No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

DONALD KIE, JR.,

Petitioner, v.

GARRETT, Warden, *Respondent*

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

Did the Ninth Circuit Court of Appeals err in denying a Certificate of Appealability ("COA") consistent with the standards set by 28 U.S.C. § 2253(c)(2) and by this Court in *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003) and *Slack v. McDaniel,* 529 U.S. 473 (2000), to review the holdings of the district court and the Nevada Supreme Court that

1. There was sufficient evidence to support a conviction based on an alleged conspiracy that relied on a distribution of drugs as payment for an assault, where the alleged drug transaction was not charged in the Information, no person admitted to any conspiracy, and the alleged drugs were not seen by any witness or admitted to by any person and were never recovered or tested, contrary to the Fifth and Fourteenth Amendments to the Constitution as determined by *In re Winship,* 397 U.S. 358 (1970) and *Jackson v. Virginia,* 443 U.S. 307 (1979) and other prior and subsequent Supreme Court precedents requiring sufficient evidence to support a conviction, and

2. Mr. Kie was not deprived of due process of law and a fair trial by the ineffective assistance of trial counsel who (1) failed to obtain a complete set of videos of the alleged offense from the prosecution or its witnesses, (2) failed to show the complete set of videos to Mr. Kie or communicate adequately with him about them, and (3) failed to use exculpatory video evidence, resulting in Mr. Kie foregoing a very favorable plea offer, contrary to the Sixth and Fourteenth Amendments to the Constitution as determined by *Strickland v. Washington,* 466 U.S. 668 (1984), *Lafler v. Cooper,* 566 U.S. 156 (2012) and other prior and subsequent Supreme Court precedents requiring effective assistance of counsel in trial and plea bargaining.

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I. PRAYER FOR RELIEF

Mr. Donald Kie, Jr. respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision denying his request for a Certificate of Appealability ("COA") from the denial of his habeas corpus petition under 28 U.S.C. § 2254. The basis of this petition is that the Ninth Circuit's denial of a COA is

(1) contrary to the Due Process clause of the Fifth and Fourteenth Amendments to the United States Constitution and in conflict with the standards for a COA set by 28 U.S.C. § 2253(c)(2) and by this Court in *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003) and *Slack v. McDaniel,* 529 U.S. 473 (2000), and

(2) contrary to the Fifth and Fourteenth Amendments to the Constitution as determined by *In re Winship,* 397 U.S. 358 (1970) and *Jackson v. Virginia,* 443 U.S. 307 (1979) and other prior and subsequent Supreme Court precedents requiring sufficient evidence to support a conviction, and

(3) contrary to the Sixth Amendment to the United States Constitution as determined by this Court's binding precedents under *Strickland v. Washington,* 466 U.S. 668 (1984) and *Lafler v. Cooper,* 566 U.S. 156 (2-12) and other prior and subsequent Supreme Court precedents requiring effective assistance of counsel in trial and plea bargaining, and

(4) as inexplicable as it was unexplained, in violation of this Court's authority in *Jackson v. Felkner,* 562 U.S. 594 (2011).

In the alternative, the state and federal courts below have decided an important question of federal law that has not been, but should be, settled by this Court.

II. OPINION BELOW

A two-judge panel of the Ninth Circuit denied Mr. Kie's petition for a COA in an Order that was final and unpublished. *Kie v. Garrett,* No. 23-2214 (9th Cir. March 4, 2024), *Appendix A.*

III. JURISDICTION

On March 4, 2024, a two-judge panel of the Court of Appeals for the Ninth Circuit issued an unpublished Order denying Mr. Kie's petition for a COA. *Appendix A.* This is the final judgment for which a writ of certiorari is sought.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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

> No person shall be held to answer for a capital, or otherwise infamous crime… nor be deprived of life, liberty, or property, without due process of law….

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

> In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.

V. STATEMENT OF THE CASE

A. Jurisdiction of Courts of First Instance

The district court had jurisdiction pursuant to 28 U.S.C. § 2254. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

B. Facts Material to the Questions Presented

On the night of November 8, 2015, Joseph McKinney was attacked by Bryan Eagles and an unknown second individual as he approached the 5th Avenue Pub in Las Vegas and suffered serious bodily injuries. Eagles stole McKinney's shoes, and an unknown individual attempted to steal McKinney's truck. McKinney was later dragged to an adjacent parking lot and left near a dumpster. The primary evidence against Mr. Kie at trial was a portion of the pub's surveillance video footage of the incident. While Mr. Kie was one of numerous individuals who were present and observed the beating, Mr. Kie was not seen in any of the videos nor described in any testimony as assaulting McKinney or taking anything from him. McKinney himself did not testify that Mr. Kie participated in or was in any way involved in the attack or in any conspiracy. However, a detective separately and to the contrary testified that McKinney thought Mr. Kie was "behind the attack."

The State called numerous witnesses, none of whom witnessed the incident. The primary piece of evidence allegedly linking Mr. Kie to the incident was a portion of a surveillance video showing that Mr. Kie appeared to touch his mouth and then he and Mr. Eagles appeared to touch hands, which the State alleged showed Mr. Kie paying Eagles with drugs for beating up McKinney on his behalf. None of the witnesses observed this supposed transaction at the time, no drugs were visible in the surveillance video, and none were ever recovered, no witness testified to any agreement between Mr. Kie and Eagles, and all the trial testimony regarding this supposed transaction was based on the witnesses' interpretation of the video evidence just described. Specifically, a detective and a bartender who viewed some of the surveillance videos testified that the hand motions described above were consistent with drug deals that they had seen in the past, although both admitted that they didn't see any actual drugs in the videos or in person.

The detective also testified that several people owed McKinney money for drugs,

primarily two women that the officer did not follow up on. The detective indicated that McKinney said he owed Mr. Kie "a couple of bucks."

The other testimony was to the effect that days after the incident, Mr. Kie told a bartender that McKinney had threatened to tell his wife about his extramarital affair (although McKinney himself only testified about a vague and non-violent disagreement about "lifestyles" and "balance in life"), and that he said his lawyer told him (after he saw the detective viewing the surveillance video with the bartender and detective who concluded that it showed a drug transfer) that he had nothing to worry about since it just looked like he was wiping his mouth and spitting on his hand or something and shaking somebody else's hand.

Regarding the ineffective assistance of counsel issue, the bar had multiple surveillance cameras that caught portions of the event. The bar manager gave the police what he considered the relevant portions of the surveillance tapes, and a few minutes' worth were shown at the preliminary hearing in Mr. Kie's presence. However, Mr. Kie's attorney failed to obtain all of them and Mr. Kie did not see most of them until the trial. Mr. Kie argued in the state supreme court and below that had he known that his attorney had not obtained, and the jury therefore would not see, the entire video evidence, part of which showed him trying to stop the beating and then trying to help McKinney after the assault, he had showed a reasonable probability that he would have accepted the State's plea offer to a much lesser sentence than he received after trial. In the state supreme court, he argued that this deprived him of the ability to decide on the plea offer; the district court below refused to consider his sworn declaration that he would have in fact accepted the plea offer had his attorney not been ineffective in this regard.

VI. REASONS SUPPORTING ALLOWANCE OF THE WRIT

This writ should be granted to allow this Court to correct the Ninth Circuit Panel's decision erroneously holding that "appellant has not shown that 'jurists of

reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Appendix A.*

A. Applicable Legal Standards For COAs

AEDPA permits the federal district courts and court of appeal to issue a COA on an issue when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c) (2)-(3). The Ninth Circuit itself has explained what it takes under this Court's authority to meet this standard:

> In *Barefoot [v. Estelle,* 463 U.S. 880 (1983)], the [Supreme] Court established several ways in which a petitioner can make the 'substantial showing of the denial of a constitutional right.' To meet this threshold inquiry, Slack [v. McDaniel, 529 U.S. 473,] 120 S. Ct. [1595] at 1604 [2000], the petitioner 'must demonstrate *that the issues are* ***debatable*** *among jurists of reason; that a court* ***could*** *resolve the issues [in a different manner];* ***or*** *that the questions* ***are adequate to deserve encouragement*** to proceed further."… *We will resolve any doubt about whether the petitioner has met the Barefoot standard in his favor….*
> …At this preliminary stage, we must be careful to avoid conflating the standard for gaining permission to appeal with the standard for obtaining a writ of habeas corpus. Indeed, the Supreme Court has cautioned that, in examining a petitioner's application to appeal from the denial of a habeas corpus petition, "obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor."… In non-capital as well as capital cases, the issuance of a COA is not precluded where the petitioner cannot meet the standard to obtain a writ of habeas corpus….

Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000) (emphasis added; citations omitted). The court went on to say that even "an issue apparently settled [against petitioner] by the law of our circuit remained debatable for purposes of issuing a COA." *Id.* at 1026. "[I]t is thus clear that we should not deny a petitioner an opportunity to persuade us through full briefing and argument to *reconsider* circuit law that apparently forecloses relief." *Id.* (emphasis added). The purpose of the COA requirement is not to set a much higher bar for habeas appeals than other criminal

appeals, or to prevent the court of appeals from hearing argument on issues that may at first glance appear to lack merit, but to prevent the wasting of judicial resources on issues that are truly *frivolous*. See *id.* at 1025. Indeed, "the showing a petitioner must make to be heard on appeal is less than that to obtain relief." *Id. See also Tennard v. Dretke*, 542, U.S. 274, 282, 288 (2004); *Miller-El v. Cockrell*, 123 S. Ct. 1029 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Barefoot v. Estelle,* 463 U.S. 880, 893 & n. 4 (1983); 2 CEB, *Appeals and Writs in Criminal Cases*, § 4.190 (2d ed. 2003).

As demonstrated below, the Ninth Circuit failed to meet this standard.

B. The Sufficiency of the Evidence Issue In This Case More Than Meets The Standard for a COA

Due process requires every element of the offense to be proven beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364 (1970). A petition for federal habeas corpus relief may challenge the sufficiency of the evidence supporting a verdict. *Jackson v. Virginia,* 443 U.S. 307 (1979). The court may grant habeas relief if, after viewing the evidence in the light most favorable to the prosecution, it finds that no rational trier of fact could have found proof of guilt beyond a reasonable doubt. *Jackson,* 443 U.S. at 324. The question is whether the jury acted in an irrational manner in returning a guilty verdict based on the evidence before it. *McDaniel v. Brown,* 558 U.S. 120, 130 (2010). And "speculation and conjecture cannot take the place of reasonable inferences and the evidence." *Maquiz v. Hedgpeth,* 907 F.3d 1212, 1217 (9th Cir. 2018). Nor can mere suspicion or speculation be the basis for the creation of logical inferences. *Walters v. Maass,* 45 F.3d 1355, 1358 (9th Cir. 1995).

Mr. Kie was convicted of a beating in which video evidence showed he did not participate, based on an agreement to commit a crime (conspiracy) that no witness testified existed, of a robbery (of McKinney's shoes) that video evidence showed other people committing, and speculation and conjecture that he paid for the beating with drugs that no

witness ever saw or testified existed, with an intent to pay for the beating (as opposed to an unrelated drug deal) that no witness testified existed either. And at no point was there any evidence that Mr. Kie knew that the victim would be there that night, or that he had a relationship of any kind with the men shown on video committing the beating.[1] The testimony of the detective and bartender, neither of whom were percipient witnesses, to their interpretation of what they saw in the surveillance videos, was pure speculation and conjecture. Speculation about matters that were not even alleged in the charging document (the Amended Information filed on March 29, 2016).

There was evidence that Mr. Kie had a non-violent disagreement with the victim, and which theoretically may have created a motive to harm him. But that also does not support a finding of conspiracy with Eagles to beat him severely and steal his shoes, absent some actual evidence of an agreement, or even a relationship with Eagles. As for Mr. Kie saying he spoke with his lawyer and being told that since the video doesn't show any drugs changing hands he was "free and clear," it is important to note that this occurred *after* Mr. Kie viewed the videos with the bartender, her boss and the police. Given that such transactions were alleged to have occurred at the bar, any reasonable person would seek legal advice to determine if he had any legal exposure even if he were wholly innocent (or even if he *had* sold drugs to Mr. Eagles *unrelated* to the beating). It is also important to note that there was no testimony or other evidence that *Mr. Kie* was a drug dealer. Indeed, drugs were not even mentioned in the Amended Information, let alone charged.

Mr. Kie was sentenced to 24 to 60 months for conspiracy to commit robbery with no evidence of any kind that a conspiratorial agreement existed. He was sentenced to a consecutive 72 to 180 months for robbery, which videos of the robbery showed were

[1] Eagles actually complained to the trial court about having to be tried together with Mr. Kie because "I don't even know this guy…. I seen him but I don't know him."

committed by other people. He was sentenced to 19 to 48 months for battery with substantial bodily harm, again based on video evidence of other people committing the battery. Finally, he was sentenced to 48 to 120 months for battery with intent to commit a crime (robbery and a crime committed by other people on video). All of these were consecutive to each other, and all of them depended on the underlying conspiracy charge, and without that conspiracy, or without any actual drugs, even viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have convicted Mr. Kie of any of the charges. Their entire case is based on the speculation of the bartender and detective that a touching of hands was not only a transfer of unseen drugs, but drugs that were paid in furtherance of an unproved conspiracy to beat up Mr. McKinney.

The state court of appeal, in the last reasoned decision on this matter, simply noted the identity of the State's witnesses and cited general legal principles to reject the sufficiency of the evidence claims. The district court, perhaps realizing that this was not a sufficient ruling, stated that Eagles and Mr. Kie stood near each other at one point (as did many other people who observed the incident), the mouth to hand gesture that the detective and bartender *speculated* could have involved drugs for a *speculative* payment pursuant to a *speculative* conspiracy, that at one point Mr. Kie "stood over the victim" (again, as did others, and without stating that he did any harm or whether he was actually trying to help him), and that there was testimony as to motive, specifically that the victim was going to tell Mr. Kie's wife about his infidelity and that Mr. Kie owed him money for drugs. As to the first purported motive, McKinney himself never testified to such a thing. As to the second, the district court's statement misconstrued the evidence at trial, which was simply hearsay from the detective that McKinney owed Mr. Kie "a couple of bucks"—again, McKinney didn't testify to that. Along with the irrelevant identities of the State's witnesses referred to by the state court of appeals, none of that comes close to proof beyond a reasonable doubt of a

conspiracy, or even a relationship, between Mr. Kie and Eagles, let alone a conspiracy to do the things that the video shows Eagles did to the victim and for which Mr. Kie was held criminally liable. Simply repeating irrelevant evidence and the speculation of witnesses that the touching of hands represented a transfer of unseen drugs, and one specifically in exchange for a conspiracy without evidence to beat the victim, does not come close to a reasonable decision under AEDPA.

The district court below did not in reality conduct a de novo review of the matter, it simply adopted the state appellate court's vague conclusions. *See generally Kemp v. United States,* 142 S. Ct. 1856 (2022).

In short, Mr. Kie was convicted on evidence that (1) he was present, and (2) he touched his mouth and Mr. Eagles' hand and the bartender and detective speculated that it could have been a transfer of unseen drugs for a purpose that no witness testified to. That comes nowhere close to even circumstantial evidence of conspiracy, robbery or assault *by Mr. Kie.* And, of course, Mr. Kie affirms his innocence and denies that he paid Eagles either money or drugs to beat McKinney.

Because there was no evidence of an agreement between Mr. Kie and Eagles to commit a battery or robbery, or of any distribution of actual drugs for the specific purpose of paying for the beating (nor even any non-speculative evidence of the *existence* of any drugs), the district court should have granted habeas relief.

For the reasons set forth above, it is at a minimum debatable among jurists of reason as to whether habeas relief should have been granted, and the Ninth Circuit erred in denying a COA to allow Mr. Kie to have his appeal heard on the merits after full briefing and argument.

C. The Ineffective Assistance of Counsel Issue In This Case More Than Meets The Standard for a COA

Strickland v. Washington, 466 U.S. 668 (1984) governs claims of ineffective assistance of trial counsel and sets the standard applied to counsel's performance. Reversal is required if (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different; a reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* at 687-94; *Bailey v. Newland*, 263 F.3d 1022, 1028 (9th Cir. 2001).

Defense counsel is ineffective if he fails to subject important components of the State's case to meaningful adversarial testing. *United States v. Cronic,* 466 U.S. 648, 659 (1984).

Ineffective assistance of trial counsel in the plea-bargaining process that causes a defendant to reject a relatively favorable plea offer is subject to habeas relief. *Lafler v. Cooper,* 566 U.S. 156, 174 (2012); *Johnson v. Uribe,* 700 F.3d 413, 427 (9th Cir. 2012). *See also Missouri v. Frye,* 566 U.S. 134, 145 (2012) (failure to communicate settlement offer to defendant is ineffective assistance of counsel where it causes defendant to fail to accept better plea offer or go to trial); *Estrada v. Biter,* 774 Fed. Appx. 1041 (9th Cir. 2019)

It is also ineffective assistance to fail to investigate or present favorable defense evidence. *Burger v. Kemp,* 483 U.S. 776 (1986); *Cannedy v. Adams,* 706 F.3d 1148 (9th Cir. 2013); *Williams v. Taylor*, 529 F.3d 914 (9th Cir. 2001); *Harris v. Wood*, 64 F.3d 1432 (9th Cir. 1995); *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995); *Eggleston v. United States*, 798 F.2d 374 (9th Cir. 1986).

It is also ineffective assistance to fail to communicate with one's client or give him information that he requested. *Holland v. Florida,* 560 U.S. 631 (2010).

In this case, the evidence overwhelmingly came from numerous closed circuit

surveillance videos in and around the bar. There were at least twelve different camera angles, only some of which were turned over to the defense or shown to the jury. Indeed, Ms. Bacon (the bartender) testified that additional video angles existed, and Mr. Laird (Ms. Bacon's boss) testified that he provided footage from at least six of those camera angles to the police. At the preliminary hearing, Mr. Laird also testified to what appeared to be less than one-minute segments of video and testified that there existed video "significantly longer than the few scenes I've shown you."

At a pretrial hearing, Mr. Kie asked the Judge if he had received his *pro se* motion for discovery. In response, the court ordered his attorney to provide him with a copy of all the discovery as soon as possible. Mr. Kie never saw the complete set of videos, either from discovery or at the preliminary hearing or trial.

The reason Mr. Kie wanted to see it was because the brief and incomplete portion of some of the videos offered at the preliminary hearing did not include the portions of the videos that he knew must exist showing him trying to stop the beating and helping the victim to get the keys to his truck back. Had he known there was no video of him helping the victim and/or that his attorney would fail to use such an exculpatory video and instead offer an obviously ineffective defense (that the man in the videos was not Mr. Kie), he would have accepted the plea offer of 3 to 8 years in prison and avoided the 13.5 to 34 years he received after trial.[2]

Mr. Kie's attorney never used this exculpatory video at trial, instead relying on the incredible defense that the videos did not depict Mr. Kie at all.

In short, because his attorney failed to obtain the full set of videos from the prosecution and/or the bar, failed to show Mr. Kie the complete set of videos, and failed to use

[2] The district court erroneously declined to consider Mr. Kie's declaration on this issue, discussed below.

the exculpatory video that he had, Mr. Kie lacked the knowledge of what the evidence against him purported to show until well after the start of the trial, meaning that he could not properly choose between entering a plea and proceeding to trial as a result, nor could he agree to a reasonable defense trial strategy. This fell below the standard of competent counsel, and because it prevented Mr. Kie from accepting a more favorable plea, it had a substantial and injurious effect or influence in determining the jury's verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).

There is another issue of law that is relevant here. Mr. Kie presented to the district court a sworn declaration (again which the district court erroneously declined to consider) summarizing the video issue involving his attorney. It reiterated facts previously presented to the state courts--that he asked the trial court to order his attorney to provide him with all the discovery, and that he had only seen an incomplete portion of the surveillance videos before trial. It also stated that he did not know that the exculpatory portions showing him attempting to stop the beating and help McKinney afterwards would not be shown at trial. The declaration also confirmed that had he known that his attorney had not obtained, and would not use, the exculpatory portions of the video at trial, he would have accepted the plea offer of three to eight years in prison. The district court below refused to consider the declaration because *the declaration itself* had not been presented to the state supreme court, citing *Shinn v. Ramirez,* 142 S. Ct. 1712 (2022) and *Cullen v. Pinholster,* 563 U.S. 170 (2011).

The district court ignored the fact that the substance of what Mr. Kie swore to in the declaration *had* been presented to the state supreme court. In his habeas appeal to the state supreme court, Mr. Kie pointed out that he had expressed his concerns about the videos prior to any post-conviction proceedings, that his counsel's failures deprived him of information needed to properly decide between proceeding to trial or pleading guilty, and that he had established a reasonable probability that he would have pled guilty but for his inability to

view the videos. *Kie v. State of Nevada,* Case No. 79189, Opening Brief at 18, Reply Brief at 6, 8.

The district court's refusal to consider the declaration, and its conclusion that Mr. Kie had failed to show a reasonable probability that he would have accepted the plea offer, misconstrues not only the state court record, but it also it misconstrues both the purpose of the declaration and the legal effect of *Shinn* and *Pinholster* on the relevant case law. The district court therefore violated a long line of cases, including the following, taken from the briefing over exhaustion and the Traverse below:

> "New factual allegations do not ordinarily render a claim unexhausted." *Beatty v. Stewart,* 303 F.3d 975, 989 (9th Cir. 2002). "In pleading and presenting a case in federal court, a habeas petitioner is not limited to the exact same facts presented in state court." 2 CEB *Appeals and Writs in Federal Cases* (June 2020 update). "The development of additional facts in federal court do not render a claim unexhausted, even if the additional facts alter the precise factual predicate of the claim, if the new facts do not fundamentally alter the *legal* claim that was presented to the state courts." *Id.* (emphasis in original)*; Weaver v. Thompson,* 197 F.3d 359, 364 (9th Cir. 1999); *Vasquez v. Hillery,* 474 U.S. 254, 260 (1986).
>
> A petitioner need only "present the *substance* of [the] claim to the state courts;" he need not present every fact to the state court that the federal courts may later deem relevant to deciding the habeas petition. *Id.* at 257. *See also Beatty,* 303 F.3d at 989–90; *Weaver v. Thompson,* 197 F.3d 359, 364 (9th Cir. 1999). It is not necessary that *"every piece of evidence"* supporting federal claims have been presented to the state court. *Chacon v. Wood,* 36 F.3d 1459, 1469 n. 9 (9th Cir.1994) (emphasis in original). *See also Davis v. Silva,* 511 F.3d 1005, 1009 (9th Cir.2008). Moreover, new factual allegations that are merely cumulative of those presented to the state court do not transform the claim and thus do not require exhaustion. *Hillery v. Pulley,* 533 F. Supp. 1189, 1200–02 (E.D.Cal.1982), *aff'd,* 733 F.2d 644 (9th Cir.1984), *aff'd,* 474 U.S. 254 (1986). *See also Weaver,* 197 F.3d at 364 (holding that even where the "precise factual predicate" for a claim had changed after the evidentiary hearing in federal court, the claim remained rooted in the same incident and was therefore exhausted).
>
> Thus, exhaustion does not require that every piece of evidence **supporting** the federal claim be presented to the highest state court. *Davis,* 511 F.3d at 1009….
>
> Finally, there are multiple rules that permit new *factual details* supporting the exhausted *claims* to be submitted to a federal habeas court, even without an evidentiary hearing. Where, as here, the *pro se* petitioner has exercised diligent efforts to develop the factual basis of the claims in the state

> court proceedings, additional evidence can be submitted to the federal habeas court. *Holland v. Jackson,* 542 U.S. 649 (2004)…. The Court can also expand the record to consider new facts and affidavits under Habeas Rules 7 and 7.1 on its own or on the motion of a party made at any time until 21 days after the State's Answer is served and filed.
>
> Relation Back. Relation back is permitted if the amended claim only serves to add facts and specificity to the original claim. *See, e.g., Cowan v.Stovall,* 645 F.3d 815, 818-19 (6th Cir. 2011); *Dean v. United States,* 278 F.3d 1218, 1222 (11th Cir. 2002); *Mandacina v. United States,* 328 F.3d 995, 1000-1001 (8th Cir. 2003); *Woodward v. Williams,* 263 F.3d 1135, 1142 (10th Cir. 2001); *United States v. Thomas,* 221 F.3d 430, 436 (3d Cir. 2000). All that is required is that the amended pleading arise from the same conduct, transaction or occurrence set forth in the original pleading and has a common core of operative facts. *Mayle v. Felix,* 545 U.S. 644, 659 (2005).
>
> Relation back is permitted where the amended claim is merely a more carefully drafted version of a claim in the original petition. *See, e.g., Dean v. United States, supra* at 1223.

E.C.F. No. 44 at 3-5 (footnote omitted). *None* of the cases cited above have been overruled since *Pinholster* and *Shinn* were decided. Accordingly, the same principles continue to apply. The substance of the declaration was presented to the state supreme court. Moreover, the addition of facts supporting the habeas claims is proper if the legal claims remain the same. The district court erred in refusing to consider Mr. Kie's sworn declaration, and erred in concluding that he had not shown a reasonable probability that he would have accepted the plea but for his trial counsel's ineffective assistance regarding the videos.

The State's and district court's reasons for denying the claim were erroneous. The state appellate court stated that because Mr. Kie had seen a few minutes of the 12 or so videos at the preliminary hearing, he knew enough to decide whether to plead guilty to the 3-to-8-year offer, which is patently absurd. It also stated that he did not demonstrate a reasonable probability that there was a plea offer that he would have accepted if he had seen the entire set of videos, or that would not have been withdrawn by the State or rejected by the state trial court—in spite of the fact that a specific plea offer *was* made, and no defendant can *ever* prove that an offer, once made, would not in some hypothetical future be withdrawn or rejected by the trial court (both being quite rare as well as hypothetical). The district court

simply repeated the state appellate court's *conclusions* and did so without even considering the evidence stated in Mr. Kie's declaration (the substance of which had been previously presented to the state courts). It seems as if the district court did not conduct a proper review. *See Appendix A,* Order denying the petition, at 1 n. 1 (stating that the court made no credibility or factual findings, but only summarized the state courts' version of the evidence).

For the reasons set forth above, it is at a minimum debatable among jurists of reason as to whether habeas relief should have been granted, and the Ninth Circuit erred in denying a COA to allow Mr. Kie to have his appeal heard on the merits after with full briefing and argument.

D. Failure To Explain

Finally, by denying a COA in a *one sentence Order, Appendix A.* without any meaningful explanation, the Ninth Circuit ruling was "as inexplicable as they were unexplained," contrary to this Court's stern admonition in *Jackson v. Felkner,* 562 U.S. 594 (2011).

VII. CONCLUSION

For the foregoing reasons, petitioner Donald Kie, Jr. respectfully requests that this petition for writ of certiorari be granted.

Dated: May 29, 2024

Respectfully submitted,

/s/ Mark D. Eibert

MARK D. EIBERT
Counsel for Petitioner DONALD KIE, JR.

APPENDIX A

Unpublished Order of the Ninth Circuit Court of Appeals, June 4, 2024

FILED

MAR 4 2024

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD KIE, Jr.,

Petitioner - Appellant,

v.

GARRETT, Warden,

Respondent - Appellee.

No. 23-2214

D.C. No.
3:20-cv-00709-RCJ-CLB
District of Nevada,
Reno

ORDER

Before: OWENS and COLLINS, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX B

Opinion and Judgment of the U.S. District Court for the District of Nevada, August 10, 2023

AO450 (NVD Rev. 2/18) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Donald Kie, Jr.,

Petitioner,

v.

Warden Garrett, *et al.*,

Respondents.

JUDGMENT IN A CIVIL CASE

Case No. 3:20-cv-00709-RCJ-CLB

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

__X__ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Petitioner Donald Kie, Jr.'s third amended Petition for a writ of habeas corpus (ECF No. 35) is denied.
IT IS FURTHER ORDERED that a certificate of appealability is denied.
IT IS FURTHER ORDERED that judgment is hereby entered accordingly, and this case is closed.

Date: August 10, 2023

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

CLERK OF COURT

Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Donald Kie, Jr.,

Petitioner

v.

Warden Garrett, et al.,

Respondents

Case No.: 3:20-cv-00709-RCJ-CLB

Order

Petitioner Donald Kie, Jr. is a Nevada prisoner who was convicted of conspiracy to commit robbery, robbery, battery resulting in substantial bodily harm, and battery with intent to commit a crime and is serving an aggregate sentence of 13 years and 7 months to 34 years. ECF No. 39-36. Petitioner filed a third amended petition for writ of habeas corpus under 18 U.S.C. § 2254, alleging claims of insufficient evidence and ineffective assistance of counsel. ECF No. 35. The Court denies the remaining grounds of the third amended petition, denies Petitioner a certificate of appealability, and directs the clerk to enter judgment accordingly.

I. Background[1]

a. Conviction and Appeal

Petitioner challenges a 2016 judgment of conviction and sentence imposed by the

[1] The Court makes no credibility findings or other factual findings regarding the truth or falsity of evidence or statements of fact in the state court. The Court summarizes the factual assertions solely as background to the issues presented in the case, and it does not summarize all such material. No statement of fact made in describing statements, testimony, or other evidence in the state court constitutes a finding by the Court. Any absence of mention of a specific piece of evidence or category of evidence does not signify that the Court has overlooked the evidence in considering Petitioner's claims.

Eighth Judicial Court for Clark County. Following a jury trial, Petitioner was found guilty of conspiracy to commit robbery, robbery, battery resulting in substantial bodily harm, and battery with intent to commit a crime. ECF No. 39-36. The Nevada Court of Appeals affirmed the conviction. ECF No. 40-5.

b. Facts Underlying Conviction

An individual named Brian Eagles ("Eagles") and another man accosted, robbed, and severely battered the victim outside of a bar, breaking the victim's neck and leaving him temporarily paralyzed. ECF No. 40-5 at 2. They also stole the victim's personal property and his truck. *Id*. The incident was captured by surveillance cameras and the State presented the video of the incident at trial. *Id*.; *see also* ECF No. 39-23 at 8.

Petitioner was present before, during, and after the incident. ECF No. 40-5 at 2. The State presented its theory of the case at trial that Petitioner paid Eagles with drugs to beat up and rob the victim. ECF No. 39-23 at 8-9. Shortly after Eagles finished beating the victim, Petitioner approached Eagles. ECF No. 40-5 at 2. Petitioner moved his hand to his mouth and then touched Eagles's right hand. *Id*. Seconds later, Eagles transferred something from his right hand to his left hand. *Id*. The State presented evidence that drug transactions have occurred at this bar and that drugs are often transferred from mouth to hand. *Id*. The State argued that Petitioner conspired with Eagles to beat the victim because the victim threatened to tell Petitioner's wife of Petitioner's extramarital affairs. *Id*.

c. State Post-Conviction Proceedings and Federal Habeas Action

Petitioner filed a *pro se* state habeas petition and a counseled supplemental state petition. ECF Nos. 40-12, 40-13, 40-21. The state court denied relief and the Nevada Court of Appeals affirmed the denial of relief. ECF Nos. 40-42, 40-49.

Petitioner initiated this federal habeas proceeding *pro se*. ECF No. 1. The Court appointed counsel and granted leave to amend the petition. ECF No. 12. Petitioner filed a first, second, and third amended petition. ECF Nos. 13, 24, 35. Respondents moved to dismiss and the Court granted, in part, finding Ground 3 unexhausted. ECF Nos. 38, 48. Petitioner elected to abandon Ground 3 and proceed on his remaining claims. ECF No. 49.

II. Governing Standards of Review

a. Review under the Antiterrorism and Effective Death Penalty Act

28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in *habeas corpus* cases under the Antiterrorism and Effective Death Penalty Act (AEDPA):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) 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
> (2) 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.

28 U.S.C. § 2254(d). A state court decision is contrary to established Supreme Court precedent, within the meaning of § 2254(d)(1), "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court decision is an unreasonable application of established Supreme Court precedent under § 2254(d)(1), "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 75 (quoting

Williams, 529 U.S. at 413). "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Id.* (internal citation omitted) (quoting *Williams*, 529 U.S. at 409-10).

The Supreme Court has instructed that a "state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Court has stated that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102 (citing *Lockyer*, 538 U.S. at 75); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks and citations omitted) (describing the standard as "difficult to meet" and "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt").

b. Standard for Evaluating an Ineffective Assistance of Counsel Claim

In *Strickland*, the Supreme Court propounded a two-prong test for analysis of ineffective-assistance-of-counsel claims requiring Petitioner to demonstrate that: (1) the counsel's "representation fell below an objective standard of reasonableness[;]" and (2) the counsel's deficient performance prejudices Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Courts considering an ineffective-assistance-of-counsel claim must apply a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. It is Petitioner's burden to show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . .

by the Sixth Amendment." *Id.* at 687. Additionally, to establish prejudice under *Strickland*, it is not enough for Petitioner to "show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, errors must be "so serious as to deprive [Petitioner] of a fair trial, a trial whose result is reliable." *Id*. at 687.

Where a state court previously adjudicated the ineffective-assistance-of-counsel claim under *Strickland*, establishing the court's decision was unreasonable is especially difficult. *See Richter*, 562 U.S. at 104-05. In *Richter*, the Supreme Court clarified that *Strickland* and § 2254(d) are each highly deferential, and when the two apply in tandem, review is doubly so. *See id.* at 105; *see also Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010) (internal quotation marks omitted) The Court further clarified, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105.

III. Discussion

a. Ground 1—Insufficient Evidence

In Ground 1, Petitioner alleges that he was denied his due process rights because there was insufficient evidence to support the convictions. ECF No. 35 at 17-20. Petitioner asserts he was convicted because he was present at the incident, because of his interaction with Eagles after the beating, and testimony speculating that Petitioner transferred drugs to Eagles. *Id*. at 18. He further asserts that the video evidence demonstrates that Petitioner did not participate in the beating and there was no evidence of an agreement between Petitioner and Eagles to commit a robbery. *Id*. at 18-19.

Petitioner argues that the Nevada Court of Appeals' decision was unreasonable because the court referred to irrelevant evidence in its decision and because the evidence, nonetheless, did

not support a conviction of conspiracy. *Id*. at 19-20. He asserts that the "entire case is based on speculation of the bartender that a touching of hands was not only a transfer of unseen drugs, but drugs that were paid in furtherance of a conspiracy to beat up [the victim]." *Id*. at 19. He argues that there was no credible evidence of a conspiracy. *Id*. at 20.

i. Background Information

1. Surveillance Video

At trial, the State presented surveillance video that showed that Petitioner and Eagles standing together in the parking lot before the victim arrived at the bar. ECF No. 39-25 at 20. Next, Eagles moved to stand with another individual to wait for the victim to arrive while Petitioner stood in front of the bar that had a view of where the incident took place. *Id*. When the victim arrives, Eagles and another man flanked the victim. *Id*. at 21. They beat the victim and stomped on his body while Petitioner walked into the bar smiling. *Id*. at 20.

The surveillance video showed Eagles taking the victim's shoes, pointing at the victim, dancing around and taunting the victim while the victim lay motionless on the ground. *Id*. at 22. Petitioner approached Eagles. *Id*. Petitioner reached his hand to his mouth then touched Eagles's right hand. *Id*. The surveillance video showed Eagles transferring an item from his right hand to left. *Id*.

The surveillance video also showed Petitioner standing over the victim, who was lying on the ground, approximately 10 minutes after the beating. *Id*. at 23. While standing over the victim, Petitioner shook his head and gestured towards the victim. *Id*. Another individual took the keys from the victim's pocket and drove the victim's truck out of the parking lot. *Id*. at 24.

The surveillance video showed Eagles and two women moved the victim's body from the parking lot. *Id*. at 24. Petitioner was present and watching. *Id*. Petitioner held Eagles's cigarette while Eagles and the two women moved the victim's body. *Id*.

2. The Victim's Testimony

The state called the victim to testify at trial. ECF No. 39-23 at 68. He testified that he was attacked after walking out of his truck towards the entrance of the bar. *Id*. at 70. Petitioner and Eagles knew the victim's truck. ECF No. 38-25 at 20. The victim recalled Petitioner standing over him while he was on the ground. ECF No. 39-23 at 85. The victim further testified that he had a disagreement with Petitioner a day or two before the incident happened. *Id.* at 86. Defense counsel cross-examined the victim regarding his ability to recollect the incident and his previous habitual drug use. *Id*. at 95-119.

3. Bacon's Testimony

The state called Angela Bacon ("Bacon"), a bartender, to testify at trial. ECF No. 39-23 at 124. She testified that drug dealers and vagrants were patrons of the bar. *Id*. at 127. She identified Petitioner and Eagles as regular patrons of the bar. *Id*. at 129. She testified the Petitioner entered the bar laughing and told her she needed to go outside to see what happened. *Id*. She observed a man lying on the ground and was told that he was sleeping. *Id*. at 133.

Bacon testified that she watched the surveillance video while at the bar when a detective came to access the video. ECF No. 39-23 at 142. Petitioner was also present at the bar when the detective came. *Id*. at 143. Bacon testified that Petitioner was nervous when the detective came to the bar. *Id*. She further testified that Petitioner informed her that he spoke to his lawyer who advised him that he "didn't have anything to worry about as long as it looked like he was just wiping his mouth and spitting on his hand or something and shaking somebody else's hand." *Id*.

at 145. Bacon testified that Petitioner informed her that the victim was going to tell Petitioner's wife that Petitioner was sleeping with another woman. *Id*. at 145-46. Petitioner told Bacon that "he wasn't going to have that." *Id*. at 146.

Bacon identified Eagles and Petitioner in the surveillance video. *Id*. at 151-52. She testified that the video showed Petitioner transferring an item to Eagle's hand. *Id*. at 164. Bacon testified that based on her conversations with Petitioner, she believed they were transferring narcotics. *Id*. Bacon observed narcotics transactions during her employment at the bar. *Id*. at 165. She testified that during drug transactions, individuals would put drugs in their mouth under their tongue, take the drugs out, and put it in somebody's hand. *Id*.

Defense counsel cross-examined Bacon clarifying that her testimony was based on the video surveillance because she was not present at the scene of the incident. *Id*. at 167. Defense counsel also cross-examined Bacon regarding her testimony at the preliminary hearing. *Id*.

4. Detective Auschwitz's Testimony

The State called Detective Auschwitz to testify at trial. ECF No. 39-23 at 221. Detective Auschwitz testified that when he spoke with the victim, the victim "was quite sure that an individual named [Eagles] was the one that…battered him," and that Petitioner "was the lead guy behind that." *Id*. at 227. Detective Auschwitz showed the victim still images from the surveillance video and the victim also identified Petitioner and Eagles from a photo lineup. *Id*. at 230, 235.

He further testified as to his experience observing narcotics transactions. *Id*. at 240. He testified he observed narcotics activity as a patrol officer in the Downtown Area Command and "pretty much everywhere [his] whole entire career." *Id*. The prosecution played the portion of the

surveillance video where Petitioner touched Eagles's hand after touching his mouth. *Id.* at 241. Detective Auschwitz testified as follows:

> When you look at the video, you could see [Petitioner] reach – reach around in the facial area towards the general area of his mouth, and – and it appears that he's – he takes something out, and the way he hand – he handed something to [Eagles]. That – that's not normal. Normal people don't – don't do that. Especially some – at – at a particular establishment, like the 5th Avenue Pub. That's – you – normally, you – you hand out the drugs, and with the other hand, you take something back, such as money. In this – in most my narcotics experiences, you – you take the money back the US currency or whatever it might be, and hand off the drugs. And then you go on your way.
>
> And in this situation, [Petitioner] handed something to him, it's unknown, but he handed something to him from – I'm assuming from his mouth, because of my training and experience, most narcotics dealers use their mouth as a way to transport and conceal narcotics. But [Eagles], he never – he never – gave anything to [Petitioner]. He just – he just went up there as, like, he expected something from him in return.

Id. at 242-43. He testified that in his training and experience that a drug transaction took place between Petitioner and Eagles. *Id*. at 257. He further testified that the 5th Avenue Pub was a known location to buy narcotics. *Id*. at 244. During his investigation, the victim told Detective Auschwitz that he owed Petitioner money for drugs. *Id*. at 258.

ii. State Court Determination

On direct appeal, the Nevada Court of Appeals held:

> Evidence is sufficient to support a verdict if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Higgs v. State*, 126 Nev. 1, 11, 222 P.3d 648, 654 (2010) (quoting *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007)). A conspiracy is "an agreement between two or more persons for an unlawful purpose," and a co-conspirator "who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator." *Doyle v. State*, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996), *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 91 P.3d 16 (2004). The Nevada Supreme Court has explained, "if a coordinated series of acts furthering the underlying offense is sufficient to infer the existence of an agreement, then sufficient evidence exists to support a conspiracy conviction." *Thomas v. State*, 114 Nev. 1127, 1143, 967 P.2d 1111,1122 (1998) (internal quotations marks omitted). "[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975).

> Our review of the record reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). The State presented evidence supporting the charges, including surveillance video and testimony by the victim, the bartender and the manager, a trauma nurse who treated the victim, and the detective assigned to the case. We conclude the jury could reasonably infer the essential elements of the conspiracy and other crimes charged from this evidence.

ECF No. 40-5 at 3-4.

iii. Conclusion

The Nevada Court of Appeals' rejection of Petitioner's claim was neither contrary to nor an objectively unreasonable application of clearly established law as determined by the United States Supreme Court. When a habeas petitioner challenges the sufficiency of evidence to support his conviction, the court reviews the record to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Jones v. Wood*, 207 F.3d 557, 563 (9th Cir. 2000).

Sufficiency claims are limited to a review of the record evidence submitted at trial. *Herrera v. Collins*, 506 U.S. 390, 402 (1993). Such claims are judged by the elements defined by state law. *Jackson*, 443 U.S. at 324, n.16). The reviewing court must respect the exclusive province of the fact-finder to determine the credibility of witnesses, to resolve evidentiary conflicts, and to draw reasonable inferences from proven facts. *United States v. Hubbard*, 96 F.3d 1223, 1226 (9th Cir. 1996). The district court must assume the trier of fact resolved any evidentiary conflicts in favor of the prosecution, even if the determination does not appear on the record, and must defer to that resolution.

At trial, the State presented video evidence of the incident wherein Eagles beat the victim after Eagles was standing with Petitioner. The video evidence depicted Petitioner placing his

hand on his mouth, then putting an item into Eagles's hand after Eagles beat the victim. The video evidence further depicted Petitioner standing over the victim while he lay motionless on the ground. Detective Auschwitz and Bacon testified that individuals transport or conceal narcotics in their mouth. In his training and experience, Detective Auschwitz testified that a drug transaction took place between Petitioner and Eagles.

Detective Auschwitz, Bacon, and the victim also testified as to motive. The victim testified that he and Petitioner had a disagreement a day or two before the incident. Bacon testified that Petitioner informed her that the victim was going to tell Petitioner's wife that Petitioner had an affair. Detective Auschwitz testified that the victim stated that he owed Petitioner money for drugs.

Viewing the evidence in the light most favorable to prosecution, any rational trier of fact would have found the essential elements of conspiracy beyond a reasonable doubt. There was sufficient evidence of an agreement or mutual understanding between two or more people to commit the crimes of which Petitioner was convicted. Based on a review of the record of evidence submitted at trial, the Court concludes that a rational jury could have found the essential elements of the crimes beyond a reasonable doubt. Petitioner is denied federal habeas relief for Ground 1.

b. Ground 2—Ineffective Assistance of Counsel

In Ground 2, Petitioner alleges trial counsel rendered ineffective assistance for failure to obtain a full set of videos of the incident from the prosecution, failure to show the complete set of videos to Petitioner, and failure to use exculpatory video evidence. ECF No. 35 at 23. He alleges that because he only saw a portion of the surveillance video evidence at the preliminary hearing, he did not accept a more favorable plea offer and/or did not insist on a different defense

strategy at trial. *Id*. He asserts that the portion of the videos presented at the preliminary hearing "did not include the portions of the videos that he knew must exist showing him trying to stop the beating and help the victim to get the keys to his truck back." *Id*. at 22.

i. Petitioner's Declaration

In support of Ground 2, Petitioner attached a declaration dated November 5, 2021 to his second amended petition. ECF No. 24-1. Respondents object to consideration of Petitioner's declaration because he failed to properly present his declaration to the Nevada courts in accordance with Nevada's procedural rules. ECF No. 54 at 11. Petitioner argues that the substance of Ground 2 was presented to the state courts and his declaration contains additional facts in support of such claim. ECF No. 59 at 7.

The United States Supreme Court recently reiterated that a federal habeas court may not consider evidence beyond the state court record unless a petitioner satisfies 28 U.S.C. § 2254(e)(2). *Shinn v. Ramirez*, 142 S. Ct. 1712, 1730 (2022) ("Only rarely may a federal habeas court hear a claim or consider evidence that a prisoner did not previously present to the state courts in compliance with state procedural rules.") *see also Pinholster*, 563 U.S. at 180-81 (holding a federal court may review a federal habeas claim based solely on the record that was before the court that adjudicated the claim on the merits). Accordingly, the Court will not consider Petitioner's declaration.

ii. State Court Determination

In denying the postconviction state habeas petition, the Nevada Court of Appeals held:

> [Petitioner] argued his trial counsel was ineffective for failing to ensure [Petitioner] personally viewed the surveillance video depicting the crime. [Petitioner] contended he should have been permitted to view the video when deciding whether to accept a plea offer. The district court found the State utilized the surveillance video during the preliminary hearing when it questioned witnesses and [Petitioner]

> was present at that hearing. The district court further found that, because [Petitioner] attended the preliminary hearing, he would have been aware of the nature of the evidence against him and had the opportunity to utilize that knowledge when weighing plea offers. Therefore, the district court concluded, [Petitioner] failed to demonstrate a reasonable probability of a different outcome had counsel ensured he viewed the surveillance video when deciding whether to accept the plea offer. The record supports the district court's decision.
>
> Moreover, [Petitioner] did not demonstrate a reasonable probability there was a plea offer from the State that he would have accepted absent counsel's alleged deficiency, the State would not have withdrawn its plea offer in light of intervening circumstances, and the district court would have accepted such offer. *See Laffler v. Cooper*, 566 U.S. 156, 163-64 (2012); *see also Missouri v. Frye*, 566 U.S. 134, 147 (2012) ("To establish a prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or sentence of less prison time."). Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

ECF No. 40-49 at 4-5.

iii. Conclusion

The Nevada Court of Appeals' rejection of Petitioner's claim that trial counsel rendered ineffective assistance was neither contrary to nor an objectively unreasonable application of clearly established law as determined by the United States Supreme Court.

The state appellate court's determination that Petitioner failed to demonstrate a reasonably probability of a different outcome had trial counsel ensured Petitioner viewed the surveillance video when deciding whether to accept the plea offer was not an unreasonable application of the prejudice prong of *Strickland*. As stated by the Nevada Court of Appeals, Petitioner was aware of the nature of the evidence against him because he viewed portions of the surveillance video presented at the preliminary hearing.

Petitioner failed to show a reasonable probability that if trial counsel ensured Petitioner viewed the complete set of surveillance videos available, including portions that may support an argument that Petitioner attempted to help the victim, that Petitioner would have accepted the

plea offer. In light of the evidence presented at trial, Petitioner also failed to show a reasonable probability that a different defense including argument that Petitioner attempted to help the victim would have been successful or that the result of the proceeding would have been different. Ground 2 is denied.

IV. Certificate of Appealability

This is a final order adverse to Petitioner. Rule 11 of the Rules Governing Section 2254 Cases requires the Court to issue or deny a certificate of appealability ("COA"). Therefore, the Court has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002). Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether this Court's procedural ruling was correct. *Id.*

Applying these standards, this Court finds that a certificate of appealability is unwarranted.

V. Conclusion

It is therefore ordered that Petitioner Donald Kie, Jr.'s third amended petition for writ of habeas corpus (ECF No. 35) is DENIED.

It is further ordered that a certificate of appealability is DENIED.

It is further ordered that the Clerk of the Court is directed to enter judgment accordingly and close this case.

DATED this 10th day of August, 2023.

ROBERT C. JONES
UNITED STATES DISTRICT JUDGE

APPENDIX C

Order of the Court of Appeal of Nevada on Habeas Appeal, August 10, 2020

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DONALD KIE, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79189-COA

FILED

AUG 10 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Donald Kie, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Kie argues the district court erred by denying the claims of ineffective assistance of counsel he raised in his July 31, 2018, petition and later-filed supplement. To prove ineffective assistance of counsel, a petitioner must demonstrate counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. To warrant an evidentiary hearing, the petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Kie argued his trial counsel was ineffective for failing to request a *Petrocelli*[1] hearing regarding evidence of Kie's participation in a drug deal or a limiting instruction concerning that evidence. The State contended Kie used the drugs as payment to induce a person to attack the victim in the underlying case. Prior to trial, the State filed a motion requesting admission of the drug-sale evidence and Kie did not oppose the motion. During the hearing concerning the State's motion, Kie's counsel informed the trial court the State merely sought admission of evidence it already utilized during the preliminary hearing and the State would not seek to introduce any further evidence concerning Kie's prior wrongdoing unless the defense opened the door to such information. Counsel stated that, based upon those reasons, he chose not to oppose the motion. The district court found that counsel's decision to decline to oppose the motion was objectively reasonable under the circumstances of this case and the record supports the district court's decision.

In addition, on direct appeal this court concluded that evidence concerning Kie's participation in the drug deal was properly admitted at trial pursuant to the res gestae rule to prove Kie engaged in a conspiracy by providing drugs to another person in exchange for an attack on the victim. *Kie, Jr. v. State*, Docket No. 71905-COA (Order of Affirmance, December 15, 2017). Because the evidence concerning Kie's participation in a drug deal was properly admitted at trial, Kie failed to demonstrate a reasonable probability of a different outcome had counsel argued against the admission of the challenged evidence. In addition, in light of the significant evidence

[1]*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), *superseded in part by statute as stated in Thomas v. State*, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004).

of Kie's guilt presented at trial, he failed to demonstrate a reasonable probability of a different outcome had counsel requested a limiting instruction concerning the drug-deal evidence. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Kie argued his trial counsel was ineffective for failing to ensure Kie personally viewed the surveillance video depicting the crime. Kie contended he should have been permitted to view the video when deciding whether to accept a plea offer. The district court found the State utilized the surveillance video during the preliminary hearing when it questioned witnesses and Kie was present at that hearing. The district court further found that, because Kie attended the preliminary hearing, he would have been aware of the nature of the evidence against him and had the opportunity to utilize that knowledge when weighing plea offers. Therefore, the district court concluded, Kie failed to demonstrate a reasonable probability of a different outcome had counsel ensured he viewed the surveillance video when deciding whether to accept a plea offer. The record supports the district court's decision.

Moreover, Kie did not demonstrate a reasonable probability there was a plea offer from the State that he would have accepted absent counsel's alleged deficiency, the State would not have withdrawn its plea offer in light of intervening circumstances, and the district court would have accepted such an offer. *See Lafler v. Cooper*, 566 U.S. 156, 163-64 (2012); *see also Missouri v. Frye*, 566 U.S. 134, 147 (2012) ("To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time."). Therefore,

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

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Cristina D. Silva, District Judge
Zaman & Trippiedi, PLLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

APPENDIX D

Order of the Supreme Court of Nevada on Direct Appeal, December 10, 2017

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DONALD KIE, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71905

FILED

DEC 15 2017

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

ORDER OF AFFIRMANCE

Donald Kie, Jr. appeals from a judgment of conviction entered pursuant to a jury verdict finding him guilty of conspiracy to commit robbery, robbery, battery resulting in substantial bodily harm, and battery with intent to commit a crime. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Bryan Eagles and another man accosted, robbed, and severely battered the victim outside a bar, breaking the victim's neck and leaving him temporarily paralyzed. They, along with a third man, also stole the victim's personal property and his truck. The incident was captured by surveillance cameras. Donald Kie, Jr., who was present before, during, and after the crime, approached Eagles shortly after Eagles finished beating the victim. Kie moved his hand to his mouth and then touched Eagles' right hand. Seconds after, Eagles transferred something from his right hand to his left. The State's theory of the case was that Kie was angry with the victim for threatening to tell Kie's wife of Kie's extramarital affairs, and Kie retaliated by conspiring with Eagles to beat the victim. The State

argued Kie paid Eagles in drugs, and presented evidence that drugs are often transferred from mouth to hand.[1]

On appeal, Kie argues that the evidence was insufficient to show the conspiracy and support the convictions and that the district court abused its discretion by admitting evidence of the alleged drug transaction. We disagree.

Evidence is sufficient to support a verdict if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Higgs v. State*, 126 Nev. 1, 11, 222 P.3d 648, 654 (2010) (quoting *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007)). A conspiracy is "an agreement between two or more persons for an unlawful purpose," and a co-conspirator "who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator." *Doyle v. State*, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996), *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 91 P.3d 16 (2004). The Nevada Supreme Court has explained, "if a coordinated series of acts furthering the underlying offense is sufficient to infer the existence of an agreement, then sufficient evidence exists to support a conspiracy conviction." *Thomas v. State*, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998) (internal quotation marks omitted). "[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975).

Our review of the record reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.

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[1]We do not recount the facts except as necessary to our disposition.

See Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). The State presented evidence supporting the charges, including the surveillance video and testimony by the victim, the bartender and the manager, a trauma nurse who treated the victim, and the detective assigned to the case. We conclude the jury could reasonably infer the essential elements of the conspiracy and other crimes charged from this evidence.

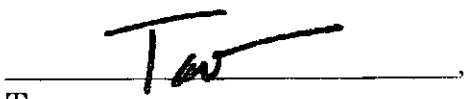
We next turn to Kie's second assertion of error. We review the district court's decision to admit evidence for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). NRS 48.035(3) permits the district court to admit evidence of another act or crime that "is so closely related to . . . [the] crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime." This exception is narrowly construed and limited to the express provisions of NRS 48.035(3). *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005); *Tabish v. State*, 119 Nev. 293, 307, 72 P.3d 584, 593 (2003). Because the statute refers to a witness's ability to describe, rather than explain, the charged crime, evidence of other acts may not be admitted under NRS 48.035(3) "to make sense of or provide a context for a charged crime." *Weber v. State*, 121 Nev. 554, 574, 119 P.3d 107, 121 (2005).

Here, the State charged Kie with conspiracy. "Conspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties." *Thomas*, 114 Nev. at 1143, 967 P.2d at 1122 (internal quotation marks omitted). In this case, the State could not elicit testimony of the crime of conspiracy without referencing the facts of the alleged drug transaction, as that transaction was central to establish

the inferences supporting the conspiracy. The evidence was therefore admissible res gestae evidence, and the district court did not abuse its discretion by admitting this evidence.[2] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver



_____, J.
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_____, J.
Gibbons

cc: Hon. Douglas Smith, District Judge
Benjamin Durham Law Firm
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[2]Though not raised by the parties, we note Kie failed to file below an opposition to the State's motion to admit the evidence, thereby consenting to the admission of the evidence. *See* EDCR 2.20(e) (stating that failure to file a written opposition will be construed as an admission that the motion has merit and should be granted).