No. 75097

SUPREME COURT OF NEVADA

JAVAR ERIS KETCHUM, *Appellant*, vs. STATE OF NEVADA, *Appellee*,	Supreme Court No. 75097 District Court Case No. C-16-319714-1

DEFENDANT-APPELLANT'S CORRECTED OPENING BRIEF

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NRAP 26.1 DICLOSURE STATEMENT

The undersigned counsel of record for Defendant-Appellant Javar Eris Ketchum hereby certify that no real party in interest represented by the undersigned counsel has a parent corporation and that there are no parent corporations or publicly held companies that own more than 10% or more of any of those parties' stock. There is no such corporation. Undersigned counsel is the only attorney of record that has appeared in this case (including proceedings in the district court) on behalf of the Defendant-Appellant.

Dated: Las Vegas, Nevada
August 27, 2018

JAVAR E. KETCHUM
by his attorney,

/s/

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ROUTING STATEMENT - RETENTION IN THE SUPREME COURT

This case is presumptively retained for the Supreme Court to "hear and decide" because it raises "a question of first impressing involving the United States or Nevada Constitutions or common law." NRAP 17(a)(11). This case presents three questions. First, whether the trial court abused its discretion when it denied the defendant's pre-trial petition for habeas corpus and motion to dismiss where the State presented impermissible hearsay to the Grand Jury. *See* N.R.S. § 171.2135(2). Second, whether the legislative prohibition on character evidence contained in N.R.S. § 48.045, as applied to the defendant, and coupled with the trial court's lopsided interpretation of that provision deprived the defendant of a fair trial and right to due process as guaranteed by both the United States and Nevada State Constitutions. *See* U.S. CONST. amend. VI; and NEV. CONST. Art. § 1. On the latter point, the issue is also of "statewide public importance" because it is a repeatedly recurring issue and the interpretation of the decisions of this Court, *see e.g. Petty v. State*, 116 Nev. 321 (2000), by the lower courts has been inconsistent. *See* NRAP 17(a)(11). Third, whether the State violated the defendant's right to fair trial and due process when it failed to disclose inculpatory evidence to trial counsel. NRAP 17(a)(11).

STATEMENT OF ISSUES PRESENTED

1. Did the trial court abuse its discretion when it denied Defendant's pre-trial petition for writ of habeas corpus and motion to dismiss, which sought dismissal on the grounds that the State had presented impermissible hearsay to the grand jury in contravention of N.R.S. § 171.2135(2)?

2. In light of the Defendant's assertion of self-defense, did the trial court commit reversible error in refusing to allow the Defendant to present evidence of the victim's character and prior bad acts and, thus, deprive the Defendant of his right to fair trial?

3. Did the State's failure to disclose inculpatory evidence during the evidence viewing to counsel render the trial fundamentally unfair and violate the Defendant's right to due process and fair trial?

STATEMENT OF THE CASE

This is an appeal from the judgment of conviction filed on May 5, 2018, wherein Defendant was adjudged guilty of Count One, murder with use of a deadly weapon, and, Count Two, robbery with use of a deadly weapon. D.A.-3-4. On Count One, Defendant was sentenced to life with the eligibility for parole after serving a minimum of twenty (20) years plus a consecutive term of two-hundred forty (240) months with a minimum parole eligibility of ninety-six (96) months for the use of a deadly weapon. On Count Two, Defendant was sentenced to a maximum of one hundred eighty (180) months with a minimum parole eligibility of forty (48) months, plus a consecutive term of one hundred twenty (120) months with a minimum parole eligibility of forty-eight (48) months for the use of a deadly weapon, concurrent with Count One. Defendant was also given credit for four hundred seventy-five (475) days served in custody. *Id*.

This appeal is timely because Defendant filed his Notice of Appeal on February 6, 2018. DA-1.

STATEMENT OF FACTS

A. Overview

The charges alleged in the Indictment arise from the September 25, 2016 shooting of Ezekiel F. Davis outside the Top Knotch Apparel on the 4200 block of South Decatur Boulevard. The State of Nevada charged Mr. Ketchum in a five (5) count Indictment together with co-defendants Antoine Bernard, Roderick Vincent, and Marlo Chiles as follows: (1) one count of murder with a deadly weapon; (2) one count of robbery with use of a deadly weapon; and (3) three counts of accessory to murder. DA-1. Mr. Ketchum was only charged in the first two counts of the Indictment. DA-71.

Jury trial began on May 23, 2017 and the jury returned a verdict of guilty on both counts on May 26, 2017. DA-3.

Mr. Ketchum was sentenced on February 1, 2018 as follows:

> Count 1: to Life with eligibility for parole after serving a minimum of twenty (20) years plus a consecutive term of two hundred forty (24) months with a minimum parole eligibility of ninety-six (96) months for the use of a deadly weapon; and
>
> Count 2: a maximum of one hundred eighty (180) months with a minimum parole eligibility of forty-eight (48) months, plus a consecutive term of one hundred twenty (12) months with a minimum parole eligibility of forty-eight (48) months for the use of a deadly weapon, concurrent with Count 1, and given credit for 475 days credit for time already served in custody.

DA-3.

The district court's judgment and conviction entered on February 5, 2018. DA-3. Mr. Ketchum filed his timely notice of appeal on February 6, 2018. DA-1.

B. Evidence at Trial

On or about September 25, 2016 Ezekiel F. Davis was shot outside the Top Knotch Apparel on the 4200 block of South Decatur Boulevard. On or about October 16, 2016, as a result of anonymous phone calls, surveillance video from a Swann recording device, law enforcement arrested Mr. Ketchum on charges of murder with a deadly weapon and robbery with use of a deadly weapon.

On March 8, 2017, Defendant filed a Motion in Limine, seeking to admit character evidence of the victim, Ezekiel Davis. In that Motion, Defendant articulated the specific character evidence he sought to admit, attached certified copies of the victims' previous criminal convictions, arrest records, as well as probation reports. DA-50.

On May 9, 2017, the State filed a Motion in Limine, addressing prior specific acts of violence by the murder victim. In that motion, the State requested that Defendant not be allowed to present evidence of the murder

victim's prior convictions, without some proof that Defendant was aware of those events.

On May 18, 2017, the State filed a Supplement to its Motion in Limine. In that supplement, the State again argued that Defendant should not be allowed to introduce the prior crimes of the murder victim, given that there had been no showing that Defendant knew the victim.

On May 22, 2017, Defendant's jury trial began. During Defendant's opening statement, he indicated that the murder victim had a reputation for sticking people up at gun-point. The State objected to this statement, given the Court's prior rulings. During argument on the point, the Court ruled that the reputation or opinion testimony could be admissible as a reputation or opinion for violence, but not for the underlying facts. The defense indicated that although it did not want to forecast its defense, the time may come when given Ketchum's testimony, the prior acts of the victim may be admissible. On the third day of the trial, Antoine Bernard testified. Bernard testified that Defendant asked who the victim was. DA-167.

At the end of the third day of trial, the Court held a colloquy regarding the testimony of the defendant's anticipated witnesses. During that colloquy, the State requested that if Defendant intended to testify of knowledge of specific prior acts of his victim, that a *Petrocelli* hearing be held. *Id*. at DA-

82. More importantly, the State unequivocally indicated that it would not open the door to Mr. Davis' reputation and character:

> MR. GIORDANI: …When I put those witnesses up on the stand, I just want to be clear before we get there that we're offering the victim's past five or so years of his life -- or two to three years of his life in order to rebut what they've done so far and what they're about to do with these next witnesses.
>
> THE COURT: Um-hum.
>
> MR. GIORDANI: **And we're not going any further than that. So of course, it would not open the door to any specific acts, and that's exactly what, you know, the law permits.**

DA-114.

Defendant testified on the fourth day of trial, May 25, 2017. Defendant testified that his first interaction with the victim, Ezekiel Davis, was near the dancing pole. DA-130. The Defendant testified that he knew of Ezekiel F. Davis' violent past, including robbery, and his modus operandi. Id. Ketchum testified:

> Q. And what eventually happened when you got over there?
>
> A. When we got over there, he -- he got in between the cars, and you know, he reached like he was reaching for a lighter. And, you know, I was looking -- pulling out my phone and then when I looked up, he had a gun, he grabbed me by my waistline, pulled me very hard, grabbed me by my belt, pulled me very hard close to him, shoved the gun in my waistline, and he -- he was like, he was like, you know, tear it off, bitch ass nigga. I'm like, and I was just, you know, I was very shocked. And, you know, I just thought I was fixing to get shot so I went in my pocket –

Q. Hold on one second. Before you go there, tell me about did you see Zeke's face when he did that? When he pulled you right above your crotch –

A. Yes.

Q. -- and pulled you to him?

A. When he jerked me very hard and I looked him in his eyes, and you know, I could just see demons all over him. His eyes was real black, black lines -- I mean, black sags up under his eyes. He had white stuff right here or kind of foaming at the mouth, and I could just tell he meant business and he was very serious.

Q. Were you scared?

A. Yes, I was.

Q. And a scale from one to ten, how scared were you?

A. I mean, I don't want to sound, you know, weak, but I was scared about like a nine, nine and a half.

Q. Did you -- was that about the scariest time you've ever had in your life?

A. Yeah. Yes, absolutely.

Q. Did you think that he was going to kill you?

A. Yeah, I knew he was.

Q. Did you think if you gave him your money he was just going to let you go?

A. No, I knew if I gave him my money, it was still -- I -- I knew I was going to get shot.

Q. And as a result of that, those thoughts that you had in your mind, what did you do?

A. Well, you know, I just closed my eyes, and I just was like, you no he, dear God help me. I was like, God, you know, I called on him, and you know, I just got a warm feeling and the spirit just came over me like a voice of my grandmother's, it's like, you know, stand up for yourself. And so I just came out of my pocket and I shot. And when I shot, I hit him. And he rolled on the ground -- I mean, he hit the ground. He was shaking, you know, kicking at the pants and then when I seen him hit the ground, I -- I gained my composure back, and you know, I got very, very angry. And --

Q. Hold on before we get into you being angry. Did there come a time when he had that gun in your rib cage and grabbing on your belt, did you recognize him?

A. That's when I did recognize him because he had that -- that hat on, a Gucci hat, but I couldn't really see under there. All I could just see the hat and his gold teeth, and I -- when he pulled me close to him, that's when I realized who he was because I could see now.

Q. Who was -- who did you know him to be?

A. Zeke. I had had some girls -- I know a girl, she works at Larry's, her name is –

MR. GIORDANI: Objection. This is calling for hearsay.

MR. WOOLDRIDGE: And hearsay --

THE COURT: Overruled.

BY MR. WOOLDRIDGE:

Q. Go ahead.

A. She works at Larry's Gentlemen Club and her name is Barry (phonetic). I met her up there at her job one time for, you know,

> just -- just to hang out, and she came to the car with a friend, Misty. They got in talking about girl talk, in my phone looking at Facebook and My Time on it. And as they get in, you know, she like, babe, what you think? And I'm like what? She showed me the phone. She was like --
>
> Q. Who was on the phone?
>
> A. -- this -- it was a picture of Zeke.
>
> Q. Okay.
>
> A. And she was like Misty want to talk to him or he's trying to talk to Misty, and I'm like, who is that? She was like this dude named Zeke. He -- she -- he ain't no good. He known for this. He been -- so --
>
> Q. Known for what?
>
> A. He's known for robbing -- I mean, he's been in jail-- he's been to jail -- in and out of jail and he's known as a jack boy.

DA-132-136.

The defense theory of the case was heavily dependent upon Ketchum's belief and knowledge of the victim's specific prior bad acts, which formed the basis of his opinion of the victim's reputation and character for violence. Defense counsel proffered evidence of Mr. Davis' history of luring victims to parking lots and then robbing them at gun point. The district court limited the defense to testimony regarding the victim's reputation and character but not to the specific prior bad acts. *See* DA-82-83. The district court precluded the defendant from offering evidence of Ezekiel Davis' prior robbery convictions

and robbery related offenses. *Id*. These offences involved a similar factual scenarios and *modus operandi* where Ezekiel Davis accosted his robbery victims outside in parking lots and eventually robbed or attempted to rob them; this was similar to the facts as alleged by Mr. Ketchum when he took the stand. Specifically, Mr. Ketchum testified that he was aware Mr. Davis was known as a "Jack Boy" and had gone to prison for robbery. *Id*. This was true and supported by Mr. Davis' record conviction for robbery and related offenses, as well as victims of Mr. Davis who were ready and willing to testify concerning the robberies. *Id.*

Also the nature of Mr. Davis' prior robbery conviction occurred under similar circumstances to what Mr. Ketchum testified and supported his theory of self-defense. DA-132-136. Specifically, Mr. Ketchum testified that Mr. Davis attempted to rob him at gunpoint. *Id.* Importantly, in analogous set of circumstances, in two of Mr. Davis' prior bad acts that the defense sought to admit, Mr. Davis had attempted to rob victims at gunpoint in a parking lot. DA-50.

At the time the trial court considered Defendant's motions to introduce the above-described evidence, the trial court was aware that Mr. Ketchum was asserting that the fatal shooting of the victim was done in self-defense. DA-50, 132-136. The trial court was also aware that certain specific acts of

violence of the deceased were known to defendant Ketchum or had been communicated to him. *Id*.

Defendant counsel proffered that Ketchum would take the witness stand and testify that he knew of Ezekiel Davis's past convictions and modus operandi and attached copies of Mr. Davis' extensive criminal record to his Motion to Admit Character Evidence of Ezekiel Davis. *See* DA-50.

The Defendant made a record regarding the prior acts of the victim. DA-152. At that time, Defendant argued that the prior acts should be admitted pursuant to N.R.S. § 48.045 (2). Defendant sought to admit the prior judgments of conviction, based upon the revelation that "Barry" had known of and revealed Davis' past to Defendant three months prior. *Id*. Defendant called two witnesses, who gave their opinions that Davis was a violent person. *Id.*

Following the last of Defendant's witnesses, and him resting his case, the State called a single rebuttal witness. *Id*. at DA-137-149. Bianca Hicks testified that she was living with Davis, and the two shared a pair of children. *Id*. at 137-149. Hicks presented an emotionally charged and heavily skewed portrait of Mr. Davis and testified that in the three years she knew him, she had not seen Davis with a gun. *Id*. Specifically, during direct examination, the State asked the fiancée the following question:

Q. One final -- did you ever see Zeke with a gun during the three years that you knew him?

A. No.

DA-145.

During cross examination, defense counsel asked whether she knew that Mr. Davis had, in fact, previously been convicted of ex-felon possession of a firearm in 2010:

Q. You indicated that he did not carry a gun?

A. Yes.

Q. Were you aware that he had been convicted --

DA-148.

The State objected and the trial court excused the jury and strenuously admonished trial counsel:

MR. GIORDANI: Objection.

BY MR. WOOLDRIDGE:

Q. -- of --

MR. GIORDANI: Objection.

BY MR. WOOLDRIDGE:

Q. -- possession of a firearm by an ex-felon.

THE COURT: Counsel. Jury will take a five-minute recess.

THE MARSHAL: Rise for the jurors.

THE COURT: All right. We'll be back on the record. Counsel for State is present. Counsel for the defense is present. Defendant is present. We're outside the presence of the jury panel. Counsel, you have been told time and time and time again by not only myself but Judge Villani who made the original ruling, you were not to ask regarding the prior convictions of the victim in this case. You specifically violated the ruling of the Court, and you did it deliberately going to leave it to Judge Villani to determine the sanction.

The question is, where do we go from here? I am not inclined to give a mistrial in this case. However, I think the door has been opened. I think that the best way to resolve this would be for both sides to stipulate to the fact that the victim was convicted in 2008, in 2010 and we'll state what the convictions were for.

MR. WOOLDRIDGE: Your Honor --

THE COURT: And that can be the only information that will be presented to them.

MR. WOOLDRIDGE: -- one of the -- just to be heard. So the State brought a witness who testified. They opened the door about whether the -- about the fact that Ezekiel Davis doesn't carry a gun. I didn't even bring in the conviction about the robberies. That was not the question I had. The question I had, and I tested this witness' knowledge --

THE COURT: You asked specifically, so are you aware that he was convicted of --

MR. WOOLDRIDGE: Of ex-felon in possession of a firearm? Her testimony --

THE COURT: I specifically told you, you were not to mention the convictions. If you wanted to draw and bring them in at that point, it was your obligation to ask to approach the bench and request that the Judge the prior ruling.

MR. WOOLDRIDGE: Judge --

THE COURT: You don't just get to blurt it out in court in front of he have been in contravention of a Court's earlier ruling. You violated your duties as an attorney when you did so.

MR. WOOLDRIDGE: Judge, I don't think I violated my duties. They opened the door, I cross-examined her. I did --

THE COURT: I just explained to you the circumstances under which you had an obligation to this Court to approach the bench first. When you have a specific order from a Judge that you may not bring up prior convictions, it is your obligation to ask the Judge to change the ruling before you ask the question. Look up any case law on it. Educate yourself, Counsel, before you do stupid things in court.

MR. WOOLDRIDGE: Judge, I'm not trying to upset you, but I will tell you that when we approached and I did say if they opened up the door, I would be cross-examining this witness on any prior bad acts. I did not -- I did not cross-examine the witness --

THE COURT: Counsel, you were wrong.

MR. WOOLDRIDGE: I did not --

THE COURT: I don't need any further explanation. I'm going to leave it up to Judge Villani. If it were me, you might be going to jail this afternoon. I'm going to hold a off on that. I'm going to let Judge Villani determine whether or not he's going to impose some type of sanction, whether it be monetary sanctions, referral to the bar, or some other type of sanction. It will be up to him.

MR. WOOLDRIDGE: I understand. I just want to – I just want to make a record, that's all, Judge. I'm not trying to upset you.

THE COURT: You made your record.

MR. WOOLDRIDGE: I'm not trying to upset you at all.

MR. GIORDANI: Briefly, Your Honor. As to the remedy proposed by the Court, the State certainly doesn't want anything about a robbery conviction coming in, and I don't believe he blurted that out. The one he did blurt out, I believe –

THE COURT: You know, at this point –

MR. GIORDANI: I know, but Judge, it's --

THE COURT: -- so they know it was in 2008 or 2010. So what?

MR. GIORDANI: Well, the title's never been said so I don't want us to be punished, and now they're going to know he has a robbery conviction because of what he did. All I'm asking is tell the jury that they're to disregard what he just said and we'll leave it at that and not draw anymore attention to it.

THE COURT: All right, that's fine.

MR. GIORDANI: Thank you. Should I bring the witness back on the stand?

THE COURT: You may. Bring the jury back in. We're going to finish it this afternoon and then we're going to settle jury instructions. Do you have any further witnesses after this one?

DA-149-153.

Finally, During the discovery phase of the case, the undersigned counsel informed the State's Deputy District Attorney Marc DiGiacomo that he would like to view the original SWAN video from the incident in question. On or about February 16, 2017, viewed the original SWAN Video surveillance in possession of law enforcement. The original surveillance was in evidence at the evidence vault and could only be accessed with law enforcement. At the

time and date set for the review, and Detective Bunn along with Chief Deputy District Attorney Marc DiGiacomo presented the video to counsel in the Grand Jury room. Counsel had no control of the video while it was played, and law enforcement controlled the surveillance. Counsel was only shown parts of the video.

During trial, and when the surveillance was placed into evidence, portions of the video that were played for the jury appeared to be the same portions counsel reviewed with law enforcement and the State in the Grand Jury Room. However, crucially, in the State's closing argument, the State presented two alleged segments of surveillance undersigned counsel did not previously view prior to the closing argument and that were not presented during trial. *See Rippo v. State*, 113 Nev. 1239, 1255, 946 P.2d 1017, 1027 (1997) (it is improper for the State to refer to facts not in evidence in closing summation).

This included video surveillance of the defendant purportedly having a lengthy rap battle outside the Top Notch with the victim and another video of defendant showing off his firearm in the presence of the victim. These two never seen video portions substantially undercut the defense theory, that the victim was unaware defendant had a firearm.

This was a close case requiring the jury to make a judgment call on whose theory of the case was more believable, the trial court's evidentiary rulings unfairly skewed the outcome in favor of the State and prejudiced the defense's ability to test the State's theory of the case. Here, Mr. Ketchum should have permitted to introduce evidence of the victim's character, reputation and prior bad acts to show the victims' propensity for violence, to demonstrate the reasonableness of his fear. At a minimum, once the State opened the door, Mr. Ketchum should have been entitled to present evidence or elicit testimony regarding Mr. Davis' prior convictions and character, namely, Mr. Davis previous conviction of ex-felon in possession of a firearm. Finally, the State's conduct in presenting evidence during closing arguments that was not previously identified to the defense undermined counsel's opening statement, trial strategy, credibility, and rendered the trial fundamentally unfair.

At the end of the fifth day of trial, Defendant was found guilty by the jury. Following the verdict, Defendant entered into a stipulation and order, waiving the penalty phase, and agreeing to a sentence of life in prison with parole eligibility after twenty years, with the sentences for the deadly weapon enhancement and the count of robbery with use of a deadly weapon to be

argued by both parties. Seven days after the verdict, Defendant filed a Motion for New Trial pursuant to N.R.S. § 176.515 (4), which was denied.

ARGUMENT

POINT ONE

THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS AND MOTION TO DISMISS INDICTMENT BASED ON HEARSAY AND/OR SECONDARY EVIDENCE CONTRARY TO N.R.S. § 172.135(2)

A. Standard of Review

This court reviews a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion. *Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008). An appellant must show actual prejudice for a grand jury indictment to be dismissed on appeal. *Id*.

B. The District Court Abused Its Discretion When it Denied Defendant's Motion to Dismiss the Indictment

The State presented the testimony of Detective Christopher Bunn and a surveillance video recovered from the Swann device to the Grand Jury. The relevant portions of Detective Bunn's testimony is summarized below:

> Q. And when you were able to access this Swann device, were you able to find something relevant to your investigation?
>
> A. Extensive amount of video that showed basically almost the entire event.

GJT at 19.

Q. And that particular Swann device, how much information is contained on there?

A. I think it's like several gigs, like 45 gigs of some sort of information, you know, contained within it. It's quite a bit.

Q. More than one day's worth of four different camera angles?

A. Yes.

Q. And when you're using the actual Swann device, **can you do something with it that we're not going to be able to do here in this room with the video?**

A. Yeah. The control system within that device allows you to zoom in on the video itself. So you can actually pan all the way in and you can actually zoom images up to like four times greater than what we'll be able to see.

GJT at 21.

Q. I'm going to hit play. But what is it the Grand Jury should be looking at while we show about a minute and a half of this particular video?

A. If you watch the gentleman with the number 3 on the back, that's Javar Ketchum, you're going to see him remove a gun from his right front pocket area in his right hand and he's going to display it to all of the individuals that are there. And it's going to be in front of him but you can see, it's a little bit difficult to see because the background you have is the front of Roderick Vincent's shirt which is dark in color and the gun's dark in color. But that's what's going to happen here. And then you'll see him place it back in his pocket.

Q. We're [not] going to be able to see that on this video. But were you able to zoom in and confirm that that appeared to be a weapon within his hand?

A. That's correct. Because within the Swann playing system we were actually able to use that. We were able to zoom in and see it clearer. But you can see it here, just a little more difficult because of the distance.

Q. Can you describe the gun we're going to see?

A. It's a semi-automatic handgun. It's very dark in color. So like I said it becomes very difficult. It's probably got a four, four and a half 21 inch barrel on it I would guess.

Q. So now I'm going to hit play on this. And if you could, could you tell us when you see Mr. Ketchum draw the weapon.

A. He's removing it. It's going to be his right hand. And his hand's in the pocket with the gun at this point. And he's going to ... And there goes the gun. It's in his hand. There's a slight flash. And you may have to step closer to the monitor to be able to actually see that happen.

Q. I'm going to, if I can here in just a second, I'm going to try and back it up for the ladies and gentlemen of the Grand Jury. That zoomed in it. So hold on a second. I want to back it out to what it is I wanted to go to. Darn it. There we go. And I'm going to back it up here until we get to the right point.

A. He should have it in his hand at this point.

Q. Do you want to come up here and look for us? I can hit play if you want to watch it.

A. No. It's in his hand. You can just barely see it. And there it is. He's twisting his hand back and forth and he's now placing it back in his right front pocket.

See GJT at 19, 21-29.

It was undisputed that Detective Bunn testified to facts that are not visible on the video that was played to the Grand Jury. *Id.* In other words, the video played to the Grand Jury is not the same video that Detective Bunn was testifying to before the Grand Jury because the version Detective Bunn was testifying to is a zoomed in and/or altered (i.e. blown up) version that differed from the version showed to the Grand Jury. *Id.* Consequently, Detective Bunn's testimony constituted impermissible hearsay or secondary evidence contrary to N.R.S. § 172.2135(2) and, therefore, the Indictment should have been dismissed.

To secure an indictment, the State must present sufficient evidence showing probable cause that the accused committed the alleged offense. *Sheriff v. Burcham*, 124 Nev. 1247, 1258, 198 P.3d 326, 333 (2008). That probable cause determination "may be based on slight, even 'marginal' evidence." *Sheriff v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980). If the grand jury is to fulfill its purpose of acting as a bulwark between those sought to be charged with crimes and their accusers, it must be permitted to investigate and act as an informed body throughout the entire course of the proceedings. *See Sheriff v. Frank*, 103 Nev. at 165, 734 P.2d at 1244. At the same time, the grand jury, by statute, "can receive none but legal evidence,

and the best evidence in degree, to the exclusion of hearsay or secondary evidence." N.R.S. § 172.135. Therefore, if the integrity of an indictment is to be preserved, grand jurors must, when appropriate, be steered away from certain areas of inquiry. "The grand jury's `mission is to clear the innocent, no less than to bring to trial those who may be guilty.'" *Sheriff v. Frank*, 103 Nev. 160, 165, 734 P.2d 1241, 1244 (1987) (quoting *United States v. Dionisio*, 410 U.S. 1, 16-17, 93 S. Ct. 764, 772-773, 35 L. Ed. 2d 67 (1973)).

N.R.S. § 172.135(2) provides in relevant part as follows:

> The Grand Jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.

See N.R.S. § 172.135(2).

In the present case, the State presented to the Grand Jury audio visual evidence materially different from the video about which Detective Christopher Bunn testified. *See* GJT at 19-29. The video played to the Grand Jury from the Swann Recording device was not the same video that Detective Bunn was testifying to (and providing a running commentary) before the grand jury. *Id.* The video that Detective Bunn was testifying about was a zoomed in, i.e. altered version that displays facts, events and/or occurrences that were not visible or seen on the version presented to the Grand Jury. *Id*. Consequently, Detective Bunn testified to facts, events and occurrences from

a video—a video that was not played to the Grand Jury and where the same facts, events or occurrences were not visible—and his testimony constituted impermissible hearsay. *Id.*

The Nevada Legislature has chosen to preclude a grand jury from considering hearsay evidence. Under Nevada law, a "grand jury can receive none but legal evidence ... to the exclusion of hearsay or secondary evidence." N.R.S. § 172.135(2). The "definition of hearsay as used in N.R.S. § 172.135(2) is the same as that found in N.R.S. § 51.035." *Gordon v. Eighth Judicial Dist. Court*, 112 Nev. 216, 223, 913 P.2d 240, 245 (1996). N.R.S. § 51.035 defines hearsay as an out-of-court statement offered to prove the truth of the matter asserted.

By presenting Detective Bunn testimony as to facts, events and occurrences, *i.e.* as a narration of the surveillance video recovered from the Swann device from a video—a video that was not played to the Grand Jury and where the same facts, events or occurrences were not visible to the Grand Jury—the State ran afoul of N.R.S. § 172.135(2) and undermined the purpose and function of the grand jury which is to assure "that persons will not be charged with crimes simply because of the zeal, malice, partiality or other prejudice of the prosecutor, the government or private persons." *United States v. Gold,* 470 F. Supp. 1336, 1346 (N.D.Ill. 1979) (quoting *United States v.*

DiGrazia, 213 F. Supp. 232, 235 (N.D.Ill. 1963)). Finally, none of the statutory hearsay exceptions applied to permit the State to present hearsay evidence. *See* N.R.S. § 51.035.

Accordingly, Detective Bunn's testimony constituted hearsay and the district court abused its discretion when it denied the Defendant's Petition for Habeas Corpus and Motion to Dismiss, as Detective Bunn's testimony was based on impermissible hearsay or secondary evidence contrary to N.R.S. § 172.135(2).

POINT TWO

IN LIGHT OF DEFENDANT'S ASSERTION OF SELF-DEFENSE THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO ALLOW THE DEFENDANT TO PRESENT EVIDENCE OF THE VICTIM'S CHARACTER AND PRIOR BAD ACTS TO SHOW A PROPENSITY FOR VIOLENCE

A. STANDARD OF REVIEW

This court overturns a district court's decision to admit or exclude evidence only in the case of abuse of discretion. *See Petty v. State*, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000). N.R.S. § 48.045(1) sets forth the rule that character evidence is normally not admissible to show that persons have acted in conformity with their character. N.R.S. § 48.045(1) also provides three exceptions to the rule, and one is pertinent to the issue at hand: "(b) Evidence of the character or a trait of character of the victim of the crime offered by an

accused ... and similar evidence offered by the prosecution to rebut such evidence ....” This exception permits a defendant to present evidence of a victim's character when it tends to prove that the victim was the likely aggressor, regardless of the defendant's knowledge of the victim's character. *Id.*

B. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO ALLOW DEFENDANT TO PRESENT EVIDENCE OF THE VICTIM’S SPECIFIC PRIOR BAD ACTS

The defense theory of the case was heavily dependent upon Ketchum’s belief and knowledge of the victim’s specific prior bad acts, which formed the basis of his opinion of the victim’s reputation and character for violence. Defense counsel proffered evidence of Mr. Davis’ history of luring victims to parking lots and then robbing them at gun point. The district court limited the defense to testimony regarding the victim’s reputation and character but not to the specific prior bad acts. *See* DA-82-84. The district court precluded the defendant from offering evidence of Ezekiel Davis’ prior robbery convictions and robbery related offenses. *Id*. These offences involved a similar factual scenarios and *modus operandi* where Ezekiel Davis accosted his robbery victims outside in parking lots and eventually robbed or attempted to rob them; this was similar to the facts as alleged by Mr. Ketchum when he took the stand. Specifically, Mr. Ketchum testified that he was aware Mr. Davis

was known as a "Jack Boy" and had gone to prison for robbery. This was true and supported by Mr. Davis' record conviction for robbery and related offenses, as well as victims of Mr. Davis who were ready and willing to testify concerning the robberies. DA-82-84.

Also the nature of Mr. Davis' prior robbery conviction occurred under similar circumstances to what Mr. Ketchum testified and supported his theory of self-defense. Specifically, Mr. Ketchum testified that Mr. Davis attempted to rob him at gunpoint. *Id.* Importantly, in analogous set of circumstances, in two of Mr. Davis' prior bad acts that the defense sought to admit, Mr. Davis had attempted to rob victims at gunpoint in a parking lot. DA-50.

At the time the trial court considered Defendant's motions to introduce the above-described evidence, the trial court was aware that Mr. Ketchum was asserting that the fatal shooting of the victim was done in self-defense. DA-82-84. The trial court was also aware that certain specific acts of violence of the deceased were known to defendant Ketchum or had been communicated to him. *Id*.

Defendant counsel proffered that Ketchum would take the witness stand and testify that he knew of Ezekiel Davis's past convictions and modus operandi and attached copies of Mr. Davis' extensive criminal record to his Motion to Admit Character Evidence of Ezekiel Davis. *See* DA-50.

Finally, during the State's rebuttal, the State called Mr. Davis' fiancée, Ms. Bianca Hicks, to the stand. DA-136-149. She testified that she knew Mr. Davis intimately and had his children. *Id*. During direct examination, the State asked the fiancée the following question:

> Q. One final -- did you ever see Zeke with a gun during the three years that you knew him?
>
> A. No.

DA-145.

During cross examination, defense counsel asked whether she knew that Mr. Davis had, in fact, previously been convicted of ex-felon possession of a firearm in 2010:

> Q. You indicated that he did not carry a gun?
>
> A. Yes.
>
> Q. Were you aware that he had been convicted --

DA-148.

The State objected and the trial court excused the jury and strenuously admonished trial counsel:

> MR. GIORDANI: Objection.
>
> BY MR. WOOLDRIDGE:
>
> Q. -- of --

MR. GIORDANI: Objection.

BY MR. WOOLDRIDGE:

Q. -- possession of a firearm by an ex-felon.

THE COURT: Counsel. Jury will take a five-minute recess.

THE MARSHAL: Rise for the jurors.

THE COURT: All right. We'll be back on the record. Counsel for State is present. Counsel for the defense is present. Defendant is present. We're outside the presence of the jury panel. Counsel, you have been told time and time and time again by not only myself but Judge Villani who made the original ruling, you were not to ask regarding the prior convictions of the victim in this case. You specifically violated the ruling of the Court, and you did it deliberately going to leave it to Judge Villani to determine the sanction.

The question is, where do we go from here? I am not inclined to give a mistrial in this case. However, I think the door has been opened. I think that the best way to resolve this would be for both sides to stipulate to the fact that the victim was convicted in 2008, in 2010 and we'll state what the convictions were for.

MR. WOOLDRIDGE: Your Honor --

THE COURT: And that can be the only information that will be presented to them.

MR. WOOLDRIDGE: -- one of the -- just to be heard. So the State brought a witness who testified. They opened the door about whether the -- about the fact that Ezekiel Davis doesn't carry a gun. I didn't even bring in the conviction about the robberies. That was not the question I had. The question I had, and I tested this witness' knowledge --

THE COURT: You asked specifically, so are you aware that he was convicted of --

MR. WOOLDRIDGE: Of ex-felon in possession of a firearm? Her testimony --

THE COURT: I specifically told you, you were not to mention the convictions. If you wanted to draw and bring them in at that point, it was your obligation to ask to approach the bench and request that the Judge the prior ruling.

MR. WOOLDRIDGE: Judge --

THE COURT: You don't just get to blurt it out in court in front of he have been in contravention of a Court's earlier ruling. You violated your duties as an attorney when you did so.

MR. WOOLDRIDGE: Judge, I don't think I violated my duties. They opened the door, I cross-examined her. I did --

THE COURT: I just explained to you the circumstances under which you had an obligation to this Court to approach the bench first. When you have a specific order from a Judge that you may not bring up prior convictions, it is your obligation to ask the Judge to change the ruling before you ask the question. Look up any case law on it. Educate yourself, Counsel, before you do stupid things in court.

MR. WOOLDRIDGE: Judge, I'm not trying to upset you, but I will tell you that when we approached and I did say if they opened up the door, I would be cross-examining this witness on any prior bad acts. I did not -- I did not cross-examine the witness --

THE COURT: Counsel, you were wrong.

MR. WOOLDRIDGE: I did not --

THE COURT: I don't need any further explanation. I'm going to leave it up to Judge Villani. If it were me, you might be going to jail this afternoon. I'm going to hold a off on that. I'm going to let Judge Villani determine whether or not he's going to impose some type of sanction, whether it be monetary sanctions, referral to the bar, or some other type of sanction. It will be up to him.

MR. WOOLDRIDGE: I understand. I just want to – I just want to make a record, that's all, Judge. I'm not trying to upset you.

THE COURT: You made your record.

MR. WOOLDRIDGE: I'm not trying to upset you at all.

MR. GIORDANI: Briefly, Your Honor. As to the remedy proposed by the Court, the State certainly doesn't want anything about a robbery conviction coming in, and I don't believe he blurted that out. The one he did blurt out, I believe –

THE COURT: You know, at this point –

MR. GIORDANI: I know, but Judge, it's --

THE COURT: -- so they know it was in 2008 or 2010. So what?

MR. GIORDANI: Well, the title's never been said so I don't want us to be punished, and now they're going to know he has a robbery conviction because of what he did. All I'm asking is tell the jury that they're to disregard what he just said and we'll leave it at that and not draw anymore attention to it.

THE COURT: All right, that's fine.

MR. GIORDANI: Thank you. Should I bring the witness back on the stand?

THE COURT: You may. Bring the jury back in. We're going to finish it this afternoon and then we're going to settle jury instructions. Do you have any further witnesses after this one?

DA-149-153.

The trial court's attempt to limit the defense's ability to cross-examine Ms. Davis' fiancée was in error for any of two reasons. First, once the State opened the door to evidence of Mr. Davis' character or a trait of his character,

the defense should have been entitled to offer similar evidence. For instance, in a counter-factual scenario, in *Daniel v. State*, 119 Nev. 498 (2003), the Nevada Supreme Court held that the "Statute which prohibits the admission of evidence of other crimes, wrongs, or acts to prove a person's character was not applicable because defendant placed his character in issue on direct examination, and instead, statute providing that, once a criminal defendant presents evidence of his character or a trait of his character, the prosecution may offer similar evidence in rebuttal governed whether prosecutor's cross-examination of defendant regarding his prior arrests was proper." *Id*. If the State is permitted to present character evidence where the defendant has presented evidence of his character or a trait of his character, the reverse should be true too. "After all, in the law, what is sauce for the goose is normally sauce for the gander." *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016).

Here, once the State opened the door, Mr. Ketchum should have been entitled to present evidence or elicit testimony regarding Mr. Davis' prior convictions and character, namely, Mr. Davis previous conviction of ex-felon in possession of a firearm. *See also Jezdik v. State*, 121 Nev. 129 (2005) (where defendant placed his character at issue through testimony that he had never been "accused of anything prior to these current charges" the rules of

evidence do not prohibit a party from introducing extrinsic evidence specifically rebutting the adversary's proffered evidence of good character).

Second, where an evidentiary ruling limits the introduction of evidence and no exceptions apply, an attorney has several options. He may object or he may move to strike. *See* N.R.S. § 47.040 (the Nevada counterpart to Federal Rules of Evidence 103); *Holmes v. State*, 129 Nev. Adv. Opn. 59 (2013); *Abram v. State*, 594 P.2d 1143 (1979); and *United States v. McElmurry*, 2015 WL 305274 (9th Cir. 2015). Also, counsel may move for reconsideration of the previous evidentiary ruling pursuant to EDCR 2.24(b), which provides "[a] party seeking reconsideration of a ruling of the court other than an order which may be addressed by motion pursuant to NRCP 50(b)…must file a motion for such relief within 10 days after serving a written notice of entry of the order of judgment, unless the time is shortened or enlarged by Order." *Id*. In this way, the attorney can seek modification or clarification of the evidentiary ruling.

Alternatively, in extraordinary circumstances, subject to NRAP 17(b)(8), an attorney may seek a writ of mandamus from the Nevada Supreme Court. A writ of mandamus is an extraordinary remedy and will not issue where the petition has a plan, speedy, and adequate remedy in the ordinary course of law. *See State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225

(2005). However, the Nevada Supreme Court "may issue a writ of mandamus to compel the performance of an act…or to control a manifest abuse of or arbitrary and capricious exercise of discretion." *Jackson v. State*, 117 Nev. 116 (2001). Otherwise, all attorneys, as officers of the court are expected to obey and comply with the Court's rulings.

Here, however, none of the circumstances were relevant, the State opened the door despite its earlier indication that it would not open the door:

> MR. GIORDANI: …When I put those witnesses up on the stand, I just want to be clear before we get there that we're offering the victim's past five or so years of his life -- or two to three years of his life in order to rebut what they've done so far and what they're about to do with these next witnesses.
>
> THE COURT: Um-hum.
>
> MR. GIORDANI: **And we're not going any further than that. So of course, it would not open the door to any specific acts, and that's exactly what, you know, the law permits.**

DA-114.

This should have been the end of the matter and the trial court's asymmetrical interpretation of the rules of evidence deprived Mr. Ketchum of a fair trial because once the State opened the door, it could not and should not have limited Mr. Davis' fiancée's testimony, which was emotionally charged and highly prejudicial to Mr. Ketchum. The State was permitted to portray the

victim as an angelic father through the emotionally charged testimony of Ms. Bianca and the trial court's evidentiary limitations handicapped the defense.

C. DEFENDANT WAS DEPRIVED OF FAIR TRIAL

The trial court's evidentiary rulings deprived Ketchum of a fair trial. Specifically, Mr. Ketchum should have been permitted to present prior bad acts and related evidence of the victim for any of three reasons. First, the evidence was relevant and admissible to support Mr. Ketchum's theory that the victim was the initial aggressor. Second, the evidence relating to Mr. Davis relevant and admissible to show a common plan or scheme by Mr. Davis, namely, corroborating Mr. Davis' violent past, including, his robbery of previous victims in a similar manner by taking them outside, pointing a gun, and robbing them. Third, the evidence relating to Mr. Davis was relevant and admissible to corroborate the fact that he took Mr. Ketchum outside to rob him, it went to show motive on why Mr. Davis was taking him outside.

Finally, in precluding defense counsel from questioning Mr. Davis' fiancée about Mr. Davis' previous conviction for ex-felon in possession of a firearm, the District Court's asymmetrical interpretation of the rules of evidence deprived Mr. Ketchum of a fair trial because once the State opened the door, it could not limit Mr. Davis' fiancée's testimony.

1. Self-Defense and Where Victim is Likely Aggressor

In a homicide or assault and battery case, evidence of the victim's character, including evidence of specific prior acts of violence by the victim, is admissible when the defendant is aware of those prior bad acts. *See* N.R.S. § 48.045(1)(b). N.R.S. § 48.045(1)(b) provides in relevant part:

> 1. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: ... (b) Evidence of the character or a trait of character of the victim of the crime offered by an accused ... and similar evidence offered by the prosecution to rebut such evidence[.]

As Mr. Ketchum testified at trial, he was aware that Mr. Davis has committed prior robberies and gone to prison as a result. *See Petty v. State*, 116 Nev. 321, 326 (2000) (citing *Burgeon v. State*, 102 Nev. 43, 46, 714 P.2d 576, 578 (1986)). Thus, testimony regarding the character of the victim, including the specific acts, which established the victim's *modus operandi*, were admissible under N.R.S. § 48.045(1)(b).

In *Petty*, the Nevada Supreme Court also held that it was reversible error for the district court to exclude evidence of the victim's criminal conviction where the defendant had general knowledge of the offense:

> the accused may present evidence of specific acts to show the accused's state of mind at the time of the commission of the crime only if the accused had knowledge of the specific prior acts to show the accused's state of mind at the time of the commission of

> the crime only if the accused had knowledge of the specific act. The record reveals that Petty was aware that Watts had committed robberies. Although Petty's testimony does not explicitly mention the 1990 robbery, we hold that the evidence is admissible for purposes of showing the reasonableness of the appellant's state of mind according to NRS 48.055(2) and our reasoning in Burgeon.

See Petty, 116 Nev. at 326 (internal citations omitted).

The Declaration of Arrest and Judgment of Conviction for Mr. Davis' attempted robbery conviction, attached to his Motion to Admit (DA-50), document his violent and aggressive character:

> The victim, Tracy Smith, told Officer Wall the following: at about 2045 hours, he walked out of the Port of Subs located at 1306 West Craig road toward his vehicle, a black Hummer H3, which was parked in front of the Port of Subs. Smith noticed a black male walking east bound on the sidewalk toward him. Smith opened his driver's door and heard footsteps approaching quickly from behind. Smith got inside the car, shut and locked the door just as the black male grabbed his exterior driver side door handle. The black male grabbed the handle with his right hand and began banging on the driver's side window with his left first. The black male yelled "give me all your fucking money!" The black male appeared to be standing on the driver's side foot rail and continued banging and yelling at Smith. The black male saw Smith reach his keys toward the ignition and yelled "if you start this car, I'll fucking kill you!" Smith could not see the suspect's right hand and feared for his own safety.

Here, the evidence strongly supported Mr. Ketchum's allegation that Mr. Davis was the initial aggressor. As recognized by numerous out-of-state decisions, testimony about the victim's prior acts of violence can be

convincing and reliable evidence of the victim's propensity for violence. *See e.g., State v. Miranda*, 176 Conn. 107, 113-114, 405 A.2d 622 (1978); *Lolley v. State*, 259 Ga. 605, 608-10, 385 S.E.2d 285 (1989) (Weltner, J., concurring); *People v. Lynch*, 104 Ill.2d 194, 201-202 (1984); *Commonwealth v. Beck*, 485 Pa. 475, 478-479, 402 A.2d 1371 (1979).

Accordingly, the District Court's evidentiary rulings precluding Mr. Ketchum from introducing the relevant portions of Mr. Davis' prior robbery and theft convictions, deprived him of a fair trial.

2. Prior Bad Acts Evidence Showed Common Plan, Scheme or Motive

In addition to supporting Mr. Ketchum's theory of the case, the evidence should have been admitted to prove the victim's [Mr. Davis], the initial aggressor's motive and common plan or scheme. Specifically, Mr. Davis modus operandi was to violently target unsuspecting victims in parking lots and proceed to rob them. On at least two occasions, Mr. Davis has used a gun to carry out his robberies. For instance, the offense synopsis section of his PSI for his conspiracy to commit robbery and robbery conviction states as follows:

> At 9:30 P.M. on August 5, victims Houston MacGyver, Shane Velez and Luke Jaykins were in the Craig's Discount Mall parking lot and were approached by suspect 1 who asked them for a cigarette. One of the victim's gave suspect 1 a cigarette and the suspect stated he would give him a dollar. The suspect 1 reached into his waistband area and produced a small silver handgun and

> pointed it at the victims and demanded money. Initially the victim's refused until suspect 2 walked up behind them and produced a black semi-automatic hand gun and racked the slide. Mr. MacGyver was afraid of being shot and gave suspects $700.00 in US currency.

See Presentence Investigation Report (PSI) prepared in *State of Nevada v. Ezekiel Davis*, Case No. C258227 (provided to the district court *in camera*).

This evidence tended to show that Mr. Davis had a motive to bring Mr. Ketchum outside. Since the State's theory of the case was that Mr. Ketchum robbed Mr. Davis, the prior bad acts evidence would have discounted or called into doubt the State's theory of the case. Specifically, it showed that luring and/or distracting his victims outside was Mr. Davis' "m.o." and, therefore, would have supported Mr. Ketchum's theory of self-defense at trial.

3. Trial Court's Limitation of Cross-Examination of Bianca Hicks Was Reversible Error

As noted in the previous section, during the State's rebuttal, the State called Mr. Davis' fiancée to the stand. DA-137-149. She testified that she knew Mr. Davis intimately and she had Mr. Davis' children. *Id*. During direct examination, the State asked the fiancée the following question: in the past three (3) years have you known Ezekiel Davis to carry a gun? She responded "no." *Id*. During cross examination, defense counsel attempted to rebut the fiancée's character evidence and asked whether she knew that Mr. Davis had,

in fact, previously been convicted of ex-felon possession of a firearm in 2010. The State objected and the District Court admonished defense counsel and referred to its prior rulings precluding the defense from asking about Mr. Davis' criminal history.

The District Court attempt to limit the defense's ability to cross-examine Ms. Davis' fiancée was in error. Specifically, once the State opened the door to evidence of Mr. Davis' character or a trait of his character, the defense should have been entitled to offer similar evidence. For instance, in a counter-factual scenario, in *Daniel v. State*, 119 Nev. 498 (2003), the Nevada Supreme Court held that the "Statute which prohibits the admission of evidence of other crimes, wrongs, or acts to prove a person's character was not applicable because defendant placed his character in issue on direct examination, and instead, statute providing that, once a criminal defendant presents evidence of his character or a trait of his character, the prosecution may offer similar evidence in rebuttal governed whether prosecutor's cross-examination of defendant regarding his prior arrests was proper." *Id*. If the State is permitted to present character evidence where the defendant has presented evidence of his character or a trait of his character, the reverse should be true too. "After all, in the law, what is sauce for the goose is normally sauce for the gander." *Heffernan*, 136 S. Ct. at 1418.

In short, once the State opened the door, Mr. Ketchum should have been entitled to present evidence or elicit testimony regarding Mr. Davis' prior convictions and character, namely, Mr. Davis previous conviction of ex-felon in possession of a firearm. *See also Jezdik*, 121 Nev. 129 (where defendant placed his character at issue through testimony that he had never been "accused of anything prior to these current charges" the rules of evidence do not prohibit a party from introducing extrinsic evidence specifically rebutting the adversary's proffered evidence of good character).

4. Trial Court's Erroneous Rulings Were Not Harmless Error

There was substantial evidence in support of Ketchum's claim of self-defense. He knew of Ezekiel F. Davis' violent past, including robbery, and his modus operandi. And, as Ketchum testified:

> Q. And what eventually happened when you got over there?
>
> A. When we got over there, he -- he got in between the cars, and you know, he reached like he was reaching for a lighter. And, you know, I was looking -- pulling out my phone and then when I looked up, he had a gun, he grabbed me by my waistline, pulled me very hard, grabbed me by my belt, pulled me very hard close to him, shoved the gun in my waistline, and he -- he was like, he was like, you know, tear it off, bitch ass nigga. I'm like, and I was just, you know, I was very shocked. And, you know, I just thought I was fixing to get shot so I went in my pocket –
>
> Q. Hold on one second. Before you go there, tell me about did you see Zeke's face when he did that? When he pulled you right above your crotch –

A. Yes.

Q. -- and pulled you to him?

A. When he jerked me very hard and I looked him in his eyes, and you know, I could just see demons all over him. His eyes was real black, black lines -- I mean, black sags up under his eyes. He had white stuff right here or kind of foaming at the mouth, and I could just tell he meant business and he was very serious.

Q. Were you scared?

A. Yes, I was.

Q. And a scale from one to ten, how scared were you?

A. I mean, I don't want to sound, you know, weak, but I was scared about like a nine, nine and a half.

Q. Did you -- was that about the scariest time you've ever had in your life?

A. Yeah. Yes, absolutely.

Q. Did you think that he was going to kill you?

A. Yeah, I knew he was.

Q. Did you think if you gave him your money he was just going to let you go?

A. No, I knew if I gave him my money, it was still -- I -- I knew I was going to get shot.

Q. And as a result of that, those thoughts that you had in your mind, what did you do?

A. Well, you know, I just closed my eyes, and I just was like, you no he, dear God help me. I was like, God, you know, I called on him, and you know, I just got a warm feeling and the spirit just

came over me like a voice of my grandmother's, it's like, you know, stand up for yourself. And so I just came out of my pocket and I shot. And when I shot, I hit him. And he rolled on the ground -- I mean, he hit the ground. He was shaking, you know, kicking at the pants and then when I seen him hit the ground, I -- I gained my composure back, and you know, I got very, very angry. And --

Q. Hold on before we get into you being angry. Did there come a time when he had that gun in your rib cage and grabbing on your belt, did you recognize him?

A. That's when I did recognize him because he had that -- that hat on, a Gucci hat, but I couldn't really see under there. All I could just see the hat and his gold teeth, and I -- when he pulled me close to him, that's when I realized who he was because I could see now.

Q. Who was -- who did you know him to be?

A. Zeke. I had had some girls -- I know a girl, she works at Larry's, her name is –

MR. GIORDANI: Objection. This is calling for hearsay.

MR. WOOLDRIDGE: And hearsay --

THE COURT: Overruled.

BY MR. WOOLDRIDGE:

Q. Go ahead.

A. She works at Larry's Gentlemen Club and her name is Barry (phonetic). I met her up there at her job one time for, you know, just -- just to hang out, and she came to the car with a friend, Misty. They got in talking about girl talk, in my phone looking at Facebook and My Time on it. And as they get in, you know, she like, babe, what you think? And I'm like what? She showed me the phone. She was like --

> Q. Who was on the phone?
>
> A. -- this -- it was a picture of Zeke.
>
> Q. Okay.
>
> A. And she was like Misty want to talk to him or he's trying to talk to Misty, and I'm like, who is that? She was like this dude named Zeke. He -- she -- he ain't no good. He known for this. He been -- so --
>
> Q. Known for what?
>
> A. He's known for robbing -- I mean, he's been in jail-- he's been to jail -- in and out of jail and he's known as a jack boy.

May 25, 2018, Trial Tr. 24-28.

Defendant's fear that he was about to be robbed and killed by Davis and his knowledge of Davis' history of robberies and firearm possession supported his theory of self-defense. *Id*. The introduction of the victim's prior bad acts, including judgments of conviction for violent crimes of robbery, including potentially testimony of his prior probation officer, bore directly on the reasonableness of Defendant's belief that Ezekiel F. Davis posed a deadly threat to him.

Admission of this evidence may well have resulted in a different verdict being returned by the jury. Whether Davis was a violent man, prone to aggression, "throws light" on the crucial question at the heart of Ketchum's self-defense: who was the initial aggressor before the fatal shooting. *See*

Commonwealth v. Woods, 414 Mass. 343, 356, 607 N.E.2d 1024, *cert. denied*, 510 U.S. 815, 114 S.Ct. 65, 126 L.Ed.2d 35 (1993), *quoting Commonwealth v. Palladino*, 346 Mass. 720, 726, 195 N.E.2d 769 (1964). The evidence, if admitted, would have supported the inference that Ezekiel F. Davis, with a history of violent and aggressive robberies, probably acted in conformity with that history by attacking Ketchum, and that the defendant's story of self-defense was truthful. *See Commonwealth v. Adjutant*, 443 Mass. 649, 658 (2005) (citing *State v. Miranda*, 176 Conn. 107, 113-114, 405 A.2d 622 (1978)).

The trial court's erroneous and capricious exclusionary rulings constituted prejudicial error and require reversal.

POINT THREE

STATE'S FAILURE TO DISCLOSE THE INCULPATORY EVIDENCE (THE SEGMENTS OF THE VIDEO) DURING THE EVIDENCE VIEWING BY COUNSEL AND TO DISCLOSE SUCH EVIDENCE AT CLOSING ARGUMENT RENDERED THE TRIAL FUNDAMENTALLY UNFAIR AND VIOLATED MR. KETCHUM'S RIGHT TO FAIR TRIAL AND DUE PROCESS

A. Standard of Review

Although criminal defendants have no general right to discovery, "[n]evertheless, under certain circumstances the late disclosure even of inculpatory evidence could render a trial so fundamentally unfair as to violate due process." *Lindsey v. Smith*, 820 F.2d 1137, 1151 (11th Cir. 1987). In fact, the example posited by the Eleventh Circuit is directly on point, as the court noted "a trial could be rendered fundamentally unfair if a defendant justifiably relies on a prosecutor's assurances that certain inculpatory evidence does not exist and, as a consequence, is unable to effectively counter that evidence upon its subsequent introduction at trial." *Id.* It is also well established that district courts have a duty to "protect the defendant's right to a fair trial [.]" *Rudin v. State*, 120 Nev. 121, 140, 86 P.3d 572, 584 (2004); *see also United States v. Evanston*, 651 F.3d 1080, 1091 (9th Cir. 2011) (stating that the district court is to manage the trial so as to avoid "a significant risk of undermining the defendant's due process rights to a fair trial"); *Valdez v. State*,

124 Nev. 1172, 1183 n.5, 196 P.3d 465, 473 n.5 (2008) ("[T]he district court had a sua sponte duty to protect the defendant's right to a fair trial.").

B. The State's Failure to Disclose the Inculpatory Evidence (The Segments of the Video) during the evidence viewing and not Until Its Closing Argument Rendered the Trial Fundamentally Unfair and Violated Mr. Ketchum's Right to Fair Trial and Due Process

During the discovery phase of the case, trial counsel informed the State's Deputy District Attorney Marc DiGiacomo that he would like to view the original SWAN video from the incident in question. On or about February 16, 2017, trial counsel viewed the original SWAN Video surveillance in possession of law enforcement. The original surveillance was in evidence at the evidence vault and could only be accessed with law enforcement. At the time and date set for the review, Detective Bunn along with Chief Deputy District Attorney Marc DiGiacomo presented the video to counsel in the Grand Jury room. Counsel had no control of the video while it was played, and law enforcement controlled the surveillance. Counsel was only shown parts of the video.

During trial, portions of the video that were played for the jury appeared to be the same portions counsel reviewed with law enforcement and the State in the Grand Jury Room. However, crucially, in the State's closing argument, the State presented two never before seen segments of the surveillance video.

Importantly, undersigned counsel did not previously view these segments, was not aware of the existence of these segments because he did not have access to the same device, and these segments were not presented during the State's case-in-chief at trial. *See Rippo v. State*, 113 Nev. 1239, 1255, 946 P.2d 1017, 1027 (1997) (it is improper for the State to refer to facts not in evidence in closing summation). This argument was raised in Ketchum's Supplement to his Motion for New Trial, which was denied.

The segments on the surveillance video—showing the defendant purportedly having a lengthy rap battle outside the Top Notch with the victim and another video of defendant showing off his firearm in the presence of the victim—substantially undercut the defense theory, that the victim was unaware defendant had a firearm.

The State's failure to disclose this inculpatory evidence during the evidence viewing, when the original was shown to defense counsel, had a serious detrimental effect on Mr. Ketchum's intended defense similar to what happens when a party is confronted with surprise detrimental evidence. *See Bubak v. State*, No. 69096, Court of Appeals of Nevada, Slip Copy 2017 WL570931 at *5 (Feb. 8, 2017) (citing *Land Baron Inv., Inc. v. Bonnie Springs Family Ltd. P'ship*, 131 Nev.___, ____ n.14, 356 P.3d 511, 522 n.14 (2015) (emphasis added) (stating that "[t]rial by ambush traditionally occurs

where a party withholds discoverable information and then later presents this information at trial, effectively ambushing the opposing party through gaining an advantage by the surprise attack[,]" and observing that although the appellants were "already aware of" the arguments and evidence respondents raised, "[t]he trial judge ...took steps necessary to mitigate any damage")). Here, the defense's strategy was undermined by the State's use of the undisclosed evidence (the portions played during closing).

This was a difficult case for the jury, one that required them to consider Mr. Ketchum's theory of self-defense. The never before seen and never previously shown video clips presented to the jury abolished the defense theory, namely that the victim and defendant had only one previous contact with one another--not the rap battle, and that the victim was unaware defendant had a firearm

Consequently, Mr. Ketchum suffered clear prejudice: the introduction of the evidence served to directly undermine counsel's opening statement, trial strategy, and credibility. Accordingly, this Court should vacate the trial court's judgment and conviction and grant Mr. Ketchum a new trial.

CONCLUSION

Based on the trial court's erroneous ruling denying Mr. Ketchum's pre-trial Petition for Habeas Corpus and Motion to Dismiss, and the trial court's prejudicial errors in excluding admissible character and prior bad acts evidence of the victim, and the State's failure to comply with its disclosure obligations, the judgment of conviction should be reversed and the case remanded for conducting of a new trial.

Dated: Las Vegas, Nevada
August 27, 2018

/s/

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CERTIFICATE OF COMPLIANCE AND CERTIFICATE OF COUNSEL

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 2010 14 pt. Times New Roman type style.

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 proportionally spaced, has a typeface of 14 points or more and contains 11,354 words.

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: Las Vegas, Nevada
August 27, 2018

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by his attorney,

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2018, I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Supreme Court of Nevada, which in provides service to all registered parties.

/s/
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