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3 UNITED STATES DISTRICT COURT  
4 DISTRICT OF NEVADA

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6 BLAKE L. ANDERSON,

Case No. 3:19-cv-00139-MMD-CBC

7 Petitioner,

ORDER

8 v.

9 EIGHTH JUDICIAL DISTRICT COURT, *et*  
10 *al.*,

11 Respondents.

12 This action brought by Blake Anderson (“Petitioner” or “Anderson”) comes before  
13 the Court for initial review under 28 U.S.C. § 1915(e)(2).

14 **I. INTRODUCTION**

15 Anderson has filed a petition for a writ of mandamus or prohibition under 28 U.S.C.  
16 § 1651 against the State of Nevada and its Eight Judicial District Court seeking to overturn  
17 a judgment of conviction entered in Nevada state district court. (ECF No. 1.) A filing fee  
18 has been paid.<sup>1</sup> Following initial review, the Court concludes that Anderson’s papers are  
19 subject to multiple substantial defects.

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22 <sup>1</sup>The Court proceeds on the assumption that the \$5.00 filing fee for a habeas  
23 petition is applicable to this action even though Anderson has filed a petition for a writ of  
24 mandamus or prohibition pursuant to 28 U.S.C. § 1651 rather than a petition for a writ of  
25 habeas corpus under 28 U.S.C. § 2254. The Court has stated to Anderson in two  
26 somewhat similar prior actions that the applicable filing fee would be \$5.00. See No. 3:18-  
27 cv-00414-MMD-CBC, ECF No. 11 (D. Nev. Oct. 05, 2018); No. 2:19-cv-00273-JAD-VCF,  
28 ECF No. 3 (D. Nev., Feb. 19, 2019). *Cf. Washington v. Los Angeles County Sheriff’s*  
*Dept.*, 833 F.3d 1048 (9th Cir. 2016) (two prior dismissed federal mandamus actions that  
had sought to challenge a state court conviction did not constitute “a civil action” so as to  
constitute “strikes” for purposes of the three-strikes rule in 28 U.S.C. § 1915(g)); *but see*  
28 U.S.C. § 1914(a) (“The clerk of each district court shall require the parties instituting  
*any* civil action, suit or proceeding in such court, *whether by original process, removal or*  
*otherwise*, to pay a filing fee of \$350, *except that on application for a writ of habeas corpus*  
the filing fee shall be \$5.”) (emphasis added).

1 **II. DISCUSSION**

2 **A. Eleventh Amendment Immunity**

3 First, a federal district court does not have jurisdiction over an action brought  
4 against the State of Nevada or the Eighth Judicial District Court for the State of Nevada.  
5 Petitioner may not proceed directly against the State of Nevada or an arm of the State –  
6 such as the state district court – in federal court due to the state sovereign immunity  
7 recognized by the Eleventh Amendment. *E.g., O'Connor v. State of Nevada*, 686 F.2d  
8 749 (9th Cir. 1982) (state district court). State sovereign immunity bars an action against  
9 the state or an arm of the state in federal court regardless of the relief sought. *E.g.,*  
10 *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101–02 (1984).

11 **B. No Appellate Jurisdiction Over the State Courts**

12 Second, a federal district court does not have appellate jurisdiction over a state  
13 court, whether by direct appeal, mandamus, prohibition, and/or an exercise of supervisory  
14 jurisdiction. *See, e.g., Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Bianchi v.*  
15 *Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003); *see also Demos v. United States District*  
16 *Court*, 925 F.2d 1160, 1161 (9th Cir. 1991) (federal court of appeals did not have  
17 jurisdiction to issue a writ of mandamus to a state court). If Petitioner wants to seek  
18 collateral review of his conviction in federal court, he must file a timely petition for a writ  
19 of habeas corpus under 28 U.S.C. § 2254, not a petition for a writ of mandamus or  
20 prohibition under 28 U.S.C. § 1651.<sup>2</sup>

21 **C. Heck Bar**

22 Third, to the extent that Petitioner challenges his judgment of conviction other than  
23 through a habeas petition, the civil action is barred under *Heck v. Humphrey*, 512 U.S.  
24 477 (1994). An inmate in custody pursuant to a judgment of conviction may not pursue  
25 claims that necessarily challenge the validity of that conviction in a federal civil action  
26 other than in a federal habeas action. *Id.*

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28 <sup>2</sup>The All Writs Act, 28 U.S.C. § 1651, does not provide an independent basis for  
jurisdiction. *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 33–34 (2002).

1           **D. Opportunity to Recharacterize and Amend**

2           Given the multiple substantial defects presented, the petition for a writ of  
3 mandamus or prohibition will be dismissed without prejudice, but without entry of final  
4 judgment. Anderson will have 30 days within which to recharacterize his request for relief  
5 and file an amended petition that, *inter alia*: (a) instead seeks a writ of habeas corpus; (b)  
6 is filed on the Court's required § 2254 petition form; and (c) names his immediate physical  
7 custodian, *i.e.*, the warden of his facility, as a respondent.

8           Anderson should note that if he – despite the dismissal of his petition for a writ of  
9 mandamus or prohibition – tries to simply use the habeas petition form as a means to  
10 pursue instead a mandamus petition,<sup>3</sup> final judgment will be entered dismissing this  
11 action, for the reasons assigned herein. Anderson's continuing efforts, across multiple  
12 actions, to pursue a petition for a writ of mandamus by this Court directed to the state  
13 courts are completely frivolous. His only available remedy is in habeas; but if he chooses  
14 not to pursue that remedy herein, the action simply will be dismissed by a final judgment.

15           Recharacterization of a *pro se* litigant's pleadings should occur only after notice  
16 and an opportunity for the litigant to decide how he wishes to proceed. *See, e.g., Castro*  
17 *v. United States*, 540 U.S. 375, 381–83 (2003); *Nettles v. Grounds*, 830 F.3d 922, 935–  
18 36 (9th Cir. 2016). Anderson is informed that if he seeks relief under § 2254, his action  
19 will be subject to all rules applicable to § 2254 petitions, including, *inter alia*, the  
20 exhaustion requirement, abstention doctrine,<sup>4</sup> the one-year limitation period in 28 U.S.C.  
21 § 2244(d),<sup>5</sup> and the restriction on second or successive petitions. Generally, if a federal  
22 habeas petition is dismissed with prejudice, such as on the merits or as time-barred, the

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24           <sup>3</sup>*Cf.* No. 3:18-cv-00502-HDM-WGC, ECF No. 12.

25           <sup>4</sup>*See, e.g., Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983); *Carden v.*  
26 *State of Montana*, 626 F.2d 82, 83–85 (9th Cir. 1980); *Davidson v. Klinger*, 411 F.2d 746  
27 (9th Cir. 1969). A state court direct appeal is part of the original state criminal proceedings  
for purposes of abstention. *E.g., supra Sherwood*. Anderson's direct appeal currently is  
pending in the state courts. Abstention doctrine is not limited to habeas actions.

28           <sup>5</sup>Anderson at all times remains responsible for calculating all applicable state and  
federal limitations periods and timely and properly seeking appropriate relief in an  
appropriate court or courts. The Court expresses no opinion in this regard.

1 petitioner will not be able to pursue a later federal habeas petition. He thus could be  
2 barred from, *inter alia*, pursuing additional claims in a later petition. See 28 U.S.C. §  
3 2244(b).

4 On the other hand, while it is to an extent Petitioner's choice as to how he wishes  
5 to proceed, if his final choice is to instead pursue a petition for a writ of mandamus or  
6 prohibition, then, again, final judgment will be entered dismissing this action without  
7 prejudice, for the reasons assigned herein.

8 Petitioner can choose which type of petition that he wishes to pursue, but he cannot  
9 choose the consequences that follow from his choice.

10 **III. CONCLUSION**

11 It is therefore ordered that the petition will be dismissed without prejudice, but  
12 without entry of final judgment.

13 It is further ordered that Petitioner will have 30 days within which to dispatch an  
14 amended petition for a writ of habeas corpus to the Clerk for filing. If he does not timely  
15 do so, final judgment will be entered dismissing this action without prejudice. If Petitioner  
16 seeks to further pursue a petition for a writ of mandamus or prohibition, including by  
17 presenting a petition for a writ of mandamus or prohibition on a § 2254 petition form, final  
18 judgment will be entered dismissing this action without prejudice.

19 It is further ordered that, on any amended petition filed, Petitioner must clearly  
20 identify the pleading as an amended petition by writing the case number in the space  
21 provided on page 1 of the form and writing "Amended" in the space under the case  
22 number.

23 The Clerk will send Petitioner two copies of a § 2254 form packet along with a copy  
24 of the papers that he filed.

25 DATED THIS 20<sup>th</sup> day of June 2019.

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28 MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE