IN THE SUPREME COURT OF THE STATE OF NEVADA

JAVAR KETCHUM,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No.: 87012

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

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

APPELLANT'S OPENING BRIEF

Volume V

Bates Nos.:

AO000763 – AO000848

C. BENJAMIN SCROGGINS, ESQ.
Nevada Bar No. 7902
THE LAW FIRM OF
C. BENJAMIN SCROGGINS, CHTD.
629 South Casino Center Boulevard
Las Vegas, Nevada 89101
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Attorney for Appellant,
JAVAR KETCHUM

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAVAR KETCHUM,

Appellant,

vs.

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Supreme Court Case No.: 87012

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APPELLANT'S APPENDIX
ALPHABETICAL INDEX

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

Aaron Ford
Alexander Chen

Sentencing Memorandum, (10/16/2017) . . . . . **Volume III - (Bates Nos.: AO000471 – 506)**

State's Opposition to Defendant's Motion for New Trial, 09/05/2017. . . . . **Volume III - (Bates Nos.: AO000441 – 453)**

State's Opposition to Defendant's Motion to Vacate Stipulation, (11/28/2017). . . . . **Volume III - (Bates Nos.: AO000543 – 548)**

State's Response to Petitioner's Amended Petition for Writ of Habeas Corpus – Post Conviction, (04/27/2023). . . . . **Volume V- (Bates Nos.: AO000806 – 832)**

Supplement to Defendant's Motion for New Trial, (09/28/2017). . . . . **Volume III - (Bates Nos.: AO000463 – 470)**

Transcript of Proceedings, Jury Trial – Day 1, Partial Transcript – Excludes Jury Voir Dire, 05/22/2017 . . . . . **Volume I - (Bates Nos.: AO000001 - 12)**

Transcript of Proceedings, Jury Trial – Day 2, Partial Transcript – Excludes Jury Voir Dire & Opening Statements, 05/23/2017. . . . . **Volume I - (Bates Nos.: AO000013 – 111)**

Transcript of Proceedings, Jury Trial – Day 3, 05/24/2017 . . . . . **Volume II - (Bates Nos.: AO000112 – 253)**

Transcript of Proceedings, Jury Trial – Day 4, 05/25/2017. . . . . **Volume II - (Bates Nos.: AO000254 – 359)**

Transcript of Proceedings, Jury Trial – Day 5, Partial Transcript – Excludes Closing Arguments, 05/26/2017. . . . . **Volume III - (Bates Nos.: AO000360 – 381)**

CERTIFIED this 20th day of January, 2024.

KELLY JARVI, Legal Assistant to
THE LAW FIRM OF
C. BENJAMIN SCROGGINS, CHTD.

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

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

Supreme Court No. 82863
District Court Case No. A821316;C319714

NOTICE OF TRANSFER TO COURT OF APPEALS

Pursuant to NRAP 17(b), the Supreme Court has decided to transfer this matter to the Court of Appeals. Accordingly, any filings in this matter from this date forward shall be entitled "In the Court of Appeals of the State of Nevada." NRAP 17(e).

DATE: December 06, 2021

Elizabeth A. Brown, Clerk of Court

By: Rory Wunsch
Deputy Clerk

Notification List
Electronic
Clark County District Attorney \ Alexander G. Chen

Paper
Hon. Michael Villani, District Judge
Javar Eris Ketchum
Steven D. Grierson, Eighth District Court Clerk

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 82863-COA

FILED

FEB 03 2022

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

ORDER OF AFFIRMANCE

Javar Eris Ketchum appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Ketchum argues the district court erred by denying his September 11, 2020, petition without first conducting an evidentiary hearing. In his petition, Ketchum claimed his trial counsel was ineffective. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Ketchum claimed that his trial counsel was ineffective for failing to file a motion requesting discovery. However, counsel filed a motion to compel discovery prior to trial. Accordingly, Ketchum failed to demonstrate that his trial counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel performed different actions concerning a request for pretrial discovery. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Ketchum claimed that his trial counsel was ineffective for failing to review all of the surveillance footage in the possession of the State prior to trial. Ketchum asserted that counsel failed to review portions of the surveillance video that depicted him interacting with the victim prior to the shooting. Ketchum contended that counsel's failure to review all of the surveillance footage led counsel to improperly assess the factual circumstances of the case.

However, the record in this matter demonstrated that significant evidence of Ketchum's guilt was presented at trial. During trial, a witness testified that Ketchum indicated that he intended to rob the victim prior to the shooting. The record demonstrates that surveillance video depicted Ketchum and the victim together shortly before the shooting but did not depict the actual shooting. The surveillance video also depicted the aftermath of the shooting and showed Ketchum taking items from the victim. Ketchum subsequently fled the scene with the victim's belongings. In light of the significant evidence of Ketchum's guilt presented at trial, he failed to demonstrate a reasonable probability of a different outcome at trial had counsel viewed all of the surveillance footage prior to the trial.

Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Ketchum claimed that his trial counsel was ineffective for failing to object to admission of the surveillance video recordings. Ketchum contended that counsel should have attempted to stop the admission of the recordings because they were the State's most critical pieces of evidence. The record demonstrates that the surveillance video recordings were relevant evidence, and relevant evidence is generally admissible at trial. *See* NRS 48.015; NRS 48.025(1). In addition, Ketchum did not demonstrate that the probative value of the surveillance recordings was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, *see* NRS 48.035(1), and therefore, Ketchum did not demonstrate the recordings were inadmissible. Accordingly, Ketchum failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness. Ketchum also failed to demonstrate a reasonable probability of a different outcome had counsel objected to admission of the surveillance video recordings. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Ketchum claimed that his trial counsel was ineffective for failing to object during the State's rebuttal argument when it displayed portions of the surveillance video recording that were not previously utilized during the trial. The record demonstrates that the surveillance video recordings that the State used during its rebuttal argument were admitted into evidence during trial. Thus, the State did not improperly base its argument upon facts not in evidence. *See Morgan v. State*, 134 Nev. 200, 215, 416 P.3d 212, 227 (2018) ("A fundamental legal and ethical rule is that

neither the prosecution nor the defense may argue facts not in evidence."). Accordingly, Ketchum failed to demonstrate his counsel's performance fell below an objective standard of reasonableness. In addition, the Nevada Supreme Court reviewed the underlying claim on direct appeal and concluded that the State properly utilized the surveillance videos during its rebuttal argument. *Ketchum v. State*, No. 75097, 2019 WL 4392486448 (Nev. Sept. 12, 2019) (Order of Affirmance). Ketchum thus failed to demonstrate a reasonable probability of a different outcome had counsel objected to the State's rebuttal argument. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

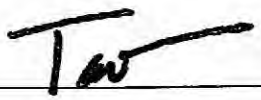
Fifth, Ketchum claimed that his trial counsel was ineffective during the cross-examination of Antoine Bernard by failing to question him concerning his pretrial statement to the police. During cross-examination, counsel extensively questioned Bernard concerning his statement to the police, and counsel highlighted inconsistencies between that statement and Bernard's testimony during direct examination. Accordingly, Ketchum did not demonstrate his counsel's performance fell below an objective standard of reasonableness. Ketchum also failed to demonstrate a reasonable probability of a different outcome had counsel questioned Bernard further concerning his statement to the police. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Ketchum argues that the State withheld the surveillance video recordings in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). This claim could have been raised on direct appeal, and was therefore procedurally barred absent a demonstration of good cause and actual

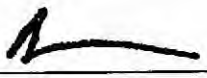
prejudice. *See* NRS 34.810(1)(b), (3). A valid *Brady* claim can constitute good cause and prejudice sufficient to excuse the procedural bars. *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) ("[P]roving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice."). However, the Nevada Supreme Court has already concluded "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," *Ketchum v. State*, No. 75097, 2019 WL 4392486448 (Nev. Sept. 12, 2019) (Order of Affirmance), and that conclusion is the law of the case, *see Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing, and we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Bulla

cc: Hon. Michael Villani, District Judge
Javar Eris Ketchum
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 82863
District Court Case No. A821316;C319714

FILED

MAR 22 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

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: February 28, 2022

Elizabeth A. Brown, Clerk of Court

By: Sandy Young
Deputy Clerk

cc (without enclosures):
Hon. Michael Villani, District Judge
Clark County District Attorney \ Alexander G. Chen, Chief Deputy District Attorney
Javar Eris Ketchum

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 MAR - 1 2022.

Deputy District Court Clerk

RECEIVED
APPEALS
MAR - 1 2022
CLERK OF THE COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 82863
District Court Case No. A821316;C319714

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 the district court AFFIRMED."

Judgment, as quoted above, entered this 3ed day of February, 2022.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this February 28, 2022.

Elizabeth A. Brown, Supreme Court Clerk

By: Sandy Young
Deputy Clerk

OPI
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JOHN GIORDANI
Chief Deputy District Attorney
Nevada Bar #12381
200 Lewis Avenue
Las Vegas, Nevada, 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAVAR KETCHUM,
#6009695

Defendant.

CASE NO. A-20-821316-W

DEPT NO. VI

ORDER FOR PRODUCTION OF INMATE JAVAR KETCHUM, BAC #1192727

DATE OF HEARING: 3/28/23
TIME OF HEARING: 9:30 AM

TO: NEVADA DEPARTMENT OF CORRECTIONS; and

TO: KEVIN MCMAHILL, Sheriff of Clark County, Nevada:

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by STEVEN B. WOLFSON, District Attorney, through JOHN GIORDANI, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that NEVADA DEPARTMENT OF CORRECTIONS shall be, and is, hereby directed to produce JAVAR KETCHUM, Defendant in Case Number A-21-835140-W, wherein THE STATE OF NEVADA is the Plaintiff, inasmuch as the said JAVAR KETCHUM is currently incarcerated in the NEVADA DEPARTMENT OF CORRECTIONS located in Clark County, Nevada, and his presence will be required in Las

Vegas, Nevada, commencing on 3/28/23, at the hour of 9:30 o'clock AM and continuing until completion of the prosecution's case against the said Defendant.

IT IS FURTHER ORDERED that KEVIN MCMAHILL, Sheriff of Clark County, Nevada, shall accept and retain custody of the said JAVAR KETCHUM in the Clark County Detention Center, Las Vegas, Nevada, pending completion of said matter in Clark County, or until the further Order of this Court; or in the alternative shall make all arrangements for the transportation of the said JAVAR KETCHUM to and from the Nevada Department of Corrections facility which are necessary to insure the JAVAR KETCHUM's appearance in Clark County pending completion of said matter, or until further Order of this Court.

~~DATED this _____ day of March, 2023.~~

Dated this 3rd day of March, 2023

DISTRICT JUDGE

828 839 859D 729D kj
Jacqueline M. Bluth
District Court Judge

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

BY /s/JOHN GIORDANI
JOHN GIORDANI
Chief Deputy District Attorney
Nevada Bar #12381

16F16375X/dd/MVU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Javar Ketchum, Plaintiff(s)	CASE NO: A-20-821316-W
vs.	DEPT. NO. Department 6
Nevada State of, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 3/3/2023

Craig Mueller	craig@craigmeullerlaw.com
Craig Mueller	receptionist@craigmuellerlaw.com
District Attorney	motions@clarkcountyda.com
John Niman	JOHN.NIMAN@CLARKCOUNTYDA.COM
Clark County District Attorney	motions@clarkcountyda.com
John Niman	john.niman@clarkcountyda.com
Law Firm of C. Benjamin Scroggins, Chtd.	info@cbscrogginslaw.com
C. Scroggins, Esq.	cbs@cbscrogginslaw.com
Kelly Jarvi	kelly@cbscrogginslaw.com

APET
C. BENJAMIN SCROGGINS, ESQ.
Nevada Bar No. 7902
THE LAW FIRM OF
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629 South Casino Center Boulevard
Las Vegas, Nevada 89101
Tel.: (702) 328-5550
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info@cbscrogginslaw.com

Attorney for Petitioner,
JAVAR KETCHUM

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAVAR KETCHUM, Petitioner, vs. STATE OF NEVADA, Respondent.	Case No.: A-20-821316-W Dept. No.: VI
And All Related Cases.	

AMENDED PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)

Petitioner, JAVAR KETCHUM (hereinafter "Mr. Ketchum"), by and through his attorney, C. BENJAMIN SCROGGINS, ESQ., of THE LAW FIRM OF C. BENJAMIN SCROGGINS, CHTD., hereby submits his Amended Petition for Writ of Habeas Corpus. This Petition is made and based upon the pleadings and papers on file in this matter; the following Memorandum of Points and Authorities; the exhibits in the Appendices filed herewith; as well as

upon any further argument or evidence this Honorable Court may entertain at the hearing on the Petition.

DATED this 24th day of March, 2023.

THE LAW FIRM OF
C. BENJAMIN SCROGGINS, CHTD.

C. BENJAMIN SCROGGINS, ESQ.
Nevada Bar No. 7902
629 South Casino Center Boulevard
Las Vegas, Nevada 89101
Tel.: (702) 328-5550
Fax: (702) 442-8660
info@cbscrogginslaw.com

Attorney for Petitioner,
JAVAR KETCHUM

PETITION

1. Name of institution and county in which Petitioner is presently imprisoned or where and how he is presently restrained of his liberty: **High Desert State Prison, Indian Springs, Clark County, Nevada.**

2. Name and location of court which entered the judgment of conviction under attack: **Eighth Judicial District Court, Clark County, Nevada.**

3. Date of judgment of conviction: **February 5, 2018.**

4. Case number: **C-16-319714-1**

5. (a) Length of sentence: **Life with the eligibility of parole after serving a MINIMUM of TWENTY (20) YEARS plus a CONSECUTIVE term of TWO HUNDRED FORTY MONTH (240) MONTHS with a MINIMUM parole eligibility after NINETY-SIX (96) MONTHS for the Use of a Deadly Weapon; 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 (120) MONTHS with a MINIMUM parole eligibility of FORTY-EIGHT (48) MONTHS for the Use of a Deadly Weapon, CONCURRENT with COUNT 1; with FOUR HUNDRED SEVENTY-FIVE (475) DAYS credit for time served.

(b) If sentence is death, state any date upon which execution is scheduled: **N/A**

6. Is Petitioner presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes ____ No __**X**__

If "yes," list crime, case number and sentence being served at this time: **N/A**

7. Nature of offense involved in conviction being challenged: **First Degree Murder with use of a Deadly Weapon; Robbery with use of a deadly weapon.**

8. What was Petitioner's plea? (check one)

(a) Not guilty .....**X**.....

(b) Guilty .....

(c) Guilty but mentally ill .....

(d) Nolo contendere .....

9. If Petitioner entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: **N/A**

10. If Petitioner was found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury .....**X**.....

(b) Judge without a jury .....

11. Did Petitioner testify at the trial? Yes .....X..... No .....

12. Did Petitioner appeal from the judgment of conviction**?** Yes .....X..... No .....

13. If Petitioner did appeal, answer the following:

(a) Name of court: **Supreme Court of The State of Nevada**

(b) Case number or citation: **75097**

(c) Result: **Order of Affirmance; Affirmed**

(d) Date of result: **September 12, 2019**

(Attach copy of order or decision, if available.)

14. If Petitioner did not appeal, explain briefly why he did not: **N/A**

15. Other than a direct appeal from the judgment of conviction and sentence, has Petitioner previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes .....X..... No .....

09/11/2020 – Petition for Writ of Habeas Corpus; C-16-319714-1

05/06/2021 – Post Conviction Appeal; Docket Number: 82863;

16. If Petitioner's answer to No. 15 was "yes," give the following information: -

(a) Petition for Writ of Habeas Corpus

(1) Name of court: Eighth Judicial District Court

(2) Nature of proceeding: Petition for Writ of Habeas Corpus

(3) Grounds raised: (1) Infeffective Assistance of Trial and Appellate Counsel.

(4) Did Petitioner receive an evidentiary hearing on his petition, application or motion? Yes ..... No .....X.....

(5) Result: Petition Denied

(6) Date of result: March 31, 2021

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Findings of Fact, Conclusions of Law and Order, March 31, 2021.

(b) Post-Conviction Appeal:

(1) Name of court: Nevada Court of Appeals

(2) Nature of proceeding: Appeal from Denial of Post-Conviction Petition

(3) Grounds raised: (1) The District Court Erred by Failing to Conduct an Evidentiary Hearing; (2) Ineffective Assistance of Trial Counsel; and (3) The Prosecution Intentionally Withheld Brady Materials.

(4) Did Petitioner receive an evidentiary hearing on his petition, application or motion? Yes ..... No .....X.....

(5) Result: District Court Order Affirmed

(6) Date of result: February 3, 2022

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Ketchum v. State, 2022 Nev. Unpub. LEXIS 41, 502 P.3d 1093 (Nev. Ct. App. Unpub., Feb. 3, 2022).

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did Petitioner appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes .....X..... No .....

Citation or date of decision: Ketchum v. State, 2022 Nev. Unpub. LEXIS 41, 502 P.3d 1093 (Nev. Ct. App. Unpub., Feb. 3, 2022).

(2) Second petition, application or motion? Yes ..... No .....

Citation or date of decision: **N/A**

(3) Third or subsequent petitions, applications or motions? Yes ..... No .....

Citation or date of decision: **N/A**

(e) If Petitioner did not appeal from the adverse action on any petition, application or motion, explain briefly why Petitioner did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify: **Yes**

(a) Which of the grounds is the same: One, Two, Three and Four

(b) The proceedings in which these grounds were raised: Ground One was raised in Petitioner's Petition for Writ of Habeas Corpus and on appeal from its denial; Grounds Two, Three and Four were raised in the Direct Appeal.

(c) Briefly explain why Petitioner is again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or

typewritten pages in length.) Petitioner was never granted an evidentiary hearing to present evidence supporting his grounds for relief.

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) Yes. The Petition was filed within one year of the affirmance of the judgment of conviction, but the Court ordered that this Amended Petition be filed after the affirmance of the Court's denial of the Petition by the Nevada Court of Appeals.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ..... No .....X.....

If yes, state what court and the case number: **N/A**

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Nicholas Wooldrige

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ..... No .....X.....

If yes, specify where and when it is to be served, if you know: **N/A**

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

/ / /

/ / /

/ / /

(a) **GROUND ONE**: trial counsel and appellate counsel were ineffective in the representation of Petitioner. U.S. Const. amends. V, VI and XIV.

SUPPORTING FACTS:

Trial Counsel Was Ineffective in Dealing With the State's Surveillance Video Evidence.

During the discovery phase of the case, trial counsel informed Chief Deputy District Attorney Marc DiGiacomo that he wanted 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 LVMPD. The original surveillance video was in evidence at the evidence vault and could only be accessed by law enforcement. At the time and date set for the review, LVMPD Det. Bunn and Chief Deputy DA DiGiacomo presented the video to trial counsel in the Grand Jury room. Trial counsel had no control of the video while it was played, and law enforcement personnel controlled the surveillance video. Trial counsel was only shown parts of the video.

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

These two never-before seen portions of video substantially undercut the defense theory that the victim was unaware that Petitioner was carrying a firearm the night of the shooting. On

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

> . . . 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 in 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).

Ketchum v. State, 2019 Nev. Unpub. Lexis 998, *3, 448 P.3d 574, 2019 WL 4392486 (Nev., Sep. 12, 2019).

An accused has the right to effective assistance of counsel pursuant to the Sixth Amendment to the United States Constitution, as well as the of the constitution of the State of Nevada. The right to effective assistance of counsel attaches prior to a defendant's decision to plead guilty. McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (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 objective standard of reasonableness, and 2) whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 688-694. "Establishment of deficient performance requires a showing that counsel's

performance fell below an objective standard of reasonableness." Lara v. State, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004), citing Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). To satisfy the second element, a defendant must demonstrate prejudice by showing "a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Id., citing Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

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

Trial counsel went to the Grand Jury room with Det. Bunn and Chief Deputy DA DiGiacomo on or about February 16, 2017, to view the original surveillance video of the incident. Trial counsel later reported that he was only shown parts of the video. This begs the obvious question: why didn't he insist on viewing the original, unaltered video in its entirety? This video was obviously the single most important piece of evidence in the State's arsenal. Yet trial counsel left it to the bona fides of law enforcement and the chief prosecutor to be honest with him? Surely, trial counsel could have subpoenaed a whole and complete copy of the video. Trial counsel could have filed a motion for discovery pursuant to NRS 174.235 and/or Brady v. Maryland, 373 U.S. 83, 86-88 (1963). It appears trial counsel did neither. Trial counsel's performance thus fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lara v. State, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (citing Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

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

Trial counsel admitted to being caught completely by surprise by these videos. Yet trial counsel constructed Petitioner's entire defense on grounds that were completely discredited by a few seconds of videotape. Surely a reasonably prudent attorney would have watched the video in its entirety. Having discovered the incriminating evidence, a reasonably prudent attorney would have altered or abandoned this defense before presenting it to a jury. Instead, due to trial counsel's failure to properly review the video while preparing for trial, trial counsel prepared and presented a defense theory that was doomed to fail from its inception. Thus, Petitioner has demonstrated actual prejudice by showing "a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Lara, Supra (citing Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

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

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

Finally, trial counsel's failures to object placed Petitioner in a worse position for his appeal. Failure to object at trial is generally considered a waiver of the issue on appeal and then is reviewable only for plain error. Davis v. City of Reno, 113 Nev. 207, 931 P.2d 207 (1997); Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992); Davis v. State, 107 Nev. 600, 817 P.2d 1169 (1991). Again, Petitioner has demonstrated actual prejudice by showing "a reasonable probability that, but for counsel's errors, the result of the trial would have been different."

Trial Counsel Was Ineffective in His Cross-Examination of Antoine Bernard.

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

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

There is a reasonable probability that, but for the deficient performance of trial counsel, the outcome of the trial would have been different.

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(b) **GROUND TWO**: The trial court abused its discretion when it denied Mr. Ketchum's motion to dismiss the grand jury indictment, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

SUPPORTING FACTS:

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.

Ex. 2 at **AA0000070**.

> 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.

Ex. 2 at **AA0000072**.

> 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.

Ex. 2 at **AA0000072-80**.

It was undisputed that Detective Bunn testified to facts that are not visible on the video that was played to the Grand Jury. 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. 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.

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. 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. 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. 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.

This claim was raised in Mr. Ketchum's direct appeal, but the Nevada Supreme Court held that the district court did not abuse its discretion because any infirmity in the grand jury proceedings were irrelevant because Mr. Ketchum was found guilty at a jury trial. This decision was contrary to the constitutional requirements for due process and should be overturned.

(c) **Ground Three**: The trial court committed constitutional error when it denied Mr. Ketchum's ability to support his claim of self-defense by prohibiting him from introducing specific prior acts of violence and robbery by the alleged victim, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

SUPPORTING FACTS:

The defense theory of the case was heavily dependent upon Mr. 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's 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 **AA0001155-57**. The district court precluded the defendant from offering evidence of Ezekiel Davis's prior robbery convictions and robbery related offenses. Id. These offences involved 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 and supported by Mr. Davis's record conviction for robbery and related offenses, as well as victims of Mr. Davis who were ready and willing to testify concerning the robberies. **AA0001155-1157**.

The nature of Mr. Davis's 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 gunp Importantly, in an analogous set of circumstances, in two of Mr. Davis's prior bad acts that the defense sought to admit, Mr. Davis had attempted to rob victims at gunpoint in a parking lot. **AA0001123**.

Finally, during the State's rebuttal, the State called Mr. Davis's fiancée, Ms. Bianca Hicks, to the stand. **AA0001209-1222**. 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.

AA0001218.

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 –

AA0001221.

The State objected and the trial court excused the jury and 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 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?

AA0001222-1226.

The trial court's attempt to limit the defense's ability to cross-examine Mr. Davis's fiancée was in error for two reasons. First, once the State opened the door to evidence of Mr. Davis's character or a trait of his character, the defense should have been entitled to offer similar evidence. 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. Here, once the State opened the door, Mr. Ketchum should have been entitled to present evidence or elicit testimony regarding Mr. Davis's prior convictions and character, namely, Mr. Davis's previous conviction of ex-felon in possession of a firearm.

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. Also, counsel may move for reconsideration of the previous evidentiary ruling. In this way, the attorney can seek modification or clarification of the evidentiary ruling.

At trial, the State opened the door to questioning about the alleged victim's prior history. It did so in contradiction to its representations that it would not:

> 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.

AA0001187.

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's 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.

The trial court's evidentiary rulings deprived Mr. Ketchum of a fair trial. Specifically, Mr. Ketchum should have been permitted to present prior bad acts and related evidence of the alleged victim for any of three reasons. First, the evidence was relevant and admissible to support Mr. Ketchum's theory that the alleged victim was the initial aggressor. Second, the evidence relating to Mr. Davis was relevant and admissible to show a common plan or scheme by Mr. Davis, namely, corroborating Mr. Davis's 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's fiancée about Mr. Davis's previous conviction for ex-felon in possession of a firearm, 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 limit Mr. Davis's fiancée's testimony.

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. NRS 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 had committed prior robberies and gone to prison as a result.

The Declaration of Arrest and Judgment of Conviction for Mr. Davis's attempted robbery conviction, attached to his Motion to Admit (**AA0001123**) document his violent and aggressive character:

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

In this case the evidence strongly supported Mr. Ketchum's allegation that Mr. Davis was the initial aggressor. Testimony about the victim's prior acts of violence can be convincing and reliable evidence of the victim's propensity for violence. Accordingly, the trial court's evidentiary rulings precluding Mr. Ketchum from introducing the relevant portions of Mr. Davis's prior robbery and theft convictions, deprived him of a fair trial.

In addition to supporting Mr. Ketchum's theory of the case, the evidence should have been admitted to prove the alleged victim's motive and common plan or scheme. Specifically, Mr. Davis's modus operandi was to violently target unsuspecting victims in parking lots and proceed to rob them. On at least two occasions, Mr. Davis 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 victims 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 victims 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).

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. **AA0001155-1157**. The trial court was also aware that certain specific acts of violence of the deceased were known to Mr. Ketchum or had been communicated to him. Id.

Defense counsel proffered that Mr. 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's extensive criminal record to his Motion to Admit Character Evidence of Ezekiel Davis. See **AA0001123**. The trial court's evidentiary rulings on these issues severely hampered Mr. Ketchum's defense and denied him of due process.

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(d) **GROUND FOUR**: The 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 under the Fifth and Fourteenth Amendments to the United States Constitution.

SUPPORTING FACTS:

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 had a sua sponte duty to protect the defendant's right to a fair trial.").

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.

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WHEREFORE, Petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

DATED this 24th day of March, 2023.

THE LAW FIRM OF
C. BENJAMIN SCROGGINS, CHTD.

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Attorney for Petitioner,
JAVAR KETCHUM

VERIFICATION

Under penalty of perjury, the undersigned declares that the undersigned is the attorney for the petitioner named in the foregoing petition and knows the contents thereof, that the petitioner personally authorized the undersigned to commence this action, that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

DATED this 24th day of March, 2023.

C. BENJAMIN SCROGGINS, ESQ.
Attorney for Petitioner,
JAVAR KETCHUM

/ / /

CERTIFICATE SERVICE

I hereby certify that I served the foregoing Amended Petition for Writ of Habeas Corpus by electronic means, by eFiling and eServing the same through the Court's EFS, service addressed to the registered email addresses for all parties to this case as reflected in the Court's eService list.

CERTIFIED this 24th day of March, 2023.

C. BENJAMIN SCROGGINS, ESQ.

RSPN
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Respondent,

-vs-

JAVAR KETCHUM,
#1192727

Petitioner.

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

STATE'S RESPONSE TO PETITIONER'S AMENDED PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: MAY 23, 2023
TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JOHN AFSHAR, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction)

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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

On March 8, 2017, Petitioner filed a Motion in Limine, seeking to admit character evidence of the victim, Ezekiel Davis (hereinafter "Davis" or "victim"). 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. On May 18, 2017, the State filed a Supplement to its Motion in Limine. The District Court held a Petrocelli hearing on May 19, 2017, determining that Petitioner could only bring in opinion testimony regarding the victim's character and that witnesses were not to elaborate on that opinion.

On May 22, 2017, Petitioner's five-day jury trial commenced. At the end of the fifth day of trial, the jury found Petitioner guilty of both charges. Following the verdict, the Court approved and filed a Stipulation and Order Waiving Separate Penalty Hearing, with an agreement a life sentence 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.

On June 2, 2017, Petitioner filed a Motion for New Trial pursuant to NRS 176.515(4). The State filed its Opposition on September 9, 2017. Petitioner filed a Reply on September 27, 2017, and a Supplement thereto on September 28, 2017. The District Court, finding that Petitioner's disagreement with the Court's evidentiary rulings was not a basis for a new trial, denied the motion on October 17, 2017. Petitioner was adjudicated that same day. However, the defense requested additional time to handle sentencing matters. Pursuant to the stipulation, on February 1, 2018, the District Court sentenced Petitioner to Nevada Department of Corrections as follows: Count 1- 20 years to life, plus a consecutive term of 96 to 240 months

for the Use of a Deadly Weapon; Count 2- 48 months to 180 months, plus a consecutive term of 48 months to 120 months for the Use of a Deadly Weapon, concurrent with Count 1. The Judgment of Conviction was filed on February 5, 2018. Petitioner filed a Notice of Appeal on February 6, 2018. On September 12, 2019, the Nevada Supreme Court affirmed Petitioner's conviction. Remittitur issued on October 11, 2019.

On September 11, 2020, Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "First Petition"). The State filed its Response to the First Petition on December 16, 2020. On January 11, 2021, Petitioner filed a Notice of Motion to Continue Reply Brief Deadline and Hearing Date. On January 26, 2021, the Court granted Petitioner's motion to continue. On February 9, 2021, Petitioner filed a Reply to State's Response to the First Petition. On March 12, 2021, the Court heard and denied the First Petition.

On March 31, 2021, Petitioner filed a Motion for Reconsideration Or In the Alternative Motion for Rehearing of Petitioner's NRS 34 Petition (hereinafter "Motion for Reconsideration"). On April 27, 2021, the State filed an Opposition to Petitioner's Motion for Reconsideration. On April 29, 2021, Petition filed a Notice of Appeal, appealing the Court's denial of the First Petition. On May 4, 2021, the District Court denied Petitioner's Motion for Reconsideration. On May 10, 2021, Petitioner filed a Motion for Appointment of Counsel for his Motion for Reconsideration. On June 15, 2021, the Court granted Petitioner's Motion for Appointment of Counsel.

On June 29, 2021, counsel for Petitioner confirmed and requested a later date for status check and briefing schedule. Since then, this case has continued numerous times. First, on August 10, 2021, the Court granted Petitioner's motion for a six-month continuance to file a Supplemental Brief. Second, the Court filed a Stipulation and Order to Extend Time for Briefing on February 4, 2022, to give Petitioner's investigator time to interview witnesses and view evidence. Third, the Court filed a Stipulation and Order to Extend Time for Briefing on May 25, 2022, to give Petitioner's investigator time to interview witnesses and view evidence. Fourth, the Court filed a Stipulation and Order to Extend Time for Briefing on August 11, 2022, to give Petitioner additional time to investigate his case. Fifth, Petitioner filed a Motion

to Extend Time for Briefing on November 10, 2022. The Court granted Petitioner's motion on November 29, 2022. Sixth, Petitioner filed a Motion to Extend Time for Briefing on December 15, 2022. The Court granted Petitioner's motion on January 17, 2023. Seventh, Petitioner filed a Motion to Extend Time for Briefing on February 14, 2023. The Court granted Petitioner's motion on March 13, 2023.

Between continuances, the Nevada Court of Appeals issued an order on February 3, 2022, affirming the District Court's denial of the First Petition. Remittitur issued February 28, 2022. On March 24, 2023, Petitioner filed an Amended Petition for Writ of Habeas Corpus (hereinafter "Second Petition").

STATEMENT OF THE FACTS

At 6:22 a.m. on September 25, 2016, LVMPD Officers Brennan Childers and Jacqulyn Torres were dispatched to a shooting at 4230 South Decatur Boulevard, a strip mall with several businesses including Top Knotch. Jury Trial Transcript (hereinafter "JTT") Day 2, at 20-23, 29-32. When police arrived, they found Davis upon whom another man was performing chest compressions. Id. at 22-23, 32. Davis was not wearing pants. Id. at 32. Several other people were in the parking lot, and none of the businesses appeared opened. Id. at 22-23. Davis was transported to the hospital but did not survive a single gunshot wound to the abdomen. Id. at 66. Trial testimony from Davis's fiancée, Bianca Hicks, and from Detective Christopher Bunn (hereinafter "Detective Bunn") revealed that Davis's person was missing a belt which had a gold "M" buckle and a gold watch. JTT Day 3, at 17, 122; JTT Day 4, at 86, 90-92.

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

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 (hereinafter "Chiles"), Roderick Vincent (hereinafter "Vincent"), and Samantha Cordero—

exited Top Knotch. JTT Day 3, at 42-67. Chiles owned Top Knotch, and Vincent owned a recording located studio inside Top Knotch. Id. at 68. Vincent denied that there were any DVRs of the surveillance video from Top Knotch or the studio; however, Detective Bunn had noted a camera. Id. at 69,73. A subsequent search of Vincent's car in the parking lot located two DVRs of the surveillance footage from Top Knotch and the studio. Id. at 58-59, 63-64.

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

The video also showed that at about 6:14 a.m., Petitioner and Davis exited arm-in-arm out the front of Top Knotch. Id. at 97. At that point, there was still a watch on Davis's wrist. Id. at 98. 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 the camera's view. Id. at 99-102. At about 6:16 a.m., the people on video all appeared to have their attention drawn to the area where Petitioner and Davis were. Id. at 99. Petitioner then entered the view of the camera, removing Davis's belt from his body while holding the gun in his other hand. Id. at 101-102. Bernard also testified at trial that he saw Petitioner take Davis's belt. Id. at 20. The 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 Davis'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. at 102.

Despite contact with several witnesses in the parking lot including Chiles and Vincent, the police had no information regarding the identity of the shooter. Id. at 107. After further investigation, the shooter was identified as Petitioner and a warrant for his arrest was issued. Id. at 107. Petitioner was apprehended at a border control station in Sierra Blanca, Texas, whereupon he was brought back to Nevada to face charges. Id. at 108.

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ARGUMENT

I. THE SECOND PETITION IS PROCEDURALLY BARRED

This Second Petition is procedurally barred. The Second Petition is titled "Amended Petition For Writ of Habeas Corpus," however, there is no habeas petition to amend. The First Petition, filed on September 11, 2020, was denied by the District Court on March 12, 2021. Petitioner's related Motion For Reconsideration was also denied by the District Court on May 4, 2021. The Nevada Court of Appeals affirmed the denial of the First Petition on February 3, 2022. Thus, Petitioner has no habeas petition to amend.

Petitioner's instant Second Petition stems from Petitioner's Motion for Appointment of Counsel filed in relation to his Motion for Reconsideration. After the Court denied Petitioner's Motion for Reconsideration on May 4, 2021, the Court granted Petitioner's Motion for Appointment of Counsel on June 15, 2021. Petitioner then continued this case, to file a supplemental brief, until he filed the instant Second Petition on March 24, 2023. To the extent that this Second Petition is presented as a supplemental brief to the Motion for Reconsideration, it must be denied. Petitioner is not entitled to a reconsideration of his denied First Petition and he does not provide any authority that states otherwise.

In addition to being time-barred, all four grounds in this Second Petition are procedurally barred because they have been considered and denied by the District Court, Nevada Court of Appeals and/or the Nevada Supreme Court. Ground One has been considered and denied by the District Court in the First Petition; and the Nevada Court of Appeals has affirmed its denial. Grounds Two, Three and Four were raised and denied by the Supreme Court of Nevada on direct appeal.

A. Application Of The Procedural Bars Is Mandatory

The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars. Instead, the Nevada Supreme Court has emphatically and repeatedly stated that the procedural bars *must* be applied.

The district courts have *a duty* to consider whether post-conviction claims are procedurally barred. State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112

P.3d 1070, 1076 (2005). Riker held that the procedural bars "cannot be ignored when properly raised by the State." Id. at 233, 112 P.3d at 1075. Accord, State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 94-95, footnote 2 (2012), cert. denied, 571 U.S. ___, 133 S.Ct. 988 (2013) ("under the current statutory scheme the time bar in NRS 34.726 is *mandatory, not discretionary*" (emphasis added)).

Even "a stipulation by the parties cannot empower a court to disregard the mandatory procedural default rules." State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003); accord, Sullivan v. State, 120 Nev. 537, 540, footnote 6, 96 P.3d 761, 763-64, footnote 6 (2004) (concluding that a petition was improperly treated as timely and that a stipulation to the petition's timeliness was invalid). The Sullivan Court "expressly conclude[d] that the district court should have denied [a] petition" because it was procedurally barred. Sullivan, 120 Nev. at 542, 96 P.3d at 765.

The district courts have zero discretion in applying the procedural bars because to allow otherwise would undermine the finality of convictions. In holding that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," the Riker Court noted:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Riker, 121 Nev. at 231, 112 P.3d at 1074.

Moreover, strict adherence to the procedural bars promotes the best interests of the parties:

> At some point, we must give finality to criminal cases. Should we allow [petitioner's] post-conviction relief proceeding to go forward, we would encourage defendants to file groundless petitions for federal habeas corpus relief, secure in the knowledge that a petition for post-conviction relief remained indefinitely available to them. This situation would prejudice both the accused and the State since the interests of both the petitioner and the government are best served if post-conviction claims are raised while the evidence is still fresh.

Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989) (citations omitted).

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B. The Second Petition Is Time-Barred

The Second Petition is time-barred pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit. 118 Nev. 590, 596, 53 P.3d 901, 904 (2002).

This is not a case wherein the Judgment of Conviction was, for example, not final. See, e.g., Johnson v. State, 133 Nev. 571, 402 P.3d 1266 (2017) (holding that the defendant's judgment of conviction was not final until the district court entered a new judgment of conviction on counts that the district court had vacated); Whitehead v. State, 128 Nev. 259, 285 P.3d 1053 (2012) (holding that a judgment of conviction that imposes restitution in an unspecified amount is not final and therefore does not trigger the one-year period for filing a habeas petition). Nor is there any other legal basis for running the one-year time-limit from the filing of the Amended Judgment of Conviction. Thus, Petitioner had one year from the filing of his original Judgment of Conviction to file a timely petition.

Petitioner failed to file this Second Petition prior to the one-year deadline. Remittitur issued from Petitioner's appeal on October 11, 2019; therefore, Petitioner had until October

11, 2020, to file a timely habeas petition. Petitioner filed the Second Petition on March 24, 2023. This is over two years and five months after Petitioner's one-year deadline. Absent a showing of good cause to excuse this delay, Petitioner's Second Petition must be denied.

C. The Second Petition Is Barred As Successive

NRS 34.810(2) reads:

> A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds, but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v. State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that "where a defendant previously has sought relief from the judgment, the defendant's failure to identify all grounds for relief in the first instance should weigh against consideration of the successive motion.")

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

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Here, Petitioner has already filed a prior postconviction habeas petition. The First Petition was filed on September 11, 2020. The District Court heard and denied the First Petition on March 31, 2021. On February 3, 2022, the Nevada Court of Appeals affirmed the District Court's denial of the First Petition.

Furthermore, this Second Petition fails to allege new or different grounds for relief and these grounds have already been denied on the merits. Ground One has been raised in the First Petition; denied by the District Court; and reviewed and denied by the Nevada Court of Appeals. See Section III, *infra*. Ground Two, Three, and Four have been raised on direct appeal and denied by the Nevada Supreme Court. See Section IV, V and VI, *infra*. Thus, this Second Petition is successive and must be denied.

II. PETITIONER FAILS TO ESTABLISH GOOD CAUSE AND PREJUDICE TO OVERCOME THE PROCEDURAL BARS

Petitioner's failure to prove good cause or prejudice requires the dismissal of his Second Petition. To overcome the procedural bars, a petitioner must demonstrate: (1) good cause for delay in filing his petition or for bringing new claims or repeating claims in a successive petition; and (2) undue or actual prejudice. NRS 34.726(1); NRS 34.800(1); NRS 34.810(3).

To avoid procedural default under NRS 34.726 and NRS 34.810, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or comply with the statutory requirements. See Hogan, 109 Nev. at 959-60, 860 P.2d at 715-16; Phelps, 104 Nev. at 659, 764 P.2d at 1305.

"To establish good cause, appellants *must* show that an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v.

Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

The Nevada Supreme Court has clarified that, a defendant cannot attempt to manufacture good cause. See Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. at 236, 773 P.2d at 1230). Excuses such as the lack of assistance of counsel when preparing a petition, as well as the failure of trial counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

Further, a petitioner raising good cause to excuse procedural bars must do so within a *reasonable* time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing).

A reasonable period is presumably one-year from when the claim became available. See Rippo v. State, 132 Nev. 95, 101, 368 P.3d 729, 734 (2016) ("[A] petition … has been filed within a reasonable time after the … claim became available so long as it is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur."); Pellegrini v. State, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001) ("The State concedes, and we agree, that for purposes of determining the timeliness of these successive petitions pursuant to NRS 34.726, assuming the laches bar does not apply, it is both reasonable and fair to allow petitioners one year from the effective date of the amendment to file any successive habeas petitions"). A claim is reasonably available if the facts giving rise to the claim were discoverable using reasonable diligence. McClesky v. Zant, 499 U.S. 467, 493, 111 S.Ct. 1454, 1470 (1991).

A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S.Ct. 1587, 1592 (2000).

To demonstrate prejudice to overcome the procedural bars, a defendant must show "not merely that the errors of [the proceeding] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions." Hogan v Warden, 109 Nev. at 960, 860 P.2d at 716 (internal quotation omitted), Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545.

Here, Petitioner fails to allege, much less demonstrate, good cause to overcome the procedural bars. Petitioner's four claims cannot constitute good cause because they are all procedurally barred. Ground One is successive because it has been raised and rejected in the First Petition. See Section III, *infra*. It is also barred by the law of the case because the District Court's denial was affirmed by the Nevada Court of Appeals. See Section III, *infra.* Grounds Two, Three and Four are all barred by the law of the case because they have all been raised and denied by the Nevada Supreme Court on direct appeal. See Section IV-VI, *infra.* Furthermore, Petitioner fails to demonstrate prejudice to overcome the procedural bars because Petitioner's claims are meritless. See Sections III-VI, *infra*. Thus, this Second Petition must be denied.

III. GROUND ONE MUST BE DENIED BECAUSE PETITIONER'S INEFFECTIVE OF ASSISTANCE CLAIMS ARE MERITLESS, SUCCESSIVE, AND BARRED BY THE LAW OF THE CASE

Ground One claims ineffective assistance of counsel. Second Petition, at 9. Petitioner's claims for ineffective assistance of counsel have been raised in the First Petition and denied by the District Court. The Nevada Supreme Court also reviewed these claims and affirmed the District Court' denial.

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A. Petitioner's Ineffective Assistance of Counsel Claims Regarding The Handling of The Surveillance Video Are Meritless and Barred By The Law of The Case

Petitioner claims his trial counsel made multiple mistakes in dealing with the State's surveillance video evidence. Second Petition, 9-13. First, Petitioner claims his trial counsel was ineffective for not viewing the entire surveillance video showing Petitioner and victim at the time of the shooting. Second Petition, at 9-13. Petitioner claims trial counsel should have subpoenaed the complete video; and "filed a motion for discovery pursuant to NRS 174.235 and/or Brady v. Maryland, 373 U.S. 83, 86-88 (1963)." Second Petition, at 11. Second, Petitioner claims trial counsel should have objected to the State's motion to admit the surveillance video. Second Petition, at 13. Third, Petitioner claims trial counsel should have objected to the State playing the two portions during its rebuttal argument. Second Petition, at 13. Petitioner's claims of ineffective assistance of trial counsel are all meritless and barred by the law of the case.

1. Petitioner's claims are meritless, and were raised and denied by the District Court in the First Petition

The doctrine of res judicata precludes a party from re-litigating an issue which has been finally determined by a court of competent jurisdiction. Exec. Mgmt. v. Ticor Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998) (citing Univ. of Nev. v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994)); see also Sealfon v. United States, 332 U.S. 575, 578, 68 S. Ct. 237, 239 (1948) (recognizing the doctrine's availability in criminal proceedings). "The doctrine is intended to prevent multiple litigation causing vexation and expense to the parties and wasted judicial resources." Id.

Petitioner's ineffective assistance of trial counsel claims regarding the surveillance video were raised in the First Petition and denied by this Court:

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

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

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

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was. ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

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

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not

require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

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

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

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

First, Petitioner alleges that counsel was ineffective in his initial viewing of the surveillance video because counsel allegedly "reported he was only shown parts of the video." Petition, at 6. It must be noted that Petitioner has utterly failed to cite anything in the record or otherwise present any evidence supporting this claim. Thus, this is a bare and naked claim. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner is simply complaining that counsel did not view the video in its entirety without support. Additionally, the Nevada Supreme Court already found that counsel had access to the entire surveillance video. Order of

Affirmance, No. 75097, at 3. The State cannot meaningfully respond to such a bare and naked claim, and to the extent Petitioner is claiming that counsel did not have access to the entire surveillance 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. Petitioner does not present any alternative defense that would have worked better, or otherwise explain what counsel could have done differently. Therefore, Petitioner cannot demonstrate how counsel was ineffective.

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

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

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

Lastly, Petitioner alleges counsel was ineffective because it put Petitioner in a worse position for his appeal. Petition, at 9. Petitioner complains about appellate counsel's deficient performance on appeal. Id. There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id. The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments … in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. "For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314.

Here, objecting to the surveillance video in rebuttal would not have changed the outcome of Petitioner's appeal because there was no basis to exclude the surveillance video or prevent the State from playing portions in rebuttal. As discussed supra, Section I.C., the surveillance video was admitted at trial, and it would have been futile for counsel to object to it in rebuttal. Counsel cannot be ineffective for failing to object to the surveillance video in rebuttal. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Because trial counsel did not have any reason

> to object, there is no indication that an objection would have put appellate counsel in any better position.
>
> In his Opening Brief for Petitioner's direct appeal, appellate counsel raised the issue that he could not "control the video" when he viewed it at the evidence vault with law enforcement. Appellant's Opening Brief, August 29, 2018, No. 75097, at 46. However, he was given a copy during discovery and admitted to viewing the surveillance video on appeal. Id. Furthermore, the Nevada Supreme Court found that counsel had access to the entire surveillance video. Order of Affirmance, No. 75097, at 3. Therefore, there was not any basis for trial counsel to object to the surveillance video being played during rebuttal, and appellate counsel found not have raised any stronger argument on appeal. As such, this claim is without merit, and Petitioner cannot demonstrate how counsel was ineffective.

Findings of Fact, Conclusions of Law and Order filed 3/31/2021, at 7-10. Thus, Petitioner's claims are successive because they have been raised in the First Petition. Furthermore and as the Order showed, they are also meritless.

2. Petitioner's claims are barred by the law of the case because the Nevada Court of Appeal has reviewed and affirmed the District Court's denial of these claims

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. Nev. Const. Art. VI § 6. See Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011).

Here, Petitioner's claims are barred by the law of the case because the Nevada Court of Appeals affirmed the District Court's denial of these claims:

First, Ketchum claimed that his trial counsel was ineffective for failing to file a motion requesting discovery. However, counsel filed a motion to compel discovery prior to trial. Accordingly, Ketchum failed to demonstrate that his trial counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel performed different actions concerning a request for pretrial discovery. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Ketchum claimed that his trial counsel was ineffective for failing to review all of the surveillance footage in the possession of the State prior to trial. Ketchum asserted that counsel failed to review portions of the surveillance video that depicted him interacting with the victim prior to the shooting. Ketchum contended that counsel's failure to review all of the surveillance footage led counsel to improperly assess the factual circumstances of the case.
However, the record in this matter demonstrated that significant evidence of Ketchum's guilt was presented at trial. During trial, a witness testified that Ketchum indicated that he intended to rob the victim prior to the shooting. The record demonstrates that surveillance video depicted Ketchum and the victim together shortly before the shooting but did not depict the actual shooting. The surveillance video also depicted the aftermath of the shooting· and showed Ketchum taking items from the victim. Ketchum subsequently fled the scene with the victim's belongings. In light of the significant evidence of Ketchum's guilt presented at trial, he failed to demonstrate a reasonable probability of a different outcome at trial had counsel viewed all of the surveillance footage prior to the trial. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Ketchum claimed that his trial counsel was ineffective for failing to object to admission of the surveillance video recordings. Ketchum contended that counsel should have attempted to stop the admission of the recordings because they were the State's most critical pieces of evidence. The record demonstrates that the surveillance video recordings were relevant evidence, and relevant evidence is generally admissible at trial. *See* NRS 48.015; NRS 48.025(1). In addition, Ketchum did not demonstrate that the probative value of the surveillance recording was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading· the jury, *see* NRS 48.035(1), and therefore, Ketchum did not demonstrate the recordings were inadmissible. Accordingly, Ketchum failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness. Ketchum also failed to demonstrate a reasonable probability of a different outcome had counsel objected to admission of the surveillance video recordings. Therefore, we conclude the district could did not err by denying this claim without conducting an evidentiary hearing.

> Fourth, Ketchum claimed that his trial counsel was ineffective for failing to object during the State's rebuttal argument when it displayed portions of the surveillance video recording that were not previously utilized during the trial. The record demonstrates that the surveillance video recordings that the State used during its rebuttal argument were admitted into evidence during trial. Thus, the State did not improperly base its argument upon facts not in evidence. *See Morgan v. State,* 134 Nev. 200, 215, 416 P .3d 212, 227 (2018) ("A fundamental legal and ethical rule is that neither the prosecution nor the defense may argue facts not in evidence."). Accordingly, Ketchum failed to demonstrate his counsel's performance fell below an objective standard of reasonableness. In addition, the Nevada Supreme Court reviewed the underlying claim on direct appeal and concluded that the State properly utilized the surveillance videos during its rebuttal argument. *Ketchum v. State*, No. 75097, 2019 WL 4392486448 (Nev. Sept. 12, 2019) (Order of Affirmance). Ketchum thus failed to demonstrate a reasonable probability of a different outcome had counsel objected to the State's rebuttal argument. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Ketchum v. State, 502 P.3d 1093, 1-4, 2022 WL 336288, (2022) (unpublished). Thus, Petitioner's claims were all reviewed and denied by the Nevada Court of Appeals and are barred by the law of the case.

B. Petitioner's Claim That His Counsel Was Ineffective In His Cross-Examination Of Antoine Bernard Is Meritless And Barred By The Law Of The Case

Petitioner claims his trial counsel's cross-examination of Bernard was ineffective. Second Petition, at 14.

This claim was raised in the First Petition and denied by the District Court:

> Petitioner alleges that counsel was ineffective in his preparation and execution of the cross-examination of Antoine Bernard. Petition, at 9-10. Petitioner raises this claim without any citations to the record and fails to explain what counsel should have done differently that would have changed the outcome at trial. As such, this claim is belied by the record and suitable for only summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225.
>
> Although Petitioner chose not to cite to any lawful authority, construed liberally, the State assumes he is arguing that there are discrepancies with Bernard's initial police statement and what he testified to at trial. It is important to note that Bernard was originally charged as a co-defendant in the instant case. Indictment,

November 30, 2016, at 1-5. Thus, the State is assuming that Petitioner is complaining regarding his initial police statement when he was a suspect, and his testimony in front of the jury against Petitioner when his case was resolved.

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

Additionally, because Petitioner does not even cite to counsel's cross-examination of Bernard at trial, he overlooks counsel questioning him regarding his initial statement to police. Jury Trial Transcript, Day 3, May 24, 2017, at 26-31. In fact, counsel even got Bernard to admit that he had omitted information from the police in his original statement to them. Id. at 31. Then on recross-examination, counsel again got Bernard to admit that his testimony at trial was different than his initial statement to the police. Id. at 36-37. The cross-examination of 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. As such, counsel was not ineffective in his cross-examination of Antoine Bernard and this Petition is denied.

Findings of Fact, Conclusions of Law and Order filed 3/31/2021, at 10-11. As discussed by the order, Petitioner's claim is meritless.

Petitioner's claim is also barred by the law of the case. The Nevada Court of Appeals affirmed the District Court's denial of this claim:

Fifth, Ketchum claimed that his trial counsel was ineffective during the cross-examination of Antoine Bernard by failing to question him concerning his pretrial statement to the police. During cross-examination, counsel extensively questioned Bernard concerning his statement to the police, and counsel highlighted inconsistencies between that statement and Bernard's testimony during direct examination. Accordingly, Ketchum did not demonstrate his counsel's performance fell below an objective standard of reasonableness. Ketchum also failed to demonstrate a reasonable probability of a different outcome had counsel questioned Bernard further concerning his statement to the police. Therefore, we conclude the district court did not err by denying th1s claim without conducting an evidentiary hearing.

Ketchum v. State, 502 P.3d 1093, 4, WL 336288 (2022) (unpublished). Thus, Petitioner's claim is successive as it has been raised in the First Petition. Furthermore, and as the order showed, it is also meritless.

In summary, the Petitioner's claims of ineffective assistance of counsel are meritless as discussed in the District Court's order denying the First Petition. They are also successive because they were raised in the First Petition; and barred by the law of the case because the Nevada Court of Appeal reviewed and affirmed the Court's denial of these claims. Ground One must be denied.

IV. GROUND TWO IS MERITLESS AND BARRED BY THE LAW OF THE CASE

Ground Two claims that "the trial court abused its discretion when it denied [Petitioner's] motion to dismiss the grand jury indictment." Second Petition, at 16. Petitioner claims the District Court should not have allowed Detective Bunn to testify about the "zoomed in and/or altered" version of the video shown to the grand jury. Second Petition, at 18.

This claim has been reviewed and denied by the Nevada Supreme Court on direct 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).

Ketchum v. State, 135 Nev. 671, 1, 488 P.3d 574 (2019) (unpublished). Thus, Petitioner's claim is meritless and barred by the law of the case. Ground Two must be denied.

V. GROUND THREE IS MERITLESS AND BARRED BY THE LAW OF THE CASE

Ground Three claims the District Court erred by not admitting victim's prior bad acts. Second Petition, at 19. This claim has been reviewed and denied by the Nevada Supreme Court on direct appeal:

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

Ketchum v. State, 135 Nev. 671, 1, 488 P.3d 574 (2019) (unpublished). Thus, Petitioner's claim is meritless and barred by the law of the case. Ground Three must be denied.

VI. GROUND FOUR IS MERITLESS AND BARRED BY THE LAW OF THE CASE

Ground Four claims that "the 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" violated Petitioner's rights to a fair trial and due process. Second Petition, at 28.

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This claim has been reviewed and denied by the Nevada Supreme Court on direct appeal:

> 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).

Ketchum v. State, 135 Nev. 671, 3, 488 P.3d 574 (2019) (unpublished).

This claim was further denied by the Nevada Court of Appeals when it reviewed the District Court's denial of the First Petition:

> Next, Ketchum argues that the State withheld the surveillance video recordings in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). This claim could have been raised on direct appeal, and was therefore procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.810(1)(6), (3). A valid *Brady* claim can constitute good cause and prejudice sufficient to excuse the procedural bars. *State v. Bennett*, 119 Nev. 58H, 599, 81 P.3d 1, 8 (2003) ("[P]roving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice."). However, the Nevada Supreme Court has already concluded "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," *Ketchum v. State*, No. 75097, 2019 WL 43924-86448 (Nev. Sept. 12, 2019) (Order of Affirmance), and that conclusion is the law of the case, *see Hall v. State*, 91 Nev. 314, 315-16, 585 P .2d 797, 798-99 (1975). Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing and we order the judgment of the district court affirmed.

Ketchum v. State, 502 P.3d 1093, 4-5, WL 336288 (2022) (unpublished).

Thus, Petitioner's claim is meritless and barred by the law of the case. Ground Four must be denied.

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VII. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

A district court's denial of a request for an evidentiary hearing is reviewed for an abuse of discretion. Berry v. State, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015). The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.")**.**

An evidentiary hearing is not necessary to resolve Petitioner's claims. Petitioner's claims are all meritless and procedurally barred. Furthermore, all of the facts and law necessary

to resolve Petitioner's complaints are available. Therefore, there is no need to expand the record. Thus, this Court should deny Petitioner's request for an evidentiary hearing.

CONCLUSION

For the foregoing reasons, this Court should deny Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction).

DATED this 27th day of April, 2023.

Respectfully submitted,

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

BY /s/ *JOHN AFSHAR*
JOHN AFSHAR
Chief Deputy District Attorney
Nevada Bar #14408

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 27th day of April, 2023 to the following: info@cbscrogginslaw.com

BY */s/ V. Wright*
Secretary for the District Attorney's Office

JA/jc/

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**May 23, 2023**

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

May 23, 2023 **9:30 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Bluth, Jacqueline M. **COURTROOM:** RJC Courtroom 10C

COURT CLERK: Kristen Brown

RECORDER:

PARTIES PRESENT:

JOURNAL ENTRIES

- COURT ORDERED, Petitioner's Amended Petition for Writ of Habeas Corpus (Post-Conviction) is DENIED for the following reasons.

The Amended Petition is Time-Barred

"Unless there is good cause shown for delay, a petition that challenges the validity of a judgement or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution issues its remittitur." NRS 34.726(1). "For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court: (a) That the delay is not the fault of the petitioner; and (b) That dismissal of the petition as untimely will unduly prejudice the petitioner." NRS 34.726(1)(a)-(b).

Here, Petitioner failed to timely file the instant Amended Petition. A review of the record indicates this is a second petition for writ of habeas corpus (post-conviction) as there was no petition for the instant Amended Petition to amend. Following a jury trial that commenced on May 22, 2017, Petitioner was found guilty of one count of Murder with a Deadly Weapon and one count of Robbery

with a Deadly Weapon. On February 1, 2018, Petitioner was sentenced on both counts. Petitioner's resulting Judgment of Conviction was appealed, but the Nevada Supreme Court affirmed Petitioner's conviction and remittitur issued on October 11, 2019. On September 11, 2020, Petitioner filed his first petition for writ of habeas corpus (post-conviction) (the "First Petition"). Ultimately, the First Petition was denied on March 12, 2021. Petitioner moved for reconsideration or alternatively for rehearing on the First Petition, but this motion was denied on May 4, 2021. From there, Petitioner appealed the denial of the First Petition; this denial was affirmed by the Nevada Court of Appeals and remittitur issued on February 3, 2022. Subsequent to the denial of the First Petition and Petitioner's motion for reconsideration or alternatively for rehearing, a motion for appointment of counsel was granted on June 15, 2021. On March 24, 2023, the instant Amended Petition was filed.

Petitioner's Amended Petition is procedurally barred by NRS 34.726(1) as it was filed nearly three and a half years after the Nevada Supreme Court issued its remittitur following Petitioner's appeal of his Judgment of Conviction. Even momentarily ignoring the plain language of NRS 34.726(1), Petitioner's Amended Petition was still filed over one year after the most recent remittitur was issued by the Nevada Court of Appeals. Petitioner does not address in his Amended Petition how this delay was not his fault or that dismissal of the petition as untimely would unduly prejudice him. Further, Petitioner recognizes in his Amended Petition that this is his second petition for writ of habeas corpus (post-conviction) after the first one was denied, appealed, and affirmed. See Amended Petition, at pages 4-6. The Court recognizes that Petitioner indicated in his acknowledgment that this Amended Petition was being filed past the one year deadline because, "the Court ordered that this Amended Petition be filed after the affirmance of the Court's denial of the Petition by the Nevada Court of Appeals." Amended Petition, at page 7. However, the Court cannot find when or where this order was made, especially in relation to the timing indicated by Petitioner. Regardless, the Court finds that the Amended Petition is time-barred pursuant to NRS 34.726(1).

The Amended Petition is Successive

"A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petition to assert those grounds in a prior petition constituted an abuse of the writ." NRS 34.810(2).

Here, as addressed above, this is the second petition for writ of habeas corpus that Petitioner has filed. Further, Petitioner recognizes that each of the four grounds he has brought in the instant Amended Petition have already been raised in the First Petition and Petitioner's direct appeal from his Judgment of Conviction. Amended Petition, at page 6. Petitioner alleged that he was raising these grounds again because he "was never granted an evidentiary hearing to present evidence supporting his grounds for relief." Amended Petition, at pages 6-7. Upon review of the Nevada Supreme Court's affirmance (Ketchum v. State, 135 Nev. 671, 488 P.3d 574 (2019)(unpublished)), the Nevada Court of Appeals' affirmance (Ketchum v. State, 502 P.3d 1092, 2022 WL 336288 (2022)(unpublished)), and the Findings of Fact, Conclusions of Law and Order filed on March 31, 2021, the Court finds that all four

grounds have already been determined on their merits. Therefore, the instant Amended Petition is barred as successive.

The Amended Petition is Subject to the Doctrine of Res Judicata and the Doctrine of the Law of the Case

"Generally, the doctrine of res judicata precludes parties ... from relitigating a cause of action or an issue which has been finally determined by a court ...." Exec. Mgmt. v. Ticor Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998) (internal quotation & citation omitted). "The law of the first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (internal quotation omitted). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316. "Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief." Pellegrini v. State, 117 Nev. 860, 888, 34 P.3d 519, 538 (2001) abrogated by Rippo v. State, 134 Nev. 411, 423 P.3d 1084 (2018).

Again, as addressed above, all four of Petitioner's grounds for relief have either been raised already or their dispositions affirmed by the Nevada Supreme Court and the Nevada Court of Appeals. Therefore, the instant Amended Petition is barred under the doctrines of res judicata and the law of the case.

An Evidentiary Hearing is Not Necessary Here

"The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required." NRS 34.770(1). "A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held." Id. "If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he [or she] shall dismiss the petition without a hearing." NRS 34.770(2). "If the judge or justice determines that an evidentiary hearing is required, he [or she] shall grant the writ and shall set a date for the hearing." Id.

Here, Petitioner is not entitled to relief as all of his claims are barred for the various reasons provided above. As such, the Court finds there is no need for an evidentiary hearing.

Therefore, for the aforementioned reasons, Petitioner's Amended Petition is DENIED. COURT FURTHER ORDERED, as Petitioner's Amended Petition is denied, its setting on May 23, 2023 shall be VACATED. The State of Nevada is to prepare an Order consistent with the Court's ruling.

CLERK'S NOTE: A copy of this minute order was electronically mailed to John Afshar, Deputy District Attorney.

FOF

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JOHN AFSHAR
Chief Deputy District Attorney
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200 Lewis Avenue
Las Vegas, Nevada 89155-2212
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Attorney for Plaintiff

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: VI

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATE OF HEARING: MAY 23, 2023
TIME OF HEARING: 9:30 A.M.

THIS CAUSE having come on for hearing before the Honorable JACQUELINE M. BLUTH, District Judge, on May 23, 2023, the Petitioner not being present, represented by C. Benjamin Scroggins, esq, Respondent represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through JOHN AFSHAR, Chief Deputy District Attorney, and this Court having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On November 30, 2016, the State charged Javar Ketchum (hereinafter "Petitioner") by way of Indictment with one count each of Murder with a Deadly Weapon, and Robbery with a Deadly Weapon. On December 30, 2016, Petitioner filed a pre-trial Petition for Writ of

Habeas Corpus and Motion to Dismiss. The State filed its Return on January 4, 2017. Petitioner filed a Reply on January 9, 2017. The district court denied the Petition on February 17, 2017.

On March 8, 2017, Petitioner filed a Motion in Limine, seeking to admit character evidence of the victim, Ezekiel Davis (hereinafter "Davis" or "victim"). 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. On May 18, 2017, the State filed a Supplement to its Motion in Limine. The District Court held a Petrocelli hearing on May 19, 2017, determining that Petitioner could only bring in opinion testimony regarding the victim's character and that witnesses were not to elaborate on that opinion.

On May 22, 2017, Petitioner's five-day jury trial commenced. At the end of the fifth day of trial, the jury found Petitioner guilty of both charges. Following the verdict, the Court approved and filed a Stipulation and Order Waiving Separate Penalty Hearing, with an agreement a life sentence 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.

On June 2, 2017, Petitioner filed a Motion for New Trial pursuant to NRS 176.515(4). The State filed its Opposition on September 9, 2017. Petitioner filed a Reply on September 27, 2017, and a Supplement thereto on September 28, 2017. The District Court, finding that Petitioner's disagreement with the Court's evidentiary rulings was not a basis for a new trial, denied the motion on October 17, 2017. Petitioner was adjudicated that same day. However, the defense requested additional time to handle sentencing matters. Pursuant to the stipulation, on February 1, 2018, the District Court sentenced Petitioner to Nevada Department of Corrections as follows: Count 1- 20 years to life, plus a consecutive term of 96 to 240 months for the Use of a Deadly Weapon; Count 2- 48 months to 180 months, plus a consecutive term of 48 months to 120 months for the Use of a Deadly Weapon, concurrent with Count 1. The Judgment of Conviction was filed on February 5, 2018. Petitioner filed a Notice of Appeal on February 6, 2018. On September 12, 2019, the Nevada Supreme Court affirmed Petitioner's conviction. Remittitur issued on October 11, 2019.

On September 11, 2020, Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "First Petition"). The State filed its Response to the First Petition on December 16, 2020. On January 11, 2021, Petitioner filed a Notice of Motion to Continue Reply Brief Deadline and Hearing Date. On January 26, 2021, the Court granted Petitioner's motion to continue. On February 9, 2021, Petitioner filed a Reply to State's Response to the First Petition. On March 12, 2021, the Court heard and denied the First Petition.

On March 31, 2021, Petitioner filed a Motion for Reconsideration Or In the Alternative Motion for Rehearing of Petitioner's NRS 34 Petition (hereinafter "Motion for Reconsideration"). On April 27, 2021, the State filed an Opposition to Petitioner's Motion for Reconsideration. On April 29, 2021, Petition filed a Notice of Appeal, appealing the Court's denial of the First Petition. On May 4, 2021, the District Court denied Petitioner's Motion for Reconsideration. On May 10, 2021, Petitioner filed a Motion for Appointment of Counsel for his Motion for Reconsideration. On June 15, 2021, the Court granted Petitioner's Motion for Appointment of Counsel.

On June 29, 2021, counsel for Petitioner confirmed and requested a later date for status check and briefing schedule. Since then, this case has continued numerous times. First, on August 10, 2021, the Court granted Petitioner's motion for a six-month continuance to file a Supplemental Brief. Second, the Court filed a Stipulation and Order to Extend Time for Briefing on February 4, 2022, to give Petitioner's investigator time to interview witnesses and view evidence. Third, the Court filed a Stipulation and Order to Extend Time for Briefing on May 25, 2022, to give Petitioner's investigator time to interview witnesses and view evidence. Fourth, the Court filed a Stipulation and Order to Extend Time for Briefing on August 11, 2022, to give Petitioner additional time to investigate his case. Fifth, Petitioner filed a Motion to Extend Time for Briefing on November 10, 2022. The Court granted Petitioner's motion on November 29, 2022. Sixth, Petitioner filed a Motion to Extend Time for Briefing on December 15, 2022. The Court granted Petitioner's motion on January 17, 2023. Seventh, Petitioner filed a Motion to Extend Time for Briefing on February 14, 2023. The Court granted Petitioner's motion on March 13, 2023.

Between continuances, the Nevada Court of Appeals issued an order on February 3, 2022, affirming the District Court's denial of the First Petition. Remittitur issued February 28, 2022. On March 24, 2023, Petitioner filed an Amended Petition for Writ of Habeas Corpus. The State filed a response to the Amended Petition on April 27,2023. On May 23, 2023 this Court denied the Amended Petition for the following reasons.

FACTUAL BACKGROUND

At 6:22 a.m. on September 25, 2016, LVMPD Officers Brennan Childers and Jacqulyn Torres were dispatched to a shooting at 4230 South Decatur Boulevard, a strip mall with several businesses including Top Knotch. Jury Trial Transcript (hereinafter "JTT") Day 2, at 20-23, 29-32. When police arrived, they found Davis upon whom another man was performing chest compressions. Id. at 22-23, 32. Davis was not wearing pants. Id. at 32. Several other people were in the parking lot, and none of the businesses appeared opened. Id. at 22-23. Davis was transported to the hospital but did not survive a single gunshot wound to the abdomen. Id. at 66. Trial testimony from Davis's fiancée, Bianca Hicks, and from Detective Christopher Bunn (hereinafter "Detective Bunn") revealed that Davis's person was missing a belt which had a gold "M" buckle and a gold watch. JTT Day 3, at 17, 122; JTT Day 4, at 86, 90-92. Top Knotch, the clothing store in front of which Davis was shot, doubles as an after-hours club. JTT Day 2, at 9. Davis's friend Deshawn Byrd (hereinafter "Byrd")—the one who had given him CPR in an attempt to save his life—testified at trial that sometime after 3:00 a.m., Davis arrived at the club. Id. at 10-11. Byrd testified there was no indication that anything had happened in the club which led to any sort of confrontation. Id. at 10-14.

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 (hereinafter "Chiles"), Roderick Vincent (hereinafter "Vincent"), and Samantha Cordero—exited Top Knotch. JTT Day 3, at 42-67. Chiles owned Top Knotch, and Vincent owned a recording studio located inside Top Knotch. Id. at 68. Vincent denied that there were any DVRs of the surveillance video from Top Knotch or the studio; however, Detective Bunn had

noted a camera. Id. at 69,73. A subsequent search of Vincent's car in the parking lot located two DVRs of the surveillance footage from Top Knotch and the studio. Id. at 58-59, 63-64. A review of the video footage, extensive portions of which were played at trial, showed that Petitioner entered the club at about 2:00 a.m. Id. at 91-92. At 3:25 a.m., Chiles, Vincent, Antoine Bernard (hereinafter "Bernard"), and several other people were in the back area of the business when a person in a number 3 jersey, later identified as Petitioner, produced a semi-automatic handgun from his pants and showed it to the group. Id. at 93-94.

The video also showed that at about 6:14 a.m., Petitioner and Davis exited arm-in-arm out the front of Top Knotch. Id. at 97. At that point, there was still a watch on Davis's wrist. Id. at 98. 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 the camera's view. Id. at 99-102. At about 6:16 a.m., the people on video all appeared to have their attention drawn to the area where Petitioner and Davis were. Id. at 99. Petitioner then entered the view of the camera, removing Davis's belt from his body while holding the gun in his other hand. Id. at 101-102. Bernard also testified at trial that he saw Petitioner take Davis's belt. Id. at 20. The 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 Davis'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. at 102.

Despite contact with several witnesses in the parking lot including Chiles and Vincent, the police had no information regarding the identity of the shooter. Id. at 107. After further investigation, the shooter was identified as Petitioner and a warrant for his arrest was issued. Id. at 107. Petitioner was apprehended at a border control station in Sierra Blanca, Texas, whereupon he was brought back to Nevada to face charges. Id. at 108.

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ANALYSIS

I. THE AMENDED PETITION IS PROCEDURALLY BARRED

The Amended Petition is time-barred pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

Petitioner failed to file this Amended Petition prior to the one-year deadline. Remittitur issued from Petitioner's appeal on October 11, 2019; therefore, Petitioner had until October 11, 2020, to file a timely habeas petition. Petitioner filed the Second Petition on March 24, 2023. This is over two years and five months after Petitioner's one-year deadline.

Petitioner's Amended Petition is procedurally barred by NRS 34.726(1) as it was filed nearly three and a half years after the Nevada Supreme Court issued its remittitur following Petitioner's appeal of his Judgment of Conviction. Even momentarily ignoring the plain language of NRS 34.726(1), Petitioner's Amended Petition was still filed over one year after the most recent remittitur was issued by the Nevada Court of Appeals. Petitioner does not address in his Amended Petition how this delay was not his fault or that dismissal of the petition as untimely would unduly prejudice him. Further, Petitioner recognizes in his Amended Petition that this is his second petition for writ of habeas corpus (post-conviction) after the first one was denied, appealed, and affirmed. See Amended Petition, at pages 4-6. The Court recognizes that Petitioner indicated in his acknowledgment that this Amended Petition was being filed past the one-year deadline because, "the Court ordered that this

Amended Petition be filed after the affirmance of the Court's denial of the Petition by the Nevada Court of Appeals." Amended Petition, at page 7. However, the Court cannot find when or where this order was made, especially in relation to the timing indicated by Petitioner. Regardless, the Court finds that the Amended Petition is time-barred pursuant to NRS 34.726(1).

II. THE AMENDED PETITION IS BARRED AS SUCCESSIVE

NRS 34.810(2) reads:

> A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds, but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v. State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that "where a defendant previously has sought relief from the judgment, the defendant's failure to identify all grounds for relief in the first instance should weigh against consideration of the successive motion.")

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of

the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Here, Petitioner has already filed a prior postconviction habeas petition. The First Petition was filed on September 11, 2020. The District Court heard and denied the First Petition on March 31, 2021. On February 3, 2022, the Nevada Court of Appeals affirmed the District Court's denial of the First Petition.

Furthermore, Petitioner recognizes that each of the four grounds he has brought in the Amended Petition have been raised in the First Petition and Petitioner's direct appeal from his Judgement of Conviction. Amended Petition, at page 6. Petitioner fails to allege new or different grounds for relief and these grounds have already been denied on the merits. Upon review of the Nevada Supreme Court's affirmance (Ketchum v. State, 135 Nev. 671, 488 P.3d 574 (2019)(unpublished)), the Nevada Court of Appeals' affirmance (Ketchum v. State, 502 P.3d 1092, 2022 WL 336288 (2022)(unpublished)), and the Findings of Fact, Conclusions of Law and Order filed on March 31, 2021, the Court finds the Amended Petition is barred as successive because all four grounds have already been determined on their merits.

III. THE AMENDED PETITION IS SUBJECT TO THE DOCTRINE OF RES JUDICATA & THE DOCTRINE OF THE LAW OF THE CASE

"Generally, the doctrine of res judicata precludes parties ... from relitigating a cause of action or an issue which has been finally determined by a court ...." Exec. Mgmt. v. Ticor Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998) (internal quotation & citation omitted). "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) abrogated by

Rippo v. State, 134 Nev. 411, 423 P.3d 1084 (2018). Furthermore, this Court cannot overrule the Nevada Supreme Court. Nev. Const. Art. VI § 6. See Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011).

Here, Petitioner's claims are barred by the law of the case because the Nevada Court of Appeals affirmed the District Court's denial of these claims:

> First, Ketchum claimed that his trial counsel was ineffective for failing to file a motion requesting discovery. However, counsel filed a motion to compel discovery prior to trial. Accordingly, Ketchum failed to demonstrate that his trial counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel performed different actions concerning a request for pretrial discovery. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.
>
> Second, Ketchum claimed that his trial counsel was ineffective for failing to review all of the surveillance footage in the possession of the State prior to trial. Ketchum asserted that counsel failed to review portions of the surveillance video that depicted him interacting with the victim prior to the shooting. Ketchum contended that counsel's failure to review all of the surveillance footage led counsel to improperly assess the factual circumstances of the case.
> However, the record in this matter demonstrated that significant evidence of Ketchum's guilt was presented at trial. During trial, a witness testified that Ketchum indicated that he intended to rob the victim prior to the shooting. The record demonstrates that surveillance video depicted Ketchum and the victim together shortly before the shooting but did not depict the actual shooting. The surveillance video also depicted the aftermath of the shooting· and showed Ketchum taking items from the victim. Ketchum subsequently fled the scene with the victim's belongings. In light of the significant evidence of Ketchum's guilt presented at trial, he failed to demonstrate a reasonable probability of a different outcome at trial had counsel viewed all of the surveillance footage prior to the trial. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.
>
> Third, Ketchum claimed that his trial counsel was ineffective for failing to object to admission of the surveillance video recordings. Ketchum contended that counsel should have attempted to stop the admission of the recordings because they were the State's most critical pieces of evidence. The record demonstrates that the surveillance video recordings were relevant evidence, and relevant evidence is generally admissible at trial. *See* NRS 48.015; NRS 48.025(1). In

addition, Ketchum did not demonstrate that the probative value of the surveillance recording was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading· the jury, *see* NRS 48.035(1), and therefore, Ketchum did not demonstrate the recordings were inadmissible. Accordingly, Ketchum failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness. Ketchum also failed to demonstrate a reasonable probability of a different outcome had counsel objected to admission of the surveillance video recordings. Therefore, we conclude the district could did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Ketchum claimed that his trial counsel was ineffective for failing to object during the State's rebuttal argument when it displayed portions of the surveillance video recording that were not previously utilized during the trial. The record demonstrates that the surveillance video recordings that the State used during its rebuttal argument were admitted into evidence during trial. Thus, the State did not improperly base its argument upon facts not in evidence. *See Morgan v. State,* 134 Nev. 200, 215, 416 P .3d 212, 227 (2018) ("A fundamental legal and ethical rule is that neither the prosecution nor the defense may argue facts not in evidence."). Accordingly, Ketchum failed to demonstrate his counsel's performance fell below an objective standard of reasonableness. In addition, the Nevada Supreme Court reviewed the underlying claim on direct appeal and concluded that the State properly utilized the surveillance videos during its rebuttal argument. *Ketchum v. State*, No. 75097, 2019 WL 4392486448 (Nev. Sept. 12, 2019) (Order of Affirmance). Ketchum thus failed to demonstrate a reasonable probability of a different outcome had counsel objected to the State's rebuttal argument. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Ketchum v. State, 502 P.3d 1093, 1-4, 2022 WL 336288, (2022) (unpublished). All four of Petitioner's grounds for relief have either been raised already or their dispositions affirmed by the Nevada Supreme Court and the Nevada Court of Appeals. Therefore, the Amended Petition is barred under the doctrine of res judicata and the law of the case.

IV. AN EVIDENCIDENTIARY HEARING IS NOT NECESSARY HERE

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

A district court's denial of a request for an evidentiary hearing is reviewed for an abuse of discretion. Berry v. State, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015). The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.")**.**

Here, Petitioner is not entitled to relief as all his claims are meritless and procedurally barred. There is no need to expand the record because all the facts and law necessary to resolve Petitioner's complaints are available. The Court finds there is no need for an evidentiary hearing.

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ORDER

THEREFORE, IT IS HEREBY ORDERED that this Petitioner's Amended Petition for Writ of Habeas Corpus (Post-Conviction), shall be, and is, hereby DENIED.

Dated this 15th day of June, 2023

JL
0ED A4C 6CCE 9A49
Jacqueline M. Bluth
District Court Judge

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #01565

BY ***/s/ John Afshar***
JOHN AFSHAR
Chief Deputy District Attorney
Nevada Bar #14408

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this ____ day of June, 2023, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JAVAR KETCHUM, #1192727
HIGH DESERT STATE PRISON
PO BOX 650
INDIAN SPRINGS, NV 89070

BY ***/s/ E. Del Padre***
E. DEL PADRE
Secretary for the District Attorney's Office

JA/mf/ed/L3

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Javar Ketchum, Plaintiff(s)	CASE NO: A-20-821316-W
vs.	DEPT. NO. Department 6
Nevada State of, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 6/15/2023

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