DEPUTY CLERK

TO WHOM IT MAY CONCERN:

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

(1) THAT, James Hayes is the Affiant in this Affidavit and is currently incarcerated at High Desert State Prison.

Comes Now, Appellant in a "Memorandum to the Court" to show cause that counsel, Michael W. Janoff has failed to raise material issues and arguments in his Fast track statement and has failed to be accurate in stating the facts:

Whereas, in his prepared statement (Page 3 at 22-27) at 17 "Pending and Prior proceedings in this Court" should include the following Supreme Court case Numbers 73436, 75173, 77151, and 78622 for filed writ of habeas corpus and writ of prohibition; at 18 (page 4 at 1-8) "Pending and prior proceedings in other courts" should include writs of habeas corpus, A-19-793315-W, 8th Jud. District Court, Department 19 and Exclude State of Nevada v. James Hayes, C-19-338412-1, Dept 19, 8th Jud. Dist Court as that case has been dismissed.

Whereas, the State of Nevada, Clark County knowingly and voluntarily filed a fraudulent unconstitutional and false information in open court to deprive and

RECEIVED

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

1 misled the appellant to his prejudice and its un-
2 conscionable for the state to attempt to insulate a conviction
3 from collateral constitutional review by conditioning its
4 willingness to enter into fraudulent plea negotiations on a
5 appellant's waiver of the right to pursue a direct appeal.

6 WHEREAS, the GPA was violative of constitutional safe-
7 guards and NRS 174.085(3)(5A) violation when the charge
8 of Attempt Grand Larceny was dismissed at the conclusion
9 of the preliminary hearing in Justice Court for lack of
10 evidence, no corpus delicti, slight or marginal evidence to
11 proceed to District Court leaving no subject matter jurisdiction
12 for District Court.

13 WHEREAS, there was no transportation to support the At. Gr.
14 Larceny charge and this mistake of fact worked to the
15 extreme detriment of the appellant. As the guilty plea was the
16 product of ignorance that was discovered after judgment
17 and now the appellant stands convicted of a crime he did
18 not commit. When in fact, the character of the material
19 evidence in the Amended Information and Guilty Plea
20 Agreement is false, and the proceedings was constitutionally
21 inadequate. (See enclosed exhibits 7 and 8)

22 FURTHER, AFFIANT SAYETH NAUGHT.

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

24 IN FRONT OF: Under Penalty of Perjury

BY James H. Hayes
NDOC # 1175077

25 I, James Hayes, certify, declare, or state that
26 the foregoing is true and correct, to the best
27 of my knowledge and belief, in accordance
28 with NRS 208.165 and 28 USC § 1746.

7-8-2019

James H. Hayes

-2-

1 whereas even if the state alleged contentions
2 were true that petitioner "waived all constitutional
3 claims based on events occurring prior to the entry
4 of the plea" that would not satisfy the violation
5 of substantial rights that occurred after plea.
6 What in fact petitioner was reborn on the
7 charge of Attempt Grand Larceny on February 4,
8 2019 ~~2~~ since again violate petitioner's constitutional
9 rights and NRS 174.085(3)(5A) violation as the
10 guilty plea was entered on November 7, 2018
11 well before the reborn on the charge of Attempt
12 Grand Larceny that was barred from District
13 Court proceedings. So it is without contention
14 that the state knowingly violated petitioner's
15 substantial rights and no colorable argument
16 that would allow them to overcome this
17 manifest injustice.

18
19 NRS 174.085(3) provides: "When the defendant is
20 convicted or acquitted or has been once placed in
21 jeopardy upon an indictment, information, or complaint
22 the conviction, acquittal or jeopardy is a bar to another
23 indictment, information, or complaint for the offense
24 charged in the former, or for an attempt to commit
25 the same, or for an offense necessarily included
26 therein, of which he might have been convicted under
27 that indictment, information or complaint."

NO. 78590

FILED

Supreme Court of Nevada

AUG 15 2019

8-9-19

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY ELIZABETH A. BROWN
DEPUTY CLERK

Dear Clerk of the Courts

I, James H Hayes, appellant am writing you greatly concerned about my Direct Appeal case No. 78590 that I pray upon you that you will Notify the Judges of this said court "Supreme Court of Nevada" that I have never had appointed or retain counsel to represent me on this appeal process.

Whereas, my trial counsel M. SAULT was ineffective and did not provide zealous and adequate representation and failed to file a Notice of appeal so I filed a motion to withdraw counsel that was granted and filed a proper Notice of Appeal. That has caused a manifest injustice as no supplemental brief or Reply brief has been filed on my behalf as I do not have counsel to do so and every document I try to file concerning this matter is being return to me unfiled. So as it stands as of today I have very meritorious claims that are not before this said court and this is a miscarriage of justice that must be corrected. So I beg of you to please Notify the Judges of this court that I need counsel to prepare and file supplemental brief and reply brief. As this injury needs to be remedied through

AUG 12 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

Page 1 of 2

19-34399

APP401

1 this said court by review of the complete record.
2 WHEREAS, appellant stands convicted of a crime
3 he did not commit, when in fact, the convicted
4 charge of Attempt Grand Larceny was dismissed by
5 the ~~the~~ Las Vegas township magistrate at the
6 conclusion of the preliminary examination for lack
7 of evidence, No corpus delicti. No slight or marginal
8 evidence.

9 WHEREAS, it is black letter law in the state of
10 Nevada per NRS 174.085(3) that when appellant was
11 once placed in jeopardy upon the criminal complaint
12 and case dismissed that is a bar to another information
13 for the offense charged in the former. And the court
14 can not amend an information to restore a charge
15 that has been dismissed by the magistrate at the
16 preliminary examination, and once the judicial officer
17 determined that probable cause did not exist it was
18 the most naked deprivation of due process that appellant
19 could face to be convicted of said crime Attempt Grand
20 Larceny.

21 WHEREAS, it would be unconscionable for the state to
22 attempt to insulate this conviction from collateral constitutional
23 review by conditioning its willingness to enter into plea
24 negotiations on the appellant's "waiver of the right" to
25 pursue direct appeal remedies. when in fact, the district
26 court did not divest subject matter jurisdiction to
27 proceed on the charge of Attempt Grand Larceny.

Steven D. Grierson

1 **ORDR**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 FRANK LOGRIPPO
6 Deputy District Attorney
7 Nevada Bar #013911
8 200 Lewis Avenue
9 Las Vegas, NV 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 JAMES HOWARD HAYES,
14 #2796708

15 Defendant.

CASE NO: C-16-315718-1

DEPT NO: XIX

16 **ORDER GRANTING DEFENDANT'S PRO PER MOTION TO WITHDRAW**
17 **COUNSEL**

18 DATE OF HEARING: July 15, 2019
19 TIME OF HEARING: 08:30 A.M.

20 THIS MATTER having come on for hearing before the above entitled Court on the
21 15th day of July, 2019, the Defendant not being present, in proper person, the Plaintiff being
22 represented by STEVEN B. WOLFSON, District Attorney, through FRANK LOGRIPPO,
23 Deputy District Attorney, without argument, based on the pleadings and good cause appearing
therefor,

24 ///

25 ///

26 ///

27 ///

28 ///

W:\2013\2013F\10723\13F10723-ORDR-(HAYES_JAMES)-002.DOCX

1 IT IS HEREBY ORDERED that the Defendant's Pro Per Motion to Withdraw Counsel,
2 shall be, and it is GRANTED.

3 DATED this 28 day of July, 2019.

4 Willie K. [Signature]
5 DISTRICT JUDGE

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

9 BY [Signature]
10 FRANK LOCIRIPPO
11 Deputy District Attorney
12 Nevada Bar #013911

13 CERTIFICATE OF SERVICE

14 I certify that on the 29th day of July, 2019, I mailed a copy of the foregoing Order
15 to:

16 JAMES H. HAYES, BAC #1175077
17 HIGH DESERT STATE PRISON
18 P.O. BOX 650
19 INDIAN SPRINGS, NV 89018

20 BY [Signature]
21 C. Garcia
22 Secretary for the District Attorney's Office

23
24
25
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28 cg/L2

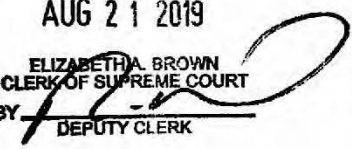
IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES HOWARD HAYES, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78590

FILED

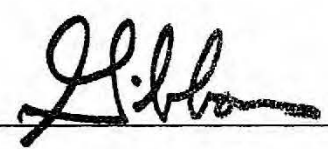
AUG 21 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER

This appeal is subject to the provisions of NRAP 3C. Appellant has filed a pro se document indicating that it is his belief that he is not being represented by counsel in this appeal. Appellant is being represented in this appeal by his trial counsel, Michael Sanft of Sanft Law, P.C. See NRAP 3C(b) (describing the responsibilities of trial counsel in an appeal subject to NRAP 3C). Mr. Sanft filed the fast track statement on behalf of appellant on June 18, 2019, and the appendix on June 15, 2019. See NRAP 3C(e). Appellant should address all concerns regarding this appeal through counsel, and shall proceed through counsel in the prosecution of this appeal.

It is so ORDERED.

 C.J.

cc: Sanft Law, P.C.
James Howard Hayes, Jr.
Attorney General/Carson City
Clark County District Attorney



SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
ELIZABETH A. BROWN, CLERK
201 SOUTH CARSON STREET, SUITE 201
CARSON CITY, NEVADA 89701-4702

Telephone
(775) 684-1600

September 18, 2019

JAMES HOWARD HAYES, JR.
INMATE ID: 1175077
PIOCHE CONSERVATION CAMP
P.O. BOX 509
PIOCHE NV 89043

Re: HAYES, JR. (JAMES) VS. STATE, Supreme Court Case No. 78590

Dear Mr. Hayes:

We are returning, unfiled, your letter received in this office on September 16, 2019 in the above Supreme Court case number. You are represented by an attorney in this appeal. Because of this, we can only file documents from your attorney. Please contact your attorney with any further questions or concerns you may have regarding your appeal.

Please do not resubmit this document to the Supreme Court as no action will be taken on it.

Sincerely,

J. Hendricks
Deputy Clerk

19-38952

RETURNED
UNFILED

9-11-19

SEP 18 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

Dear Clerk of the Courts,

In writing you in response to Justice Gorton's order dated that he acknowledge that I have counsel assigned to my direct appeal, where in lies the very problem as I, James Hayes case no. 28590, appellant, have not had one opportunity to communicate with said counsel M. Smith as I have tried at least 50 times through different means (correspondence, emails, voice messages, etc...) to no avail and he failed to honor any of my requests concerning my direct appeal as I have many meritorious issues that must be raised or I will have waived the issues if subsequent post conviction remedies are needed and that was my reason for filing a 2nd notice of appeal to bring awareness of some of the issues to this said court "Norfolk Supreme Court" praying that this court would review the complete record or issue sanctions on my appellate counsel ordering him to raise these issues and correct the mistake of facts in his filed fast track statement and redress this manifest injustice that has left me the appellant with irreparable injury so I beg of this said court to please give consideration to the 2nd notice of appeal when reviewing the facts for this court's opinion. Where, as here, one can only assume of reasons why counsel has failed to raise these meritorious issues as the "waiver of rights" that would not be justifiable, whereas, the state rebuked the appellant on the charge of Attorney General's fees then \$3500 after the waiver of rights where signed that voided the loss of collateral constitutional

(1)

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SEP 16 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

APP407

challenge as the rebirth occurred after the signing of Plea agreement allowing appellant grounds to challenge the court's lack of subject matter jurisdiction and constitutional violations.

James H. Hayes # 1175077
PCC
P.O. Box 509
Pioche, Nevada 89043

** note: Please allow Justice Gibbons the opportunity to respond...
Thanks



SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
ELIZABETH A. BROWN, CLERK
201 SOUTH CARSON STREET, SUITE 201
CARSON CITY, NEVADA 89701-4702

Telephone
(775) 684-1600

December 9, 2019

James Howard Hayes, Jr.
Inmate ID#1175077
Southern Desert Correctional Center
P.O. Box 208
Indian Springs, NV 89070

Re: HAYES, JR. (JAMES) VS. STATE, Supreme Court Case No. 78590-COA

Dear Mr. Hayes:

We are returning, unfiled, your document received in this office on December 5, 2019 in the above Supreme Court case number ("Affidavit of: Attorney was Ineffective"). You are represented by an attorney in this appeal. Because of this, we can only file documents from your attorney. Please contact your attorney with any further questions or concerns you may have regarding your appeal.

Please do not resubmit this document to the Supreme Court as no action will be taken on it.

Sincerely,

A handwritten signature in cursive script, appearing to read "J. Hendricks".

J. Hendricks
Deputy Clerk

RETURNED
UNFILED

AFFIDAVIT OF: Attorney was Ineffective

DEC 09 2019

STATE OF NEVADA)

ss: Supreme Court Case No. 78590

NEVADA Supreme Court

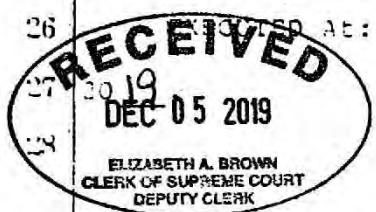
ELIZABETH A. BROWN
CLERK OF SUPREME COURT

BY: DEPUTY CLERK

TO WHOM IT MAY CONCERN:

I, James H. Hayes the undersigned, do hereby swear that all statements, facts and events within my foregoing Affidavit are true and correct of my own knowledge, information and belief, and as to those, I believe them to be True and Correct. Signed under the penalty of perjury, pursuant to, NRS. 29.010; 53.045; 208.165, and state the following: That James H. Hayes, appellant is currently incarcerated at SOCC allege the following facts supporting a Miscarriage of Justice. Appellant has not had ONE opportunity to speak with appeal counsel throughout the entire appeal process thru many attempts in writing and voicemail... Counsel has misstated the facts in his filed "first track statement" and failed to raise meritorious claims that have not been waived per guilty plea agreement most importantly that the district court had NO subject matter jurisdiction for the charge of Attempt Second Homicide when it was dismissed at preliminary hearing by magistrate for lack of evidence, no corpus delicti, no flight nor marginal evidence. When in fact, the state ran afoul of NRS. 178.562(1) and NRS. 174.085(3) and have created a manifest injustice, along with other claims. (Example: the sentence imposed is not in accordance with the negotiated agreement.)

FURTHER YOUR AFFIANT SAYETH NAUGHT.



At: Indian Springs, Nevada, this 26 day of November.

BY: James H. Hayes
James H. Hayes # 1175074
Post Office Box-203 (SOCC)
Indian Springs, Nevada 89070.
Affiant, In Propria Personam:

11-26-19

Supreme Court of Nevada

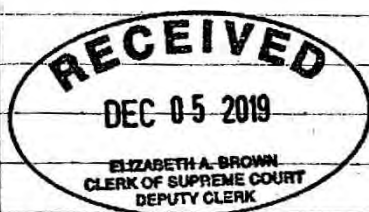
Dear Clerk,

Can you please send me a copy
of dockets to date for case No. 78590
James H. Hayes direct appeal...

Thanks

NOTE: What's the timeframe for a decision on
my fast track appeal

JAMES H. HAYES # 1195082
JDCC
P.O. Box 208
Indian Springs, NV
89070



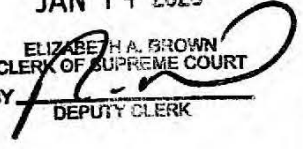
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES HOWARD HAYES, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78590-COA

FILED

JAN 14 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

James Howard Hayes, Jr., appeals from a judgment of conviction entered pursuant to an *Alford*¹ plea of attempted grand larceny. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Hayes argues his sentence is cruel and unusual because his sentence is disproportionate to his crime. Regardless of its severity, “[a] sentence within the statutory limits is not ‘cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.’” *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); *see also Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (explaining the Eighth Amendment does not require strict proportionality between crime and sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime).


Hayes’ sentence of 60 to 174 months in prison is within the parameters provided by the relevant statute, *see* NRS 207.010(1)(a), and

¹*North Carolina v. Alford*, 400 U.S. 25 (1970).

Hayes does not allege that statute is unconstitutional. We conclude the sentence imposed is not grossly disproportionate to the crime and Hayes' history of recidivism. *See Ewing v. California*, 538 U.S. 11, 29 (2003) (plurality opinion) ("In weighing the gravity of [the defendant's] offense, we must place on the scales not only his current felony, but also his long history of felony recidivism."). Therefore, Hayes' sentence does not constitute cruel and unusual punishment. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. William D. Kephart, District Judge
Sanft Law, P.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

**IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK**

JAMES HOWARD HAYES, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 78590-COA
District Court Case No. C315718

NOTICE OF REJECTION OF FILED DOCUMENT

TO: James Howard Hayes, Jr.

You are represented by counsel in this appeal. Therefore, your document entitled, "Motion for Review," is being returned, unfiled. Please contact your attorney with any further questions or concerns you may have regarding your appeal.

DATE: February 07, 2020

Elizabeth A. Brown, Clerk of Court

By: Sandy Young
Deputy Clerk

Notification List

Electronic

Sanft Law, P.C. \ Michael W. Sanft

Clark County District Attorney \ Charles W. Thoman

Clark County District Attorney \ Alexander G. Chen, Chief Deputy District Attorney

20-05333

APP414

1 Hayes, James H ID NO. 1175077

2 SOUTHERN DESERT CORRECTIONAL CTN.
3 20825 COLD CREEK RD.
4 P.O. BOX 208
5 INDIAN SPRINGS, NV 89070

RETURNED
UNFILED **FILED**

FEB 07 2020

FEB 03 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT

BY ELIZABETH A. BROWN
DEPUTY CLERK BY S. Young
DEPUTY CLERK

6 IN the Court of Appeals of the
7 State of Nevada

8 James H. Hayes

appellant

9 v.

10 State of Nevada

11 respondent

CASE NO.: 78590 -COA

DEPT. NO.: _____

DOCKET: _____

12 "Motion for Rehearing"

13 "Hearing Requested"

14 CASE NO.: 78590

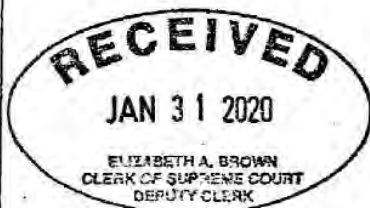
15 Nevada Court of Appeals

16
17 COMES NOW, appellant James H. Hayes, herein above respectfully
18 moves this Honorable Court for an granting of the "Motion for
19 rehearing" to redress an injury done to appellant
20 to his extreme prejudice and to correct manifest injustice

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

23 DATED: this 27 day of January, 2020

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



20-04590

Points and Authorities

Statement of the Case:

ON April 17, 2019, James H. Hayes (hereinafter Appellant) filed notice of appeal was docketed in the Supreme Court of Nevada.

ON June 3, 2019, the 8th Judicial District Office, William Keppert granted motion to withdraw counsel Michael Smith of Smith Law, P.C.

ON August 21, 2019, this said court "Supreme Court of Nevada" filed order that appellant was being represented in his appeal by trial counsel Michael Smith and shall proceed through counsel in the prosecution of this appeal.

Argument:

I. Appellant's counsel was dismissed by 8th Jud. Dist. Court Judge W. Keppert prior to the perfection and completion of the first track appeal proceedings.

"U.S. and Nevada Constitution Violation of Due Process"

Contrary to this court's order and belief, appellant was left without counsel to provide zealous and quality representation at all stages of the appellate process due to the fact counsel was dismissed on June 3, 2019 as 8th Jud. Dist. Court Judge W. Keppert stated his reason for the granting the motion for dismissal of counsel was that the remittitur had issued by the Supreme Court of Nevada leaving appellant without counsel on

1 direct appeal a blatant Due Process violation (see exhibit #43)
2 where, had appellant been represented by counsel
3 meritorious claims of error would have been
4 reflected in the briefing, thorough research and all
5 viable issues would have been raised, a request for
6 transcripts would have been filed, reply briefing would
7 have been done, the record would have been accurate,
8 and appellant would have been successful on appeal.

9 where, as here, appellant was left without counsel
10 that was affront to Justice and Due Process to a fair
11 and just opportunity to pursue direct appeal, and justice
12 requires this court to grant this motion for rehearing as
13 this court erred in its determination that appellant was
14 being represented by counsel to redress this injury done
15 to appellant to correct manifest injustice.

16 II. This appeal presents a question of first 17 impression:

18 where, the conviction was without subject matter
19 jurisdiction as the charge of "Attempt Grand Larceny"
20 was dismissed at preliminary examination for lack of
21 evidence, no corpus delicti, no slight or marginal evidence
22 to proceed to district court by Justice court magistrate.
23 And state law (NRS 174.085(3); NRS 178.562) provides the
24 authority by which the appellant was immune from
25 prosecution of this charge in district court 8th Judicial
26 district and the state knowingly and intelligently
27

1 committed fraud upon the court by prosecuting its case
2 without first establishing that jurisdiction exists. This
3 unique case is one that the Supreme Court of Nevada
4 has no previous rulings on with there been rulings by
5 this court on some what ~~similar~~ similar cases like
6 Turpin v Sheriff 484 P.2d 1083 (1971) and Thompson vs.
7 State 221 P.3d 708 but none where a defendant has
8 proceed to preliminary examination and at the conclusion
9 of examination charge be dismissed and then the
10 state files an amended information in district court
11 through a Guilty Plea Agreement to restate the charge
12 that had previously been dismissed for lack of evidence
13 No corpus delicti, no slight or marginal evidence to
14 proceed to district court and ~~BARRED~~ from subsequent
15 prosecution as we have in the instant case.

16 III. THE STATE'S AMENDED NOTICE OF INTENT TO SEEK

17 Punishment as a habitual criminal did not carry the
18 burden of proving that Appellant was a habitual criminal.

19 WHEREAS, THE TEXAS CRIME OF Credit Card Abuse
20 was a state jail crime that doesn't carry a prison term,
21 mandatory supervision, nor parole and not a category
22 A, B, C, D, or E felony so at best its trivial, the Burglary
23 charge used was not a prior felony as it occurred in
24 2016 and the instant offense occurred in 2013. So
25 at the time of the adjudication appellant did not
26 qualify per NRS 207.010(1)(c). Furthermore, at the date
27 of the instant offense appellant had never been to

1 prison and had one prior felony conviction for
2 Attempt Possession of Credit or Debit Card without card-
3 holder's consent (Category E felony), making appellant's
4 conviction easily deemed cruel and unusual in
5 violation of the Eighth Amendment to the U.S. Constitution
6 as well as Article I Section 6 of the Nevada Constitution.
7 IV. Sentencing was founded on facts supported only by
8 impeachable and highly suspect evidence.³

9 Whereas, the breach of issue was not material nor
10 volitional, when in fact the court was required to hold
11 an evidentiary hearing on the alleged breach which has
12 resulted in dire consequences to appellant and an additional
13 five (5) to 14 1/2 years in prison in violation of the bargain
14 for stipulations. That the state entered in bad faith with
15 appellant as the agreement was unconstitutional, malicious
16 and a manifest injustice. Indeed, in reliving the factual
17 and procedural history of the case, the state has taken
18 great liberties to continue the sort of narrative that has
19 likely fueled inconsistent and unfair mass incarceration in
20 Nevada.

21 Appellant knows the record and has tried to contest
22 this actual record to reveal that a manifest injustice was
23 done in his specific case. Although his counsel's briefing
24 presented a very unconvincing argument worthy of
25 sanctions and is blatant ineffective assistance that has
26 greatly prejudice appellant to his extreme detriment.

27 In other words, the state's claim of breach that he

1 was found to have probable cause for a NEW Burglary
2 charge is absurd when the alleged victim of said Burglary
3 testified under oath facing the penalty of perjury that
4 he was 100% sure appellant was not the perpetrator of
5 ispe divit crime and that this alleged charged crime
6 against appellant was dismissed. Furthermore the Guilty
7 Plea agreement in this case does not explicitly provide
8 for abdication of stipulation for a mere run into the law
9 for a crime he had no part of, let alone for a charge
10 that was dismissed to further solidify his non-participa-
11 tion in the ispe divit Burglary lodged against him without
12 DUE PROCESS CONSIDERATIONS.

13 Appellant's case Attempt Grand Larceny is the only
14 ostensibly on appeal which allegedly occurred on April 13,
15 2013 and was formally charged by way of Criminal Complaint
16 on July 23, 2013 that was dismissed at the conclusion of
17 preliminary hearing for lack of evidence, no corpus delicti,
18 slight or marginal evidence to proceed to district court
19 leaving the district court no subject matter jurisdiction for
20 the charge of Attempted Grand Larceny against appellant as
21 said charge is BARRED from any subsequent prosecution
22 (NAS 174.085(3) & NAS 178.562) Making the state's amended
23 information for Attempted Grand Larceny unconstitutional, in
24 bad faith, fraud upon the court, and void that has prejudiced
25 appellant to his extreme detriment causing him irreparable
26 injury.

27 The unconstitutional guilty plea agreement of issue

1 here for the "wobbler" charge of "Attempt Grand Larceny" indicated
2 that there was a stipulated sentence of probation with the
3 only condition to be 30 days in the Clark County Detention
4 center with 30 days credit for time served "and further
5 stipulates that it is to run concurrent to case C-16-315125
6 that gives the interpretation that it will be treated as a
7 gross misdemeanor. This stipulation is unique to this case
8 and do not contain any boilerplate language and do not
9 explicitly rely upon or even reference the loss of stipulation
10 in their language.

11 Indeed, the boilerplate language regarding "Magistrate
12 to find probable cause" does not explicitly refer to loss of
13 stipulation, but only that "the state will have the unquestioned
14 right to argue for any legal sentence and term of confinement
15 allowable for the crime to which I am pleading guilty,
16 including the use of any prior convictions I may have to
17 INCREASE my sentence as an habitual criminal to five(5)
18 to twenty(20) years. When in fact, there is no legal sentence
19 for Attempt Grand Larceny against appellant as the said
20 charge is BARRED from all 8th Judicial District court
21 proceedings and a guilty plea is nothing without
22 jurisdiction. As the guilty plea is invalid and the sentence
23 court had no authority to render the instant judgment.

24 Whereas, it is also undisputed that the boilerplate
25 language does not explicitly refer to a right to argue for
26 consecutive time against appellant. It should also be noted
27 that the boilerplate language of the guilty plea agreement

1 does not refer in any way to what would constitute
2 (or not constitute) an excusable ruling of probable cause
3 by magistrate nor does it make any reference to any
4 ability for a due process to challenge an overruling of
5 a material breach.

6 7 Conclusion

8 Therefore, appellant requests that:
9 this said court Nevada Court of Appeals grant
10 appellant such relief which appellant may be entitled.

11
12 Footnotes: 1. See Exhibit 1, 3, 2, 2

13 2. Amended Notice of Intent to seek
14 punishment as a habitual criminal was for the
15 information charge of Burglary (2nd offense) not the
16 Amended information charge of Attempt Grand larceny
17 a wobbler.

18 3. Burglary case No C-19-338412-1 was
19 dismissed

20 4. See Exhibit 3,

21
22 ~~xxx~~ It's worthwhile noting I have not received
23 a copy of this court's opinion of affirmance...

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

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

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

14 Defendant.

CASE NO. C-16-315718-1

DEPT NO. XIX

AMENDED
INFORMATION

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

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

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

27 ///

28 ///

EXHIBIT "1"

W:\016315718\016315718-19-AMENDED-001.docx

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

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

6 BY 
7 MICHAEL DICKERSON
8 Deputy District Attorney
9 Nevada Bar #013476

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27 DA#13F10723X /cmj/VL2
28 LVMPD EV#1304090843
(TK3)

FREEBOOK

*CO-DET: N

DETAIN

TIME STAMP AT BOOKING	JOSHUA D FERRY	7386	MPD	OT
24/2819 4:38 PM	*ARRESTING OFFICER SIGNATURE	*PRINTED NAME	*PB	*AGENCY
	*TRANSPORTING OFFICER SIGNATURE	*PRINTED NAME	*PB	*AGENCY
			*AGENCY	OTHER ARREST CHD

*EMERGENCY CONTACT NOT GIVEN NOT GIVEN	CUSTODY RELEASED TO
*RELATIONSHIP NOT PROVIDED	NAME
*PHONE NUMBER	POSITION
*EMAIL ADDRESS	AGENCY

COURT: <input type="checkbox"/> JUSTICE <input type="checkbox"/> MUNICIPAL <input type="checkbox"/> JUVENILE	<input type="checkbox"/> STD BAIL <input type="checkbox"/> O.R. RELEASE
<input type="checkbox"/> PC <input type="checkbox"/> I.A.D.	
JUDGE:	

PD: 7136728
 DOC DIST PD

RT LT RI LI SCORE: _____ SCORE
☐ POLICE RECORDS COPY ☐ COURTS COPY ☐ DSD RECORDS COPY ☐ PROCESSING COPY

1:1 RT LT RI LI SCORE: _____

LMSFD 22 Rev. 08/17/WORD 2010

Electronically Filed
08/17/2016 02:44:33 PM

Alfonso J. Salazar
CLERK OF THE COURT

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

DISTRICT COURT
CLARK COUNTY, NEVADA

7 LA. 6/23/16
10:00 AM
8 PD

9 THE STATE OF NEVADA,

10 Plaintiff,

CASE NO: C-16-315718-1

11 -vs-

DEPT NO: XII

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

14 Defendant.

INFORMATION

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

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

19 That JAMES HOWARD HAYES, aka James Howard Hayes, Jr., the Defendant(s)
20 above named, having committed the crime of BURGLARY (Category B Felony - NRS
21 205.060 - NOC 50424), on or about the 9th day of April, 2013, within the County of Clark,
22 State of Nevada, contrary to the form, force and effect of statutes in such cases made and
23 provided, and against the peace and dignity of the State of Nevada, did then and there wilfully,
24 unlawfully, and feloniously enter, with intent to commit larceny, Room No. 17151, of the

25 ///

26 ///

27 ///

28 ///

EXHIBIT 2

W:\20130813\JAMES_HAYES\723-2014-01\JAMES_HAYES-001.DOCX

1 EXCALIBUR HOTEL & CASINO, located at 3850 South Las Vegas Boulevard, Las Vegas,
2 Clark County, Nevada, occupied by JOSHUA JARVIS.
3
4 STEVEN B. WOLFSON
5 Clark County District Attorney
6 Nevada Bar #001565
7
8 BY M.A. Dickerson
9 MICHAEL DICKERSON
10 Deputy District Attorney
11 Nevada Bar #013476
12
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ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

NOV 07 2018

BY *[Signature]*
TIA EVERETT, DEPUTY

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

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

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

Defendant.

CASE NO: C-16-315718-1

DEPT NO: XIX

GUILTY PLEA AGREEMENT

16 I hereby agree to plead guilty, pursuant to North Carolina v. Alford, 400 U.S. 25 (1970),
17 to: **ATTEMPT GRAND LARCENY (Category D Felony/Gross Misdemeanor - NRS**
18 **205.220.1, 205.222.2, 193.330 - NOC 56025/56026)**, as more fully alleged in the charging
19 document attached hereto as Exhibit "1".

20 My decision to plead guilty by way of the Alford decision is based upon the plea
21 agreement in this case which is as follows:

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

25 I agree to the forfeiture of any and all weapons or any interest in any weapons seized
26 and/or impounded in connection with the instant case and/or any other case negotiated in
27 whole or in part in conjunction with this plea agreement.

28 ///

C-16-315718-1
GPA
Guilty Plea Agreement
4784980

Exhibit 3

W:\2013\2013F\10723\13F10723-GPA-(HAYES_JAMES)-004.DOCX



A004

APP428

1 I understand and agree that, if I fail to interview with the Department of Parole and
2 Probation (P&P), fail to appear at any subsequent hearings in this case, or an independent
3 magistrate, by affidavit review, confirms probable cause against me for new criminal charges
4 including reckless driving or DUI, but excluding minor traffic violations, the State will have
5 the unqualified right to argue for any legal sentence and term of confinement allowable for the
6 crime(s) to which I am pleading guilty, including the use of any prior convictions I may have
7 to increase my sentence as an habitual criminal to five (5) to twenty (20) years, Life without
8 the possibility of parole, Life with the possibility of parole after ten (10) years, or a definite
9 twenty-five (25) year term with the possibility of parole after ten (10) years.

10 Otherwise I am entitled to receive the benefits of these negotiations as stated in this
11 plea agreement.

12 CONSEQUENCES OF THE PLEA

13 By pleading guilty pursuant to the Alford decision, it is my desire to avoid the
14 possibility of being convicted of more offenses or of a greater offense if I were to proceed to
15 trial on the original charge(s) and of also receiving a greater penalty. I understand that my
16 decision to plead guilty by way of the Alford decision does not require me to admit guilt, but
17 is based upon my belief that the State would present sufficient evidence at trial that a jury
18 would return a verdict of guilty of a greater offense or of more offenses than that to which I
19 am pleading guilty.

20 I understand that by pleading guilty I admit the facts which support all the elements of
21 the offense(s) to which I now plead as set forth in Exhibit "1".

22 I understand that as a consequence of my plea of guilty by way of the Alford decision
23 the Court may elect to treat this offense as a felony or as a gross misdemeanor. If the Court
24 elects to treat this offense as a felony I may be imprisoned in the Nevada Department of
25 Corrections for a minimum term of not less than one (1) year and a maximum term of not more
26 than four (4) years. In addition, I may be fined up to \$5,000.00. I further understand that the
27 minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of
28 imprisonment. If the Court elects to treat this offense as a gross misdemeanor, I may be

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. C-16-315718-1

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

06/03/2019

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

06/03/2019, 07/15/2019

Defendant's Pro Per Motion to Withdraw Counsel

Matter Continued;

Granted;

Journal Entry Details:

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

Matter Continued;

Granted;

Journal Entry Details:

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

10/07/2019

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

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

DATE

FINANCIAL INFORMATION

Defendant Hayes, James Howard

Total Charges

28.00

Total Payments and Credits

0.00

Balance Due as of 10/4/2019

28.00

Exhibit 4

JUSTICE COURT, LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant.

JUSTICE COURT
LAS VEGAS NEVADA

CASE NO: 13F10723X

DEPT NO: 3

CRIMINAL COMPLAINT

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

COUNT 1 - BURGLARY

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

COUNT 2 - ATTEMPT GRAND LARCENY

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

///

///

///

///

SEP 16 2013
CLERK
Criminal Complaint
#2796708

FWFOOCNCL

EXHIBIT 7

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

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

CERTIFICATE OF SERVICE BY MAILING

I, JAMES H. NAYES, hereby certify, pursuant to NRCP 5(b), that on this 27
day of JANUARY, 2020, I mailed a true and correct copy of the foregoing, "Motion
for Rehearing"

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

Court of Appeals of the
STATE OF NEVADA
201 S. CARSON ST., STE 201
CARSON CITY, NV
89701

Nevada Appellate General
100 N. CARSON STREET
CARSON CITY, NV
89701

CC:FILE

DATED: this 27 day of JANUARY, 2020.

James H. Naves
JAMES H. NAYES # 1193692
An Propria Personam
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Motion

for Rehearing

(Title of Document)

filed in Supreme Court Case number 78590

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

-OR-

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

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

(State specific law)

-or-

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

James N. Hayes
Signature

1-27-20
Date

JAMES N. HAYES
Print Name

PROPER PERSON
Title

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES HOWARD HAYES, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82734-COA

FILED

SEP 17 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

James Howard Hayes, Jr., appeals from orders of the district court denying a postconviction petition for a writ of habeas corpus and a motion to compel judgment. Eighth Judicial District Court, Clark County; Monica Trujillo, Judge.

Postconviction petition for a writ of habeas corpus

In his February 12, 2020, petition¹ and later-filed supplements, Hayes claimed that his trial-level counsel was ineffective. To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of

¹Hayes filed an "amended petition," and due to the nature of the claims raised, the district court construed it as a postconviction petition for a writ of habeas corpus. See NRS 34.724(2)(b). The district court also found that Hayes' petition was successive and procedurally barred pursuant to NRS 34.810(2) because he had previously filed a postconviction petition for a writ of habeas corpus. However, Hayes' first petition has not yet been resolved by the district court. Because the petition was not denied on the merits, the district court erred by concluding Hayes' petition was successive. See NRS 34.810(2).

reasonableness, and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). To demonstrate prejudice regarding the decision to enter an *Alford*² plea, a petitioner must show a reasonable probability that, but for counsel's errors, petitioner would not have entered an *Alford* plea and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry—deficiency and prejudice—must be shown, *Strickland*, 466 U.S. at 687, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, Hayes claimed counsel was ineffective for failing to assert that his prosecution was barred by NRS 174.085(3) and NRS 178.562 because a count of attempted grand larceny was dismissed during the preliminary hearing. NRS 174.085(3) bars re-prosecution of a defendant for a charge after that defendant has been convicted, acquitted, or placed in jeopardy for that charge. NRS 178.562 bars re-prosecution of an offense under certain situations when a criminal action is dismissed and bars the filing of another complaint against a person for an offense that had previously been discharged following a preliminary hearing.

²*North Carolina v. Alford*, 400 U.S. 25 (1970).

During the preliminary hearing in this matter, the State moved to strike a count of attempted grand larceny, and the justice court granted its request. The justice court later found probable cause to believe that Hayes committed burglary and bound Hayes over to district court. Before the district court, the burglary charge was reduced to a charge of attempted grand larceny as a result of the plea agreement reached between the parties. Because the justice court found probable cause to support the burglary charge, and at no point was that charge dismissed or was Hayes discharged, NRS 178.562 did not bar Hayes' prosecution. In addition, because the preliminary hearing proceedings did not convict, acquit, or place Hayes in jeopardy, NRS 174.085(3) did not bar Hayes' prosecution.

Accordingly, Hayes did not demonstrate that his counsel's performance fell below an objective standard of reasonableness by failing to argue that Hayes' prosecution was barred by the application of NRS 174.085(3) or NRS 178.562. Hayes also failed to demonstrate a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Second, Hayes claimed counsel was ineffective for failing to ensure he fully understood the plea agreement and potential consequences he faced from entry of an *Alford* plea. The written plea agreement, which Hayes acknowledged having read and understood, informed Hayes of the potential sentences he faced by entry of his plea. The written plea agreement also informed Hayes of the potential sentences he faced due to the habitual criminal enhancement if he violated the failure-to-appear (FTA) clause. At the plea canvass, Hayes informed the trial-level court that he read the written plea agreement and his counsel was available to answer any of his questions concerning the agreement. At the canvass, Hayes also

asserted he understood the plea agreement and believed entry of an *Alford* was in his best interests.

In light of the record concerning Hayes' understanding of the plea agreement and the consequences he faced from entry of his plea, Hayes failed to demonstrate his counsel's performance fell below an objective standard of reasonableness. Hayes also failed to demonstrate a reasonable probability he would have refused to enter an *Alford* plea and would have insisted on proceeding to trial had counsel done a more thorough job of explaining the plea agreement and potential consequences to him or discussed the plea agreement in a different manner. Therefore, we conclude the district court did not err by denying this claim.

Third, Hayes claimed counsel was ineffective for failing to move to withdraw his plea after it became clear he would not receive a sentence in accordance with the plea agreement. In the plea agreement, the State agreed not to oppose probation in exchange for Hayes' *Alford* plea. However, the written plea agreement also contained the FTA clause and explained the potential consequences Hayes faced if he violated that clause, including a sentence pursuant to the habitual criminal enhancement. Accordingly, Hayes' sentence pursuant to the habitual criminal enhancement was in accordance with Hayes' plea agreement. Thus, Hayes did not demonstrate that his counsel's performance fell below an objective standard of reasonableness by failing to assert that Hayes should be permitted to withdraw his plea or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Hayes claimed counsel was ineffective for failing to argue that Hayes did not violate the FTA clause contained within the plea

agreement. The written plea agreement contained a clause that permitted the State to argue for any legal sentence, including one under the habitual criminal enhancement, if an independent magistrate confirmed probable cause against Hayes for new criminal charges. After entry of his plea, Hayes was charged with committing a new burglary offense and a justice court found probable cause to support that charge. Because an independent magistrate confirmed there was probable cause to support the new burglary charge, Hayes failed to demonstrate his counsel's performance fell below an objective standard of reasonableness by failing to assert he did not violate the FTA clause. Hayes also failed to demonstrate a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Hayes claimed counsel was ineffective for failing to assert he was not eligible for sentencing under the habitual criminal enhancement as his two Texas convictions should not have been considered felonies for sentencing purposes because he did not serve prison terms for those convictions. Hayes also appeared to assert that his prior felony convictions should have only been considered as a single prior conviction for enhancement purposes because they arose out of one event.

The State provided the sentencing court with two judgments of conviction from the state of Texas demonstrating that Hayes was convicted of two separate felony convictions in that state and sentenced to serve two years in prison for each conviction. *See* NRS 207.016(5) ("For the purposes of NRS 207.010, 207.012 and 207.014, a certified copy of a felony conviction is prima facie evidence of conviction of a prior felony."). Because Hayes had at least two prior convictions "which under the laws of the situs of the crime" were felonies, he was eligible to be sentenced pursuant to the small habitual

criminal enhancement. 2009 Nev. Stat., ch. 156, § 1, at 567 (NRS 207.010(1)(a)). In addition, the State filed two separate judgments of conviction from Texas containing different criminal case numbers for each conviction. Hayes thus did not demonstrate the Texas convictions were prosecuted in the same indictment or information. Therefore, Hayes did not demonstrate his prior convictions should have been considered as a single prior conviction for purposes of enhancing his sentence pursuant to the habitual criminal statute. *See Rezin v. State*, 95 Nev. 461, 462, 596 P.2d 226, 227 (1979) (“[W]here two or more convictions grow out of the same act, transaction or occurrence, and are prosecuted in the same indictment or information, those several convictions may be utilized only as a single ‘prior conviction’ for purposes of applying the habitual criminal statute.”). Accordingly, Hayes did not demonstrate that his counsel’s performance fell below an objective standard of reasonableness by failing to raise Hayes’ underlying arguments or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Next, Hayes claimed his appellate counsel was ineffective. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel’s performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have a reasonable probability of success on appeal. *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114. Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 687, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means*, 120 Nev. at 1012, 103 P.3d at 33. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745,

751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, Hayes claimed his appellate counsel was ineffective for failing to investigate meritorious claims because Hayes asserted counsel would have discovered that the State did not properly file a notice of its intent to request sentencing under the habitual criminal enhancement. The State filed a notice of its intent as required by NRS 207.016(2) to request the sentencing court to sentence Hayes pursuant to the habitual criminal enhancement, and did so prior to entry of Hayes' *Alford* plea. Hayes failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness by failing to argue the State did not properly file the notice or a reasonable likelihood of success on appeal had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Second, Hayes claimed his appellate counsel was ineffective for failing to file a notice of appeal or inform him of his right to an appeal. Hayes filed a pro se notice of appeal and this court considered his direct appeal. *See Hayes v. State*, Docket No. 78590-COA (Order of Affirmance, January 14, 2020). Because Hayes pursued a direct appeal, Hayes does not demonstrate that any failure by counsel to perform these actions caused him to suffer prejudice. Therefore, we conclude the district court did not err by denying this claim.

Third, Hayes appeared to claim his appellate counsel was ineffective for withdrawing after issuance of the remittitur on appeal. Hayes filed a pro se motion requesting the withdrawal of his counsel and the district court granted that motion. Hayes did not demonstrate that

withdrawal by counsel under these circumstances was objectively unreasonable. Hayes also failed to demonstrate a reasonable probability of a different outcome had counsel declined to withdraw from Hayes' case. Therefore, we conclude the district court did not err by denying this claim.

Next, Hayes appeared to claim that his plea was not knowing and voluntary because the trial-level court failed to explain the consequences he faced by violating the FTA clause. "This court will not invalidate a plea as long as the totality of the circumstances, as shown by the record, demonstrates that the plea was knowingly and voluntarily made and that the defendant understood the nature of the offense and the consequences of the plea." *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). As explained previously, the written plea agreement explained to Hayes the consequences he faced by violating the FTA clause and Hayes acknowledged that he read and understood the written plea agreement. Thus, the totality of the circumstances demonstrated that Hayes understood the consequences he faced from entry of his plea and from violating the FTA clause. Therefore, we conclude that Hayes is not entitled to relief based upon this claim.

Next, Hayes claimed the State breached the plea agreement, presented impalpable evidence at the sentencing hearing, amended the information in bad faith, violated his right to equal protection, and should have been barred from prosecuting him. Hayes also asserted that the trial-level court lacked jurisdiction to convict him and the presentence investigation report contained mistakes concerning his criminal record. These claims were not based on an allegation that his plea was involuntarily or unknowingly entered or that his plea was entered without the effective assistance of counsel, and therefore, these claims were not permissible in

Hayes' postconviction petition for a writ of habeas corpus. *See* NRS 34.810(1)(a). Accordingly, we conclude the district court properly denied relief for these claims.

Motion to compel judgment

Hayes also appealed from an order denying his motion to compel judgment. However, no statute or court rule permits an appeal from an order denying a motion to compel judgment. Therefore, we lack jurisdiction to consider this portion of Hayes' appeal. *See Castillo v. State*, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Monica Trujillo, District Judge
James Howard Hayes, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES HOWARD HAYES, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83274-COA

FILED

FEB 09 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

James Howard Hayes, Jr., appeals from an order of the district court denying a motion to modify and/or correct an illegal sentence filed on March 25, 2021. Eighth Judicial District Court, Clark County; Monica Trujillo, Judge.

In his motion, Hayes first claimed the sentencing court's decision to adjudicate him a small habitual criminal was based on mistaken assumptions about his criminal record. Hayes claimed he lacked the requisite number of prior felony convictions to qualify for habitual criminal treatment, because he had only one prior felony conviction at the time he was adjudicated and not the three the State claimed. "[A] motion to modify a sentence is limited in scope to sentences based on mistaken assumptions about a defendant's criminal record which work to the defendant's extreme detriment." *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

First, Hayes claimed he lacked the requisite number of prior felony convictions because one of the offenses the State relied upon—a 2007 Texas conviction for credit card abuse—was nonviolent and would not be a

felony in Nevada. A prior offense may be used to adjudicate a person as a habitual criminal so long as the offense would amount to a felony “under the laws of the situs of the crime or of this State.” NRS 207.010(1)(a). “NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court.” *Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992). Credit card abuse is a felony under Texas law, *see* Tex. Penal Code Ann. § 32.21(d) (West 2005), and it was within the sentencing court’s discretion to consider this prior felony conviction despite it being nonviolent. Hayes thus failed to demonstrate that the sentencing court’s reliance on this conviction amounted to a mistaken assumption about his criminal record. Therefore, we conclude this district court did not err by denying this claim.

Second, Hayes claimed he lacked the requisite number of prior felony convictions because one of the offenses the State relied upon—a 2017 burglary conviction—was entered after the commission of the primary offense. “All prior convictions used to enhance a sentence must have preceded the primary offense.” *Brown v. State*, 97 Nev. 101, 102, 624 P.2d 1005, 1006 (1981). Because Hayes committed the instant offense in 2013, the 2017 burglary conviction could not be used to adjudicate him a habitual criminal.

However, at the time Hayes committed his crimes, anyone who was convicted of a felony and had two prior felony convictions qualified for habitual criminal treatment. *See* 2009 Nev. Stat., ch. 156, § 1, at 567. In addition to the Texas conviction discussed above, the State also provided evidence that Hayes had a 2011 felony conviction for attempted possession

of a credit or debit card without the cardholder's consent. Because Hayes had two other prior felony convictions, he failed to demonstrate that he lacked the requisite number of felony convictions to qualify for habitual criminal treatment. Hayes thus failed to demonstrate any mistaken assumptions about his criminal record worked to his extreme detriment. Therefore, we conclude this district court did not err by denying this claim.

Hayes next claimed his sentence was facially illegal because the district court lacked subject matter jurisdiction. A motion to correct an illegal sentence may only challenge the facial legality of the sentence: either the district court was without jurisdiction to impose a sentence, or the sentence was imposed in excess of the statutory maximum. *Edwards*, 112 Nev. at 708, 918 P.2d at 324. Hayes claimed the crime to which he entered his *Alford*¹ plea was dismissed by the justice court after his preliminary hearing. Hayes was bound over to the district court on one count of burglary but resolved the matter by entering an *Alford* plea to one count of attempted grand larceny. Hayes failed to demonstrate the *Alford* plea divested the district court of subject matter jurisdiction. See Nev. Const. art. 6, § 6(1); NRS 4.370(3); NRS 171.010; *Landreth v. Malik*, 127 Nev. 175, 183, 251 P.3d 163, 168 (2011) ("Subject matter jurisdiction is the court's authority to render a judgment in a particular category of case." (internal quotation marks omitted)). Therefore, we conclude the district court did not err by denying this claim.

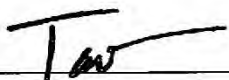
¹See *North Carolina v. Alford*, 400 U.S. 25 (1970).

Hayes also raised claims challenging the validity of his judgment of conviction and sentence. These claims were outside the scope of claims permissible in a motion to modify or correct an illegal sentence. *See Edwards*, 112 Nev. at 708, 918 P.2d at 324. Therefore, we conclude the district court did not err in denying these claims.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Monica Trujillo, District Judge
James Howard Hayes, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²Hayes raises several new claims on appeal. We decline to consider them in the first instance. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999)

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES HOWARD HAYES, JR.,
Appellant,
vs.
THE STATE OF NEVADA; AND JERRY
HOWELL, WARDEN,
Respondents.

No. 83151-COA

FILED

FEB 18 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER AFFIRMING IN PART AND DISMISSING IN PART

James Howard Hayes, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 30, 2021. Hayes also appeals from a purported May 10, 2021, order of the district court denying a “supplemental” petition. Eighth Judicial District Court, Clark County; Monica Trujillo, Judge.

In his March 30, 2021, petition, Hayes alleged that the conditions in the prison and the prison’s actions regarding COVID-19 were so bad as to constitute cruel and unusual punishment. This claim fell outside the scope of claims allowed to be raised in a postconviction petition for a writ of habeas corpus because Hayes is challenging the conditions of confinement and not his judgment of conviction or the computation of time served. *See* NRS 34.724(1); *Bowen v. Warden*, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984). Therefore, we conclude the district court did not err by denying this petition.

Hayes indicates he is also appealing from a May 10, 2021, order of the district court denying a supplemental petition. Our review of the record on appeal reveals that no order, oral or written, was entered on that date by the district court. Because Hayes failed to designate an appealable

order, this court lacks jurisdiction, and we dismiss this portion of the appeal. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND DISMISSED IN PART.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Monica Trujillo, District Judge
James Howard Hayes, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES HOWARD HAYES, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84169-COA

FILED

MAY 26 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *S. Young*
DEPUTY CLERK

ORDER OF AFFIRMANCE

James Howard Hayes, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on November 16, 2021.¹ Eighth Judicial District Court, Clark County; Nancy A. Becker, Judge.

Hayes filed his petition more than one year after issuance of the remittitur on direct appeal on February 10, 2020. *See Hayes v. State*, No. 78590-COA, 2020 WL 230182 (Nev. Ct. App. Jan. 14, 2020) (Order of Affirmance). Thus, Hayes's petition was untimely filed. *See* NRS 34.726(1). Moreover, Hayes's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus that was decided on the merits, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.² *See* NRS 34.810(2). Hayes's petition was procedurally barred absent a demonstration of good

¹Hayes's pleading was captioned as a postsentence motion to withdraw guilty plea. The district court properly construed the pleading as a postconviction petition for a writ of habeas corpus. *See Harris v. State*, 130 Nev. 435, 448-49, 329 P.3d 619, 628 (2014).

²*See Hayes v. State*, No. 82734-COA, 2021 WL 4261335 (Nev. Ct. App. Sept. 17, 2021) (Order of Affirmance).

cause and actual prejudice, *see* NRS 34.726(1); NRS 34.810(3), or that he was actually innocent such that it would result in a fundamental miscarriage of justice were his claims not decided on the merits, *see Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015).

Hayes appeared to claim he had good cause because the trial court lacked subject matter jurisdiction over the attempted grand larceny charge to which he pleaded guilty since the justice court dismissed a count of attempted grand larceny at the preliminary hearing. Hayes previously raised this claim in a motion to modify or correct an illegal sentence. This court concluded Hayes failed to demonstrate the trial court lacked subject matter jurisdiction. *See Hayes v. State*, No. 83274-COA, 2022 WL 405312 (Nev. Ct. App. Feb. 9, 2022) (Order of Affirmance). This claim was barred by the doctrine of law of the case, *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975), and therefore could not be good cause to overcome the procedural bar.

Hayes next appeared to claim he had good cause because he was actually innocent of attempted grand larceny since the charge was dismissed after the justice court found insufficient evidence of it was presented at the preliminary hearing. To demonstrate actual innocence to overcome the procedural bars, Hayes was required to demonstrate “it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.” *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). Further, actual innocence in a case involving a guilty plea requires that the petitioner demonstrate that he is actually innocent of more serious charges forgone by the State in the course of plea bargaining. *See Bousley v. United States*, 523 U.S. 614, 624 (1998).

Here, Hayes failed to allege new evidence that he was actually innocent. Further, we note the justice court did not dismiss the charge of attempted grand larceny based on insufficient evidence. Instead, the State requested that the charge be dismissed and gave no reason for the request. Therefore, the act of dismissing the charge did not demonstrate insufficient evidence or actual innocence. Finally, Hayes failed to demonstrate actual innocence with regard to the burglary charge that was forgone by the State in the course of plea bargaining. Burglary was a more serious crime than attempted grand larceny. *Compare* NRS 205.060(2) (burglary), *with* NRS 193.153 (attempts), *and* 2011 Nev. Stat., ch. 41, § 13-14, at 163-64 (former NRS 205.220 and NRS 205.222, defining grand larceny and providing the attendant penalties). Accordingly, we conclude Hayes did not overcome the procedural bars and the district court did not err by denying the petition as procedurally barred.³ Thus, we

ORDER the judgment of the district court AFFIRMED.

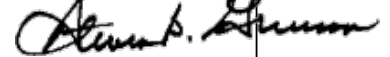

_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

³On appeal, Hayes appears to argue he has good cause because certain documents have not been produced to him that would support his claims. Because this good-cause claim was not raised below, we decline to consider it for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

cc: Chief Judge, Eighth Judicial District Court
Hon. Nancy A. Becker, Senior Judge
James Howard Hayes, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk



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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY

James Howard Hayes,
Petitioner,
v.

State of Nevada,
Respondents.

Case No. C-16-315718-1

Dept. No. 3

MOTION TO MODIFY OR CORRECT AND ILLEGAL SENTENCE

1 James Howard Hayes, by and through his attorney, Assistant Federal Public
2 Defender Martin L. Novillo, files this Motion to Modify or Correct an Illegal
3 Sentence, challenging the legality of the sentence imposed on March 6, 2019, and
4 the judgment of conviction entered on March 12, 2019, in the present case. Hayes
5 argues that the sentence must be modified because it was based upon mistaken
6 assumptions of fact pertaining to his criminal record. Hayes further argues that the
7 Court's failure to observe and abide with the statutory requirements set forth in
8 NRS 207.010, governing habitual criminal adjudications, rendered his sentence
9 illegal.

10 **RELEVANT PROCEDURAL HISTORY**

11 **A. Trial court proceedings**

12 On July 25, 2013, the State filed a criminal complaint in Case No. 13F10723X
13 charging James Howard Hayes with Burglary (Count 1) and Attempt Grand
14 Larceny (Count 2). 07/25/2013 Complaint.

15 On June 17, 2016, the State filed an Information charging Hayes with
16 burglary. 06/17/2016 Information. On November 21, 2016, the State filed a Notice of
17 Intent to Seek Punishment as a Habitual Criminal. 11/21/2016 Notice. The State
18 cited three prior convictions in support: (1) 2007 convictions out of Texas on two
19 counts of fraudulent use/possession of personal identification information, (2) 2007
20 convictions of Texas on two counts of credit card abuse, and (3) a 2011 Nevada
21 conviction for attempt possession of credit or debit card without cardholder's
22 consent. *Id.*

23 On August 29, 2017, the State filed an Amended Notice of Intent to Seek
24 Punishment as Habitual Criminal. *See* Ex. 4. The State cited to three convictions in
25 support: (1) Hayes' 2007 Texas conviction for the crime of credit card abuse in Case
26 No. 108378501010, (2) Hayes' 2011 Nevada conviction for the crime of attempt
27

1 possession of credit or debit card without cardholder's consent in case no. C270308,
2 and (3) Hayes' 2017 Nevada conviction for the crime of burglary in Case No. C-16-
3 315125. *See id.*

4 On August 29, 2018, Hayes appeared at a motion's hearing with new counsel,
5 Michael Sanft. 08/29/2018 PT. Sanft represented that Hayes intended to accept the
6 State's offer to plea guilty to one count of attempt grand larceny and that, in
7 exchange, the State would make no recommendation at sentencing and would not
8 oppose a sentence of thirty (30) days and probation. *Id.* at 2. Sanft explained Hayes
9 would be pleading guilty pursuant to *Alford*. *Id.* On November 7, 2018, Hayes
10 appeared before the district court and executed a Guilty Plea Agreement.
11 11/07/2018 PT; *see also* Ex. 5. Pursuant to *Alford*, Hayes entered a plea of guilty to
12 attempt grand larceny. 11/07/2018 PT at 2. The State agreed it would not oppose a
13 sentence of probation conditioned on thirty (30) days of incarceration with thirty
14 (30) days credit for time served. *Id.* Pursuant to the agreement, the State filed an
15 Amended Information charging Hayes with one count of attempt grand larceny.
16 11/07/2018 Am. Inf. The State then requested a pre-sentence investigation report
17 and the district court set Hayes' sentencing for March 6, 2019. 11/07/2018 PT at 9.

18 **i. Hayes' 2019 arrest and breach of the guilty plea**
19 **agreement**

20 On January 26, 2019, Hayes was arrested by the Las Vegas Metropolitan
21 Police Department and charged with burglary in Case No. 19F01534X (hereinafter
22 "the Mirage case"). *See* Ex. 6. The complaint filed by the State alleged Hayes had
23 unlawfully entered a hotel room at the Mirage Hotel & Casino with the intent to
24 commit larceny. *Id.* The State moved to revoke bail on Hayes' attempt grand larceny
25 case for which Hayes was then set to be sentenced on March 6, 2019. 01/31/2019
26 Motion. In the motion, the State further argued that Hayes had violated a condition
27 precedent in his Guilty Plea Agreement (Ex. 5) and that the State had thus

1 regained the right to argue at sentencing and to seek habitual criminal treatment.
2 *Id.* at 5-6.

3 On March 6, 2019, Hayes was sentenced on the charge of attempt grand
4 larceny. Ex. 8. Counsel Sanft represented Hayes at the hearing. *Id.* The district
5 court inquired whether there was anything in the pre-sentence investigation report
6 that Hayes believed was incorrect. *Id.* at 3. Hayes answered in the affirmative,
7 noting that the report included crimes that occurred after the offense date. *Id.*
8 Hayes also explained that his Texas convictions did not comprise felonies. *Id.* The
9 State noted that, given Hayes' arrest in the Mirage case, it had regained the right to
10 argue at sentencing and requested that the district court sentence Hayes to 8 to 20
11 years in prison, to run consecutive to Hayes' conviction in Case No. 315125 (Ex. 3).
12 *Id.* at 10. The district court adjudicated Hayes guilty pursuant to the small habitual
13 criminal statute, NRS 207.010(a), and sentenced him to a minimum of sixty (60)
14 and maximum of one hundred seventy-four (174) months in prison, to run
15 consecutively to Hayes' sentence in case no. C315125. *Id.* at 18-19. On March 12,
16 2019, the district court executed Hayes' judgment of conviction.

17 **B. Direct Appeal**

18 On March 28, 2019, Hayes filed a Notice of Appeal in which he also listed
19 various claims. Ex. 9. On April 17, 2019, the Nevada Supreme Court delivered a
20 letter to counsel Sanft noting that he had failed to request transcripts in the appeal.
21 Ex. 10. On May 31, 2019, the Nevada Supreme Court entered an order conditionally
22 imposing sanctions upon Sanft for his failure to file a transcript request form and
23 ordering that Sanft file the form within 14 days. Ex. 11.

24 On June 3, 2019, Sanft appeared before the district court on Hayes' motion to
25 have him withdraw as counsel. Ex. 12. Sanft represented to the district court that
26 he could not withdraw from the case due to the above-referenced order imposing
27

1 sanctions. *Id.* at 3. Sanft also noted that Hayes had filed the appeal despite Sanft
2 informing him that there was no “basis” for an appeal. *Id.*

3 On June 14, 2019, Sanft filed a Certificate noting that no transcript was
4 being requested for Hayes’ appeal. Ex. 13. Sanft then attempted to fast-track Hayes’
5 appeal, but his request was returned “deficient” by the Nevada Supreme Court. Ex.
6 14. On June 18, 2019, Sanft filed a corrected Fast Track Statement wherein he
7 noted a single issue: that Hayes’ Eighth Amendment right against cruel and
8 unusual punishment had been violated as a result of his sentence. Ex. 15.

9 On July 15, 2019, this Court—acting under the misapprehension that a
10 remittitur had issued in Hayes’ appeal—allowed Sanft to withdraw as counsel of
11 record. Ex. 16. Sanft did not appear at the hearing, *id.*, and did not seek to correct
12 the Court’s actions following entry of the order.

13 On July 17, 2019, the Nevada Supreme Court delivered a letter to Hayes
14 indicating it was rejecting a pro se memorandum filed in his appeal because the
15 same had not been filed by Sanft. Ex. 17. On August 15, 2019, Hayes delivered a
16 letter to the Nevada Supreme Court noting that he had never had appointed or
17 retained counsel and that Sanft had rendered ineffective assistance by failing to file
18 a notice of appeal. Ex. 18. Hayes also noted that every pro se pleading he tried to
19 file with the Nevada Supreme Court was being returned unfiled because the state
20 court was under the misapprehension that Sanft was still representing him. *Id.* On
21 August 21, 2019, the Nevada Supreme Court filed an Order reiterating that Hayes
22 was represented by Sanft and that he “shall proceed through counsel in the
23 prosecution of this appeal.” Ex. 19.

24 On September 11, 2019, Hayes delivered a letter to the Clerk of Court for the
25 Nevada Supreme Court noting that Sanft was not communicating with him and
26 that counsel was failing to honor his “requests concerning [his] direct appeal.” Ex.
27 20. On November 21, 2019, the Nevada Supreme Court transferred Hayes’ appeal to

1 the Nevada Court of Appeals pursuant to NRAP 17(b). 11/21/2019 Notice. On
2 December 9, 2019, Hayes delivered an affidavit asserting various claims. Ex. 21.
3 The Nevada Supreme Court returned the document, noting Hayes was represented
4 by counsel. *Id.* On January 14, 2020, the Nevada Court of Appeals entered an
5 Order of Affirmance. Ex. 22. The order failed to address any of the pro se claims
6 raised by Hayes and merely ruled upon Sanft's fast track issue asserting a violation
7 of the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.*

8 On February 3, 2020, Hayes filed a Motion for Rehearing with the Nevada
9 Court of Appeals. Ex. 23. The Nevada Supreme Court delivered a letter to Hayes on
10 February 7, 2020 indicating it was rejecting the pleading because Hayes was
11 represented by counsel. *Id.* The Nevada Supreme Court issued its Remittitur on
12 February 25, 2020.

13 C. State post-conviction proceedings

14 Hayes filed numerous pro se motions to correct his illegal sentence, petitions
15 for postconviction relief, and accompanying addenda with this Court as well as the
16 Nevada Supreme Court. On May 12, 2020, this Court entered an Order denying
17 Hayes' requests for relief. 05/12/2020 Order. The Court noted Hayes' claims should
18 have been raised on appeal. *Id.* On March 9, 2021, in response to various pro se
19 pleadings, the Court once more entered an order denying postconviction relief.
20 03/09/2021 Order. On March 17, 2021, the Court entered yet another order denying
21 post-conviction relief. 03/17/2021 Order.

22 On September 17, 2021, the Nevada Court of Appeals entered an order in
23 case no. 82734 affirming this Court's denial of postconviction relief. Ex. 24. On
24 October 4, 2021, Hayes filed a Petition for Reconsideration. 10/04/2021 Petition. On
25 November 17, 2021, the Nevada Court of Appeals entered an order denying
26 rehearing. 11/17/2021 Order.

On February 9, 2022, the Nevada Court of Appeals entered an order in case no. 83274 affirming this Court’s denial of a motion to modify and/or correct an illegal sentence filed on March 25, 2021. Ex. 25. Remittitur issued on March 22, 2022. 03/22/2022 Remittitur. On March 15, 2022, the Nevada Supreme Court entered an order recalling the remittitur and reinstating Hayes’ appeal in light of a timely submitted motion for reconsideration, which the state court “inadvertently returned to [Hayes] unfiled.” 03/15/2022 Order. On April 20, 2022, the Nevada Court of Appeals entered an order denying rehearing. 04/20/2022 Order.

On February 18, 2022, the Nevada Court of Appeals entered an order in case no. 83151 denying a petition by Hayes challenging his conditions of confinement and a supplemental petition challenging his conviction. Ex. 26. With respect to the supplemental petition, the Nevada Court of Appeals noted Hayes had failed to “designate an appealable order” by the district court and thus the court lacked jurisdiction. *Id.*

On May 26, 2022, the Nevada Court of Appeals entered an order in case no. 84169 affirming the denial of a postconviction petition filed by Hayes on November 6, 2021. Ex. 27. Hayes filed a Motion for Reconsideration. 06/14/2022 Motion. The Nevada Court of Appeals denied the same on July 21, 2022. 07/21/2022 Order. Hayes then filed a Petition for Rehearing En Banc. 08/09/2022 Motion. The Nevada Court of Appeals denied the petition on August 23, 2022. 08/23/2022 Order.

LEGAL STANDARD

NRS 176.555 states, “The [district] court may correct an illegal sentence at any time.” The Nevada Supreme Court has interpreted this statute to allow a defendant—based on due process considerations—to bring one of two types of motions at any time: (1) a motion to correct a facially illegal sentence; and (2) a motion to modify a sentence that was based on a materially untrue assumption or mistake of fact. *Edwards v. State*, 112 Nev. 704, 708 (1996).

1 A motion to modify sentence “is limited in scope to sentences based on
2 mistaken assumptions about a defendant's criminal record which work to the
3 defendant’s extreme detriment.” *Id.*; see also *State v. Eighth Judicial Dist. Court*
4 (*Husney*), 100 Nev. 90, 97 (1984) (“[T]he district court has authority to correct or
5 modify a sentence which is the result of the sentencing judge’s misapprehension of a
6 defendant’s criminal record.”). Motions to correct illegal sentences address the facial
7 legality of a sentence. *Edwards*, 112 Nev. at 708. An “illegal sentence” is “one ‘at
8 variance with the controlling sentencing statute,’ or ‘illegal’ in the sense that the
9 court goes beyond its authority by acting without jurisdiction or imposing a
10 sentence in excess of the statutory maximum provided” *Id.* (citing *Allen v.*
11 *United States*, 495 A.2d 1145, 1149 (D.C. 1985) (citations omitted)).

12 ARGUMENT

13 **A. Hayes’ sentence must be modified because it was based on**
14 **materially untrue assumptions and mistakes of fact pertaining**
15 **to his criminal record**

16 This Court sentenced Hayes based on several materially untrue assumptions
17 pertaining to his criminal record. *Edwards*, 112 Nev. at 708. At the time of Hayes’
18 sentencing, NRS 207.010(a), the “small habitual criminal” statute, provided that a
19 person convicted in Nevada of “[a]ny felony, who has previously been two times
20 convicted, whether in this State or elsewhere, of any crime which under the laws of
21 the situs of the crime or of this State would amount to a felony is a habitual
22 criminal and shall be punished for a category B felony by imprisonment in the state
23 prison for a minimum term of not less than 5 years and a maximum term of not
24 more than 20 years.”

25 In this case, the Amended Notice of Intent to Seek Punishment as Habitual
26 Criminal filed by the State cited to three convictions:

- 27 1. A 2007 conviction out of Texas for Credit Card Abuse in Case
No. 108378501010;

2. A 2011 conviction out of Nevada for Attempt Possession of Credit or Debit Card without Cardholder's Consent in Case No. C270308; and
3. A 2017 conviction out of Nevada for Burglary in Case No. C315125.

Ex. 4. At Hayes' sentencing, the State presented an additional and unnoticed judgment of conviction from Harris County, Tx. *See* Ex. 7 at 12 (Judgment of Conviction for Case No. 1083786); *see also* Ex. 8. Further, the State cited to the then unadjudicated 2019 Mirage burglary offense in Case No. 19F01534X, *see supra* at 3-4, and a 2011 incident during which Hayes allegedly stole from a convenience store tip jar, thus improperly relying on prior bad acts to argue Hayes was a habitual criminal. *See* Ex. 8 at 7-10.

As described below, the Court mistakenly assumed the Texas convictions (Case Nos. 1083785, 1083786) comprised separate convictions. In addition, and as noted above, the Court mistakenly assumed it could consider unadjudicated conduct and a conviction that followed Hayes' primary offense. The aforementioned assumptions worked to Hayes' "extreme detriment" because they prompted the Court to adjudicate Hayes as a habitual criminal when in fact he did not meet the criteria set forth in NRS 207.010(a). *Edwards*, 112 Nev. at 708. Irrespective—even if Hayes technically qualified under NRS 207.010(a) because he had at least two prior, felony convictions—the Court's sentence was based upon materially untrue assumptions about Hayes' criminal record. *Id.*

i. Hayes' adjudication as a habitual criminal was based upon numerous mistaken assumptions

The Court mistakenly assumed Hayes' 2017 Nevada conviction in Case No. C315125-1 (Ex. 7 at 7) could be relied upon to adjudicate Hayes a habitual criminal. *See Brown v. State*, 97 Nev. 101, 102 (1981) ("All prior convictions used to enhance

1 a sentence must have preceded the primary offense.”). Here, the relevant offense
2 occurred in 2013. *See* 11/07/2018 Am. Inf. Thus, the conviction could not be relied
3 upon to adjudicate Hayes a habitual criminal.¹

4 The Court also mistakenly assumed Hayes’ 2007 Texas convictions (Ex. 7 at
5 3, 13) comprised separate convictions for purposes of NRS 207.010(a). Specifically, a
6 cursory review of the Harris County record² reveals that both convictions, Case No.
7 1083785 and Case No. 1083786, “[grew] out of the same act, transaction or
8 occurrence, and [were] prosecuted in the same indictment or information” and thus,
9 at most, could be “utilized only as a single ‘prior conviction’ for purposes of applying
10 the habitual criminal statute.” *Rezin v. State*, 95 Nev. 461, 462 (1979).

11 Here, during sentencing, the State introduced two judgments from the 185th
12 District Court of Harris County, Texas:

13 (1) A conviction in Case No. 1083785 entered on March 2, 2007, for
14 Credit/Debit Card Abuse, said to have occurred on September 7, 2006; and

15 (2) A conviction in Case No. 1083786 entered on March 2, 2007, for
16 Fraudulent Use/Possession of Identifying Information, said to have occurred on
17 September 7, 2006.

18 Ex. 7; *see also* Ex. 8.

21 ¹ The Court likewise mistakenly assumed it could consider the 2011 Nevada
22 conviction (Ex. 7 at 10). In Nevada, the crime of attempt possession of credit or debit
23 card without cardholder’s consent is punishable as a category E felony/gross
24 misdemeanor. *See* NRS 205.690; NRS 193.330 (replaced by NRS 193.153). Per NRS
25 193.130(2)(e), the prison sentence for a category E felony must be suspended and
probation must be granted. Thus, the offense is not a felony pursuant to NRS

26 ² Undersigned counsel obtained the public records cited in the present claim
27 by searching the Harris County District Court’s website, located at
<https://www.hcdistrictclerk.com/Common/Default.aspx>.

1 A review of the pleadings out of Harris County, Texas demonstrates that the
2 offenses grew out of the same transaction. Specifically, the record shows that on
3 September 7, 2006, Hayes used a credit card belonging to an individual named
4 Dean Alac to purchase jewelry from a business operating out of Las Vegas and used
5 a Texas driver's license belonging to an individual named Percy Vital to assume
6 that person's identity and accept the jewelry once it was delivered to a Hilton hotel
7 in Houston, Texas. *See* Ex. 2 at pp. 43-44 (Order of Affirmance by the Court of
8 Appeals for the First District of Texas). Use of Alac's credit card resulted in the
9 charge of credit card abuse in Case No. 1083785 while use of Vital's driver's license,
10 led to the fraudulent use of identifying information charged in Case No. 1083786.
11 *See id.*

12 A review of the Texas record further shows that the charges were prosecuted
13 as part of the same indictment. Here, both charges were indicted by the same grand
14 jury. *See* Ex. 1 at 33 (Indictment for Case No. 1083785); Ex. 2 at 67 (Indictment for
15 Case No. 1083786). Because they were indicted together and were never severed,
16 both charges were tried jointly. *See* Ex. 2 at 167. In short, the Texas convictions
17 comprised a single prior conviction for purposes of applying the habitual criminal
18 statute. *Rezin*, 95 Nev. at 462. This Court, however, mistakenly assumed the State
19 had provided proof of two distinct convictions. *See* Ex. 8 at 6.

20 In addition to comprising a single conviction, neither Texas conviction
21 qualified as a felony for purposes of NRS 207.010(a) because each comprised a "*state*
22 *jail* felony." Ex. 15 (emphasis added). Texas' Penal Code provides that "individual[s]
23 adjudged guilty of a state jail felony shall be punished by confinement *in a state jail*
24 for any term of not more than two years or 180 days." Tex. Penal Code § 12.35(a). In
25 addition, in 2007, Texas law required mandatory supervision for Hayes' offenses. *In*
26 *re Craven*, 2009 Tex. App. LEXIS 8836, *6 (Tex. App. 2009). Further, Section
27 1.07(a)(23) of the Texas Penal Code defines a "felony" as "an offense so designated

1 by law or punishable by death or confinement *in a penitentiary*.” Tex. Penal Code §
2 1.07(a)(23) (emphasis added). Finally, Section 12.42(d), which governs the
3 adjudication of habitual offenders in Texas, provides that ordinary state jail
4 felonies—such as those Hayes was convicted of in 2007—are not eligible for
5 purposes of adjudging an individual a habitual criminal. Tex. Penal Code § 12.42(d).

6 Here—in addition to mistakenly assuming the convictions were distinct—this
7 Court mistakenly assumed that the Texas convictions comprised felonies for
8 purposes of adjudicating Hayes a habitual criminal. The Court thus relied on
9 mistaken assumptions about Hayes’ criminal record when it determined that he
10 was eligible for habitual criminal treatment. In light of the foregoing, this Court
11 should reverse its judgment of conviction and re-sentence Hayes.

12 **B. Hayes’ sentence must be corrected because the Court failed to**
13 **follow the statutory requirements set forth in NRS 207.010**
14 **when it adjudicated Hayes a habitual criminal**

15 In *Passanisi v. State*, the Supreme Court of Nevada explained that “the
16 district court has inherent authority to correct... a sentence that, although within
17 the statutory limits was entered in violation of the defendant’s due process
18 rights.” 108 Nev. 318, 321 (1992) (*overruled on other grounds by Harris v. State*,
19 130 Nev. 435 (2014)). Here, the Court sentenced Hayes under the mistaken
20 assumption that it was obligated to automatically adjudicate him a habitual
21 criminal should it find that the prosecutor had established two prior felony
22 convictions. The Court failed to comply with NRS 207.010(3), which provides that
23 “[t]he trial judge may, at his discretion, dismiss a count under this section which is
24 included in any indictment or information.”

25 NRS 207.010 provides the trial court with “the broadest kind of judicial
26 discretion” when determining whether to adjudicate a defendant a habitual
27 criminal. *Clark v. State*, 109 Nev. 426, 428 (1993). In *Clark*, the Nevada Supreme
Court recognized that a habitual criminal adjudication not only required that the

1 requisite felony convictions be authenticated and established, but that the district
2 court determine “whether it [is] just and proper for [a defendant] to be punished and
3 segregated as a habitual criminal.” *Id.* The Court noted that it “was incumbent upon
4 the trial court to weigh properly whether the habitual criminality count should have
5 been dismissed pursuant to the discretion conferred by NRS 207.010[.]” *Id.* at 429.
6 In *Hughes v. State*, 116 Nev. 327, 333 (2000), the Nevada Supreme Court,
7 reiterated the district court must “exercise its discretion and weigh the appropriate
8 factors for and against the habitual criminal statute before adjudicating a person as
9 a habitual criminal.”

10 In this case, the Court automatically adjudicated Hayes a habitual criminal
11 after noting the State had “satisfied any obligations statutorily under [NRS]
12 207.010 to support their claim for habitual treatment.” Ex. 8 at 18. Thus, rather
13 than conclude that Hayes “deserved to be declared a habitual criminal[.]” the Court
14 merely found that Hayes had committed the requisite number of crimes. *Clark*, 109
15 Nev. at 427. The Court’s reference to the State satisfying the statutory criteria
16 demonstrates it was under the impression that two felony convictions
17 “automatically equated to habitual criminal status.” *Id.* The Court’s failure to
18 address the nature of the prior convictions—including their remoteness and the
19 non-violent character of the crimes—further evinces it did not weigh whether the
20 habitual criminality count should be dismissed. *See Sessions v. State*, 106 Nev. 186
21 (1990) (finding it was an abuse of discretion for the court to enter a habitual
22 adjudication when the convictions were nonviolent and remote in time). The failure
23 to scrutinize the judgment of convictions from Harris County, Texas (Ex. 7 at 3,
24 13)—which on their face showed the offenses grew out of the same occurrence, had
25 been prosecuted together, and thus did not merit separate consideration—likewise
26 demonstrates the Court overlooked its discretionary power under NRS 207.010(3).

1 Here, the Court did not weigh the appropriate factors for an against the
2 criminal enhancement and did not decide that it was “just and proper” to adjudge
3 Hayes a habitual criminal. *See Walker v. Deeds*, 50 F.3d 673 (9th Cir. 1995). The
4 Court’s automatic adjudication and its failure to make an individualized finding
5 that it was just and proper to adjudge Hayes a habitual criminal deprived Hayes of
6 his liberty without due process of law. *See Hicks v. Oklahoma*, 447 U.S. 343, 346
7 (1980). The Court’s error rendered Hayes’ sentence illegal.

8 CONCLUSION

9 The Court’s adjudication of Hayes as a habitual criminal was based upon
10 mistaken assumptions of fact regarding his criminal record. In addition, the Court’s
11 failure to exercise its discretion, as provided in NRS 207.010(3), violated Hayes’ due
12 process rights and rendered his sentence illegal. Because the sentence in this case is
13 illegal, this Court should vacate the judgment of conviction and re-sentence Hayes.

14
15
16 Dated January 4, 2023

17 Respectfully submitted,

18 Rene L. Valladares
19 Federal Public Defender

20 /s/Martin L. Novillo
21 Martin L. Novillo
22 Assistant Federal Public Defender
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DECLARATION UNDER PENALTY OF PERJURY

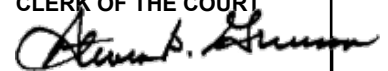
I declare under penalty of perjury under the laws of the United States of America and the State of Nevada that the facts alleged in this petition are true and correct to the best of counsel’s knowledge, information, and belief.

Dated January 4, 2023.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/Martin L. Novillo
Martin L. Novillo
Assistant Federal Public Defender



1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JONATHAN E. VANBOSKERCK
6 Chief Deputy District Attorney
7 Nevada Bar #006528
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 DISTRICT COURT

8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

CASE NO: C-16-315718-1

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

Defendant.

DEPT NO: III

15 **OPPOSITION TO MOTION TO MODIFY OR CORRECT AN ILLEGAL**
16 **SENTENCE**

17 DATE OF HEARING: January 25, 2023

18 TIME OF HEARING: 9:30 A.M.

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
20 District Attorney, through JONATHAN E. VANBOSKERCK, Chief Deputy District
21 Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's
22 Motion to Modify or Correct an Illegal Sentence.

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

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1 Amended Notice of Intent to Seek Punishment as a Habitual Criminal. (Hereinafter “Amended
2 Notice”).

3 On November 7, 2018, Defendant entered a Guilty Plea Agreement (“GPA”) pursuant
4 to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970), to one count of Attempt Grand
5 Larceny. The State filed an Amended Information to reflect that charge the same day. The
6 Defendant’s Presentence Investigation Report (“PSI”) was filed on December 18, 2018.

7 On January 31, 2019, the State filed a State’s Notice of Motion and Motion to Revoke
8 Bail, asserting that in Las Vegas Justice Court case number 19F01534X, a Justice of the Peace
9 had found probable cause to charge Defendant with Burglary for acts committed on or around
10 January 26, 2019. The State’s Motion to Revoke Bail was granted after a hearing on February
11 4, 2019.

12 At sentencing on March 6, 2019, the Court found the State had regained the right to
13 argue pursuant to the terms of the GPA. Further, the Court agreed Defendant should be
14 punished under NRS 207.010 (the “Small Habitual Statute”). Defendant was sentenced to sixty
15 (60) to one hundred seventy-four (174) months in the Nevada Department of Corrections
16 (NDOC), consecutive to Defendant’s sentence in another case (C315125). The Court awarded
17 Defendant ten (10) days credit for time served. The Judgment of Conviction was filed March
18 12, 2019.

19 **Pretrial Petitions for Writ of Habeas Corpus (C-16-315718-1, SCN 73436, 75173, 77151)**

20 SCN 73436 – On July 11, 2017, Defendant filed a pretrial Petition for Writ of Habeas
21 Corpus in the Nevada Supreme Court, contending the evidence at the preliminary hearing was
22 insufficient since the State did not bring all occupants of the hotel room to testify. On August
23 30, 2017, defense counsel informed the court the defendant had filed an unknown “something”
24 in the Nevada Supreme Court. Defendant said his petition challenged probable cause.
25 Defendant filed an Addendum on September 26, 2017, asserting the State had produced no
26 proof he had entered the victims’ hotel room “wrongfully.” On September 27, 2017, defense
27 counsel announced there was a deal Defendant wanted to accept but there was an outstanding
28 appeal that had not been decided. The court continued the matter pending the Supreme Court

1 decision. The petition was denied on October 12, 2017, as it should have been made to the
2 district court. On October 6, 2017, Defendant filed a letter asking the Supreme Court clerk to
3 tell the district court and district attorney that they no longer had jurisdiction as his case was
4 in the Nevada Court of Appeals. Counsel announced on October 25, 2017, that the Court of
5 Appeals had dismissed the pro per writ. The Supreme Court decided on October 31, 2017, that
6 it would take no action on this letter. Notice in lieu of remittitur issued on November 8, 2017.

7 C-16-315718-1 – On January 29, 2018, Defendant filed a pretrial Petition for Writ of
8 Habeas Corpus in the district court, which was “courtesy filed” on March 1, 2018. Defense
9 counsel refiled the petition on April 6, 2018, as Amended Courtesy Filing of Defendant’s Pro
10 Per Petition for Writ of Habeas Corpus. On April 23, 2018, the district court asked the State
11 to respond to the petition. The State asked the filing to be dismissed as untimely on April 25,
12 2018. On August 29, 2018, the district court denied Defendant’s Pro Per Petition for Writ of
13 Habeas Corpus as untimely, as it was filed years after the preliminary hearing transcript was
14 filed. The court’s order was filed on September 18, 2018.

15 SCN 75173 – On February 23, 2018, Defendant filed a pro per Petition for Writ of
16 Habeas Corpus in the Nevada Supreme Court, contending the evidence at the preliminary
17 hearing was insufficient since the State did not bring all occupants of the hotel room to testify
18 and that the State had produced no proof he had entered the victims’ hotel room “wrongfully.”
19 On April 5, 2018, Defendant filed a letter asking the 21-day deadline to file a pretrial habeas
20 petition after the preliminary hearing transcript is filed to not be applied in his case, as he had
21 begged counsel to file this petition for him and they had refused to do so. On May 9, 2018,
22 defense counsel said an appeal was pending, so the trial date was vacated. Both the petition
23 and the letter were denied on May 15, 2018, as the Court of Appeals held the district court
24 should decide the matter first. On June 6, 2018, counsel advised the Supreme Court denied the
25 defendant’s petition. Defendant filed a motion for rehearing on June 11, 2018, which was
26 denied on July 27, 2018. On July 11, 2018, counsel informed the court that there were
27 outstanding motions Defendant filed on his own. Notice in lieu of remittitur issued on August
28 21, 2018.

1 SCN 77151 – On September 26, 2018, Defendant filed a notice of appeal regarding the
2 district court's denial of his Petition for Writ of Habeas Corpus. The Nevada Supreme Court
3 denied the appeal on December 12, 2018, finding that no appeal is available from the denial
4 of a pretrial petition for writ of habeas corpus. Remittitur issued January 11, 2019.

5 **Direct Appeal (C-16-315718-1, SCN 78590)**

6 Defendant filed a Notice of Appeal on March 28, 2019. On April 29, 2019, Defendant
7 filed a *pro per* motion to withdraw counsel. On June 3, 2019, defense counsel argued the
8 motion could not be granted as the Supreme Court had ordered him to file an appeal. Finding
9 remittitur from the Nevada Supreme Court had been filed, the district court granted the motion
10 to withdraw counsel on July 15, 2019.

11 Defendant filed a second Notice of Appeal on July 31, 2019, this time *pro per*. On
12 January 14, 2020, the Nevada Supreme Court affirmed Defendant's Judgment of Conviction,
13 finding that because Defendant's sentence of five to fifteen years in prison was within the
14 parameters of the range of punishment for his offense, and given Defendant's history of
15 recidivism, his sentence was not disproportionate to his crime, nor was it cruel or unusual.
16 Remittitur issued on February 25, 2020 (hereinafter "Direct Appeal Remittitur").

17 **Post-Conviction Petition for Writ of Habeas Corpus (A-19-793315-W)**

18 On April 15, 2019, Defendant filed a Petition for Writ of Habeas Corpus. Addendum
19 One was filed May 7, 2019, and Addendum Two on May 9, 2019. The court ordered the State
20 to respond on May 2, 2019.

21 The State filed its Response on June 26, 2019. Defendant filed a Motion for Judgment
22 of Default Against the Respondents and Enforce Procedural Default on July 5, 2019.
23 Defendant replied to the State's opposition the same day. He filed an Affidavit of Issuance of
24 Habeas Corpus on July 12, 2019, and an Affidavit of Facial Legality on August 9, 2019. At
25 the hearing on the Petition on August 19, 2019, the district court ordered the State to respond
26 to the Addenda. The State filed a Response to the Addenda on October 10, 2019.

27 On November 18, 2019, Defendant's Petition came before the Court, at which time the
28 Court took the matter off calendar due to Defendant's pending appeal. As Defendant filed a

1 new, also timely, habeas petition, see infra, this Petition was not addressed on the merits. See
2 Affirmance, filed September 17, 2021, docket number 82734 (hereinafter “Affirmance
3 9/17/21”), finding Defendant’s first habeas petition had not been resolved on the merits but
4 raised the same issues as the later petition. As shown below, the Court of Appeals affirmed the
5 denial of his later petition on the merits.

6 Defendant filed a Reply to the State’s Response to the petition on November 4, 2019,
7 and another in reply to the State’s response to the Addenda on December 20, 2019.

8 **Writ of Mandamus/Prohibition (SCN 78622)**

9 On April 23, 2019, Defendant filed a Petition for Writ of Mandamus/Prohibition with
10 the Nevada Supreme Court, asserting he was subjected to double jeopardy. The Court denied
11 the petition on May 2, 2019, as Defendant had not included an appendix. The Court returned
12 unfiled the appendix Defendant sent on May 16, 2019. He filed a Motion for Reconsideration
13 of Order Denying Petition on May 22, 2019. His PSI was returned unfiled on the same date.

14 Rehearing was denied on June 6, 2019, and Notice in Lieu of Remittitur issued on July
15 1, 2019.

16 **Peremptory Challenge of Judge (A-19-793315-W)**

17 On May 20, 2019, Defendant filed a Motion for Peremptory Challenge of Judge and to
18 Disqualify Judge William Bill Kephart. He filed this again on June 4, 2020. Judge Kephart
19 filed an affidavit in response on July 2, 2020. On July 7, 2020, Chief Judge Linda Bell
20 considered, and denied, Defendant’s Motion for Peremptory Challenge of Judge Kephart.
21 Chief Judge Bell’s Decision and Order was filed on July 8, 2020.

22 **Coram Nobis (C-16-315718-1, SCN 80222)**

23 Defendant filed a Motion in the Nature of a Writ of Coram Nobis on September 9, 2019,
24 and an Affidavit of Granting Motion in the Nature of a Writ of Coram Nobis on September
25 26, 2019. The State filed its opposition on October 1, 2019. The district court denied the
26 Motion on October 7, 2019, finding the State was not properly served and an appeal was
27 pending in the Supreme Court. Defendant filed his reply to the State’s opposition on October

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1 17, 2019. He accompanied his reply with an Affidavit of No Material Dispute as to the Mistake
2 of Fact Motion in the Nature of a Writ of Coram Nobis, filed October 28, 2019.

3 On November 19, 2019, Defendant filed a Notice of Appeal regarding the denial of his
4 coram nobis writ. On August 31, 2020, the Nevada Court of Appeals affirmed the district
5 court's denial of his Coram Nobis motion, finding Defendant had the remedy of habeas corpus
6 available to him, so the writ of Coram Nobis was unavailable. Remittitur issued on September
7 28, 2020.

8 **Motion to Modify (C-16-315718-1, SCN 81076)**

9 Defendant filed a Motion to Correct an Illegal Sentence on December 16, 2019. The
10 State filed its opposition on December 30, 2019. On January 6, 2020, the court took the matter
11 off calendar as there was an outstanding appeal.

12 Defendant filed an Affidavit of Granting Motion to Correct an Illegal Sentence of the
13 Wrongfully Convicted on January 6, 2020. Defendant replied to the State's opposition on
14 January 27, 2020.

15 On February 24, 2020, Defendant filed a Motion for Ruling for Motion to Correct an
16 Illegal Sentence. On March 18, 2020, the court denied his Motion for Ruling. On May 12,
17 2020, the court denied his Motion to Correct Illegal Sentence. The court found Defendant's
18 claims were similar to those in his appeal, he provided no statutory basis or authority to support
19 his motion, and his other claims were substantive and waived as they were not raised on appeal.

20 Defendant filed a Notice of Appeal on March 30, 2020. On October 2, 2020, he
21 voluntarily dismissed his appeal as the district court would not consider his habeas
22 petition while the appeal was outstanding.

23 **Amended Writ of Habeas Corpus (A-19-793315-W, SCN 83151, 83368, 82734)**

24 On February 12, 2020, Defendant filed an "Amended Petition for Writ of Habeas
25 Corpus." On March 4, 2020, the court ordered the State to respond. The State filed its response
26 on April 17, 2020. On May 15, 2020, Defendant filed a document titled "Petition for Writ of
27 Habeas Corpus," which was a reply to the State's response.

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1 On March 6, 2020, Defendant filed a Petition: Expeditious Judicial Examination. The
2 State filed its response on April 17, 2020. Defendant replied to the State's response on May
3 15, 2020. No ruling on the petition appears in the record.

4 On May 15, 2020, Defendant filed an Affidavit of Actual Innocence not Mere Legal
5 Insufficiency but 'Factual Innocence.' On June 10, 2020, the State responded and moved to
6 strike the affidavit. Defendant replied to the State's response on June 29, 2020. No ruling on
7 the affidavit appears in the record.

8 On May 27, 2020, Defendant filed a Supplemental Petition for Writ of Habeas Corpus
9 (hereinafter "First Supplemental"). On June 10, 2020, the State responded. On July 23, 2020,
10 Defendant replied to the State's response.

11 On June 15, 2020, the court took the matter off calendar until the Defendant's motion
12 to disqualify the judge was decided.

13 On September 25, 2020, Defendant filed a Motion for Expeditious Ruling for
14 "Amended Petition for Writ of Habeas Corpus" 3rd Request!! On October 7, 2020, Defendant
15 filed a Motion to Set Evidentiary Hearing and Issue Transport Order. The State responded to
16 both motions on November 10, 2020. On November 16, 2020, the Court denied both motions.

17 On December 22, 2020, Defendant filed a Motion to Compel Judgment Pursuant to
18 Nevada Revised Statutes Chapter 34 FRCP Rule 12(c) for Amended Petition for Writ of
19 Habeas Corpus. The State filed its response on January 27, 2021. The court denied the motion
20 to compel on February 1, 2021. Defendant filed his reply the next day, and on February 18,
21 2021, he filed an Opposition to State's Response to Petitioner's Motion to Compel Judgment.
22 On March 17, 2021, the Court issued its Findings of Fact, Conclusions of Law, and Order
23 (hereinafter "FOFCOL 3/17/21").

24 The court told Defendant to supplement his motion to compel with specificity on March
25 8, 2021. The State filed its opposition to Defendant's reply on April 16, 2021. Defendant
26 replied to this opposition on May 6, 2021. The court denied the motion to compel again on
27 May 12, 2021. The same day, Defendant filed his opposition to the State's opposition, as well
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1 as a Memorandum to the Court asking for the court's briefing schedule. He filed another
2 opposition to the State's opposition on June 14, 2021.

3 The Amended Petition for Writ of Habeas Corpus was denied on February 1, 2021. The
4 Court issued its Findings of Fact, Conclusions of Law, and Order on March 9, 2021
5 (hereinafter "FOFCOL 3/9/21").

6 On March 11 and 17, 2021, Defendant filed Petitions to Reconsider the Court's
7 Findings of Fact, Conclusions of Law, and Order. On April 9, 2021, the State filed its
8 Opposition to both. On April 12, 2021, the Court denied both. Defendant filed a reply to the
9 State's opposition on May 6, 2021. The court's order was entered on May 12, 2021.
10 Defendant's reply was denied on June 21, 2021.

11 On August 11, 2021, Defendant filed a request for transcripts at the State's expense,
12 accompanied by a memorandum in support. The Court denied the request on October 7, 2021.
13 He filed a Petition for Reconsideration/Rehearing on August 18, 2021. The court denied this
14 on September 23, 2021.

15 On March 18, 2021, Defendant filed a Notice of Appeal from the Court's denial of his
16 Amended Petition in SCN 82734. On June 9, 2021, Defendant filed a Motion for Leave of
17 Appeal to Obtain Favorable Ruling in the 8th Judicial District Court, Clark County, asking for
18 favorable rulings on his motion to modify, his supplemental to amended habeas petition, and
19 his writ of prohibition. This motion was denied on June 16, 2021, with the Supreme Court
20 holding he may appeal these matters as they became ripe. Defendant filed a Motion to Expedite
21 Appeal on August 23, 2021, which was granted. On September 17, 2021, the Court of Appeals
22 affirmed the district court's decision on the Amended Petition. See Affirmance 9/17/21. The
23 Court noted its affirmance encompassed Defendant's "February 12, 2020, petition and later-
24 filed supplements." Affirmance 9/17/21 at 1. This included Defendant's Amended Petition,
25 filed February 12, 2020, his First Supplemental, filed May 27, 2020, and the filings related to
26 those. Defendant filed a Petition for Rehearing on October 4, 2021, and an Addendum on
27 October 8, 2021. Rehearing was denied on November 17, 2021. On December 2, 2021, he
28 filed a Petition for Review. This is pending.

1 On June 29, 2021, Defendant filed a Notice of Appeal from the denial of Supplemental
2 Petition for Writ of Habeas Corpus in SCN 83151. This is believed to refer to the First
3 Supplemental, as the Second Supplemental has not yet been decided. *See infra*. The First
4 Supplemental was incorporated in the Nevada Court of Appeals' Affirmance. The Supreme
5 Court combined this docket with SCN 83368, his COVID habeas appeal. *See infra*. On
6 October 19, 2021, Defendant filed a Motion to Expedite Appeal. The motion was granted "to
7 the extent that this court's docket will permit" on November 15, 2021. These appeals are
8 pending.

9 **Rule 60b Motion (C-16-315718-1, A-19-793315-W)**

10 On May 4, 2020, Defendant filed a "Rule 60b Motion for Relief from the March 18,
11 2020, Order Which Denied Mr. Hayes Motion to Correct an Illegal Sentence." The court
12 continued the matter on June 1, 2020, as there was an appeal outstanding. The State filed its
13 opposition on June 10, 2020. On June 22, 2020, the court took the matter off calendar as
14 Defendant had filed a motion to disqualify the judge.

15 On July 23, 2020, Defendant filed a Motion for Ruling for Rule 60b Motion for Relief;
16 Motion to Vacate; Amended Petition for Writ of Habeas Corpus. The State filed its Response
17 to Defendant's Motion for Ruling on September 2, 2020. Defendant's Motion was denied on
18 September 9, 2020. Defendant replied to the State's opposition on November 2, 2020.

19 On February 18, 2021, Defendant filed a Motion to Compel Judgment for Rule 60b
20 Motion for Relief and Motion to Vacate (Conviction Invalid). The court found the motions
21 moot on March 29, 2021.

22 On October 14, 2020, Defendant filed a Motion to Reconsider Order Denying Motion
23 for Ruling for Rule 60b Motion for Relief; Motion to Vacate; Amended Petition for Writ of
24 Habeas Corpus. The State responded on November 10, 2020. The motion for reconsideration
25 was denied November 16, 2020.

26 Defendant filed a Notice of Appeal on April 16, 2021. This appeal does not appear on
27 the Supreme Court docket.

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1 **Motion to Vacate (C-16-315718-1)**

2 On June 1, 2020, Defendant filed a Motion to Vacate Sentence (Conviction Invalid).
3 The State filed an opposition on June 10, 2020. On June 22, 2020, the court took the matter
4 off-calendar until the defendant's motion to disqualify the court was heard.

5 Defendant replied to the State's opposition, possibly filed in response to Defendant's
6 Rule 60b Motion, on June 26, 2020. Defendant filed an Affidavit of Jurisdiction of the Subject
7 Matter Is Derived from the Law; It Neither Can Be Waived Nor Conferred by Consent of the
8 Accused Motion to Vacate Sentence (Conviction Invalid) on July 31, 2020.

9 The court took the matter off calendar on August 24, 2020, as the denial of Defendant's
10 previous motion was pending on appeal. The Motion was denied on September 9, 2020.

11 **Emergency Writ of Mandamus/Prohibition (SCN 82202)**

12 On December 11, 2020, Defendant filed an Emergency Petition for Writ of
13 Mandamus/Prohibition in the Nevada Supreme Court, asking for a decision on his amended
14 habeas petition and motion to vacate. His appendix was filed the same day.

15 The Court denied the writ, stating the district court would respond to his filings as
16 promptly as its docket and the pandemic would allow. Defendant filed a Petition for Rehearing
17 on January 1, 2021, which was denied on March 12, 2021. Notice in lieu of remittitur issued
18 on April 6, 2021.

19 **Second Motion to Modify (C-16-315718-1, A-19-793315-W, SCN 83274)**

20 On March 25, 2021, Defendant filed a Motion to Modify and/or Correct Illegal
21 Sentence. On April 21, 2021, Defendant filed a "Reply" without having received the State's
22 opposition, contending the State's failure to oppose his motion was an admission of its merits.
23 The State filed its opposition on April 22, 2021, and amended it the same day. Defendant filed
24 an Opposition to State's Amended Opposition to Defendant's Motion to Modify and/or
25 Correct Illegal Sentence on May 12, 2021. The motion to modify was denied on July 14, 2021,
26 when the district court found Defendant's sentence was legal.

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1 Defendant filed an Affidavit of the District Court Acted in Excess of Its Jurisdiction on
2 June 3, 2021. A ruling on this affidavit does not appear in the record.

3 Defendant filed a Request for Submission for Motion to Modify and/or Correct Illegal
4 Sentence on June 23, 2021. The State filed its opposition to the motion to modify on July 7,
5 2021. Defendant filed Defendant's Opposition to State's Opposition to Defendant's Motion to
6 Modify and/or Correct Illegal Sentence on July 19, 2021. The request for submission was
7 denied July 14, 2021.

8 Defendant filed a Request for Submission Addendum on July 20, 2021, in which he
9 asked the court to consider his motion to modify and respond on the merits. The State filed an
10 opposition on August 6, 2021. The Request for Submission Addendum was denied on August
11 11, 2021, under the doctrine of res judicata. The Findings of Fact, Conclusions of Law, and
12 Order were filed August 13, 2021 (hereinafter "FOFCOL 8/13/21").

13 On August 9, 2021, Defendant filed a Motion for a Rehearing on Defendant's Motion
14 to Modify and/or Correct Illegal Sentence that Was Denied on July 14, 2021 Improperly;
15 Hearing Requested. The State filed its opposition to rehearing on August 19, 2021. The motion
16 for rehearing was denied August 30, 2021. The Findings of Fact, Conclusions of Law, and
17 Order were filed on August 13, 2021 (hereinafter "FOFCOL 8/20/21").

18 Defendant filed a Notice of Appeal on July 21, 2021. He filed his brief on November
19 5, 2021. This appeal is pending.

20 **Writ of Habeas Corpus (COVID) (A-19-793315-W, A-21-831979-W, SCN 83368,**
21 **83151)**

22 Defendant filed a "Petition for Writ of Habeas Corpus COVID-19 (Coronavirus)" on
23 March 30, 2021. On May 17, 2021, the court learned the State had not received the petition.
24 The State filed its Opposition on June 24, 2021, and this was filed again on July 19, 2021. On
25 May 4, 2021, the district court consolidated A-21-831979-W with A-19-793315-W. The court
26 denied the petition on July 19, 2021, as cruel and unusual punishment due to COVID is not an
27 appropriate claim for a habeas petition. Defendant filed his Opposition to State's Opposition
28 on July 22, 2021.

1 He filed a Notice of Appeal on August 12, 2021. This matter was combined with SCN
2 83151, *supra*, and is pending.

3 **Second Supplemental Petition (A-19-793315-W)**

4 On April 7, 2021, Defendant filed a “Supplemental Petition for Writ of Habeas Corpus”
5 Petition (NRS 34.360-34.830) (hereinafter “Second Supplemental”). On April 14, 2021,
6 Defendant filed a Supplemental ‘Addendum.’ On June 6, 2021, Defendant filed an Affidavit
7 of “The State of Nevada Knowingly, Intelligently, Categorically Acted in Bad Faith.” On July
8 8, 2021, Defendant filed a Request for Submission of his Supplemental Petition for Writ of
9 Habeas Corpus.

10 **Emergency Writ of Prohibition (SCN 82962)**

11 On May 27, 2021, Defendant filed an Emergency Petition for Writ of Prohibition,
12 asserting the district court abused its discretion in deciding his case without subject matter
13 jurisdiction. The Nevada Supreme Court transferred the matter to the Court of Appeals on June
14 14, 2021. The writ was denied on June 25, 2021, as the Court of Appeals found Defendant’s
15 challenge to his conviction must be raised on habeas. Defendant filed a Letter, a Question Is
16 Reviewed De Novo on June 28, 2021, and a Petition for Rehearing on July 7, 2021. The
17 petition was denied on August 19, 2021. The Supreme Court issued notice in lieu of remittitur
18 on September 14, 2021.

19 **Motion to Refer (C-16-315718-1)**

20 On July 7, 2021, the State filed a Motion to Refer Defendant to Department of
21 Corrections for Forfeiture of Statutory Credits. The court denied this motion on July 19, 2021.

22 **Motion to Withdraw Plea (C-16-315718-1)**

23 Defendant filed a Motion to Withdraw Plea on November 16, 2021. This was denied
24 on December 8, 2021.

25 **Motion to Refer (C-16-315718-1)**

26 On December 6, 2021, the State filed a Second Motion to Refer Defendant to
27 Department of Corrections for Forfeiture of Statutory Credits. The Court granted the motion
28 on December 29, 2021.

1 **Supplemental Petition Addendum 2 (A-19-793315-W)**

2 Defendant filed the instant Supplemental Petition Addendum 2 (hereinafter "Add. 2")
3 on November 12, 2021, in which he claimed this Court has not responded to his April 7, 2021,
4 Supplemental Petition. The State filed an opposition on December 16, 2021. The Court denied
5 the supplement on February 7, 2022.

6 **Motion for Discovery (C-16-315718-1, A-19-793315-W)**

7 On December 7, 2021, Defendant filed a Motion for Discovery and Reconsideration of
8 Motion for Transcripts at State's Expense. The State filed an opposition on December 16,
9 2021. The Court denied the motion on January 10, 2022.

10 **Motion to Modify or Correct an Illegal Sentence (C-16-315718-1)**

11 On January 4, 2023, Defendant filed a Motion to Modify or Correct an Illegal Sentence
12 (Motion).

13 **STATEMENT OF THE FACTS**

14 The district court relied on the Presentence Investigation Report ("PSI") for the facts
15 of the case at sentencing:

16 On April 9, 2013, the victim was staying at the Excalibur Hotel when
17 he awoke due to a strange sound. He saw a man, later identified as the
18 defendant James Howard Hayes, aka, James Howard Hayes Jr., next to
19 the bed. Mr. Hayes was going through some of the belongings of the
20 people staying in the room. The victim jumped out of bed and
21 confronted the defendant. He blocked Mr. Hayes from exiting the room
22 and had him empty his pockets and instructed Mr. Hayes to sit on the
23 bed. He then had Mr. Hayes hand over his Nevada identification and
24 the victim took a picture of it with his phone. The victim asked what he
25 was doing and Mr. Hayes just kept stating he was sorry. He told Mr.
26 Hayes if he took anything he would call the police and at that time Mr.
27 Hayes fled. Security was called and spoke to two of the other room
28 occupants who noticed they were missing a total of \$130.00 dollars. Las
Vegas Metropolitan Police Department officers arrived and the victim
gave them photos of Mr. Hayes and his identification. A review of hotel
records showed the hotel room was left unlocked for about two and a
half hours before Mr. Hayes was seen in the room, and it was believed
he just pushed the door open. A warrant was issued for the arrest of Mr.
Hayes.

1 On April 2, 2016, police were dispatched to a room robbery at Harrah's
2 casino and discovered the suspect, Mr. Hayes, had outstanding warrants
3 for the instant offense. He was placed under arrest and transported to
4 the Clark County Detention Center where he was booked accordingly.

5 PSI at 5.

6 ARGUMENT

7 Defendant's claims are without merit as he was appropriately adjudicated under the
8 habitual criminal statute and this Court did not rely upon impalpable or highly suspect
9 information in sentencing him.

10 In general, a district court lacks jurisdiction to modify a sentence once the defendant
11 has started serving it. Passanisi v. State, 108 Nev. 318, 321, 831 P.2d 1371, 1373 (1992).
12 However, a district court has inherent authority to correct, vacate, or modify a sentence that
13 violates due process where the defendant can demonstrate the sentence is based on a materially
14 untrue assumption or mistake of fact about the defendant's criminal record that has worked to
15 the *extreme detriment* of the defendant. Edwards v. State, 112 Nev. 704, 707, 918 P.2d 321,
16 324 (1996); see also Passanisi, 108 Nev. at 322, 831 P.2d at 1373.

17 Not every mistake or error during sentencing gives rise to a due process violation. State
18 v. Eighth Judicial Dist. Court, 100 Nev. 90, 97, 677 P.2d 1044, 1048 (1984). A district court
19 has jurisdiction to modify a defendant's sentence "*only* if (1) the district court actually
20 sentenced appellant based on a materially false assumption of fact that worked to appellant's
21 extreme detriment, and (2) the particular mistake at issue was of the type that would rise to the
22 level of a violation of due process." Passanisi, 108 Nev. at 322-23, 831 P.2d at 1373-74
(emphasis added).

23 Additionally, if substantial and material mistakes of fact were relied upon in rendering
24 judgment, a judge may reconsider a sentence. State v. District Court, 100 Nev. 90, 677 P.2d
25 1044 (1984); Warden v. Peters, 83 Nev. 298, 429 P.2d 549 (1967). When the sentencing court
26 "makes a mistake in rendering a judgment which works to the extreme detriment of the
27 defendant," the district court has jurisdiction to vacate or modify the suspect sentence or
28 judgment. Id. at 95, citing Warden v. Peters, 83 Nev. 298, 429 P.2d 549 (1967).

1 The United States Supreme Court has expressly held that where a defendant is
2 sentenced on the basis of materially untrue assumptions concerning his criminal record, “[the]
3 result, whether caused by carelessness or design, is inconsistent with due process of law.” Id.
4 at 96, citing Townsend v. Burke, 334 U.S. 736, 741, 68 S.Ct. 1252, 1255, 92 L.Ed. 1690
5 (1948). A sentencing judge's misapprehension of a defendant's criminal record may result in
6 a violation of the defendant's right to due process of law. Id. at 96. However, not every mistake
7 or error which occurs during sentencing gives rise to a due process violation. The cases
8 implicitly recognize this point; a due process violation arises only when the errors result in
9 “materially untrue” assumptions about a defendant's record. Id. at 96, citing Townsend v.
10 Burke, 334 U.S. at 741, 68 S.Ct. at 1255.

11 NRS 176.555 states that “[t]he court may correct an illegal sentence at any time.” See
12 also Passanisi v. State, 108 Nev. 318, 321, 831 P.2d 1371, 1372 (1992). However, the grounds
13 to correct an illegal sentence are interpreted narrowly under a limited scope. See Edwards v.
14 State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996); see also Haney v. State, 124 Nev. 408,
15 411, 185 P.3d 350, 352 (2008). “A motion to correct an illegal sentence is an appropriate
16 vehicle for raising the claim that a sentence is facially illegal at any time; such a motion cannot
17 be used as a vehicle for challenging the validity of a judgment of conviction or sentence based
18 on alleged errors occurring at trial or sentencing.” Edwards, 112 Nev. at 708, 918 P.2d at 324.

19 “Motions to correct illegal sentences address only the facial legality of a sentence.” Id.
20 Motions to correct illegal sentences evaluate whether the sentence imposed on the defendant
21 is “at variance with the controlling statute, or illegal in the sense that the court goes beyond
22 its authority by acting without jurisdiction or imposing a sentence in excess of the statutory
23 maximum provided.” Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).
24 Other claims attacking the conviction or sentence must be raised by a timely filed direct appeal
25 or a timely filed Petition for a Post-Conviction Writ of Habeas Corpus per NRS 34.720-34.830,
26 or other appropriate motion. See Id.

27 To the extent that Defendant challenges his sentencing as a habitual criminal, his claims
28 are largely governed by the law of the case doctrine because the Court of Appeals has

1 repeatedly rejected challenges to his adjudication. Pellegrini v. State, 117 Nev. 860, 884, 34
2 P.3d 519, 535 (2001); McNelson v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Valerio
3 v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hall v. State, 91 Nev. 314, 315-16, 535
4 P.2d 797, 798-99 (1975). Notably, *a defendant cannot avoid the doctrine of law of the case*
5 *by a more detailed and precisely focused argument.* Hall, 91 Nev. at 316, 535 P.2d at 798-99;
6 Pertgen v. State, 110 Nev. 557, 557-58, 875 P.2d 316, 362 (1994).

7 The Court of Appeals issued an Order of Affirmance on September 17, 2021, finding
8 that Defendant was appropriately sentenced as a habitual criminal:

9 Fifth, Hayes claimed counsel was ineffective for failing to assert he
10 was not eligible for sentencing under the habitual criminal enhancement as
11 his two Texas convictions should not have been considered felonies for
12 sentencing purposes because he did not serve prison terms for those
13 convictions. Hayes also appeared to assert that his prior felony convictions
14 should have only been considered as a single prior conviction for
15 enhancement purposes because they arose out of one event.

16 The State provided the sentencing court with two judgments of
17 conviction from the state of Texas demonstrating that Hayes was convicted
18 of two separate felony convictions in that state and sentenced to serve two
19 years in prison for each conviction. See NRS 207.016(5) (“For the
20 purposes of NRS 207.010, 207.012 and 207.014, a certified copy of a
21 felony conviction is prima facie evidence of conviction of a prior felony.”).
22 Because Hayes had at least two prior convictions “which under the laws of
23 the situs of the crime” were felonies, he was eligible to be sentenced
24 pursuant to the small habitual criminal enhancement. 2009 Nev. Stat., ch.
25 156, § 1, at 567 (NRS 207.010(1)(a)). In addition, the State filed two
26 separate judgments of conviction from Texas containing different criminal
27 case numbers for each conviction. Hayes thus did not demonstrate the
28 Texas convictions were prosecuted in the same indictment or information.
Therefore, Hayes did not demonstrate his prior convictions should have
been considered as a single prior conviction for purposes of enhancing his
sentence pursuant to the habitual criminal statute. See Rezin v. State, 95
Nev. 461, 462, 596 P.2d 226, 227 (1979) (“[W]here two or more
convictions grow out of the same act, transaction or occurrence, and are
prosecuted in the same indictment or information, those several convictions
may be utilized only as a single ‘prior conviction’ for purposes of applying
the habitual criminal statute.”). Accordingly, Hayes did not demonstrate
that his counsel’s performance fell below an objective standard of
reasonableness by failing to raise Hayes’ underlying arguments or a

1 reasonable probability of a different outcome had counsel done so.
2 Therefore, we conclude the district court did not err by denying this claim.

3 Clerk's Certificate, A-19-793315-W, filed December 20, 2021, Hayes v. State, Nevada
4 Supreme Court Case Number 82734, Order of Affirmance, filed September 17, 2021, p. 5-6.

5 The Court of Appeals again examined Defendant's challenges to his adjudication as a
6 habitual criminal in a February 9, 2022, Order of Affirmance:

7 In his motion, Hayes first claimed the sentencing court's decision to
8 adjudicate him a small habitual criminal was based on mistaken
9 assumptions about his criminal record. Hayes claimed he lacked the
10 requisite number of prior felony convictions to qualify for habitual criminal
11 treatment, because he had only one prior felony conviction at the time he
12 was adjudicated and not the three the State claimed. "[A] motion to modify
13 a sentence is limited in scope to sentences based on mistaken assumptions
14 about a defendant's criminal record which work to the defendant's extreme
15 detriment." Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324
16 (1996).

17 First, Hayes claimed he lacked the requisite number of prior felony
18 convictions because one of the offenses the State relied upon—a 2007
19 Texas conviction for credit card abuse—was non-violent and would not be a
20 felony in Nevada. A prior offense may be used to adjudicate a person as a
21 habitual criminal so long as the offense would amount to a felony "under
22 the laws of the situs of the crime or of this State." NRS 207.010(1)(a). "NRS
23 207.010 makes no special allowance for non-violent crimes or for the
24 remoteness of convictions; instead, these are considerations within the
25 discretion of the district court." Arajakis v. State, 108 Nev. 976, 983, 843
26 P.2d 800, 805 (1992). Credit card abuse is a felony under Texas law, see
27 Tex. Penal Code Ann. § 32.21(d) (West 2005), and it was within the
28 sentencing court's discretion to consider this prior felony conviction despite
it being nonviolent. Hayes thus failed to demonstrate that the sentencing
court's reliance on this conviction amounted to a mistaken assumption
about his criminal record. Therefore, we conclude this district court did not
err by denying this claim.

Second, Hayes claimed he lacked the requisite number of prior
felony convictions because one of the offenses the State relied upon—a
2017 burglary conviction—was entered after the commission of the
primary offense. "All prior convictions used to enhance a sentence must
have preceded the primary offense." Brown v. State, 97 Nev. 101, 102,
624 P.2d 1005, 1006 (1981). Because Hayes committed the instant offense
in 2013, the 2017 burglary conviction could not be used to adjudicate him
a habitual criminal.

1 However, at the time Hayes committed his crimes, anyone who was
2 convicted of a felony and had two prior felony convictions qualified for
3 habitual criminal treatment. See 2009 Nev. Stat., ch. 156, § 1, at 567. In
4 addition to the Texas conviction discussed above, the State also provided
5 evidence that Hayes had a 2011 felony conviction for attempted possession
6 of a credit or debit card without the cardholder's consent. Because Hayes
7 had two other prior felony convictions, he failed to demonstrate that he
lacked the requisite number of felony convictions to qualify for habitual
criminal treatment. Hayes thus failed to demonstrate any mistaken
assumptions about his criminal record worked to his extreme detriment.
Therefore, we conclude this district court did not err by denying this claim.

8 Clerk's Certificate, C-16-315718-1, filed March 8, 2022, Hayes v. State, Nevada Supreme
9 Court Case Number 83274, Order of Affirmance, filed February 9, 2022, p. 1-2.

10 Defendant complains that "even if Hayes technically qualified under NRS 207.101(a)
11 because he had at least two prior felony convictions—the Court's sentence was based upon
12 materially untrue assumptions." Motion, p. 9. In support of this faulty conclusion Defendant
13 argues that this "Court mistakenly assumed Hayes' 2017 Nevada conviction in Case No.
14 C315125-1 (Ex. 7 at 7) could be relied upon to adjudicate Hayes a habitual criminal." Id.
15 Defendant cites Brown v. State, 97 Nev. 101, 102, 624 P.2d 1005, 1006 (1981), for the
16 proposition that "[a]ll prior convictions used to enhance a sentence must have preceded the
17 primary offense." Id. at p. 9-10. This claim has already been adjudicated by the Court of
18 Appeal's February 9, 2022, affirmance. The Court found that reliance on the 2017 Nevada
19 burglary conviction was inappropriate but irrelevant due to Defendant's 2007 Texas conviction
20 and his 2011 Nevada conviction. Clerk's Certificate, C-16-315718-1, filed March 8, 2022,
21 Hayes v. State, Nevada Supreme Court Case Number 83274, Order of Affirmance, filed
22 February 9, 2022, p. 1-2.

23 In an attempt to present a more focused argument in violation of the law of the case
24 doctrine, Defendant proceeds to attack this Court's reliance upon his 2011 Nevada conviction:

25 The Court likewise mistakenly assumed it could consider the 2011 Nevada
26 conviction (Ex. 7 at 10). In Nevada, the crime of attempt possession of
27 credit or debit card without cardholder's consent is punishable as a category
28 E felony/gross misdemeanor. See NRS 205.690; NRS 193.330 (replaced
by NRS 193.153). Per NRS 193.130(2)(e), the prison sentence for a
category E felony must be suspended and probation must be granted. Thus,

1 the offense is not a felony pursuant to NRS 207.010(a) notwithstanding that
2 the Nevada courts and statutes describe it as a “felony.” See United States
3 v. Robles-Rodriguez, 281 F.3d 900, 902 (9th Cir. 2002).

4 Motion, p. 10, footnote 1.

5 Defendant offered a similar complaint when he alleged that “his two Texas convictions
6 should not have been considered felonies for sentencing purposes because he did not serve
7 prison terms for those convictions.” Clerk’s Certificate, A-19-793315-W, filed December 20,
8 2021, Hayes v. State, Nevada Supreme Court Case Number 82734, Order of Affirmance, filed
9 September 17, 2021, p. 5. Tellingly, the Court of Appeals did not grant relief based on this
10 argument. Further, Defendant’s reliance upon United States v. Robles-Rodriguez, 281 F.3d
11 900, 902 (9th Cir. 2002), is misplaced. Robles-Rodriguez addressed the use of Arizona
12 convictions to enhance a federal sentence under the federal sentencing guidelines. Both
13 California and Arizona have rejected similar calls to treat felony offenses with mandatory
14 probation as ineligible for use in enhancing a state conviction. People v. Espinoza, 107 Cal.
15 App. 4th 1069, 132 Cal. Rptr. 2d 670 (2003); State v. Thues, 203 Ariz. 339, 54 P.3d 368 (Az.
16 App. 2003). Regardless, Defendant admits that Nevada treats his Nevada 2011 conviction as
17 a felony. Motion, p. 10, footnote 1. Notably, a “prior offense may be used to adjudicate a
18 person as a habitual criminal so long as the offense would amount to a felony “under the laws
19 of the situs of the crime or of this State.” NRS 207.010(1)(a).” Clerk’s Certificate, C-16-
20 315718-1, filed March 8, 2022, Hayes v. State, Nevada Supreme Court Case Number 83274,
21 Order of Affirmance, filed February 9, 2022, p. 2. Since Defendant cannot show that his 2011
22 Nevada conviction is not a conviction under the laws of Nevada, it was properly used to
23 adjudicate him a habitual criminal.

24 Defendant next complains that this “Court also mistakenly assumed Hayes’ 2007 Texas
25 convictions (Ex. 7 at 3, 13) comprised separate convictions for purposes of NRS 207.010(a).”
26 Motion, p. 10. Defendant goes on to assert that “a cursory review of the Harris County record
27 reveals that both convictions, Case No. 1083785 and Case No. 1083786, ‘[grew] out of the
28 same act, transaction or occurrence, and [were] prosecuted in the same indictment or
information’ and thus, at most, could be ‘utilized only as a single ‘prior conviction’ for

1 purposes of applying the habitual criminal statute.’ Rezin v. State, 95 Nev. 461, 462 (1979).”
2 Id. (footnote omitted). Assuming, without conceding, that Defendant correctly represents his
3 Texas convictions, he was still appropriately adjudicated a habitual criminal because his 2011
4 Nevada conviction plus a single Texas conviction made him eligible to be adjudicated a
5 habitual criminal.

6 Perhaps in recognition of this, Defendant goes on to complain that neither Texas
7 conviction could be used to adjudicate him as a habitual criminal because each was a “state
8 jail felony.” Motion, p. 11.¹ This appears to be another variant of his argument that “his two
9 Texas convictions should not have been considered felonies for sentencing purposes because
10 he did not serve prison terms for those convictions.” Clerk’s Certificate, A-19-793315-W,
11 filed December 20, 2021, Hayes v. State, Nevada Supreme Court Case Number 82734, Order
12 of Affirmance, filed September 17, 2021, p. 5. As noted previously, Defendant did not win
13 this argument. Further, a “prior offense may be used to adjudicate a person as a habitual
14 criminal so long as the offense would amount to a felony “under the laws of the situs of the
15 crime or of this State.” NRS 207.010(1)(a).” Clerk’s Certificate, C-16-315718-1, filed March
16 8, 2022, Hayes v. State, Nevada Supreme Court Case Number 83274, Order of Affirmance,
17 filed February 9, 2022, p. 2.

18 Defendant’s contention that his convictions do not amount to felonies under Texas law is
19 governed by the law of the case because the Court of Appeals has held that “Credit card abuse
20 is a felony under Texas law, see Tex. Penal Code Ann. § 32.21(d) (West 2005)[.]” Clerk’s
21 Certificate, C-16-315718-1, filed March 8, 2022, Hayes v. State, Nevada Supreme Court Case
22 Number 83274, Order of Affirmance, filed February 9, 2022, p. 2. This holding is protected
23 by the law of the case doctrine and may not be disturbed by this Court. Pellegrini, 117 Nev.
24 at 884, 34 P.3d at 535; McNelson, 115 Nev. at 990, P.2d at 1276; Valerio, 112 Nev. at 386,
25 915 P.2d at 876; Hall, 91 Nev. at 315-16, 535 P.2d at 798-99. Additionally, Defendant does

26 ///

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28 ¹ Defendant cites to Exhibit 15 as supporting this argument. Motion, p. 11. According to his Index of Exhibits,
Exhibit 15 is a Fast Track Statement that was filed with the appellate court under case number 78590. A review
of that Fast Track Statement indicates that the only issue raised was that Defendant’s sentence amounted to cruel
and unusual punishment. Notably, relief was denied.

1 not even argue that his Texas convictions would not be considered felonies under Nevada law.
2 As such, this Court must reject Defendant's argument on this point.

3 To the extent that Defendant argues that the various minutia he raises somehow
4 amounts to this Court relying on materially untrue assumptions or mistakes of fact about his
5 criminal record, he is wrong. Defendant does not argue that any of his convictions were
6 overturned or invalidated. He does not argue that this Court was given incorrect information
7 regarding the underlying facts of the criminal conduct related to those convictions. Instead,
8 he nibbles around the edges and pulls on allegedly loose threads in the hope of receiving an
9 undeserved windfall from this Court. None of the trivialities raised by Defendant worked to
10 his extreme detriment. At best they show a judicial system suffering through an overwhelming
11 caseload. Regardless, this Court is privileged to consider all information in sentencing so long
12 as they are not supported by only "impalpable" or "highly suspect" information. Silks v. State,
13 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976).

14 Finally, Defendant contends that this Court "failed to follow the statutory requirements
15 set forth in NRS 207.010" in adjudicating him a habitual criminal. Motion, p. 12 (bolding
16 removed). Defendant believes he was automatically adjudicated a habitual criminal because
17 the sentencing judge found that the State had met its burden under the habitual criminal statute
18 and allegedly did not "weigh the appropriate factors for and against the habitual criminal
19 statute before adjudicating ... [him] a habitual criminal." Id. at p. 13 (quoting, Hughes v.
20 State, 116 Nev. 327, 333, 966 P.2d 890, 893 (2000). However, Defendant ignores the fact that
21 the very next line in Hughes cautions that "nothing in Clark stands for the proposition that in
22 meeting this obligation the sentencing court must utter specific phrases or make 'particularized
23 findings' that it is 'just and proper' to adjudicate a defendant as a habitual criminal." Hughes,
24 116 Nev. at 333, 966 P.2d at 893. Accord, McKinnon v. State, 134 Nev. 979, 2, 417 P.3d
25 1120 (2018), 2018 WL 2272981 (unpublished opinion) (district court did not abuse its
26 discretion in sentencing defendant without explicitly stating it applied the mitigating factors
27 under NRS 176.017). The sentencing judge was under no obligation to make particularized
28 findings and the fact that he did not do so does not demonstrate that Defendant was

1 automatically sentenced as a habitual criminal without consideration of the appropriateness of
2 doing so. Indeed, "trial judges are presumed to know the law and apply it in making their
3 decisions." Jones v. State, 107 Nev. 632, 636, 817 P.2d 1179, 1181 (1991). As such, this
4 complaint must be denied.

5 **CONCLUSION**

6 For the above reasons, the State respectfully requests that this Court deny the Motion
7 to Modify or Correct an Illegal Sentencing, filed January 4, 2023.

8 DATED this 13th day of January, 2023.

9 Respectfully submitted,

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

13 BY BB for
14 JONATHAN E. VANBOSKERCK
15 Chief Deputy District Attorney
16 Nevada Bar #006528

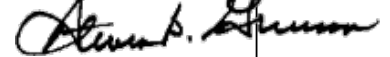
17 **CERTIFICATE OF ELECTRONIC FILING**

18 I hereby certify that service of Enter document, was made this 13th day of January,
19 2023, by Electronic Filing to:

20 MARTIN L. NOVILLO, Assistant Federal Public Defender
21 Martin_Novillo@fd.org

22 C. Garcia
23 C. Garcia
24 Secretary for the District Attorney's Office

25
26
27
28 JEV/cg/L2



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*Attorney for Petitioner James Howard Hayes

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY

James Howard Hayes,
Petitioner,
v.

State of Nevada,
Respondents.

Case No. C-16-315718-1

Dept. No. 3

REPLY TO OPPOSITION TO MOTION TO MODIFY OR CORRECT
AN ILLEGAL SENTENCE

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The State further argues that it should be presumed that the Court found it just and proper to adjudge Hayes a habitual criminal, as mandated by NRS 207.010(3). The record belies the State's argument and demonstrates that Hayes' adjudication was automatic and in response to the Court finding Hayes had the pre-requisite number of convictions. The Court's misapprehension of Hayes' record and its failure to observe and abide with the statutory requirements set forth in NRS 207.010(3) render his sentence illegal.

I. Hayes demonstrates his habitual criminal adjudication was based on materially untrue assumptions and mistakes of fact pertaining to his criminal record

The State argues that Hayes’ motion is governed by the law of the case doctrine and notes that the Nevada Court of Appeals has “repeatedly rejected challenges to his [habitual criminal] adjudication.” Opp. at 17 (citations and quotation marks omitted). The State is wrong. In its September 17, 2021 Order of

1 Affirmance, the Court of Appeals concluded that Hayes “was eligible to be sentenced
2 pursuant to the small habitual criminal enhancement.” Ex. 21 at 5-6. In its
3 February 9, 2022 Order, the Court of Appeals similarly noted Hayes possessed “the
4 requisite number of felony convictions to qualify for habitual criminal treatment.”
5 Ex. 25 at 1-2. In short, both times it addressed claims pertaining to Hayes’ habitual
6 criminal adjudication, the Court of Appeals limited its ruling to addressing whether
7 Hayes had the requisite number of convictions to qualify for a habitual criminal
8 adjudication, *not* whether Hayes’ adjudication involved a “misapprehension of [his]
9 [] criminal record.” *State v. Eighth Judicial Dist. Court (Husney)*, 100 Nev. 90, 97
10 (1984). The distinction is significant because—irrespective of whether Hayes was
11 eligible under NRS 207.010—two prior felony convictions did not “automatically
12 equate[] to habitual criminal status” and the sentencing court was compelled to
13 exercise discretion pursuant to NRS 207.010(3). *Clark v. State*, 109 Nev. 426, 427
14 (1993).

15 Here, that Hayes technically qualified under NRS 207.010(1)(a) does not
16 defeat the claim that this Court misapprehended his 2007 Texas convictions as
17 involving two separate offenses, mistakenly construed those convictions or the 2011
18 Nevada conviction¹ to comprise felonies as provided in the habitual criminal
19 statute, or erroneously considered Hayes’ 2017 Nevada conviction² despite that
20 offense following the primary offense.

21 **B. Hayes presents substantially new and different evidence**
22 **excepting his motion from the law of the case doctrine**

23 In addition to raising a new claim, Hayes’ motion presents “substantially new
24 [and] different” evidence pertaining to Hayes’ 2007 Texas case, which demonstrates

25 ¹ Hayes’ 2011 Nevada conviction for the crime of attempt possession of credit
26 or debit card without cardholder’s consent in Case No. C270308. *See* Ex. 7.

27 ² Hayes’ 2017 Nevada conviction for the crime of burglary in Case No. C-16-
315125. *See* Ex. 7.

1 that this Court misapprehended the nature of those convictions. *Rippo v. State*, 134
2 Nev. 411, 427 (2018) (recognizing exception to the doctrine of law of the case when
3 subsequent proceedings produce “substantially new or different evidence”) (citing
4 *Hsu v. Cty of Clark*, 123 Nev. 625, 630 (2007)). Specifically, Hayes has submitted
5 records obtained from the Harris County District Court’s website that conclusively
6 demonstrate the two 2007 convictions “[grew] out of the same act, transaction or
7 occurrence, and [were] prosecuted in the same indictment or information.” *Rezin v.*
8 *State*, 95 Nev. 461, 462 (1979).

9 Finally, this court may deviate from the law of the case doctrine in cases of
10 clear error causing manifest injustice. *Hsu*, 123 Nev. at 631, 633 n.26. Here, it is
11 incontrovertible that the Court misapprehended Hayes’ 2007 Texas offense as
12 comprising two convictions involving distinct events. *See* Ex. 8 at 6. In addition, it is
13 equally clear that the Court admitted and considered the 2017 Nevada conviction
14 despite the primary offense preceding that offense. *Id.* Lastly, and as further
15 discussed below, the Court, when sentencing Hayes, did not exercise that discretion
16 mandated by NRS 207.010(3). *See id.* at 18. Here, allowing Hayes’ adjudication to
17 stand despite the new evidence submitted in the present motion would cause
18 manifest injustice and violate Hayes’ due process rights.

19 **II. Hayes demonstrates the Court failed to follow the statutory**
20 **requirements set forth in NRS 207.010(3) when it adjudicated him a**
21 **habitual criminal**

22 Here, the Court sentenced Hayes under the mistaken assumption that it was
23 obligated to automatically adjudicate him a habitual criminal should it find that the
24 prosecutor had established two prior felony convictions. The Court failed to conduct
25 the discretionary assessment mandated by NRS 207.010(3), which compelled the
26 sentencing judge to determine “whether it [is] just and proper for [a defendant] to be
27 punished and segregated as a habitual criminal.” *Clark*, 109 Nev. at 428. Instead,

1 the Court concluded “the State ha[d] satisfied any obligations under 207.010 to
2 support their claim for habitual treatment.” Ex. 8 at 18.

3 The State argues that Hayes’ claim fails because, as noted in *Hughes v. State*,
4 116 Nev. 327 (2000), the sentencing judge was under no obligation to make explicit
5 and particularized findings that it was “just and proper” to adjudicate him a
6 habitual criminal. Opp. at 22. However, Hayes’ claim before this Court does not
7 assert a due process violation on account of the sentencing judge not “utter[ing]
8 specific phrases or mak[ing] particularized findings” *Hughes*, 116 Nev. at 333.
9 Rather, Hayes submits that the Court altogether failed to observe NRS 207.010(3)
10 because it mistakenly assumed that it was compelled to adjudicate Hayes a
11 habitual criminal in response to the State presenting two or more authenticated
12 and certified prior felony convictions.

13 In *Clark*, the Nevada Supreme Court found that the record did not “clearly
14 disclose that the court weighed the appropriate factors for and against the habitual
15 criminal enhancement and then, in the exercise of discretion, decided to adjudicate
16 Clark as a habitual criminal.” *Clark*, 109 Nev. at 428. Noting there were “doubts
17 and ambiguities relating to the manner in which the trial court adjudicated Clark to
18 be a habitual criminal[,]” the Nevada Supreme Court remanded for resentencing.
19 *Id.* at 427. Here, the record likewise discloses the Court did not weigh any factors
20 when adjudging Hayes, but rather concluded the State had “satisfied [its]
21 obligations” under NRS 207.010. Ex. 8 at 18.

22 The State fails to address the Court’s statements at sentencing as well as its
23 failure to address the merits of the habitual criminal count. Instead, the State
24 merely notes that “trial judges are presumed to know the law and apply it in
25 making their decisions.” Opp. at 23 (citing *Jones v. State*, 107 Nev. 632, 636 (1991)).
26 The State’s expansive reading of *Jones* should be rejected. In *Jones*, the Nevada
27 Supreme Court noted that the presumption applies “[a]s to any prosecutorial

1 *misconduct.*” 107 Nev. at 636 (emphasis added). Further, applying the presumption
2 in this case would run afoul of *Clark*. In that case, the Nevada Supreme Court
3 remanded for re-sentencing based on “doubts and ambiguities” in the record despite
4 the sentencing court failing to explicitly assert that the habitual criminal
5 adjudication was non-discretionary. *Clark*, 109 Nev. at 427. As noted in *Clark*, it
6 “was incumbent upon the trial court to weigh properly whether the habitual
7 criminality count should have been dismissed pursuant to the discretion conferred
8 by NRS 207.010[].” *Id.* at 429. Here, no such discretion was exercised, rendering
9 Hayes’ sentence illegal and in violation of his due process rights.

10 **CONCLUSION**

11 The Court’s adjudication of Hayes as a habitual criminal was based upon
12 mistaken assumptions of fact regarding his criminal record. In addition, the Court’s
13 failure to exercise its discretion, as provided in NRS 207.010(3), violated Hayes’ due
14 process rights and rendered his sentence illegal. Because the sentence in this case is
15 illegal, this Court should vacate the judgment of conviction and re-sentence Hayes.

16
17
18 Dated January 18, 2023

19 Respectfully submitted,

20
21 Rene L. Valladares
22 Federal Public Defender

23 /s/ Martin L. Novillo
24 Martin L. Novillo
25 Assistant Federal Public Defender
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DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury under the laws of the United States of America and the State of Nevada that the facts alleged in this petition are true and correct to the best of counsel’s knowledge, information, and belief.

Dated January 18, 2023.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/Martin L. Novillo
Martin L. Novillo
Assistant Federal Public Defender

ORDR

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
HILARY HEAP
Chief Deputy District Attorney
Nevada Bar #012395
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant.

CASE NO: C-16-315718-1

DEPT NO: III

ORDER DENYING MOTION TO MODIFY OR CORRECT ILLEGAL SENTENCE.

DATE OF HEARING: January 25, 2023
TIME OF HEARING: 09:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 25th day of January, 2023, the Defendant not being present, represented by MARTIN H. LOPEZ-NOVILLO, Assistant Federal Public Defender, the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through HILARY HEAP, Chief Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

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\\CLARKCOUNTYDA.NET\CRM\CASE2\2013\340\63\201334063C-ORDR-(JAMES HOWARD HAYES JR)-008.DOCX

1 Court FINDS Mr. Sanft argued for the Court not to habitualize the Defendant and
2 requested a lower sentence. Court stated it does not believe that by Judge Kephart stating the
3 State had satisfied its obligations under 207.071 was not inappropriate as that needed to be
4 met before he could use his discretion to proceed and further, just and proper was not the state
5 of the law.

6 COURT FINDS, there is nothing to suggest Judge Kephart inappropriately considered
7 those and can assume he considered them as it is a legal sentence and there were the
8 appropriate number of prior convictions that were valid, even just with the Texas conviction
9 and the 2011 conviction, therefore Court does not believe it was based on mistaken
10 assumptions of fact and stated it does not violate Defendant's due process, further the Court
11 properly exercised its discretion and the sentence was legal, therefore

12 IT IS HEREBY ORDERED that the Defendant's Motion to Modify or Correct an
13 Illegal Sentence, shall be, and it is DENIED.

14 DATED this _____ day of February, 2023.

Dated this 13th day of February, 2023

15
16 
DISTRICT JUDGE

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

BD9 90F 6093 4266
Monica Trujillo
District Court Judge

19
20 BY  for
21 HILARY HEAP
22 Chief Deputy District Attorney
Nevada Bar #012395

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 State of Nevada

CASE NO: C-16-315718-1

7 vs

DEPT. NO. Department 3

8 James Hayes

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 2/13/2023

15 "Kelli DeVaney-Sauter, DPD" .

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24 Dept 3 Law Clerk

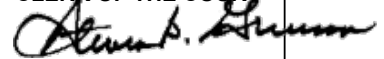
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Attorney for Petitioner James Howard Hayes

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY

James Howard Hayes,
Petitioner,

v.

State of Nevada,
Respondents.

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

NOTICE OF APPEAL

Notice is hereby given that Petitioner James Hayes appeals to the Nevada Supreme Court from the Order Denying Motion to Modify or Correct an Illegal Sentence entered in this action on February 13, 2023.

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Dated February 14, 2023

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ Martin L. Novillo
Martin L. Novillo
Assistant Federal Public Defender

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2023, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court’s electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Steven Wolfson, Steven.Wolfson@clarkcountyda.com, Motions@clarkcountyda.com.

I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, potage pre-paid, or have dispatched it to a third-party commercial carrier for delivery within three calendars days, to the following person:

James H. Hayes, #1175077 Three Lakes Valley Conservation Camp P.O. Box 208 Indian Springs, Nevada 89070	Jaime Stilz Office of the Attorney General 555 E. Washington Ave. Las Vegas, NV 89101 jstilz@ag.nv.gov
Clark County District Attorney 200 Lewis Ave. Las Vegas, NV 89101	

/s/ Kaitlyn O’Hearn
An Employee of the Federal Public
Defender, District of Nevada