IN THE SUPREME COURT OF THE STATE OF NEVADA

JAVAR KETCHUM,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 87012

(Appeal from Final Order of the Eighth Judicial District Court Denying Petition for Writ of Habeas Corpus (Postconviction))

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

A. Statute which grants jurisdiction to review the judgment: **NRS 34.575(1)**

B. Timeliness: Notice of Entry of Findings of Fact, Conclusions of Law and Order filed **June 20, 2023**; Notice of Appeal filed **July 19, 2023**

C. This appeal is from a final order of a district court issued on June 15, 2023

ROUTING STATEMENT

This case is not in a category presumptively assigned to the Court of Appeals, but is not in a category that must be retained by the Supreme Court under NRAP 17.

ISSUES PRESENTED FOR REVIEW

I. Whether it is a reversible abuse of discretion for a district court to deny a postconviction writ of habeas corpus without an evidentiary hearing where the petitioner raises factual claims that, if true, would entitle him to relief where the claims are not belied by the record.

STATEMENT OF THE CASE

This is an appeal from a final Findings of Fact and Conclusions of Law denying Appellant, JAVAR KETCHUM's (hereinafter "MR. KETCHUM"), Petition for Writ of Habeas Corpus (Postconviction).

STATEMENT OF FACTS

MR. KETCHUM was convicted after a jury trial of Murder With Use of a Deadly Weapon and Robbery With Use of a Deadly Weapon. See J. of Conviction (Feb. 5, 2018), **III AO 551-52**.[1] MR. KETCHUM was sentenced to Life with the eligibility for parole after serving a minimum of 20 years, plus a consecutive term of 240 months with a minimum parole eligibility of 96 months for the Use of a Deadly Weapon for the Murder charge; and 180 months with a minimum parole eligibility of 48 months, plus a consecutive term of 120 months with a minimum parole eligibility of 48 months for the Use of a Deadly Weapon on the Robbery charge. **III AO 552**. Counts one and two were to run concurrent. Id.

MR. KETCHUM filed a Notice of Appeal on February 6, 2018. See Notice of Appeal (Feb. 6, 2018), **IV AO 553-54**. His Corrected Opening Brief was filed on August 29, 2018. See **IV AO 575-634**. The State filed its Answering Brief on

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[1] References to Appellant's Appendix are to volume number, followed by Bates Stamp number with beginning zeros omitted. (E.g., volume I, Bates numbers AO000001 through AO000020 would be cited as **I AO 1-20**.)

October 29, 2018. See **IV AO 635-81**. This Court issued its Order of Affirmance on September 12, 2019. See **IV AO 683-87**. Remittitur issued on November 1, 2019. See **IV AO 688-90**.

A Petition for Post-Conviction Writ of Habeas Corpus was filed in the Eighth Judicial District Court on September 11, 2020. See **IV AO 691-701**. The district court denied the Petition and its Findings of Fact, Conclusions of Law and Order was filed on March 31, 2021. See **IV AO 704-16**. A Notice of Appeal from that Order was filed on May 6, 2021. See **IV AO 717-60**. The Nevada Court of Appeals issued an order of affirmance on February 3, 2022. See **V AO 764-68**.

Prior to the Nevada Court of Appeals's Order of Affirmance, undersigned counsel was appointed to represent MR. KETCHUM in district court. An Amended Petition for Writ of Habeas Corpus (Postconviction) was filed on March 24, 2023. See **V AO 774-805**. The State filed its Response on April 27, 2023. See **V AO 806-32**. The district court, without a hearing, denied MR. KETCHUM's Petition and issued its Findings of Fact, Conclusions of Law and Order on June 15, 2023. See **V AO 836-48**. This Appeal followed.

SUMMARY OF THE ARGUMENT

The district court erred by failing to hold an evidentiary hearing on any of MR. KETCHUM's meritorious claims in his petitions for writ of habeas corpus. MR. KETCHUM raised claims of constitutional error that were not belied by the

record. The district court had a duty to hold an evidentiary hearing as to those claims before denying MR. KETCHUM's petitions. The district court's error deprived MR. KETCHUM of Due Process of law and this Court should vacate the district court's order and remand for the district court to hold a proper evidentiary hearing.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING MR. KETCHUM'S PETITION FOR WRIT OF HABEAS CORPUS WITHOUT CONDUCTING AN EVIDENTIARY HEARING.

A. Standard of Review

A district court's denial of an evidentiary hearing is reviewed for an abuse of discretion. See Berry v. State, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015). "This court has long recognized a petitioner's right to a post-conviction evidentiary hearing when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." Mann v. State, 118 Nev. 351, at 354, 46 P.3d 1228, at 1230 (2002) (citations omitted).

B. Argument

1. Introduction

The district court abused its discretion by denying MR. KETCHUM's Amended Petition for Writ of Habeas Corpus without holding an evidentiary hearing. The facts alleged in MR. KETCHUM's Petition were not belied by the

record. The facts alleged, if true, would entitle MR. KETCHUM to relief in the form of a new trial.

2. Claim One in MR. KETCHUM's Amended Petition, That Trial and Appellate Counsel Were Ineffective in the Representation of MR. KETCHUM, Was Not Belied By the Record and, If True, Would Entitle MR. KETCHUM to Relief.

MR. KETCHUM's claims that trial and appellate counsel were ineffective were not belied by the record and would entitle him to relief if true. An accused has the right to effective assistance of counsel pursuant to the Sixth Amendment to the United States Constitution, as well as Article I, section 1 of the constitution of the State of Nevada. The right to effective assistance of counsel attaches prior to a defendant's decision to plead guilty. McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970). The standard of review for "effective assistance of counsel" was enunciated by the U.S. Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), and requires the court to determine whether: 1) counsel's representation fell below an objective standard of reasonableness; and 2) whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 688-94. "Establishment of deficient performance requires a showing that counsel's performance fell below an objective standard of reasonableness." Lara v. State, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (citing Kirksey v. State, 112 Nev. 980,

987, 923 P.2d 1102, 1107 (1996)). To satisfy the second element, a defendant must demonstrate prejudice by showing "a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Id., citing Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

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

MR. KETCHUM made the following claims in his Amended Petition for Writ of Habeas Corpus that were not belied by the record. If true, these claims would have entitled MR. KETCHUM to relief. The district court abused its discretion by failing to grant an evidentiary hearing as to the following factual allegations raised in the Petition:

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

During the discovery phase of the case, trial counsel informed Chief Deputy District Attorney Marc DiGiacomo that he wanted to view the original SWAN video from the incident in question. On or about February 16, 2017, trial counsel

viewed the original SWAN video surveillance in possession of LVMPD. The original surveillance video was in evidence at the evidence vault and could only be accessed by law enforcement. At the time and date set for the review, LVMPD Det. Bunn and Chief Deputy DA DiGiacomo presented the video to trial counsel in the Grand Jury room. Trial counsel had no control of the video while it was played, and law enforcement personnel controlled the surveillance video. Trial counsel was only shown parts of the video.

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

These two never-before seen portions of video substantially undercut the defense theory that the victim was unaware that MR. KETCHUM was carrying a firearm the night of the shooting. On direct appeal, appellate counsel argued that the State's conduct in presenting evidence during closing arguments that was not

previously identified to the defense undermined trial counsel's opening statement, trial strategy, credibility and rendered the trial fundamentally unfair. In denying MR. KETCHUM's direct appeal, this Court held:

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

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

Trial counsel's performance thus fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Lara v. State, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (citing Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996)). Trial counsel's failures to object placed MR. KETCHUM in a worse position for his appeal. Failure to object at trial is generally considered a waiver of the issue on appeal and then is reviewable only for plain error. Davis v. City of Reno, 113 Nev. 207, 931 P.2d 207 (1997);

Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992); Davis v. State, 107 Nev. 600, 817 P.2d 1169 (1991). Again, MR. KETCHUM has demonstrated actual prejudice by showing "a reasonable probability that, but for counsel's errors, the result of the trial would have been different."

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

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

Antoine Bernard had given an interview to Det. Bunn during the investigation of the shooting. He told Det. Bunn that he didn't hear or see anything. At trial he testified that he was fiddling with the auxiliary cable to his car stereo when the shooting occurred and didn't see anything. He did, however, say that he heard MR. KETCHUM say something to the effect of "Give me my shit" or "Give me your shit" right before the gunshot. Antoine Bernard told Det. Bunn that MR. KETCHUM had no ill will or animosity that night towards the victim. At trial, however, Antoine Bernard testified that he knew something was

about to go down when he saw MR. KETCHUM and the victim walk out of the club together. Trial counsel also appeared to be unprepared when during rebuttal the State presented a clip of the video surveillance wherein a man in a white shirt walks up to Antoine Bernard as he waited in his car immediately before the shooting. The man leans in and tells Bernard something. Bernard immediately moves the car closer to where MR. KETCHUM and the victim were located, apparently driving up onto the curb. The shot is fired and MR. KETCHUM is seen jumping into the car and they drive away. This video is suggestive of planning or coordination. A reasonably prudent attorney would have anticipated this testimony and evidence and prepared for it. Trial counsel did not. There is a reasonable probability that, but for the deficient performance of trial counsel, the outcome of the trial would have been different.

3. Claim Four in MR. KETCHUM's Amended Petition, That the State's Failure to Disclose the Inculpatory Evidence (The Segments of the Video) During the Evidence Viewing by Counsel and to Disclose Such Evidence at Closing Argument Rendered the Trial Fundamentally Unfair and Violated MR. KETCHUM's Right to a Fair Trial and Due Process under the Fifth and Fourteenth Amendments to the United States Constitution, Was Not Belied By the Record and, If True, Would Entitle MR. KETCHUM to Relief.

MR. KETCHUM made the following arguments in his Amended Petition for Writ of Habeas Corpus that, if true, would entitle him to relief:

Although criminal defendants have no general right to discovery, "[n]evertheless, under certain circumstances the late disclosure even of inculpatory evidence could render a trial so fundamentally unfair as to violate due process." Lindsey v. Smith, 820 F.2d 1137, 1151 (11th Cir. 1987). In fact, the example posited by the Eleventh Circuit is directly on point, as the court noted "a trial could be rendered fundamentally unfair if a defendant justifiably relies on a prosecutor's assurances that certain inculpatory evidence does not exist and, as a consequence, is unable to effectively counter that evidence upon its subsequent introduction at trial." Id. It is also well established that district courts have a duty to "protect the defendant's right to a fair trial [.]" Rudin v. State, 120 Nev. 121, 140, 86 P.3d 572, 584 (2004); see also United States v. Evanston, 651 F.3d 1080, 1091 (9th Cir. 2011) (stating that the district court is to manage the trial so as to avoid "a significant risk of undermining the defendant's due process rights to a fair trial"); Valdez v. State, 124 Nev. 1172, 1183 n.5, 196 P.3d 465, 473 n.5 (2008) ("[T]he district court had a had a sua sponte duty to protect the defendant's right to a fair trial.").

During the discovery phase of the case, trial counsel informed the State's Deputy District Attorney Marc DiGiacomo that he would like to view the original SWAN video from the incident in question. On or about February 16, 2017, trial counsel viewed the original SWAN Video surveillance in possession of law

enforcement. The original surveillance was in evidence at the evidence vault and could only be accessed with law enforcement. At the time and date set for the review, Detective Bunn along with Chief Deputy District Attorney Marc DiGiacomo presented the video to counsel in the Grand Jury room. Counsel had no control of the video while it was played, and law enforcement controlled the surveillance. Counsel was only shown parts of the video.

During trial, portions of the video that were played for the jury appeared to be the same portions counsel reviewed with law enforcement and the State in the Grand Jury Room. However, crucially, in the State's closing argument, the State presented two never before seen segments of the surveillance video.

Importantly, trial counsel did not previously view these segments, was not aware of the existence of these segments because he did not have access to the same device, and these segments were not presented during the State's case-in-chief at trial. See Rippo v. State, 113 Nev. 1239, 1255, 946 P.2d 1017, 1027 (1997) (it is improper for the State to refer to facts not in evidence in closing summation). This argument was raised in MR. KETCHUM's Supplement to his Motion for New Trial (**III AO 543-48**), which was denied.

The State's failure to disclose this inculpatory evidence during the evidence viewing, when the original was shown to trial counsel, had a serious detrimental effect on MR. KETCHUM's intended defense similar to what happens when a

party is confronted with surprise detrimental evidence. See Bubak v. State, No. 69096, Court of Appeals of Nevada, Slip Copy 2017 WL570931 at *5 (Feb. 8, 2017) (citing Land Baron Inv., Inc. v. Bonnie Springs Family Ltd. P'ship, 131 Nev.___, ____ n.14, 356 P.3d 511, 522 n.14 (2015) (emphasis added) (stating that "[t]rial by ambush traditionally occurs where a party withholds discoverable information and then later presents this information at trial, effectively ambushing the opposing party through gaining an advantage by the surprise attack[,]" and observing that although the appellants were "already aware of" the arguments and evidence respondents raised, "[t]he trial judge ...took steps necessary to mitigate any damage")). Here, the defense's strategy was undermined by the State's use of the undisclosed evidence (the portions played during closing).

This was a difficult case for the jury, one that required them to consider MR. KETCHUM's theory of self-defense. The never before seen and never previously shown video clips presented to the jury abolished the defense theory, namely that the victim and MR. KETCHUM had only one previous contact with one another--not the rap battle, and that the victim was unaware defendant had a firearm.

Consequently, MR. KETCHUM suffered clear prejudice: the introduction of the evidence served to directly undermine counsel's opening statement, trial strategy, and credibility. Accordingly, the district court should have permitted an evidentiary hearing on the State's alleged misconduct.

CONCLUSION

MR. KETCHUM was deprived of his constitutional right to Due Process by the district court's failure to afford him an evidentiary hearing. The district court's order denying his Petition for Writ of Habeas Corpus should be vacated and this Court should remand this case for an evidentiary hearing. The district court abused its discretion in not holding an evidentiary hearing on assertions that, if true, would entitle MR. KETCHUM relief.

DATED this 20th day of January, 2024.

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VERIFICATION

I declare under penalty of perjury that I have read this Opening Brief, that the information provided in this Brief is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents

in the Appendix filed with the Brief.

MADE this 20th day of January, 2024.

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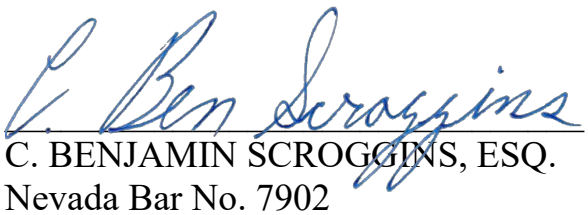

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This Brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 MSO in 14-point Times New Roman font.

2. I further certify that this Brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A)(ii) because:

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It is 3,010 words in length, exclusive of those portions excluded from the computation by NRAP 32(a)(7)(C).

DATED this 20th day of January, 2024.

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PROOF OF SERVICE

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

Alexander Chen
Aaron Ford

CERTIFIED this 20th day of January, 2024.

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