In the Supreme Court of the State of Nevada

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No. 85884

DAINE CRAWLEY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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

APPELLANT'S REPLY BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

DAINE CRAWLEY, Appellant v. THE STATE OF NEVADA Respondent.	NO. 85884

Reply Brief

I. Summary

Our appeal arguments are that Mr. Crawley committed to the plea agreement unknowingly, the pretrial withdrawal efforts were inadequate and he had prejudicial ineffectiveness at sentencing. This case should be remanded for an evidentiary hearing.

He thought he was agreeing to a 1-5 year sentence for possession of a small pocketknife but instead was agreeing to the possibility of life imprisonment without parole. He was ultimately sentenced to seven to twenty years. Trial counsel appointed to represent him in the plea

withdrawal efforts and sentencing was prejudicially ineffective. He did not get any sort of documentation to support Mr. Crawley's treatment efforts; nor did he order the requisite transcripts or provide a sworn declaration by Crawley. See Attorney Arnold Motion to Withdraw Guilty Plea. 1AA63-68. No documentation is provided and even the State complains of this: …Crawley fails to present evidence to this court…Proof of that claim is required before this could should even entertain" the argument. 1AA70. All of these arguments show why an evidentiary hearing is mandated.

II. Pro Per Arguments.

We concede that most of the pro per arguments raised by Mr. Crawley are fitted for a direct appeal but not sufficient to establish ineffectiveness of appellate counsel for failure to raise these issues. To the extent that the pro per arguments overlap with our arguments herein we incorporate them. Answering Brief p. 8-14.

The remainder of this brief will focus on the primary appeal arguments and the response to them. Opening Brief p. 29-36: Plea Withdrawal; p. 36-41: Sentencing; p. 41-42 Evidentiary Hearing. Answering Brief p.

15-25: Plea Withdrawal; p. 26-30 Sentencing; p. 31-33 Evidentiary Hearing.

III. RESPONDENT MISSTATES THE RECORD AND WE PROVE THE PLEA WAS UNKNOWING DUE TO PREJUDICIAL INEFFECTIVENESS. Answering Brief p. 15.

The Respondent argues "To the District Court, Appellant argued that his counsel failed to fully advise him of his plea, and that his second counsel did not effectively argue his motion to withdraw his plea. Appellant now argues that the District Court erred in finding Appellant knowingly and voluntarily entered into the plea agreement because it he did not account for the totality of circumstances." Response Brief p 15. End.

It is unclear what Respondent is hoping for with this assertion. He does not allege that it rises to a level of a new argument that needs to be excised from this court's consideration. See: 'In the ordinary course, the United States Supreme Court will not decide questions neither raised nor resolved in the courts below.' Glover v. United States, 531 U.S. 198, 199, 121 S. Ct. 696, 698 (2001). '…this court generally declines to consider issues not raised in a post-conviction petition filed in district court when no cause and prejudice is alleged for the failure

to raise issues below). Accordingly, we do not address these claims.' McNelton v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Nor does he cite to the lower court record regarding where this conflict can be found.

To the extent that he is implying this - we point the court's attention to the record which demonstrates that the arguments raised at the District Court level and now are identical: "To establish prejudice in the context of challenging a guilty plea agreement based upon the ineffective assistance of counsel, Petitioner must demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial…." District Court Supplemental Brief 2AA394.

"He can show this prejudice by a declaration under oath and also by pointing to the strengths of this case now known to support the believability of his declaration District Court Supplemental Brief 2AA394. "The totality of the circumstances must demonstrate that a defendant pleaded guilty with knowledge of the direct consequences of his plea." 2AA394. Opening Brief p. 29-30. "Direct consequences are

those ramifications that have 'a definite, immediate and largely automatic effect on the range of the defendant's punishment." 2AA394. "The totality of the circumstances must demonstrate that a defendant pleaded guilty with knowledge of the direct consequences of his plea….Mr. Crawley's sentence exposure is a direct consequence of his plea ….2AA397. …It was the misinformation and lack of his information by his attorney that led him to accept an agreement he otherwise would not have. And that caused a sentence much larger than anticipated. 2AA398. Declaration of Mr. Crawley: 56. I don't feel she explained the plea agreement to me sufficiently and this lead to an unknowing plea on my part. It was my understanding if I showed that I had tried to get into programming the State would honor the spirit of the agreement and not seek habitual treatment at sentencing. 2AA425. 60. Though a habitual potential is stated in the plea agreement [4:-12] I thought it was to be read in combination with the agreement that the State would not seek the habitual if he made good faither efforts to get treatment. I was also not advised that out of state convictions would count. Nor did I know that felony crimes from other states qualifying as gross misdemeanors out here would be counted as felonies. 2AA426. 62. I would not have accepted the plea agreement and instead

would have insisted on going to trial had I known what I know now; but did not know because my representation was prejudicially ineffective. 2AA426.

We have always argued that the plea was unknowing because of trial counsel's prejudicial ineffectiveness: District Court Supplemental Brief submitted 08.26.2022: Supplemental Brief: 2AA395

Its true, we do partially gear our argument at the appeal level toward addressing why the District Court is wrong in the ruling -instead of just restating our initial lower court argument. And here it was apparent in the language in their Opinion that they were basing their finding solely on the plea colloquy transcript and written plea form. Opening Brief p. 29. See also 3AA679-699 at 684-685. And further like the Respondent - the lower court misstates the record and finds that "he also does not elaborate on what was not explained or what would have caused him to reject the agreement." 2AA685 lines 14-15.

Not only have we provided very specific information on what made his plea unknowing due to prejudicial ineffectiveness of trial counsel we have pointed to his very significant mental health records and his

condition the night he was charged with these two crimes which bolster the strength of his case. 2AA409-483; 3AA485-646.

His initial 2 charges were assault with a deadly weapon and 2- carrying a concealed weapon. Under NRS 200.471 assault requires intent. Mr. Crawley swears in point 48 of his Sworn Declaration "What I do definitely remember is I never had any intent to hurt anyone." 2AA423. Further Nevada Behavioral Health records verify his regular treatment with this during this time period and his significant mental health issues. 2AA428-484. 3AA485-517.

The judge / respondent find it significant that when asked whether he was satisfied with the performance of his counsel he answered yes. 3AA685. But how are you supposed to know if you weren't told or were told something contrary? What if they have asked him. So Mr. Crawley you think you just plead to 1-5 years when in reality you have just committed to life imprisonment without the chance of parole – now tell me again – are you satisfied with the representation you received. 1AA23 lines 4-5. [See N.R.S. 207.010(1)(b), Habitual Criminals as amended through 1997 Laws, c. 314, § 8, at 1184. Manley v. Filson, No. 3:15-cv-00083-LRH-WGC, 2018 U.S. Dist. LEXIS 53476, at *9

(D. Nev. Mar. 29, 2018)]. [Overturned: Carter v. State, 79 Nev. 89, 378 P.2d 876 (1963) on tabulating habituals and out of state convictions.]

If everything Mr. Crawley alleges is true – then his plea was unknowing and should be overturned due to manifest injustice caused by prejudicially ineffective trial counsel. 2AA406.

Respondent appears to argue that there can be no 'unknowing plea' found if it is based on increased time that could occur if a habitual is added to the sentencing factors. Respondent's Answering Brief p 22. But you are required to be informed of your risk to sentencing exposure under the plea agreement, period. The plea agreement addresses the potential of a habitual. 1AA22-29 at 23. Trial counsel was duty bound to advise him what this meant for him in direct consequences should the threat play out. The numbers given in the plea form are too broad to implicate any sort of knowing plea. Rather his counsel really needed to go through his background and address what this most likely meant for him in numbers. Obviously having a tiny little knife leading to life imprisonment without is ridiculous but that is one of the potentials

listed on the form. And leads one to believe that the habitual portion of the form is not applicable to him in a practical manner.

Respondent misinterprets precedent to mean that you can't look beyond the plea agreement and plea colloquy to show the plea was unknowing citing Crawford v. State and Rubio v. State p. 15 of their brief. To wit on page 16 of their brief they state: 'Appellant's plea agreement, combined with the plea canvass conducted by the District Court, establishes by totality of the circumstances that Appellant's guilty plea was the result of a voluntary and informed choice." "But a claim is not 'belied by the record' just because a factual dispute is created by the pleadings or affidavits filed during the postconviction proceedings. A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." *Id.* at 354, 46 P.3d at 1230. Berry v. State, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015). And the claim here – includes the postconviction record and whether or not his counsel told him something false or misleading off the record and relied on it to commit to the plea.

While the agreement does discuss the possibility of a habitual treatment adding from five to twenty years to his sentence (p. 20 Response Brief) citing 1AA22-23 in which the use of his prior crimes could be used to increase his sentence if he among other things incurs new criminal charges – it does not address the inmate's position that he was assured the State would not seek this if he made efforts to get treatment. Further it does not establish that he was advised that felonies in other states that are misdemeanors here would be treated as felonies in this state for the purpose of tabulating sentencing and habitual penalty. 2AA426 lines 12-20. This is all a direct consequence of the plea. This form goes further: may have to increase my sentence as an habitual criminal to five (5) to twenty (20) years, life without the possibility of parole, life with the possibility of parole after (10) years, or a definite twenty-five (25) year term with the possibility of parole after ten (10) years. 1AA23.

The respondent's claims that Crawley does not state for the record why he felt his plea was unknowing is belied by the record. See page 32 of the Opening Brief citing from Crawley's sworn signed declaration. 2AA409-427:

Declaration of Daine Crawley: 3AA409-427. Petitioner very carefully outlines in his petition and sworn Declaration exactly why his attorney's errors led this to be an unknowing involuntary plea. Said errors resulted in him committing to a plea agreement that risked far more imprisonment time than what he was led to believe could be possible under his circumstances.

Examples 2AA409-427:

Declaration of Crawley: 57. I don't feel he explained the plea agreement to me sufficiently and this led to an unknowing plea on my part. It was my understanding if I showed that I had tried to get into programming the State would honor the spirit of the agreement and not seek habitual treatment at sentencing. 2AA425.

60. Though a habitual potential is stated in the plea agreement [4:1-2] I thought it was to be read in combination with the agreement that the State would not seek the habitual if he made good faith efforts to get treatment. I was also not advised that out of state convictions would count. Nor did I know that felony crimes from other states qualifying as gross misdemeanors out here would be counted as felonies. 2AA426.

62. I would not have accepted the plea agreement and instead would have insisted on going to trial had I known what I know now; but did

not know because my representation was prejudicially ineffective. 2AA426.

See also argument hearing transcript and briefing materials. 3AA668:

MS. LOWE:

MS. LOWE: First and foremost with respect to the plea agreement, the State seems to imply that since he was told that he has an exposure of one to five years that anything else is a collateral consequence of the plea. We disagree with that. 3AA668. Right. Direct consequence has the immediate and largely automatic effect on the range of the Defendant's punishment. 3AA669.

And he's stating that he was told if he participated or tried to participate in programming the State would not seek habitual treatment. He's stating he was not aware of other things with respect to the plea agreement either. For instance, that his out of state felonies which are misdemeanors would be treated as felonies in this state. He wasn't aware that they would be counted and he thought that his treatment at Nevada Behavioral Health was sufficient under the spirit of the agreement as per Gonzalez that it would be honored without raising the exposure from one to five years to seven to twenty years which is

ultimately what he got for having a tiny little razor blade which he didn't even consider a knife on him. 3AA669.

Respondent does not attempt to address our citation of Toston v. State. Opening Br p.30-31. This was a case where inmate states he was given incorrect advise causing him he to forgo a direct appeal. The court determined that the record established he was properly advised of his limited right to appeal but the record did not establish whether he gave up that right because of off the record misinformation from his counsel. And we believe this reasoning can be extended to cover Crawley's situation and allow a broader examination of what is now the record consisting of Mr. Crawley's sworn declaration among other things.

Respondent cites 7 cases mainly with broad generalized quotes and ignoring the favorable quotes to Crawley also found within.

Answering Brief p 15 "Guilty Pleas are valid if both voluntary and intelligent. Brady v. United States, 397 U.S. 742, 747 (1970). "

Brady also states: Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. Brady v. United States, at 743.

Beyond that Brady is a federal death penalty case primarily focusing on whether 'risk of death penalty' is a sufficient State threat to allow a plea to be withdraw because of the duress and sense of coercion it created. It does not.

The Answering Brief cites Crawford v. State on p. 15: 'The guidelines for voluntariness of guilty pleas require only that the record affirmatively show that the defendant entered his plea understandingly and knowingly.' 117 Nev. 718 (2001). The Answering Brief says it was overturned on other grounds and it is true that the warnings are listed by other similar headnotes but not headnote 7 wherein this quote is found. We would assert nevertheless that it was this very sentiment that 2015 caselaw sought to replace: See LexisNexis Shepards which states Crawford v State was overruled because: Overruled in part by: Stevenson v. State 131 Nev. 598, 354 P.3d 1277, 2015 Nev. LEXIS 73, 131 Nev. Adv. Rep. 61. 'More recently, federal courts have expressly rejected the notion that the "fair and just" analysis turns upon the validity of the plea. United States v. Ortega-Ascanio, 376 F.3d 879, 884 (9th Cir. 2004). ... Thus, the statement in Crawford which focuses the "fair and just" analysis solely upon whether the plea was knowing, voluntary, and intelligent is more narrow than contemplated by NRS

176.165. We therefore disavow Crawford's exclusive focus on the validity of the plea and affirm that the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just.' In Crawford the plea was reversed because the appeal court found the trial court specifically induced the defendant to plead guilty to murder with use of a deadly weapon by promising he would be allowed to stay out on bail until after Christmas and sentencing. Since the trial judge did not stand by this promise then the plea agreement was revoked. So to with Crawley, he has repeatedly said that he was told that if he sought mental health treatment the State would not seek the habitual. Thus this promise though outside the plea hearing and plea form – must be considered as part of the totality of circumstances to allow overturning the agreement.

And likewise with Rubio v. State cited in the Answering brief at p. 15: "A guilty plea is knowing and voluntary if the defendant 'has a full understanding of both the nature of the charges and the direct consequences arising from a plea of guilty.' Rubio v. State, 124 Nev. 1032, 1038 (2008). While we don't disagree with the quote we find it

of note that in this case the court found relief because trial counsel affirmatively told the client something contrary to the law about chances for deportation. And while normally the absence of information on the chance of deportation is not actionable grounds for plea relief because it is considered a collateral consequence to the plea – in Rubio since there was wrong information given in relation to the plea agreement by the court interpreter she was abandoned to by her attorney it was an exception: "…an affirmative misrepresentation of immigration consequences by counsel was an exception to the general rule." Rubio at 1034.

And a final note on the Respondent's often seen fast and loose use of the phrase 'bare and naked allegations.' Citing Hargrove v State the Respondent argues: "Moreover, Appellant's clam "that the State would not honor the spirit of their agreement on the habitual," is belied by the record. "Bare" and "naked" allegations are not sufficient nor are those belied and repelled by the record. 100 Nev. 498, 502 (1984)." Response Brief p. 25. We have already addressed their faulty use of the term 'belied and repelled by the record.' Under current caselaw, Mann, just because there is something contrary on the record preconviction to the current argument – it does not ban all contrary argument under the

belied by the record law. Rather postconviction sworn declarations can be used to elaborate on what caused the confusion about the plea agreement and thus provide relief even though the written plea agreement and plea hearing would tend to indicate a knowing plea.

But as to bare and naked allegations – and their citation of Hargrove: In Hargrove he pled guilty to making a bomb threat. Later he tried postconviction to withdraw the plea. His briefing support consisted of a claim of innocence and a promise that if he was allowed to withdraw the plea and proceed to trial he would present newly discovered evidence at his trial. Hargrove v. State, 100 Nev. 498 (1984). This does not even come close to the carefully delineated reasons Mr. Crawley asserts his plea was unknowing. Examples 2AA409-427:

Declaration of Crawley: 57. I don't feel he explained the plea agreement to me sufficiently and this led to an unknowing plea on my part. It was my understanding if I showed that I had tried to get into programming the State would honor the spirit of the agreement and not seek habitual treatment at sentencing. 2AA425.

60. Though a habitual potential is stated in the plea agreement [4:1-2] I thought it was to be read in combination with the agreement that the State would not seek the habitual if he made good faith efforts to get

treatment. I was also not advised that out of state convictions would count. Nor did I know that felony crimes from other states qualifying as gross misdemeanors out here would be counted as felonies. 2AA426. 62. I would not have accepted the plea agreement and instead would have insisted on going to trial had I known what I know now; but did not know because my representation was prejudicially ineffective. 2AA426.

IV. Prejudicial Ineffectiveness of Plea Withdraw Counsel

The Respondent does not address this brief minor argument in our appeal. We are not so concerned about it except to the extent that they might claim or the court might rule that because there was a pretrial effort to withdraw a plea – there is some sort of law of the case barring a successful postconviction effort. Trial counsel did not get a sworn declaration from his client to attach to his brief motion. No transcripts were prepared. The efforts at treatment he argues are not backed up by certified institutional records that we have provided herein. Likewise that same attorney with the appeal found the door shut in their face with an admonishment by the court that they were unable to reach the merits of any arguments because no record was provided.

It does seem like relief should be granted for the faulty pretrial withdrawal effort, since the easier standard of pretrial withdrawal 'fair and just' was because of this prejudicial ineffectiveness replaced with the postconviction manifest injustice standard. A much more difficult standard to reach. Nev. Rev. Stat. §176.165 allows a defendant who has pleaded guilty, but not been sentenced, to petition the district court to withdraw his plea. A court may grant such motions for any substantial reason that is "fair and just". Stevenson v. State, 354 P.3d 1277, 1278 (Nev. 2015). The Eighth District has discussed and distinguished the standards of before and after plea withdrawal citing the 2015 Stevenson case; the easier standard to withdraw your plea under is "fair and just" and is before sentencing. After sentencing it is the more stringent standard of "manifest injustice." State v Barajas, 2018 Nev. Dist. LEXIS 243, 9. "The Nevada Supreme Court disavows Crawford's exclusive focus on the validity of a plea and holds that a district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just." Stevenson v. State, 354 P.3d 1277, 1278 (Nev. 2015).

Courts in Nevada generally define "manifest injustice" as "plain error" or a verdict that is "shocking to the conscience of reasonable men." In various contexts, courts have found manifest injustice when there is a jury's disregard of instructions, a misunderstanding of the law, or a verdict that is contrary to the evidence. Courts may also find manifest injustice in the context of withdrawing a guilty plea, revisiting a prior ruling, or granting a new trial. Several cases discuss "manifest injustice" in the context of withdrawing a guilty plea. In Jerome v. State, the court sets forth the standard of review for claims of manifest injustice, noting that it reviews such claims for abuse of discretion. Jerome v. State, No. 74397-COA (Nev. App. Jul. 30, 2019).

In Meyer v. State, the court cites the relevant Nevada statute that allows for withdrawal of a guilty plea to "correct manifest injustice." Meyer v. State, 95 Nev. 885 (Nev. 1979).

Overruled in part on other grounds by Little v Warden, 117 Nev. 845 (2001).

In Trudeau v. State, the court provides several definitions and explanations of "manifest injustice," including that it occurs when a defendant makes a plea involuntarily or without knowledge of the

consequences. Trudeau v. State, No. 74984-COA (Nev. App. Dec. 19, 2018).

And that is what occurred with Mr. Crawley.

V. RESPONDENT'S ARGUMENT THAT MR. CRAWLEY RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING MUST FAIL.

There are two transcripts labeled Sentencing Hearing. The actual sentencing hearing was Wednesday April 1 2020 starting at 11:25 am. 1AA104. Attorney Roger Bailey appeared for Mr. Crawley. Much to Mr. Crawley's chagrin who objected to having a fill in attorney for Mr. Arnold who he felt knew his case better. 1AA107 line 2. 1AA112 line 7-15. Judge Bluth presided. Respondent cites nine cases in their argument purporting to support a finding of effective assistance of sentencing counsel. Respondent has talked circles around it but the fact of the matter is as all admit – the court was wrongly informed by the State that Defendant Crawley standing before the court to be sentenced – had a felony history spanning almost 20 years. Response Brief p 28. That clearly had to stick in her head and be a factor when meting out the final sentencing. Even one additional day in prison is prejudice. In actuality it was only a felony history of only 10 years. Opening Brief p. 37. 3AA669-670. Also he goes on in his memo to say "More careful

analysis of his prior convictions reveals that many also involve the use of or threat to use force. 1AA83. But looking at the PSI you see this is not the case. Supplemental PSI p. 4-6: DUI, Forgery, grand larceny not from person; grand larceny not from person; drug possession; grand larceny not from person, drug possession. It is ineffective and prejudicial and the reasonable attorney would have jumped in and corrected that misstatement. But he was a fill in attorney and probably didn't even know Crawley's history:

The Defendant: I – that's why I kind of wanted to speak to my attorney about this, because I really don't understand…Sentencing Transcript 1AA112 lines 7-8.

Attorney Bailey conferencing on the record with Defendant at sentencing admitting that they did not look into his prior convictions in advance to explain to him the possible effects at sentencing: "Once you get a certain amount of convictions, felony convictions and then you have additional ones; that gives them the right to argue for habitual treatment. We would not have had that, you know [indiscernible]". 1AA113 lines 2-4.

It is interesting that the Respondent now says that any omissions by the trial counsel at sentencing doesn't matter because the defendant himself had an opportunity to address the court. All of the things he discusses in his brief about mitigation documentation minimal though it was – was presented by Mr. Crawley himself. Response Brief p. 28. This he says suffices. But the trial attorney cannot abrogate his responsibility to his client to make an effective sentencing presentation. And in fact the District attorney successfully attacked all evidence presented by Crawley himself at sentencing by stating: Mr. Stanton: "This is a perfect example of what I outlined in my Sentencing Memorandum" – The Court: 'I know'. Mr. Stanton – "that there is nothing of his interaction with the criminal justice system where he tells the truth. And that's exhibited here yet again today for the second time that we've been here." 1AA113.

Therefore we would posit that none of what Mr. Crawley presented should be seen as a replacement or fulfillment to trial counsel obligations to their client at sentencing. Nev. Rev. Stat. § 34.810(1)(a) does not bar a claim that a petitioner received ineffective assistance of counsel at sentencing. Gonzales v. State, 492 P.3d 556, 558 (Nev. 2021).

Prosecutor Stanton continues: "…Number one, and the opportunities that were provided by the court systems as he's professing now. 1AA121. The second thing that I think is important, once again with the theme as I put in the Sentencing Memorandum. There's virtually nothing that this individual says to authorities that's truthful. And once again, that has been -- occurred at the last time we were here for sentencing, and yet again here today. 1AA121. Within two minutes he says completely and opposite things.

"I'm homeless, I don't have any income." 1AA121 line 11.

But then he says,

"I have a place to live and I'm fully employed." Line 13.

So if you go to'" –

THE DEFENDANT: I didn't say that. 1AA121 line 15.

MR. STANTON: 'So if you go to the PSI and of the three PSIs…

…that none of this is verified that he has 14 years of experience as a HVAC technician and was employed as such. 1AA122. ..So what the Defendant claims and asserts isn't even consistent with what he has asserted and claimed in other cases.' 1AA122 line 6-7.

Of course hindsight with the transcript reveals Stanton is wrong, but the damage was one. The only place Stanton could be referring to is found at 1AA117 where Crawley's transcribed statements don't reflect any apparent lies alleged by Stanton. Though they do outline experiences of homelessness and a possible future housing potential.

Defense Counsel Mr. Bailey's statement and any and all argument on behalf of his client was very short: MR. BAILEY: Your Honor, I mean you can see his history, yes. He does have extensive criminal history. But if you go back almost everything is - involves drugs. It's a drug related Your Honor. He does have some document issues as far as his mental health, that's why he's under substance abuse. He's tried to go these different ways.

I'm not saying that Your Honor's inclined to send him to Drug Court. But Your Honor, I don't think habitual treatment is necessary at this point, because it - the underlying offense was Possession of a Deadly Weapon, which [1AA122] basically was more less like a, a tool, a utility tool in the first place. It wasn't so much just a flat out blade that he's going to attack these, these people with - the alleged victim in this case, Your Honor.

More less, they startled him. He was nervous. He was scared. Like I said he's living on the street. He's, you know, he's - everything - his whole life is in chaos, Your Honor. I think obviously he needs some kind of structure. I'm not saying that that could - let him go free. But I think something in the - more in the lines of either 24 to 60 or even 36 to 96 months would be more than in line with the sentencing I think that my client deserves, Your Honor. 1AA123.

THE COURT: Okay.

MR. BAILEY: And with that I'll submit it.

THE COURT: All right. Thank you.

The State's 3 page Sentencing Memorandum which is referred to three times at the Sentencing hearing commences "Defendant has ten (10) prior felony convictions – he is 33 years old. His felony criminal resume spans three (3) state and almost twenty (20) years." 1AA83. Lines 22-23.

This is wrong by 10 years and it was prejudicially ineffective for trial counsel not to correct this. Page 10 lines 14-15 P. 18 line 6 page 19 line 10

Mr. Stanton: This is a perfect example of what I outlined in my Sentencing Memorandum –

The Court I know. P. 10 line 14-16

And at the hearing just before that he wrongly states "So no we have him being arrested in March of 2004 in Virginia for another felony. He's convicted of that. 1AA91. Lines 17-18.

The supplemental PSI reflects a felony conviction stemming from an incident in March 2014 but none in 2004. Supplemental PSI p. 3-6.

PSI and Supplemental PSI Order to be Transmitted to this Court for Consideration April 14, 2023. The date of this incident in this case is June 12 2019. Mr. Crawley has submitted verified treatment records from the Nevada Behavioral Health System documenting his significant struggles with mental health and attempts to better himself – professional diagnosis of issues – which are all mandated by law – as things which can be considered by the court to reduce his sentence. Treatment Records provided from May 17, 2019 to July 23, 2019 with Nevada Behavioral Health Systems. The PSI nor the Supplemental PSI took this into proper consideration.

We also provided medical records from CrossRoads Treatment. 3AA524-641. And several program completion certificates. 3AA646-666. Opening brief p. 38.

See Correll v. Ryan, 539 F.3d 938, 949-51 (9th Cir. 2008).

It is difficult to imagine how the Respondent can say with such confidence and in clear contravention to caselaw that this, none of this matters. Response Brief p 28-30. Respondent states "the Court had enough evidence regarding Appellant's behavioral health based on records submitted to the Court by his counsel. Response Brief p 29. But he does not cite where in the record he alleges this is. Because a review of the record does not establish this. Trial defense counsel did not submit a sentencing memorandum or any documentation.

Next Respondent states that our complaint about trial counsel's statement was vague and not to be considered because we don't cite particulars. Response Brief p. 29. On the contrary we cite very specific particulars by juxtaposing all of the things that he should have included with what he did not. Opening Brief p. 37-38. While we didn't include in the actual Opening brief the full sentencing transcript in the brief proper – but added many citations to it - we do include herein a verbatim recitation of what trial counsel said. 1AA122.

MR. BAILEY: Your Honor, I mean you can see his history, yes. He does have extensive criminal history. But if you go back almost everything is - involves drugs. It's a drug related Your Honor. He does have some document issues as far as his mental health, that's why he's under substance abuse. He's tried to go these different ways.
I'm not saying that Your Honor's inclined to send him to Drug Court. But Your Honor, I don't think habitual treatment is necessary at this point, because it - the underlying offense was Possession of a Deadly

Weapon, which 1AA122 basically was more less like a, a tool, a utility tool in the first place. It wasn't so much just a flat out blade that he's going to attack these, these people with - the alleged victim in this case, Your Honor. More less, they startled him. He was nervous. He was scared. Like I said he's living on the street. He's, you know, he's - everything - his whole life is in chaos, Your Honor. I think obviously he needs some kind of structure. I'm not saying that that could - let him go free. But I think something in the - more in the lines of either 24 to 60 or even 36 to 96 months would be more than in line with the. And as you can see our descriptions provided of it are accurate. His statements were prejudicially deficient.

None of this is provided:

Nevada Behavioral Health Records of Daine Crawley part 1 Supplement Attachment 2AA428- 484
Nevada Behavioral Health Records of Daine Crawley part 2 Supplement Attachment 3AA 485- 517
Community Orthopedic Medical Letter re Treatment of Mr. Crawley 3AA519-520
Declaration of Program Director of CrossRoads of Southern Nevada re Daine Crawley & their Operation James June 3AA521-523
Medical Records of Daine Crawley from Crossroads Treatment 3AA524-641
Clark County Detention Center Inquiry and Response re Release time of Daine Crawley 3AA 642-643
Completion of Program Letter Dated March 25, 2022 from Life Coach at Body, Mind, Soul, Support Solutions from Sharon Bachman 3AA 644-645 2AA366-371
Daine Crawley Certificate of Achievement for Substance Abuse Counseling March 15 2020 3AA 646

VI. RETRACTION

Respondent points out that there is a one line assertion in the opening brief about the State saying on the record that they thought trial

counsel's representation was ineffective. Response Brief p. 30 lines 2-4. Further they point out the record is not cited. And they are correct. Opening Brief p. 41. We retract this statement. It is not on the record and was inadvertently left in a final copy of the brief.

VII. EVIDENTIARY HEARING.

For all of these reasons cited in our briefing, this case must be remanded for an evidentiary hearing. If these allegations are true then Mr. Crawley is entitled to relief because he committed in an unknowing unintelligent manner to his plea agreement because of prejudicial ineffectiveness of counsel. There can be no strategy argument put forward for the tact taken by trial counsel. We argue that we have proven by the record alone that his assistance at sentencing was prejudicially ineffective. But if it is between denial of relief and an evidentiary hearing we would request that the sentencing issue be remanded for hearing as well.

VIII. CONCLUSION

WHEREFORE, based upon the above and foregoing Mr. Crawley respectfully requests this Court reverse the District Court's Findings of Fact, Conclusions of Law & Order and grant an evidentiary hearing.

DATED this 7th day of July 2023.

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 Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 6,214 words;

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 7th Day of July 2023.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

In accordance with NRAP 25, I hereby certify and affirm that this document and the appendix were electronically filed with the Nevada Supreme Court on July 7, 2023. Electronic Service of the foregoing document and appendix shall be made in accordance with the Master Service list as follows:

Steven B. Wolfson Clark County District Attorney

Aaron D. Ford Attorney General Carson City

USPS Priority Mail to Daine Crawley, Stewart Conservation Camp (SCC)

Respectfully Submitted,

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