

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 JAVAR KETCHUM,

Supreme Court Case No.: 87012

3 Appellant,

District Case No.: **Electronically Filed**
C-16-319714-1
Jan 20 2024 12:54 AM
Elizabeth A. Brown
Clerk of Supreme Court

4 vs.

5 THE STATE OF NEVADA,

6 Respondent.

7
8 (Appeal From a Final Order of The Eighth Judicial District Court, Denying
9 Petition of Writ of Habeas Corpus (Post Conviction))

10 **APPELLANT’S OPENING BRIEF**

11 **Volume IV**

12 **Bates Nos.:**

13 **AO000553 – AO000762**

14
15 C. BENJAMIN SCROGGINS, ESQ.

16 Nevada Bar No. 7902

17 **THE LAW FIRM OF**

18 **C. BENJAMIN SCROGGINS, CHTD.**

19 629 South Casino Center Boulevard

20 Las Vegas, Nevada 89101

21 Tel.: (702) 328-5550

info@cbscrogginslaw.com

Attorney for Appellant,

JAVAR KETCHUM

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 JAVAR KETCHUM,

Supreme Court Case No.: 87012

3 Appellant,

District Case No.: C-16-319714-1

4 vs.

5 THE STATE OF NEVADA,

6 Respondent.

7
8 **APPELLANT'S APPENDIX**
9 **ALPHABETICAL INDEX**

10 Pursuant to NRAP 25(c)(1)(E) I certify that I served the foregoing Appellant's
11 Appendix by causing it to be served by electronic means to the registered users of
12 the Court's electronic filing system consistent with NEFCR 9 to the following:

12 Aaron Ford
13 Alexander Chen

14 Amended Petition for Writ of Habeas Corpus (Post-Conviction), (03/24/2023).
15 **Volume V - (Bates Nos.: AO000774 – 805)**

16 Appellant's Corrected Opening Brief, - 75097, (08/29/2018).
17 **Volume IV - (Bates Nos.: AO000575 – 634)**

18 Court Minutes RE Amended PWHC, (05/23/2023).
19 **Volume V - (Bates Nos.: AO000833 – 835)**

20 Court Minutes RE Confirmation of Counsel, (07/26/20218).
21 **Volume IV - (Bates Nos.: AO000571)**

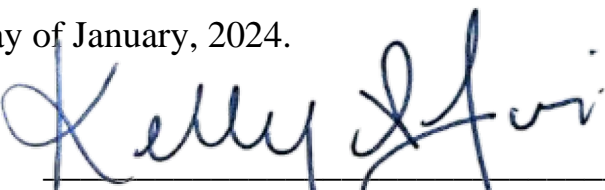
22 Court Minutes RE Defendant's Motion for Medical Treatment,
(12/12/2017) **Volume - (Bates Nos.: AO000550)**

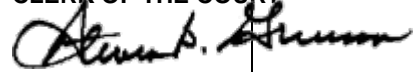
1	Court Minutes RE Defendant’s Motion to Withdraw Stipulation, (12/01/2017).
2	.....Volume III - (Bates Nos.: AO000549)
3	Criminal Order to Statistically Close Case, (02/13/2018).
4	.....Volume IV - (Bates Nos.: AO000555)
5	Findings of Fact, Conclusions of Law & Order, (03/31/2021).
6	.....Volume IV - (Bates Nos.: AO000704 – 716)
7	Findings of Fact, Conclusions of Law & Order, (06/15/2023).
8	.....Volume V - (Bates Nos.: AO000836 – 848)
9	Judgment, Affirmed, (10/11/2019) Volume IV- (Bates Nos.: AO000682)
10	Judgment of Conviction, (02/05/2018)
11	.....Volume III - (Bates Nos.: AO000551 - 552)
12	Motion for Appointment of Counsel on Appeal, (06/27/2018).
13	.....Volume IV - (Bates Nos.: AO000562 – 570)
14	Motion to Compel Production of Trial Transcript, (03/12/2018).
15	.....Volume IV - (Bates Nos.: AO000556 – 560)
16	Motion for Medical Treatment, (11/27/2017)
17	.....Volume IV - (Bates Nos.: AO000538 – 542)
18	Motion for New Trial, (06/02/2017). . . Volume III - (Bates Nos.: AO000382 – 440)
19	Motion to Vacate Stipulation, (10/30/2017)
20	.....Volume III - (Bates Nos.: AO000507 – 513)
21	Notice of Additional Letters of Support in Aide of Sentencing, (11/13/2017). Volume III - (Bates Nos.: AO000514 – 537)
	Notice of Appeal, (02/06/2018). Volume IV- (Bates Nos.: AO000553 - 554)
	Notice of Appeal – 82863, (05/06/2021).
	.....Volume IV- (Bates Nos.: AO000717 – 760)

1	Notice of Change of Case Number, (09/16/2020)	
2	. . . . . Volume IV - (Bates Nos.: AO000702 – 703)	
3	Notice of Transfer to Court of Appeals – 82863-COA, (12/06/2021).	
4	. . . . . Volume V - (Bates Nos.: AO000763)	
5	Order, Appointment of Counsel, (07/31/2018).	
6	. . . . . Volume IV - (Bates Nos.: AO000572 – 574)	
7	Order, (04/04/2018). Volume IV - (Bates Nos.: AO000561)	
8	Order of Affirmance – 75097, (09/12/2019).	
9	. . . . . Volume IV - (Bates Nos.: AO000683 – 687)	
10	Order of Affirmance – 82863-COA, (02/03/2022).	
11	. . . . . Volume V - (Bates Nos.: AO000764 – 768)	
12	Order Directing Transmission of Record & Regarding Briefing – 82863,	
13	(05/13/2021). Volume IV - (Bates Nos.: AO000761 – 762)	
14	Order for Transcript, (06/12/2017). Volume III - (Bates Nos.: AO000507)	
15	Order for Production of Inmate, (03/03/2023)	
16	. . . . . Volume V - (Bates Nos.: AO000771 – 773)	
17	Petition for Post-Conviction Writ of Habeas Corpus,	
18	(09/11/2020) Volume IV- (Bates Nos.: AO000691 – 701)	
19	Remittitur – 75097, (11/01/2019). Volume IV - (Bates Nos.: AO000688 – 690)	
20	Remittitur – 82863-COA, (03/22/2022)	
21	. . . . . Volume V - (Bates Nos.: AO000769 – 770)	
	Reply Memorandum to State of Nevada’s Opposition to Defendant’s Motion for	
	New Trial, (09/27/2017). Volume III - (Bates Nos.: AO000454 – 462)	
	Respondent’s Answering Brief – 75097, (10/29/2018)	
	. . . . . Volume IV - (Bates Nos.: AO000635 – 681)	

1 Sentencing Memorandum, (10/16/2017)
..... **Volume III - (Bates Nos.: AO000471 – 506)**
2
3 State's Opposition to Defendant's Motion for New Trial, 09/05/2017. . .
..... **Volume III - (Bates Nos.: AO000441 – 453)**
4 State's Opposition to Defendant's Motion to Vacate Stipulation,
(11/28/2017)..... **Volume III - (Bates Nos.: AO000543 – 548)**
5
6 State's Response to Petitioner's Amended Petition for Writ of Habeas Corpus – Post
Conviction, (04/27/2023). **Volume V- (Bates Nos.: AO000806 – 832)**
7 Supplement to Defendant's Motion for New Trial,
(09/28/2017). **Volume III - (Bates Nos.: AO000463 – 470)**
8
9 Transcript of Proceedings, Jury Trial – Day 1, Partial Transcript – Excludes Jury
Voir Dire, 05/22/2017 **Volume I - (Bates Nos.: AO000001 - 12)**
10 Transcript of Proceedings, Jury Trial – Day 2, Partial Transcript – Excludes Jury
Voir Dire & Opening Statements, 05/23/2017.
11 **Volume I - (Bates Nos.: AO000013 – 111)**
12 Transcript of Proceedings, Jury Trial – Day 3, 05/24/2017
..... **Volume II - (Bates Nos.: AO000112 – 253)**
13
14 Transcript of Proceedings, Jury Trial – Day 4, 05/25/2017.
..... **Volume II - (Bates Nos.: AO000254 – 359)**
15 Transcript of Proceedings, Jury Trial – Day 5, Partial Transcript – Excludes Closing
Arguments, 05/26/2017. **Volume III - (Bates Nos.: AO000360 – 381)**
16

17 CERTIFIED this 20th day of January, 2024.

18 
19 _____
20 KELLY JARVI, Legal Assistant to
21 THE LAW FIRM OF
C. BENJAMIN SCROGGINS, CHTD.



NICHOLAS M. WOOLDRIDGE
Nevada State Bar No. 8732
WOOLDRIDGE LAW, LTD.
400 South 7th Street, 4th Floor
Las Vegas, NV 89101
Telephone: (702) 330-4645
nicholas@wooldridgelawlv.com
Attorney for Javar Eris Ketchum

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

JAVAR ERIS KETCHUM,

Defendant.

Case No.: C-16-319714-1

Dept. XVII

NOTICE OF APPEAL

Notice is hereby given that Javar Ketchum, the defendant in the above-captioned matter, hereby appeals to the Supreme Court of Nevada from the Final Judgment entered in this action on the February 5, 2018, and any and all orders and rulings that were adverse to him, whether or not subsumed within the February 5, 2018 Final Judgment.

DATED this 6th day of February, 2018.

JAVAR ERIS KETCHUM,
by his attorney,

/s/ Nicholas M. Wooldridge

Nicholas M. Wooldridge, Esq.
Wooldridge Law Ltd.

400 South 7th Street, 4th Floor
Las Vegas, NV 89101
nicholas@wooldridgelawlv.com
(702) 330-4645 Tel.
(702) 359-8494 Fax.

CERTIFICATE OF SERVICE

I confirm that on this 6th day of February, 2018, a copy of the foregoing Notice of Appeal was served on the below District Attorney's Office by having the same e-filed and courtesy copied to pdmotions@clarkcountyda.com, which in turn provides electronic service to:

Marc DiGiacamo, Esq.
Chief Deputy District Attorney
200 Lewis Ave.
Las Vegas, NV 89155-2212

/s/ Nicholas M. Wooldridge

Nicholas M. Wooldridge, Esq.

Steven D. Grierson

COSCC

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA

CASE NO.: C-16-319714-1

VS

DEPARTMENT 17

JAVAR KETCHUM

CRIMINAL ORDER TO STATISTICALLY CLOSE CASE

Upon review of this matter and good cause appearing,

IT IS HEREBY ORDERED that the Clerk of the Court is hereby directed to
statistically close this case for the following reason:

DISPOSITIONS:

- ☐ Nolle Prosequi (before trial)
- ☐ Dismissed (after diversion)
- ☐ Dismissed (before trial)
- ☐ Guilty Plea with Sentence (before trial)
- ☐ Transferred (before/during trial)
- ☐ Bench (Non-Jury) Trial
 - ☐ Dismissed (during trial)
 - ☐ Acquittal
 - ☐ Guilty Plea with Sentence (during trial)
 - ☐ Conviction
- ☐ Jury Trial
 - ☐ Dismissed (during trial)
 - ☐ Acquittal
 - ☐ Guilty Plea with Sentence (during trial)
 - ☒ Conviction
- ☐ Other Manner of Disposition

DATED this 9th day of February, 2018.

Michael Villani

MICHAEL VILLANI
DISTRICT COURT JUDGE

en

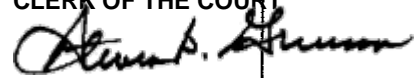
CLERK OF THE COURT

FEB 13 2018

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NICHOLAS M. WOOLDRIDGE
Nevada State Bar No. 8732
WOOLDRIDGE LAW, LTD.
400 South 7th Street, 4th Floor
Las Vegas, NV 89101
Telephone: (702) 330-4645
nicholas@wooldridgelawlv.com
Attorney for Javar Eris Ketchum

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs.

JAVAR ERIS KETCHUM,
Defendant.

Case No.: C-16-319714-1

Dept. XVII

MOTION TO COMPEL
PRODUCTION OF TRIAL
TRANSCRIPT

COMES NOW the Petitioner, JAVAR ERIS KETCHUM (hereinafter, "Mr. Ketchum"), by and through his undersigned counsel, Nicholas M. Wooldridge, of the law firm of Wooldridge Law Ltd., and hereby files this Motion to Compel Production of Trial Transcript (May 26, 2017, Closing Arguments). This motion is accompanied by the attached Memorandum of Points and Authorities, all papers and documents on file, as well as any oral argument, which the Court deems appropriate.

Through this motion, counsel moves for an order directing the Court Reporter to prepare and file the transcripts for May 26, 2017 covering the parties' closing arguments.

1 DATED this 7th day of March, 2018.

JAVAR ERIS KETCHUM,
by his attorney,

2
3
4 /s/ Nicholas M. Wooldridge

5 Nicholas M. Wooldridge, Esq.
6 400 South 7th Street, 4th Floor
7 Las Vegas, NV 89101
8 Telephone: (702) 330-4645
9 Facsimile: (702) 359-8494
10 nicholas@wooldridgelawlv.com

11 **NOTICE OF MOTION**

12 TO: STATE OF NEVADA, Plaintiff

13 TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff

14 PLEASE TAKE NOTICE that the undersigned will bring the foregoing MOTION TO
15 COMPEL PRODUCTION OF TRIAL TRANSCRIPTS on the 27 day of March,
16 2018, at the hour of 8:30am am/pm in the Department No. of the above Court, or as soon
17 thereafter as counsel may be heard.
18

19 DATED this 7th day of March, 2018.

JAVAR ERIS KETCHUM,
by his attorney,

20
21
22 /s/ Nicholas M. Wooldridge

23 Nicholas M. Wooldridge, Esq.
24 400 South 7th Street, 4th Floor
25 Las Vegas, NV 89101
26 Telephone: (702) 330-4645
27 Facsimile: (702) 359-8494
28 nicholas@wooldridgelawlv.com

1
2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 Mr. Ketchum was convicted of one count of murder with a deadly weapon and one count
4 of robbery with use of a deadly weapon on May 26, 2017. Mr. Ketchum was sentenced on
5 February 5, 2018. Mr. Ketchum filed a timely appeal of the district court's judgment on February
6 6, 2018. A review of the trial transcripts filed on the docket sheet reveal that the trial transcript
7 and record do not contain transcript of the parties' closing arguments on May 26, 2017 and
8 specifically exclude the closing arguments. Upon information and belief, the court reporter,
9 Cynthia Georgilas, did not prepare or include the closing arguments as a part of the trial
10 transcripts. One of the arguments Mr. Ketchum intends to raise in his appeal brief involves the
11 State's closing argument and, therefore, it is essential that these transcripts be prepared and filed
12 forthwith to enable Mr. Ketchum to pursue his appeal.
13
14

15 Pursuant to Nevada Rules of Appellate Procedure ("NRAP") Rule 10(a), the transcript of
16 the parties' closing argument is part of the Trial Court Record. Through this motion, Mr.
17 Ketchum requests an Order directing that the transcript of the parties' closing argument be
18 prepared and filed so it can be transmitted to the Nevada Supreme Court as a part of the Record
19 on Appeal pursuant to NRAP Rule 10(b). A copy of a proposed order is attached hereto and filed
20 simultaneously with this motion.
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1
2 **CONCLUSION**

3 **WHEREFORE**, for all the foregoing reasons, Mr. Ketchum's motion should be granted.

4 DATED this 7th day of March, 2018.

JAVAR ERIS KETCHUM,
by his attorney,

7 /s/ Nicholas M. Wooldridge

8
9 _____
10 Nicholas M. Wooldridge, Esq.
11 400 South 7th Street, 4th Floor
12 Las Vegas, NV 89101
13 Telephone: (702) 330-4645
14 Facsimile: (702) 359-8494
15 nicholas@wooldridgelawlv.com
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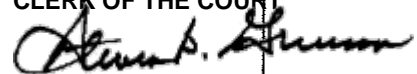
CERTIFICATE OF SERVICE

I confirm that on this 7th day of March, 2018, a copy of the foregoing Motion to Compel Production of Trial Transcript and Memorandum of Points and Authorities was served on the below District Attorney's Office by having the same e-filed and courtesy copied to pdmotions@clarkcountyda.com, which in turn provides electronic service to:

Marc DiGiacamo, Esq.
Chief Deputy District Attorney
200 Lewis Ave.
Las Vegas, NV 89155-2212

/s/ Nicholas M. Wooldridge

Nicholas M. Wooldridge, Esq.



NICHOLAS M. WOOLDRIDGE
Nevada State Bar No. 8732
WOOLDRIDGE LAW, LTD.
400 South 7th Street, 4th Floor
Las Vegas, NV 89101
Telephone: (702) 330-4645
nicholas@wooldridgelawlv.com
Attorney for Javar Eris Ketchum

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

JAVAR ERIS KETCHUM,

Defendant.

Case No.: C-16-319714-1

Dept. XVII

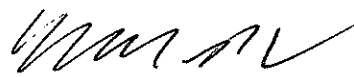
ORDER

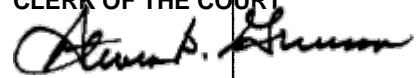
Upon consideration of Defendant Javar Eris Ketchum's (hereinafter, "Mr. Ketchum"),
Motion to Compel Production of Trial Transcripts ("Motion"), it is hereby ordered as follows:

1. Mr. Ketchum's Motion is hereby GRANTED;
2. The Court Reporter shall prepare and file the transcripts for the proceedings held
on May 26, 2017 *including* the parties' closing arguments and include it in the record to be
transmitted to the Nevada Supreme Court.

Dated this 2 day of April 2018. IT IS SO ORDERED:

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DEPT 17 ON
MAR 30 2018


District Judge *FG*



Nicholas M. Wooldridge, Esq.
Bar Number 8732
Wooldridge Law Ltd.
400 South 7th St., 4th Floor
Las Vegas, NV 89101
Telephone: (702) 330-4245
nicholas@wooldridgelawlv.com
Attorney for Defendant

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

JAVAR ERIS KETCHUM,

Defendant.

Case No.: C-16-319714-1

Dept. XVII

**MOTION FOR APPOINTMENT OF
COUNSEL ON APPEAL**

COMES NOW, the defendant, JAVAR ERIS KETCHUM, by and through, his undersigned counsel of record, NICHOLAS M. WOOLDRIGE, ESQ., and pursuant to N.R.S. §§§§ 7.115, 7.135, 171.188, 260.060 and *Widdis v. Second Judicial District Court*, 114 Nev. 1224, 968 P.2d 1165 (1998) requests an Order from this Honorable Court appointing Wooldridge Law, Ltd. as counsel for the defendant in connection with his appeal of his conviction and sentence.

This Motion is made based upon all the papers and pleadings on file herein, and the following Memorandum of Points and Authorities.

1
2
3
4 DATED this 27th day of June 2018.

JAVAR ERIS KETCHUM,
by his attorney,

5
6 /s/ Nicholas M. Wooldridge

7
8 Nicholas M. Wooldridge, Esq.
9 Wooldridge Law Ltd.
10 400 South 7th St., 4th Floor
11 Las Vegas, NV 89101
12 nicholas@wooldridgelawlv.com
13 (702) 330-4645 Tel.
14 (702) 359-8494 Fax.

15
16 **NOTICE OF MOTION**

17 TO: STATE OF NEVADA, Plaintiff; and

18 TO: DISTRICT ATTORNEY, its attorneys:

19 **PLEASE TAKE NOTICE** that the undersigned will bring the foregoing MOTION FOR
20 APPOINTMENT OF COUNSEL for hearing in the above-entitled Court on (day) 10 of
21 (month) July, 2018 in Department 17 at (time) 8:30 A m.

22 Dated this 27th day June 2018.

JAVAR ERIS KETCHUM,
by his attorney,

23 /s/ Nicholas M. Wooldridge

24
25 Nicholas M. Wooldridge, Esq.
26 Wooldridge Law Ltd.
27 400 South 7th Street, 4th Floor
28 Las Vegas, NV 89101
nicholas@wooldridgelawlv.com
(702) 330-4645 Tel.
(702) 359-8494 Fax.

I. FACTUAL BACKGROUND

Mr. Ketchum is incarcerated. He does not have any assets from which to pay undersigned counsel. Mr. Ketchum now moves this Court pursuant to N.R.S. §§§§ 7.115, 7.135, 171.188, 260.060 and *Widdis v. Second Judicial District Court*, 114 Nev. 1224, 968 P.2d 1165 (1998), to appoint Wooldridge Law, Ltd. as counsel for the defendant in connection with his pending appeal.

1 **II. ARGUMENT**

2 Mr. Ketchum is incarcerated. Mr. Ketchum's original retainer only covered the period up
3 to trial. Undersigned counsel has not been paid for his services to prosecute Mr. Ketchum's
4 appeal. Undersigned counsel is intimately familiar with the facts of Mr. Ketchum's case and any
5 new counsel would face a steep learning curve and lead to delays in the briefing schedule.
6

7 As clear from Mr. Ketchum's financial affidavit attached to this motion as **Exhibit A**, he
8 has no assets or accounts receivable from which Wooldridge Law can be paid for either past or
9 future services.
10

11 Wooldridge Law cannot continue its representation of Mr. Ketchum without payment for
12 its services. Accordingly, Mr. Ketchum requests that this Court appoint Wooldridge Law as
13 counsel to prosecute his appeal styled as Ketchum v. State of Nevada, Docket No. 75097. This
14 appoint is authorized pursuant to N.R.S. §§§§ 7.115, 7.135, 171.188, 260.060 and *Widdis v.*
15 *Second Judicial District Court*, 114 Nev. 1224, 968 P.2d 1165 (1998).
16

17 **A. Applicable Law**

18 NRS §§§ 7.115, NRS 171.188, and NRS 260.060 address the appointment of counsel for
19 indigent criminal defendants. NRS §§ 7.115 and NRS 171.188(3) are specific statutes that
20 expressly require the court to appoint the public defender unless the public defender is
21 “disqualified,” “unable to represent the defendant,” or “other good cause appears.” *See Mathews*
22 *v. State*, 91 Nev. 682, 684, 541 P.2d 906, 907 (1975) (“[W]hen an eligible indigent takes an
23 appeal ..., the appeal must be handled by the county public defender; except, of course, in those
24 cases where the county defender cannot act or is otherwise disqualified.” (emphasis added)).
25 NRS § 260.060, on the other hand, is a general statute that allows the court to appoint counsel
26 “other than, or in addition to, the public defender” for cause if the appointment is consistent with
27
28

1 “the laws of this state pertaining to the appointment of counsel to represent indigent criminal
2 defendants.” *See generally Sechrest v. State*, 101 Nev. 360, 367, 705 P.2d 626, 631 (1985) (the
3 permissive language of NRS § 260.060 indicates the appointment of additional counsel is
4 discretionary with the court), *overruled on other grounds by Harte v. State*, 116 Nev. 1054,
5 1067, 13 P.3d 420, 429 (2000).

7 **B. The Motion to Appoint Counsel Should Be Granted**

8 Here, appointment of undersigned counsel who has gained familiarity with this case
9 would avoid unnecessary delays and serve the interests of judicial economy. Further, Mr.
10 Ketchum is indigent—he is unable to secure funds to pay Wooldridge Law or retain replacement
11 counsel. The Nevada Supreme Court has stated that the standard for determining indigency for
12 the appointment of counsel is whether a person “is unable, without substantial hardship to
13 himself or his dependents, to obtain competent, qualified legal counsel on his or her own.” *See*
14 *Brown v. Eighth Judicial District Court*, 415 P.3d 7 (2017) (citing *n the Matter of the Review of*
15 *Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency*
16 *Cases*, ADKT No. 411 (Order, January 4, 2008)). This standard is easily met here because Mr.
17 Ketchum’s affidavit establishes that he is unable to obtain counsel on his own and there is no
18 prospect of any future income from employment, accounts receivables or any other assets. Thus,
19 good cause exists for this Court to appoint Wooldridge Law to represent Mr. Ketchum in this
20 case.
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1 **III. CONCLUSION**

2 **WHEREFORE**, for all the foregoing reasons, Mr. Ketchum's Motion for Appointment
3 of Counsel should be granted and Nicholas M. Wooldridge, Esq. and Wooldridge Law, Ltd.
4 should be appointed as counsel for Mr. Ketchum.
5

6 DATED this 27th day of June 2018.

JAVAR ERIS KETCHUM,
by his attorney,

7
8 /s/ Nicholas M. Wooldridge

9
10 Nicholas M. Wooldridge, Esq.
11 Wooldridge Law Ltd.
12 400 South 7th St., 4th Floor
13 Las Vegas, NV 89101
14 nicholas@wooldridgelawlv.com
15 (702) 330-4645 Tel.
16 (702) 359-8494 Fax.
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EXHIBIT A

DISTRICT COURT

APPLICATION FOR COURT-APPOINTED COUNSEL OR WIDDIS FEES

Name: Javar Ketchum Case No: _____
Address: Detained Charges: Murder
Phone: N/A I am in Jail: ☒ Yes ☐ No

☒ Defendant-Adult ☐ Defendant-Juvenile ☐ Material Witness ☐ Other _____

How long have you lived in Clark County? 4 years

I, Javar Ketchum, state under oath that I am financially unable to employ an attorney. I understand that if I am charged with a felony and/or a gross misdemeanor and I am eligible, a court must appoint counsel.

SECTION 1: PERSONAL

Date of Birth: 8-12-85 Married ☒ Single ☐ Separated
Employed by: Unemployed Spouse employed by: N/A
If not employed, month of last employment: September 2016
Children living with you: None
Other household members and relationship: None

SECTION 2: PLEASE CHECK ALL THAT APPLY:

I am currently receiving food stamps;
I am currently receiving welfare benefits (TANF);
I am currently receiving assistance from Medicaid;
I am currently receiving disability insurance;
I am currently residing in public housing (Section 8);
I am currently receiving public assistance from _____;
I am currently serving a sentence in a correctional institution;
I am currently housed in a mental facility;
I am currently unemployed with no source of income. ✓

SECTION 3

A: INCOME (Note: you may be required to provide proof of income including pay stubs or tax returns)

I and/or my family are currently receiving the following funds:

TANF \$ 0 Food Stamps \$ 0 Medicaid \$ 0 SSI (Supplemental Security Income) \$ 0

Gross monthly wage (self)	\$ <u>0</u>	Unemployment	\$ <u>0</u>	Veteran's Benefits	\$ <u>0</u>
Gross monthly wage (spouse)	\$ <u>N/A</u>	Worker's Comp	\$ <u>0</u>	Child Support	\$ <u>0</u>
Gross monthly wage (others)	\$ <u>N/A</u>	Pension/Retirement	\$ <u>0</u>	General Assistance	\$ <u>0</u>
(include all other household members)		Social Security	\$ <u>0</u>	Other Income	\$ <u>0</u>

Total All Income \$ 0

B: ASSETS (list total values)

Cash on hand in bank	\$ <u>0</u>	Savings accounts	\$ <u>0</u>	Sporting Equipment	\$ <u>0</u>
Wages not received	\$ <u>0</u>	Stocks/bonds/securities	\$ <u>0</u>	(guns, boats, motorcycles etc.)	
Money owed to me	\$ <u>0</u>	Interest in real estate	\$ <u>0</u>		
Personal Property	\$ <u>0</u>	Motor vehicles	\$ <u>0</u>		
(furniture, appliances, etc.)					

Total All Assets \$ 0

C: MONTHLY DEBTS

Rent Mortgage	\$ <u>0</u>	Gas (vehicles)	\$ <u>0</u>	Credit Cards	\$ <u>0</u>
Alimony	\$ <u>0</u>	Utilities	\$ <u>0</u>	Groceries	\$ <u>0</u>
Collections	\$ <u>0</u>	Courts	\$ <u>0</u>	Telephone	\$ <u>0</u>
Cable/Sat TV	\$ <u>0</u>	Dependent Care	\$ <u>0</u>	Attorneys	\$ <u>0</u>
		(adult or child)			
Car Payment	\$ <u>0</u>	Doctor/Hospital	\$ <u>0</u>	Child Support	\$ <u>0</u>

Total All Monthly Debts \$ 0

I hereby authorize Clark County to investigate my assets, liabilities, employment, and income references. I further authorize Clark County to receive this information from any persons, organizations, agencies, institutions, and companies which have such information.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

James K. Kahan
SIGNATURE OF APPLICANT

[Signature]
Witnessed By

APPROVED ☐ DENIED ☐

Judge 4b

Date _____

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

July 26, 2018

C-16-319714-1 State of Nevada
 vs
 Javar Ketchum

July 26, 2018

8:30 AM

Confirmation of Counsel

HEARD BY: Villani, Michael

COURTROOM: RJC Courtroom 11A

COURT CLERK: Haly Pannullo

RECORDER: Cynthia Georgilas

PARTIES

PRESENT:

Ferreira, Amy L.

State of Nevada

Wooldridge, Nicholas

Attorney for State

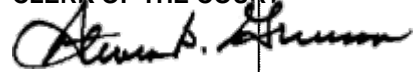
Plaintiff

Attorney for Defendant

JOURNAL ENTRIES

- Defendant not present. Court noted Drew Christensen's Office is appointing Mr. Woolridge on the appeal. Mr. Wooldridge confirmed the Court's representation. Court directed Mr. Woolridge to prepare the Order.

NDC



Nicholas Wooldridge, Esq.
Nevada Bar # 8732
Wooldridge Law, Ltd.
400 South 7th Street, 4th Floor
Las Vegas, NV 89101
Phone: (702) 330-4645
Fax: (702) 359-8494
Attorney for Defendant Javar Eris Ketchum

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

JAVAR ERIS KETCHUM,

Defendant.

Case No.: C-16-319714-1

Dept. XVII

ORDER

This matter came before the Court on July 26, 2018 to consider the Defendant Javar Eris Ketchum (hereinafter, "Mr. Ketchum" or "Defendant"), Motion to Appoint Counsel ("Motion") to prosecute his pending appeal before the Nevada Supreme Court.

Having considered all papers on file and heard argument from counsel, the Court orders as follows:

IT IS HEREBY ORDERED, Defendant's Motion is **GRANTED**; and

//

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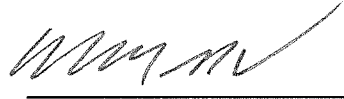
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1 **IT IS FURTHER ORDERED**, Nicholas M. Wooldridge, Esq. and Wooldridge Law, Ltd
2 are appointed as counsel at public expense to represent Mr. Ketchum in connection with his
3 pending appeal before the Nevada Supreme Court;
4

5
6 Dated: 7/30/15

IT IS SO ORDERED:

7
8 
9 _____
District Judge *fla*

10 **SUBMITTED BY:**

11 
12 _____
13 Nicholas M. Wooldridge, Esq.
14 Wooldridge Law Ltd.
15 400 South 7th St., 4th Floor
16 Las Vegas, NV 89101
17 nicholas@wooldridgelawlv.com
(702) 330-4645 Tel.
(702) 359-8494 Fax
Counsel for Defendant

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Chief Deputy District Attorney
200 Lewis Ave.
Las Vegas, NV 89155-2212

An Employee of Wooldridge Law

No. 75097

SUPREME COURT OF NEVADA

JAVAR ERIS KETCHUM,
Appellant,

vs.

STATE OF NEVADA,
Appellee,

Electronically Filed
Aug 29 2018 11:42 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

District Court Case No.

C-16-319714-1

DEFENDANT-APPELLANT'S CORRECTED OPENING BRIEF

Nicholas M. Wooldridge
Wooldridge Law Ltd.
400 South 7th St., Suite 400
Las Vegas, NV 89101
nicholas@wooldridgelawlv.com
Tel. (702) 330- 4645
Fax (702) 359-8494

Attorney for Defendant-
Appellant

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/_____
Nicholas Wooldridge, Esq.
Wooldridge Law Ltd.,
400 South 7th St.
Las Vegas, NV 89101
(702) 330-4645 Tel.
(702) 35908494 Fax

Attorney for Defendant-Appellant

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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 plain, 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 fist. 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/

Nicholas Wooldridge, Esq.
Wooldridge Law Ltd.,
400 South 7th St.
Las Vegas, NV 89101
(702) 330-4645 Tel.
(702) 35908494 Fax

Attorney for Defendant-Appellant

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

JAVAR E. KETCHUM
by his attorney,

/s/

Nicholas Wooldridge, Esq.
Wooldridge Law Ltd.,
400 South 7th St.
Las Vegas, NV 89101
(702) 330-4645 Tel.
(702) 35908494 Fax

Attorney for Defendant-Appellant

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/

Nicholas M. Wooldridge

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAVAR ERIS KETCHUM,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Case No. 75097

RESPONDENT'S ANSWERING BRIEF

**Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County**

NICHOLAS M. WOOLDRIDGE, ESQ
Nevada Bar #008732
Wooldridge Law Ltd.
400 South 7th Street, Suite 400
Las Vegas, Nevada 89101
(702) 330-4645

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

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar #012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Appellant

Counsel for Respondent

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JAVAR ERIS KETCHUM,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 75097

RESPONDENT'S ANSWERING BRIEF

**Appeal from Judgment of Conviction
Eighth Judicial District Court, Clark County**

ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(b)(2) because it is an appeal from a judgment of conviction based on a jury verdict that involves a conviction for an offense that is a Category A felony.

STATEMENT OF THE ISSUE(S)

1. Whether the district court did not abuse its discretion in denying the pre-trial Petition for Writ of Habeas Corpus.
2. Whether the district court did not abuse its discretion in precluding inadmissible prior bad act evidence.
3. Whether the State did not fail to disclosure inculpatory evidence.

STATEMENT OF THE CASE

On November 30, 2016, the State charged Javar Ketchum (“Appellant”) by way of Indictment with one count each of Murder with a Deadly Weapon and Robbery with a Deadly Weapon. I Appellant’s Appendix (“AA”) 047–48. On December 30, 2016, Appellant filed a pre-trial Petition for Writ of Habeas Corpus and Motion to Dismiss. II RA 452–63. The State filed its Return on January 4, 2017. II RA 464–75. Appellant filed a Reply on January 9, 2017. II RA 476–80. The district court denied the Petition on February 17, 2017. II RA 481–82.

On March 8, 2017, Appellant filed a Motion in Limine, seeking to admit character evidence of the victim, Ezekiel Davis. I AA 050–53. On May 9, 2017, the State filed a Motion in Limine, asking that the district court preclude prior specific acts of violence by the murder victim. II Respondent’s Appendix (“RA”) 348–53. On May 18, 2017, the State filed a Supplement to its Motion in Limine. II RA 354–60. The district court held a Petrocelli Hearing on May 19, 2017, determining that Appellant could only bring in opinion testimony regarding the victim’s character and that witnesses were not to elaborate on that opinion. II RA 361.

On May 22, 2017, Appellant’s jury trial began. I AA 080. At the end of the fifth day of trial, the jury found Appellant guilty of both charges. I AA 179. Following the verdict, Appellant 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. I AA 180–81.

On June 2, 2017, Appellant filed a Motion for New Trial pursuant to NRS 176.515 (4). II RA 363–420. The State filed its Opposition on September 9, 2017. II RA 421–33. Appellant filed a Reply on September 27, 2017 and a Supplement thereto on September 28, 2017. II RA 434–50. The district court, finding that Appellant’s disagreement with the court’s evidentiary rulings was not a basis for a new trial, denied the Motion on October 17, 2017. II RA 451. Appellant was adjudicated that same day. II RA 451. However, the defense requested additional time to handle sentencing matters. II RA 451.

According to the stipulation, on February 1, 2018, the district court sentenced Appellant to an aggregate of life in the Nevada Department of Corrections with minimum parole eligibility after twenty-eight (28) years, with four hundred seventy-five (475) days credit for time served. I AA 003–04. The Judgment of Conviction was filed on February 5, 2018. I AA 003–04. Appellant filed a Notice of Appeal on February 6, 2018. I AA 001–02.

STATEMENT OF THE FACTS

At 6:22 a.m. on September 25, 2016, Officers Brennan Childers and Jacquelyn Torres were dispatched to a shooting at 4230 S. Decatur Blvd, a strip mall with several businesses including a clothing store. I RA 020–23, 029–32. When police

arrived, they found a man—later identified as Ezekiel Davis (“Ezekiel” or “the victim”)—upon whom another man was performing chest compressions. I RA 022–23, 032. Ezekiel was not wearing pants. I RA 032. Several other people were in the parking lot, and none of the businesses appeared opened. I RA 022–23. Ezekiel was transported to the hospital but did not survive a single gunshot wound to the abdomen. I RA 066. Trial testimony from Ezekiel’s fiancé, Bianca Hicks, and from Detective Christopher Bunn revealed that missing from Ezekiel’s person was a belt which had a gold “M” buckle and a gold watch. I RA 116, 221; II RA 327, 331–33.

Top Knotch, the clothing store in front of which Ezekiel was shot, doubles as an after-hours club. I RA 009. Ezekiel’s friend Deshawn Byrd—the one who had given him CPR in an attempt to save his life—testified at trial that sometime after approximately 3:00 a.m., Ezekiel arrived at the club. I RA 010–11. Byrd testified there was no indication that anything had happened in the club which led to any sort of confrontation. I RA 010–14.

Detective Bunn testified at trial that the day of the murder, as detectives and crime scene analysts were documenting the scene, three individuals—later identified as Marlo Chiles, Roderick Vincent, and Samantha Cordero—exited Top Knotch. I RA 141–66. Chiles was the owner of Top Knotch, and Vincent owned a studio inside of Top Knotch. I RA 167. Vincent denied that there were any DVRs of the surveillance video for Top Knotch or the recording studio. I RA 172. Detective Bunn

had noted a camera, however. I RA 168. A subsequent search warrant on the vehicles in the parking lot located two (2) DVR's of the surveillance footage from Top Knotch and the studio in Vincent's car. I RA 157–58, 162–63.

A review of the video footage, extensive portions of which were played at trial, demonstrated that Appellant entered the club at about 2:00 a.m. I RA 190–91. At 3:25 a.m., Chiles, Vincent, Antoine Bernard, and several other people were in the back area of the business when a person in a number 3 jersey, later identified as Appellant, produced a semi-automatic handgun from his pants and showed it to the group. I RA 192–93.

The video also showed that at about 6:14 a.m., Appellant and Ezekiel exited arm-in-arm out the front of Top Knotch. I RA 196. At that point, there was still a watch on Ezekiel's wrist. I RA 197. The two walked to the front of Bernard's black vehicle and appeared to converse for a short time, then walked by the driver's side of Bernard's vehicle, where they left camera view. I RA 198–201. At about 6:16 a.m., the people on video all appeared to have their attention drawn to the area where Appellant and Ezekiel were. I RA 198. Appellant then entered the view of the camera, removing Ezekiel's belt from his body while holding the gun in his other hand. I RA 200–01. Bernard also testified at trial that he saw Appellant take Ezekiel's belt. I RA 119. The video showed that Appellant approached Bernard's car, opened the passenger door, placed the belt on the front seat, and returned to the

area of Ezekiel's body. I RA 201. Appellant returned to Bernard's vehicle, entered the passenger seat of the vehicle and the vehicle fled the area. I RA 201.

Despite contact with several witnesses in the parking lot including Chiles and Vincent, the police had no information regarding the identity of the shooter. I RA 206. After further investigation, the shooter was identified as Appellant and a warrant for his arrest was issued. I RA 206. Appellant was apprehended at a border control station in Sierra Blanca, Texas, whereupon he was brought back to Nevada to face charges. I RA 207.

SUMMARY OF THE ARGUMENT

First, Appellant claims the district court abused its discretion in denying his pre-trial Petition for Writ of Habeas Corpus and Motion to Dismiss Indictment. However, the district court denied these pleadings because sufficient evidence was presented to the grand jury to support the Indictment and the narration of the enhanced video footage was legal evidence. Second, Appellant complains that the district court abused its discretion in excluding evidence of the murder victim's prior convictions. However, such prior bad acts may only be admitted to bolster a self-defense claim if the accused knew about them. Appellant cannot demonstrate that he ever offered proof that he personally knew of such convictions until he was on the witness stand; and even then, the defense did not specifically move to admit the victim's prior conviction. The prior convictions could not have been admitted under

the common scheme or plan exception, nor could they have been admitted through the State's rebuttal witness—who did not “open the door” to such convictions. Third, Appellant complains that the State failed to disclose inculpatory evidence in the form of a surveillance video, portions of which had been played throughout trial; Appellant alleges portions had not been disclosed to him until the State's closing argument. However, the record reveals that Appellant did not object at that point. Further, a close reading shows that Appellant was actually shown the video prior to trial, and in this Opening Brief, is only complaining of not being able to control the video when counsel viewed it at the evidence vault. Appellant—who bears the burden on appeal—has not provided any proof that he was not actually given a copy of the entire video during the discovery process. His argument also ignores the facts that he had the opportunity to play whatever portions of the video he wished during trial, and that he did actually play portions of the video during Detective Bunn's testimony. Each of Appellant's claims is without merit, and this Court should affirm the Judgment of Conviction.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE PRE-TRIAL PETITION FOR WRIT OF HABEAS CORPUS

Appellant alleges the district court erred in denying his pre-trial Petition for Writ of Habeas Corpus and Motion to Dismiss, which challenged the grand jury

proceedings on the ground that inadmissible evidence was presented. AOB at 18–25. This argument is without merit. The district court did not abuse its discretion in denying the pleadings because sufficient evidence was presented to the grand jury to support the Indictment, and the narration of the enhanced video footage was legal evidence.

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). However, on appeal, this Court will only dismiss an indictment where a defendant can show actual prejudice. Id.

A. The enhanced video is irrelevant to the validity of the Indictment.

First, Appellant attempts to paint Detective Bunn’s narration of the enhanced¹ video as the lynchpin of the Indictment. However, Appellant ignores the legal standard. Before the grand jury, the State need only show that a crime has been committed and that the accused probably committed it. The finding of probable cause to support a criminal charge may be based on “slight, even ‘marginal’ evidence . . . because it does not involve a determination of the guilt or innocence of the accused.” Sheriff v. Hodges, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980); see also Sheriff v. Potter, 99 Nev. 389, 391, 663 P.2d 350, 351 (1983).

¹ The only “enhancement” applied to any portion of the video was the zoom feature that is built into the Swan video player itself, which was not available for use during the Grand Jury proceedings. I AA 31–32.

“To commit an accused for trial, the State is not required to negate all inferences which might explain his conduct, but only to present enough evidence to support a reasonable inference that the accused committed the offense.” Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340, 341 (1971). Sheriff v. Miley, 99 Nev. 377, 663 P.2d 343 (1983). This Court need not consider whether the evidence presented at the grand jury may, by itself, sustain a conviction, since at the grand jury the State need not produce the quantum of proof required to establish the guilt of accused beyond a reasonable doubt. See Hodges, 96 Nev. at 186, 606 P.2d at 180; Miller v. Sheriff, 95 Nev. 255, 592 P.2d 952 (1979); McDonald v. Sheriff, 87 Nev. 361, 487 P.2d 340, (1971).

Thus, to hold Appellant to answer to the charges of open murder and robbery, the State was not required to negate all inferences which might be drawn from a certain set of facts. State v. VonBrincken, 86 Nev. 769, 476 P.2d 733, (1970); Johnson v. State, 82 Nev. 338, 418 P.2d 495 (1966). It was only required only to present enough evidence to support a reasonable inference that Appellant committed the crimes charged.

An open murder charge includes murder in the first degree and all necessarily included offenses, such as manslaughter, where less than all the elements of first degree murder are present. See Miner v. Lamb, 86 Nev. 54, 464 P.2d 451 (1970); Parsons v. State, 74 Nev. 302, 329 P.2d 1070 (1958); State v. Oschoa, 49 Nev. 194,

242 P.2d 582 (1926); NRS 175.501. First degree murder and second degree murder are not separate and distinct crimes which must be pleaded accordingly. See Thedford v. Sheriff, 86 Nev. 741, 476 P.2d 25 (1970); Howard v. Sheriff, 83 Nev. 150, 425 P.2d 596 (1967). Thus, there need not be evidence of first degree murder to support an open charge. See Wrenn v. Sheriff, 87 Nev. 85, 482 P.2d 289 (1971).

The defendant's explanation for the homicide, being in the nature of a defense, whether true or false, reasonable or unreasonable, is for the trier of fact to consider at trial; and the preliminary examination is not designed as a substitute for that function. Ricci v. Sheriff, Washoe County, 503 P.2d 1222, 1223, 88 Nev. 662, 663 (1972) (quoting State v. Fuchs, 78 Nev. 63, 368 P.2d 869 (1962)); see also Hearne v. Sheriff, Clark County, 547 P.2d 322, 322, 92 Nev. 174, 175 (1976). "[T]he presence of malice is a question of fact which bears directly on the guilt or innocence of a defendant and upon the degree of the crime charged. It is not a question to be determined by the magistrate at a preliminary examination—it is a question to be determined by the trier of fact at the trial of the case." Thedford v. Sheriff, 86 Nev. 741, 476 P.2d 25 (1970) (citing State v. Acosta, 49 Nev. 184, 242 P.2d 316 (1926)). "Neither a preliminary hearing, nor a hearing upon a petition for a writ of habeas corpus is designed as a substitute for this function (a trial)." Id. at 28 (quoting State v. Fuchs, 78 Nev. 63, 368 P.2d 869 (1962)).

Here, Appellant simply does not explain how the video footage—raw or “enhanced”—precluded the grand jury from finding by slight or marginal evidence that a murder and a robbery were committed, and that Appellant committed them. The portion of the video Appellant complains about is that of Appellant waving his gun around in front of a crowd of onlookers. AOB at 19. Appellant complains that the Grand Jury could not actually see the gun but that Detective Bunn testified that he could see it in the enhanced video. AOB at 19–21. However, the State could have met the “slight or marginal” standard even without this portion of the video.

Appellant utterly ignores the fact that Detective Bunn offered significantly more evidence that a murder and robbery had been committed and that Appellant had committed it. He testified that Ezekiel had been killed. I AA 014. He testified that Ezekiel had a gunshot wound to the abdomen. I AA 018. He testified that he identified Appellant from surveillance footage and from later interactions. I AA 029–30.² He testified that, and the video the Grand Jury saw clearly showed, Appellant and Ezekiel walked out of Top Knotch, arm-in-arm, the morning of the murder I AA 034–35. And he testified, and the video the Grand Jury saw clearly showed, that Appellant was the last one to be seen with Ezekiel—and that people

² As Appellant was not present at the Grand Jury, and Detective Bunn had familiarity with Appellant by viewing him after arrest, Detective Bunn’s identification of Appellant was proper. Burnside v. State, 131 Nev. ___, 352 P.3d 627 (2015) (citing Rossana v. State, 113 Nev. 375, 380, 934 P.2d 1045, 1048 (1997)).

are running around the scene after the two walk off camera together. I AA 036–37. Detective Bunn says to the Grand jury that they “can see [Appellant] dragging a belt out of a pair of pants”—pants that had been missing from Ezekiel’s body. I AA 017–18, 037. Appellant does not argue that these last three pieces of video footage were in any way enhanced or that Detective Bunn’s narration thereof constituted hearsay.

Thus, there was sufficient evidence, beside that which was tied to the enhanced portion of the video where Appellant was waving his gun around, to satisfy the “slight or marginal evidence” standard at grand jury.

B. The fact that Detective Bunn narrated an “enhanced” video, but the State showed raw video footage, did not constitute illegal evidence.

NRS 172.135(2) provides that, “[t]he grand jury can receive none but legal evidence, and best evidence in degree, to the exclusion of hearsay or secondary evidence.” However, “regardless of the presentation of inadmissible evidence, the indictment will be sustained if there is the slightest sufficient legal evidence.” Collins v. State, 113 Nev. 1177, 1182, 946 P.2d 1055, 1059 (1997). Similarly, a grand jury proceeding may be sustained even though it relies on nothing but hearsay testimony. Costello v. United States, 350 U.S. 359, 363, 76 S. Ct. 406, 408–09 (1956).

As noted by the district court when it denied the Petition / Motion to Dismiss on February 17, 2017, Detective Bunn’s narration of the zoomed-in version of the video, while the Grand Jury viewed the non-zoomed-in version, did not constitute

hearsay. II RA 481. The Detective merely testified to what he observed. II RA 481–82. Indeed, Appellant cannot now explain how Detective Bunn’s testimony constitutes “hearsay.” “‘Hearsay’ means a statement offered in evidence to prove the truth of the matter asserted unless: 1. The statement is one made by a witness while testifying at the trial or hearing.” NRS 51.035. Detective Bunn clearly made these statements while testifying at the Grand Jury hearing. How they constitute hearsay is not explained.

Regardless, Detective Bunn’s testimony was in no way improper. In his Opening Brief, Appellant again asserts that there are “facts that are not visible on the video that was played to the Grand Jury”—that it was not “the same video.” AOB at 21. This is not true. In fact, the events are visible in the original video; the Grand Jury was just not “able to zoom in and see it clearer.” I AA 032.

In other words, the original video *was* shown to the Grand Jury. What was not present was the original player for the video. I AA 025–26. That player had the capacity to zoom in on individual sections of the same video that was displayed to the grand jury. I AA 025–26.

Further, the narration of surveillance video is proper if it assists the jury in making sense of the images depicted in the video. See Burnside, 131 Nev. ___, 352 P.3d at 627. And here, that is precisely what Detective Bunn did. Appellant complains that at one point, Detective Bunn testified that he zoomed in the video to

confirm that the black, metallic firearm-like object in Appellant's hand when he is removing the belt from Ezekiel's pants was in fact a firearm. I AA 031–33. The black, metallic firearm-like object is visible on the version played for the Grand Jury. Id. Only a limitation in technology precluded the zooming function from being used before the Grand Jury. I AA 025–26.

A review of all the evidence presented to the Grand Jury clearly establishes more than sufficient evidence to indict Appellant. The district court did not abuse its discretion in denying the pre-trial Petition and Motion to Dismiss.

C. Any error was harmless.

Even if there was any deficiency in the evidence presented to the Grand Jury, that any error was harmless. Any error in Grand Jury proceedings is harmless when a defendant is later found guilty beyond a reasonable doubt at trial. Lisle v. State, 114 Nev. 221, 224–25, 954 P.2d 744, 746–47 (1998) (quoting United States v. Mechanik, 475 U.S. 66, 70, 106 S. Ct. 938 (1986) (holding that because the defendants were convicted after trial beyond a reasonable doubt, probable cause undoubtedly existed to bind them over for trial; therefore, any error in the grand jury proceedings connected with the charging decision was harmless beyond a reasonable doubt)). At Appellant's trial, all of the original video—on the original Swann player and thus capable of being zoomed in on—was presented to the jury. See, e.g., I AA 163, 184–86. And the jury found Appellant guilty beyond a reasonable doubt, curing

any deficiencies in the Grand Jury. This Court should dismiss this claim and affirm the Judgment of Conviction.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING INADMISSIBLE PRIOR BAD ACT EVIDENCE

Appellant complains that the Court prevented him from presenting a defense by excluding evidence of the victim's prior bad acts to demonstrate a propensity for violence. AOB at 25–44. This argument is without merit. The district court made the correct evidentiary ruling. As extensively litigated below, Appellant: did not establish that he knew about the specific prior convictions he wished to admit; could not admit these prior bad acts under the “common scheme or plan” exception; and could not establish that the State had ever opened the door to the prior bad acts.

A. Applicable Standard

This Court reviews a district court's evidentiary rulings for an abuse of discretion. Rodriguez v. State, 128 Nev. 155, 160, 273 P.3d 845, 848 (2012). “The trial court's determination to admit or exclude evidence is given great deference and will not be reversed absent manifest error.” Baltazar-Monterrosa v. State, 122 Nev. 606, 613–14, 137 P.3d 1137, 1142 (2006).

B. Litigation of the Preclusion of Evidence

On March 8, 2017, Appellant filed a Motion in Limine, seeking to admit character evidence of the victim, Ezekiel. I AA 050–52. In that Motion, Appellant declined to articulate what character evidence he sought to admit, or the basis upon

which he premised the motion. I AA 051. Appellant claims in his Opening Brief that he attached the victim's "extensive criminal record" to this Motion; however nothing of the kind is attached in his Appendix. AOB at 26; see I AA 050–53. Nor did Appellant argue in this Motion that he knew about specific prior convictions of Ezekiel's. See id. Indeed, it does not appear that Appellant attached any sort of proof regarding the murder victim's criminal record until his Motion for New Trial. II RA 363–420.

On May 9, 2017, the State filed a Motion in Limine seeking to preclude the murder victim's prior specific acts of violence. I RA 348–53. In that Motion, the State requested that Appellant not be allowed to present evidence of Ezekiel's prior convictions, at least without some proof that Appellant was aware of those events. I RA 352. At that time, there had been no evidence to suggest that Appellant had met Ezekiel before the morning he murdered him, let alone that he had personal knowledge of specific prior bad acts committed by Ezekiel. See I RA 352.

On May 18, 2017, the State filed a Supplement to its Motion in Limine. I RA 354–60. In that supplement, the State again argued that Appellant should not be allowed to introduce Ezekiel's prior convictions, given that there had been no showing that Appellant knew the victim or anything at all about his history. I RA 357–58. As the State clarified in its supplement:

[Appellant] has made no showing he was aware of any specific act of violence. Indeed, [Appellant] has made no showing that he was

familiar with the victim. Rather, the evidence shows that [Appellant] and the victim arrive at different times, in different cars, and with different people. [Appellant] has not demonstrated that he was aware of any specific acts of violence committed by the victim. Thus, although character evidence may be admissible, “[e]vidence of specific instances of conduct is generally not admissible because ‘it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time.’”

I RA 357–58 (citing Daniel v. State, 119 Nev. 498, 514, 78 P.3d 890, 901 (2003)).

In its supplement, the State also rebutted Appellant’s argument at a prior hearing regarding the use of specific acts of Ezekiel’s to show a common scheme or plan. I RA 358–59.

At the hearing on the Motions in Limine, held on May 19, 2017, Appellant indicated that he wanted to bring in testimony in the form of opinions about the victim. I RA 361. The Court allowed Appellant to bring in such opinion testimony, but precluded the witnesses from expanding on those opinions to introduce the specific underlying facts. I RA 361. Again, at no time did Appellant indicate that he knew of the prior acts. See I RA 361.

Even on the eve of trial, the district court was certainly not “aware that certain specific acts of violence of the deceased were known to Appellant or had been communicated to him.” AOB at 26. Indeed, on the second day of trial, the parties had the following exchange:

THE COURT: All right. Reputation evidence with the character of the victim in this type of case is admissible, if you have the proper

witnesses. And in order for it to constitute self-defense, your client's going to have to testify he knew or --

MR. WOOLDRIDGE [for the defense]: I understand that.

THE COURT: -- somebody's going to have to provide evidence that he knew what the reputation was.

MR. WOOLDRIDGE: That's correct.

THE COURT: Specific evidence as to the specific bad acts or proving the bad acts is not admissible. You're not going to be able to put the victim on trial to prove that he had prior convictions or had prior incidences of robbing people. It's what his reputation and character was. So you're stuck with witnesses who can testify they were aware of his reputation. You can have a reputation of being violent, even if you're not.

MR. WOOLDRIDGE: Sure.

THE COURT: It's what people around him knew of his reputation, maybe stories he's read or someone else read, that have no basis in truth, but that's his reputation. So he's going to be allowed to put on that evidence. Be careful how you argue it on opening statements, though.

I RA 007. Neither defense counsel nor the district court gave any indication that Appellant himself was aware of specific acts that would support a so-called reputation for violence.

During Appellant's opening statement at trial, counsel indicated that the murder victim had a reputation for sticking people up at gun-point. AOB at 5.³ The State objected to this statement, given the Court's prior rulings. AOB at 5. During argument on this 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.

³ The incomplete transcripts Appellant has included in his Appendix do not include opening statements; however, he admits that this exchange occurred in his Opening Brief.

AOB at 5. Appellant indicated that although he did not want to forecast his defense, the time may come when given his testimony, the prior acts may be admissible. AOB at 5.

On the third day of the trial, Antoine Bernard testified. Bernard testified that Appellant asked him who the victim was. I RA 108–09. This obviously supported the State’s position that Appellant did not know Ezekiel, had no idea about his criminal history, and thus could not have known about his specific prior bad acts.

At the end of the third day of trial, the Court held a colloquy regarding the testimony of anticipated defense witnesses. II RA 238–40. During that colloquy, the State requested that if Appellant intended to testify of knowledge of specific prior acts of his victim, that a Petrocelli hearing be held. II RA 238. However, the parties and the Court were still operating under the impression that the defense was “not going to prove the prior bad acts,” and if that any specific acts were to be introduced to explain a defense witness’s opinion testimony, the parties would “learn that outside the presence of the jury.” II RA 238, 240.

Appellant himself testified on the fourth day of trial, May 25, 2017. II RA 259–312. Appellant testified that his first interaction with the man he would later kill was when he bumped into Ezekiel near the dancing pole. II RA 264. Appellant asked who Ezekiel was. II RA 264–65. Appellant swore that the next time he encountered Ezekiel was shortly before they all left the building, when Ezekiel

embraced him and apologized for bumping into him earlier. II RA 265. Appellant claimed that Ezekiel lured him off to the side of the parking lot, grabbed Appellant by the belt, and put a gun against his waist. II RA 266. Appellant testified that he was afraid, and that he:

just closed my eyes, and I just was like, you no he [sic], 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.

II RA 268. Appellant was specifically asked whether he recognized Ezekiel as someone he knew or knew or during their interaction earlier that night. Appellant claimed he did not, because Ezekiel's hat was too low down over his head. II RA 268.

Appellant then testified that Barry, a woman he met previously at Larry's Gentlemen's Club, had previously shown him a picture on her phone of Ezekiel. I RA 268–69. This was the first indication of *any* kind that Appellant had ever seen Ezekiel prior to the events leading to Appellant murdering him. Appellant then claimed this “Barry” told him that Ezekiel was known for robbing people, and that he had been in jail in the past. I RA 269–70. Contrary to Appellant's assertion in his Opening Brief, he did not claim at trial that he knew Ezekiel to have gone to prison

for any robberies. AOB at 26. He merely claimed Ezekiel had “been in jail – he’s been to jail – in and out of jail and he’s known as a jack boy.”⁴ II RA 269. Even at that point, Appellant did not argue that he knew Ezekiel had specifically “attempted to rob victims at gunpoint in a parking lot.” AOB at 26.

Appellant reiterated that he recognized Ezekiel for the first time when face to face with him in front of the building, because Appellant’s eyes were bad, and he had only ever been inside the club with Ezekiel, where he could not see Ezekiel’s face. I RA 270. On cross-examination, Appellant reiterated that the first time he ever encountered Ezekiel was in the night-club, but he could not see Ezekiel’s face. I RA 302.

When the Court returned from the lunch-recess, Appellant made a record regarding the prior acts of the victim. I RA 314. At that time, Appellant argued that the prior acts should be admitted pursuant to NRS 48.045(2), as evidence of common plan or scheme or intent. I RA 314. Appellant did not argue or request to admit the prior judgments of conviction, based upon the stunning revelation that “Barry” had known of and revealed Ezekiel’s past to Appellant three months prior. I RA 314. Appellant was permitted to call two witnesses, who gave their opinions that Ezekiel was a violent person. I RA 316–19.

⁴ Notably, this claim by Appellant occurred after he sat through hours of argument regarding the legal standard for admissibility of specific acts of violence: i.e., that a defendant must be aware of them.

Following the last of Appellant's witnesses, the defense rested its case. I AA 136. Then, the State called a single rebuttal witness. I AA 136–37. Bianca Hicks testified that she was living with Ezekiel, and the couple had two children together. I AA 137. Hicks testified that in the three years she knew him, she had not seen Ezekiel with a gun. I AA 145. Hicks did not testify about any time periods prior to the three years she knew him. I AA 145. On cross-examination, Appellant began to ask, based on the fact that Hicks testified she had not seen Ezekiel with a gun in three years, whether she knew about one of his prior convictions. I AA 148. Despite repeated, mid-question objections from the State, Appellant literally blurted out to the witness that Ezekiel was convicted of possession of a firearm by an ex-felon. I AA 148–49. He did not allow the Court a chance to rule on the State's objection. Id. The State objected to the reference which not only implied one prior felony but two, and the Court struck the question from the record. I AA 139, 153. In fact, in striking the question, the Court cited the lengthy litigation on the issue, and the specific orders to not elicit evidence of the victim's specific priors. Id.

The district court did not abuse its discretion in precluding the evidence Appellant now complains should have been admitted: specifically, prior bad acts to demonstrate a propensity for violence. AOB at 25. The district court's decision was correct based on several grounds that had been extensively litigated: the district court properly applied the law on character evidence and prior bad acts because Appellant

could not show—and did not even try to show until halfway through his trial testimony—that he knew about the priors; Appellant waived some arguments by failing to request to admit Judgments of Conviction; the victim’s prior felonies were not admissible under the common scheme or plan exception; and no witness opened the door to these inadmissible acts.

C. The district court correctly excluded the victim’s prior bad acts, about which Appellant did not demonstrate that he knew.

As he did below, Appellant argues that the prior bad acts should have been admitted to bolster Appellant’s self-defense claim. AOB at 35–37. The State’s position with regard to this evidentiary issue did not change, from the pre-trial litigation to the evidence that came in through its last rebuttal witness. In accordance with the law, absent some proof that Appellant knew about the prior events, the victim’s prior bad acts were inadmissible to support Appellant’s claim of self-defense. Burgeon v. State, 102 Nev. 43, 46, 714 P.2d 576, 578 (1986) (“In the present case, appellant concedes that the specific acts of violence of the victim were not previously known to him. Since appellant did not have knowledge of the acts, evidence of the victim's specific acts of violence were therefore not admissible to establish the reasonableness of appellant’s fear or his state of mind.”). The district court agreed with the State and ruled accordingly, deeming opinion evidence of the victim’s character admissible but prohibiting specific prior bad acts of the victim’s.

II RA 361.

NRS 48.045(1) states, 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, subject to the procedural requirements of NRS 48.069 where applicable, and similar evidence offered by the prosecution to rebut such evidence. . .

However, NRS 48.055 limits the method in which character evidence may be proved:

1. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or in the form of an opinion. On cross-examination, inquiry may be made into specific instances of conduct.

This Court has held that a victim's propensity for violence is not an essential element of a claim of self-defense, and, therefore, NRS 48.055(1) applies. Daniel v. State, 119 Nev. 498, 78 P.3d 890 (2003). The Court has recognized a narrow exception to the rule:

However, this court has held that evidence of specific acts showing that the victim was a violent person is admissible if a defendant seeks to establish self-defense *and was aware of those acts*. This evidence is relevant to the defendant's state of mind, i.e., whether the defendant's belief in the need to use force in self-defense was reasonable.

Id at 902 (internal footnotes omitted) (emphasis in original). As such, a specific act of which Appellant was aware would be admissible within reason:

We also agree that the admission of evidence of a victim's specific acts, regardless of its source, is within the sound and reasonable discretion of the trial court and is limited to the purpose of establishing what the defendant believed about the character of the victim. The trial court “should exercise care that the evidence of specific violent acts of the victim not be allowed to extend to the point that it is being offered to prove that the victim acted in conformity with his violent tendencies.”

Id. (internal footnotes omitted). Thus, only acts of which the Appellant was aware would be admissible at trial. See id. This is exactly what the district court ruled below, during the arguments on the Motions in Limine and throughout trial. See I RA 007. II RA 238–40, 361.

D. Appellant denied the district court the ability to rule on Appellant’s knowledge of specific prior bad acts when he failed to request to admit the judgments of conviction following his testimony of alleged knowledge thereof.

During pre-trial litigation, and during trial, the State made clear that if Appellant was going to testify that he had knowledge of Ezekiel’s past, the State wished to conduct an evidentiary hearing pursuant to Petrocelli v. State, 101 Nev. 46, 51–52, 692 P.2d 503, 507–08 (1985). I RA 236. During pre-trial litigation, the State specifically requested that Ezekiel’s priors be excluded, absent proof that Appellant was aware of them. II RA 352. At trial, the State was not of the position that the priors were per se excluded, but instead once again requested an opportunity to examine their admissibility, if Appellant claimed knowledge thereof. II RA 238. At trial, Appellant did testify, however incredibly, about hearing that a person whose

picture he saw briefly on “Barry’s” phone—whom Appellant claimed was Ezekiel—had committed robberies. II RA 269.

Even after Appellant testified, claiming to know through “Barry” about Ezekiel’s past, Appellant never sought to introduce the prior Judgments of Conviction, never requested the Petrocelli hearing, and never sought the Court’s permission to re-raise the issue. Instead, when Appellant requested a renewed ruling on Ezekiel’s priors, he did so by arguing under NRS 48.045, and the common scheme or plan exception. II RA 314. The State would have responded differently, and requested the Petrocelli hearing, as the State did prior to trial, had Appellant attempted to admit Ezekiel’s prior robbery convictions due to his knowledge thereof. Appellant precluded that from occurring, however. The district court can hardly be said to be in error over a decision that Appellant did not ask it to make.

E. Ezekiel’s priors were not admissible under a common scheme or plan exception.

As he did below, Appellant again attempts to argue that two of the victim’s prior bad acts should have been admissible under the common scheme or plan exception. AOB at 37–38. The district court correctly rejected that argument.

NRS 48.045 precludes the use of propensity evidence, subject to certain limited exceptions. One such exception is to prove common scheme or plan. Because Appellant could not show such a plan, the district court correctly held that he could not use the common scheme or plan exception under NRS 48.045, first during

argument on the State's Motion in Limine to exclude this evidence and then during his renewed request after Appellant testified. II RA 314, 361.

The district court's evidentiary ruling was in accordance with the law. As stated above, NRS 48.045 prohibits the use of propensity evidence in the vast majority of instances. Relevant to this argument, the law states:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

NRS 48.045(2). In order to make otherwise inadmissible evidence admissible as proof of a common scheme or plan, certain things are required. First and foremost, there must be a plan—not just any plan, but a plan which was conceived before the first of the acts to be introduced, and which encompasses all of the acts to be introduced. Rosky v. State, 121 Nev. 184, 196, 111 P.3d 690, 698 (2005). There, this Court was explicit in its requirement for the common scheme or plan, holding:

The common scheme or plan exception of NRS 48.045(2) is applicable when both the prior act evidence and the crime charged constitute an “integral part of an overarching plan explicitly conceived and executed by the defendant.” “The test is not whether the other offense has certain elements in common with the crime charged, but whether it tends to establish a preconceived plan which resulted in the commission of that crime.”

Id. (emphasis in original) (quoting Richmond v. State, 118 Nev. 924, 933, 59 P.3d 1249, 1255 (2002) and Nester v. State, 75 Nev. 41, 47, 334 P.2d 524, 527 (1959)).

This Court reaffirmed this requirement in Ledbetter v. State, 122 Nev. 252, 260–61, 129 P.3d 671, 677–78 (2006).

In Rosky, this Court held that two acts, eight years apart, were not part of one common scheme or plan, when it appeared that each act was a crime of opportunity. Rosky, 121 Nev. at 196, 111 P.3d at 698. Because the crimes could not have been planned in advance, and simply occurred when the defendant got close enough to the victims, the Court ruled that they could not belong to one overarching plan. Id. Similarly, in Richmond, this Court held that where a defendant “appeared simply to drift from one location to another, taking advantage of whichever potential victims came his way,” he could not use the common scheme or plan exception. 118 Nev. at 934, 59 P.3d at 1259. Rather, the defendant’s “crimes were not part of a single overarching plan, but independent crimes, which [he] did not plan until each victim was within reach.” Id.

All of the evidence in this case proved that Appellant’s murder of Ezekiel was a crime of opportunity conceived of, and executed all within a few hours on September 25, 2016. The district court correctly found that Appellant could not, and did not show that Ezekiel’s robberies, which occurred seven or eight years earlier, were part of a singular overarching scheme, which somehow encompassed both those acts and a confrontation with Appellant. II RA 314, 361.

Appellant did nothing but attempt to point out to the district court the “similarities” between the events, equating two instances years prior where Ezekiel used a firearm to rob people in isolated parking lots away from anyone else to the event leading to his murder: an alleged brazen robbery in broad daylight with dozens of people milling around. However, as the district court correctly noted, “[t]he test is not whether the other offense has certain elements in common with the crime charged, but whether it tends to establish a preconceived plan which resulted in the commission of that crime.” Rosky, 121 Nev. at 196, 111 P.3d at 698. Without proving a common plan or scheme which lasted nearly a decade, the district court did not abuse its discretion in finding that Ezekiel’s priors were inadmissible under this exception. II RA 314, 361.

F. Hicks’s testimony did not open the door to inadmissible acts that defendant later referenced.

Finally, Appellant claims that the State somehow opened the door to questioning Ezekiel’s fiancée, Hicks, about his prior convictions. AOB at 30–32, 38–40. The district court correctly rejected this argument, too. II RA 336.

The first flaw in Appellant’s argument is that Hicks did not testify to any character traits of Ezekiel. Instead, Hicks testified that she met Ezekiel three years prior to his death at Appellant’s hands. II RA 323. She then testified to a simple fact—that in the three years he knew him, she did not see him with a gun. II RA 324. Such a statement is not evidence of an individual’s character. Ezekiel’s prior felony

conviction for possession of a firearm as a prohibited person resulted in a Judgment of Conviction filed in 2010. This is far more remote than the three year time that Hicks knew Ezekiel.

This scenario is entirely distinct from that presented in Jezdik v. State, 121 Nev. 129, 110 P.3d 1058 (2005). In Jezdik, the defendant claimed “he had never been ‘accused of anything prior to these current charges.’” 121 Nev. at 136, 110 P.3d at 1063. Such a statement is a blanket statement with no temporal component, and is an attempt to establish a good character. Id. Here, however, all that was testified to was that for the last three years, Hicks had not seen Ezekiel with a gun. II RA 331. Such testimony is not an attempt to establish character, and thus cannot allow for rebuttal in the form of contradictory evidence. It is also worth noting, that Appellant cannot demonstrate that Hicks was incorrect. There was no showing that Ezekiel was found with a gun in the prior three years, and the only person to claim to see Ezekiel with a gun on the last morning of his life was Appellant—not the dozen or so witnesses to his cold-blooded murder. Hicks’s testimony by no means “opened the door” to the prior convictions.

G. Any error was harmless given the overwhelming evidence contradicting Appellant’s theory.

Even if the Court erred in its rulings, that error was harmless. See NRS 178.598 (Any “error, defect, irregularity or variance which does not affect substantial rights shall be disregarded”); Knipes v. State, 124 Nev. 927, 935, 192

P.3d 1178, 1183 (2008) (noting that nonconstitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict). On the other hand, constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The test under Chapman for constitutional trial error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n.14 (2001).

A nonconstitutional standard of review is applicable in light of the district court's exclusion of the prior convictions pursuant to evidentiary rules. Nonetheless, under any standard, the error does not warrant reversal. First, Appellant was permitted to support his self-defense claim in several ways. Appellant offered two witnesses to speak about Ezekiel's character for violence. II RA 316–20. Then, while cross-examining the State's rebuttal witness, Appellant directly contravened the district court's order and asked the witness a question about a specific prior bad act of the victim's—the 2010 conviction for firearm possession. II RA 334–35. The district court even decided that, due to Appellant's violation of its order, the best thing to do to avoid jury confusion would be to have the parties stipulate to the jury that Ezekiel had in fact been convicted of ex-felon in possession of a firearm in 2010. II RA 335–36. To claim that the district court denied Appellant the opportunity to

present support for his self-defense claim is belied by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (noting that “bare” and “naked” allegations are not sufficient for relief, nor are those belied and repelled by the record).

Moreover, at trial, there was overwhelming evidence to contradict Appellant’s self-defense theory. The evidence showed that throughout the night, Appellant and Ezekiel had multiple interactions. The two were even seen on video walking through the club arm-in-arm mere minutes before Appellant murdered and robbed Ezekiel—with his claim that he had not recognized Ezekiel until mere moments before he shot Ezekiel. I RA 196. The robbery was literally caught on camera. I AA 116, 199–201. Appellant could be seen very clearly ripping the expensive belt from the victim while Ezekiel lay dying. Id. The victim’s property—including his watch—was also missing from his body. I RA 116, 221; II RA 327, 331–33. Any so-called error in not admitting Ezekiel’s years-old convictions was harmless in light of the evidence Appellant was allowed to present and the evidence directly contradicting his self-defense theory.

The district court did not abuse its discretion in not admitting the prior bad acts of the murder victim because Appellant could not establish that they were admissible. Even if there was an error, it was harmless in light of the self-defense

evidence Appellant was permitted to introduce. This Court should affirm the Judgment of Conviction.

III. THE STATE DID NOT FAIL TO DISCLOSURE INCULPATORY EVIDENCE

Finally, Appellant complains that during the State's closing argument, he was ambushed with inculpatory video evidence that he had not seen before and that undermined his defense. AOB at 16, 45–48. First, it must be noted that Appellant has utterly failed to cite anything in the record supporting this claim. Thus, any argument relying on this so-called incident should be ignored as a bare and naked statement and as a violation of NRAP 28(10). Hargrove, 100 Nev. at 502, 686 P.2d at 225. Regardless, there was no such error—because the State did provide the entire video to Appellant during the discovery process.

NRAP 28 provides, in pertinent part:

- (10) the argument, which *must* contain:
 - (A) appellant's contentions and the reasons for them, *with citations to the authorities and parts of the record on which the appellant relies*.

NRAP 28 (emphasis added). This Court previously ruled that it is an appellant's responsibility to provide relevant authority and cogent argument, and when appellant fails to adequately brief the issue, it will not be addressed by this court. Maresca v. State, 103 Nev. 669, 672–73, 748 P.2d 3, 6 (1987). The appellate court *cannot* consider matters not properly appearing in the record on appeal. Tabish v. State, 119

Nev. 293, 296, 72 P.3d 584, 586 (2003). See also Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that this court need not consider claims that are not cogently argued or supported by relevant authority); Byford v. State, 116 Nev. 215, 225, 994 P.2d 700, 707 (2000) (issue unsupported by cogent argument warrants no relief); Campos v. Hernandez, No. 69163, 2017 Nev. Unpub. LEXIS 298, at *5 (Apr. 26, 2017).

Without a record of the closing argument—which Appellant has not included in his Appendix—the proper standard of review for this issue would remain a mystery. However, in Respondent’s Appendix, the record becomes clear that Appellant failed to object to the playing of any so-called undisclosed portions of the video during closing argument. III RA 483–531. Thus, the claim is waived and is reviewable, if at all, only for plain error.⁵ Dermody v. City of Reno, 113 Nev. 207, 210–11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 58 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991); Martinorellan v. State, 131 Nev. ___, ___, 343 P.3d 590, 593 (2015); Maestas v. State, 128 Nev. ___, ___, 275 P.3d 74, 89 (2012); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Patterson v.

⁵ Appellant seems to have raised this issue, obliquely and for the first time, in his Supplement to Motion for New Trial—filed months after the verdict. II RA 447–48. Appellant’s initial Reply had mainly addressed the district court’s proper evidentiary ruling not to permit specific prior bad acts of the victim’s. II 436–40.

State, 111 Nev. 1525, 1530, 907 P.2d 948, 987 (1995); Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995). Plain error review asks:

“To amount to plain error, the ‘error must be so unmistakable that it is apparent from a casual inspection of the record.’” Vega v. State, 126 Nev. ___, ___, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, “the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing ‘actual prejudice or a miscarriage of justice.’” Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003))). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan, 131 Nev. at ___, 343 P.3d at 594.

In the event this Court chooses to entertain Appellant’s unsupported claim, the complaint is in effect similar to a claim of prosecutorial misconduct. But even under that framework, the record is clear that there was no error. In resolving claims of prosecutorial misconduct, this Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476. This Court views the statements in context, and will not lightly overturn a jury’s verdict based upon a prosecutor’s statements. Byars v. State, 130 Nev. ___, ___, 336 P.3d 939, 950–51 (2014). Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

This Court need not analyze this issue past the first step, because Appellant's claim of improper conduct on the part of the State is bare and naked if not utterly belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. It is important to note that Appellant does not claim that he never had access to the video. Rather, he simply complains that at one specific point in time—the evidence vault viewing—he did not control the video. Indeed, Appellant admits that defense counsel viewed the surveillance footage in the evidence vault during the discovery process. AOB at 46. But it does not matter that during that viewing, he did not personally control the video. Id. He could have asked to see the entirety of the video. And, most importantly, this evidence vault viewing was not the only opportunity Appellant had to view the video.

Appellant—who bears the burden on appeal—has not offered any proof that during discovery, the State did not provide Appellant a copy of the entire surveillance video. Given that the evidence vault viewing occurred on February 16, 2017, more than three full months before trial, any claim that he did not receive a copy of it or request to view it in its entirety beggars belief. AOB at 15. For example, there is no indication in the record that Appellant—who clearly knew about the video—complained to the Court that the State was withholding it during discovery. Had Appellant been given a copy, or requested a copy, he would have had complete

access to every single frame of the video—including the portions that were later played during the State’s rebuttal during closing arguments.

Appellant even had a chance to view the video during trial. The State had brought the Swan player; Appellant could have accessed any portion of it at any time. See, e.g., I RA 163, 184–86. Indeed, during Detective Bunn’s testimony on cross-examination, Appellant actually directed which portions were played or replayed for the jury. I RA 209–10. There is no indication whatsoever that the State or the Court precluded Appellant from seeing any portion of the video.

The State did disclose the evidence of which Appellant complains. Appellant did not object at trial to its being played. And he cannot claim now that he was “ambushed” during the State’s closing. This Court should affirm the Judgment of Conviction.

CONCLUSION

For the foregoing reasons, this Court should deny each of Appellant’s claims and affirm the Judgment of Conviction.

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Dated this 29th day of October, 2018.

Respectfully submitted,

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

BY */s/ John T. Niman*

JOHN T. NIMAN
Deputy District Attorney
Nevada Bar #014408
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 9,552 words.
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 29th day of October, 2018.

Respectfully submitted

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

BY */s/ John T. Niman*

JOHN T. NIMAN
Deputy District Attorney
Nevada Bar #014408
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 29th day of October, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

NICHOLAS M. WOOLDRIDGE, ESQ.
Counsel for Appellant

JOHN T. NIMAN
Deputy District Attorney

/s/ J. Garcia

Employee, Clark County
District Attorney's Office

JTN/Andrea Orwoll/jg

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAVAR ERIS KETCHUM A/K/A JAMES
TERCHUM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 75097
District Court Case No. C319714

FILED

OCT 11 2019

Elizabeth A. Brown
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of conviction AFFIRMED."

Judgment, as quoted above, entered this 12th day of September, 2019.

IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
October 08, 2019.

Elizabeth A. Brown, Supreme Court Clerk

By: Rory Wunsch
Deputy Clerk

C-16-319714-1
CCJA
NV Supreme Court Clerks Certificate/Judg
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IN THE SUPREME COURT OF THE STATE OF NEVADA

JAVAR ERIS KETCHUM A/K/A JAMES
TERCHUM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75097

FILED

SEP 12 2019

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael Villani, Judge. Appellant Javar Ketchum raises three main contentions on appeal.

Ketchum first argues that the district court erred by denying his pretrial petition for a writ of habeas corpus and motion to dismiss the indictment. We do not agree that the district court abused its discretion, *see Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008) (reviewing denials of motions to dismiss indictments for an abuse of discretion), as the detective's testimony that Ketchum complains about was not hearsay but was a permissible narration that aided the grand jury while viewing a surveillance video. *See Burnside v. State*, 131 Nev. 371, 387-89, 352 P.3d 627, 639-640 (2015) (explaining that narration of surveillance video is proper if it assists the jury in making sense of the depicted images); *see also* NRS 51.053 (defining hearsay). Even if that testimony was inadmissible during the grand jury proceeding, the State presented sufficient legal evidence to sustain the grand jury indictment, and the subsequent jury verdict under the higher beyond-a-reasonable-doubt standard cured any

irregularities in the grand jury proceeding. *Dettloff v. State*, 120 Nev. 588, 596 & n.18, 97 P.3d 586, 591 & n.18 (2004).


Second, Ketchum argues that the district court abused its discretion by excluding evidence of the victim's specific past acts of violence, which Ketchum claims supported his theory of self-defense. *See Petty v. State*, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000) (reviewing evidentiary decisions for an abuse of discretion). We disagree. The alleged prior bad acts were not admissible under NRS 48.045(2) because they were too dissimilar and distant in time from the victim's alleged actions in this case. *See Rosky v. State*, 121 Nev. 184, 196, 111 P.3d 690, 698 (2005) (concluding that prior bad acts were inadmissible under NRS 48.045(2) for a nonpropensity purpose where they were dissimilar in nature and there was a lengthy time gap between those acts and the current charges). Further, the State did not open the door to the admission of such evidence by asking the victim's fiancée if she ever saw the victim with a gun because that question did not call for the witness to opine on the victim's character. *See* NRS 48.045 (providing the circumstances under which character and prior bad acts evidence is admissible).¹ In addition, the district court did not abuse its discretion in excluding the victim's past robbery convictions because Ketchum did not know about them and therefore they could not be offered to support his self-defense theory. *See Petty*, 116 Nev. at 325-27, 997 P.2d at 802-03 (explaining that a defendant can support his self-defense argument with prior acts tending to show the victim as a violent person,

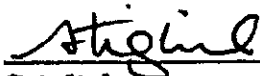
¹Because we conclude that the State did not introduce improper character evidence, we need not address Ketchum's argument that the court should have admitted the victim's alleged prior bad acts to rebut that character evidence.

provided that the accused had knowledge of some specific act of violence committed by the victim).

Third, Ketchum contends for the first time on appeal that the State ambushed him during closing argument with inculpatory video surveillance evidence that was neither provided in discovery nor presented during the State's case-in-chief. But the State did not withhold the evidence because the record shows that Ketchum had pretrial access to the entire DVR system memorializing the night's events. Further, the State playing video segments from those DVR systems during its rebuttal closing argument was not plain error warranting reversal because it appears from the record that the entire video was admitted into evidence as a State exhibit without objection, giving the jury access to view the segments Ketchum complains of. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (providing for plain-error review for unpreserved errors). Accordingly, we

ORDER the judgment of conviction AFFIRMED.²


Gibbons C.J.


Stiglich J.


Douglas Sr. J.

²The Honorable Michael Douglas, Senior Justice, participated in the decision of this matter under a general order of assignment.

cc: Hon. Michael Villani, District Judge
Wooldridge Law
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

CERTIFIED COPY

This document is a full, true and correct copy of
the original on file and of record in my office.

DATE: OCTOBER 8, 2019

Supreme Court Clerk, State of Nevada

By


Deputy

AO000687

IN THE SUPREME COURT OF THE STATE OF NEVADA

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TERCHUM,
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Respondent.

Supreme Court No. 75097
District Court Case No. C319714

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: October 08, 2019

Elizabeth A. Brown, Clerk of Court

By: Rory Wunsch
Deputy Clerk

cc (without enclosures):
Hon. Michael Villani, District Judge
Wooldridge Law
Clark County District Attorney

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on OCT 11 2019.

HEATHER UNGERMANN

Deputy District Court Clerk

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APPEALS

OCT 10 2019

CLERK OF THE COURT

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FILED

NOV 01 2019

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

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Clark County District Attorney

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[Signature]
Deputy District Court Clerk

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APPEALS

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CLERK OF THE COURT



19-41614

AO000689

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Supreme Court No. 75097
District Court Case No. C319714

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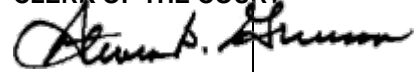
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IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
October 08, 2019.

Elizabeth A. Brown, Supreme Court Clerk

By: Rory Wunsch
Deputy Clerk



PETN
CRAIG A. MUELLER, ESQ.
Nevada Bar No. 4703
CRAIG A. MUELLER & ASSOCIATES
723 S. Seventh Street
Las Vegas, NV 89101
702.382.1200
Facsimile: (702) 637-4817
receptionist@craigmuellerlaw.com
Attorney For Petitioner Ketchum

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,	)	CASE NO. C-16-319714-1
)	
VS.	)	DEPT. NO. XVII
)	
JAVAR KETCHUM,)	
#1836597)	
)	
Defendant.)	

PETITION FOR POST-CONVICTION WRIT OF HABEAS CORPUS

TO: THE HONORABLE JUDGE OF THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

The Petition of Defendant JAVAR KETCHUM respectfully shows:

1. Petitioner is the Defendant in Case Number C-16-319714-1 before the Eighth Judicial District Court in and for the County of Clark, State of Nevada;
2. Petitioner makes application herein for a Writ Of Habeas Corpus;
3. Petitioner waives the 60-day limitation for bringing an accused to trial;
4. If this Petition is not decided within fifteen (15) days before the date set for trial, the Petitioner consents that the Court may, without notice or hearing, continue the

1 trial indefinitely, or to a date designated by the Court.

2 5. This Petition is founded on the grounds stated herein, the pleadings and records
3 on file herein, the Points and Authorities in support of said Writ, the Affidavit of
4 Petitioner's counsel, and upon such other evidence and grounds as will be brought
5 forth at a hearing on the Writ.
6

7 WHEREFORE, Petitioner prays that this Honorable Court make and Order directing the
8 County Clerk to issue an Order directed to Calvin Johnson, Warden of High Desert State Prison,
9 Nevada Department of Corrections, commanding him to appear before your Honor and return the
10 cause for restraint of your Petitioner.
11

12 DATED this 11th Day Of September, 2020.

13 /s/Craig Mueller, Esq.
14 CRAIG A. MUELLER, ESQ.
15 Nevada Bar No. 4703
16 CRAIG A. MUELLER & ASSOCIATES
17 723 S. Seventh Street
18 Las Vegas, NV 89101
19 702.382.1200
20 Facsimile: (702) 637-4817
21 receptionist@craigmuellerlaw.com
22 Attorney For Petitioner Ketchum
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **PROCEDURAL HISTORY OF THE CASE**

4 The charges alleged in the Indictment arise from the September 25, 2016 shooting of
5 Ezekiel F. Davis outside the Top Notch Apparel store located in the 4200 block of South
6 Decatur Boulevard. The State of Nevada charged Mr. Ketchum in a five (5) count Indictment
7 together with co-defendants Antoine Bernard, Roderick Vincent and Marlo Chiles as follows:
8 one count of murder with use of a deadly weapon; one count of robbery with use of a deadly
9 weapon; and three counts of accessory to murder. Mr. Ketchum was only charged in the first
10 two counts of the Indictment. Jury trial began on May 23, 2017 and the jury returned a verdict of
11 guilty as to both counts on May 26, 2017.

12 Petitioner was adjudged guilty in a judgment of conviction filed on May 5, 2018, wherein
13 Petitioner was adjudged guilty of Count 1, murder with use of a deadly weapon, and, Count 2,
14 robbery with use of a deadly weapon. On Count 1, Petitioner was sentenced to life with the
15 eligibility for parole after serving a minimum of twenty (20) years plus a consecutive term of two
16 hundred forty (240) months with a minimum parole eligibility of ninety-six months for the
17 deadly weapon enhancement. On Count 2 Petitioner was sentenced to a maximum of one
18 hundred eighty (180) months with a minimum parole eligibility of forty-eight months, plus a
19 consecutive term of one hundred twenty (120) months with a minimum parole eligibility of
20 forty-eight (48) for the deadly weapon enhancement, concurrent to Count 1. Petitioner was
21 given credit for four hundred seventy-five (475) days served in custody.

22 Trial counsel timely filed a Notice Of Appeal on February 6, 2018. Trial counsel
23 continued on as appellate counsel as well. Petitioner's direct appeal was denied on September
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25
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1 12, 2019. Current counsel was recently retained and files the instant Petition For Writ Of Habeas
2 Corpus (Postconviction).

3
4 II.

5 ISSUE PRESENTED

6 Was trial counsel (who was also appellate counsel) ineffective in his representation of
7 Petitioner?

8
9 III.

10 SUMMARY OF RELEVANT FACTS

11 During the discovery phase of the case, trial counsel informed Chief Deputy District
12 Attorney Marc DiGiacomo that he wanted to view the original SWAN video from the incident in
13 question. On or about February 16, 2017, trial counsel viewed the original SWAN video
14 surveillance in possession of LVMPD. The original surveillance video was in evidence at the
15 evidence vault and could only be accessed by law enforcement. At the time and date set for the
16 review, LVMPD Det. Bunn and Chief Deputy DA DiGiacomo presented the video to trial
17 counsel in the Grand Jury room. Trial counsel had no control of the video while it was played,
18 and law enforcement personnel controlled the surveillance video. Trial counsel was only shown
19 parts of the video.
20
21

22 During the trial, and when the video was placed into evidence, portions of the video that
23 were played for the jury appeared to be the same portions trial counsel had reviewed with law
24 enforcement and the State in the Grand Jury room. Crucially, in the State's Rebuttal, the State
25 presented two alleged segments of surveillance that trial counsel admittedly did not view prior to
26 the closing argument and that were not presented during the trial. This included video
27 surveillance of Petitioner purportedly having a lengthy "rap battle" outside the Top Notch with
28

1 the victim and another video of Petitioner showing off his handgun in the presence of the victim.
2 These two never-before seen portions of video substantially undercut the defense theory that the
3 victim was unaware that Petitioner was carrying a firearm the night of the shooting.
4

5 On direct appeal trial counsel argued that the State's conduct in presenting evidence during
6 closing arguments that was not previously identified to the defense undermined trial counsel's
7 opening statement, trial strategy, credibility and rendered the trial fundamentally unfair. In
8 denying his direct appeal, the Nevada Supreme Court held:

9
10 ...Ketchum contends for the first time on appeal that the State ambushed him
11 during closing argument with inculpatory video surveillance evidence that was
12 neither provided in discovery nor presented in the State's case-in-chief. But the
13 State did not withhold the evidence because the record shows that Ketchum had
14 pretrial access to the entire DVR system memorializing the night's events.
15 Further, the State playing video segments from those DVR systems during its
16 rebuttal closing argument was not plain warranting reversal because it appears
17 from the record that the entire video was admitted into evidence as a State exhibit
18 without objection, giving the jury access to view the segments Ketchum complains
19 of. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (providing for
20 plain-error review for unpreserved errors).

21 *Ketchum v. State*, 2019 Nev. Unpub. Lexis 998, 448 P.3d 574, 2019 WL 4392486.

22 IV.

23 STATEMENT OF APPLICABLE LAW

24 An accused has the right to effective assistance of counsel pursuant to the Sixth
25 Amendment to the United States Constitution, as well as the of the constitution of the State of
26 Nevada. The right to effective assistance of counsel attaches prior to a defendant's decision to
27 plead guilty. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763
28 (1970). The standard of review for "effective assistance of counsel" was enunciated by the U.S.
Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674
(1984), and requires the court to determine whether 1) counsel's representation fell below an

1 objective standard of reasonableness, and 2) whether there is a reasonable probability that, but
2 for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at
3 688-694. "Establishment of deficient performance requires a showing that counsel's
4 performance fell below an objective standard of reasonableness." *Lara v. State*, 120 Nev. 177,
5 180, 87 P.3d 528, 530 (2004), citing *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107
6 (1996). To satisfy the second element, a defendant must demonstrate prejudice by showing "a
7 reasonable probability that, but for counsel's errors, the result of the trial would have been
8 different." *Id.*, citing *Kirksey*, 112 Nev. at 988, 923 P.2d at 1107.

11 "The constitutional right to effective assistance of counsel extends to a direct appeal." *Id.*,
12 citing *Kirksey*, 112 Nev. at 987, 923P.2d at 1107. This court reviews a claim of ineffective
13 assistance of appellate counsel under the Strickland test. *Id.*, citing *Kirksey*, 112 Nev. at 998,
14 923 P.2d at 1113. "To establish prejudice based on the deficient assistance of appellate counsel,
15 the defendant must show that the omitted issue would have a reasonable probability of success
16 on appeal." *Id.*, citing *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114.

17 V.

18 ARGUMENT

19 A. Trial Counsel Was Ineffective In Multiple Ways In The Way 20 He Handled The Surveillance Video.

21 1. The Initial Viewing.

22 Trial counsel went to the Grand Jury room with Det. Bunn and Chief Deputy DA
23 DiGiacomo on or about February 16, 2017, to view the original surveillance video of the
24 incident. Trial counsel later reported that he was only shown parts of the video. This begs the
25 obvious question: why didn't he insist on viewing the original, unaltered video in its entirety?
26 This video was obviously the single most important piece of evidence in the State's arsenal. Yet
27 trial counsel left it to the *bona fides* of law enforcement and the chief prosecutor to be honest
28

1 with him? Surely, trial counsel could have subpoenaed a whole and complete copy of the video.
2 Trial counsel could have filed a motion for discovery pursuant to NRS 174.235 and/or *Brady v.*
3 *Maryland*, 373 U.S. 83, 86-88 (1963)? It appears trial counsel did neither. Trial counsel's
4 performance thus fell below an objective standard of reasonableness. *Strickland v. Washington*,
5 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *Lara v. State*, 120 Nev. 177, 180, 87 P.3d
6 528, 530 (2004), citing *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).
7

8 2. Failure To Review The Video In Preparation For Trial.

9
10 Eventually, the State did provide trial counsel with a copy of the entire video before trial.
11 The problem is that trial counsel apparently did not bother to watch it. Petitioner's defense
12 consisted entirely of self-defense: Petitioner shot the victim in self-defense when the victim tried
13 to rob him at gunpoint. Petitioner then immediately fled the scene because the Top Notch was
14 filled with the victim's friends and associates; he fled because he feared retribution from these
15 people. The defense's whole argument became completely thwarted by two unviewed portions
16 of video. In one portion of the video, Petitioner is seen showing off his handgun to a group of
17 men, including the victim, thus undercutting the defense's argument that the victim did not know
18 Petitioner was armed. In another portion, Petitioner is seen laughing with, and greeting others at
19 the gathering at Top Notch, including participating in a rap contest with the victim. This gutted
20 the defense theory that Petitioner was among strangers, many of whom were friends or associates
21 of the victim, so Petitioner fled the scene in order to avoid possible retribution.
22

23
24 Trial counsel admitted to being caught completely by surprise by these videos. Yet trial
25 counsel constructed Petitioner's entire defense on grounds that were completely discredited by a
26 few seconds of videotape. Surely a reasonably prudent attorney would have watched the video
27 in its entirety. Having discovered the incriminating evidence, a reasonably prudent attorney
28

1 would have altered or abandoned this defense before presenting it to a jury. Instead, due to trial
2 counsel's failure to properly review the video while preparing for trial, trial counsel prepared and
3 presented a defense theory that was doomed to fail from its inception. Thus, Petitioner has
4 demonstrated actual prejudice by showing "a reasonable probability that, but for counsel's errors,
5 the result of the trial would have been different." *Lara, Supra*, citing *Kirksey*, 112 Nev. at 988,
6 923 P.2d at 1107.

7 8 3. Failure To Object To Admittance Of Video Into Evidence And To Its Use In Rebuttal.

9
10 Trial counsel committed two critical errors in handling the State's presentation of the
11 surveillance video. The first error was not objecting to the State's motion to admit the
12 surveillance video. This was the State's most critical piece of evidence. It was critical for trial
13 counsel to attempt to keep it out and preserve the issue for appeal. Yet trial counsel allowed it in
14 without objection. The reason for this might very well be that since he didn't watch the whole
15 video prior to trial, he didn't realize just how damning it was to his defense. The Supreme Court
16 noted trial counsel's failure to object at trial, thus allowing the entire video into evidence, when it
17 affirmed Petitioner's conviction. *Ketchum, Supra*.

18
19 The second error occurred when trial counsel failed to object to the "surprise" portion of
20 the video played by the State in its Rebuttal. These two videos were not played in the State's
21 case-in-chief. Trial counsel could have objected that they were not in evidence and therefore
22 could not be used in Rebuttal. Trial counsel failed to preserve the issue on appeal. Of course,
23 had counsel objected, the State could have replied that the entire video, including the two
24 "surprise" segments, had already been admitted without objection from trial counsel. The two
25 "surprise" segments obviously destroyed Petitioner's defense, yet trial counsel made absolutely
26 no effort to keep them from the jury. Again, the Supreme Court noted this in its order affirming
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1 Petitioner's conviction.

2 Finally, trial counsel's failures to object placed Petitioner in a worse position for his
3 appeal. Failure to object at trial is generally considered a waiver of the issue on appeal and then
4 is reviewable only for plain error. *Valdez, Supra; Davis v. City of Reno*, 113 Nev. 207, 931 P.2d
5 207 (1997); *Guy v. State*, 108 Nev. 770, 839 P.2d 578 (1992); *Davis v. State*, 107 Nev. 600, 817
6 P.2d 1169 (1991). Again, Petitioner has demonstrated actual prejudice by showing "a reasonable
7 probability that, but for counsel's errors, the result of the trial would have been different." *Id.*,
8 citing *Kirksey*, 112 Nev. at 988, 923 P.2d at 1107.
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11 B. Trial Counsel Was Ineffective In His Preparation And
12 Execution Of The Cross-Examination Of Antoine Bernard.

13 Antoine Bernard was an acquaintance of Petitioner. On the night in question, Petitioner
14 was dropped off at the Top Notch by a friend. He saw Antoine Bernard at the club, and Antoine
15 Bernard offered to give him a ride home after they were done. He drove Petitioner away from
16 the scene after the shooting. Later, Antoine Bernard was arrested and charged as an accessory in
17 the killing of Ezekial Davis. At the start of the trial Antoine Bernard took a plea deal in
18 exchange for his testimony.
19

20 Antoine Bernard had given an interview to Det. Bunn during the investigation of the
21 shooting. He told Det. Bunn that he didn't hear or see anything. At trial he testified that he was
22 fiddling with the auxiliary cable to his car stereo when the shooting occurred and didn't see
23 anything. He did, however, say that he heard Petitioner something to the effect of "Give me my
24 shit" or "Give me your shit" right before the gunshot. Antoine Bernard told Det. Bunn that
25 Petitioner had no ill will or animosity that night towards the victim. At trial, however, Antoine
26 Bernard testified that he knew something was about to go down when he saw Petitioner and the
27
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1 victim walk out of the club together. Trial counsel also appeared to be unprepared when during
2 rebuttal the State presented a clip of the video surveillance wherein a man in a white shirt walks
3 up to Antoine Bernard as he waited in his car immediately before the shooting. The man leans in
4 and tells Bernard something. Bernard immediately moves the car closer to where Petitioner and
5 the victim were located, apparently driving up onto the curb. The shot is fired and Petitioner is
6 seen jumping into the car and they drive away. This video is suggestive of planning or
7 coordination. A reasonably prudent attorney would have anticipated this testimony and evidence
8 and prepared for it. Trial counsel did not.

11 CONCLUSION

12 Based on the foregoing, Petitioner Javar Ketchum respectfully request that his Petition For
13 Writ Of Habeas Corpus be granted, that his conviction be reversed, and a new trial ordered.

14 Respectfully SUBMITTED this 11th day of September, 2020.

15
16 /s/Craig Mueller, Esq.
17 CRAIG A. MUELLER, ESQ.
18 Nevada Bar No. 4703
19 CRAIG A. MUELLER & ASSOCIATES
20 723 S. Seventh Street
21 Las Vegas, NV 89101
702.382.1200
Facsimile: (702) 637-4817
receptionist@craigmuellerlaw.com
Attorney For Petitioner Ketchum

22 CERTIFICATE OF ELECTRONIC TRANSMISSION

23 I hereby certify that service of the above and foregoing was made on the 11th day of
24 September, 2020, by electronic transmission through the District Court's Odyssey efile system
25 to:

26 STEVE WOLFSON
27 Clark County District Attorney

28 By: /s/ Rosa Ramos
Office Manager, Craig A. Mueller & Associates

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Javar Ketchum, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

Case No.: A-20-821316-W

Department 17

NOTICE OF CHANGE OF CASE NUMBER

NOTICE IS HEREBY GIVEN that pursuant to NRS 34.730 the Petition for Writ of Habeas Corpus filed into C-16-319714-1 has been filed into the Petitioner's existing case number A-20-821316-W currently assigned to Judge Michael Villani. Please include the new case number on all future filings. The Petition for Writ of Habeas Corpus in the above entitled matter is set for hearing as follows:

Date: 11-6-20 at 10:15am

Location: RJC Courtroom 11A

200 Lewis Ave

Las Vegas, NV 89155

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Allison Behrhorst

Allison Behrhorst

Deputy Clerk of the Court

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CERTIFICATE OF SERVICE

I hereby certify that this 16th day of September, 2020

☒ The foregoing Notice of Change of Case Designation was electronically served to all registered parties for case number A-20-821316-W.

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

Heather S. Hume

CLERK OF THE COURT

FFCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JOHN NIMAN
Deputy District Attorney
Nevada Bar #14408
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

JAVAR KETCHUM,
#1836597

Petitioner,

-vs-

THE STATE OF NEVADA,
Respondent.

CASE NO: A-20-821316-W
C-16-319714-1
DEPT NO: XVII

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER**

DATE OF HEARING: MARCH 12, 2021
TIME OF HEARING: 9:00AM

THIS CAUSE having come on for hearing before the Honorable MICHAEL VILLANI, District Judge, on the 12th day of March, 2021, the Petitioner not being present, REPRESENTED BY JOSE CARLOS PALLARES, ESQ., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through JOHN GIORDANI, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **STATEMENT OF THE CASE**

3 On November 30, 2016, the State charged Javar Ketchum (hereinafter "Petitioner") by
4 way of Indictment with one count each of Murder with a Deadly Weapon and Robbery with a
5 Deadly Weapon. On December 30, 2016, Petitioner filed a pre-trial Petition for Writ of Habeas
6 Corpus and Motion to Dismiss. The State filed its Return on January 4, 2017. Petitioner filed
7 a Reply on January 9, 2017. The district court denied the Petition on February 17, 2017.

8 On March 8, 2017, Petitioner filed a Motion in Limine, seeking to admit character
9 evidence of the victim, Ezekiel Davis. On May 9, 2017, the State filed a Motion in Limine,
10 asking that the district court preclude prior specific acts of violence by the murder victim. On
11 May 18, 2017, the State filed a Supplement to its Motion in Limine. The district court held a
12 Petrocelli Hearing on May 19, 2017, determining that Petitioner could only bring in opinion
13 testimony regarding the victim's character and that witnesses were not to elaborate on that
14 opinion.

15 On May 22, 2017, Petitioner's five-day jury trial commenced. At the end of the fifth
16 day of trial, the jury found Petitioner guilty of both charges. Following the verdict, Petitioner
17 entered into a stipulation and order, waiving the penalty phase and agreeing to a sentence of
18 life in prison with parole eligibility after twenty years, with the sentences for the deadly
19 weapon enhancement and the count of robbery with use of a deadly weapon to be argued by
20 both parties.

21 On June 2, 2017, Petitioner filed a Motion for New Trial pursuant to NRS 176.515 (4).
22 The State filed its Opposition on September 9, 2017. Petitioner filed a Reply on September 27,
23 2017 and a Supplement thereto on September 28, 2017. The district court, finding that
24 Petitioner's disagreement with the court's evidentiary rulings was not a basis for a new trial,
25 denied the Motion on October 17, 2017. Petitioner was adjudicated that same day. However,
26 the defense requested additional time to handle sentencing matters.

27 According to the stipulation, on February 1, 2018, the district court sentenced Petitioner
28 to an aggregate of life in the Nevada Department of Corrections with minimum parole

1 eligibility after twenty-eight (28) years, with four hundred seventy- five (475) days credit for
2 time served. The Judgment of Conviction was filed on February 5, 2018.

3 Petitioner filed a Notice of Appeal on February 6, 2018. On September 12, 2019, the
4 Nevada Supreme Court affirmed Petitioner's conviction. Remittitur issued on October 11,
5 2019.

6 On September 11, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus
7 (Post-Conviction) (hereinafter "Petition"). The State filed its Response on December 16, 2020.
8 Petitioner filed his Reply on February 9, 2021. Following a hearing on March 12, 2021, this
9 Court finds and concludes as follows:

10 **STATEMENT OF THE FACTS**

11 At 6:22 a.m. on September 25, 2016, Officers Brennan Childers and Jacquelyn Torres
12 were dispatched to a shooting at 4230 S. Decatur Blvd, a strip mall with several businesses
13 including a clothing store. Jury Trial Transcript, Day 2, ("JTT Day 2") May 23, 2017, at 20-
14 23, 29-32. When police arrived, they found a man—later identified as Ezekiel Davis
15 ("Ezekiel" or "the victim")—upon whom another man was performing chest compressions.
16 Id. at 22-23, 32. Ezekiel was not wearing pants. Id. at 32. Several other people were in the
17 parking lot, and none of the businesses appeared opened. Id. at 22-23. Ezekiel was transported
18 to the hospital but did not survive a single gunshot wound to the abdomen. Id. at 66. Trial
19 testimony from Ezekiel's fiancé, Bianca Hicks, and from Detective Christopher Bunn revealed
20 that missing from Ezekiel's person was a belt which had a gold "M" buckle and a gold watch.
21 Jury Trial, Day 3, ("JTT Day 3") May 24, 2017, at 17, 122; Jury Trial Transcript, Day 4, ("JTT
22 Day 4") May 25, 2017, at 86, 90-92.

23 Top Knotch, the clothing store in front of which Ezekiel was shot, doubles as an after-
24 hours club. JTT Day 2, at 9. Ezekiel's friend Deshawn Byrd—the one who had given him CPR
25 in an attempt to save his life—testified at trial that sometime after approximately 3:00 a.m.,
26 Ezekiel arrived at the club. Id. at 10-11. Byrd testified there was no indication that anything
27 had happened in the club which led to any sort of confrontation. Id. at 10-14.

28 ///

1 Detective Bunn testified at trial that the day of the murder, as detectives and crime scene
2 analysts were documenting the scene, three individuals—later identified as Marlo Chiles,
3 Roderick Vincent, and Samantha Cordero—exited Top Knotch. JTT Day 3, at 42-67. Chiles
4 was the owner of Top Knotch, and Vincent owned a studio inside of Top Knotch. Id. at 68.
5 Vincent denied that there were any DVRs of the surveillance video for Top Knotch or the
6 recording studio. Id. at 73. Detective Bunn had noted a camera, however. Id. at 69. A
7 subsequent search warrant on the vehicles in the parking lot located two (2) DVR's of the
8 surveillance footage from Top Knotch and the studio in Vincent's car. Id. at 58-59, 63-64.

9 A review of the video footage, extensive portions of which were played at trial,
10 demonstrated that Petitioner entered the club at about 2:00 a.m. Id. at 91-92. At 3:25 a.m.,
11 Chiles, Vincent, Antoine Bernard, and several other people were in the back area of the
12 business when a person in a number 3 jersey, later identified as Petitioner, produced a semi-
13 automatic handgun from his pants and showed it to the group. Id. at 93-94.

14 The video also showed that at about 6:14 a.m., Petitioner and Ezekiel exited arm-in-
15 arm out the front of Top Knotch. Id. at 97. At that point, there was still a watch on Ezekiel's
16 wrist. Id. at 98. The two walked to the front of Bernard's black vehicle and appeared to
17 converse for a short time, then walked by the driver's side of Bernard's vehicle, where they
18 left camera view. Id. at 99-102. At about 6:16 a.m., the people on video all appeared to have
19 their attention drawn to the area where Petitioner and Ezekiel were. Id. at 99. Petitioner then
20 entered the view of the camera, removing Ezekiel's belt from his body while holding the gun
21 in his other hand. Id. at 101-102. Bernard also testified at trial that he saw Petitioner take
22 Ezekiel's belt. Id. at 20. The video showed that Petitioner approached Bernard's car, opened
23 the passenger door, placed the belt on the front seat, and returned to the area of Ezekiel's body.
24 Id. at 102. Petitioner returned to Bernard's vehicle, entered the passenger seat of the vehicle
25 and the vehicle fled the area. Id. at 102.

26 Despite contact with several witnesses in the parking lot including Chiles and Vincent,
27 the police had no information regarding the identity of the shooter. Id. at 107. After further
28 investigation, the shooter was identified as Petitioner and a warrant for his arrest was issued.

1 Id. at 107. Petitioner was apprehended at a border control station in Sierra Blanca, Texas,
2 whereupon he was brought back to Nevada to face charges. Id. at 108.

3 **AUTHORITY**

4 **I. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL**

5 Petitioner claims that counsel was ineffective “in multiple ways in the way he handled
6 the surveillance video.” Petition, at 6. Specifically, Petitioner claims that counsel was
7 ineffective in three ways: 1) the initial viewing, 2) failing to review the video in preparation
8 for trial, and 3) failing to object to the State admitting the video and using it in rebuttal.
9 Petition, at 6-9.

10 The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal
11 prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his
12 defense.” The United States Supreme Court has long recognized that “the right to counsel is
13 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,
14 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
15 (1993).

16 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
17 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of
18 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865
19 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel’s
20 representation fell below an objective standard of reasonableness, and second, that but for
21 counsel’s errors, there is a reasonable probability that the result of the proceedings would have
22 been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State
23 Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-
24 part test). “[T]here is no reason for a court deciding an ineffective assistance claim to approach
25 the inquiry in the same order or even to address both components of the inquiry if the defendant
26 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

27 The court begins with the presumption of effectiveness and then must determine
28 whether the defendant has demonstrated by a preponderance of the evidence that counsel was

1 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
2 does not mean errorless counsel, but rather counsel whose assistance is “[w]ithin the range of
3 competence demanded of attorneys in criminal cases.” Jackson v. Warden, 91 Nev. 430, 432,
4 537 P.2d 473, 474 (1975).

5 Counsel cannot be ineffective for failing to make futile objections or arguments. See
6 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
7 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
8 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
9 (2002).

10 Based on the above law, the role of a court in considering allegations of ineffective
11 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
12 whether, under the particular facts and circumstances of the case, trial counsel failed to render
13 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
14 (1978). This analysis does not mean that the court should “second guess reasoned choices
15 between trial tactics nor does it mean that defense counsel, to protect himself against
16 allegations of inadequacy, must make every conceivable motion no matter how remote the
17 possibilities are of success.” Id. To be effective, the constitution “does not require that
18 counsel do what is impossible or unethical. If there is no bona fide defense to the charge,
19 counsel cannot create one and may disserve the interests of his client by attempting a useless
20 charade.” United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

21 “There are countless ways to provide effective assistance in any given case. Even the
22 best criminal defense attorneys would not defend a particular client in the same way.”
23 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
24 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
25 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
26 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel’s
27 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s
28 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

1 Even if a defendant can demonstrate that his counsel's representation fell below an
2 objective standard of reasonableness, he must still demonstrate prejudice and show a
3 reasonable probability that, but for counsel's errors, the result of the trial would have been
4 different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
5 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability
6 sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-
7 89, 694, 104 S. Ct. at 2064-65, 2068).

8 The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the
9 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of
10 the evidence." Means, 120 Nev. at 1012, 103 P.3d at 33. Furthermore, claims of ineffective
11 assistance of counsel asserted in a petition for post-conviction relief must be supported with
12 specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v.
13 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not
14 sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant
15 part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure
16 to allege specific facts rather than just conclusions may cause your petition to be dismissed."
17 (emphasis added).

18 **A. Counsel was not ineffective in the initial viewing of the surveillance video**

19 First, Petitioner alleges that counsel was ineffective in his initial viewing of the
20 surveillance video because counsel allegedly "reported he was only shown parts of the video."
21 Petition, at 6. It must be noted that Petitioner has utterly failed to cite anything in the record
22 or otherwise present any evidence supporting this claim. Thus, this is a bare and naked claim.
23 Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner is simply complaining that counsel did
24 not view the video in its entirety without support. Additionally, the Nevada Supreme Court
25 already found that counsel had access to the entire surveillance video. Order of Affirmance,
26 No. 75097, at 3. The State cannot meaningfully respond to such a bare and naked claim, and
27 to the extent Petitioner is claiming that counsel did not have access to the entire surveillance
28 video, that claim is barred by law of the case. Therefore, this claim is without merit.

B. Counsel was not ineffective for failing to review the surveillance video

Second, Petitioner similarly alleges that counsel failed to review the surveillance video in preparation of trial. Petition, at 7-8. Petitioner claims that trial counsel “admitted to being completely caught by surprise by these videos.” Petition, at 7. Petitioner’s claim that counsel “admitted to being completely caught by surprise by these videos” is wholly unsupported, and counsel’s supposed “admission” appears nowhere in the record. Petitioner simply assumes that counsel “did not bother to watch” the surveillance videos. But, once again, Petitioner has failed to cite anything in the record supporting this claim. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner provides no reason to think that counsel failed to view the entire videotape when it is an established fact that counsel had access to that tape. More importantly, in his Opening Brief for Petitioner’s direct appeal, trial counsel admitted that he viewed the surveillance video. Appellant’s Opening Brief, August 29, 2018, No. 75097, at 46. Therefore, this claim is without merit.

Even if counsel did not review the portions of the surveillance video that the State played in rebuttal, he cannot demonstrate how this prejudiced. There was overwhelming evidence of Petitioner’s guilt in the surveillance video—portions of the surveillance video that counsel clearly knew about as he cross-examined witnesses regarding it. The surveillance video showed that Petitioner and the victim were seen on video walking through the club arm-in-arm mere minutes before Petitioner murdered and robbed the victim. Jury Trial Transcript, Day 3, May 24, 2017, at 97. Petitioner robbing the victim was literally caught on the surveillance video. Id. at 17, 100-102. Petitioner could be seen very clearly ripping the expensive belt from the victim while the victim lay dying. Id. The victim’s property—including his watch—was also missing from his body. Id. at 17, 122; Jury Trial Transcript, Day 4, May 25, 2017, at 86, 90-92. Bernard also testified at trial that he saw Petitioner take Ezekiel’s belt. Jury Trial Transcript, Day 3, May 24, 2017, at 20. The surveillance video showed that Petitioner approached Bernard’s car, opened the passenger door, placed the belt on the front seat, and returned to the area of the victim’s body. Id. at 102. Petitioner returned to Bernard’s vehicle, entered the passenger seat of the vehicle and the vehicle fled the area. Id.

1 Petitioner does not present any alternative defense that would have worked better, or otherwise
2 explain what counsel could have done differently. Therefore, Petitioner cannot demonstrate
3 how counsel was ineffective.

4 **C. Counsel was not ineffective for failing to object to the surveillance video**

5 Third, Petitioner argues that counsel was ineffective for failing to object to the State
6 admitting portions of the surveillance video in the State's rebuttal. Petition, at 8-9. However,
7 Petitioner fails to explain on what basis counsel should have moved to exclude the portions of
8 the video. The surveillance video in its entirety was admitted into evidence, so any objection
9 to playing portions of the surveillance video in rebuttal would have been overruled. There is
10 no legal basis establishing a valid objection to the admission of the video, proper foundation
11 was established, and there was no argument during trial or in the Petition stating the video was
12 inadmissible evidence. Because counsel cannot be ineffective for failing to make frivolous
13 objections, counsel here cannot be ineffective for failing to object to the surveillance video in
14 rebuttal. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, this claim is without merit.

15 **D. Counsel was not ineffective for failing to object to the surveillance video**

16 Lastly, Petitioner alleges counsel was ineffective because it put Petitioner in a worse
17 position for his appeal. Petition, at 9. Petitioner complains about appellate counsel's deficient
18 performance on appeal. Id.

19 There is a strong presumption that appellate counsel's performance was reasonable and
20 fell within "the wide range of reasonable professional assistance." See United States v.
21 Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at
22 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set
23 forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order
24 to satisfy Strickland's second prong, the defendant must show that the omitted issue would
25 have had a reasonable probability of success on appeal. Id.

26 The professional diligence and competence required on appeal involves "winnowing
27 out weaker arguments on appeal and focusing on one central issue if possible, or at most on a
28 few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In

1 particular, a “brief that raises every colorable issue runs the risk of burying good arguments
2 ... in a verbal mound made up of strong and weak contentions.” Id. at 753, 103 S. Ct. at 3313.
3 “For judges to second-guess reasonable professional judgments and impose on appointed
4 counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very
5 goal of vigorous and effective advocacy.” Id. at 754, 103 S. Ct. at 3314.

6 Here, objecting to the surveillance video in rebuttal would not have changed the
7 outcome of Petitioner’s appeal because there was no basis to exclude the surveillance video or
8 prevent the State from playing portions in rebuttal. As discussed supra, Section I.C., the
9 surveillance video was admitted at trial, and it would have been futile for counsel to object to
10 it in rebuttal. Counsel cannot be ineffective for failing to object to the surveillance video in
11 rebuttal. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Because trial counsel did not have any
12 reason to object, there is no indication that an objection would have put appellate counsel in
13 any better position.

14 In his Opening Brief for Petitioner’s direct appeal, appellate counsel raised the issue
15 that he could not “control the video” when he viewed it at the evidence vault with law
16 enforcement. Appellant’s Opening Brief, August 29, 2018, No. 75097, at 46. However, he was
17 given a copy during discovery and admitted to viewing the surveillance video on appeal. Id.
18 Furthermore, the Nevada Supreme Court found that counsel had access to the entire
19 surveillance video. Order of Affirmance, No. 75097, at 3. Therefore, there was not any basis
20 for trial counsel to object to the surveillance video being played during rebuttal, and appellate
21 counsel found not have raised any stronger argument on appeal. As such, this claim is without
22 merit, and Petitioner cannot demonstrate how counsel was ineffective.

23 **II. COUNSEL WAS NOT INEFFECTIVE IN HIS PREPARATION AND**
24 **CROSS-EXAMINATION OF ANTOINE BERNARD**

25 Petitioner alleges that counsel was ineffective in his preparation and execution of the
26 cross-examination of Antoine Bernard. Petition, at 9-10. Petitioner raises this claim without
27 any citations to the record and fails to explain what counsel should have done differently that

28 ///

1 would have changed the outcome at trial. As such, this claim is belied by the record and
2 suitable for only summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225.

3 Although Petitioner chose not to cite to any lawful authority, construed liberally, the
4 State assumes he is arguing that there are discrepancies with Bernard's initial police statement
5 and what he testified to at trial. It is important to note that Bernard was originally charged as
6 a co-defendant in the instant case. Indictment, November 30, 2016, at 1-5. Thus, the State is
7 assuming that Petitioner is complaining regarding his initial police statement when he was a
8 suspect, and his testimony in front of the jury against Petitioner when his case was resolved.

9 Petitioner does not articulate how counsel was ineffective in his cross-examination, or
10 explain to this Court what counsel should have done differently that would have changed the
11 outcome of the trial. Petitioner slightly discusses the discrepancies in Bernard's testimony,
12 then, once again, argues that counsel was unprepared for the surveillance video being
13 introduced during rebuttal. Petition, at 9-10. As discussed supra, Section I., Petitioner's claims
14 that counsel was ineffective for not being prepared for the surveillance video in rebuttal is
15 without merit.

16 Additionally, because Petitioner does not even cite to counsel's cross-examination of
17 Bernard at trial, he overlooks counsel questioning him regarding his initial statement to police.
18 Jury Trial Transcript, Day 3, May 24, 2017, at 26-31. In fact, counsel even got Bernard to
19 admit that he had omitted information from the police in his original statement to them. Id. at
20 31. Then on recross-examination, counsel again got Bernard to admit that his testimony at trial
21 was different than his initial statement to the police. Id. at 36-37. The cross-examination of
22 Bernard brought up his statements to the police were incomplete or had omissions and he was
23 confronted with the differences in his trial testimony and his statements to the police, therefore
24 neither prong of Strickland has been established. As such, counsel was not ineffective in his
25 cross-examination of Antoine Bernard and this Petition is denied.

26 Lastly, Petitioner raised a new claim for the first time at the oral argument on the
27 Petition that trial counsel should have called a psychologist to testify as to his state of mind as
28 a robbery victim. He also requested an evidentiary hearing on this new claim. This Court

declined to consider the claim or have an evidentiary hearing on the claim because it was not raised in the underlying instant Petition. As such, an evidentiary hearing on this new claim was not warranted.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

Dated this 31st day of March, 2021



E28 0E3 17F9 EE2
Michael Villani
District Court Judge

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

BY /s/ JOHN NIMAN
JOHN NIMAN
Deputy District Attorney
Nevada Bar #14408

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the above and foregoing, was made this 31st day of March, 2021, by Electronic Filing to:

CRAIG MULLER, ESQ.

Email: receptionist@craigmullerlaw.com

By: /s/ Janet Hayes
Secretary for the District Attorney's Office

16F16375A/JN/bs/jh/MVU

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Javar Ketchum, Plaintiff(s)

CASE NO: A-20-821316-W

7 vs.

DEPT. NO. Department 17

8 Nevada State of, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 3/31/2021

15 Craig Mueller craig@craigmuellerlaw.com

16 Craig Mueller receptionist@craigmuellerlaw.com

17 District Attorney motions@clarkcountyda.com

18 John Niman JOHN.NIMAN@CLARKCOUNTYDA.COM
19
20
21
22
23
24
25
26
27
28

AO000716

Steven D. Grierson

JAVAR KETCHUM #1192727
H.D.S.P. / TB-19
P.O. BOX 650
INDEPENDENCE, NEVADA
89070
IN PROPER PERSON

Electronically Filed
May 06 2021 11:49 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

DISTRICT COURT
CLARK COUNTY, NEVADA

—

JAVAR KETCHUM,
PETITIONER,

CASE No.: A-20-821316-W
DEPT. No.: 17

VS.

NOTICE OF APPEAL

THE STATE OF NEVADA,
RESPONDENT. /

COMES NOW, PETITIONER, JAVAR KETCHUM, IN
HIS PROPER PERSON AND FILES THE INSTANT NOTICE
OF APPEAL. THIS NOTICE OF APPEAL IS MADE
IN GOOD FAITH; FROM THE DISTRICT COURT'S
SUMMARY DENIAL OF PETITIONER'S: NRS CHAPTER 34
PETITION FOR WRIT OF HABEAS CORPUS, AND THE
DATE OF: MARCH 12, 2021.

THEREFORE, PETITIONER SEEKS TO APPEAL THE
DENIAL OF THE PETITION FOR WRIT OF HABEAS

1.

RECEIVED

APR 29 2021

CLERK OF THE COURT

CORPUS TO THE NEVADA SUPREME COURT.

DATE: THE 25TH DAY OF APRIL, 2021.

RESPECTFULLY SUBMITTED:

Javar Ketum

JAVAR KETUM #1192727

P.O. BOX 650 / H.D.S.P.

INDIAN SPRINGS, NEVADA
89070

IN PROPER PERSON

CERTIFICATE OF SERVICE

I, JAVAR KETUM, DO HEREBY SWEAR AND
DEPOSE, UNDER PENALTY OF PERJURY, PURSUANT
TO NRS ~~208~~ 8.165; THAT I DID MAIL THE ORIGINAL
COPY OF THIS NOTICE OF APPEAL TO THE COURT
CLERK; POSTAGE PREPAID AT HIGH DESERT STATE
PRISON MAILROOM; DATE: APRIL 25TH, 2021

SIGNED BY:

Javar Ketum

JAVAR KETUM #1192727

JAVAR KETCHUM #1192727
H.D.S.P./TB-19
P.O. Box 650
INDIAN SPRINGS, NEVADA
89070
IN PROPER PERSON

DISTRICT COURT
CLARK COUNTY, NEVADA

JAVAR KETCHUM,
PETITIONER,

CASE NO.: A-21-821316-W

DEPT. NO.: 17

VS.

STATE OF NEVADA,

JUDICIAL NOTICE

RESPONSE.

COMES NOW PETITIONER, JAVAR KETCHUM, IN HIS PROPER PERSON; AND GIVES: JUDICIAL NOTICE TO THIS COURT, THAT PETITIONER HAS FILED HERELWITH, AN APPROPRIATE: NOTICE OF APPEAL; TO APPEAL THE COURTS: MARCH 12, 2021; DECISION OF PETITIONER'S: NRS CHAPTER 34 PETITION.

PETITIONER ALSO BRINGS JUDICIAL NOTICE, TO INFORM THIS COURT THAT PETITIONER FILED A: MOTION FOR RECONSIDERATION; TO BE HEARD BY THIS COURT ON THE DATE OF: MAY 4TH, 2021. IN SUPPORT OF THE MOTION FOR RECONSIDERATION; PETITIONER HAS FILED:

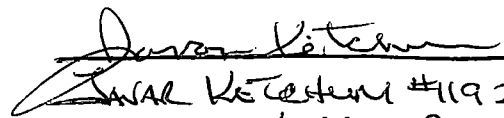
ADDITIONAL MOTIONS, DOCUMENTS, AFFIDAVITS, AND PAPERS; INCLUDING A MOTION TO CONTINUE THE MAY 4TH, 2021 HEARING, IN ORDER FOR THIS COURT TO HEAR SAID PLEADINGS. IN.

AND THAT, IF THIS COURT DENIES THE MOTION FOR RECONSIDERATION, PETITIONER SEEKS TO APPEAL ALL DOCUMENTS RELEVANT TO THE NEVADA SUPREME COURT.

NOTICE OF APPEAL HAS BEEN GIVEN.

DATE: APRIL 25TH, 2021.

SIGNED BY:

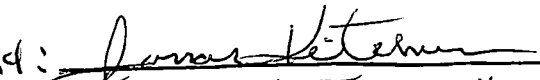

JAMAR KETCHEM #1192727
H.D.S.P. / TB-19
P.O. BOX 650
INDIAN SPRINGS, NEVADA

89070

IN PROPER PERSON

CERTIFICATE OF SERVICE:

I, JAMAR KETCHEM, DO HEREBY SWEAR AND DEPOSE, UNDER PENALTY OF PERJURY, THAT I DID MAIL A TRUE AND CORRECT COPY OF THE DISCOT: JUDICIAL NOTICE TO THE COURT CLERK; POSTAGE PREPAID AT H.D.S.P. MAIL ROOM; DATED: THIS 25TH DAY OF APRIL, 2021.

BY: 
JAMAR KETCHEM #1192727

Javar Ketchum
H.D.S.P #1192727

P.O.Box 650
Indian Springs, NV 89070

LAS VEGAS NV 890

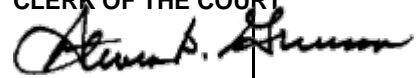
26 APR 2021 PM 3 L



clerk of court
Regional Justice Center
200 Lewis Ave
Las Vegas, NV 89101

AO000721

000000-10100



1 ASTA

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

9
10 JAVAR KETCHUM,

11 Plaintiff(s),

12 vs.

13 THE STATE OF NEVADA,

14 Defendant(s),

Case No: A-20-821316-W

Dept No: XVII

15
16
17 **CASE APPEAL STATEMENT**

18 1. Appellant(s): Javar Ketchum

19 2. Judge: Michael Villani

20 3. Appellant(s): Javar Ketchum

21 Counsel:

22 Javar Ketchum #1192727
23 P.O. Box 650
24 Indian Springs, NV 89070

25 4. Respondent (s): The State of Nevada

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Ave.
Las Vegas, NV 89155-2212

1 5. Appellant(s)'s Attorney Licensed in Nevada: N/A
2 Permission Granted: N/A

3 Respondent(s)'s Attorney Licensed in Nevada: Yes
4 Permission Granted: N/A

5 6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

6 7. Appellant Represented by Appointed Counsel On Appeal: N/A

7 8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
8 **Expires 1 year from date filed

9 Appellant Filed Application to Proceed in Forma Pauperis: No
10 Date Application(s) filed: N/A

11 9. Date Commenced in District Court: September 11, 2020

12 10. Brief Description of the Nature of the Action: Civil Writ

13 Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus

14 11. Previous Appeal: No

15 Supreme Court Docket Number(s): N/A

16 12. Child Custody or Visitation: N/A

17 13. Possibility of Settlement: Unknown

18 Dated This 30 day of April 2021.

19 Steven D. Grierson, Clerk of the Court

20 /s/ Amanda Hampton

21 Amanda Hampton, Deputy Clerk
22 200 Lewis Ave
23 PO Box 551601
24 Las Vegas, Nevada 89155-1601
25 (702) 671-0512

26 cc: Javar Ketchum
27
28

CASE SUMMARY

CASE NO. A-20-821316-W

Javar Ketchum, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

§
§
§
§
§
§

Location: **Department 17**
 Judicial Officer: **Villani, Michael**
 Filed on: **09/11/2020**
 Cross-Reference Case Number: **A821316**
 Defendant's Scope ID #: **1836597**

CASE INFORMATION

Related Cases

C-16-319714-1 (Writ Related Case)

Case Type: **Writ of Habeas Corpus**

Statistical Closures

03/31/2021 Other Manner of Disposition

Case Status: **03/31/2021 Closed**

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number A-20-821316-W
 Court Department 17
 Date Assigned 09/11/2020
 Judicial Officer Villani, Michael

PARTY INFORMATION

Plaintiff **Ketchum, Javar**

Lead Attorneys

Pro Se

Defendant **Nevada State of**

Wolfson, Steven B
Retained
 702-671-2700(W)


DATE

EVENTS & ORDERS OF THE COURT

INDEX

EVENTS


09/11/2020

 Petition for Writ of Habeas Corpus
 Filed by: Plaintiff Ketchum, Javar
Petition for Post Conviction Writ of Habeas Corpus


09/16/2020

 Notice of Change
Notice of Change of Case Number and Hearing


12/16/2020

 Response
 Filed by: Defendant Nevada State of
State's Response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction)


01/11/2021

 Motion
 Filed By: Plaintiff Ketchum, Javar
Notice of Motion and Motion to Continue Reply Brief Deadline and Hearing Date

01/13/2021

 Clerk's Notice of Hearing
Clerk's Notice of Hearing

02/09/2021


 Reply
 Filed by: Plaintiff Ketchum, Javar

CASE SUMMARY
CASE NO. A-20-821316-W

Reply to State's Response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction)

- 03/31/2021  Motion to Reconsider
Filed By: Plaintiff Ketchum, Javar
Motion for Reconsideration, or in the Alternative Motion for Rehearing of Petitioner's NRS Chapter 34 Petition
- 03/31/2021  Clerk's Notice of Hearing
Notice of Hearing
- 03/31/2021  Findings of Fact, Conclusions of Law and Order
Filed By: Defendant Nevada State of
Finding of Fact, conclusion of Law and Order
- 04/05/2021  Notice of Entry of Findings of Fact, Conclusions of Law
Filed By: Defendant Nevada State of
Notice of Entry of Findings of Fact, Conclusions of Law and Order
- 04/23/2021  Motion
Filed By: Plaintiff Ketchum, Javar
Counsel's Notice of Motion and Motion to Withdraw as Attorney of Record
- 04/23/2021  Clerk's Notice of Hearing
Clerk's Notice of Hearing
- 04/27/2021  Opposition to Motion
Filed By: Defendant Nevada State of
State's Opposition to Petitioner's Motion for Reconsideration or in the Alternative Motion for Rehearing of Petitioner's NRS Chapter 34 Petition
- 04/29/2021  Notice of Appeal
Notice of Appeal
- 04/30/2021  Case Appeal Statement
Filed By: Plaintiff Ketchum, Javar
Case Appeal Statement

HEARINGS

- 11/06/2020  **Petition for Writ of Habeas Corpus (10:15 AM)** (Judicial Officer: Villani, Michael)
11/06/2020, 03/12/2021
Matter Heard;
Denied;
Journal Entry Details:

Defendant not present. Court noted it had reviewed all of the pleadings filed. Mr. Pallares stated he was requesting an Evidentiary Hearing on the issue that trial counsel should have called a psychologist to testify as to his state of my mind as a robbery victim, as the Defendant claimed to be a robbery victim by the victim of the shooting. Court noted it can only address the Petition in front of it and further noted the Petition brought up the issues of trial counsel failing to view the video, failing to object to the admission of the video, and ineffective cross-examination of Mr. Bernard. Upon Court's inquiry, Mr. Pallares stated trial counsel had no access to the video and the inculpatory parts were not presented during trial. Upon Court's inquiry, Mr. Pallares indicated there was a lack of foundation and a violation of Brady that trial counsel was not shown the video, however trial counsel failed to view the video once it was given to him in its entirety. Mr. Pallares stated the ineffective cross-examination claim occurred when trial counsel failed to bring up the differences in Mr. Bernard's statements to police and his testimony at trial. Mr. Giordani stated the Strickland standard is very clear and

CASE SUMMARY
CASE NO. A-20-821316-W

noted Mr. Woolridge was very effective and worked with what he had. Mr. Giordani further stated bringing up a Brady claim was inappropriate and advised Mr. Woolridge had full access to the video prior to trial, therefore there would have been no legal basis to object to the video. Mr. Giordani noted Mr. Ketchum testified and gave a claim of self defense. Court noted it had reviewed the Appellant's Opening Brief and it was asserted trial counsel watched the entire video. Court FINDS no legal basis establishing a valid objection to the admission of the video, proper foundation was established, there was no argument during trial or in the Petition stating the video was inadmissible evidence, the cross-examination of Mr. Bernard brought up his statements to the police were incomplete or had omissions and he was confronted with the differences in his trial testimony and his statements to the police, therefore neither prong of Strickland has been established. COURT ADOPTED the Procedural History as set forth by the State. Court noted it was difficult to confirm the allegations as there were no citations in the Petition or Reply Brief. COURT ORDERED, Petition DENIED and DIRECTED the State to prepare the Findings of Facts and Conclusions of Law; Status Check SET. Court stated the Status Check date would be vacated once that document was filed. NDC 4/1/2021 10:00 AM STATUS CHECK: FINDINGS OF FACTS AND CONCLUSIONS OF LAW;

Matter Heard;

Denied;

Journal Entry Details:

Court noted it had received the Petition and stated a briefing schedule needed to be set. COURT ORDERED, Briefing Schedule SET as follows: State's Return due by December 18, 2020; Petitioner's Reply due by January 15, 2021; and hearing SET. NDC 2/3/2021 9:00 AM PETITION FOR WRIT OF HABEAS CORPUS;

01/26/2021



Motion (8:30 AM) (Judicial Officer: Villani, Michael)

Defendant's Motion to Continue Reply Brief Deadline and Hearing Date

Granted;

Journal Entry Details:

Defendant not present. Mr. Mueller stated a previous appointment to meet with the Defendant was canceled and a new appointment has been scheduled for February 8th, therefore he requested the reply brief be due on that date and the hearing be continued. COURT ORDERED, Motion GRANTED, Reply Brief due 2/8/2021 and Hearing on Petition VACATED and RESET. NDC 3/12/21 8:30 AM PETITION FOR WRIT OF HABEAS CORPUS;

04/01/2021



Status Check: Status of Case (10:00 AM) (Judicial Officer: Villani, Michael)

Status Check: Findings of Facts, Conclusions of Law and Order

Off Calendar;

Journal Entry Details:

Court noted the Findings of Facts and Conclusions of Law were filed on March 31, 2021. COURT ORDERED status check OFF CALENDAR.;

05/04/2021

Motion (8:30 AM) (Judicial Officer: Villani, Michael)

Plaintiff's - Motion for Reconsideration, or in the Alternative Motion for Rehearing of Petitioner's NRS Chapter 34 Petition

05/04/2021

Motion to Withdraw as Counsel (8:30 AM) (Judicial Officer: Villani, Michael)

Counsel's Notice of Motion and Motion to Withdraw as Attorney of Record

05/25/2021

Status Check: Status of Case (10:00 AM) (Judicial Officer: Villani, Michael)

Status Check: Order

A-20-821316-W
Dept. XVII

DISTRICT COURT CIVIL COVER SHEET

County, Nevada

Case No.

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):

Javar Ketchum #1836597

Defendant(s) (name/address/phone):

Nevada State of

Attorney (name/address/phone):

Craig A. Mueller Esq.

Attorney (name/address/phone):

II. Nature of Controversy (please select the one most applicable filing type below)

Civil Case Filing Types

<p style="text-align: center;">Real Property</p> <p>Landlord/Tenant</p> <p><input type="checkbox"/> Unlawful Detainer</p> <p><input type="checkbox"/> Other Landlord/Tenant</p> <p>Title to Property</p> <p><input type="checkbox"/> Judicial Foreclosure</p> <p><input type="checkbox"/> Other Title to Property</p> <p>Other Real Property</p> <p><input type="checkbox"/> Condemnation/Eminent Domain</p> <p><input type="checkbox"/> Other Real Property</p>	<p style="text-align: center;">Negligence</p> <p><input type="checkbox"/> Auto</p> <p><input type="checkbox"/> Premises Liability</p> <p><input type="checkbox"/> Other Negligence</p> <p style="text-align: center;">Malpractice</p> <p><input type="checkbox"/> Medical/Dental</p> <p><input type="checkbox"/> Legal</p> <p><input type="checkbox"/> Accounting</p> <p><input type="checkbox"/> Other Malpractice</p>	<p style="text-align: center;">Torts</p> <p>Other Torts</p> <p><input type="checkbox"/> Product Liability</p> <p><input type="checkbox"/> Intentional Misconduct</p> <p><input type="checkbox"/> Employment Tort</p> <p><input type="checkbox"/> Insurance Tort</p> <p><input type="checkbox"/> Other Tort</p>
<p style="text-align: center;">Probate</p> <p>Probate (select case type and estate value)</p> <p><input type="checkbox"/> Summary Administration</p> <p><input type="checkbox"/> General Administration</p> <p><input type="checkbox"/> Special Administration</p> <p><input type="checkbox"/> Set Aside</p> <p><input type="checkbox"/> Trust/Conservatorship</p> <p><input type="checkbox"/> Other Probate</p> <p>Estate Value</p> <p><input type="checkbox"/> Over \$200,000</p> <p><input type="checkbox"/> Between \$100,000 and \$200,000</p> <p><input type="checkbox"/> Under \$100,000 or Unknown</p> <p><input type="checkbox"/> Under \$2,500</p>	<p style="text-align: center;">Construction Defect & Contract</p> <p>Construction Defect</p> <p><input type="checkbox"/> Chapter 40</p> <p><input type="checkbox"/> Other Construction Defect</p> <p style="text-align: center;">Contract Case</p> <p><input type="checkbox"/> Uniform Commercial Code</p> <p><input type="checkbox"/> Building and Construction</p> <p><input type="checkbox"/> Insurance Carrier</p> <p><input type="checkbox"/> Commercial Instrument</p> <p><input type="checkbox"/> Collection of Accounts</p> <p><input type="checkbox"/> Employment Contract</p> <p><input type="checkbox"/> Other Contract</p>	<p style="text-align: center;">Judicial Review/Appeal</p> <p>Judicial Review</p> <p><input type="checkbox"/> Foreclosure Mediation Case</p> <p><input type="checkbox"/> Petition to Seal Records</p> <p><input type="checkbox"/> Mental Competency</p> <p style="text-align: center;">Nevada State Agency Appeal</p> <p><input type="checkbox"/> Department of Motor Vehicle</p> <p><input type="checkbox"/> Worker's Compensation</p> <p><input type="checkbox"/> Other Nevada State Agency</p> <p style="text-align: center;">Appeal Other</p> <p><input type="checkbox"/> Appeal from Lower Court</p> <p><input type="checkbox"/> Other Judicial Review/Appeal</p>
<p style="text-align: center;">Civil Writ</p> <p>Civil Writ</p> <p><input checked="" type="checkbox"/> Writ of Habeas Corpus</p> <p><input type="checkbox"/> Writ of Mandamus</p> <p><input type="checkbox"/> Writ of Quo Warrant</p> <p><input type="checkbox"/> Writ of Prohibition</p> <p><input type="checkbox"/> Other Civil Writ</p>		<p style="text-align: center;">Other Civil Filing</p> <p>Other Civil Filing</p> <p><input type="checkbox"/> Compromise of Minor's Claim</p> <p><input type="checkbox"/> Foreign Judgment</p> <p><input type="checkbox"/> Other Civil Matters</p>

Business Court filings should be filed using the Business Court civil coversheet.

9-11-20

Date

Prepared by Clerk

Signature of initiating party or representative

See other side for family-related case filings.

FFCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JOHN NIMAN
Deputy District Attorney
Nevada Bar #14408
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JAVAR KETCHUM,
#1836597

Petitioner,

-vs-

THE STATE OF NEVADA,
Respondent.

CASE NO: A-20-821316-W
C-16-319714-1
DEPT NO: XVII

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER**

DATE OF HEARING: MARCH 12, 2021
TIME OF HEARING: 9:00AM

THIS CAUSE having come on for hearing before the Honorable MICHAEL VILLANI, District Judge, on the 12th day of March, 2021, the Petitioner not being present, REPRESENTED BY JOSE CARLOS PALLARES, ESQ., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through JOHN GIORDANI, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **STATEMENT OF THE CASE**

3 On November 30, 2016, the State charged Javar Ketchum (hereinafter "Petitioner") by
4 way of Indictment with one count each of Murder with a Deadly Weapon and Robbery with a
5 Deadly Weapon. On December 30, 2016, Petitioner filed a pre-trial Petition for Writ of Habeas
6 Corpus and Motion to Dismiss. The State filed its Return on January 4, 2017. Petitioner filed
7 a Reply on January 9, 2017. The district court denied the Petition on February 17, 2017.

8 On March 8, 2017, Petitioner filed a Motion in Limine, seeking to admit character
9 evidence of the victim, Ezekiel Davis. On May 9, 2017, the State filed a Motion in Limine,
10 asking that the district court preclude prior specific acts of violence by the murder victim. On
11 May 18, 2017, the State filed a Supplement to its Motion in Limine. The district court held a
12 Petrocelli Hearing on May 19, 2017, determining that Petitioner could only bring in opinion
13 testimony regarding the victim's character and that witnesses were not to elaborate on that
14 opinion.

15 On May 22, 2017, Petitioner's five-day jury trial commenced. At the end of the fifth
16 day of trial, the jury found Petitioner guilty of both charges. Following the verdict, Petitioner
17 entered into a stipulation and order, waiving the penalty phase and agreeing to a sentence of
18 life in prison with parole eligibility after twenty years, with the sentences for the deadly
19 weapon enhancement and the count of robbery with use of a deadly weapon to be argued by
20 both parties.

21 On June 2, 2017, Petitioner filed a Motion for New Trial pursuant to NRS 176.515 (4).
22 The State filed its Opposition on September 9, 2017. Petitioner filed a Reply on September 27,
23 2017 and a Supplement thereto on September 28, 2017. The district court, finding that
24 Petitioner's disagreement with the court's evidentiary rulings was not a basis for a new trial,
25 denied the Motion on October 17, 2017. Petitioner was adjudicated that same day. However,
26 the defense requested additional time to handle sentencing matters.

27 According to the stipulation, on February 1, 2018, the district court sentenced Petitioner
28 to an aggregate of life in the Nevada Department of Corrections with minimum parole

1 eligibility after twenty-eight (28) years, with four hundred seventy- five (475) days credit for
2 time served. The Judgment of Conviction was filed on February 5, 2018.

3 Petitioner filed a Notice of Appeal on February 6, 2018. On September 12, 2019, the
4 Nevada Supreme Court affirmed Petitioner's conviction. Remittitur issued on October 11,
5 2019.

6 On September 11, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus
7 (Post-Conviction) (hereinafter "Petition"). The State filed its Response on December 16, 2020.
8 Petitioner filed his Reply on February 9, 2021. Following a hearing on March 12, 2021, this
9 Court finds and concludes as follows:

10 **STATEMENT OF THE FACTS**

11 At 6:22 a.m. on September 25, 2016, Officers Brennan Childers and Jacquelyn Torres
12 were dispatched to a shooting at 4230 S. Decatur Blvd, a strip mall with several businesses
13 including a clothing store. Jury Trial Transcript, Day 2, ("JTT Day 2") May 23, 2017, at 20-
14 23, 29-32. When police arrived, they found a man—later identified as Ezekiel Davis
15 ("Ezekiel" or "the victim")—upon whom another man was performing chest compressions.
16 Id. at 22-23, 32. Ezekiel was not wearing pants. Id. at 32. Several other people were in the
17 parking lot, and none of the businesses appeared opened. Id. at 22-23. Ezekiel was transported
18 to the hospital but did not survive a single gunshot wound to the abdomen. Id. at 66. Trial
19 testimony from Ezekiel's fiancé, Bianca Hicks, and from Detective Christopher Bunn revealed
20 that missing from Ezekiel's person was a belt which had a gold "M" buckle and a gold watch.
21 Jury Trial, Day 3, ("JTT Day 3") May 24, 2017, at 17, 122; Jury Trial Transcript, Day 4, ("JTT
22 Day 4") May 25, 2017, at 86, 90-92.

23 Top Knotch, the clothing store in front of which Ezekiel was shot, doubles as an after-
24 hours club. JTT Day 2, at 9. Ezekiel's friend Deshawn Byrd—the one who had given him CPR
25 in an attempt to save his life—testified at trial that sometime after approximately 3:00 a.m.,
26 Ezekiel arrived at the club. Id. at 10-11. Byrd testified there was no indication that anything
27 had happened in the club which led to any sort of confrontation. Id. at 10-14.

28 ///

1 Detective Bunn testified at trial that the day of the murder, as detectives and crime scene
2 analysts were documenting the scene, three individuals—later identified as Marlo Chiles,
3 Roderick Vincent, and Samantha Cordero—exited Top Knotch. JTT Day 3, at 42-67. Chiles
4 was the owner of Top Knotch, and Vincent owned a studio inside of Top Knotch. Id. at 68.
5 Vincent denied that there were any DVRs of the surveillance video for Top Knotch or the
6 recording studio. Id. at 73. Detective Bunn had noted a camera, however. Id. at 69. A
7 subsequent search warrant on the vehicles in the parking lot located two (2) DVR's of the
8 surveillance footage from Top Knotch and the studio in Vincent's car. Id. at 58-59, 63-64.

9 A review of the video footage, extensive portions of which were played at trial,
10 demonstrated that Petitioner entered the club at about 2:00 a.m. Id. at 91-92. At 3:25 a.m.,
11 Chiles, Vincent, Antoine Bernard, and several other people were in the back area of the
12 business when a person in a number 3 jersey, later identified as Petitioner, produced a semi-
13 automatic handgun from his pants and showed it to the group. Id. at 93-94.

14 The video also showed that at about 6:14 a.m., Petitioner and Ezekiel exited arm-in-
15 arm out the front of Top Knotch. Id. at 97. At that point, there was still a watch on Ezekiel's
16 wrist. Id. at 98. The two walked to the front of Bernard's black vehicle and appeared to
17 converse for a short time, then walked by the driver's side of Bernard's vehicle, where they
18 left camera view. Id. at 99-102. At about 6:16 a.m., the people on video all appeared to have
19 their attention drawn to the area where Petitioner and Ezekiel were. Id. at 99. Petitioner then
20 entered the view of the camera, removing Ezekiel's belt from his body while holding the gun
21 in his other hand. Id. at 101-102. Bernard also testified at trial that he saw Petitioner take
22 Ezekiel's belt. Id. at 20. The video showed that Petitioner approached Bernard's car, opened
23 the passenger door, placed the belt on the front seat, and returned to the area of Ezekiel's body.
24 Id. at 102. Petitioner returned to Bernard's vehicle, entered the passenger seat of the vehicle
25 and the vehicle fled the area. Id. at 102.

26 Despite contact with several witnesses in the parking lot including Chiles and Vincent,
27 the police had no information regarding the identity of the shooter. Id. at 107. After further
28 investigation, the shooter was identified as Petitioner and a warrant for his arrest was issued.

1 Id. at 107. Petitioner was apprehended at a border control station in Sierra Blanca, Texas,
2 whereupon he was brought back to Nevada to face charges. Id. at 108.

3 AUTHORITY

4 **I. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL**

5 Petitioner claims that counsel was ineffective “in multiple ways in the way he handled
6 the surveillance video.” Petition, at 6. Specifically, Petitioner claims that counsel was
7 ineffective in three ways: 1) the initial viewing, 2) failing to review the video in preparation
8 for trial, and 3) failing to object to the State admitting the video and using it in rebuttal.
9 Petition, at 6-9.

10 The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal
11 prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his
12 defense.” The United States Supreme Court has long recognized that “the right to counsel is
13 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,
14 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
15 (1993).

16 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
17 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of
18 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865
19 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel’s
20 representation fell below an objective standard of reasonableness, and second, that but for
21 counsel’s errors, there is a reasonable probability that the result of the proceedings would have
22 been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State
23 Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-
24 part test). “[T]here is no reason for a court deciding an ineffective assistance claim to approach
25 the inquiry in the same order or even to address both components of the inquiry if the defendant
26 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

27 The court begins with the presumption of effectiveness and then must determine
28 whether the defendant has demonstrated by a preponderance of the evidence that counsel was

1 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
2 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
3 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
4 537 P.2d 473, 474 (1975).

5 Counsel cannot be ineffective for failing to make futile objections or arguments. See
6 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
7 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
8 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
9 (2002).

10 Based on the above law, the role of a court in considering allegations of ineffective
11 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
12 whether, under the particular facts and circumstances of the case, trial counsel failed to render
13 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
14 (1978). This analysis does not mean that the court should “second guess reasoned choices
15 between trial tactics nor does it mean that defense counsel, to protect himself against
16 allegations of inadequacy, must make every conceivable motion no matter how remote the
17 possibilities are of success.” Id. To be effective, the constitution “does not require that
18 counsel do what is impossible or unethical. If there is no bona fide defense to the charge,
19 counsel cannot create one and may disserve the interests of his client by attempting a useless
20 charade.” United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

21 “There are countless ways to provide effective assistance in any given case. Even the
22 best criminal defense attorneys would not defend a particular client in the same way.”
23 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
24 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
25 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
26 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel’s
27 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s
28 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

1 Even if a defendant can demonstrate that his counsel's representation fell below an
2 objective standard of reasonableness, he must still demonstrate prejudice and show a
3 reasonable probability that, but for counsel's errors, the result of the trial would have been
4 different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
5 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability
6 sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-
7 89, 694, 104 S. Ct. at 2064-65, 2068).

8 The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the
9 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of
10 the evidence." Means, 120 Nev. at 1012, 103 P.3d at 33. Furthermore, claims of ineffective
11 assistance of counsel asserted in a petition for post-conviction relief must be supported with
12 specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v.
13 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not
14 sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant
15 part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure
16 to allege specific facts rather than just conclusions may cause your petition to be dismissed."
17 (emphasis added).

18 **A. Counsel was not ineffective in the initial viewing of the surveillance video**

19 First, Petitioner alleges that counsel was ineffective in his initial viewing of the
20 surveillance video because counsel allegedly "reported he was only shown parts of the video."
21 Petition, at 6. It must be noted that Petitioner has utterly failed to cite anything in the record
22 or otherwise present any evidence supporting this claim. Thus, this is a bare and naked claim.
23 Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner is simply complaining that counsel did
24 not view the video in its entirety without support. Additionally, the Nevada Supreme Court
25 already found that counsel had access to the entire surveillance video. Order of Affirmance,
26 No. 75097, at 3. The State cannot meaningfully respond to such a bare and naked claim, and
27 to the extent Petitioner is claiming that counsel did not have access to the entire surveillance
28 video, that claim is barred by law of the case. Therefore, this claim is without merit.

B. Counsel was not ineffective for failing to review the surveillance video

Second, Petitioner similarly alleges that counsel failed to review the surveillance video in preparation of trial. Petition, at 7-8. Petitioner claims that trial counsel “admitted to being completely caught by surprise by these videos.” Petition, at 7. Petitioner’s claim that counsel “admitted to being completely caught by surprise by these videos” is wholly unsupported, and counsel’s supposed “admission” appears nowhere in the record. Petitioner simply assumes that counsel “did not bother to watch” the surveillance videos. But, once again, Petitioner has failed to cite anything in the record supporting this claim. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner provides no reason to think that counsel failed to view the entire videotape when it is an established fact that counsel had access to that tape. More importantly, in his Opening Brief for Petitioner’s direct appeal, trial counsel admitted that he viewed the surveillance video. Appellant’s Opening Brief, August 29, 2018, No. 75097, at 46. Therefore, this claim is without merit.

Even if counsel did not review the portions of the surveillance video that the State played in rebuttal, he cannot demonstrate how this prejudiced. There was overwhelming evidence of Petitioner’s guilt in the surveillance video—portions of the surveillance video that counsel clearly knew about as he cross-examined witnesses regarding it. The surveillance video showed that Petitioner and the victim were seen on video walking through the club arm-in-arm mere minutes before Petitioner murdered and robbed the victim. Jury Trial Transcript, Day 3, May 24, 2017, at 97. Petitioner robbing the victim was literally caught on the surveillance video. Id. at 17, 100-102. Petitioner could be seen very clearly ripping the expensive belt from the victim while the victim lay dying. Id. The victim’s property—including his watch—was also missing from his body. Id. at 17, 122; Jury Trial Transcript, Day 4, May 25, 2017, at 86, 90-92. Bernard also testified at trial that he saw Petitioner take Ezekiel’s belt. Jury Trial Transcript, Day 3, May 24, 2017, at 20. The surveillance video showed that Petitioner approached Bernard’s car, opened the passenger door, placed the belt on the front seat, and returned to the area of the victim’s body. Id. at 102. Petitioner returned to Bernard’s vehicle, entered the passenger seat of the vehicle and the vehicle fled the area. Id.

1 Petitioner does not present any alternative defense that would have worked better, or otherwise
2 explain what counsel could have done differently. Therefore, Petitioner cannot demonstrate
3 how counsel was ineffective.

4 **C. Counsel was not ineffective for failing to object to the surveillance video**

5 Third, Petitioner argues that counsel was ineffective for failing to object to the State
6 admitting portions of the surveillance video in the State's rebuttal. Petition, at 8-9. However,
7 Petitioner fails to explain on what basis counsel should have moved to exclude the portions of
8 the video. The surveillance video in its entirety was admitted into evidence, so any objection
9 to playing portions of the surveillance video in rebuttal would have been overruled. There is
10 no legal basis establishing a valid objection to the admission of the video, proper foundation
11 was established, and there was no argument during trial or in the Petition stating the video was
12 inadmissible evidence. Because counsel cannot be ineffective for failing to make frivolous
13 objections, counsel here cannot be ineffective for failing to object to the surveillance video in
14 rebuttal. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, this claim is without merit.

15 **D. Counsel was not ineffective for failing to object to the surveillance video**

16 Lastly, Petitioner alleges counsel was ineffective because it put Petitioner in a worse
17 position for his appeal. Petition, at 9. Petitioner complains about appellate counsel's deficient
18 performance on appeal. Id.

19 There is a strong presumption that appellate counsel's performance was reasonable and
20 fell within "the wide range of reasonable professional assistance." See United States v.
21 Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at
22 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set
23 forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order
24 to satisfy Strickland's second prong, the defendant must show that the omitted issue would
25 have had a reasonable probability of success on appeal. Id.

26 The professional diligence and competence required on appeal involves "winnowing
27 out weaker arguments on appeal and focusing on one central issue if possible, or at most on a
28 few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In

1 particular, a “brief that raises every colorable issue runs the risk of burying good arguments
2 ... in a verbal mound made up of strong and weak contentions.” Id. at 753, 103 S. Ct. at 3313.
3 “For judges to second-guess reasonable professional judgments and impose on appointed
4 counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very
5 goal of vigorous and effective advocacy.” Id. at 754, 103 S. Ct. at 3314.

6 Here, objecting to the surveillance video in rebuttal would not have changed the
7 outcome of Petitioner’s appeal because there was no basis to exclude the surveillance video or
8 prevent the State from playing portions in rebuttal. As discussed supra, Section I.C., the
9 surveillance video was admitted at trial, and it would have been futile for counsel to object to
10 it in rebuttal. Counsel cannot be ineffective for failing to object to the surveillance video in
11 rebuttal. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Because trial counsel did not have any
12 reason to object, there is no indication that an objection would have put appellate counsel in
13 any better position.

14 In his Opening Brief for Petitioner’s direct appeal, appellate counsel raised the issue
15 that he could not “control the video” when he viewed it at the evidence vault with law
16 enforcement. Appellant’s Opening Brief, August 29, 2018, No. 75097, at 46. However, he was
17 given a copy during discovery and admitted to viewing the surveillance video on appeal. Id.
18 Furthermore, the Nevada Supreme Court found that counsel had access to the entire
19 surveillance video. Order of Affirmance, No. 75097, at 3. Therefore, there was not any basis
20 for trial counsel to object to the surveillance video being played during rebuttal, and appellate
21 counsel found not have raised any stronger argument on appeal. As such, this claim is without
22 merit, and Petitioner cannot demonstrate how counsel was ineffective.

23 **II. COUNSEL WAS NOT INEFFECTIVE IN HIS PREPARATION AND**
24 **CROSS-EXAMINATION OF ANTOINE BERNARD**

25 Petitioner alleges that counsel was ineffective in his preparation and execution of the
26 cross-examination of Antoine Bernard. Petition, at 9-10. Petitioner raises this claim without
27 any citations to the record and fails to explain what counsel should have done differently that

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1 would have changed the outcome at trial. As such, this claim is belied by the record and
2 suitable for only summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225.

3 Although Petitioner chose not to cite to any lawful authority, construed liberally, the
4 State assumes he is arguing that there are discrepancies with Bernard's initial police statement
5 and what he testified to at trial. It is important to note that Bernard was originally charged as
6 a co-defendant in the instant case. Indictment, November 30, 2016, at 1-5. Thus, the State is
7 assuming that Petitioner is complaining regarding his initial police statement when he was a
8 suspect, and his testimony in front of the jury against Petitioner when his case was resolved.

9 Petitioner does not articulate how counsel was ineffective in his cross-examination, or
10 explain to this Court what counsel should have done differently that would have changed the
11 outcome of the trial. Petitioner slightly discusses the discrepancies in Bernard's testimony,
12 then, once again, argues that counsel was unprepared for the surveillance video being
13 introduced during rebuttal. Petition, at 9-10. As discussed supra, Section I., Petitioner's claims
14 that counsel was ineffective for not being prepared for the surveillance video in rebuttal is
15 without merit.

16 Additionally, because Petitioner does not even cite to counsel's cross-examination of
17 Bernard at trial, he overlooks counsel questioning him regarding his initial statement to police.
18 Jury Trial Transcript, Day 3, May 24, 2017, at 26-31. In fact, counsel even got Bernard to
19 admit that he had omitted information from the police in his original statement to them. Id. at
20 31. Then on recross-examination, counsel again got Bernard to admit that his testimony at trial
21 was different than his initial statement to the police. Id. at 36-37. The cross-examination of
22 Bernard brought up his statements to the police were incomplete or had omissions and he was
23 confronted with the differences in his trial testimony and his statements to the police, therefore
24 neither prong of Strickland has been established. As such, counsel was not ineffective in his
25 cross-examination of Antoine Bernard and this Petition is denied.

26 Lastly, Petitioner raised a new claim for the first time at the oral argument on the
27 Petition that trial counsel should have called a psychologist to testify as to his state of mind as
28 a robbery victim. He also requested an evidentiary hearing on this new claim. This Court

declined to consider the claim or have an evidentiary hearing on the claim because it was not raised in the underlying instant Petition. As such, an evidentiary hearing on this new claim was not warranted.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

Dated this 31st day of March, 2021



E28 0E3 17F9 EE2
Michael Villani
District Court Judge

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

BY /s/ JOHN NIMAN
JOHN NIMAN
Deputy District Attorney
Nevada Bar #14408

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the above and foregoing, was made this 31st day of March, 2021, by Electronic Filing to:

CRAIG MULLER, ESQ.

Email: receptionist@craigmullerlaw.com

By: /s/ Janet Hayes
Secretary for the District Attorney's Office

16F16375A/JN/bs/jh/MVU

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Javar Ketchum, Plaintiff(s)

CASE NO: A-20-821316-W

7 vs.

DEPT. NO. Department 17

8 Nevada State of, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 3/31/2021

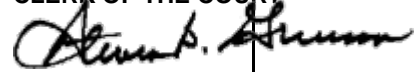
15 Craig Mueller craig@craigmuellerlaw.com

16 Craig Mueller receptionist@craigmuellerlaw.com

17 District Attorney motions@clarkcountyda.com

18 John Niman JOHN.NIMAN@CLARKCOUNTYDA.COM
19
20
21
22
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AO000740



1 NEFF

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4 JAVAR KETCHUM,

5
6 Petitioner,

7 vs.

8 STATE OF NEVADA,

9 Respondent,

Case No: A-20-821316-W

Dept No: XVII

**NOTICE OF ENTRY OF FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

10
11 **PLEASE TAKE NOTICE** that on March 31, 2021, the court entered a decision or order in this matter, a
12 true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
15 mailed to you. This notice was mailed on April 5, 2021.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

17 /s/ Amanda Hampton

18 Amanda Hampton, Deputy Clerk

19 **CERTIFICATE OF E-SERVICE / MAILING**

20 I hereby certify that on this 5 day of April 2021, I served a copy of this Notice of Entry on the following:

21 ☒ By e-mail:

22 Clark County District Attorney's Office
23 Attorney General's Office – Appellate Division-
24 Public Defender's Office

25 ☒ The United States mail addressed as follows:

26 Javar Ketchum # 1192727
27 P.O. Box 650
28 Indian Springs, NV 89070

Craig A. Mueller, Esq.
723 S. Seventh St.
Las Vegas, NV 89101

Jose Pallares, Esq.
808 S. Seventh St.,
Las Vegas, NV 89101

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

Heather S. Hume

CLERK OF THE COURT

FFCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JOHN NIMAN
Deputy District Attorney
Nevada Bar #14408
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

JAVAR KETCHUM,
#1836597

Petitioner,

-vs-

THE STATE OF NEVADA,
Respondent.

CASE NO: A-20-821316-W
C-16-319714-1
DEPT NO: XVII

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER**

DATE OF HEARING: MARCH 12, 2021
TIME OF HEARING: 9:00AM

THIS CAUSE having come on for hearing before the Honorable MICHAEL VILLANI, District Judge, on the 12th day of March, 2021, the Petitioner not being present, REPRESENTED BY JOSE CARLOS PALLARES, ESQ., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through JOHN GIORDANI, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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///

1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **STATEMENT OF THE CASE**

3 On November 30, 2016, the State charged Javar Ketchum (hereinafter "Petitioner") by
4 way of Indictment with one count each of Murder with a Deadly Weapon and Robbery with a
5 Deadly Weapon. On December 30, 2016, Petitioner filed a pre-trial Petition for Writ of Habeas
6 Corpus and Motion to Dismiss. The State filed its Return on January 4, 2017. Petitioner filed
7 a Reply on January 9, 2017. The district court denied the Petition on February 17, 2017.

8 On March 8, 2017, Petitioner filed a Motion in Limine, seeking to admit character
9 evidence of the victim, Ezekiel Davis. On May 9, 2017, the State filed a Motion in Limine,
10 asking that the district court preclude prior specific acts of violence by the murder victim. On
11 May 18, 2017, the State filed a Supplement to its Motion in Limine. The district court held a
12 Petrocelli Hearing on May 19, 2017, determining that Petitioner could only bring in opinion
13 testimony regarding the victim's character and that witnesses were not to elaborate on that
14 opinion.

15 On May 22, 2017, Petitioner's five-day jury trial commenced. At the end of the fifth
16 day of trial, the jury found Petitioner guilty of both charges. Following the verdict, Petitioner
17 entered into a stipulation and order, waiving the penalty phase and agreeing to a sentence of
18 life in prison with parole eligibility after twenty years, with the sentences for the deadly
19 weapon enhancement and the count of robbery with use of a deadly weapon to be argued by
20 both parties.

21 On June 2, 2017, Petitioner filed a Motion for New Trial pursuant to NRS 176.515 (4).
22 The State filed its Opposition on September 9, 2017. Petitioner filed a Reply on September 27,
23 2017 and a Supplement thereto on September 28, 2017. The district court, finding that
24 Petitioner's disagreement with the court's evidentiary rulings was not a basis for a new trial,
25 denied the Motion on October 17, 2017. Petitioner was adjudicated that same day. However,
26 the defense requested additional time to handle sentencing matters.

27 According to the stipulation, on February 1, 2018, the district court sentenced Petitioner
28 to an aggregate of life in the Nevada Department of Corrections with minimum parole

1 eligibility after twenty-eight (28) years, with four hundred seventy- five (475) days credit for
2 time served. The Judgment of Conviction was filed on February 5, 2018.

3 Petitioner filed a Notice of Appeal on February 6, 2018. On September 12, 2019, the
4 Nevada Supreme Court affirmed Petitioner's conviction. Remittitur issued on October 11,
5 2019.

6 On September 11, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus
7 (Post-Conviction) (hereinafter "Petition"). The State filed its Response on December 16, 2020.
8 Petitioner filed his Reply on February 9, 2021. Following a hearing on March 12, 2021, this
9 Court finds and concludes as follows:

10 **STATEMENT OF THE FACTS**

11 At 6:22 a.m. on September 25, 2016, Officers Brennan Childers and Jacquelyn Torres
12 were dispatched to a shooting at 4230 S. Decatur Blvd, a strip mall with several businesses
13 including a clothing store. Jury Trial Transcript, Day 2, ("JTT Day 2") May 23, 2017, at 20-
14 23, 29-32. When police arrived, they found a man—later identified as Ezekiel Davis
15 ("Ezekiel" or "the victim")—upon whom another man was performing chest compressions.
16 Id. at 22-23, 32. Ezekiel was not wearing pants. Id. at 32. Several other people were in the
17 parking lot, and none of the businesses appeared opened. Id. at 22-23. Ezekiel was transported
18 to the hospital but did not survive a single gunshot wound to the abdomen. Id. at 66. Trial
19 testimony from Ezekiel's fiancé, Bianca Hicks, and from Detective Christopher Bunn revealed
20 that missing from Ezekiel's person was a belt which had a gold "M" buckle and a gold watch.
21 Jury Trial, Day 3, ("JTT Day 3") May 24, 2017, at 17, 122; Jury Trial Transcript, Day 4, ("JTT
22 Day 4") May 25, 2017, at 86, 90-92.

23 Top Knotch, the clothing store in front of which Ezekiel was shot, doubles as an after-
24 hours club. JTT Day 2, at 9. Ezekiel's friend Deshawn Byrd—the one who had given him CPR
25 in an attempt to save his life—testified at trial that sometime after approximately 3:00 a.m.,
26 Ezekiel arrived at the club. Id. at 10-11. Byrd testified there was no indication that anything
27 had happened in the club which led to any sort of confrontation. Id. at 10-14.

28 ///

1 Detective Bunn testified at trial that the day of the murder, as detectives and crime scene
2 analysts were documenting the scene, three individuals—later identified as Marlo Chiles,
3 Roderick Vincent, and Samantha Cordero—exited Top Knotch. JTT Day 3, at 42-67. Chiles
4 was the owner of Top Knotch, and Vincent owned a studio inside of Top Knotch. Id. at 68.
5 Vincent denied that there were any DVRs of the surveillance video for Top Knotch or the
6 recording studio. Id. at 73. Detective Bunn had noted a camera, however. Id. at 69. A
7 subsequent search warrant on the vehicles in the parking lot located two (2) DVR's of the
8 surveillance footage from Top Knotch and the studio in Vincent's car. Id. at 58-59, 63-64.

9 A review of the video footage, extensive portions of which were played at trial,
10 demonstrated that Petitioner entered the club at about 2:00 a.m. Id. at 91-92. At 3:25 a.m.,
11 Chiles, Vincent, Antoine Bernard, and several other people were in the back area of the
12 business when a person in a number 3 jersey, later identified as Petitioner, produced a semi-
13 automatic handgun from his pants and showed it to the group. Id. at 93-94.

14 The video also showed that at about 6:14 a.m., Petitioner and Ezekiel exited arm-in-
15 arm out the front of Top Knotch. Id. at 97. At that point, there was still a watch on Ezekiel's
16 wrist. Id. at 98. The two walked to the front of Bernard's black vehicle and appeared to
17 converse for a short time, then walked by the driver's side of Bernard's vehicle, where they
18 left camera view. Id. at 99-102. At about 6:16 a.m., the people on video all appeared to have
19 their attention drawn to the area where Petitioner and Ezekiel were. Id. at 99. Petitioner then
20 entered the view of the camera, removing Ezekiel's belt from his body while holding the gun
21 in his other hand. Id. at 101-102. Bernard also testified at trial that he saw Petitioner take
22 Ezekiel's belt. Id. at 20. The video showed that Petitioner approached Bernard's car, opened
23 the passenger door, placed the belt on the front seat, and returned to the area of Ezekiel's body.
24 Id. at 102. Petitioner returned to Bernard's vehicle, entered the passenger seat of the vehicle
25 and the vehicle fled the area. Id. at 102.

26 Despite contact with several witnesses in the parking lot including Chiles and Vincent,
27 the police had no information regarding the identity of the shooter. Id. at 107. After further
28 investigation, the shooter was identified as Petitioner and a warrant for his arrest was issued.

1 Id. at 107. Petitioner was apprehended at a border control station in Sierra Blanca, Texas,
2 whereupon he was brought back to Nevada to face charges. Id. at 108.

3 **AUTHORITY**

4 **I. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL**

5 Petitioner claims that counsel was ineffective “in multiple ways in the way he handled
6 the surveillance video.” Petition, at 6. Specifically, Petitioner claims that counsel was
7 ineffective in three ways: 1) the initial viewing, 2) failing to review the video in preparation
8 for trial, and 3) failing to object to the State admitting the video and using it in rebuttal.
9 Petition, at 6-9.

10 The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal
11 prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his
12 defense.” The United States Supreme Court has long recognized that “the right to counsel is
13 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,
14 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
15 (1993).

16 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
17 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of
18 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865
19 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel’s
20 representation fell below an objective standard of reasonableness, and second, that but for
21 counsel’s errors, there is a reasonable probability that the result of the proceedings would have
22 been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State
23 Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-
24 part test). “[T]here is no reason for a court deciding an ineffective assistance claim to approach
25 the inquiry in the same order or even to address both components of the inquiry if the defendant
26 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

27 The court begins with the presumption of effectiveness and then must determine
28 whether the defendant has demonstrated by a preponderance of the evidence that counsel was

1 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
2 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
3 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
4 537 P.2d 473, 474 (1975).

5 Counsel cannot be ineffective for failing to make futile objections or arguments. See
6 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
7 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
8 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
9 (2002).

10 Based on the above law, the role of a court in considering allegations of ineffective
11 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
12 whether, under the particular facts and circumstances of the case, trial counsel failed to render
13 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
14 (1978). This analysis does not mean that the court should “second guess reasoned choices
15 between trial tactics nor does it mean that defense counsel, to protect himself against
16 allegations of inadequacy, must make every conceivable motion no matter how remote the
17 possibilities are of success.” Id. To be effective, the constitution “does not require that
18 counsel do what is impossible or unethical. If there is no bona fide defense to the charge,
19 counsel cannot create one and may disserve the interests of his client by attempting a useless
20 charade.” United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

21 “There are countless ways to provide effective assistance in any given case. Even the
22 best criminal defense attorneys would not defend a particular client in the same way.”
23 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
24 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
25 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
26 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel’s
27 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s
28 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

1 Even if a defendant can demonstrate that his counsel's representation fell below an
2 objective standard of reasonableness, he must still demonstrate prejudice and show a
3 reasonable probability that, but for counsel's errors, the result of the trial would have been
4 different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
5 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability
6 sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-
7 89, 694, 104 S. Ct. at 2064-65, 2068).

8 The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the
9 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of
10 the evidence." Means, 120 Nev. at 1012, 103 P.3d at 33. Furthermore, claims of ineffective
11 assistance of counsel asserted in a petition for post-conviction relief must be supported with
12 specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v.
13 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not
14 sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant
15 part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure
16 to allege specific facts rather than just conclusions may cause your petition to be dismissed."
17 (emphasis added).

18 **A. Counsel was not ineffective in the initial viewing of the surveillance video**

19 First, Petitioner alleges that counsel was ineffective in his initial viewing of the
20 surveillance video because counsel allegedly "reported he was only shown parts of the video."
21 Petition, at 6. It must be noted that Petitioner has utterly failed to cite anything in the record
22 or otherwise present any evidence supporting this claim. Thus, this is a bare and naked claim.
23 Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner is simply complaining that counsel did
24 not view the video in its entirety without support. Additionally, the Nevada Supreme Court
25 already found that counsel had access to the entire surveillance video. Order of Affirmance,
26 No. 75097, at 3. The State cannot meaningfully respond to such a bare and naked claim, and
27 to the extent Petitioner is claiming that counsel did not have access to the entire surveillance
28 video, that claim is barred by law of the case. Therefore, this claim is without merit.

B. Counsel was not ineffective for failing to review the surveillance video

Second, Petitioner similarly alleges that counsel failed to review the surveillance video in preparation of trial. Petition, at 7-8. Petitioner claims that trial counsel “admitted to being completely caught by surprise by these videos.” Petition, at 7. Petitioner’s claim that counsel “admitted to being completely caught by surprise by these videos” is wholly unsupported, and counsel’s supposed “admission” appears nowhere in the record. Petitioner simply assumes that counsel “did not bother to watch” the surveillance videos. But, once again, Petitioner has failed to cite anything in the record supporting this claim. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner provides no reason to think that counsel failed to view the entire videotape when it is an established fact that counsel had access to that tape. More importantly, in his Opening Brief for Petitioner’s direct appeal, trial counsel admitted that he viewed the surveillance video. Appellant’s Opening Brief, August 29, 2018, No. 75097, at 46. Therefore, this claim is without merit.

Even if counsel did not review the portions of the surveillance video that the State played in rebuttal, he cannot demonstrate how this prejudiced. There was overwhelming evidence of Petitioner’s guilt in the surveillance video—portions of the surveillance video that counsel clearly knew about as he cross-examined witnesses regarding it. The surveillance video showed that Petitioner and the victim were seen on video walking through the club arm-in-arm mere minutes before Petitioner murdered and robbed the victim. Jury Trial Transcript, Day 3, May 24, 2017, at 97. Petitioner robbing the victim was literally caught on the surveillance video. Id. at 17, 100-102. Petitioner could be seen very clearly ripping the expensive belt from the victim while the victim lay dying. Id. The victim’s property—including his watch—was also missing from his body. Id. at 17, 122; Jury Trial Transcript, Day 4, May 25, 2017, at 86, 90-92. Bernard also testified at trial that he saw Petitioner take Ezekiel’s belt. Jury Trial Transcript, Day 3, May 24, 2017, at 20. The surveillance video showed that Petitioner approached Bernard’s car, opened the passenger door, placed the belt on the front seat, and returned to the area of the victim’s body. Id. at 102. Petitioner returned to Bernard’s vehicle, entered the passenger seat of the vehicle and the vehicle fled the area. Id.

1 Petitioner does not present any alternative defense that would have worked better, or otherwise
2 explain what counsel could have done differently. Therefore, Petitioner cannot demonstrate
3 how counsel was ineffective.

4 **C. Counsel was not ineffective for failing to object to the surveillance video**

5 Third, Petitioner argues that counsel was ineffective for failing to object to the State
6 admitting portions of the surveillance video in the State's rebuttal. Petition, at 8-9. However,
7 Petitioner fails to explain on what basis counsel should have moved to exclude the portions of
8 the video. The surveillance video in its entirety was admitted into evidence, so any objection
9 to playing portions of the surveillance video in rebuttal would have been overruled. There is
10 no legal basis establishing a valid objection to the admission of the video, proper foundation
11 was established, and there was no argument during trial or in the Petition stating the video was
12 inadmissible evidence. Because counsel cannot be ineffective for failing to make frivolous
13 objections, counsel here cannot be ineffective for failing to object to the surveillance video in
14 rebuttal. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, this claim is without merit.

15 **D. Counsel was not ineffective for failing to object to the surveillance video**

16 Lastly, Petitioner alleges counsel was ineffective because it put Petitioner in a worse
17 position for his appeal. Petition, at 9. Petitioner complains about appellate counsel's deficient
18 performance on appeal. Id.

19 There is a strong presumption that appellate counsel's performance was reasonable and
20 fell within "the wide range of reasonable professional assistance." See United States v.
21 Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at
22 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set
23 forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order
24 to satisfy Strickland's second prong, the defendant must show that the omitted issue would
25 have had a reasonable probability of success on appeal. Id.

26 The professional diligence and competence required on appeal involves "winnowing
27 out weaker arguments on appeal and focusing on one central issue if possible, or at most on a
28 few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In

1 particular, a “brief that raises every colorable issue runs the risk of burying good arguments
2 ... in a verbal mound made up of strong and weak contentions.” Id. at 753, 103 S. Ct. at 3313.
3 “For judges to second-guess reasonable professional judgments and impose on appointed
4 counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very
5 goal of vigorous and effective advocacy.” Id. at 754, 103 S. Ct. at 3314.

6 Here, objecting to the surveillance video in rebuttal would not have changed the
7 outcome of Petitioner’s appeal because there was no basis to exclude the surveillance video or
8 prevent the State from playing portions in rebuttal. As discussed supra, Section I.C., the
9 surveillance video was admitted at trial, and it would have been futile for counsel to object to
10 it in rebuttal. Counsel cannot be ineffective for failing to object to the surveillance video in
11 rebuttal. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Because trial counsel did not have any
12 reason to object, there is no indication that an objection would have put appellate counsel in
13 any better position.

14 In his Opening Brief for Petitioner’s direct appeal, appellate counsel raised the issue
15 that he could not “control the video” when he viewed it at the evidence vault with law
16 enforcement. Appellant’s Opening Brief, August 29, 2018, No. 75097, at 46. However, he was
17 given a copy during discovery and admitted to viewing the surveillance video on appeal. Id.
18 Furthermore, the Nevada Supreme Court found that counsel had access to the entire
19 surveillance video. Order of Affirmance, No. 75097, at 3. Therefore, there was not any basis
20 for trial counsel to object to the surveillance video being played during rebuttal, and appellate
21 counsel found not have raised any stronger argument on appeal. As such, this claim is without
22 merit, and Petitioner cannot demonstrate how counsel was ineffective.

23 **II. COUNSEL WAS NOT INEFFECTIVE IN HIS PREPARATION AND**
24 **CROSS-EXAMINATION OF ANTOINE BERNARD**

25 Petitioner alleges that counsel was ineffective in his preparation and execution of the
26 cross-examination of Antoine Bernard. Petition, at 9-10. Petitioner raises this claim without
27 any citations to the record and fails to explain what counsel should have done differently that

28 ///

1 would have changed the outcome at trial. As such, this claim is belied by the record and
2 suitable for only summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225.

3 Although Petitioner chose not to cite to any lawful authority, construed liberally, the
4 State assumes he is arguing that there are discrepancies with Bernard's initial police statement
5 and what he testified to at trial. It is important to note that Bernard was originally charged as
6 a co-defendant in the instant case. Indictment, November 30, 2016, at 1-5. Thus, the State is
7 assuming that Petitioner is complaining regarding his initial police statement when he was a
8 suspect, and his testimony in front of the jury against Petitioner when his case was resolved.

9 Petitioner does not articulate how counsel was ineffective in his cross-examination, or
10 explain to this Court what counsel should have done differently that would have changed the
11 outcome of the trial. Petitioner slightly discusses the discrepancies in Bernard's testimony,
12 then, once again, argues that counsel was unprepared for the surveillance video being
13 introduced during rebuttal. Petition, at 9-10. As discussed supra, Section I., Petitioner's claims
14 that counsel was ineffective for not being prepared for the surveillance video in rebuttal is
15 without merit.

16 Additionally, because Petitioner does not even cite to counsel's cross-examination of
17 Bernard at trial, he overlooks counsel questioning him regarding his initial statement to police.
18 Jury Trial Transcript, Day 3, May 24, 2017, at 26-31. In fact, counsel even got Bernard to
19 admit that he had omitted information from the police in his original statement to them. Id. at
20 31. Then on recross-examination, counsel again got Bernard to admit that his testimony at trial
21 was different than his initial statement to the police. Id. at 36-37. The cross-examination of
22 Bernard brought up his statements to the police were incomplete or had omissions and he was
23 confronted with the differences in his trial testimony and his statements to the police, therefore
24 neither prong of Strickland has been established. As such, counsel was not ineffective in his
25 cross-examination of Antoine Bernard and this Petition is denied.

26 Lastly, Petitioner raised a new claim for the first time at the oral argument on the
27 Petition that trial counsel should have called a psychologist to testify as to his state of mind as
28 a robbery victim. He also requested an evidentiary hearing on this new claim. This Court

declined to consider the claim or have an evidentiary hearing on the claim because it was not raised in the underlying instant Petition. As such, an evidentiary hearing on this new claim was not warranted.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

Dated this 31st day of March, 2021



E28 0E3 17F9 EE2
Michael Villani
District Court Judge

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

BY /s/ JOHN NIMAN

JOHN NIMAN
Deputy District Attorney
Nevada Bar #14408

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the above and foregoing, was made this 31st day of March, 2021, by Electronic Filing to:

CRAIG MULLER, ESQ.

Email: receptionist@craigmullerlaw.com

By: /s/ Janet Hayes

Secretary for the District Attorney's Office

16F16375A/JN/bs/jh/MVU

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Javar Ketchum, Plaintiff(s)

CASE NO: A-20-821316-W

7 vs.

DEPT. NO. Department 17

8 Nevada State of, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 3/31/2021

15 Craig Mueller craig@craigmuellerlaw.com

16 Craig Mueller receptionist@craigmuellerlaw.com

17 District Attorney motions@clarkcountyda.com

18 John Niman JOHN.NIMAN@CLARKCOUNTYDA.COM
19
20
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23
24
25
26
27
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AO000754

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

November 06, 2020

A-20-821316-W Javar Ketchum, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

**November 06, 2020 10:15 AM Petition for Writ of Habeas
Corpus**

HEARD BY: Johnson, Eric

COURTROOM: RJC Courtroom 11A

COURT CLERK: Samantha Albrecht

RECORDER: Cynthia Georgilas

REPORTER:

PARTIES

PRESENT:	Giordani, John	Attorney
	Maynard, Jay	Attorney
	Nevada State of	Defendant

JOURNAL ENTRIES

- Court noted it had received the Petition and stated a briefing schedule needed to be set. COURT ORDERED, Briefing Schedule SET as follows: State's Return due by December 18, 2020; Petitioner's Reply due by January 15, 2021; and hearing SET.

NDC

2/3/2021 9:00 AM PETITION FOR WRIT OF HABEAS CORPUS

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

January 26, 2021

A-20-821316-W Javar Ketchum, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

January 26, 2021 8:30 AM Motion

HEARD BY: Villani, Michael

COURTROOM: RJC Courtroom 11A

COURT CLERK: Samantha Albrecht

RECORDER: Cynthia Georgilas

REPORTER:

PARTIES

PRESENT:	Luong, Vivian	Attorney
	Mueller, Craig A	Attorney
	Nevada State of	Defendant

JOURNAL ENTRIES

- Defendant not present. Mr. Mueller stated a previous appointment to meet with the Defendant was canceled and a new appointment has been scheduled for February 8th, therefore he requested the reply brief be due on that date and the hearing be continued. COURT ORDERED, Motion GRANTED, Reply Brief due 2/8/2021 and Hearing on Petition VACATED and RESET.

NDC

3/12/21 8:30 AM PETITION FOR WRIT OF HABEAS CORPUS

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

March 12, 2021

A-20-821316-W	Javar Ketchum, Plaintiff(s)
	vs.
	Nevada State of, Defendant(s)

March 12, 2021	8:30 AM	Petition for Writ of Habeas Corpus
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HEARD BY: Villani, Michael	COURTROOM: RJC Courtroom 11A
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COURT CLERK: Samantha Albrecht

RECORDER: Cynthia Georgilas

REPORTER:

PARTIES

PRESENT:	Giordani, John	Attorney
	Nevada State of	Defendant
	Pallares, Jose Carlos	Attorney

JOURNAL ENTRIES

- Defendant not present. Court noted it had reviewed all of the pleadings filed. Mr. Pallares stated he was requesting an Evidentiary Hearing on the issue that trial counsel should have called a psychologist to testify as to his state of my mind as a robbery victim, as the Defendant claimed to be a robbery victim by the victim of the shooting. Court noted it can only address the Petition in front of it and further noted the Petition brought up the issues of trial counsel failing to view the video, failing to object to the admission of the video, and ineffective cross-examination of Mr. Bernard. Upon Court's inquiry, Mr. Pallares stated trial counsel had no access to the video and the inculpatory parts were not presented during trial. Upon Court's inquiry, Mr. Pallares indicated there was a lack of foundation and a violation of Brady that trial counsel was not shown the video, however trial counsel failed to view the video once it was given to him in its entirety. Mr. Pallares stated the ineffective cross-examination claim occurred when trial counsel failed to bring up the differences in Mr. Bernard's statements to police and his testimony at trial.

Mr. Giordani stated the Strickland standard is very clear and noted Mr. Woolridge was very effective and worked with what he had. Mr. Giordani further stated bringing up a Brady claim was

PRINT DATE: 04/30/2021

Page 3 of 5

Minutes Date: November 06, 2020

AO000757

inappropriate and advised Mr. Woolridge had full access to the video prior to trial, therefore there would have been no legal basis to object to the video. Mr. Giordani noted Mr. Ketchum testified and gave a claim of self defense.

Court noted it had reviewed the Appellant's Opening Brief and it was asserted trial counsel watched the entire video. Court FINDS no legal basis establishing a valid objection to the admission of the video, proper foundation was established, there was no argument during trial or in the Petition stating the video was inadmissible evidence, the cross-examination of Mr. Bernard brought up his statements to the police were incomplete or had omissions and he was confronted with the differences in his trial testimony and his statements to the police, therefore neither prong of Strickland has been established. COURT ADOPTED the Procedural History as set forth by the State. Court noted it was difficult to confirm the allegations as there were no citations in the Petition or Reply Brief. COURT ORDERED, Petition DENIED and DIRECTED the State to prepare the Findings of Facts and Conclusions of Law; Status Check SET. Court stated the Status Check date would be vacated once that document was filed.

NDC

4/1/2021 10:00 AM STATUS CHECK: FINDINGS OF FACTS AND CONCLUSIONS OF LAW

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

April 01, 2021

A-20-821316-W Javar Ketchum, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

**April 01, 2021 10:00 AM Status Check: Status of
Case**

HEARD BY: Villani, Michael

COURTROOM: RJC Courtroom 11A

COURT CLERK: Nicole McDevitt

RECORDER: Cynthia Georgilas

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- Court noted the Findings of Facts and Conclusions of Law were filed on March 31, 2021. COURT ORDERED status check OFF CALENDAR.

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT
DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER; NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER;
DISTRICT COURT MINUTES

JAVAR KETCHUM,

Plaintiff(s),

vs.

THE STATE OF NEVADA,

Defendant(s),

Case No: A-20-821316-W

Dept No: XVII

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 30 day of April 2021.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAVAR ERIS KETCHUM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82863

FILED

MAY 13 2021

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

*ORDER DIRECTING TRANSMISSION OF RECORD
AND REGARDING BRIEFING*

Having reviewed the documents on file in this pro se appeal, this court has concluded that its review of the complete record is warranted. See NRAP 10(a)(1). Accordingly, the clerk of the district court shall have 30 days from the date of this order to transmit to the clerk of this court a certified copy of the complete trial court record of this appeal. See NRAP 11(a)(2). The record shall include copies of documentary exhibits submitted in the district court proceedings, but shall not include any physical, non-documentary exhibits or the original documentary exhibits. The record shall also include any presentence investigation reports submitted in a sealed envelope identifying the contents and marked confidential. See NRS 176.156(5).

Within 120 days, appellant may file either (1) a brief that complies with the requirements in NRAP 28(a) and NRAP 32; or (2) the "Informal Brief Form for Pro Se Parties" provided by the supreme court clerk. NRAP 31(a)(1). If no brief is submitted, the appeal may be decided on the record on appeal. NRAP 34(g). Respondent need not file a response to any brief filed by appellant, unless ordered to do so by this court. NRAP

46A(c). This court generally will not grant relief without providing an opportunity to file a response. *Id.*

It is so ORDERED.

1. J. J. J., C.J.

cc: Javar Eris Ketchum
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk