No. _____

In the
Supreme Court of the United States

Rodney Marshall,

Petitioner,

v.

Brian Williams, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred by denying a certificate of appealability on the question of whether Mr. Marshall's right to be free from double jeopardy was violated when he was sentenced for both robbery and battery with intent to commit robbery?

2. Whether the Ninth Circuit erred by denying a certificate of appealability on the question of whether Mr. Marshall's right to due process and a fair trial was violated when the trial court failed to sever the individual counts?

List of Parties

The only parties in this proceeding are those listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rodney Marshall respectfully prays that a writ of certiorari issue to review the order denying a certificate of appealability of the United States Court of Appeals for the Ninth Circuit.[1]

OPINIONS BELOW

On October 18, 2021, the United States District Court for the District of Nevada denied Mr. Marshall's habeas petition on the merits and declined to issue a certificate of appealability.[2] On May 24, 2022, the Ninth Circuit Court of Appeals issued an unpublished order, denying Mr. Marshall's application for a certificate of appealability.[3]

JURISDICTION

The United States District Court had original jurisdiction over this habeas case pursuant to 28 U.S.C. § 2254. The District Court denied Mr. Marshall a certificate of appealability.[4] The Ninth Circuit also denied Mr. Marshall's application for a certificate of appealability.[5] This Court has jurisdiction pursuant to 28 U.S.C. § 1254. *See also* SUPREME COURT RULE 13(5).[6]

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[1] Appendix 001.

[2] Appendix 002.

[3] Appendix 001.

[4] Appendix 022.

[5] Appendix 001.

[6] On August 15, 2022, the Honorable Justice Kagan granted Mr. Marshall's application to extend the time to file his petition for writ of certiorari until October 21, 2022. This petition is therefore timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be… subject for the same offense to be twice put in jeopardy of life or limb....

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall… deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. The test to determine whether a prosecution or sentence for two offenses violates double jeopardy is whether "each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). However, it becomes a more nuanced question when a court must ask how to evaluate whether double jeopardy is violated when there is more than way to satisfy one of the offenses. In this case, the District Court held there was no clearly established U.S. Supreme Court law on "whether a double-jeopardy violation exists when an offense can be committed multiple ways."[7] Mr. Marshall submits that the District Court was wrong.

In *Illinois v. Vitale*, 447 U.S. 410 (1980), this Court applied the *Blockburger*

[7] Appendix 016, n.82.

test in a somewhat similar factual circumstance.[8] In *Vitale*, the Court addressed whether double jeopardy prohibited the state from prosecuting the petitioner for involuntary manslaughter (based on a fatal car accident) after he had already been convicted for failing to reduce speed to avoid the collision. 447 U.S. at 411. The Court noted the offense of manslaughter by automobile "does not always entail proof of a failure to slow," but it was a possibility. *Id.* at 419. The Court concluded that if the state did "find it necessary to prove failure to slow" at trial, then "because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial." *Id.* at 420.

Similarly, in *Whalen v. United States*, 445 U.S. 684, 686 (1980), this Court addressed whether rape and felony murder were separate statutory offenses for double jeopardy purposes where rape was one of the predicate offenses for felony murder. While there were six enumerated felonies that *could* satisfy the felony murder statute, the petitioner was convicted of murder in the course of committing a rape. The government argued that felony murder and rape were not the same offense because felony murder did not require proof of rape "in all cases." *Id.* at 694.

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[8] *Vitale* was a correct application of the *Blockburger* test. However, in *Vitale*, the Court included language, in dicta, suggesting double jeopardy might also be violated based on successive prosecutions for the same conduct. 447 U.S. at 420. That "same conduct test" was later adopted in *Grady v. Corbin*, 495 U.S. 508, 510 (1980) and then rejected in *United States v. Dixon*, 509 U.S. 688, 703 (1993). But since the holding in *Vitale* was correctly based on the *Blockburger* test, it remains valid precedent.

The Court observed, however, that proof of rape was required in the current case, as the petitioner was not charged with murder during perpetration of a robbery, kidnapping, arson, or any of the other predicate offenses. *Id*. The felony murder statute could just as easily been drafted as six distinct statutory provisions, rather than one offense with six alternatives, and the outcome would have been the same. *Id*. Thus, pursuant to the *Blockburger* test, double jeopardy was violated.

The District Court's holding was clearly wrong. The Ninth Circuit declined to hear the double jeopardy claim in this case despite its legal significance. To the extent that federal law remains ambiguous on the matter, this Court should take this opportunity to clarify how double jeopardy is assessed when there is more than one alternative way to commit one of the offenses.

2. Mr. Marshall was alleged to have committed five robberies over a span of nearly two years. The robberies occurred at different times of day, different places (one in the perpetrator's apartment, one in the victim's apartment, the rest on the street), and under different conditions (sometimes other people were with the robber and sometimes a weapon was used). Despite having little in common other than the fact that forced was used to obtain money, the five robberies were joined for a single trial. The evidence against Mr. Marshall was much weaker in some of the cases than in others. But the evidence in the stronger cases was used to bolster the weaker ones. This resulted in a denial of Mr. Marshall's right to due process and a fair trial. The Ninth Circuit erred by declining to issue a certificate of appealability on this claim.

REASONS FOR GRANTING THE PETITION

This Court has ruled a certificate of appealability should issue where "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 276 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). *See also Welch v. United States*, 136 S.Ct. 1257, 1264 (2016) (finding a COA should only be denied when it is "beyond all debate" that the petitioner is not entitled to relief). This Court has expressed a preference for ensuring that a prisoner's case is reviewed by an appellate court even if the merits of his claim are weak. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) ("Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief"). As this Court recognized:

> The COA inquiry… is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims."

Buck v. Davis, 137 S.Ct. 759, 773 (2017) (quoting *Miller-El*, 537 U.S. at 327, 336). Mr. Marshall should have been granted a COA because reasonable jurists could debate the merits of his constitutional claims.

I. Jurists of reason could debate whether Mr. Marshall's right to be free from double jeopardy was violated when he was sentenced for both robbery and battery with intent to commit robbery.

The right not to be twice punished for the same crime is secured by the Fifth and Fourteenth Amendments to the United States Constitution, as well as this Court's holdings in *Blockburger v. United States*, 284 U.S. 299 (1932) and *Rutledge v. United States*, 517 U.S. 292 (1996).

A. Robbery and battery with intent to commit robbery are the same offense.

The Double Jeopardy Clause prohibits a person from being twice prosecuted, or twice sentenced, for the same criminal offense. Whether two offenses are the same for double jeopardy purposes is not always readily apparent. "It has long been understood that separate statutory crimes need not be identical either in constituent elements or in actual proof in order to be the same within the meaning of the constitutional prohibition." *Brown v. Ohio*, 432 U.S. 161, 164 (1977). The test to determine whether a prosecution or sentence for two offenses violates double jeopardy is whether "each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304.

In two of the five joined cases against Mr. Marshall, he was convicted and sentenced for both robbery and battery with intent to commit robbery. In Nevada, robbery is defined as "the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property…" NEV. REV. STAT. 200.380. Battery is defined as "any willful and unlawful use of force

or violence upon the person of another." NEV. REV. STAT. 200.400.

The intent elements of the offenses in this case are undoubtedly the same because Mr. Marshall was specifically charged with battery "with intent to commit robbery." Battery also requires as an element the use of force or violence. There are, however, two ways to commit a robbery—through the use of force or violence, or through fear of injury. Only the former would make it identical to battery.

Herein lies the problem. The facts of this case, as presented at trial, are that Mr. Marshall committed the robberies with the use of force. However, theoretically, robbery can be accomplished through fear of injury, which would distinguish it from battery. The question that the District Court deemed unresolved, is how to assess double jeopardy when there are multiple possible ways of committing one of the offenses.

Double jeopardy is implicated when two statutes prohibit the same offense or when one statute is a lesser included offense of the other. To determine whether two statutes prohibit the same offense, courts look to see if each offense requires proof of an additional fact that the other does not. In this case, robbery and battery with intent to commit robbery were the same offense. The allegation in each case was that Mr. Marshall struck each victim in the head and stole their money. The force used to accomplish the robbery was the same force used to accomplish the battery. And since the battery was specifically charged as being with intent to commit robbery, the intent element was also the same. The use of force or violence (battery) was entirely subsumed by the robbery charge.

B. Reasonable jurists could disagree with the district court's decision.

The District Court held that the Nevada Supreme Court's denial of this claim was not an unreasonable application of clearly established federal law.[9] The District Court held that robbery and battery with intent to commit robbery did not violate double jeopardy because the later requires "the use of force or violence" and the former requires "the taking of property."[10] Furthermore, while the Court recognized that robbery could be committed by "one of two alternative means," one of which "makes it seemingly identical to the crime of battery with intent to commit robbery," the Court ruled there was no clearly established U.S. Supreme Court law on "whether a double-jeopardy violation exists when an offense can be committed multiple ways."[11]

The District Court erred. In *Illinois v. Vitale*, 447 U.S. 410 (1980), this Court applied the *Blockburger* test in a somewhat similar factual circumstance.[12] In *Vitale*, the Court addressed whether double jeopardy prohibited the state from prosecuting the petitioner for involuntary manslaughter (based on a fatal car accident) after he had already been convicted for failing to reduce speed to avoid the

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[9] Appendix 014.

[10] Appendix 016.

[11] Appendix 016 n.82.

[12] *Vitale* was a correct application of the *Blockburger* test. However, in *Vitale*, the Court included language, in dicta, suggesting double jeopardy might also be violated based on successive prosecutions for the same conduct. 447 U.S. at 420. That "same conduct test" was later adopted in *Grady v. Corbin*, 495 U.S. 508, 510 (1980) and then rejected in *United States v. Dixon*, 509 U.S. 688, 703 (1993). But since the holding in *Vitale* was correctly based on the *Blockburger* test, it remains valid precedent.

collision. 447 U.S. at 411. The Court noted the offense of manslaughter by automobile "does not always entail proof of a failure to slow," but it was a possibility. *Id.* at 419. The Court concluded that if the state did "find it necessary to prove failure to slow" at trial, then "because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial." *Id*. at 420.

Similarly, in *Whalen v. United States*, 445 U.S. 684, 686 (1980), this Court addressed whether rape and felony murder were separate statutory offenses for double jeopardy purposes where rape was one of the predicate offenses for felony murder. While there were six enumerated felonies that *could* satisfy the felony murder statute, the petitioner was convicted of murder in the course of committing a rape. The government argued that felony murder and rape were not the same offense because felony murder did not require proof of rape "in all cases." *Id*. at 694. The Court observed, however, that proof of rape was required in the current case, as the petitioner was not charged with murder during perpetration of a robbery, kidnapping, arson, or any of the other predicate offenses. *Id*. The felony murder statute could just as easily been drafted as six distinct statutory provisions, rather than one offense with six alternatives, and the outcome would have been the same. *Id*. Thus, pursuant to the *Blockburger* test, double jeopardy was violated.

And in *United States v. Davenport*, 519 F.3d 940 (9th Cir. 2008), the Ninth Circuit applied the *Blockburger* test in another similar situation. There, the petitioner was charged with both receipt and possession of child pornography. The

government argued receipt was not a lesser included offense because it was possible to possess child pornography without also being guilty of receipt, such as in cases of "homemade child pornography." 519 F.3d at 944. The Court rejected the government's argument. The focus in that case was the interstate commerce, or nexus, element. While the interstate commerce requirement was "technically different for receipt and possession," "the receipt provision necessarily requires shipment of the pornography, while the possession provision may meet the interstate commerce nexus either by shipment or by alternative means." *Id*. But by meeting the interstate commerce nexus for receipt, the government necessarily met the required nexus for possession. *Id*. Thus:

> Because possession's nexus requirement can be met in one of two ways and receipt's nexus requirement is one of those two ways, then at least as to the interstate commerce nexus, a conviction for receipt necessarily includes proof of the elements required for conviction under possession, and possession is a lesser included offense of receipt.

Id. at 945.

The current case closely mirrors the facts of *Vitale*, *Whalen*, and *Davenport*. One element of the Nevada robbery statute can be proven in two different ways, one of which creates a double jeopardy violation with the crime of battery. While there may not be a double jeopardy violation in every case where the two offenses are charged, there was here because Mr. Marshall was specifically charged, convicted, and sentenced for battery with intent to commit robbery, and the robbery was effectuated by the same force as the battery. The robbery charges completely

subsumed the battery charges. Therefore, separate sentences for robbery and battery with intent to commit robbery violates double jeopardy.

The Ninth Circuit erred by declining to grant a COA in this case. At the very least, reasonable jurists could disagree with the District Court's denial of habeas relief on this claim. Moreover, as the District Court (wrongfully) believed there was no clearly established law addressing double jeopardy when there are multiple ways to prove one of the offenses, this Court should review this case on a writ of certiorari to alleviate any remaining ambiguity.

II. Jurists of reason could debate whether Mr. Marshall's right to due process and a fair trial was violated when the trial court failed to sever the individual counts.

The right to due process and a fair trial is secured by the Fifth and Fourteenth Amendments to the United States Constitution. Improper joinder violates due process "if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986).

A. Facts

Five separate strong-arm robberies occurred from April 2006 to January 2008 in Las Vegas.

The first robbery occurred on April 23, 2006. The victim was Daniel **Montes**. Montes was drunk and going home around 5:00 PM when he stopped to buy beer. He met a black man and who invited him over. They had a few beers at the man's apartment. Montes stepped outside at one point and the man hit him with an object

and knocked him down. The man stole a chain off Montes' neck and took $200-$300 from Montes' pocket. Montes was injured and need surgery on his jaw. He later identified Mr. Marshall as the man who invited him over.

The second robbery was on July 2, 2006. The victim was Charles **Proudman**. Proudman knew Mr. Marshall from the neighborhood and they were friendly. On the day in question, Mr. Marshall asked Proudman to borrow some money. Proudman went out to get money and came back around 8:00 PM. When he got home, Mr. Marshall was there. They talked about money and next thing Proudman remembers is waking up on the floor. About $60 had been taken from his wallet. Proudman also needed surgery on his jaw. He was unsure if he had been struck with an object or not.

The third was on October 16, 2006. The victim was Benjamin **Livermore**. Livermore cashed a check at a check-cashing place. Outside, he saw some guys in a parking lot with Mr. Marshall. Livermore knew Mr. Marshall from before. Mr. Marshall tried to talk to Livermore, but Livermore wasn't interested. Livermore was hit on the head by someone, possibly Mr. Marshall, but didn't actually see who it was. He was struck with an unknown object hard enough that he needed staples in his head to stop the bleeding. Somewhere between $400 and $800 was stolen from him.

The fourth was on January 16, 2007, and the victim was Kendall **Featherston**. Featherston worked until 1:00 AM and stopped to do some gambling on the way home. He won $1,000. He drove home and parked on the street. He was

approached by someone who demanded his money. Featherston refused. He was then hit in the face and fell to the ground, blacked out. As a result, he had bruises and swelling to his face. He believed he was struck by the perpetrator's left hand. Featherston said his wallet and groceries were taken, but not his gambling winnings. He did *not* identify Mr. Marshall as the robber.

And the fifth robbery was on January 26, 2008. The victim was Curtis **Euart**. Euart was drunk and walking home. A man walking with two friends offered Euart drugs and Euart declined. The man tripped Euart, knocking him to the ground. Once on the ground, the man hit Euart once, took his money, and ran off. Euart's jaw was broken and needed surgery. When shown a lineup by police, Euart identified Mr. Marshall with 90% certainty as the robber. However, at trial, Euart testified he was 100% sure Mr. Marshall was *not* the robber. Euart testified he had seen the real robber on a few occasions since the incident, including on the bus not long before trial. Euart had reported this to the District Attorney's Office, but said the prosecutor didn't appear to care.

B. The robberies were not sufficiently similar to warrant joinder.

Prior to trial, the defense moved to sever the unrelated robberies, arguing they did not arise from the same transaction and did not constitute a common plan. The defense further argued that joinder of the offenses would be highly prejudicial to Mr. Marshall and that evidence of one robbery would not be cross-admissible at trial for the others. Finally, the defense alleged the State was trying to attach weak cases to stronger ones in order to secure a conviction, which is essentially improper

propensity evidence. The State responded, arguing the robberies were part of a common scheme or plan, as evidenced by the similarities between the five robberies. The trial court conducted a hearing on this issue and, following argument by counsel, held that the events were similar enough to be joined as part of a common scheme or plan. The trial court erred.

Federal due process was violated because the improper joinder rendered Mr. Marshall's trial fundamentally unfair. The five robberies at issue here did not have sufficient similarities to be indicative of a common scheme or plan, nor would evidence of one have been admissible in a separate trial for the others. The only thing the robberies had in common were: 1) money was taken, which is true for every robbery; and 2) the victims were struck in the head and injured, although the nature of the injuries varied from mere bruises to a broken jaw.

Virtually everything else about the robberies varied widely. First, the robberies occurred over a span of nearly two years, with the last occurring over one year after the previous one. Second, four of the robberies occurred within a small, high crime area, but one was over one-and-a-half miles away from the others. Third, the robberies occurred in different places, with three of them occurring on the street, one occurring in the victim's apartment, and one occurring as the victim left the suspect's apartment. Fourth, two of the victims were attacked by strangers, one victim had met the suspect earlier that day, another victim knew the suspect from around the neighborhood, and yet another victim had actually socialized with the suspect on several prior occasions. Fifth, in some of the robberies the suspect was

alone and in some he was observed with other people. Sixth, all the robberies occurred at different times of the day. Seventh, a weapon was used in some of the robberies, but not others. And eighth, three of the victims suffered a broken jaw, one had a head laceration, and one had just bruises and swelling. These vast distinctions are illustrated in the chart below:

Victim	**Montes**	**Proudman**	**Livermore**	**Feathers-ton**	**Euart**
Date	4/23/06	7/2/06	10/16/06	1/16/07	1/26/08
Location	Within a ¼ mile radius of each other				1 ½ miles away
Place	Leaving suspect's apartment	Inside own apartment	Outside on street	Outside on street	Outside on street
Known suspect or not	Met him earlier that day	Had hung out together previously	Knew from neighborhood	Stranger	Stranger
Suspect alone or not	Alone	Alone	With others	Alone	With others
Time of day	After 5 PM	8-10 PM	Evening	After 1 AM	3:30-4 PM
Use of weapon	Struck with object	Unsure	Struck with object	Hand only	Hand only
Injuries	Broken jaw	Broken jaw	Cut on head	Bruises and swelling	Broken jaw

As demonstrated by this chart, no two robberies were alike and no common modus operandi ("M.O.") existed. In fact, the supposed M.O. referred to by the prosecution during closing arguments was that the robberies were motivated by

money and that money or property was taken in each case. That is not part of an M.O.; that is part of the crime and common to literally every robbery case. A perpetrator's M.O. is akin to their unique signature. A signature crime must be "unusual and distinctive." *United States v. Smalls*, 752 F.3d 1227, 1238 (10th Cir. 2014) (quoting *United States v. Connelly*, 874 F.2d 412, 417 (7th Cir. 1989)). The taking of money or property is an element of robbery and therefore cannot be part of a signature to justify joining otherwise dissimilar robberies together. There was no common scheme or plan to warrant joinder of these robberies.

Mr. Marshall was prejudiced by the improper joinder because the stronger cases against him were used to bolster the weaker cases. Evidence against him in some of the cases was used to infer guilt in other cases. Victim Euart sat in the courtroom and stated clearly and repeatedly that Mr. Marshall was *not* the person who robbed him: "That—that's not the guy." Regarding his prior identification of Mr. Marshall in a photo lineup where he identified Mr. Marshall with 90% certainty, Euart testified at trial:

> Euart: No, alls I know is I did that, but it wasn't a hundred—now, I know—I'm glad I said 90 percent because he's not the man, but—
>
> Question: Uh-huh. Who's—who's not the man?
>
> Euart: This man in this photo and that man sitting there [defendant Marshall].
>
> Question: Who is that?
>
> Euart: I have no idea who he is.

He later continued:

> Question: Here in court, under oath, you're telling us you made a mistake in saying 90 percent sure back when you showed that—
>
> Euart: That 10 percent is a hundred percent mistake, yes.

However, the prosecution argued that Mr. Marshall must have committed the robbery because it fit his pattern and M.O. Regarding Euart's case, the prosecutor argued to the jury: "Why is that case included? Why do we know that it was a robbery and a battery with intent to commit a crime? Why do we know it was the defendant? It's the pattern. It's the MO and the defendant puts himself there." It was improper for identity to be established by reference to the other crimes because they lacked sufficient similarity to be considered signature crimes. The only commonalities, that money was taken and force was used, are also common to every other strong-armed robbery. Euart's robbery happened over a year after the others and a mile-and-a-half away from the others. Unlike Proudman and Livermore, Euart did not know Mr. Marshall previously. Unlike Montes and Proudman, the robbery happened out on the street. And unlike Montes and Livermore, Euart was not struck with an object. Nothing connected the cases together.

Combining the stronger cases, in which Mr. Marshall was identified as the robber, with the weaker cases, in which he was not, was unduly prejudicial. Mr. Marshall's right to due process and a fair trial was violated by this improper bolstering of the weaker cases. There is no other explanation for the conviction in Euart's case. Euart testified that he was 100% certain he wrongly identified Mr.

Marshall during the earlier photo lineup, he had seen the real perpetrator on a bus, and the District Attorney's Office seemed indifferent to the truth. There was no allegation that Euart was threatened or otherwise coerced into exonerating Mr. Marshall. Nevertheless, the State relied on the identification of Mr. Marshall by victims Montes, Proudman, and Livermore to obtain a conviction in Euart's case. The State argued Mr. Marshall must have robbed Euart because it fit his M.O. However, absent an actual signature crime, this was tantamount to an improper character or propensity argument. But for the joinder, the evidence from the incidents involving Montes, Proudman, and Livermore would not have been admissible at a trial for the robbery of Euart, whose robbery occurred over a year later and in a different geographical area. Had that evidence not been presented to the jury, Mr. Marshall would not have been convicted of robbery and battery of Euart. Mr. Marshall's right to due process and a fair trial was therefore violated.

C. Reasonable jurists could disagree with the district court's decision.

The District Court held that the Nevada Supreme Court's denial of this claim was not based on an unreasonable determination of facts.[13] The District Court found that joinder of the five robberies did not "render Marshall's trial fundamentally unfair because "under Nevada law, the evidence from the incidents would be cross-admissible based on a common opportunity."[14] This was because the

[13] Appendix 011.

[14] Appendix 012.

robberies had "the same operative set of facts: the victim was alone in a high-crime area of Las Vegas, was violently hit in the head, causing substantially [sic] injuries, and had his cash stolen."[15]

First, the conclusory testimony that the robberies occurred in a high crime area was not supported with any facts. Other courts have cautioned against blind reliance on such testimony. "The citing of an area as 'high-crime' requires careful examination by the court…" *United States v. Montero-Camargo*, 208 F.3d 1112, 1138 (9th Cir. 2000). The characterization of the area in the current case as a high crime area was not supported by "specific data" as previously advised by this Court. *Id*. at 1139 n.32. Additionally, the District Court did not consider that one of the joined robberies (Euart's case) occurred a mile-and-a-half away from the others.

Second, while all the victims were hit in the head, they did not all suffer substantial or serious injuries. Three of the victims suffered broken jaws requiring surgery, but another victim only suffered a laceration to his head, and the fifth had bruises and swelling but did not go to the hospital.

Third, having money taken is common to all robberies and is not part of the crime's signature because it is not "unusual and distinctive." *Smalls*, 752 F.3d at 1238. These were not signature crimes and joinder was improper. This Court should review this case on a writ of certiorari because, at the very least, reasonable jurists could disagree with the District Court's denial of habeas relief on this claim.

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[15] Appendix 012.

CONCLUSION

By failing to grant Mr. Marshall a COA on these claims, the Ninth Circuit departed so far from the usual course of judicial proceedings that it calls for this Court to exercise its supervisory power. Therefore, Rodney Marshall respectfully requests this Court grant his Petition for Writ of Certiorari, vacate the order of the Ninth Circuit Court of Appeals, and remand with instructions to grant a Certificate of Appealability.

Dated October 14, 2022

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ C.B. Kirschner
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 24 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RODNEY MARSHALL, Petitioner-Appellant, v. BRIAN WILLIAMS, Warden; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 21-16921 D.C. No. 2:18-cv-00075-JAD-DJA District of Nevada, Las Vegas ORDER

Before: RAWLINSON and NGUYEN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Rodney Marshall,

Petitioner

v.

Brian Williams, et al.,

Respondents

Case No.: 2:18-cv-00075-JAD-DJA

Order Denying Petition for Habeas Relief and Closing Case

Petitioner Rodney Marshall was found guilty of four counts of robbery and two counts of battery with intent to commit a crime in Nevada State Court and sentenced to ten years to life in prison for each count.[1] In a four-count petition, Marshall seeks a writ of habeas corpus under 28 U.S.C. § 2254 based on claims that the state district court failed to sever the counts, his right to be free from double jeopardy was violated, there was insufficient evidence to support two of his convictions, and his trial counsel failed to object to a detective's testimony.[2] Having evaluated the merits of those claims, I find that habeas relief is not warranted, so I deny Marshall's petition, deny him a certificate of appealability, and close this case.

Background

A. The facts underlying Marshall's convictions[3]

Daniel Montes was "in the area of Tropicana and Maryland Parkway" on April 23, 2006, around 5:00 p.m. when he first met Marshall. Marshall invited Montes to have a beer at Marshall's residence across the street, and after the two shared a few beers, Montes left. As Montes was urinating outside of Marshall's apartment building, Marshall hit Montes with an object, knocking him out, and stole his necklace and money. Montes needed surgery following

[1] ECF No. 12-5.

[2] ECF No. 11.

[3] These facts are taken from the trial transcripts. ECF Nos.14-30, 14-31, 14-33. For simplicity's sake, I cite to these exhibits generally for this entire fact section.

the attack; he had a metal plate placed in his chin and his mouth wired shut. Montes identified Marshall as his attacker from a single photograph shown to him at the grand jury proceeding. Montes also identified Marshall at trial.

Charles Proudman lived near Marshall and would see him walking "three, four times a week" during a three-month period. Proudman knew Marshall's first name and invited him inside his apartment to share a beer on several occasions. On July 2, 2006, Marshall approached Proudman and asked for money. Proudman told Marshall that he did not have any money but that he was going to borrow some later that day. Between 8:00 p.m. and 10:00 p.m. that evening, Proudman returned home from gambling and drinking and found Marshall inside his apartment. Marshall hit Proudman, knocking him out, and stole $60.00 from Proudman's wallet before leaving. Proudman had facial reconstructive surgery and a metal plate placed on the left side of his face as a result of the attack. Proudman was shown a set of photographs by law enforcement three years after the attack and identified Marshall as his attacker. Proudman also identified Marshall at the trial.

Benjamin Livermore cashed a check at a supermarket on October 16, 2006. Livermore then visited a smoke shop around the corner to buy cigarettes, and as he was walking to rent a short-term apartment nearby, he was approached by "a couple guys," including Marshall. Livermore was then "hit in the back of the head by some blunt object," which required "12 staples in [his] head." When he regained consciousness, Livermore realized that his wallet was missing, and after law enforcement returned it to him, he discovered that $600.00 to $800.00 was stolen. Livermore identified Marshall three years later in a photographic lineup. Livermore also identified Marshall at trial, indicating that he knew Marshall "[f]rom the neighborhood."

Kendall Featherstone got off work around 1:00 a.m. on January 16, 2007, and after gambling and stopping by a 7-Eleven convenience store, he parked his car at his apartment complex. As Featherstone was walking to his apartment, "all of a sudden there was a person standing next to [him] walking along." The person told Featherstone to "give [him] what [he's] got." Featherstone replied that he was "not giving [him] shit," and the person then "slugged [Featherstone] so hard in the face." Featherstone "was hit right on [his] left jaw just above [his]

tooth line." Featherstone was unconscious for "maybe a good half an hour," and when he regained consciousness, he realized his wallet and the groceries and beer he was carrying were gone. The person who assaulted Featherstone was wearing a hoodie and his "face was pretty shadowed," so Featherstone did not have a good opportunity to see his face. Featherstone was shown a photographic lineup several years later, but he was unable to identify his attacker.

Curtis Euart, who had been drinking, dropped his wife off at work and was walking towards the intersection of Palos Verdes Street and East Twain Avenue on January 26, 2008, around 3:30 p.m., when he was approached by three people. One of those people asked Euart if he "want[ed] to party." Euart declined, and after some friendly small talk, the person "walked [him] off the sidewalk," tripped him, hit him a few times, grabbed his money, and left. Euart needed surgery following the assault; he had a plate put in his jaw and his mouth wired shut. Euart initially lied to medical personnel about how his injuries occurred, and Euart failed to initially report the attack to law enforcement. Euart was shown a photographic lineup about a month after the attack, and he identified Marshall and stated "[t]hat's my 90 percent thought that was the guy that assaulted me." However, Euart testified at trial that Marshall was not the person who robbed him. In fact, Euart testified that he told the State that he saw the person who had robbed him on the bus two years after the robbery. That person "was trying to get away from [Euart], and . . . he just looked guilty." Euart testified that the State did not "seem . . . too interested in" the fact that Euart saw this person on the bus.

B. Procedural history

Marshall was charged with five counts of robbery and five counts of battery with intent to commit a crime.[4] Following a jury trial, Marshall was found guilty of four counts of robbery and four counts of battery with intent to commit a crime.[5] The state district court declared Marshall a habitual criminal and sentenced him to ten years to life in prison for each of his eight

[4] ECF No. 14-8.

[5] ECF No. 14-36. The jury found Marshall not guilty of battery and robbery regarding Featherstone.

convictions.[6] Marshall appealed, and the Nevada Supreme Court affirmed on August 1, 2012.[7] Marshall filed a petition for a writ of certiorari on December 13, 2012.[8] The United States Supreme Court denied the writ on February 25, 2013.[9] The Nevada Supreme Court issued its remittitur on May 14, 2013.[10]

Marshall filed his pro se state habeas petition on March 21, 2014.[11] Following an evidentiary hearing, the state district court granted, in part,[12] and denied, in part, Marshall's petition on July 12, 2016.[13] Marshall appealed, and the Nevada Supreme Court affirmed on July 11, 2017.[14] Remittitur issued on August 7, 2017.[15]

Marshall filed his federal habeas petition and his counseled first amended petition on January 22, 2018, and August 3, 2018, respectively.[16] The respondents moved to dismiss the amended petition on October 2, 2018.[17] I denied the motion on August 16, 2019.[18] The

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[6] ECF No. 15-9.

[7] ECF No. 12-4.

[8] ECF No. 15-31.

[9] ECF No. 15-32.

[10] ECF No. 15-33.

[11] ECF No. 15-34.

[12] The state district court dismissed two counts of battery with intent to commit a crime and "vacate[d] the sentence as to those counts." ECF No. 12-6 at 7. An amended judgment of conviction was entered reflecting the dismissal. *See* ECF No. 12-5.

[13] ECF Nos. 16-19, 12-6.

[14] ECF No. 12-9.

[15] ECF No. 16-34.

[16] ECF Nos. 5, 11.

[17] ECF No. 13.

[18] ECF No. 28.

respondents answered the amended petition on October 15, 2019, and Marshall replied on January 13, 2020.[19]

Marshall alleges the following violations of his federal constitutional rights:

1. His rights to due process and a fair trial were violated when the state district court failed to sever the individual counts;
2. His right to be free from double jeopardy was violated when he was convicted and sentenced for both robbery and battery with intent to commit robbery;
3. His right to due process was violated when he was convicted on insufficient evidence for the robbery and battery of Euart;
4. His right to the effective assistance of counsel was violated when his trial counsel failed to object to a detective's summary of the investigation.[20]

Discussion

A. Legal standards

1. Review under the Antiterrorism and Effective Death Penalty Act (AEDPA)

If a state court has adjudicated a habeas corpus claim on its merits, a federal district court may only grant habeas relief with respect to that claim if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[21] A state court acts contrary to clearly established federal law if it applies a rule contradicting the relevant holdings or reaches a different conclusion on materially indistinguishable facts.[22] And a state court unreasonably applies clearly established federal law if it engages in an objectively unreasonable application of the correct governing legal rule to the

[19] ECF Nos. 30, 33.

[20] ECF No. 11.

[21] 28 U.S.C. § 2254(d).

[22] *Price v. Vincent*, 538 U.S. 634, 640 (2003).

facts at hand.[23] Section 2254 does not, however, "require state courts to *extend*" Supreme Court precedent "to a new context where it should apply" or "license federal courts to treat the failure to do so as error."[24] The "objectively unreasonable" standard is difficult to satisfy;[25] "even 'clear error' will not suffice."[26]

Habeas relief may only be granted if "there is no possibility [that] fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents."[27] As "a condition for obtaining habeas relief," a petitioner must show that the state-court decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement."[28] "[S]o long as 'fairminded jurists could disagree' on the correctness of the state court's decision," habeas relief under Section 2254(d) is precluded.[29] AEDPA "thus imposes a 'highly deferential standard for evaluating state-court ruling,' . . . and 'demands that state-court decisions be given the benefit of the doubt.'"[30]

If a federal district court finds that the state court committed an error under § 2254, the district court must then review the claim de novo.[31] The petitioner bears the burden of proving

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[23] *White v. Woodall*, 134 S. Ct. 1697, 1705–07 (2014).

[24] *Id.* at 1705–06.

[25] *Metrish v. Lancaster*, 569 U.S. 351, 357–58 (2013).

[26] *Wood v. McDonald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) (citation omitted); *see also Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("The question . . . is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.").

[27] *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

[28] *Id.* at 103.

[29] *Id.* at 101.

[30] *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citations omitted).

[31] *Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008) (en banc) ("[I]t is now clear both that we may not grant habeas relief simply because of § 2254(d)(1) error and that, if there is such error, we must decide the habeas petition by considering de novo the constitutional issues raised.").

by a preponderance of the evidence that he is entitled to habeas relief,[32] but state-court factual findings are presumed correct unless rebutted by clear and convincing evidence.[33]

2. Standard for federal habeas review of an ineffective-assistance claim

The right to counsel embodied in the Sixth Amendment provides "the right to the effective assistance of counsel."[34] Counsel can "deprive a defendant of the right to effective assistance[] simply by failing to render 'adequate legal assistance[.]'"[35] In the hallmark case of *Strickland v. Washington*, the United States Supreme Court held that an ineffective-assistance claim requires a petitioner to show that: (1) his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms in light of all of the circumstances of the particular case;[36] and (2) it is reasonably probable that, but for counsel's errors, the result of the proceeding would have been different.[37]

A reasonable probability is "probability sufficient to undermine confidence in the outcome."[38] Any review of the attorney's performance must be "highly deferential" and must adopt counsel's perspective at the time of the challenged conduct so as to avoid the distorting effects of hindsight.[39] "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practice or

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[32] *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

[33] 28 U.S.C. § 2254(e)(1).

[34] *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

[35] *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 335–36 (1980)).

[36] *Strickland*, 466 U.S. at 690.

[37] *Id.* at 694.

[38] *Williams v. Taylor*, 529 U.S. 362, 390–91 (2000).

[39] *Strickland*, 466 U.S. at 689.

most common custom."[40] The burden is on the petitioner to overcome the presumption that counsel made sound trial-strategy decisions.[41]

The United States Supreme Court has described federal review of a state supreme court's decision on an ineffective-assistance claim as "doubly deferential."[42] So, the court must "take a 'highly deferential' look at counsel's performance . . . through the 'deferential lens of § 2254(d)'"[43] and consider only the record that was before the state court that adjudicated the claim on its merits.[44]

B. Evaluating Marshall's claims

Marshall claims that the state district court failed to sever the charges, his right to be free from double jeopardy was violated, there was insufficient evidence to support two of his convictions, and his trial counsel failed to object to the detective's testimony.[45]

1. Ground 1—failure to sever the individual counts

In Ground 1, Marshall alleges that his federal constitutional rights were violated when the state district court failed to sever the individual counts.[46] Marshall elaborates that there were insufficient similarities between the five robberies to show a common scheme or plan and evidence of the other robberies would not have been admissible in separate trials.[47] Marshall argues that combining the stronger cases, in which he was identified as the robber, with the weaker cases, in which he was not, was unduly prejudicial.[48] In affirming Marshall's judgment

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[40] *Harrington*, 562 U.S. at 104.

[41] *Id.*

[42] *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).

[43] *Id.*

[44] *Id.* at 181–84.

[45] ECF No. 11.

[46] ECF No. 11 at 13.

[47] *Id.* at 14.

[48] *Id.* at 16.

of conviction on direct appeal, the Nevada Supreme Court held that joinder was proper and was not unfairly prejudicial:

> Marshall argues that his constitutional rights to due process and a fair trial were violated because the district court denied his motion to sever. Marshall contends that joinder was not proper under NRS 173.115, as the generalized similarities offered by the State are not sufficient to establish a common scheme or plan. Marshall also contends that joinder was not proper because the evidence would not have been cross-admissible at separate trials and that joinder of the counts was unfairly prejudicial.
>
> NRS 173.115(2) allows joinder when the offenses are "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." While we disagree with the district court that these incidences "constitute[ed] parts of a common scheme or plan," these incidents were properly joined because they were "connected together." NRS 173.115(2); *see Fields v. State*, 125 Nev. 776, 782, 220 P.3d 724, 728 (2009) (laying out the considerations for overcoming the presumption of inadmissibility that attaches to all prior bad act evidence); *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981) (affirming the district court's decision on alternate grounds). Marshall was identified at the scenes, lived in the area during the period, and the numerous robberies and batteries were similar in nature. The evidence that all five robberies occurred after serious blows to the head could have been admissible to prove motive or intent to deprive the victims of personal property by force. *See* NRS 48.045(2). Thus, we conclude that this evidence is sufficient to show that the incidents and evidence related to each one were connected together.
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> However, even if joinder was permissible under NRS 173.115, the district court should have severed the offenses if the joinder was unfairly prejudicial. *Tabish v. State*, 119 Nev. 293, 304-05, 72 P.3d 584, 591 (2003). To assess the potential prejudice caused by joinder, the test is whether the prejudice manifestly outweighs the central concern of judicial economy. *Id.* at 304, 72 P.3d at 591. Here, the district court's jury instruction adequately addressed the issue of any potential prejudice by limiting the jury's consideration of the evidence. *See id.* Marshall's acquittal on the counts involving one of the victims also demonstrates the jury's lack of prejudice in each conviction by showing the ability of the jury to compartmentalize the evidence to each separate crime. We therefore conclude that joinder was proper and was not unfairly prejudicial, because any prejudice was outweighed by the concern for judicial economy.[49]

[49] ECF No. 12-4 at 3–4.

I find that the Nevada Supreme Court's rejection of Marshall's claim was neither contrary to nor an unreasonable application of clearly established law as determined by the United States Supreme Court and was not based on an unreasonable determination of the facts. Marshall moved "to sever the separate and non-related offenses . . . into separate complaints as joinder is not proper."[50] His motion was based, in part, on Nevada Revised Statute (NRS) § 173.115(1), which provides that "[t]wo or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged . . . are" either "[b]ased on the same act or transaction; or . . . [b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." A hearing was held on Marshall's motion.[51] Following the hearing, the state district court denied the motion, explaining, "[b]ased upon the information provided, the similarities of the events that have been outlined, I believe there's sufficient nexus and common scheme to allow the counts to remain joined."[52]

The district court "may grant habeas relief on a joinder challenge only if the joinder resulted in an unfair trial. There is no prejudicial constitutional violation unless simultaneous trial of more than one offense . . . actually render[ed] petitioner's state trial fundamentally unfair and hence, violative of due process."[53] As to prejudice, the court must ask "'if the impermissible joinder had a substantial and injurious effect or influence in determining the jury's verdict.'"[54] The Ninth Circuit explained that it "focuses particularly on cross-admissibility of evidence and

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[50] ECF No. 14-11 at 2.

[51] *See* ECF No. 14-19.

[52] *Id.* at 11.

[53] *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004) (internal quotation marks omitted) (quoting *Sandoval v. Calderon*, 241 F.3d 765, 771–72 (9th Cir. 2001)); *see also Bean v. Calderon*, 163 F.3d 1073, 1084 (9th Cir. 1998) ("[M]isjoinder must have 'result[ed] in prejudice so great as to deny [Petitioner] his Fifth Amendment right to a fair trial' in order for us to find that [Petitioner] suffered a constitutional violation."); *United States v. Lane*, 474 US 438, 466 n.8 (1986) ("Improper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial.").

[54] *Davis*, 384 F.3d at 638 (quoting *Sandoval*, 241 F.3d at 772).

the danger of 'spillover' from one charge to another, especially where one charge or set of charges is weaker than another."[55] Reversal of a conviction is not warranted if "the evidence was so strong that any due process violation in the joinder had no 'substantial and injurious effect or influence in determining the jury's verdict' with regard to that offense."[56] It is the petitioner's "burden to prove unfairness rising to the level of a due process concern."[57]

Based upon my review of the record, I cannot determine that the joinder of the five robberies rendered Marshall's trial fundamentally unfair.[58] It is true, as Marshall notes, that the five robberies had some differences: one of the robberies occurred a fair distance from the other four, the robberies took place over a large span of two years, the site and times of the robberies varied, the use of a weapon and an accomplice during the robberies varied, and the victims had varying levels of knowledge about the robbery suspect. But it also appears that, under Nevada law, the evidence from the incidents would be cross-admissible based on a common opportunity.[59] All of the robberies had the same operative set of facts: the victim was alone in a high-crime area of Las Vegas, was violently hit in the head, causing substantially injuries, and had his cash stolen. Moreover, as was the case here,[60] prejudice can be "limited through an instruction directing the jury to consider each count separately."[61] Finally, because Marshall was

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[55] *Id.*; *see also Sandoval*, 241 F.3d at 772 ("[R]ecogniz[ing] that the risk of undue prejudice is particularly great whenever joinder of counts allows evidence of other crimes to be introduced in a trial where the evidence would otherwise be inadmissible.").

[56] *Bean*, 163 F.3d at 1086 (citing *Brecht v. Abramson*, 507 U.S. 619, 637 (1993)).

[57] *Park v. California*, 202 F.3d 1146, 1149 (9th Cir. 2000).

[58] *Davis*, 384 F.3d at 638.

[59] *See Sandoval*, 241 F.3d at 772 ("[C]ross-admissibility dispels the prejudicial impact of joining all counts in the same trial."); *see also* Nev. Rev. Stat. § 48.045(2) ("Evidence of other crimes, wrongs or acts . . . may . . . be admissible . . . as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.").

[60] *See* ECF No. 14-35 at 12 (instructing the jury that "[a]lthough each charge, and the evidence pertaining to it, should be evaluated separately, you may consider evidence from one incident in a separately charged incident only for the limited purpose of proving motive, opportunity, intent, preparation, identity, absence of mistake or accident, or a common scheme or plan of the defendant").

[61] *Davis*, 384 F.3d at 639 (citing *Lane*, 474 U.S. at 450 n.13).

acquitted of the charges relating to Featherstone,[62] it cannot be concluded that the joinder "had a substantial and injurious effect or influence in determining the jury's verdict."[63] Indeed, the Ninth Circuit has explained that acquittal on one joined charge establishes that the jury successfully compartmentalized the evidence.[64] Accordingly, because the Nevada Supreme Court reasonably denied Marshall relief on this claim, Marshall is not entitled to federal habeas relief on Ground 1.[65]

2. Ground 2—double jeopardy

In Ground 2, Marshall alleges that his federal constitutional right to be free from double jeopardy was violated when he was convicted and sentenced to both robbery and battery with the intent to commit robbery.[66] Marshall elaborates that the force used to accomplish the robbery was the same force used to accomplish the battery, and since the battery was specifically charged as being with intent to commit robbery, the intent element was also the same.[67] In affirming Marshall's judgment of conviction on direct appeal, the Nevada Supreme Court found no plain error and that that the separate punishments for the robbery and battery offenses did not violate the Double Jeopardy Clause:

> Marshall argues that robbery and battery with intent to commit a crime are the same offense under *Blockburger v. United States*, 284 U.S. 299 (1932), and therefore his constitutional right against being punished twice for the same crime was violated when the district court sentenced him for both offenses. Marshall requests that this court overrule the holding in *Zgombic v. State*, 106 Nev. 571, 578, 798 P.2d 548,

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[62] *See* ECF Nos. 14-36 at 4; 14-8 at 3–4.

[63] *Davis*, 384 F.3d at 638.

[64] *See Featherstone v. Estelle*, 948 F.2d 1497, 1503–04 (9th Cir. 1991) ("[I]t is apparent from the jury's discerning verdict that it followed the court's instructions to regard each count as separate and distinct."); *see, e.g., United States v. Unruh*, 855 F.2d 1363, 1374 (9th Cir. 1987) ("The best evidence of the jury's ability to compartmentalize the evidence is its failure to convict all defendants on all counts.").

[65] I would reach the same conclusion even reviewing this claim *de novo*. *See* ECF No. 33 at 12–13 (request by Marshall that I "conduct an independent review of the record").

[66] ECF No. 11 at 17.

[67] *Id.* at 18.

> 552 (1990), *superseded by statute on other grounds as stated in Steese v. State*, 114 Nev. 479, 499 n.6, 960 P.2d 321, 324 n.6 (1998), that convictions for robbery and battery are two separate offenses. While Marshall failed to object during the proceedings below, "this court has the discretion to review constitutional or plain error." *Somee v. State*, 124 Nev. 434, 443, 187 P.3d 152, 159 (2008).
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> *Blockburger* controls the determination of whether offenses are the same for purposes of the Double Jeopardy Clause and necessitates that, in order for crimes to constitute separate offenses, each must require proof of fact that the other does not. 284 U.S. at 304. We have previously determined in *Zgombic* that battery and robbery do not implicate the Double Jeopardy Clause. 106 Nev. at 578, 798 P.2d at 552. We determined that while battery requires the use of force or violence, robbery does not. NRS 200.380(1); NRS 200.481(1)(a); *Zgombic*, 106 Nev. at 578, 798 P.2d at 552. Moreover, robbery requires the taking of property, which battery does not. NRS 200.380(1); *Zgombic*, 106 Nev. at 578, 798 P.2d at 552. The crimes of robbery and battery were created by the legislature to punish separate wrongs. The battery with intent to commit robbery and the robbery statutes regulate distinct aberrant social conduct and protect separate societal interests. Therefore, we decline to find plain error and affirm the district court ruling that the separate punishments for robbery and for battery with intent to commit a robbery do not violate the Double Jeopardy Clause.[68]

I find that the Nevada Supreme Court's rejection of Marshall's claim was neither contrary to nor an unreasonable application of clearly established law as determined by the United States Supreme Court and was not based on an unreasonable determination of the facts. The Fifth Amendment's Double Jeopardy Clause prohibits multiple punishments for the same offense.[69] The Double Jeopardy Clause provides three related protections: (1) it prohibits a second prosecution for the same offense after acquittal; (2) it prohibits a second prosecution for the same offense after conviction; and (3) it prohibits multiple punishments for the same offense.[70] "[T]he final component of double jeopardy—protection against cumulative punishments—is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature."[71] And "[b]ecause the substantive power to prescribe

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[68] ECF No. 12-4 at 5–6.

[69] U.S. Const. amend. V.

[70] *United States v. Wilson*, 420 U.S. 332, 343 (1975).

[71] *Ohio v. Johnson*, 467 U.S. 493, 499 (1984).

crimes and determine punishments is vested with the legislature, . . . the question under the Double Jeopardy Clause whether punishments are multiple is essentially one of legislative intent."[72] Therefore, "if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end."[73]

The "same-elements" test established in *Blockburger v. United States*[74] is used to determine whether multiple prosecutions or multiple punishments involve the same offense.[75] The test "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution."[76] "Conversely, '[d]ouble jeopardy is not implicated so long as each violation requires proof of an element which the other does not.'"[77] "'If each [offense] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'"[78] The "same act or transaction" can "constitute[ ] a violation of two distinct statutory provisions."[79]

Marshall was convicted of robbery and battery with the intent to commit a crime as to Livermore and Euart.[80] At the time of Marshall's trial, NRS § 200.380 defined robbery as "the unlawful taking of personal property from the person of another, or in his presence, against his

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[72] *Id*. (internal quotation marks omitted).

[73] *Id.* at n.8; *see also Whalen v. United States*, 445 U.S. 684, 691–92 (1980) ("[W]here two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent.").

[74] *Blockburger v. United States*, 284 U.S. 299 (1932).

[75] *United States v. Dixon*, 509 U.S. 688, 696 (1993).

[76] *Id.*; *see also Ball v. United States*, 470 U.S. 856, 861 (1985) ("The assumption underlying the *Blockburger* rule is that Congress ordinarily does not intend to punish the same offense under two different statutes.").

[77] *Wilson v. Belleque*, 554 F.3d 816, 829 (9th Cir. 2009) (quoting *United States v. Vargas-Castillo*, 329 F.3d 715, 720 (9th Cir. 2003).

[78] *Id.* (quoting *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975)).

[79] *Blockburger*, 284 U.S. at 304.

[80] *See* ECF Nos. 14-8 at 3–4; 12-5.

will, by means of force or violence or fear of injury, immediate or future, to his person or property." And NRS § 200.400(2) allowed for the sentencing of "[a] person who is convicted of battery with the intent to commit mayhem, robbery or grand larceny." As it is used in that statute, battery is defined as "any willful and unlawful use of force or violence upon the person of another."[81]

Here the Nevada Supreme Court relied on the correct federal-law standards and applied them reasonably to the facts of Marshall's case. As the Nevada Supreme Court reasonably determined, battery with the intent to commit robbery—but not robbery—requires the use of force or violence,[82] and robbery—but not battery with the intent to commit robbery—requires the taking of property.[83] And as the Nevada Supreme Court appears to have reasonably determined, these two crimes were created by the Nevada Legislature to punish separate actions.[84] Indeed, robbery punishes the taking while battery with the intent to commit robbery punishes the force used to accomplish the taking. Accordingly, the Nevada Supreme Court reasonably concluded that Marshall's convictions do not violate the *Blockburger* "same-elements" test.[85] Marshall is denied federal habeas relief for Ground 2.

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[81] Nev. Rev. Stat. § 200.400(1)(a).

[82] I note that, under Nevada law, robbery does not have to be committed with force; it can also be committed by mere "fear of injury, immediate or future." Nev. Rev. Stat. § 200.380(1). So the crime of robbery can be satisfied by one of two alternative means—either by force/violence or "fear of injury"—and one of those alternative means—force/violence—makes it seemingly identical to the crime of battery with intent to commit robbery. However, because there is no clearly established United States Supreme Court precedent addressing whether a double-jeopardy violation exists when an offense can be committed multiple ways—and only one of those ways has the same elements as another offense—I do not find that Marshall has shown that he is entitled to relief.

[83] *See* Nev. Rev. Stat. §§ 200.380, 200.400.

[84] *See Brown v. Ohio*, 432 U.S. 161, 167 (1977) ("We are mindful that the Ohio courts 'have the final authority to interpret . . . that State's legislation.'"); *see also Johnson*, 467 U.S. at 499 ("We accept, as we must, the Ohio Supreme Court's determination that the Ohio Legislature did not intend cumulative punishment for the two pairs of crimes involved here.").

[85] *See* 284 U.S. at 304.

3. Ground 3—insufficient evidence for the Euart incident

In Ground 3, Marshall alleges that his federal constitutional rights were violated because there was insufficient evidence to convict him of robbery and battery regarding Euart because Euart testified that Marshall was not the man who robbed him.[86] In affirming Marshall's judgment of conviction on direct appeal, the Nevada Supreme Court found sufficient evidence:

> We conclude that substantial evidence supports Marshall's jury conviction for crimes involving Euart. *See Moore v. State*, 122 Nev. 27, 35, 126 P.3d 508, 513 (2006) (this court will not reverse a verdict that is supported by substantial evidence). In addition to Euart's prior identification of Marshall, the State also presented evidence that the attack occurred in the same area and that the injuries sustained were similar to those sustained by the other four victims. Euart's attacker told him he lived off Tropicana Avenue, where Marshall resided, and police placed Marshall less than a mile from the attack site that day. While Euart later recanted his identification of Marshall, it is the task of the jury to determine the credibility of Euart's testimony, and the jury could have permissibly based the conviction on circumstantial evidence. *See Buchanan v. State*, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003).
>
> . . . Therefore, there was sufficient evidence to support the convictions for the charges involving . . . Euart . . . .[87]

I find this ruling reasonable. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[88] A federal habeas petitioner "faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds."[89] On direct review of a sufficiency-of-the-evidence claim, a state court must determine whether "any rational trier of fact could have found the essential elements of the crime

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[86] ECF No. 11 at 19.

[87] ECF No. 12-4 at 6–7.

[88] *In re Winship*, 397 U.S. 358, 364 (1970).

[89] *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005).

beyond a reasonable doubt."[90] The evidence must be viewed "in the light most favorable to the prosecution."[91] Federal habeas relief is available only if the state-court determination that the evidence was sufficient to support a conviction was an "objectively unreasonable" application of *Jackson*.[92]

It is true, as Marshall notes, that the facts of Euart's attack differ slightly from the other four robberies. Euart testified that, contrary to his identification during the photographic lineup, Marshall was not his attacker.[93] And Detective Buddy Embrey testified that Euart was robbed "kind of out of the area" of the other robberies.[94] In fact, the other four robberies were "all within a quarter of a mile" of each other, but Euart's robbery was a mile and a half away.[95] However, the evidence also demonstrated that Euart had been drinking at the time of the attack, lied to medical personnel about how his injuries occurred, and failed to initially report the attack to law enforcement. This evidence could have affected Euart's credibility with the jury regarding his recantation.[96] Further, Euart was hit in the same area of his head as the other victims, had injuries markedly similar to the other victims, and identified Marshall with ninety percent surety a month after the attack. As the Nevada Supreme Court reasonably determined, the jury could have reasonably convicted Marshall of the robbery and battery of Euart on this circumstantial evidence.[97] Thus, because a rational trier of fact could have found beyond a reasonable doubt that Marshall robbed and battered Euart, the Nevada Supreme Court's ruling

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[90] *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

[91] *See id*.

[92] *See Juan H.*, 408 F.3d at 1275 n.13.

[93] *See* ECF No. 14-33 at 45–46.

[94] *Id.* at 110.

[95] *Id.* at 111–12.

[96] *See Schlup v. Delo*, 513 U.S. 298, 330 (1995) ("[U]nder *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review.").

[97] *See Buchanan v. State*, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) ("Circumstantial evidence alone can certainly sustain a criminal conviction.").

that there was sufficient evidence to convict Marshall of the robbery and battery of Euart was reasonable.[98] Marshall is denied federal habeas relief for Ground 3.

5. Ground 4—failure to object to the detective's summary of the investigation

In Ground 4, Marshall alleges that his federal constitutional rights were violated because his trial counsel failed to object to Detective Embrey's summary of the investigation, which Marshall argues was cumulative and prejudicial.[99] Marshall elaborates that Detective Embrey's testimony was essentially a precursor to the State's closing argument with the added benefit of Detective Embrey's opinion that Marshall committed all the robberies.[100] In affirming the state district court's denial of Marshall's state habeas petition, the Nevada Supreme Court held any challenge would have been futile:

> Marshall argues that trial and appellate counsel should have contested the admission of a detective's "exciting" testimony regarding the course of the investigation. The district court found that the detective's testimony served to identify the offenses, the apparent motivation common to them that officers perceived, and the reasons by the investigation took years to develop and identify a suspect whose appearance changed over time. The detective's testimony regarding the course of the investigation was permissible, as it offered to rebut the defense theory of the case that the police investigation had failed to establish that the five robberies committed over a period of three years had all been committed by the same individual. *See United States v. Holmes*, 620 F.3d 836, 841 (8th Cir. 2010) (explaining that out-of-court statements are not hearsay when offered to illustrate the propriety of the police's investigation); *United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004) ("If a jury would not otherwise understand why an investigation targeted a particular defendant, the testimony could dispel an accusation that the officers were officious intermeddlers staking out [appellant] for nefarious purposes."); *United States v. Hawkins*, 905 F.2d 1489, 1495 (11th Cir. 1990) (concluding that investigator's testimony was admissible to explain why the investigation commenced and to rebut defense claims that the investigation was baseless and sought to harass the target). Marshall's reliance on *Abram v. State*, is misplaced because that case involved an officer's "highly prejudicial" testimony regarding inadmissible character evidence that was not relevant to the State's theory of the case, 95 Nev. 352, 354, 594 P.2d 1143, 1144-45 (1979), while here the

[98] *In re Winship*, 397 U.S. at 364; *Juan H.*, 408 F.3d at 1274; *Jackson*, 443 U.S. at 319; Nev. Rev. Stat. §§ 200.380, 200.400.

[99] ECF No. 11 at 21–22.

[100] *Id.* at 22.

> testimony was relevant to the State's theory that Marshall had committed the offenses over a prolonged period of time and to rebut the defense theory of the case. Marshall's reliance on *United States v. Reyes*, 18 F.3d 65, 69 (2d Cir. 1994), is similarly misplaced, as the detective here did not testify as to the substance of a declarant's out-of-court statements and his testimony regarding Marshall's own statements in jail calls was not hearsay pursuant to NRS 51.035(3)(a). For these reasons, trial and appellate challenges to the detective's testimony would have been futile, and counsel accordingly were not deficient on this basis. This district court therefore did not err in denying this claim.[101]

I find that the Nevada Supreme Court's rejection of Marshall's *Strickland* claim was neither contrary to nor an unreasonable application of clearly established law as determined by the United States Supreme Court and was not based on an unreasonable determination of the facts.

Detective Embrey testified that in the beginning of 2009 he was "looking [at] certain types of crimes" that occurred in the "Tropicana and Maryland Parkway" area involving "a black male striking [his] victim[s] on the left side of [their] face."[102] During that investigation, Detective Embrey "had an opportunity to review incident reports that were created for all" the robberies and identified Marshall as a suspect.[103] As soon as the State questioned Detective Embrey about the facts of the attack on the first victim, Montes, Marshall's trial counsel objected "to summarizing the testimony at this point."[104] Marshall's trial counsel asked to approach, and an off-record bench conference was held.[105] The State then informed Detective Embrey that "we're not just going to summarize everything that happened," but, instead, the State "want[ed Detective Embrey] to talk about . . . just the specific factors that caught [his] attention in [his] investigation."[106] Detective Embrey then testified about each of the victim's injuries, the

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[101] ECF No. 12-9 at 6–7.

[102] ECF No. 14-33 at 101.

[103] *Id.* at 102–103.

[104] *Id.* at 104.

[105] *Id.*

[106] *Id.*

location of each of the attacks, and whether the descriptions given by the victims matched Marshall's description.[107]

It is true, as Marshall points out, that Nevada law dictates that a detective's irrelevant comments should be excluded "[a]bsent some substantial connection between the detective's comments and the state's theory of the case."[108] However, as the Nevada Supreme Court reasonably determined, Embrey's testimony was relevant and was appropriately connected to the State's theory of the case that Marshall committed all the robberies. Indeed, his testimony relevantly described the facts of the attacks as it pertained to his investigation without simply rehashing the evidence already discussed at trial.[109] Moreover, Marshall's trial counsel did object to Detective Embrey summarizing the evidence and, following a bench conference, the State attempted to restrict Detective Embrey's testimony, instructing him to speak only about specific factors in his investigation. Therefore, because Marshall's trial counsel did preemptively object to Detective Embrey summarizing the evidence and because further objection was unnecessary because the detective appropriately testified about the facts of his investigation, the Nevada Supreme Court reasonably concluded that Marshall's trial counsel did not act deficiently.[110] Marshall is denied federal habeas relief for Ground 4.[111]

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[107] *See id.* at 105–110.

[108] *Abram v. State*, 95 Nev. 352, 355, 594 P.2d 1143, 1145 (1979).

[109] *See* ECF No. 14-33 at 101–110.

[110] *Strickland*, 466 U.S. at 690.

[111] Marshall asks the court to "[c]onduct an evidentiary hearing at which proof may be offered concerning the allegations in th[e] amended petition and any defenses that may be raised by Respondents." ECF Nos. 11 at 24. I have already determined that Marshall is not entitled to relief, and neither further factual development nor any evidence that may be proffered at an evidentiary hearing would affect my reasons for denying Marshall's amended petition. Accordingly, I deny Marshall's request for an evidentiary hearing.

C. Certificate of Appealability

The right to appeal from the district court's denial of a federal habeas petition requires a certificate of appealability. To obtain that certificate, the petitioner must make a "substantial showing of the denial of a constitutional right."[112] "Where a district court has rejected the constitutional claims on the merits," that showing "is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."[113] Because I have rejected Marshall's constitutional claims on their merits, and he has not shown that this assessment of these claims is debatable or wrong, I find that a certificate of appealability is unwarranted for this case and I decline to issue one.

Conclusion

IT IS THEREFORE ORDERED that the petition **[ECF No. 11] is DENIED**, and because reasonable jurists would not find my decision to deny this petition to be debatable or wrong, a **certificate of appealability is DENIED**.

The Clerk of Court is directed to ENTER JUDGMENT accordingly and CLOSE THIS CASE.

Dated: October 18, 2021

U.S. District Judge Jennifer A. Dorsey

[112] 28 U.S.C. § 2253(c).

[113] *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077–79 (9th Cir. 2000).

IN THE SUPREME COURT OF THE STATE OF NEVADA

RODNEY LAMAR MARSHALL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57491

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of four counts each of robbery and battery with intent to commit a crime. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Rodney Lamar Marshall was charged with robbery and battery with intent to commit robbery based on five incidents involving five different victims. Each of the incidences involved a battery followed by a robbery and happened within a three-and-a-half-mile radius in Las Vegas between the years of 2006 and 2008. The State charged Marshall by way of indictment of five counts of felony robbery and five counts of felony battery with intent to commit a crime. Marshall pleaded not guilty to the charges. A jury acquitted Marshall of the charges involving one of the victims but found him guilty of robbery and battery concerning the four other victims. The district court adjudicated Marshall as a habitual criminal on all counts and sentenced him to life in prison with a minimum parole eligibility after ten years on each count.[1]

[1]The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

On appeal, Marshall argues that: (1) the district court abused its discretion when it denied his motion to sever the counts, (2) the convictions and punishments for robbery and battery for each incident violate the Double Jeopardy Clause, (3) the State failed to present sufficient evidence to support the convictions for the incidents involving two of the victims, (4) the district court abused its discretion in allowing the state to admit evidence that referenced other criminal acts, (5) the district court abused its discretion by sentencing him as a habitual criminal, (6) this court should reverse two of the battery convictions because the statute of limitations had expired, and (7) cumulative error warrants reversal of the judgment of conviction. We conclude that there was no error on any of the issues presented for review. Therefore, we affirm Marshall's conviction on all counts.

Severance

Marshall argues that his constitutional rights to due process and a fair trial were violated because the district court denied his motion to sever. Marshall contends that joinder was not proper under NRS 173.115, as the generalized similarities offered by the State are not sufficient to establish a common scheme or plan. Marshall also contends that joinder was not proper because the evidence would not have been cross-admissible at separate trials and that joinder of the counts was unfairly prejudicial.

NRS 173.115(2) allows joinder when the offenses are "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." While we disagree with the district court that these incidences "constitut[ed] parts of a common scheme or plan," these incidences were properly joined because they were "connected

together." NRS 173.115(2); see Fields v. State, 125 Nev. 776, 782, 220 P.3d 724, 728 (2009) (laying out the considerations for overcoming the presumption of inadmissibility that attaches to all prior bad act evidence); Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981) (affirming the district court's decision on alternate grounds). Marshall was identified at the scenes, lived in the area during the period, and the numerous robberies and batteries were similar in nature. The evidence that all five robberies occurred after serious blows to the head could have been admissible to prove motive or intent to deprive the victims of personal property by force. See NRS 48.045(2). Thus, we conclude that this evidence is sufficient to show that the incidents and evidence related to each one were connected together.

However, even if joinder was permissible under NRS 173.115, the district court should have severed the offenses if the joinder was unfairly prejudicial. Tabish v. State, 119 Nev. 293, 304-05, 72 P.3d 584, 591 (2003). To assess the potential prejudice caused by joinder, the test is whether the prejudice manifestly outweighs the central concern of judicial economy. Id. at 304, 72 P.3d at 591. Here, the district court's jury instruction adequately addressed the issue of any potential prejudice by limiting the jury's consideration of the evidence. See id. Marshall's acquittal on the counts involving one of the victims also demonstrates the jury's lack of prejudice in each conviction by showing the ability of the jury to compartmentalize the evidence to each separate crime. We therefore conclude that joinder was proper and was not unfairly prejudicial, because any prejudice was outweighed by the concern for judicial economy.

Double Jeopardy Clause

Marshall argues that robbery and battery with intent to commit a crime are the same offense under Blockburger v. United States, 284 U.S. 299 (1932), and therefore his constitutional right against being punished twice for the same crime was violated when the district court sentenced him for both offenses. Marshall requests that this court overrule the holding in Zgombic v. State, 106 Nev. 571, 578, 798 P.2d 548, 552 (1990), superseded by statute on other grounds as stated in Steese v. State, 114 Nev. 479, 499 n.6, 960 P.2d 321, 324 n.6 (1998), that convictions for robbery and battery are two separate offenses. While Marshall failed to object during the proceedings below, "this court has the discretion to review constitutional or plain error." Somee v. State, 124 Nev. 434, 443, 187 P.3d 152, 159 (2008).

Blockburger controls the determination of whether offenses are the same for purposes of the Double Jeopardy Clause and necessitates that, in order for crimes to constitute separate offenses, each must require proof of fact that the other does not. 284 U.S. at 304. We have previously determined in Zgombic that battery and robbery do not implicate the Double Jeopardy Clause. 106 Nev. at 578, 798 P.2d at 552. We determined that while battery requires the use of force or violence, robbery does not. NRS 200.380(1); NRS 200.481(1)(a); Zgombic, 106 Nev. at 578, 798 P.2d at 552. Moreover, robbery requires the taking of property, which battery does not. NRS 200.380(1); Zgombic, 106 Nev. at 578, 798 P.2d at 552. The crimes of robbery and battery were created by the legislature to punish separate wrongs. The battery with intent to commit robbery and the robbery statutes regulate distinct aberrant social conduct and protect separate societal interests. Therefore, we decline to

find plain error and affirm the district court ruling that the separate punishments for robbery and for battery with intent to commit a robbery do not violate the Double Jeopardy Clause.

Sufficiency of the evidence

Marshall argues that his constitutional rights to due process and conviction only upon presentation of proof beyond a reasonable doubt were violated because there was insufficient evidence to support his conviction for the charges involving Curtis Euart and Benjamin Livermore.

We conclude that substantial evidence supports Marshall's jury conviction for crimes involving Euart. See Moore v. State, 122 Nev. 27, 35, 126 P.3d 508, 513 (2006) (this court will not reverse a verdict that is supported by substantial evidence). In addition to Euart's prior identification of Marshall, the State also presented evidence that the attack occurred in the same area and that the injuries sustained were similar to those sustained by the other four victims. Euart's attacker told him he lived off Tropicana Avenue, where Marshall resided, and police placed Marshall less than a mile from the attack site that day. While Euart later recanted his identification of Marshall, it is the task of the jury to determine the credibility of Euart's testimony, and the jury could have permissibly based the conviction on circumstantial evidence. See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003).

We further conclude that there was sufficient evidence supporting the conviction for the incident involving Livermore. While Livermore did not see who hit him, he testified that Marshall had been standing just behind him before he was hit and no one else was in that area. Livermore was positive of his identification as he knew Marshall

from the neighborhood. The State also points out that this attack occurred in the same area, the attacker had the same modus operandi, and Livermore sustained similar injuries to those of the other four victims. Therefore, there was sufficient evidence to support the convictions for the charges involving both Euart and Livermore.

Evidence of other criminal acts

Marshall argues that his constitutional rights to due process, equal protection, and to a fair trial were violated by the district court's erroneous decision to allow the State to introduce evidence that improperly referenced other criminal acts involving Marshall. Marshall contends that the district court erred in allowing the State to introduce his booking photographs, a statement he made that the victims were jumping on the bandwagon, and evidence of a hand injury. We disagree.

First, we conclude that the district court did not err in admitting Marshall's booking photographs into evidence. See Chavez v. State, 125 Nev. 328, 344, 213 P.3d 476, 487 (2009) (reviewing a district court's decision to admit or exclude evidence for an abuse of discretion); Manning v. Warden, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983) (referencing criminal history is improper if "'a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity.'" (quoting Commonwealth v. Allen, 292 A.2d 373, 375 (Pa. 1972))). The photographs had no indicators or identifiers of being booking photographs. There was also testimony that there are multiple other ways that police departments obtain photos, such as from work cards and driver's licenses. Therefore, the jurors could not have reasonably inferred from the photographs that Marshall had engaged in previous criminal activity.

Second, the introduction of Marshall's statement that the victims were jumping on the bandwagon could reasonably have been interpreted to refer to the five incidents that were prosecuted together. Extraneous prior criminal activity is not necessary for the victims to join the bandwagon in this case. Moreover, the statement is probative of the reluctance of the witnesses to come forward until Marshall was already in jail and did not create the impression that Marshall had been involved in previous criminal activity. See Manning, 99 Nev. at 86, 659 P.2d at 850.

Finally, the State elicited testimony from a detective who referred to an injury sustained to Marshall's hand. Marshall objected to the testimony in an off-record bench conference, and the judge sustained the objection on the record, apprising the jury that there had been an objection to this evidence and that it had been sustained. The jury presumptively followed the courts instructions to disregard the evidence regarding any injury to Marshall's hand. See Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) ("[T]his court generally presumes that juries follow district court orders and instructions."). Marshall therefore failed to show that he suffered any prejudice. Thus, we conclude that the evidence provided by the State did not improperly reference Marshall's past criminal behavior and did not violate his constitutional rights.

Habitual criminal

Marshall argues that his constitutional right to due process was violated because the district court improperly sentenced him as a habitual criminal. We conclude that the district court did not abuse its discretion. In determining whether a finding of habitual criminal was proper, we look to the record as a whole. See O'Neill v. State, 123 Nev. 9,

16, 153 P.3d 38, 43 (2007). Adjudication of a defendant as a habitual criminal is subject to "'the broadest kind of judicial discretion.'" Tanksley v. State, 113 Nev. 997, 1004, 946 P.2d 148, 152 (1997) (emphasis omitted) (quoting Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993)). In order to adjudge an individual as a habitual criminal, NRS 207.010(1)(b) only requires proof of three prior felony convictions. At the time of sentencing Marshall had been convicted of five previous felonies—a number more than sufficient to qualify Marshall to be adjudicated a habitual offender. The fact that the felonies were nonviolent is a non-issue because NRS 207.010(1)(b) does not require any form of violence. Additionally, the convictions that range from 7 to 21 years old are neither too remote nor too sporadic. Marshall argues that the district court inappropriately factored in an unsupported California felony, however, we need not address this issue because the requisite three prior felonies alone supported the district court's determination. While Marshall contends that these incidents should have been treated as one felony in light of the district court's decision regarding severance, these were a series of separate occurrences that can each be punished separately even though each count was prosecuted in the same indictment. We conclude that the adjudication of Marshall as a habitual criminal serves the purpose of NRS 207.010, "to increase sanctions for the recidivist," and furthers the interests of justice. See Odoms v. State, 102 Nev. 27, 32, 714 P.2d 568, 571 (1986).

Statute of limitations

Marshall contends that the convictions on two of the battery with intent to commit a crime counts should be reversed because he was charged after the statute of limitations had expired, in violation of his constitutional rights to due process and equal protection. This court has previously determined that "criminal statutes of limitation [are] non-jurisdictional affirmative defenses." Hubbard v. State, 112 Nev. 946, 948, 920 P.2d 991, 993 (1996). Failing to raise the statute of limitations defense at the trial court waives the use of this defense. Id. We decline to alter this ruling, and we conclude that because Marshall failed to raise the affirmative defense of statute of limitations at the trial level, he waived his use of this defense.

Marshall also urges this court to conclude as a matter of law that his trial counsel was ineffective in failing to raise the statute of limitations issue. However, any claim with respect to a failure to raise statutes of limitation as an issue should be raised in a post-conviction petition—"the more appropriate vehicle for presenting a claim of ineffective assistance of counsel is through post-conviction relief." Gibbons v. State, 97 Nev. 520, 522-23, 634 P.2d 1214, 1216 (1981).

Cumulative error

Marshall argues that the cumulative effect of the errors at trial denied him a fair trial. Cumulative error may deny a defendant a fair trial even if the errors, standing alone, would be harmless. Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008). "When evaluating a claim of cumulative error, we consider the following factors: '(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.'" Id. (quoting Mulder v. State, 116

Nev. 1, 17, 992 P.2d 845, 854-55 (2000)). We conclude that cumulative error does not warrant reversal in this instance when Marshall failed to raise any meritorious issues in this appeal.[2]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

C Cherry, C.J.
Cherry

Douglas, J.
Douglas

Saitta, J.
Saitta

Gibbons, J.
Gibbons

Pickering, J.
Pickering

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Hon. David B. Barker, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[2]We conclude that all other arguments on appeal lack merit.

JOC

ORIGINAL

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2010 DEC 14 A 9:53

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RODNEY LAMAR MARSHALL
#0373676

Defendant.

CASE NO. C257988

DEPT. NO. XVIII

09C257988
JOC
Judgment of Conviction
1109167

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 - ROBBERY (Category B Felony), in violation of NRS 200.380, COUNT 2 – BATTERY WITH INTENT TO COMMIT A CRIME (Category B Felony), in violation of NRS 200.480, COUNT 3 - ROBBERY (Category B Felony), in violation of NRS 200.380, COUNT 4 – BATTERY WITH INTENT TO COMMIT A CRIME (Category B Felony), in violation of NRS 200.480, COUNT 5 - ROBBERY (Category B Felony), in violation of NRS 200.380, COUNT 6 - BATTERY WITH INTENT TO COMMIT A CRIME (Category B Felony), in violation of NRS 200.480, COUNT 7 – ROBBERY (Category B Felony), in violation of NRS 200.380, COUNT 8 - BATTERY WITH INTENT TO COMMIT A CRIME (Category B Felony), in violation of NRS 200.480, COUNT 9 –

ROBBERY (Category B Felony), in violation of NRS 200.380, and COUNT 10 - BATTERY WITH INTENT TO COMMIT A CRIME (Category B Felony), in violation of NRS 200.480; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 - ROBBERY (Category B Felony), in violation of NRS 200.380, COUNT 2 – BATTERY WITH INTENT TO COMMIT A CRIME (Category B Felony), in violation of NRS 200.480, COUNT 3 – ROBBERY (Category B Felony), in violation of NRS 200.380, COUNT 4 – BATTERY WITH INTENT TO COMMIT A CRIME (Category B Felony), in violation of NRS 200.480, COUNT 5 – ROBBERY (Category B Felony), in violation of NRS 200.380, COUNT 6 - BATTERY WITH INTENT TO COMMIT A CRIME (Category B Felony), in violation of NRS 200.480, COUNT 9 – ROBBERY (Category B Felony), in violation of NRS 200.380, and COUNT 10 - BATTERY WITH INTENT TO COMMIT A CRIME (Category B Felony), in violation of NRS 200.480; thereafter, on the 29TH day of November, 2010, the Defendant was present in court for sentencing with his counsel, CLARK PATRICK, Deputy Special Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses under the LARGE HABITUAL CRIMINAL STATUTE and, in addition to the $25.00 Administrative Assessment Fee, and Indigent Defense Civil Assessment Fee of $250.00, the Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows: AS TO COUNT 1 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS; AS TO COUNT 2 – LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS, COUNT 2 to run CONCURRENT with COUNT 1 ; AS TO COUNT 3 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS, COUNT 3 to run CONSECUTIVE to COUNT 1; AS TO COUNT 4 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS, COUNT 4 to

run CONCURRENT with COUNT 3; AS TO COUNT 5 – LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS, COUNT 5 to run CONSECUTIVE to COUNT 3; AS TO COUNT 6 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS, COUNT 6 to run CONCURRENT with COUNT 9; AS TO COUNT 9 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS, COUNT 9 to run CONSECUTIVE to COUNT 5; and AS TO COUNT 10 - LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS, COUNT 10 to run CONSECUTIVE to COUNT 9; with FIVE HUNDRED SEVENTY-EIGHT (578) DAYS Credit for Time Served. As the Fee and Genetic Testing have been previously imposed, the Fee and Testing in the current case are WAIVED. COUNT 7 and COUNT 8 NOT GUILTY.

DATED this 8th day of December, 2010

DAVID BARKER
DISTRICT JUDGE