IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN MICHAEL MCKENDRICK,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 82532

RESPONDENT'S ANSWERING BRIEF

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

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RESPONDENT'S ANSWERING BRIEF (DRAFT)

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ROUTING STATEMENT

This appeal is presumptively assigned to the Nevada Court of Appeals pursuant to NRAP 17(b)(1) because it is an appeal from a post-conviction petition of writ of habeas corpus based upon a guilty plea agreement for a Category B felony.

STATEMENT OF THE ISSUE

1. Whether the district court correctly denied McKendrick's Petition for Writ of Habeas Corpus (Post-Conviction)

STATEMENT OF THE CASE

On February 20, 2019, the State charged Sean McKendrick, by way of Indictment with the following: Count I - Battery by Prisoner (Category B Felony NRS 200.481(2)(F)); Count 2 - Battery by Prisoner (Category B Felony – NRS 200.481(2)(F)); Count 3 - Attempt Murder (Category B Felony - NRS 200.010,

200.030, 193.330); and Count 4 - Attempt Battery with Substantial Bodily Harm (Category D Felony/Gross Misdemeanor - NRS 200.481, 193.330). Record on Appeal(C338224) ("ROA"), at 1-3.

On March 27, 2019, pursuant to negotiations with the State, McKendrick pled guilty to one count of Battery by Prisoner. ROA(C338224), at 39. McKendrick signed a Guilty Plea Agreement, which was filed the same day in open court. Id.

On June 10, 2019, the district court filed a Bench Warrant after McKendrick failed to appear at his sentencing. ROA(C338224), at 64. On June 14, 2019, the district court filed a Notice of Intent to Forfeit due to McKendrick's failure to appear in court. ROA(C338224), at 66. On June 20, 2019, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal. ROA(C338224), at 68.

On July 15, 2019, the district court sentenced McKendrick under the Habitual Criminal Statute NRS 207.010 to Life in the Nevada Department of Corrections (NDOC) with minimum parole eligibility after ten (10) years. ROA(C338224), at 72-73. McKendrick received fifty-nine (59) days credit for time served. Id. On July 23, 2019, the district court filed the Judgment of Conviction. Id.

On August 6, 2019, McKendrick filed a Motion for Additional Credit for Time Served. ROA(C338224), at 78. The district court granted the motion and on September 4, 2019, the district court filed the Amended Judgment of Conviction. ROA(C338224), at 90-91.

On August 15, 2019, McKendrick filed a Notice of Appeal. ROA(C338224), at 84. On September 28, 2020, the Court of Appeals of the State of Nevada affirmed the district court's sentence. ROA(C338224), at 131. On October 27, 2020, the Nevada Supreme Court issued remittitur. ROA(C338224), at 130.

On October 29, 2020, McKendrick filed a Post-Conviction Petition for Writ of Habeas Corpus ("Petition") and Motion for Appointment of Counsel ("Motion"). ROA(A823904), at 1. On January 18, 2021, the district court filed its order denying McKendrick's Petition. ROA(A823904), at 41.

On February 19, 2021, McKendrick filed a Notice of Appeal. ROA(A823904), at 48. On October 12, 2021, the Nevada Supreme Court appointed Thomas C. Michaelides, Esq. as appellate counsel and granted an extension of time to file the opening brief. On October 21, 2021, McKendrick filed his opening brief.

STATEMENT OF THE FACTS

McKendrick's Pre-Sentence Investigation Report ("PSI") filed April 23, 2019, provided a recitation of the facts of the subject offenses:

> On January 29, 2019, the Alternative to Incarceration Office received a phone call from the brother and sister-in-law of the defendant, Sean McKendrick. They requested for an officer to conduct a random Urinalysis test to determine if the defendant was under the influence of a controlled substance as he was acting bizarre.
>
> Officers arrived at the residence, and Mr. McKendrick opened the door, he was acting bizarre, and officers attempted to place him in handcuffs. Once the left

> handcuff was placed, he started questioning and challenging officers' asking why was he going back to jail. He then physically resisted, pulling away from officers and throwing his body weight and right closed fist, striking the officer, Victim #1, on his chest and leg. He struck Victim #1 and #2 another officer several times with a closed fist and hitting Victim #1 in the abdomen and leg area. During the struggle, Victim #2 was thrown into a table, causing the table to break on his back. The victim called for backup, and the fight continued outside of the apartment on the balcony, where Victim #2 was rushed by the defendant attempting to push him over the railing of the 2nd floor. However, Victim #1 was able to prevent this from happening by placing the defendant in a restraint and giving verbal commands. The defendant continued to be physical with the victims ignoring the commands. A physical restraint rendered Mr. McKendrick unconscious and subdued for a short period of time, being placed in handcuffs. When the defendant woke up, he began yelling and attempting to fight officers. Mr. McKendrick showed signs of being under the influence and was transported to the hospital for further evaluation.

PSI, at 5-6.[1]

SUMMARY OF THE ARGUMENT

The district court properly denied McKendrick's Petition for Writ of Habeas Corpus (Post-Conviction). The district court correctly dismissed McKendrick's claim that trial counsel was ineffective for failing to file a motion to withdraw a guilty plea, as McKendrick's claim was outside the scope of NRS 34.810(1)(a). The claim was also meritless because McKendrick freely agreed and was fully aware of

[1] The PSI is cited in ROA(C338224), at 53-63, but is filed separately under seal.

the term and condition that the State may argue for habitual treatment if McKendrick failed to appear for "any subsequent hearings" ROA(C338224), at 39.

McKendrick's newly raised claim that Counsel failed to object to the court's habitual treatment is belied by the record and bare and naked. *See* Opening Brief, at 10-12. At sentencing, Counsel argued in opposition to habitual treatment, albeit it unsuccessfully. *See* ROA(C338244), at 108-110, 123-124.

ARGUMENT

I. MCKENDRICK RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

"A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review." Evans v. State, 117 Nev. 609, 622, 28 P.2d 498, 508 (2001). "However, the district court's purely factual findings regarding [claims] of ineffective assistance of counsel are entitled to deference on subsequent review by this court." Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004).

B. DISTRICT COURT PROPERLY DENIED MCKENDRICK'S CLAIM AS IT WAS OUTSIDE THE SCOPE OF HABEAS REVIEW

McKendrick claimed below that Counsel was ineffective for failing to file a motion to withdraw his plea because the State gained the right to argue for habitual criminal treatment. ROA(A823904), at 13-14. Specifically, McKendrick claimed that "[C]ounsel was ineffective in failing to submit a Motion to withdraw Guilty

Plea" and that he was prejudiced by this because "by not trying to withdraw Petitioner's guilty plea, [Counsel] was allowing Petitioner to be sentenced to a much greater term of imprisonment, up to a sentence of life without Parole." Id. at 13-14.

However, McKendrick now changes his claim to the assertion that Counsel was ineffective for "failing to challenge the State's allegations of habitual offender." Opening Brief, at 6-7, 11.[2] McKendrick's new claim asserts that Counsel is ineffective because "Counsel failed to challenge the State's allegations of habitual offender." Id. at 11. In so far as McKendrick is raising a new claim, it is waived and belied by the record and bare and naked — as argued *infra*. Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.")

In any event, the district court correctly denied McKendrick's claim below, as it was outside the scope of habeas review pursuant to NRS 34.810(1)(a). The district court held:

> Because the State filed the Intent to Seek habitual Treatment, Petitioner wanted to withdraw his guilty plea. However, petitioner fails to show support from the record

[2] Under NRAP 28(e)(1): "every assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found." Here, McKendrick fails to cite to the record throughout his brief.

> that he ever attempted or wanted to withdraw his plea. Even had he tried to withdraw his plea; petitioner specifically agreed that if he failed to appear the State would have the right to argue for habitual treatment. In any case, this claim is also outside the scope of the present Petition because it does not involve ineffective assistance of counsel at plea or that his plea was not knowingly and voluntarily entered.

ROA(A823904), at 36.

Pursuant to NRS 34.810, "[t]he court shall dismiss a petition if the court determines that [the] *conviction was upon a plea of guilty* . . . and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel." NRS 34.810(1)(a). A petitioner may only escape these procedural bars if he meets the burden of establishing good cause and prejudice. *See* NRS 34.810(3).

Here, McKendrick fails to make any argument or analysis regarding how or why the district court erred in denying his underlying Petition. McKendrick cannot, as the only properly brought claim on appeal is an ineffective assistance of counsel claim beyond the scope of NRS 34.810(1)(a); Counsel failing to file a Motion to withdraw Guilty Plea does not involve (1) McKendrick "involuntarily or unknowingly" entering into the plea, or (2) McKendrick entering into the plea without effective representation. *See* NRS 34.810(1)(a).

Even if considered on the merits, McKendrick freely, voluntarily, and knowingly entered into his guilty plea agreement on March 27, 2019, with full

knowledge that the State may argue for habitual treatment if McKendrick failed "to appear at any subsequent hearings." ROA(C338224), at 39. McKendrick agreed that:

> if I fail to interview with the Department of Parole and Probation, fail to appear at any subsequent hearings in this case, or an independent magistrate, by affidavit review, confirms probable cause against me for new criminal charges including reckless driving or DUI, but excluding minor traffic violations, the State will have the unqualified right to argue for any legal sentence and term of confinement allowable for the crime(s) to which I am pleading guilty, including the use of *any prior convictions* I may have to increase my sentence *as an habitual criminal*

ROA(C338224), at 39-40.

The district court thoroughly canvased McKendrick. *See* ROA(C338224), at 96-98.

> THE COURT: Did [you] read through this guilty plea agreement?
> THE DEFENDANT: Yes, sir.
> THE COURT: Did you discuss it with your attorney?
> THE DEFENDANT: Yes, sir.
> THE COURT: *You feel confident you understand the terms and conditions of this agreement*?
> THE DEFENDANT: *Yes, sir*,
> . . .
> THE COURT: You understand that what happens to you at the time of sentencing -- the State retains the right to argue so they're going to be arguing, I have no doubt, for prison time. And what happens to you at the time of sentencing is completely and totally up to the Court, and no one can promise, or predict, what kind of sentence the Court's going to impose, except that that's the maximum sentence that the court can impose, so you're aware of that; right?

> THE DEFENDANT: Yes, sir.
> THE COURT: Okay. Did anybody promise you anything that's not contained in this guilty plea agreement in order to get you to plead guilty?
> THE DEFENDANT: No, sir.
> THE COURT: Anybody threat or coerces you in order to get you to plead guilty?
> THE DEFENDANT: No, sir.
> THE COURT: *Are you pleading guilty because in truth and fact you're actually are guilty and you're freely and -- voluntarily entering this plea; is that correct*?
> THE DEFENDANT: *Yes, sir*.

ROA(C338224), at 96-98.

McKendrick acknowledged that he understood the terms and conditions of the guilty plea. Id. McKendrick knew the State may argue for habitual treatment if he failed "to appear at any subsequent hearings in this case," and he freely and voluntarily agreed to that term upon entering into the guilty plea agreement. *See* ROA(C338224), at 96, 39-40. On March 27, 2019, McKendrick was in custody, but specifically asked to be released pending sentencing. ROA(C338224) at 95, 99-102. McKendrick was released on bail the next day. Id. at 48-49.

McKendrick failed to appear for sentencing on June 10, 2019, and the district court ordered a no bail bench warrant. ROA(C338244), at 191. Afterward, pursuant to the guilty plea agreement, the State filed a notice of intent to seek punishment as a habitual criminal. ROA(C338224), at 68.

Neither on this appeal nor below does McKendrick allege what grounds Counsel could have successfully challenged his habitual criminal status.

McKendrick fails to assert how Counsel could have successfully filed a motion to withdraw a guilty plea, given that McKendrick had 'buyer's remorse' after failing to appear. McKendrick was aware of the consequences of failing to appear, failed to appear, and was subject to no more than he agreed to in the guilty plea agreement. Therefore, the district court correctly denied McKendrick's claim as it was beyond the scope of NRS 34.810(1)(a) and was belied by the record.

II. MCKENDRICK'S CRONIC CLAIM IS INAPPROPRIATELY RAISED

McKendrick raises a new claim that Counsel failed to subject the State's "case to meaningful adversarial testing" by failing to argue against McKendrick's habitual criminal treatment. Opening Brief, at 10-11. McKendrick's claim is improperly raised before this Court and is belied by the record. Therefore, this Court should decline to hear it.

This Court will generally decline to hear new matters on appeal that have not been raised in the underlying pleadings. *See* McNelton v. State, 115 Nev. 396, 415-416, 990 P.2d 1263, 1275-76 (1999). However, if appellant shows "cause and prejudice for" failing to "raise it below," this Court may hear the appellant's newly raised claims. *See* Hill v. State, 114 Nev. 169, 178, 953 P.2d 1077, 1084 (1998).

Here, McKendrick failed to raise below that Counsel failed to subject McKendrick's case to a meaningful adversarial process. Additionally, McKendrick fails to show good cause concerning his failure to raise the said claim in his

underlying Petition. McKendrick cannot as the facts were available to him at the time of filing his Petition, no external impediment caused McKendrick to fail to raise the instant claim, and the instant claim would have been denied as it is beyond the scope of NRS 34.810(1)(a).

Moreover, McKendrick fails to address prejudice. McKendrick appears to shift his burden onto the State to prove that McKendrick was not prejudiced. *See* Opening Brief, at 9. This is contrary to Hill, 114 Nev. at 178, 953 P.2d at 1084, wherein the appellant has the burden to show he is prejudiced for failing to raise the claim below.

McKendrick cannot show prejudice as the record belies his claim. Counsel argued in opposition to habitual treatment. *See* ROA(C338224), at 194.

> MS. SIMMONS: I'm prepared, Your Honor, I did want to clarify one thing though. The State had submitted police reports for two incidents that are not part of the negotiation here. They're not at all related to this event. And I had objected to, Your Honor, considering those as part of the sentencing for today.
> THE COURT: Right.
> MS. SIMMONS: So I did want to make sure the record was clear I was objecting, because those are incidents that are not – *one was dismissed and one is screening*. Neither of them are actually factually part of this case. So *I was objecting for relevance and prejudicial purposes*. Deferring to Your Honor as to whether or not -- and the only thing I need to make clear is, whether or not, Your Honor, did -- use them, and are going to consider them today.
> THE COURT: Mr. Albright?

> MR. ALBRIGHT: . . . Another reason is because I'm seeking habitual --
> THE COURT: Right.
> MR. ALBRIGHT: -- treatment, which incubuses his criminal history, Your Honor.
> THE COURT: Understood.
> MR. ALBRIGHT: And takes into account judgments of conviction from prior convictions.
> MS. SIMMONS: And my only response to that, specially, is that, obviously, I already know in a PSI Your Honor's always made aware -- well, specifically, factually in this case he was on house arrest at the time. *Obviously there was a prior case; however, that case was dismissed*. Obviously Your Honor would know if he had picked up a new case, otherwise the State wouldn't have regained the right -- the full right to argue.
> THE COURT: Yeah.
> MS. SIMMONS: However, the factual circumstances of those cases and those allegations, especially when one of those cases was voluntarily dismissed by the State, and the State has yet to file in the other case, I think that is going beyond what should be considered in sentencing Mr. McKendrick here today. As far as the JOC goes, those are things that we can't really argue against.
> THE COURT: Sure.
> MS. SIMMONS: Those already happened. But the police reports for the other two cases, I do believe are being inappropriately used here.

ROA(C338224), at 108-110

Counsel continued to object to habitual treatment after the State made their argument for habitual treatment.

> MS. SIMMONS: As far as the other cases go, I mean, Your Honor, already knows my position. Those are cases were either voluntarily dismissed by the State, or have not yet been filed. So while I do understand that there's still an issue, there's clearly even based on the allegations

> concerns for the State and Your Honor, based on the simple allegations placed in those new cases -- or, well one older case and then the quote-unquote new case. But what's also clear from the yet -- unyet -- or the yet to be filed case.
> THE COURT: Sure.
> . . .
> MS. SIMMONS : . . . *I do believe habitual treatment is inappropriate in this case*. Mr. McKendrick has never been treated as a habitual criminal before. So jumping from zero to large does seem a little bit inappropriate, even when you consider the way that things move. Obviously the way that the law is currently written allows for anything two or more, or three or more. But it's *very clear from the intent of a legislature based on the recent changes, which aren't in affect now, but do clearly indicate the way that the State is wanting to treat what is considered a habitual -- criminal*. And at this stage, Mr. McKendrick, if that law were in place, he would not qualify based on the history that he has. Because of that, *I do believe that habitual criminal is inappropriate*, and the fact that he has three prior felonies, obviously, very serious prior felonies, but that does not mandate a large habitual criminal sentences in this case.

ROA(C338244), at 123-124.

As indicated above, Counsel did argue against habitual treatment. McKendrick's claim that Counsel failed to subject the "case to meaningful adversarial testing" is belied by the record. Opening Brief, at 10-11; ROA(C338244), at 108-110, 123-124.

McKendrick fails to assert what grounds Counsel could have successfully challenged his habitual criminal status. McKendrick does not claim the district court incorrectly applied NRS 207.010, nor does McKendrick claims his prior convictions

were used improperly or that they were incorrect. As such, McKendrick's newly raised claim is bare and naked. Because McKendrick newly raised claim is belied by the record and bare and naked, McKendrick suffered no prejudice. Therefore, this Court should decline to hear McKendrick's new claim..

CONCLUSION

Therefore, for the above reasons, this Court should AFFIRM the district court's denial of McKendrick's Petition of Writ of Habeas Corpus (Post-Conviction).

Dated this 18th day of November, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 3,199 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 18th day of November, 2021.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 18, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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