IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY BRIAN FROST,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 83065

D. Ct. 20CV00635

APPEAL FROM JUDGMENT OF
THE HONORABLE JOHN P. SCHLEGELMILCH

THIRD JUDICIAL DISTRICT COURT

APPELLANT'S OPENING BRIEF

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I. SUMMARY OF ARGUMENT

TOMMY BRIAN FROST (Mr. Frost), Appellant herein, was arrested on two counts of being a principal to the promotion of sexual performance of a minor under the age of fourteen and two counts of lewdness with a minor under the age of fourteen. AA 1-3. Mr. Frost eventually accepted a plea offer and negotiated a settlement of the case. The plea bargain was that Mr. Frost would plead guilty to two counts of lewdness with a minor under age fourteen and the parties were free to argue for the appropriate sentence. The State agreed not to pursue any additional charges against Mr. Frost. The case proceeded to sentencing and the court imposed two terms of life in prison with parole eligibility after ten years, to run consecutive to each other. There was no direct appeal. Mr. Frost filed a first and timely petition for writ of habeas corpus (postconviction) arguing that counsel was ineffective. AA 54-60; 75-88. Counsel was appointed and the petition was supplemented by counsel. AA 89-101.

The State moved to dismiss the Petition on the merits and alleged that the

claims were without merit and that they were belied by the record. AA 64-66. Mr. Frost opposed the dismissal of his Petition and argued that an evidentiary hearing was mandated. AA 68-73.

The District Court held an evidentiary hearing but ultimately dismissed the postconviction litigation and denied relief. AA 102-249. The District Court abused its discretion when it refused to grant postconviction relief to Mr. Frost.

II. JURISDICTION OF THE COURT

This Court has jurisdiction over the direct appeal from the denial of post-conviction relief under NRS 34.575(1). The District Court filed its Order denying post-conviction relief on May 19, 2021. AA254. The notice of entry of order was filed on June 3, 2021. AA 252. A timely notice of appeal from the denial of post-conviction relief was filed by counsel Butko on Mr. Frost's behalf on August 6, 2020. AA June 10, 2021. AA 261.

III. ROUTING STATEMENT

This is an appeal from allegations raised in a first and timely petition for writ of habeas corpus (post-conviction). This case involves a prison term two life sentences in prison with an aggregate of 20 years in prison before parole eligibility. The conviction entered on the lewdness charges, two Category A felony violations of NRS 201.230(2) and NRS 195.020. AA 51-53.

NRAP 17(b) (3) provides that this case would be presumptively assigned to the Nevada Supreme Court.

IV. STATEMENT OF ISSUES

1. **THE DISTRICT COURT'S ORDER DISMISSING THE PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) CONSTITUTED AN ABUSE OF DISCRETION. DISMISSAL VIOLATED THE DUE PROCESS RIGHTS OF PETITIONER UNDER THE FIFTH AND FOURTEENTH AMENDMENTS. COUNSEL WAS INEFFECTIVE UNDER THE SIXTH & FOURTEENTH AMENDMENTS.**

2. **TRIAL COUNSEL WAS INEFFECTIVE AT THE SENTENCING STAGE OF THE CASE WHEN TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PRESENT MITIGATION EVIDENCE, IN VIOLATION OF THE SIXTH & FOURTEENTH AMENDMENTS AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.**

STATEMENT OF ISSUES CONTINUED

3. **THE GUILTY PLEA WAS NOT KNOWING OR VOLUNTARILY ENTERED, IN VIOLATION OF THE FIFTH AMENDMENT RIGHT TO DUE PROCESS.**

4. **COUNSEL'S ACTIONS DEPRIVED MR. FROST OF HIS RIGHT TO DIRECT APPELLATE REVIEW OF HIS SENTENCE AND THE DISCOVERY/BRADY VIOLATION IN THE CASE.**

5. **COUNSEL WAS INEFFECTIVE WHEN COUNSEL FAILED TO LITIGATE THE INABILITY OF THE DEFENSE TO ACCESS THE TELEPHONE INVOLVED AND HAVE IT INSPECTED BY A DEFENSE EXPERT.**

V. STATEMENT OF THE CASE

This appeal involves a guilty plea to two counts of lewdness with a minor under the age of fourteen. There were two co-defendants in the matter. Co-Defendant Jessica Jordan (mother of the children). Ms. Jordan is serving a term of life in prison with parole eligibility after service of ten years on this matter.

Mr. Frost entered a plea and executed a plea memorandum. He claimed in his petition for writ of habeas corpus that he was coerced and threatened into entering the guilty plea.

The case proceeded to sentencing on June 17, 2019. Mr. Frost was sentenced to the maximum possible sentence, that of 20 years in prison and two life in prison

maximum terms. No witnesses were called in mitigation. AA 45-50; 51-53. There was no direct appeal.

Mr. Frost filed a first and timely petition for writ of habeas corpus in the Third Judicial District Court. In his petition, he argued that : 1) ineffective assistance of counsel; 2) involuntariness of plea; 3) coerced guilty plea; 4) failure of the State to provide exculpatory discoverable evidence; 5) destruction of excuplatory evidence (his cell phone) by the State. AA 58.

Counsel was appointed and the petition was amended. The claims raised in the supplemental petition were that: 1) counsel was ineffective when counsel coerced Mr. Frost into entering a plea that was not knowing or voluntary; 2) Counsel was ineffective when counsel failed to move to dismiss the charges due to loss of exculpatory evidence by the State; 3) counsel failed to file a direct appeal and litigate the lengthy consecutive sentences and the *Brady/Discovery* violation. AA 79.

The State moved to dismiss the Petition and Amended Petition and argued that it had no merit or was belied by the record. Mr. Frost opposed the dismissal. The district court granted an evidentiary hearing on the claims.

After an evidentiary hearing on the claims, Judge Schlegelmilch dismissed all claims and found that Mr. Frost did not meet his burden of proof and did not demonstrate prejudice. The district court did not find counsel ineffective. AA 253-260. A timely notice of appeal was filed on the denial of the postconviction case. AA 261.

VI. STATEMENT OF FACTS

Factually, Jessica Jordan, the mother of the two female children, went to the Lyon County Sheriff's Office to make a report of possible child pornography. Ms. Jordan alleged that Mr. Frost asked her to send him sexually explicit photographs of her young girls. Ms. Jordan stated that she did so and sent the pictures to Frost. Mr. Frost was arrested in a Reno park with a cell phone on his person. That cell phone was encrypted. The chip was rendered unreadable when the officers tried to open the phone. AA 62. At the evidentiary hearing, it was discovered that Mr.

Frost's cell phone was released form evidence to the grandmother of the two minor children.

Mr. Frost was evaluated at Lake's Crossing to determine his competence to proceed on the case. Dr. Bissett determined he was competent to proceed to adjudication of the case. AA 26. Dr. Loring determined that Mr. Frost was competent to proceed on the case. AA 32. A competency hearing was held and Mr. Frost was deemed competent by the court to proceed. AA 141.

Mr. Frost signed a plea memorandum and that document contained the phrase: "I understand that a direct appeal in this case is not appropriate." AA 63, 239.

On April 29, 2019, Mr. Frost pled guilty to the two felony lewdness with a minor charges. AA 33-44. Mr. Frost was represented by Mario Walther. AA 34-43.

On June 17, 2019, the case proceeded to sentencing. Mr. Walther made a very short sentencing argument for concurrent prison terms with the overall prison term of life in prison and parole eligibility after service of ten years in prison. AA 48. The State argued for the court to impose the recommendation of the presentence

report, two consecutive life sentences with parole eligibility after service of an aggregate sentence of twenty years in prison. AA 47. The judgment of conviction entered on July 12, 2019.

There was no direct appeal of the sentence or any other issue on this case.

Mr. Frost filed a petition for writ of habeas corpus (postconviction). Counsel was appointed and the petition was amended. The case proceeded to an evidentiary hearing. At the conclusion of the hearing, the district court ruled against Mr. Frost and denied postconviction relief. AA 254-260.

At the evidentiary hearing, Deputy Pruitt testified that he collected two different telephones from Mr. Frost on the date of his arrest. One was on the person of Mr. Frost and was locked. It was placed into evidence. After obtaining a search warrant, the telephone was searched by a program named Intuit Loader and was not able to be opened. AA 111, 242-250. The other phone was not searched. AA 109. The telephone of Jessica Jordan was successfully downloaded b use of Oxygen Forensic. AA 110, 121.

The telephone of Mr. Frost was searched a second time about a month after his arrest by Officer Pruitt and Greg Sawyer of the Washoe County Sheriff's Office. AA 112. There were no defense experts on site at the time of the second search. Mr. Frost did not consent to the search. The detectives tried a JTAG or chip-off to get around the password but that was unsuccessful. The phone was rendered unusable but the chip would still be able to be re-examined in the same fashion. AA 114. The chip would not work in a telephone but would possibly work if placed into a computer. Defense counsel Matthew Merrill was not advised by the State that a second search upon the phone would occur or that it could be destroyed by that search. AA 137. The phone was released by the DA's office to the co-defendant's mother. AA 115, 128. Neither Mr. Merrill or Mr. Walther, defense attorneys, were advised that the telephone was being released to the co-defendant's mother. AA 167. Mr. Frost did not sign consent to release his property to Ms. Jordan's mother and had never met this woman. AA 203.

The evidence against Mr. Frost consisted of the telephone of the co-defendant and the statement of the co-defendant and not any evidence on his person at the

time of arrest or any statement made by Mr. Frost. AA 116, 128. The evidence on Ms. Jordan's phone constituted child pornography. AA 119.

Mario Walther testified that he represented Mr. Frost when he worked at Matt Merrill Law. He did not take steps to have an expert open Mr. Frost's cell phone. AA 156. Mr. Frost advised that he wanted to accept a plea offer so further defense investigation ceased. AA 158. There was never a defense investigate retained on the case. AA 161. Mr. Walther stated that he went through the entire plea memorandum with Mr. Frost and that he told Mr. Frost he expected the DA's office to seek consecutive prison terms. AA 160. Mr. Walther explained that he advises the client of their appellate rights when they go through the plea memorandum. AA 166. No further discussion was had between Mr. Walther and Mr. Frost about appellate rights or appellate issues. AA 167. Mr. Walther did not recall Mr. Frost asking him to file a direct appeal and did not believe there were issues that would have been meritorious on direct appeal. AA 170-171.

Mr. Frost testified that he told Mr. Walther that he wanted to appeal the sentencing hearing. Mr. Walther told Mr. Frost that he would start the appellate process for him but never did so. AA 204.

Mr. Walther testified that he did not coerce Mr. Frost into entering a guilty plea and accepting the plea offer from the State. AA 165. Mr. Walther believed that Mr. Frost understood the plea bargain and the court system. AA 174-175.

After the entry of the plea, Mr. Walther was not present with Mr. Frost when he completed the presentence report packet of information or when he was interviewed by the department. AA 164, 178-179.

Mr. Frost testified at the evidentiary hearing. He noted that Matt Merrill and Mario Walther were his trial attorneys. AA 189. Mr. Frost was upset with Mr. Merrill because he did not believe they had significant contact with each other on the defense case. Mr. Frost indicated that Mr. Merrill only visited him two or three times while he was in the jail pending trial. AA 190. Mr. Frost advised Mr. Merrill that he did not want him to be his attorney. AA 191, 209. Mr. Frost provided Mr. Merrill letters that were written to him by Jessica Jordan, stating

that she was sorry for what she had done to him and wanted to have a relationship. AA 192.

Mr. Frost denied the evidence against him, which was on Facebook. He explained that his cell phone was in the possession of Jessica Jordan's boyfriend and Jessica Jordan and that he did not have possession of that phone. AA 194. He ultimately got his phone back from Jessica Jordan at 4:00 a.m. on August 15. AA 195. Mr. Frost argued that the loss of his cell phone precluded him from being able to defend against the charges. AA 219.

Mr. Frost testified that he advised Mr Walther that he wanted a different attorney. Mr. Frost explained that no one answered the phone at the Walther law office and that even his parents could not contact the office. AA 196. Mr. Frost explained that he was in special education classes his entire school life, that he had learning disabilities and trouble with comprehension. AA 198.

Mr. Frost wanted additional time with Mr. Walther before he signed the plea memorandum. He felt rushed, pushed off and coerced when he signed the document in court. AA 200.

Mr. Frost did send an apology letter for the sentencing proceeding. Mr. Frost testified that he provided that letter because Mr. Walther told him that if he apologized that he might get less prison time. AA 201. Mr. Frost testified that it was very difficult to write the apology letter because he knew that in his heart he was not guilty of the crimes. AA 202.

Mr. Frost offered to give Mr. Merrill the password to his phone to demonstrate that there was no child pornography of any type on his cell phone. AA 190.

At the sentencing hearing, Mr. Walther made a very short statement in support of concurrent sentences. Mr. Frost did not address the court and no sentencing mitigation was presented on the case. The court imposed maximum consecutive sentences which aggregate to 20 years before parole eligibility and two life prison terms. This appeal follows the denial of the postconviction petition and the district court's refusal to grant a postconviction remedy.

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ARGUMENT

1. **THE DISTRICT COURT'S ORDER DISMISSING THE PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) CONSTITUTED AN ABUSE OF DISCRETION. DISMISSAL VIOLATED THE DUE PROCESS RIGHTS OF PETITIONER UNDER THE FIFTH AND FOURTEENTH AMENDMENTS. COUNSEL WAS INEFFECTIVE UNDER THE SIXTH & FOURTEENTH AMENDMENTS.**

Standard of Review:

In *State v. Love*, 109 Nev. 1136, 865 P.2d 322 (1993), this Court reviewed the issue of whether or not a defendant had received ineffective assistance of counsel at trial in violation of the Sixth Amendment. This Court held that the question is a mixed question of law in fact and is subject to independent review and reiterated the High Court's ruling in *Strickland v. Washington*, 466 U.S. 668 (1984).

Strickland sets forth a two-pronged test requiring a defendant to show that "counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense." 466 U.S. at 687. The Nevada Supreme Court indicated that the test on a claim of ineffective assistance of counsel is that of "reasonably effective assistance" as enunciated by the United

States Supreme Court in *Strickland*. See *Love*, 109 Nev. 1136 (1993). Regarding the second prong, "the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

A petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence. *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)) and *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004).

Argument:

This case involved a very strange set of facts. The evidence against Mr. Frost came by way of the codefendant, Jessica Jordan. Mr. Frost's phone was never accessed so there was no evidence that Mr. Frost had really received the pictures of child pornography and the testimony of the codefendant was really the case against him. Ms. Jordan pled guilty and received a sentence of life in prison with parole eligibility after service of ten years. While the case was pending in the district court stages, Ms. Jordan sent letters to Mr. Frost apologizing for her

actions in getting him into trouble and seeking to keep a relationship with Mr. Frost. Defense counsel was advised of the letters. No investigation took place to see what was on Mr. Frost's phone by the defense. A plea offer was accepted which placed Mr. Frost into harm's way for 20 minimum mandatory years in prison before parole eligibility.

Mr. Frost argued that his guilty plea should be withdrawn because he was coerced by counsel into accepting the plea offer from the State. Mr. Frost argued that his sentencing hearing was flawed, that release of his cell phone to Jessica Jordan's mother constituted destruction of evidence and prejudiced the defense case, and that he was deprived of his right to direct appellate review of the sentencing hearing by counsel's failure to file a notice of appeal.

This Court should proceed to review the reasonableness of the available sentence. *See United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006). The United States Supreme Court has concluded that sentencing is such a "critical stage" for purposes of the Sixth Amendment right to effective assistance of counsel. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *Gonzales v. State*, 137 Nev.

Adv. Op, 40.

A district court's findings of fact are entitled to deference and will not be disturbed on appeal if they are supported by substantial evidence and are not clearly wrong. *State v. Rincon*, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006).

In *Hargrove* this Court stated that post-conviction claims must consist of more than "bare" allegations and that an evidentiary hearing is mandated only when a post-conviction petitioner asserts specific factual allegations that are not belied or repelled by the record and that, if true, would entitle him to relief. *Hargrove* is the cornerstone of post-conviction habeas review. *Hargrove v. State,* 100 Nev. 498, 686 P.2d 222 (1984).

A substantively reasonable sentence is one that is "sufficient, but not greater than necessary" to accomplish § 3553(a)(2)'s sentencing goals. 18 U.S.C. § 3553(a); *see, e.g., United States v. Vasquez-Landaver*, 527 F.3d 798, 804-05 (9th Cir. 2008). This sentence was in excess of that needed for society's interests. See *United States v. Rita,* 551 U.S. 338, 127 S. Ct. 2456, 2468-69 (2007).

Counsel was ineffective at sentencing. A new sentencing hearing should

be conducted before a court that has not been exposed to the prior litigation of these four cases.

The defendant is entitled to the presence of counsel during any 'critical stage' of the proceedings. *United States v. Wade*, 388 U.S. 218, 226-27 (1967); see also U.S. Const. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963) (indicating the Sixth Amendment right to counsel is applicable to the states through the Fourteenth Amendment). Mr. Frost proved by a preponderance of the evidence that he was entitled to a new sentencing proceeding.

Mr. Frost pled postconviction ineffective assistance of counsel claims under the Sixth and Fourteenth Amendments which would, if true, entitle him to relief. The District Court abused its discretion when it failed to grant Mr. Frost a remedy.

II. TRIAL COUNSEL WAS INEFFECTIVE AT THE SENTENCING STAGE OF THE CASE WHEN TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PRESENT MITIGATION EVIDENCE, IN VIOLATION OF THE SIXTH & FOURTEENTH AMENDMENTS AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Standard of Review:

See *Strickland standard* above and *Means v. State*, supra.

Argument:

The sentencing argument of Mr. Walther should be sufficient, in and of itself, to demonstrate that counsel was ineffective. Mr. Walther simply stated, in ten typed lines of argument, that Mr. Frost wished to seek help while incarcerated, the charges stem from the same occurrence and that the sentences should be concurrent, qualifying Mr. Frost to parole eligibility after service of 10 years. AA 48. Mr. Frost did not even address the sentencing court.

Mr. Walther had ample information with which to mitigate sentence. His client was in special education throughout his school career. Mr. Frost suffered from mood swings, depression and paranoia. Mr. Frost advised of hallucinations. He heard voices. He suffered from anxiety. AA 22-23. Mr. Frost was homeless

from age sixteen. He was suspended from school on different occasions for truancy and anger problems. He dropped out of high school at 11th Grade due to emotional and learning problems. Mr. Frost had employment but lost some jobs due to his mental health issues. AA 28. Mr. Frost suffered a childhood of physical, emotional and attempted sexual abuse. AA 32. Counsel did not advise the district court that Mr. Frost was amenable to treatment for his mental health issues.

A district court's sentencing decision is reviewed for an abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). The District Court's decision will stand "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State,* 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

This sentence was in excess of that needed for society's interests. See *United States v. Rita,* 551 U.S. 338, 127 S. Ct. 2456, 2468-69 (2007). Mr. Frost should receive a new sentencing hearing.

3. THE GUILTY PLEA WAS NOT KNOWING OR VOLUNTARILY ENTERED, IN VIOLATION OF THE FIFTH AMENDMENT RIGHT TO DUE PROCESS.

Standard of Review:

The defendant bears the burden of demonstrating that his plea "was not entered knowingly and intelligently" (quoting *Bryant v. State*, 102 Nev. 268, 721 P.2d 364 (1986)

Argument:

An attorney must make reasonable investigation in preparation for trial, or make a reasonable decision not to investigate. *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (Nev. 1996). Mr. Frost believes that the co-defendant was acting on her own behalf when she chose to store and send illicit pictures over the Facebook on her telephone. There was no evidence from Mr. Frost's phones that he received those pictures on his equipment.

Defendants have a right to constitutional effective assistance of counsel that extends to the plea bargain stage. This is proper in a system in which 97% of federal criminal cases and 94% of state criminal cases negotiate rather than

proceed to trial. See *Missouri v. Frye*, 132 S. Ct. 1399, at 1386-1387, (2012).

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. To determine the validity of the guilty plea, the supreme court requires the district court to look beyond the plea canvass to the entire record and the totality of the circumstances. The district court may grant a post-conviction motion to withdraw a guilty plea that was not entered knowingly and voluntarily in order to correct a manifest injustice. A guilty plea entered on advice of counsel may be rendered invalid by showing a manifest injustice through ineffective assistance of counsel. U.S. Const. amend. 6. Manifest injustice warranting withdrawal of a guilty plea may be demonstrated by a failure to adequately inform a defendant of the consequences of entering the plea. *Barajas v. State*, 115 Nev. 440, 442, 991 P.2d 474, 475 (1999). *Little v. Warden*, 117 Nev. 845, 849, 34 P.3d 540, 543 (2001); *United States v. Signori*, 844 F.2d 635, 638 (9th Cir. 1988); *Paine v. State*, 110 Nev. 609, 619, 877 P.2d 1025, 1031 (1994), overruled on other grounds by *Leslie v. Warden*, 118 Nev. 773, 780-81,

59 P.3d 440, 445-46 (2002). See also *Bryant v. State*, 102 Nev. 268, 721 P.2d 364 (1986).

Defense counsel's failure to promptly investigate and to thoroughly prepare will often deny the accused his constitutional right to the effective assistance of counsel. See *Powell v. Alabama*, 287 U.S. 45 (1932). Actions of the State precluded review of Mr. Frost's telephone by his own attorneys. No notice was provided to Mr. Frost that the actions of the police could harm the cell phone or the ability to get information off the phone. Counsel advised the guilty plea based upon the fact that Ms. Jordan was willing to testify against Mr. Frost as to her actions in the matter. Mr. Frost made no statement to the police and there was no physical evidence in his possession which inculpated him in the crimes.

Mr. Frost testified that he felt coerced and pressured into the guilty plea. His attorneys disagreed and stopped working on investigation stages of the case once Mr. Frost agreed to the plea offer from the State. Mr. Frost stands ready, willing and able to take his case to jury trial. *Hill v. Lockhart*, 472 U.S. 52 (1985).

The District Court abused its discretion when it found Mr. Frost's guilty plea

knowingly, voluntarily and intelligently entered and denied postconviction relief.

4. COUNSEL'S ACTIONS DEPRIVED MR. FROST OF HIS RIGHT TO DIRECT APPELLATE REVIEW OF HIS SENTENCE AND THE DISCOVERY/BRADY VIOLATION IN THE CASE.

Standard of Review:

See *Strickland* discussion, *supra*. On a defendant's claim that he was deprived of his right to a direct appeal due to ineffective assistance of counsel, the deficiency prong of such a claim has two separate, but related, components: counsel's duty to inform and consult with the client regarding the right to appeal, and counsel's duty to file an appeal. U.S. Const. amend. 6.

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985). Although deference is given to appellate counsel's decisions of which issues to raise on appeal, nonetheless, appellate counsel can be held ineffective if it fails to select proper claims for appeal. *Jones v. Barnes*, 463 U.S. 745 (1983). A petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious

issues while pursuing issues that were clearly and significantly weaker. *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994).

Argument:

This review should start with the premise that the aggregate sentence imposed in this case will keep Mr. Frost in prison for twenty mandatory years prior to even finding parole eligibility. He then has over his head two life prison terms. This is a very serious case. Appellate review should occur.

Mr. Frost testified that he wanted to appeal. The plea memorandum told Mr. Frost that "a direct appeal in this case is not appropriate". Counsel did not know on the date of entry of the plea what could occur later in the prosecution of the case. Counsel did not know if the district court would commit sentencing error. An appeal waiver of sentencing matters contained in a plea memorandum is ineffective as a matter of course.

Mr. Walther testified that he did not see any issues which would be meritorious on direct appeal. Mr. Walther did not provide much in the way of effort on the sentencing portion of the case so he left himself with less to say on

direct appeal. Having stated the obvious, the record still demonstrated ample mitigation evidence which explained the behavior of Mr. Frost and which provided the district court the ability to see that this man could thrive and abide by society's rules if he had mental health treatment.

The State's handling of the key evidence in this case was lacking. The cell phone in Mr. Frost's possession on the date of his arrest was key evidence. The State secured two separate search warrants to search the phone twice. The second search was about a month after Mr. Frost's arrest and he had counsel. Neither he or his attorneys were noticed of the second search warrant so they could have input on securing the evidence on the phone for the defense case. Then, the phone was released by the DA's office to the co-defendant's mother. This is highly improper. Defense counsel failed to litigate that issue or raise it on direct appeal.

Counsel in this case, failed to effectively communicate with Mr. Frost about his appellate rights in violation of *Strickland*, and the Sixth and Fourteenth Amendments. The constitutional right to effective assistance of counsel extends

to a direct appeal. *Burke v. State*, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed in the "reasonably effective assistance" test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (Nev. 1996).

The bottom line is that Mr. Frost proved by a preponderance of the evidence that he wanted a direct appeal. The District Court abused its discretion when it ruled against his right to perfect a belated appeal under NRAP 4 (c).

5. COUNSEL WAS INEFFECTIVE WHEN COUNSEL FAILED TO LITIGATE THE INABILITY OF THE DEFENSE TO ACCESS THE TELEPHONE INVOLVED AND HAVE IT INSPECTED BY A DEFENSE EXPERT.

Standard of Review:

To meet the test for reversal because material evidence has been lost, the accused must "show either (1) bad faith or connivance on the part of the government, or (2) prejudice from its loss." *Crockett v. State,* 95 Nev. 859, 865, 603 P.2d 1078, 1081 (1979). The Defendant must also show the evidence was exculpatory. Evidence which only suggests an alternative theory for the defense

and is not directly exculpatory is insufficient. See *Wood v. State*, 97 Nev. 363, 366-367, 632 P.2d 339, 341 (1981).

Argument:

Mr. Frost's telephone was released by the State to the co-defendant's mother. There was no consent by the defense for that to occur. This is not something that you see every day. It is impossible to understand how that telephone could be released to a person that Mr. Frost had never met.

The State had ample time to notice the defense that it was going to use computer programs that could destroy the phone in order to gain access. Mr. Frost testified he gave his attorney the password so that he could demonstrate there was no child pornography on that phone. Defense counsel suspended any investigation once Mr. Frost agreed to enter a plea bargain with the State.

The district court determined that the telephone was not destroyed, but had no evidence before it that was true. The phone is missing. Mr. Frost never gained access to the phone and certainly never consented to the release of his personal

property to a stranger. The detectives admitted that their programs to hack the phone damaged the access to the phone.

Brady v. Maryland, 373 U.S. 83 (1963) and its progeny require a prosecutor to disclose evidence favorable to the defense if the evidence is material either to guilt or to punishment. *Lay v. State*, 116 Nev. 1185, 1194 (2000); *See Jimenez v. State,* 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996). Failure to do so violates due process regardless of the prosecutor's motive. *Id.* at 618, 918 P.2d at 692. Evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed. *Id.* at 619, 918 P.2d at 692.

Due process does not require simply the disclosure of "exculpatory" evidence. Evidence also must be disclosed if it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation or to impeach the credibility of the State's witnesses. *See id.* at 442 n. 13, 445-51, 115 S.Ct. 1555.

Information in the possession of other agencies is imputed *Brady* material and the State has the obligation to reveal said exculpatory evidence to the defense

in a timely manner. Evidence also must be disclosed if it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks." *Mazzan v. Warden*, 116 Nev. 48, at 67, 993 P.2d 25, at 37 (2000).

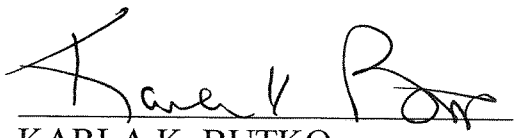
The State is held responsible for the actions of the police in their investigation stage of the case. The Defendant, of course, had no ability to collect or preserve any of the evidence that is complained of being destroyed. The Defendant must show either bad faith or connivance on the part of the government or prejudice by the loss of the evidence. Where evidence is lost as a result of inadequate governmental handling, a conviction may be reversed. *Crockett v. State*, 95 Nev. 859, 603 P.2d 1078 (1979).

This case involved a very unusual set of facts as evidence. The bulk of the evidence against Mr. Frost was coming from an accomplice/ codefendant, Jessica Jordan. The State's actions in failing to secure the cell phone of Mr. Frost for his defense case reduced his ability to defend the charges against him.

CONCLUSION

This Court should reverse the decision of the District Court and remand this matter for a jury trial. Alternatively, Mr. Frost is entitled to a new sentencing hearing at which he has effective counsel and before a court that has not been subjected to litigation in this matter. Mr. Frost was deprived of his right to direct appeal and those issues should be reviewed herein by this Court.

Respectfully submitted this 26th day of October, 2021.

By: 

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, entitled, "APPELLANT'S OPENING 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 Rule of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

I further certify that this brief complies with the page- or type- volume limitation of 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does exceed 30 pages but meets the word and line counts found in the rules.

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. The document was prepared in Word Perfect

with 2.45 line spacing, proportionally spaced type. There are 31 typed pages; 5,993 words in this brief and 583 lines of type. The Brief has been prepared in Word Perfect, proportionally spaced type, 14 point Times New Roman type with 2.45 line spacing.

DATED this 26th day of October, 2021.

By: Karla K Butko

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

X Nevada Supreme Court Eflex Delivery

__Stephen Rye
District Attorney
Lyon County District Attorney's Office

DATED this 26th day of October, 2021.

KARLA K. BUTKO, ESQ.