IN THE SUPREME COURT OF THE STATE OF NEVADA

JAVAR KETCHUM,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 87012

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus (Post Conviction)
Eighth Judicial District Court, Clark County

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Appeal from Denial of Petition for Writ of Habeas Corpus (Post Conviction)
Eighth Judicial District Court, Clark County

ROUTING STATEMENT

This appeal is neither presumptively assigned to the Nevada Court of Appeals nor the Nevada Supreme Court. NRAP 17.

STATEMENT OF THE ISSUES

1. Whether the district court properly denied Ketchum's Second Petition as being procedurally barred.
2. Whether the district court properly denied Ketchum's Second Petition as successive
3. Whether the district court properly denied Ketchum's Second Petition as subject to the doctrine of res judicata and the doctrine of the law of the case

4. Whether the district court abused its discretion in denying Ketchum an evidentiary hearing.

STATEMENT OF THE CASE

November 30, 2016, the State charged Javar Ketchum (hereinafter "Ketchum") by way of Indictment with one count each of Murder with a Deadly Weapon, and Robbery with a Deadly Weapon. Appellant Appendix ("AA") IVAO000705. On December 30, 2016, Ketchum filed a pre-trial Petition for Writ of Habeas Corpus and Motion to Dismiss. Id. The State filed its Return on January 4, 2017. Id. Ketchum filed a Reply on January 9, 2017. Id. The district court denied the Petition on February 17, 2017. Id. On March 8, 2017, Ketchum filed a Motion in Limine, seeking to admit character evidence of the victim, Ezekiel Davis (hereinafter "Davis" or "victim"). Id. 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. Id. On May 18, 2017, the State filed a Supplement to its Motion in Limine. Id. The District Court held a Petrocelli hearing on May 19, 2017, determining that Ketchum could only bring in opinion testimony regarding the victim's character and that witnesses were not to elaborate on that opinion. Id.

On May 22, 2017, Ketchum's five-day jury trial commenced. AA VI AO0000001. At the end of the fifth day of trial, the jury found Ketchum guilty of both charges. AA VIII AO000360. 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. AA VIII AO000472-AO000473.

On June 2, 2017, Ketchum filed a Motion for New Trial pursuant to NRS 176.515(4). AA VII AO000382. The State filed its Opposition on September 5, 2017. AA VIII AO000441. Ketchum filed a Reply on September 27, 2017, and a Supplement thereto on September 28, 2017. AA VIII AO000454 ,VIII AO000463. The district court, finding that Ketchum's disagreement with the court's evidentiary rulings was not a basis for a new trial, denied the motion on October 17, 2017. AA VIV AO000705. Ketchum was adjudicated that same day. Id. However, the defense requested additional time to handle sentencing matters. Id.

Pursuant to the stipulation, on February 1, 2018, the district court sentenced Ketchum 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. AA VIII AO000471.

The Judgment of Conviction was filed on February 5, 2018. AA VIII AO000551. Ketchum filed a Notice of Appeal on February 6, 2018. AA VIV AO000553. On September 12, 2019, the Nevada Supreme Court affirmed

Ketchum's conviction. AA VIV AO000688. Remittitur issued on October 11, 2019. On September 11, 2020, Ketchum filed a Petition for Writ of Habeas Corpus (PostConviction) (hereinafter "First Petition"). AA VIV AO000691. The State filed its Response to the First Petition on December 16, 2020. AA VIV AO000706. On February 9, 2021, Ketchum filed a Reply to State's Response to the First Petition. On March 12, 2021, the court heard and denied the First Petition. AA VIV AO000715.

On March 31, 2021, Ketchum filed a Motion for Reconsideration or In the Alternative Motion for Rehearing of Ketchum's NRS 34 Petition (hereinafter "Motion for Reconsideration"). AA VV AO0000838. On April 27, 2021, the State filed an Opposition to Ketchum's Motion for Reconsideration. Id. On April 29, 2021, Ketchum filed a Notice of Appeal, appealing the court's denial of the First Petition. Id.

On May 4, 2021, the district court denied Ketchum's Motion for Reconsideration. Id. On May 10, 2021, Ketchum filed a Motion for Appointment of Counsel. Id. On June 15, 2021, the court granted Ketchum's Motion for Appointment of Counsel. Id. On June 29, 2021, counsel for Ketchum confirmed and requested a later date for status check and briefing schedule. Id. The case was continued numerous times. Id. First, on August 10, 2021, the court granted Ketchum's motion for a six-month continuance to file a Supplemental Brief. Id.

Second, the court filed a Stipulation and Order to Extend Time for Briefing on February 4, 2022, to give Ketchum's investigator time to interview witnesses and view evidence. Id. Third, the court filed a Stipulation and Order to Extend Time for Briefing on May 25, 2022, to give Ketchum's investigator time to interview witnesses and view evidence. Id. Fourth, the court filed a Stipulation and Order to Extend Time for Briefing on August 11, 2022, to give Ketchum additional time to investigate his case. Id. Fifth, Ketchum filed a Motion to Extend Time for Briefing on November 10, 2022. The court granted Ketchum's motion on November 29, 2022. Id. Sixth, Ketchum filed a Motion to Extend Time for Briefing on December 15, 2022. Id. The court granted Ketchum's motion on January 17, 2023. Id. Seventh, Ketchum filed a Motion to Extend Time for Briefing on February 14, 2023. Id. The court granted Ketchum's motion on March 13, 2023. Id.

Between continuances, the Nevada Court of Appeals issued an order on February 3, 2022, affirming the district court's denial of the First Petition. AA VV AO000769- AO000770. Remittitur issued February 28, 2022. AA VV AO000770.

On March 24, 2023, Ketchum filed an Amended Petition for Writ of Habeas Corpus (hereinafter "Second Petition"). AA VV AO000774. The State filed its Response to Petitioner's Amended Petition for Writ of Habeas Corpus - Post Conviction on April 27, 2023. AAVV AO000806. The district court denied the

Second Petition on May 23, 2023. AA VV AO000833. Findings of Fact, Conclusion of Law and order were filed June 15, 2023. AA VV AO000682.

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. AAVI AO000034. When police arrived, they found Davis upon whom another man was performing chest compressions. Id. Davis was not wearing pants. AA VI AO000044. Several other people were in the parking lot, and none of the businesses appeared opened. AA VI AO000035. Davis was transported to the hospital but did not survive a single gunshot wound to the abdomen. AA VI AO00078.

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. AA VII AO000128, VII AO000339.

Top Knotch, the clothing store in front of which Davis was shot, doubles as an afterhours club. AA VI AO00021. 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. AA VI AO000023.

Byrd testified there was no indication that anything had happened in the club which led to any sort of confrontation. AA VI AO000023-AO000026.

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. AA VII AO000153- AO000178. Chiles owned Top Knotch, and Vincent owned a recording located studio inside Top Knotch. Id. Vincent denied that there were any DVRs of the surveillance video from Top Knotch or the studio; however, Detective Bunn had noted a camera. AA VII AO000180. A subsequent search of Vincent's car in the parking lot located two DVRs of the surveillance footage from Top Knotch and the studio. AA VII AO000169. A review of the video footage, extensive portions of which were played at trial, showed that Ketchum entered the club at about 2:00 a.m. AA VII AO000203. 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 Ketchum, produced a semiautomatic handgun from his pants and showed it to the group. AA VII AO000204-AO000205. The video also showed that at about 6:14 a.m., Ketchum and Davis exited arm-in-arm out the front of Top Knotch. AA VII AO000208-AO000209. At that point, there was still a watch on Davis's wrist. Id. 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. AA VII AO000210-AO000211. At about 6:16 a.m., the people on video all appeared to have their attention drawn to the area where Ketchum and Davis were. AA VII AO000210. Ketchum then entered the view of the camera, removing Davis's belt from his body while holding the gun in his other hand. AA VII AO000212.

Bernard also testified at trial that he saw Ketchum take Davis's belt. AA VII AO000131. The video showed that Ketchum approached Bernard's car, opened the passenger door, placed the belt on the front seat, and returned to the area of Davis's body. AA VII AO000213. Ketchum returned to Bernard's vehicle, entered the passenger seat of the vehicle and the vehicle fled the area. Id. Despite contact with several witnesses in the parking lot including Chiles and Vincent, the police had no information regarding the identity of the shooter. AA VII AO000218. After further investigation, the shooter was identified as Ketchum and a warrant for his arrest was issued. Id. Ketchum was apprehended at a border control station in Sierra Blanca, Texas, whereupon he was brought back to Nevada to face charges. AA VII AO000219.

SUMMARY OF THE ARGUMENT

Ketchum's Second Petition was properly denied as being timebarred, successive, and an abuse of writ. Ketchum fails to challenge the procedural bars. An

evidentiary hearing was not necessary. All of Ketchum's claims had already been addressed and ruled on the merits. Ketchum failed to overcome the bar by showing good cause or prejudice.

ARGUMENT

I. THE SECOND PETITION WAS PROCEDURALLY BARRED

Ketchum argues that the district court abused its discretion by denying Ketchum's Amended Petition for Writ of Habeas Corpus. Appellant Opening Brief ("AOB") at 3.

The Second Petition was titled "Amended Petition For Writ of Habeas Corpus," however, there was no habeas petition to amend. The First Petition, filed on September 11, 2020, was denied by the District Court on March 12, 2021. AA VV AO839 – 834. Ketchum's related Motion For Reconsideration was also denied by the District Court on May 4, 2021. AA VV AO000838. The Nevada Court of Appeals affirmed the denial of the First Petition on February 3, 2022. Ketchum v. State, 502 P.3d 1093, 4-5, WL 336288 (2022). Thus, Ketchum had no habeas petition to amend. The district court denied the "Amended Petition" as a procedurally barred Second Petition on May 23, 2023. AA VV AO000833. The district court held that in addition to being time-barred and successive, all four grounds in the Second Petition were precluded by the doctrines of res judicata and

law of the case because they had been considered and denied by the district court and the Court of Appeals of Nevada. AA VV AO000836 – 848.

Ketchum's Opening Brief fails to challenge the district court's application of the procedural bars or the application of the doctrines of res judicata or law of the case. Ketchum does not challenge the district court's several reasons for dismissing the Second Petition, but rather re-argues claims raised in the Second Petition in the first instance. The district court did not reach the merits of any of these claims because the claims were procedurally barred. Because Ketchum fails to challenge the district court's findings, the denial of the Second Petition should be affirmed. Although Ketchum offers no argument suggesting that the district court's application of the procedural bars or doctrines of res judicata were erroneous, the application of the same was clearly correct.

Application of the bars was 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, 568 U.S. 1147, 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 Ketchum 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). The district court properly applied the procedural bars.

The district court held that the Second Petition was time-barred pursuant to NRS 34.726. VV AA AO000836.

NRS 34.726(1) states:

> 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.

This 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).

Ketchum failed to file the Second Petition prior to the one-year deadline. Remittitur was issued from Ketchum's appeal on October 8, 2019; therefore,

Ketchum had until October 8, 2020, to file a timely habeas petition. AA VIV AO000688. Ketchum filed the Second Petition on March 24, 2023. AA VV AO000774. This was over two years and five months after Ketchum's one-year deadline.

Ketchum's Second Petition was 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 Ketchum's appeal of his Judgment of Conviction. Ketchum did not address in the Second Petition how this delay was not his fault or that dismissal of the petition as untimely would have unduly prejudiced him.

Further, Ketchum recognized in his Second Petition that it was his second petition for writ of habeas corpus (post-conviction) after the first one was denied, appealed, and affirmed. AA VV AO000777. The Court recognized that Ketchum indicated in his acknowledgment that the Second Petition was being filed past the one-year deadline because (according to Ketchum), "the Court ordered that this Second Petition be filed after the affirmance of the Court's denial of the Petition by the Nevada Court of Appeals." AA VV AO000780. However, the district court did not find any record support for the claim that the asserted order was made, especially in relation to the timing indicated by Ketchum. AA VV AO000836. Regardless, the court properly found that the Second Petition was time-barred pursuant to NRS 34.726(1).

II. THE SECOND PETITION WAS BARRED AS SUCCESSIVE

The district court denied the Second Petition as being successive. AA VV AO000842 – 843.

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.")

This 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.

Ketchum had already filed a prior postconviction habeas petition. AA VIV AO000691. The First Petition was filed on September 11, 2020. Id. The district court heard and denied the First Petition on March 31, 2021. AA VIV AO000704. On February 3, 2022, the Nevada Court of Appeals affirmed the District Court's denial of the First Petition. Ketchum v. State, 502 P.3d 1093, 1-4, 2022 WL 336288, (2022) (unpublished).

Furthermore, Ketchum recognized that each of the four grounds he brought in the Second Petition had been raised in the First Petition and Ketchum's direct appeal

from his Judgement of Conviction. AA VV AO000779. Ketchum failed to allege new or different grounds for relief and those grounds had already been denied on the merits, and he did not allege good cause or actual prejudice sufficient to permit him to re-raise already denied claims. The court properly denied the petition for being successive.

III. THE SECOND PETITION WAS 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).

Ketchum's claims were barred by res judicata because they had previously been adjudicated in Ketchum's First Petition on the merits. AA VIV AO000708. The court addressed each of Ketchum's claims of ineffective assistance of counsel regarding the way his counsel handled the surveillance footage. AA VIV AO000708-710. The court also addressed in the First Petition Ketchum's claim regarding his counsel's cross examination of Antoine Bernard. AA VIV AO00713-715. The court found that each one of Ketchum's Claims was without merit. AA VIV AO000713-715.

Ketchum's claims were barred by the law of the case because the Nevada Court of Appeals had previously 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 Ketchum's grounds for relief had been previously raised and the denial of those claims affirmed by the Nevada Court of Appeals. Therefore, the Second Petition was barred under the doctrine of res judicata and the law of the case. The district court properly denied this claim.

IV. AN EVIDENTIARY HEARING WAS NOT NECESSARY HERE

Ketchum claims "[t]he district court abused its discretion by denying MR.KETCHUM's Amended Petition for Writ of Habeas Corpus without holding an evidentiary hearing". AOB at 3. An evidentiary hearing was not necessary for Ketchum's claims.

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.")**.**

Ketchum was not entitled to relief as all his claims were procedurally barred and subject to summary dismissal. There was no need to expand the record because all the facts and law necessary to resolve Ketchum's complaints were available. The court properly found that there was no need for an evidentiary hearing.

CONCLUSION

For the foregoing reasons, the district court's denial of Petition for Habeas Corpus (Post Conviction) should be AFFIRMED.

Dated this 20th day of February, 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 5,000 words and 21 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 20th day of February, 2024.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 20th day of February, 2024. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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