

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES HOWARD HAYES,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Case No. 86112

RESPONDENT'S ANSWERING BRIEF

**Appeal From a Motion to Modify a Sentence
Eighth Judicial District Court, Clark County**

MARTIN L. NOVILLO
Assistant Federal Public Defender
Nevada Bar #
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Appellant

Counsel for Respondent

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**Appeal from a Motion to Modify a Sentence
Eighth Judicial District Court, Clark County**

ROUTING STATEMENT

This appeal is presumptively assigned to the Court of Appeals as it involves a challenge to a judgment of conviction based on a plea of guilty and a challenge to a motion to modify sentence pursuant to NRAP 17(b)(1) and NRAP 17(b)(4).

STATEMENT OF THE ISSUE(S)

1. Whether Appellant's sentence was not based on untrue assumptions and/or mistakes of fact pertaining to his criminal record.
2. Whether the district court properly followed the statutory requirements set forth in NRS 207.010(3) in adjudicating Appellant a habitual criminal.
3. Whether Appellant's due process rights were violated by the district court.

STATEMENT OF THE CASE

The State summarized the procedural history in detail below:

The following has been gathered from the filings in C-16-315718-1, A-19-793315-W, and A-21-831979-W. The relevant Nevada Supreme Court case numbers are 75173, 73436, 77151, 78590, 78622, 80222, 81076, 82202, 82734, 82962, 83151, 83274, 83368. This is not an exhaustive list of all filings in this case.

The events are organized around motions rather than chronologically, as Defendant has filed replies after the Court's orders, new motions before the resolution of previous motions, and duplicative motions. The notations after each heading are to aid the Court in finding the relevant events under the various case numbers.

Conviction (C-16-315718-1)

On or about July 23, 2013, James H. Hayes (hereinafter, "Defendant") was charged by way of Criminal Complaint with one count of BURGLARY (Category B Felony – NRS 205.060) and one count of ATTEMPT GRAND LARCENY (Category D Felony/Gross Misdemeanor – NRS 205.220.1, 205.222.2, 193.330).

Following a Preliminary Hearing in Justice Court, Las Vegas Township on June 14, 2016, the charge of BURGLARY was bound over to District Court, and the charge of ATTEMPT GRAND LARCENY was dismissed. See Reporter's Transcript of Proceedings ("Preliminary Transcript"), filed July 29, 2016. The State called Joshua Jeremiah Jarvis. Preliminary Transcript at 4. Jarvis heard Defendant in his hotel room, rustling through the luggage in the room without permission to be in the room. Id. at 9, 11, 20. The State chose to strike the Attempt Grand Larceny charge without stating a reason for this decision. Id. at 33. Though defense counsel argued insufficient evidence to prove intent of burglary when Defendant rummaged through someone else's luggage in someone else's hotel room, the magistrate did not agree and the defendant was bound over. Id. at 34-36.

On June 17, 2016, the State filed an Information with the District Court, charging Defendant with one count of Burglary. On November 21, 2016, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal. On August 29, 2017, the State filed an Amended Notice of Intent to Seek Punishment as a Habitual Criminal. (Hereinafter "Amended Notice").

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

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

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

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

SCN 73436 – On July 11, 2017, Defendant filed a pretrial Petition for Writ of Habeas Corpus in the Nevada Supreme Court, contending the evidence at the preliminary hearing was insufficient since the State did not bring all occupants of the hotel room to testify. On August 30, 2017, defense counsel informed the court the defendant had filed an unknown “something” in the Nevada Supreme Court. Defendant said his petition challenged probable cause. Defendant filed an Addendum on September 26, 2017, asserting the State had produced no proof he had entered the victims’ hotel room “wrongfully.” On September 27, 2017, defense counsel announced there was a deal Defendant wanted to accept but there was an outstanding appeal that had not been decided. The court continued the matter pending the Supreme Court decision. The petition was denied on October 12, 2017, as it should have been made to the district court. On October 6, 2017, Defendant filed a letter asking the Supreme Court clerk to tell the district court and district attorney that they no longer had jurisdiction as his case was in the Nevada Court of Appeals. Counsel announced on

October 25, 2017, that the Court of Appeals had dismissed the pro per writ. The Supreme Court decided on October 31, 2017, that it would take no action on this letter. Notice in lieu of remittitur issued on November 8, 2017.

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

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

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

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

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

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

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

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

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

On November 18, 2019, Defendant's Petition came before the Court, at which time the Court took the matter off calendar due to Defendant's pending appeal. As Defendant filed a new, also timely, habeas petition, see *infra*, this Petition was not addressed on the merits. See Affirmance, filed September 17, 2021, docket number 82734 (hereinafter "Affirmance 9/17/21"), finding Defendant's first habeas petition had not been resolved on the merits but raised the same issues as the later petition. As shown below, the Court of Appeals affirmed the denial of his later petition on the merits.

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

Writ of Mandamus/Prohibition (SCN 78622)

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

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

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

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

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

Defendant filed a Motion in the Nature of a Writ of Coram Nobis on September 9, 2019, and an Affidavit of Granting Motion in the Nature of a Writ of Coram Nobis on September 26, 2019. The State filed its opposition on October 1, 2019. The district court denied the Motion on October 7, 2019, finding the State was not properly served and an appeal was pending in the Supreme Court. Defendant filed his reply to the State's opposition on October 17, 2019. He accompanied his reply with an Affidavit of No Material Dispute as to the Mistake of Fact Motion in the Nature of a Writ of Coram Nobis, filed October 28, 2019.

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

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

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

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

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

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

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

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

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

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

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

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

On September 25, 2020, Defendant filed a Motion for Expeditious Ruling for "Amended Petition for Writ of Habeas Corpus" 3rd Request!! On October 7, 2020, Defendant filed a Motion to Set Evidentiary Hearing and Issue Transport Order. The State responded to

both motions on November 10, 2020. On November 16, 2020, the Court denied both motions.

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

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

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

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

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

On March 18, 2021, Defendant filed a Notice of Appeal from the Court's denial of his Amended Petition in SCN 82734. On June 9, 2021, Defendant filed a Motion for Leave of Appeal to Obtain Favorable Ruling in the 8th Judicial District Court, Clark County, asking for favorable rulings on his motion to modify, his supplemental to amended habeas petition, and his writ of prohibition. This motion was denied on June 16, 2021, with the Supreme Court holding he may appeal these

matters as they became ripe. Defendant filed a Motion to Expedite Appeal on August 23, 2021, which was granted. On September 17, 2021, the Court of Appeals affirmed the district court's decision on the Amended Petition. See Affirmance 9/17/21. The Court noted its affirmance encompassed Defendant's "February 12, 2020, petition and later-filed supplements." Affirmance 9/17/21 at 1. This included Defendant's Amended Petition, filed February 12, 2020, his First Supplemental, filed May 27, 2020, and the filings related to those. Defendant filed a Petition for Rehearing on October 4, 2021, and an Addendum on October 8, 2021. Rehearing was denied on November 17, 2021. On December 2, 2021, he filed a Petition for Review. This is pending.

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

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

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

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

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

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

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

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

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

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

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

Emergency Writ of Mandamus/Prohibition (SCN 82202)

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

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

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

On March 25, 2021, Defendant filed a Motion to Modify and/or Correct Illegal Sentence. On April 21, 2021, Defendant filed a "Reply" without having received the State's opposition, contending the State's failure to oppose his motion was an admission of its merits. The State filed its opposition on April 22, 2021, and amended it the same day. Defendant filed an Opposition to State's Amended Opposition to Defendant's Motion to Modify and/or Correct Illegal Sentence on May

12, 2021. The motion to modify was denied on July 14, 2021, when the district court found Defendant's sentence was legal.

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

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

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

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

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

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

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

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

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

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

Emergency Writ of Prohibition (SCN 82962)

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

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

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

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

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

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

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

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

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

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

On December 7, 2021, Defendant filed a Motion for Discovery and Reconsideration of Motion for Transcripts at State’s Expense. The

State filed an opposition on December 16, 2021. The Court denied the motion on January 10, 2022.

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

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

3 AA 470-482. On January 25, 2023, the district court denied Appellant's motion on the merits. 3 AA 499-500. On February 14, 2023, Appellant filed a Notice of Appeal.

SUMMARY OF THE ARGUMENT

Appellant's sentence was not based on untrue assumptions and/or mistakes of fact pertaining to his criminal record. Appellant's Texas convictions were considered as two separate convictions pursuant to NRS 207.010, because at sentencing Appellant was provided two separate judgements of conviction by the State which under Nevada law is prima facie evidence that Appellant was convicted of two separate felonies. Also, Appellant's claim that the district court mistakenly relied on his 2017 conviction was irrelevant due to Appellant's Texas conviction and 2011 Nevada conviction. Additionally, Appellant's Texas convictions qualify as felonies in Texas. Regardless, Appellant's Texas convictions would qualify as felonies under Nevada law. Furthermore, the district court did not adjudicate Appellant under the mistaken assumption that the State had proven four distinct and qualifying convictions. Rather, among the several factors weighed by the sentencing judge the State showed that Appellant met the necessary requirements of a small habitual criminal pursuant to NRS 207.010.

Next, the district court properly followed the statutory requirements set forth in NRS 207.010(3). First, the district court correctly determined that Appellant met the requirements of being a small habitual criminal under NRS 207.010(a). Second, contrary to what Appellant believes, the sentencing judge was under no obligation to make particularized findings, and the fact that he did not do so does not demonstrate that Appellant was automatically sentenced as a habitual criminal without consideration of the appropriateness of doing so. See Hughes v. State, 116 Nev. 327, 333 (2000). Third, the sentencing judge weighed and considered mitigating evidence when determining that it was just and proper to adjudicate Appellant a small habitual criminal.

Finally, Appellant's due process rights were not violated by the district court because the district court properly adjudicated Appellant a small habitual criminal.

ARGUMENT

I. APPELLANT'S SENTENCE WAS NOT BASED ON UNTRUE ASSUMPTIONS AND/OR MISTAKES OF FACT PERTAINING TO HIS CRIMINAL RECORD

Appellant argues that the district court erred in denying his motion to modify because his sentence was based on materially untrue assumptions and mistakes of fact pertaining to his criminal record. AOB 8. However, Appellant's claims are without merit as he was appropriately adjudicated under NRS.010 as a small habitual criminal.

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

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

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

or modify the suspect sentence or judgment. Id. at 95, citing Warden v. Peters, 83 Nev. 298, 429 P.2d 549 (1967).

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

NRS 176.555 states that "[t]he court may correct an illegal sentence at any time." See also Passanisi v. State, 108 Nev. 318, 321, 831 P.2d 1371, 1372 (1992). However, the grounds to correct an illegal sentence are interpreted narrowly under a limited scope. See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996); see also Haney v. State, 124 Nev. 408, 411, 185 P.3d 350, 352 (2008). "A motion to correct an illegal sentence is an appropriate vehicle for raising the claim that a sentence is facially illegal at any time; such a motion cannot be used as a vehicle for

challenging the validity of a judgment of conviction or sentence based on alleged errors occurring at trial or sentencing." Edwards, 112 Nev. at 708, 918 P.2d at 324.

"Motions to correct illegal sentences address only the facial legality of a sentence." Id. Motions to correct illegal sentences evaluate whether the sentence imposed on the defendant is "at variance with the controlling statute, or illegal in the sense that the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided." Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)). Other claims attacking the conviction or sentence must be raised by a timely filed direct appeal or a timely filed Petition for a Post-Conviction Writ of Habeas Corpus per NRS 34. 720-34.830, or other appropriate motion. See Id.

Appellant argues the district court mistakenly assumed his 2007 Texas convictions compromised separate convictions for purposes of NRS 207.010(a), because they arose out of one event.¹ AOB 12. Contrary to what Appellant argues, his Texas conviction are considered two separate convictions for purposes of NRS 207.010(a). During Appellant's sentencing the State provided the sentencing court with two judgments of conviction from the State of Texas that Appellant was convicted of two separate felony convictions and sentenced to serve two years in

¹ The 2007 Texas cases Appellant references are from the 185th District Court of Harris County, Texas (case number 1083785 and case number 1083786). 2 AA 335, 345, 352.

prison for each conviction. 2 AA 335, 345, 352. See NRS 207.016(5) (“For the purpose of NRS 207.010, 207.012 and 207.014, a certified copy of felony conviction is prima facie evidence of conviction of a prior felony”). Because Appellant 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. {(NRS 207.010(1)(a))}. Moreover, the State filed two separate judgements of conviction from Texas containing different case numbers for each conviction. 2 AA 335, 345. As such, Appellant has not demonstrated the Texas convictions are prosecuted in the same indictment or information. Therefore, Appellant has not demonstrated that his prior convictions from Texas 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”). Therefore, the district court did not err by denying Appellant’s claim.

Additionally, Appellant argues the district court mistakenly assumed a 2017 conviction and improperly relied upon it to adjudicate Appellant a habitual criminal. AOB 11. Appellant’ cites Brown v. State, 97 Nev. 101, 102, 624 P.2d 1005, 1006

(1981), for the proposition that “[a]ll prior convictions used to enhance a sentence must have preceded the primary offense.” At the time Appellant committed his crimes, anyone who was convicted of a felony and had two prior felony convictions qualified for habitual criminal treatment. See NRS 207.010(a). In addition to the Texas conviction discussed above, the State demonstrated that Appellant had a 2011 felony conviction for attempted possession of a credit or debit card without the cardholder’s consent. 2 AA 322-23, 356. Because Appellant 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. Accordingly, Appellant has failed to demonstrate that any mistaken assumptions about his criminal record have worked to his extreme detriment. Therefore, the district court did not err in denying Appellant’s claim.

Furthermore, Appellant argues that neither of his Texas convictions qualified as a felony for purposes of NRS 207.010(a) because each comprised a “state jail felony.” (AOB 14). 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). Credit card abuse is a felony under Texas law. See Tex. Penal Code Ann. § 32.21(d). Moreover, fraudulent use/possession of identifying information is a felony under Texas law as well. See Tex. Penal Code Ann. § 32.51. Regardless, if this court finds that these two

convictions do not qualify as a felony under Texas law, they do qualify as felonies under Nevada law. NRS 205.760 provides that “a person who, with the intent to defraud uses a credit or debit card to obtain money, goods, property, services or anything of value where the credit card or debit card was obtained...is guilty of a public offense and shall be punished for a category D felony.” NRS 205.760(1)(a).

NRS 205.463(4) provides:

that obtaining any personal identifying information of another person and with the intent to commit an unlawful act, uses the personal identifying information for any other unlawful purpose, including, without limitation, to obtain credit, a good, a service or anything of value in the name of that other person, is guilty of a category B felony...

As such, both of Appellant’s Texas convictions are considered felonies in Nevada. Furthermore, Appellant does not even argue that his Texas convictions would not be considered felonies under Nevada law. As such, this Court must reject Appellant's argument. Accordingly, it was within the sentencing court’s discretion to consider Appellant’s prior Texas convictions. Therefore, the district court did not err in denying Appellant’s claim.

Finally, Appellant complains that even though there was an appropriate number of prior convictions that were valid, even just with the Texas conviction and the 2011 conviction, Appellant was adjudicated under the mistaken assumption that the State had proven four distinct and qualifying convictions under NRS 207.010(a). AOB 15. Appellant’s argument here is not only wrong but is also a repeat of what

has been discussed above. At Appellant's sentencing the sentencing judge stated, "I do believe that the State has satisfied any obligations statutorily under the 207.010 to support their claim for habitual treatment." 2 AA 366. The district court then sentenced Appellant under the small habitual statute NRS 207.010(a). Id. At the time of Appellant's sentencing NRS 207.010(a) required that Appellant have only been convicted of two felonies to apply the small habitual statute to him. See NRS 207.010(a). The district court never stated or specified that it was adjudicating Appellant under four (4) convictions. Rather the sentencing judge adjudicated Appellant within the purview of NRS 207.010(a) as it read at the time of Appellant's conviction, because he met the minimum requirement of having at least two felony convictions which qualified him to be a small habitual criminal. As such, Appellant's claim that his adjudication as a habitual criminal was based upon numerous mistaken assumptions fails. Thus, this court should deny his claim.

II. THE DISTRICT COURT PROPERLY FOLLOWED THE STATUTORY REQUIREMENTS SET FORTH IN NRS 207.010(3) IN ADJUDICATING APPELLANT A HABITUAL CRIMINAL

NRS 207.010(3) provides that "[i]t is within the discretion of the prosecuting attorney whether to include a count under this section in any information or file a notice of habitual criminality if an indictment is found." The trial judge may dismiss a count under this section which is included in any indictment or information. Id.

In Clark v State, the Nevada Supreme Court stated that "the decision to adjudicate a person as a habitual criminal is not an automatic one." 109 Nev. 426,

428, 851 P.2d 426, 427 (1993). Clark recognized that a habitual criminal adjudication not only required that the requisite felony convictions be authenticated and established, but that the district court determine “whether it [is] just and proper for [a defendant] to be punished and segregated as a habitual criminal.” Id. The Clark Court also held that “it [is] incumbent upon the trial court to weigh properly whether the habitual criminality count should have been dismissed pursuant to the discretion conferred.” Clark, 109 Nev. at 429, 851 P.2d at 428.

In Hughes v. State, the Nevada Supreme Court held that “Clark [was] correct to the extent that it states that Nevada law requires a sentencing court to exercise its discretion and weigh the appropriate factors for and against the habitual criminal statute before adjudicating a person as a habitual criminal.” 116 Nev. 327, 333, 996 P.2d 890, 893 (2000). However, “nothing in Clark stands for the proposition that in meeting this obligation the sentencing court must utter specific phrases or make ‘particularized findings’ that it is ‘just and proper’ to adjudicate a defendant as a habitual criminal.” Id. While it may be easier to answer this question if the sentencing court makes particularized findings and specifically addresses the nature and gravity of the prior convictions, this court has never required the district courts to utter “talismanic” phrases. See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986). Instead, this court looks to the record as a whole to determine whether the sentencing court actually exercised its discretion. Hughes, 116 Nev. at 333, 996 P.2d

at 893. “[A]s long as the record as a whole indicates that the sentencing court was not operating under a misconception of the law regarding the discretionary nature of a habitual criminal adjudication and that the court exercised its discretion, the sentencing court has met its obligation under Nevada law.” Id.

Appellant complains that his sentence must be corrected because the sentencing judge failed to follow the statutory requirements set forth in NRS 207.010(3) when it adjudicated him a small habitual criminal. AOB 16. Citing to Clark, Appellant argues that he was automatically adjudicated as a habitual criminal because the sentencing judge found that the State had met its burden under the habitual criminal statute and allegedly did not “weigh the appropriate factors for and against the habitual criminal statute before adjudicating him as a habitual criminal.” AOB 18. However, Appellant fails to acknowledge that Hughes cautions that “nothing in Clark stands for the proposition that in meeting this obligation the sentencing court must utter specific phrases or make 'particularized findings' that it is 'just and proper' to adjudicate a defendant as a habitual criminal.”² Hughes, 116 Nev. at 333, 966 P.2d at 893. Accord, McKinnon v. State, 134 Nev. 979, 2, 417 P.3d 1120 (2018), 2018 WL 2272981 (unpublished opinion) (district court did not abuse

² Appellant includes a citation to the Hughes court when it states, “nothing in Clark stands for the proposition that in meeting this obligation the sentencing court must utter specific phrases or make ‘particularized findings’ that it is ‘just and proper’ to adjudicate a defendant as a habitual criminal.” AOB 18. However, Appellant fails to recognize how this rule impacts the holding in Clark.

its discretion in sentencing defendant without explicitly stating it applied the mitigating factors under NRS 176.017). As such, the sentencing judge was under no obligation to make particularized findings, and the fact that he did not do so does not demonstrate that Appellant was automatically sentenced as a habitual criminal without consideration of the appropriateness of doing so. Indeed, "trial judges are presumed to know the law and apply it in making their decisions." Jones v. State, 107 Nev. 632, 636, 817 P.2d 1179, 1181 (1991).

Appellant laments that the district court was wrong for rejecting his argument. AOB 19. Appellant contends that at sentencing, the sentencing judge stated, "the State had satisfied its obligations under 207.071."³ AOB 19. Appellant claims that this statement from the sentencing judge shows that he did not weigh the evidence and exercise his discretion, and that the court was under the impression that Appellant's adjudication was automatic upon the State proving the prior convictions. As discussed above, the sentencing judge was under no obligation to make particularized findings, and the fact that he did not do so does not demonstrate that Appellant was automatically sentenced as a habitual criminal without consideration of the appropriateness of doing so. See, Hughes, 116 Nev. at 333, 996 P.2d at 893. Regardless, Appellant's sentencing transcript shows that the sentencing judge

³ Appellant states that the sentencing Judge was citing to NRS 207.071. However, the record reflects that the sentencing Judge was referring to NRS 207.010. 2 AA 366.

extensively heard mitigating evidence from Appellant and weighed that against what the State had to say and the evidence the State presented. The sentencing judge gave Appellant an opportunity to explain his Texas convictions. 2 AA 351-354. The State then presented an extensive history of Appellant's habitual criminal behavior. Id. 355-58. The sentencing judge then gave Appellant an opportunity to respond to the State's claims. Id. 358. In response, Appellant attempted to present evidence he believed would mitigate his chances of being sentenced a habitual criminal. Id. 359-62. Upon weighing both the State's and Appellant's arguments the sentencing judge exercised his discretion to sentence Appellant as a habitual criminal under NRS 207.010. As such, the district court was not wrong for rejecting Appellant's argument.

Furthermore, Appellant argues that the district court erred in concluding that the sentencing court was not required to determine that it was just and proper to adjudicate Appellant a habitual criminal. Appellant's argument should fail for the following reasons. First, the district court correctly determined that Appellant met the requirements of being a small habitual criminal under NRS 207.010(a). Second, contrary to what Appellant believes, the sentencing judge was under no obligation to make particularized findings, and the fact that he did not do so does not demonstrate that Appellant was automatically sentenced as a habitual criminal without consideration of the appropriateness of doing so. See, Hughes, 116 Nev. at

333, 996 P.2d at 893. Third, similar to Hughes, in Appellant's case, the sentencing court weighed and considered mitigating evidence in ascertaining that it was just and proper to adjudicate the defendant a habitual criminal. Id. As such, Appellant's claim that his sentence must be corrected because the court failed to follow the statutory requirements set forth in NRS 207.010(3) when it adjudicated him as a habitual criminal fails. Thus, Appellant's claim should be denied.

III. APPELLANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE DISTRICT COURT

Appellant argues that the sentencing court's automatic adjudication and its failure to make an individualized finding that it was just and proper to adjudge Appellant a habitual criminal deprived him of his liberty without due process of law. AOB 21.

Procedural due process rules protect persons from deprivations of life, liberty, or property that are mistaken or unjustified. Eggleston v. Stuart, 137 Nev. 506, 511, 495 P.3d 482, 489 (2021). Procedural due process claims arise where the State interferes with a liberty or property interest and the State's procedure was constitutionally insufficient. Malfitano v. Cty. of Storey, 133 Nev. 276, 282, 396 P.3d 815, 819 (2017); Id. In Walker v. Deeds, the Ninth Circuit Court of Appeals required that [a] sentencing judge "... review and make particularized findings that it is 'just and proper' for a defendant to be adjudged a habitual offender." 50 F.3d 670, 673 (9th Cir. 1995). Walker further concluded that Nevada law created "a

constitutionally protected liberty interest” in such a sentencing procedure. Id. However, in analyzing Walker, the Hughes court determined that although the Walker Court’s interpretation of Clark was correct nothing in Clark stands for the proposition that in meeting this obligation the sentencing court must utter specific phrases or make “particularized findings” that it is “just and proper” to adjudicate a defendant as a habitual criminal. Hughes, 116 Nev at 332, 996 P.2d 893.

The district court did not fail to abide by NRS 207.010(3) as Appellant contends. The sentencing judge was under no obligation to make particularized findings, and the fact that he did not do so does not demonstrate that Appellant was automatically sentenced as a habitual criminal without consideration of the appropriateness of doing so. Also, as discussed above, the sentencing judge properly exercised his discretion in weighing the evidence and adjudicating Appellant as a small habitual criminal. As such, Appellant’s claim that his due process rights were violated by the district court fails. Thus, Appellant’s claim should be denied.

CONCLUSION

The State respectfully requests that this Court deny Appellant’s claim that his sentence be modified.

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Dated this 2nd day August, 2023.

Respectfully submitted,

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

BY */s/ Jonathan E. VanBoskerck*

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, contains 8,039 words and 27 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day August, 2023.

Respectfully submitted

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

BY */s/ Jonathan E. VanBoskerck*

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 2nd day August, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

MARTIN H. LOPEZ-NOVILLO
Assistant Federal Public Defender

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

/s/ J. Hall

Employee, Clark County
District Attorney's Office

JEV/Rudy D'Silva/jh