

IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY BRIAN FROST,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Oct 26 2021 10:06 a.m.
Elizabeth A. Brown
Clerk of Supreme Court
Docket # 20CV00635
D. Ct. 20CV00635

APPEAL FROM JUDGMENT OF
THE HONORABLE JOHN P. SCHLEGELMILCH

THIRD JUDICIAL DISTRICT COURT

APPELLANT'S APPENDIX

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P. O. Box 1249
Verdi, Nevada 89439
(775) 786-7118
State Bar # 3307

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Lyon County District Attorney
Attorney for Respondent
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Yerington, NV 89447
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INDEX TO APPELLANT'S APPENDIX
VOLUME 1

<u>Document</u>	<u>Pages</u>
Criminal Complaint.	1-4
Amended Criminal Complaint.	5-8
Conditional Waiver of Preliminary Hearing.	9
Unconditional Waiver of Preliminary Hearing.	10
Information.	11-14
Information.	15-17
Motion for Medical and Psychological Evaluation Re: Competency.	18-32
Transcript of Proceedings, Arraignment, April 29, 2019	33-44
Transcript of Proceedings, Judgment and Sentencing June 17, 2019.	45-50
Judgment of Conviction.	51-53
Petition for Writ of Habeas Corpus (Post-Conviction).	54-60
Motion to Dismiss Petition and Amend Petition for Writ of Habeas Corpus (Post-Conviction).	61-67

INDEX TO APPELLANT'S APPENDIX
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<u>Document</u>	<u>Pages</u>
Opposition to Motion to Dismiss: Petition & Amended Petition for Writ of Habeas Corpus (Post-Conviction). . .	68-74
Petition for Writ of Habeas Corpus (Post-Conviction).	75-88
Amended Petition for Writ of Habeas Corpus (Post-Conviction)	89-101
Transcript of Proceedings, Writ of Habeas Corpus Post Conviction, March 23, 2021.	102-236
Exhibits to Evidentiary hearing on postconviction:	237-251
Guilty Plea Agreement.	237-241
Canal Township Justice Court, County of Lyon, State of Nevada, Application for Search Warrant	242-248
Canal Township Justice Court, County of Lyon, State of Nevada, Search Warrant	249
Lyon County Sheriffs Office, Law Supplemental Narrative . . .	250
Lyon County Sheriffs Office, Law Supplemental Narrative. . . .	251
Notice of Entry of Order.	252-260
Notice of Appeal.	261-262

Case No. 18CR192

FILED
CANAL TOWNSHIP JUSTICE COURT

DA Case No.

2018 AUG 16 AM 10:17

LISA GRIGG
CLERK OF COURT

DEPUTY

IN THE JUSTICE COURT OF CANAL TOWNSHIP

IN AND FOR THE COUNTY OF LYON, STATE OF NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

CRIMINAL COMPLAINT

TOMMY BRIAN FROST,

Defendant.

COMES NOW, Plaintiff, State of Nevada, by and through STEPHEN B. RYE, Lyon County District Attorney, and BRIAN HASLEM, Deputy District Attorney, and hereby verifies and declares upon information and belief and under penalty of perjury, that TOMMY BRIAN FROST, the Defendant above-named, has committed the following crime(s):

COUNT I

PRINCIPAL TO THE PROMOTION OF SEXUAL PERFORMANCE OF A MINOR (VICTIM UNDER THE AGE OF FOURTEEN), in violation of NRS 200.720, NRS 200.750, and NRS 195.020, a CATEGORY A FELONY

That on, about, or between the 1st and 15th days of August, 2018, in Fernley, Canal Township, Lyon County, State of Nevada, Defendant did willfully and knowingly promote the performance of a minor to engage in or simulate, or assist others to engage in or simulate, sexual conduct, or be the subject of a sexual portrayal, or did aid or abet the commission of this offense, or did directly or indirectly counsel, encourage, hire command, induce, or otherwise procure another to commit this offense, to-wit: Defendant did request, instruct, insist, and/or encourage E.J., a known but unnamed juvenile female (DOB: 7/7/2014), to

1 participate in sexual acts, and/or to pose in various positions, and/or to manipulate said
2 victim's body in a sexual manner, in the nude, for the purpose of photography, or did aid or
3 abet the commission of this offense, occurring at or near 556 Osprey Drive, Fernley, Nevada.

4 **COUNT II**

5 **PRINCIPAL TO THE PROMOTION OF SEXUAL PERFORMANCE OF A MINOR (VICTIM**
6 **UNDER THE AGE OF FOURTEEN), in violation of NRS 200.720, NRS 200.750, and NRS**
7 **195.020, a CATEGORY A FELONY**

8 That on, about, or between the 1st and 15th days of August, 2018, in Fernley, Canal
9 Township, Lyon County, State of Nevada, Defendant did willfully and lewdly commit a lewd or
10 lascivious act, other than acts constituting the crime of sexual assault, upon or with the body,
11 or any part or member thereof, of a child under the age of 14 years, with the intent of
12 arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of
13 that child, or did aid or abet the commission of this offense, or did directly or indirectly counsel,
14 encourage, hire command, induce, or otherwise procure another to commit this offense to wit:
15 Defendant did request, instruct, insist, and/or encourage E.J., a known but unnamed juvenile
16 female (DOB: 7/7/2014), to participate in sexual acts, and/or to pose in various positions,
17 and/or to manipulate said victim's body in a sexual manner, in the nude, for the purpose of
18 photography, or did aid or abet the commission of this offense, occurring at or near 556
19 Osprey Drive, Fernley, Nevada.

20 **COUNT III**

21 **PRINCIPAL TO LEWDNESS WITH A CHILD UNDER THE AGE OF SIXTEEN (16) YEARS**
22 **OF AGE, in violation of NRS 201.230(2) and NRS 195.020, a CATEGORY A FELONY**

23 That on, about, or between the 1st and 15th days of August, 2018, in Fernley, Canal
24 Township, Lyon County, State of Nevada, Defendant did willfully and lewdly commit a lewd or
25 lascivious act, other than acts constituting the crime of sexual assault, upon or with the body,
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16 Defendant did request, instruct, insist, and/or encourage K.V., a known but unnamed juvenile
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1 All of which is contrary to the form of statute in such cases made and provided and
2 against the peace and dignity of the State of Nevada. Complainant prays that a summons
3 and/or warrant be issued and that said Defendant be dealt with according to law.

4 I declare under penalty of perjury under the law of the State of Nevada that the
5 foregoing is true and correct.

6 DATED this 16 day of August, 2018.

7 STEPHEN B. RYE
8 District Attorney

9 By: Brian Haslem
10 Brian Haslem
11 Deputy District Attorney
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Case No. 18 CR 00192 3F

DA Case No.

CANAL TOWNSHIP JUSTICE COURT

2019 FEB 28 PM 3:50

LISA GAGG
CLERK OF COURT

DEPUTY

IN THE JUSTICE COURT OF CANAL TOWNSHIP
IN AND FOR THE COUNTY OF LYON, STATE OF NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

AMENDED CRIMINAL COMPLAINT

TOMMY BRIAN FROST,

Defendant.

COMES NOW, Plaintiff, State of Nevada, by and through STEPHEN B. RYE, Lyon County District Attorney, and DAMIAN D.Q. SINNOTT, Deputy District Attorney, and hereby verifies and declares upon information and belief and under penalty of perjury, that TOMMY BRIAN FROST, the Defendant above-named, has committed the following crime(s):

COUNT I

PRINCIPAL TO THE PROMOTION OF SEXUAL PERFORMANCE OF A MINOR (VICTIM UNDER THE AGE OF FOURTEEN), in violation of NRS 200.720, NRS 200.750, and NRS 195.020, a CATEGORY A FELONY

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6 **UNDER THE AGE OF FOURTEEN), in violation of NRS 200.720, NRS 200.750, and NRS**
7 **195.020, a CATEGORY A FELONY**

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9 Township, Lyon County, State of Nevada, Defendant did willfully and lewdly commit a lewd or
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11 or any part or member thereof, of a child under the age of 14 years, with the intent of
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20 **COUNT III**

21 **PRINCIPAL TO LEWDNESS WITH A CHILD UNDER THE AGE OF SIXTEEN (16) YEARS**
22 **OF AGE, in violation of NRS 201.230(2) and NRS 195.020, a CATEGORY A FELONY**

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1 All of which is contrary to the form of statute in such cases made and provided and
2 against the peace and dignity of the State of Nevada. Complainant prays that a summons
3 and/or warrant be issued and that said Defendant be dealt with according to law.

4 I declare under penalty of perjury under the law of the State of Nevada that the
5 foregoing is true and correct.

6 DATED this 28th day of February, 2019.

7 STEPHEN B. RYE
8 District Attorney

9 By: 

10 Damian D.Q. Sinnott
11 Deputy District Attorney
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Case No. 18CR192

FILED
CANAL TOWNSHIP JUSTICE COURT

2019 OCT -2 PM 12:42

LISA GRIGG
CLERK OF COURT

DEPUTY [Signature]

IN THE JUSTICE COURT OF CANAL TOWNSHIP
IN AND FOR THE COUNTY OF LYON, STATE OF NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs

**CONDITIONAL WAIVER
OF PRELIMINARY HEARING**

Tommy B. Frost
Defendant.

I, Tommy Brian Frost, the above named Defendant,
hereby conditionally waive all rights to a preliminary examination in the above entitled action and
hereby consent to be bound over for trial on a charge of: Porn to Promotion of sexual
performance, Porn to Promotion of sexual performance, porn to lewdness
porn to lewdness
to the Third Judicial District Court of the State of Nevada, in and for the County of Lyon, and hereby
consent to arraignment on said charges in said Court on Monday,
the _____ day of _____, 20_____.

The conditions upon which this waiver is based are: Lakes

Crossing competency evaluation

DATED this 2 day of October, 2018.

[Signature]
Defendant

[Signature]
Witness/Attorney

Case No. 18CR192

CANAL TOWNSHIP JUSTICE COURT

2019 MAR -5 PM 2:30

LISA GRUBB
CLERK OF COURT

DEPUTY

IN THE JUSTICE COURT OF CANAL TOWNSHIP
IN AND FOR THE COUNTY OF LYON, STATE OF NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs

**UNCONDITIONAL WAIVER OF
PRELIMINARY EXAMINATION**

Tommy Frost
Defendant.

I, Tommy Frost, the Defendant in the above entitled action, having been fully advised of my right to a preliminary examination before this Court, hereby unconditionally waive my right to a preliminary examination upon the charge(s) filed against me in the complaint filed in this matter. I understand and consent that my case shall be transferred to the Third Judicial District Court of the State of Nevada, in and for the County of Lyon, to answer to the charge(s).

I, further understand that this waiver is not conditioned upon any plea agreement that I may have reached with the State of Nevada. I fully understand that in the event I decide not to enter into such agreement at the District Court, I will not be entitled to a preliminary hearing on any charge(s) filed against me upon this complaint.

DATED this 5 day of March, 2019.

[Signature]
Defendant

This is to certify that the foregoing Unconditional Waiver of Preliminary Examination was knowingly and voluntarily signed by the above named Defendant in my presence on the this 5 day of March, 2019.

[Signature]
Witness/Attorney

Defendant will plead Guilty TO 2 counts principal to Lewdness with - ch.10 NRS 201.230(2) a Cat A Felony Other counts 10

Case No. 18-CR-01197

Dept No. I

TCN: NVLYSO2002868C

FILED

2018 OCT 10 AM 8:58

TANYA SCORINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Andrea Andersen

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

THE STATE OF NEVADA,

Plaintiff,

vs.

INFORMATION

TOMMY BRIAN FROST,

Defendant.

STEPHEN B. RYE, District Attorney within and for the County of Lyon, State of Nevada, in the name and by the authority of the State of Nevada, informs the above-entitled Court that TOMMY BRIAN FROST, the Defendant above named, has committed the offenses of:

COUNT I

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4 **COUNT II**

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18 offense to wit: Defendant did request, instruct, insist, and/or encourage K.V., a known but
19 unnamed juvenile female (DOB: 10/6/2015), to participate in sexual acts, and/or to pose in
20 various positions, and/or to manipulate said victim's body in a sexual manner, in the nude, for
21 the purpose of photography, or did aid or abet the commission of this offense, occurring at or
22 near 556 Osprey Drive, Fernley, Nevada.

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1 All of which is contrary to the form, force and effect of the statute in such cases made
2 and provided and against the peace and dignity of the State of Nevada.

3 Pursuant to NRS 239B.030, the undersigned hereby affirms that this document does
4 not contain social security numbers.

5 DATED this 5 day of October, 2018.

6
7 STEPHEN B. RYE
Lyon County District Attorney

8
9
10 By: Brian Haslem
11 Deputy District Attorney

12 The witnesses known to the State at the time of the filing of this Information are as
13 follows:

14 Deputy Gregory Kantz 911 Harvey
15 Yerington, NV, 89447

16 Jessica Ann Jordan 556 Osprey Way
17 Fernley, NV, 89408

18 Detective Erik Pruitt 911 Harvey Way
19 Yerington, NV, 89447

20 Victim#1 18 Ly03666 ...

21 Victim#2 18 Ly03666 ...

Case No. 18-CR-01197

Dept No. I

TCN: NVLYSO2002868C

FILED

2019 MAR 11 PM 2:49

TANYA SCHEIDT
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Andrea Andersen CLERK

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

THE STATE OF NEVADA,

Plaintiff,

vs.

INFORMATION

TOMMY BRIAN FROST,

Defendant.

STEPHEN B. RYE, District Attorney within and for the County of Lyon, State of Nevada, in the name and by the authority of the State of Nevada, informs the above-entitled Court that TOMMY BRIAN FROST, the Defendant above named, has committed the offenses of:

COUNT I

PRINCIPAL TO LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN (14) YEARS OF AGE, in violation of NRS 201.230(2) and NRS 195.020, a CATEGORY A FELONY

That on, about, or between the 1st and 15th days of August, 2018, in Fernley, Canal Township, Lyon County, State of Nevada, Defendant did willfully and lewdly commit a lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child, or did aid or abet the commission of this offense, or did directly or indirectly

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4 various positions, and/or to manipulate said victim's body in a sexual manner, in the nude, for
5 the purpose of photography, or did aid or abet the commission of this offense, occurring at or
6 near 556 Osprey Drive, Fernley, Nevada.

7 **COUNT II**
8 **PRINCIPAL TO LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN (14)**
9 **YEARS OF AGE, in violation of NRS 201.230(2) and NRS 195.020,**
10 **a CATEGORY A FELONY**

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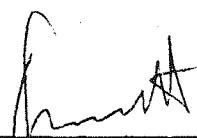
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2 and provided and against the peace and dignity of the State of Nevada.

3 Pursuant to NRS 239B.030, the undersigned hereby affirms that this document does
4 not contain social security numbers.

5 DATED this 5th day of March, 2019.

6
7 STEPHEN B. RYE
Lyon County District Attorney

8
9
10 By: 
11 Damian D.Q. Sinnott
Deputy District Attorney

12 The witnesses known to the State at the time of the filing of this Information are as
13 follows:

14 Deputy Gregory Kantz 911 Harvey
15 Yerington, NV, 89447

16 Detective Erik Pruitt 911 Harvey Way
17 Yerington, NV, 89447

18 Jessica Ann Jordan c/o 911 Harvey Way
19 Yerington, NV, 89448

20 Victim#1 18LY03666 c/o Lyon County District Attorney's Office

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22 Victim#2 18LY03666 c/o Lyon County District Attorney's Office
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1 CASE NO.: 18-CR-01197

2 DEPT. NO.: I

FILED

2018 OCT 15 AM 8:07

TANYA SCORPINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Andrea Andersen DEPUTY

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6 IN THE THIRD JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF LYON
8

9 THE STATE OF NEVADA,

10 Plaintiff,

11 vs.

**MOTION FOR MEDICAL AND
PSYCHOLOGICAL EVALUATION
RE: COMPETENCY**

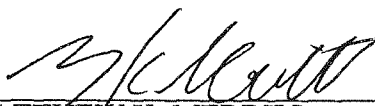
12 TOMMY BRIAN FROST,

13 Defendant.
14 _____

15 COMES NOW, MATTHEW K. MERRILL, Esquire, Attorney for Defendant, TOMMY
16 BRIAN FROST, and hereby requests that this Court issue an Order for the Defendant to undergo
17 a Medical and Psychological Evaluation regarding competency at Lakes Crossing Center, 500
18 Galletti Way, Sparks, Nevada 89431.

19 This motion is made pursuant to NRS 178.403 and NRS 178.415(1).

20 DATED: This 12 day of October, 2018.

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22 
23 MATTHEW K. MERRILL
24 Nevada State Bar No. 13537
25 Lyon County Public Defender
26 Attorney for Defendant
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AFFIDAVIT OF MATTHEW K. MERRILL

STATE OF NEVADA)
 :§.
County of Lyon)

MATTHEW K. MERRILL, being first duly sworn, under penalty of perjury, deposes and says:


1. That Affiant is an attorney licensed to practice law in the State of Nevada.
2. That Affiant was appointed by the Court to represent the Defendant, TOMMY BRIAN FROST, in the within matter.
4. That, based on the initial police reports and having met and spoken with the Defendant, TOMMY BRIAN FROST, Affiant believes there is a question as to the Defendant's competency.
5. That this Motion is made in good faith and not for the purpose of undue delay.

FURTHER, AFFIANT SAYETH NAUGHT.

DATED: This 12th day of October, 2018.


MATTHEW K. MERRILL
Affiant

SUBSCRIBED and SWORN to before me
by MATTHEW KIRK MERRILL on the
12th day of October, 2018.


NOTARY PUBLIC



BRIAN SANDOVAL
Governor

RICHARD WHITLEY, MS
Director, DHHS

STATE OF NEVADA



JULIE KOTCHEVAR, Ph.D.
Administrator, DFBH

IHSAN AZZAM, Ph.D., M.D.
Chief Medical Officer

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DIVISION OF PUBLIC AND BEHAVIORAL HEALTH
4150 Technology Way, Ste. 300
Carson City, NV 89706

November 15, 2018

The Honorable John Schlegelmilch
Third Judicial District Court, Dept. 1
911 Harvey Way
Yerington, NV 89447

RE: Tommy Brian Frost
Case No.: 18-CR-01197

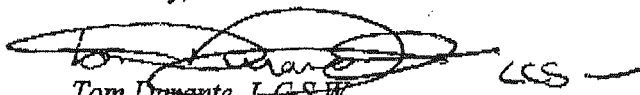
Dear Judge Schlegelmilch:

This is a request to calendar a hearing date no later than 10 days from the date of receipt of this letter, per NRS 178.460, Sections 1, 2 and 3.

Pursuant to your order file dated October 15, 2018, Mr. Tommy Brian Frost, was evaluated by Drs. Bissett and Loring. At this time they find Mr. Frost meets the criteria to be considered competent to proceed with adjudication. Enclosed you will find a copy of the examiner's reports.

If I can provide you with any further information please feel free to contact me at (775) 688-6652.

Sincerely,


Tom Durante, L.C.S.W.
Agency Director

TD:ri

cc: Brian Haslem, Deputy District Attorney
Matthew K. Merrill, Esq.

Encl: Competency Evaluation (2)



LAKE'S CROSSING CENTER
500 Galletti Way, Sparks, NV 89431-5574
(775) 688-1900 • FAX (775) 688-1909

TOM DURANTE,
L.C.S.W.
Agency Director

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Released to JUDGE JOHN SCHLEGELMILCH

BRIAN HASLEM, D.D.A.
MATTHEW K. MERRILL, ESQ.

COMPETENCY EVALUATION

Name: Tommy Brian Frost
Case Numbers: 18-CR-01197
Date of Birth: 07/10/1993
Date of Evaluation: 11/09/2018
Date of Report: 11/14/2018

Identification:

Tommy Brian Frost is a 25-year-old male who is charged with two counts of Principal to the Promotion of Sexual Performance of a Minor (Victim Under the Age of Fourteen) and two counts of Principal to Lewdness with a Child Under the Age of Sixteen (16) Years of Age, all felonies. He was ordered to be evaluated for competency to stand trial under NRS178.415. The order originated from the Justice Court of Canal Township, in and for the County of Lyon, State of Nevada.

Referral Question:

The Court ordered Mr. Frost be assessed regarding his present ability to understand the nature of the charges against him and the nature and purpose of the Court's proceedings, as well as his present ability to aid and assist his counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.

Limits of Confidentiality:

Mr. Frost was educated on the limits of confidentiality pertinent to the court-ordered evaluation of competency. He was informed data collected during this evaluation would be put into a report provided to his Attorney, the District Attorney, and the Judge presiding over his case. He was further informed confidentiality of this information could not be guaranteed. With that in mind, he was informed information about his version of events related to his charges would not be queried and he should direct that information to his lawyer only. He communicated an understanding of these limits of confidentiality and agreed to proceed with the interview and evaluation.

Methods of Evaluation:

Clinical interview at Lake's Crossing Center (LCC)
Review of court order, warrant of arrest, and miscellaneous materials
Review of Lyon County Sheriff's Office Booking Sheet for Inmate# 18LY01277
Review of Lyon County Sheriff's Office Declaration of Probable Cause and Detention
Behavioral observations
Revised Competency Assessment Instrument (RCAI)

COMPETENCY EVALUATION
FROST, Tommy Brian
Page 2 of 8

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BRIAN HASLEM, D.D.A.
MATTHEW K. MERRILL, ESQ.

Background:

Please see Dr. Loring's report for background information.

Mental Status and Behavioral Observations:

Mr. Frost's grooming, hygiene, attire, attention, and eye contact all appeared adequate. Initially, he appeared to have a minor case of hiccups; this receded over the course of the interview. While he was cooperative, he appeared to embellish psychiatric symptoms, memory deficits, and deficits in knowledge of legal process. He was not unfriendly. His speech was not elevated but he was talkative. His motor behavior was within normal limits. He described his mood as "depressed". He added he is depressed everyday (at a level "4 to 5" on a scale of '1' to '10') due to "bad memories". His affect was somewhat sad, anxious, and irritable; range of affect was restricted. He reported, "I haven't slept in three days" due to being scared. He indicated the last time he slept, he woke up choking self, he couldn't breathe, and he was having nightmares of memories of his childhood. He reported his father used to choke Mr. Frost in his sleep and it is for this reason he avoids sleep. He endorsed elevated current/recent anxiety ("always" and "constant") due to thinking people are talking about him (wanting to hurt him). He also endorsed elevated current/recent anger "everyday" and "all the time" "for no reason". He stated he punches walls when he feels angry and he broke a knuckle during his current incarceration. He added he is currently housed in "Max" due to the allegation he swung at a deputy in the jail. He described "constant" past anxiety prior to his current charges, including watching over his shoulders and feeling someone is following him. He denied current/recent thoughts of self- and other harm. He denied current/recent physical pain.

He endorsed mood swings, consisting of periods of depressed mood or anger only. He endorsed paranoia of thinking people are talking about him (wanting to hurt him) and watching over his shoulders and feeling someone is following him. He indicated he doesn't like being around anybody. He endorsed both auditory and visual hallucinations. He indicated the auditory phenomena are "every day, constant" and including "now". He added a voice was currently telling him "not to talk". However, he forces himself to tell them to "shut up" or he ignores them. He described these voices as "evil". He stated the voices worsen when he is locked-up or by himself. The voices sometimes tell him to fight officers. He described hitting his head against the wall and punching the wall or screaming because pain helps with the voices (distracts the voices). He indicated when he is on his prescribed medications, the voices and his anger moderate, he feels he has more control over himself, and his memory improves. When off his medications, he feels like a "zombie" — like "something has taken over [me]" his body. There was no observable evidence of responding to internal stimuli. He described the ("once in a while") visual phenomena as "an outline" of something; he added he is not sure he sees something or if it is more a feeling.

COMPETENCY EVALUATION
FROST, Tommy Brian
Page 3 of 8

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MATTHEW K. MERRILL, ESQ.

He endorsed intrusive aversive memories of his childhood. Both the content of his thoughts and his thought processes were generally within normal limits.

He described his mental health issues as, "I know I got problems." He believes he has schizophrenia as he indicated he once received a check-off list of symptoms for schizophrenia and he marked all of them as positive. He reported he is not currently on psychiatric medications but he reported past medications of Seroquel, Ritalin, Abilify, and one other he could not remember by name. He indicated he had been on the latter combination of medications for a "year or so" and these had been effective. However, he did not know what these medications are individually for (what they target). He knew the year and he took a while to come up with "November," but, he mistakenly thought it might be the "5th or 6th" (it was the 9th). He described problems with his memory. He elaborated he had been off his medications at the time of the alleged incidents and had been in a "blackout period". He indicated the last day he remembers was July 31, 2018 (he apparently was arrested 8/15/18). He reported no memories from July 31, 2018 until waking up in jail. His intelligence level appeared to be at the level of average.

Competency Evaluation:

A clinical interview with Mr. Frost was supplemented by his responses from the Revised Competency Assessment Instrument (RCAI), a structured interview assessing competency in fourteen separate relevant domains: Overall, Mr. Frost performed poorly on this portion of the assessment, but in my opinion, he was purposefully embellishing deficits in knowledge of legal process. Mr. Frost indicated he was "not sure" about his charges, including how many charges he has. He denied having his legal paperwork. He was then asked if he knew the general nature of his charges and he replied, "Sex offenses – that's all I know." He quickly added, "Seems like attorney is against me." Mr. Frost stated, "I don't remember anything." When asked the severity of his charges, he replied, "Pretty serious as I'm in Max." He added he is in the 'Max' due to his anger but he added prior to that he had been "locked down" for his own safety. He was provided the verbiage of his four charges. He did not know the level of seriousness of these charges, adding he knows "nothing about laws". He could not identify the level of charge for a 'trespass'. I mentioned the three levels of charges and he then correctly guessed his charges are "felonies". He was not sure of the range of incarceration for a 'felony'. He thought it "may depend" whether a felony is served in jail or prison; after a brief discussion, he correctly narrowed this to "prison". He could not identify the level of charge beneath a felony. He was provided with 'gross misdemeanor' and he then correctly guessed someone found guilty of this level or charge would serve any time in "jail".

COMPETENCY EVALUATION
FROST, Tommy Brian
Page 4 of 6

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Mr. Frost correctly identified an alternate outcome to incarceration for someone found guilty as "probation". He indicated he had previously been on same but had violated due to having contact with his family. He described a few conditions of probation as checking-in with a probation officer and taking anger management. Mr. Frost knew one could violate probation by a dirty drug test or re-offending. He knew violations could result in returning to jail or prison. I asked him how he had resolved charges in the past and he replied he usually lets his attorney do the talking. He identified pleas of "guilty" and "not guilty". He knew 'guilty' is followed by sentencing but he could not identify what happens after the entering of a 'not guilty' plea. He was asked if he had heard of 'trial,' and he replied, "No, not really." He denied ever watching legal shows on TV. I then asked him if he was giving his best effort on my questions. Mr. Frost demonstrated adequate knowledge of the functions of many courtroom participants, but he was stumped by the 'district attorney' (although he did recognize 'D.A.') and 'jury,' he could only come up with one role for the judge (sentencing), and he initially defined witnesses as only those "against you" (however, on his own, he came up with witnesses can represent both sides; he then added, "I'm guessing"). When asked if a defendant must testify at trial, Mr. Frost stated, "I don't know. I don't know about trial."

He demonstrated adequate understanding of evidence, although he limited it to evidence against someone. When asked if there could be evidence for the defendant, he replied affirmatively and, once again, added, "I guess." He was asked to identify potential prosecution evidence from a scenario about a bank robbery. He could do this but I was frankly surprised how difficult this task appeared to be for him. (I then made a note to myself Mr. Frost was likely embellishing deficits in knowledge of legal process.) When asked to comment on another scenario describing a situation involving strong prosecution evidence, he could not decide the better legal strategy (plea bargain versus trial) because he indicated he did not know what a plea deal is. I then educated him on the latter. He could not come up with why the D.A. would benefit from a deal; once again, he was educated on this and he appeared to understand same.

Mr. Frost correctly identified his attorney as "Matthew Merrill." Mr. Frost knew he could "fire" his attorney if significant disagreements emerged between them. He knew the judge decides if someone receives a new attorney. Mr. Frost demonstrated poor understanding of attorney-client confidentiality. He was provided information on the latter and he then stated, "I have a feeling they [attorneys] can tell [others]." Mr. Frost described his memory of the timeframe of the alleged incidents associated with his charges as "not there": "I don't remember any of it." He further elaborated he had been off his medications and had been in a "blackout period". He indicated the last day he remembers was July 31, 2018. He reported no memories until waking up in jail. When asked if he had read his arrest/police report, Mr. Frost replied, "No. I don't want to." He

COMPETENCY EVALUATION
FROST, Tommy Brian
Page 5 of 6

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Released to: JUDGE JOHN SCHLEGELMILCH
BRIAN HASLEM, D.D.A.
MATTHEW K. MERRILL, Esq.

elaborated reading his arrest/police report would cause him to be angry and to have to be medicated. In my opinion Mr. Frost has the capacity to discuss details of his police/arrest report, as well as his version of these events, to the degree he remembers either, with his lawyer, if he so chooses.

Mr. Frost described one instance of courtroom misbehavior: He stood up in court and shouted something along the lines of "They're all f---kin' liars." He described the Court's reaction to this apparent outburst and he demonstrated some understanding of 'contempt of court' (he mentioned his lawyer had informed him about the latter). While Mr. Frost did not engage in gross instances of misbehavior, such as verbal or physical aggression, his behavior was negatively impacted by his purposeful embellishment of psychiatric symptoms, memory deficits, and deficits in knowledge of legal process (see Possibility of Embellishment, below). However, in my opinion, he can behave in the courtroom or with his attorney if he so chooses.

When Mr. Frost was asked if he believes he meets the criteria of competency, he stated, "The whole thing is confusing" and he cited the "codes" (the NRS codes attached to his charges) as an example of confusing information. I asked Mr. Frost a few final questions to check his retention of information provided to him during this interview. He correctly defined a plea bargain and he knew he did not have to accept one but could go to trial and plead 'not guilty'. He then stated he fears going to trial as he feels confused. When asked if he could ask his lawyer to take him through any future legal points he finds confusing, Mr. Frost replied, "I have no faith in [my lawyer]."

In those cases when Mr. Frost did not provide a correct answer to a question of legal process, he did not consistently appear to understand the correct information provided to him. He did not consistently appear to demonstrate the ability to learn new information. However, these two apparent deficits were likely due to his purposeful embellishment of deficits in knowledge of legal process. His ability to engage in a reciprocal conversation was adequate. In my opinion Mr. Frost has the present ability to cooperate rationally with his attorney and the capacities to testify and challenge prosecution witnesses, if he so chooses.

Possibility of Embellishment, Exaggeration, Etc.:

I was very suspicious Mr. Frost was purposefully performing poorly in this interview. First, he appeared to embellish psychiatric symptoms and memory deficits as he reported two instances of blackout periods of no memory when he has been off his medications (the second of which was at the time of his charges). Second, his knowledge of legal process was quite poor and was inconsistent with his presentation of average intelligence. For example, he did not know his charges or number or

COMPETENCY EVALUATION
FROST, Tommy Brian
Page 6 of 6

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MATTHEW K. MERRILL, ESQ.

severity of his charges, he could not define a 'trial,' and he knew "nothing about laws". His ability to provide background details and other details on his current and past psychiatric symptoms was inconsistent with his very poor performance in providing answers to questions of legal process. Factors of embellishment, exaggeration, symptom enhancement, dissimulation, inconsistency, and misattribution were therefore estimated as *high*.

Summary and Recommendations:

Tommy Brian Frost is a 25-year-old male who is charged with two counts of Principal to the Promotion of Sexual Performance of a Minor (Victim Under the Age of Fourteen) and two counts of Principal to Lewdness with a Child Under the Age of Sixteen (16) Years of Age, all felonies. He was ordered to be evaluated for competency to stand trial under NRS178.415. The order originated from the Justice Court of Canal Township, in and for the County of Lyon, State of Nevada. Mr. Frost appeared to embellish psychiatric symptoms, memory deficits, and deficits in knowledge of legal process (See Possibility of Embellishment, above). It is therefore difficult to determine which, if any, of his psychiatric symptoms, memory deficits, and deficits in knowledge of legal process are genuine. He reported a mental health history, including psychiatric medications; he is not currently on psychiatric medications. He endorsed depressive mood swings, paranoia, auditory and visual hallucinations, intrusive aversive memories, and longstanding and situational depressed mood, anxiety, and anger, irritation, and frustration. He reported longstanding and recent drinking and use of marijuana and past use of cocaine. He has longstanding dysfunctional personality characteristics. However, I did not observe any genuine mental health symptoms or cognitive or memory deficits that would pose a barrier to him meeting the criteria associated with 'competency to proceed with adjudication'.

It is my professional opinion Mr. Frost has the present ability to understand the nature of the charges against him and the nature and purpose of the Court's proceedings. He has the present ability to aid and assist his counsel in his defense at any time during the proceedings with a reasonable degree of rational understanding, if he so chooses.

It is recommended he proceed to adjudication. Mr. Frost may be a difficult client if he chooses to continue not cooperating by embellishing psychiatric symptoms, memory deficits, and/or deficits in knowledge of legal process.

Richard T. Bissett, PhD

Richard T. Bissett, Ph.D., Nevada Licensed Psychologist, PSY 457

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Released to: JUDGE JOHN SCHUEZELMILCH
BRIAN HASLEM, D.D.A.
MATTHEW K. MERRILL, ESQ.

COMPETENCY EVALUATION

Name: Tommy Brian Frost
Date of birth: 7/10/1993
Case number: 18CR-01197
Date of evaluation: 11/09/2018
Date of report: 11/13/2018

Identifying Information

Mr. Frost is a 25 year-old male who is charged with 2 category A felony counts of Promotion of Sexual Performance of a Minor Victim Under the age of Fourteen; and 2 category A felony counts of Lewdness with a Child Under the age of Sixteen. The Third Judicial Court of the State of Nevada, in and for the County of Lyon, ordered him to be evaluated for competency to stand trial under NRS178.415.

Limits of Confidentiality

This examiner along with a second psychologist, Dr. Richard Bissett, met with Mr. Frost at Lakes Crossing Center (LCC) on 11/09/2018. Mr. Frost was informed of the purpose of this evaluation and the limits to confidentiality pertinent to a court-ordered evaluation. He reported understanding of what was stated to him and agreed to proceed with the evaluation.

Referral Question

The Court requested that Mr. Frost be assessed regarding his present ability to:

1. Understand the nature of the criminal charges against him
2. Understand the nature and purpose of the court proceedings, or
3. Aid and assist counsel in his defense with a reasonable degree of rational understanding.

Method of Evaluation

- Clinical Interview and Mental Status Examination at LCC on 11/09/2018.
- Behavioral observations.
- The Revised Competency Assessment Instrument (RCAD).
- Review of Order for Competency Evaluation dated 10/15/2018.
- Review of Criminal Complaint dated 8/16/2018.

COMPETENCY EVALUATION
FROST, Tommy Brian
Page 2 of 6

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MATTHEW R. MERRILL, ESQ.

- Review of Lyon County Sheriff's Office Booking Sheet for Inmate #18LY0127 dated 8/16/2018.
- A search of the Department of Public and Behavioral Health (DPBH) electronic records system yielded no information bearing the defendant's name.

Background

Background information was provided by Mr. Frost and has not been independently verified.

Relevant Social History

Mr. Frost reported he was born in Yuba City California and was raised by his parents and other relatives with 4 biological brothers, 2 adopted sisters, and 2 adopted brothers. He stated his family moved frequently to different states for unknown reasons. He later stated that his father used to make methamphetamine in front of him. He reported a cousin attempted to sexually abuse him but he defended himself with a knife and the cousin went to prison. He reported physical and mental abuse by his uncle and his father who he stated drowned in 2001, that "it was for the best" and he recalled his father throwing him through doors, slamming his head against walls, and witnessing his father beat his mother. He denied ever being married but reported he has a daughter in his mother's custody who will be 1 year old in December.

Mr. Frost reported he was in special education classes from the first grade onward for reading comprehension problems and "mental illness." He stated he was suspended and expelled several times for truancy and anger problems including throwing chairs and striking a teacher. He reported dropping out of school in the 11th grade.

Mr. Frost reported a brief work history comprised of 1 day at a fast food restaurant in Sacramento in 2014 and 1 day in the shipyards in Hawaii in 2017. He stated he left jobs due to anger problems, paranoia about people talking about him, and hearing voices. He stated he applied for disability income twice at age 18 and 19 with his mother's help but was denied both times. He stated that his mother obtained power of attorney over him but did not convey the reason for this. Mr. Frost reported he has been homeless since the age of 16 and earned money panhandling. He reported his grandfather gave him travel funds to go to Hawaii twice at age 17 and from 2015 to July 2018. He stated he returned to Fernley Nevada to visit his daughter in July 2018 and reported having stepchildren with his girlfriend.

Substance Abuse History

Mr. Frost reported alcohol use once or twice weekly from age 14 to his current arrest, daily cannabis use from age 12 to his current arrest, and cocaine use biweekly in Hawaii from 2017

COMPETENCY EVALUATION
FROST, Tommy Brian
Page 3 of 6

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Released to JUDGE JOHN SCHLEGELMILC
BRIAN HASLEM, D.D.A.
MATTHEW K. MERRILL, Esq.

to July 2018. He denied any other drug use or history of addiction treatment. He reported his longest sobriety has been the past 3 months during his current incarceration.

Legal History

Mr. Frost reported 2 juvenile charges for physical altercations with his family members resulting in 13 months in juvenile hall and a no-contact order which he stated he violated. He reported he smashed the windows of his mother's house and "other anger stuff." He reported he was sent to a halfway house in Oakland after juvenile hall because "I was not suitable to live on my own." He stated he was jumped there and got his ribs broken so his mother put him in a hotel in Vacaville and from there he fled to Hawaii. He denied any other history of legal charges and is currently incarcerated at Lyon County jail for his present charges.

Medical / Psychiatric History

Mr. Frost reported receiving "13 different medications" since he was age 6. He stated he was diagnosed with ADHD in school, was expelled for striking a teacher, and was admitted to West Hills Hospital at age 13 for striking his mother and breaking her windows. He stated he was admitted for 1 or 2 weeks and has not been hospitalized since then. He reported receiving 2 medications in juvenile hall which he thought included Abilify, and stopped taking it after he turned age 18. He reported "many" suicide attempts including laying on train tracks and being rescued by a bystander. He stated he had had thoughts of hanging himself and banging his head on the wall in jail. He reported receiving anger management classes in Hawaii because he could not hold a job, and stated he was diagnosed with ADHD, bipolar disorder, Tourette's disorder, and schizophrenia. He stated the last mental health treatment he received was in June 2018 prior to his returning to Nevada. He reported he brought medication to the jail when he was arrested but the jail lost his medication and he is not prescribed anything at the jail.

Mental Status and Behavioral Observations

This examiner and Dr. Bissett met with Mr. Frost at LCC for approximately 2 hours on 11/09/2018. He presented to the interview in jail-issued clothing with an average build and appeared adequately groomed. He was adequately oriented only missing the day of the month by a few days and his demeanor was calm and conversational. His speech was coherent and his attention span and concentration appeared adequate. He described his current mood as depressed at a chronic level of 4 to 5/10 with no current suicidal ideation but stated his

depression can spike up to 8 or 9 when he has bad memories. He reported nightly nightmares that wake him with cold sweats and resulting in getting only 1 or 2 hours of sleep and he stated that he wakes to choking himself at times. He reported experiencing anxiety about people talking about him and reported he "swung at an officer because I'm scared to be out in the

COMPETENCY EVALUATION
FROST, Tommy Brian
Page 4 of 6

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BRIAN HASLEM, D.D.A.
MATTHEW K. MERRILL, ESQ.

population" which resulted in his being placed in maximum security. He recalled specific details about maximum security, being allowed out 1 hour per day, and being told if he reoffended he would not come out. He has not reoffended since his initial infraction 1 month ago. He reported constant paranoia about someone following him and constant auditory hallucinations commanding him to hurt people. He reported problems with managing anger and black-outs in which "I can't control myself" when he is not on medication. Mr. Frost reported he has been off of psychiatric medication for 3 months to date and stated he woke up in a padded cell due to a threat that he was going to kill himself but stated he could not recall it. He did not exhibit any evidence of distraction by or response to internal stimuli during this evaluation. Although not formally assessed, Mr. Frost's intelligence appeared to be within the average range of cognitive functioning. He reported that he did not recall or understand the legality of his situation and "I would have to read it and study to comprehend it. I was in special education because I didn't understand when the teacher was talking." He also reported "I had my grandfather look into schizophrenia. He sent me papers on it. I kind of feel like I do have it because I'm paranoid. I'm not sure." Mr. Frost is not prescribed psychiatric medication at Lyon County jail.

COMPETENCY ASSESSMENT

Mr. Frost was assessed using the Revised Competency Assessment Instrument (RCAI) which assesses competency within the following 14 domains:

- Understanding charges
- Appreciation of penalties
- Appraisal of available defenses
- Appraisal of functions of courtroom participants
- Understanding of court procedures
- Motivation to help self in legal process
- Appraisal of likely outcomes
- Planning of legal strategies
- Ability to cooperate rationally with counsel
- Capacity to disclose pertinent information to counsel
- Capacity to testify
- Capacity to challenge prosecution witnesses
- Ability to manifest appropriate courtroom behavior
- Capacity to cope with stress of incarceration awaiting trial

Ability to Understand the Nature of the Charges

Mr. Frost stated he did not know his charges or any allegations against him. After his charges were read to him and explained to him he stated that his attorney had told him he had felonies

COMPETENCY EVALUATION
FROST, Tommy Brian
Page 5 of 6

NOTE: This information has been disclosed to you from records whose confidentiality is protected by federal law. Federal regulations (42 CFR Part 2) prohibit you from making any further disclosure of it without the specific written consent of the person to whom it pertains, or as otherwise permitted by such regulations. A general authorization for the release of medical or other information is NOT sufficient for this purpose.

Released to: JUDGE JOHN SCHLEGELMILCH
BRIAN HASLEM, D.D.A.
MATTHEW K. MERRILL, ESQ.

and sex charges and that "I just sit back and let my lawyer explain it to me." He stated he did not know any levels of any types of charges but understood when felony, gross misdemeanor and misdemeanor were conveyed to him. He was able to reason that felonies are served in prison and misdemeanors are served in jail but he also stated "I know someone serving a felony in county so I don't know." He knew what probation was and recalled "I was on juvenile probation and kept violating contact with family. It was supposed to be 4 years but they turned me into unsuccessful. He knew that probation required "check in to your P.O., anger management, drug tests," and that violations would result in reincarceration. He stated that his attorney had discussed going to LCC with him and recalled that "they were going to send me here before when I was 18 but I ran."

Ability to Understand the Nature and Purpose of Court Proceedings

Mr. Frost reported he did not know any pleas that could be made regarding his charges. After the 4 available pleas were described to him he stated his attorney had discussed this with him. He claimed he had never heard of a trial and did not know what followed any pleas. However he knew the role of the public defender was "to represent me, supposed to be on my side but seems against me." He stated he did not know the DA's role but stated he "heard them say if he agreed for Lakes Crossing." He knew a judge could give "sentencing, has power, and sits in a big ol chair." When asked the role of a jury he stated he didn't know but had "heard people talking about going to trial" after he stated he had never heard of a trial. He knew witnesses "tell what happened and stated "I'm guessin" when asked if they could be for either side. He knew he was the defendant but stated he did not know of his right not to testify in court. He knew evidence was "stuff against you and stated "I guess it might be" also for you. He knew that evidence could also be "the person that was there." He knew to "talk to my attorney the only person next to me" if a witness lied about him in court and stated "You can't talk to the judge I got yelled at about that at last court." He stated that his attorney told him that disruptive behavior in court could result in contempt of court but stated "I don't know what that is." He conveyed understanding to an explanation of this and was able to recall and repeat it after a delay. Mr. Frost was also able to recall his charges as sexual crimes and the roles of court participants after a delay of about 30 minutes.

Ability to Aid and Assist Counsel in His Defense with a Reasonable Degree of Rational Understanding

Mr. Frost knew did not know his public defender's name was Matthew Merle but stated he did not have confidence in attorney's ability to defend him. He reported irritation that his attorney was not meeting with him enough. He stated "I have people telling me I should fire him." He stated he did not know the meaning of confidentiality until after it was explained to him and did not know what a plea bargain was. After an explanation he was able to state it was a deal for a lower charge and/or sentence for a guilty plea. He stated he was unable to reason if a plea bargain would be more beneficial than trial if there was a preponderance of evidence against

COMPETENCY EVALUATION
FROST, Tommy Brian
Page 6 of 6

NOTE: This information has been disclosed to you from records whose confidentiality is protected by federal law. Federal regulations (42 CFR Part 2) prohibit you from making any further disclosure of it without the specific written consent of the person to whom it pertains, or as otherwise permitted by such regulations. A general authorization for the release of medical or other information is NOT sufficient for this purpose.

Released to: JUDGE JOHN SCHLEGELMICH
BRIAN HASLEM, D.O.A.
MATTHEW K. MERRILL, ESQ.

someone. He stated he would ask his attorney. He reported that he had not yet received his police report and did not want to read it because it would cause him anger. He stated he could not recall any events leading to his arrest, that he fell asleep in a park and awoke in jail, and it felt like a black-out period. He reported that when off medication he cannot recall anything. However he was able to recall all of the information presented to him and detailed information prior to and after the day of his arrest.

Summary and Opinion

Mr. Frost is a 25 year-old male who is charged with 2 category A felony counts of Promotion of Sexual Performance of a Minor Victim Under the age of Fourteen; and 2 category A felony counts of Lewdness with a Child Under the age of Sixteen. The Third Judicial Court of the State of Nevada, in and for the County of Lyon, ordered him to be evaluated for competency to stand trial under NRS178.415.

Mr. Frost reported a history of childhood physical and attempted sexual abuse in great detail. He reported an alcohol and substance abuse history from his teens to his arrest with his longest sobriety being his current 3 months of incarceration. He reported a long list of mental illnesses and medications from age 6 and 1 hospitalization at West Hills at age 13 for violent behavior toward his mother and siblings. There are no DPBH records bearing his name and he is not receiving psychiatric medication at Lyon County jail. Although Mr. Frost reports multiple psychiatric symptoms, any symptoms he may have do not appear to be impeding his ability to meet criteria for competency to proceed with adjudication.

The ultimate decision in this matter is a judicial determination. However, in response to the court's order for evaluation for competency, in the opinion of this examiner and stated with a reasonable degree of professional certainty, Mr. Frost:

1. Possesses adequate present ability to understand the nature of the charges against him,
2. Possesses adequate understanding of the nature and purpose of the court's proceedings, and
3. Possesses adequate present ability to aid and assist counsel in his defense with a reasonable degree of rational understanding.



Susan Loring, Ph.D.
Nevada Licensed Psychologist, PSY479

FILED

CASE NO. 18-CR-01197

2019 MAY 16 AM 9:20

TANYA SCEININE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Andrea Andersen

THE THIRD JUDICIAL DISTRICT COURT - THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

THE HON. JOHN SCHLEGELMILCH, DISTRICT JUDGE, PRESIDING

THE STATE OF NEVADA,

PLAINTIFF,

 ORIGINAL

v.

TOMMY FROST,

DEFENDANT.

----- /

TRANSCRIPT OF PROCEEDINGS

ARRAIGNMENT

APRIL 29, 2019

COURTHOUSE

YERINGTON, NEVADA

REPORTED BY:

KATHY TERHUNE, CCR #209

1 APPEARANCES:

2 FOR THE STATE:

DAMIAN SINNOTT
Deputy District Attorney
Courthouse
Yerington, NV 89447

5 DEFENDANT PRESENT IN COURT.

6 FOR THE DEFENDANT:

MARIO WALTHER
County Public Defender
15 Main Street
Dayton, NV 89403

9 FOR THE DEPARTMENT OF
10 PAROLE AND PROBATION:

ROCHELLE ALTARES-MCKENNA,
Parole/Probation Officer

11 NO OTHER APPEARANCES.

13 * * * * *

15 TRANSCRIPT OF PROCEEDINGS

17 THE COURT: State of Nevada versus Frost.

18 MR. SINNOTT: Damian Sinnott on behalf of the
19 State.

20 MR. WALTHER: Mario Walther on behalf of
21 Mr. Frost, Your Honor, who's in custody.

22 THE COURT: All right. This is Case
23 18-CR-01197, State of Nevada versus Tommy Brian Frost.
24 This is time set for arraignment.

1 Mr. Frost, take a look at Line 12 of the
2 Information that was filed against you.

3 Is that your name, is it correctly spelled?

4 THE DEFENDANT: Yes.

5 MR. WALTHER: Speak up.

6 THE DEFENDANT: Yes.

7 THE COURT: Okay. So how long did you go to
8 school for, Mr. Frost?

9 THE DEFENDANT: To the 12th grade.

10 THE COURT: Do you understand how to read and
11 write the English language?

12 THE DEFENDANT: Yes.

13 THE COURT: Any problem understanding it at
14 all?

15 THE DEFENDANT: No.

16 THE COURT: Were you able to read the
17 Information that was filed against you?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Did you understand its contents?

20 THE DEFENDANT: Yes.

21 THE COURT: Are you under the influence of
22 anything which would prevent you from understanding the
23 nature of these proceedings?

24 THE DEFENDANT: No.

1 THE COURT: The file contains a waiver of your
2 preliminary hearing that was signed by you.

3 Did you waive your preliminary hearing after
4 consulting with your attorney?

5 THE DEFENDANT: Yes, I did.

6 THE COURT: All right. The State's filed an
7 Information charging you in Count I, with lewdness with
8 a child under the age of 14. In that on or about -- or
9 between the 1st and 15th days of August of 2018, you
10 did willfully and lewdly commit a lewd and lascivious
11 act, other than an act constituting a sexual assault,
12 on or with the body or any part of a member thereof of
13 a child under the age of 14 with the intent of
14 arousing, appealing to or gratifying the lust, passion
15 and sexual desire of that person, of you or that
16 person, and aid and abet in the commission of that
17 either directly or indirectly, counsel, encourage,
18 hire, command to do so or otherwise procure another to
19 commit those acts, in that you did request, instruct,
20 insist or encourage EJ, a known but unnamed juvenile
21 female under the age of 14 to participate in sexual
22 acts or pose in various positions or manipulate said
23 victim's body in a sexual manner leading to the purpose
24 of photography to either aid or abet in the commission

1 of that offense, occurring at or near 556 Osprey Drive
2 in Fernley, Lyon County, Nevada.

3 Count II. On or between the 1st and 15th --
4 you're charged with lewdness of a child under the age
5 of 14, that on or between the 1st and 15th days of
6 August of 2018, that you did willfully and unlawfully
7 commit a lewd and lascivious act, other than acts
8 constituting a sexual assault, upon the body or a part
9 thereof of a child under the age of 14 years with the
10 intent of arousing, appealing to or gratifying lust,
11 passion or sexual desires of that person and/or the
12 child, who did aid or abet -- and did aid or abet the
13 commission of such offense by directly or indirectly
14 counsel, encourage, hire, command, induce, or otherwise
15 procure another to commit the offense in that you did
16 request, instruct, insist and/or encourage KD, a known
17 but unnamed juvenile female under the age of 14, to
18 participate in sexual acts and/or pose in various
19 positions and/or manipulate the victim's body in a
20 sexual manner, leading to the purpose of photography,
21 or did aid or abet in the commission of that offense,
22 again occurring at 556 Osprey Drive in Fernley, Lyon
23 County, Nevada.

24 Do you understand what you've been charged

1 with?

2 THE DEFENDANT: Yeah.

3 THE COURT: Have you discussed those charges
4 with your attorney?

5 THE DEFENDANT: Yup.

6 THE COURT: Do you understand -- have you
7 discussed with him the amount of time in prison you may
8 be required to spend if convicted of those offenses?

9 THE DEFENDANT: Yup.

10 THE COURT: Do you understand that each of
11 those charges carries life in Nevada State Prison, the
12 possibility of parole after ten years and \$100,000
13 fine.

14 Do you understand that?

15 THE DEFENDANT: Yes.

16 THE COURT: Also, those charges can run
17 consecutively or concurrently. Consecutively means
18 running back to back, concurrently means running at the
19 same time.

20 Do you understand that?

21 THE DEFENDANT: Yes.

22 THE COURT: You'd also be subject to lifetime
23 supervision for these offenses, that you're be subject
24 to lifetime registration for these offense as a sexual

1 violator, in that you could not be considered for
2 parole even if the ten years came up unless you were
3 considered -- unless you had a psycho-sexual evaluation
4 completed and you're less than a high risk on the
5 psycho-sexual evaluation.

6 Do you understand that?

7 THE DEFENDANT: Yup.

8 THE COURT: All right. So why don't you stand
9 up.

10 As to Count I in relation to EJ, are you guilty
11 or not guilty?

12 THE DEFENDANT: Guilty.

13 THE COURT: As to Count II in relation to KD,
14 are you guilty or not guilty?

15 THE DEFENDANT: Guilty.

16 THE COURT: Okay. You can be seated.

17 There's been filed with the Court a guilty plea
18 agreement that was signed by you today.

19 Did you read that agreement?

20 THE DEFENDANT: Yes.

21 THE COURT: Did you fully understand it?

22 THE DEFENDANT: Yes.

23 THE COURT: Did you go over it with your
24 attorney?

1 THE DEFENDANT: Yes.

2 THE COURT: Did he answer any questions that
3 you had in relation to it?

4 THE DEFENDANT: Yes.

5 THE COURT: Do you understand that the Court's
6 not bound by the agreement, you can be sentenced
7 anywhere within the range of penalties I discussed with
8 you?

9 THE DEFENDANT: Yes.

10 THE COURT: Do you understand that by pleading
11 guilty, you're giving up your right to a jury trial and
12 other constitutional rights, including the right to
13 have the State prove the offense beyond a reasonable
14 doubt, you're waiving your presumption of innocence,
15 the right to confront and cross-examine witnesses
16 against you as well as the right to produce evidence on
17 your own behalf and to compel witnesses to testify for
18 you, as well as the right to testify on your own behalf
19 if you chose to do so or remain silent which the Court
20 would not use against you.

21 Do you understand that you're giving up each
22 and every one of those constitutional rights?

23 THE DEFENDANT: Yes.

24 THE COURT: Do you also understand that you are

1 waiving your right to appeal this conviction except for
2 jurisdictional, constitutional or other grounds which
3 challenge the actual legality of these proceedings.

4 Do you understand that?

5 THE DEFENDANT: Yes.

6 THE COURT: There may be other consequences of
7 your plea as well, including losing your right to vote,
8 bear arms, serve as a juror, hold public office,
9 requiring you to register as an ex-felon wherever you
10 live and the possibility that future crimes can be
11 enhanced as a result of this conviction.

12 Do you understand that?

13 THE DEFENDANT: Yes.

14 THE COURT: Are you a United States citizen?

15 THE DEFENDANT: Yes.

16 THE COURT: So, is it true that on or between
17 the 1st and 15th days of August, you did commit a lewd
18 and lascivious act with or upon the body of EJ, a known
19 but unnamed juvenile female, to participate in sexual
20 acts and pose in various positions, manipulate the
21 victim's body in such a manner in the nude for the
22 purpose of photography or aid and abet in commission of
23 that offense?

24 THE DEFENDANT: Yes.

1 THE COURT: Is it also true that you did the
2 same thing with KD, another unnamed juvenile female who
3 was less than 14?

4 THE DEFENDANT: Yes.

5 THE COURT: And that all occurred in Fernley,
6 Lyon County, Nevada?

7 THE DEFENDANT: Yeah.

8 THE COURT: So you are pleading guilty because
9 you, in fact, did this, right?

10 THE DEFENDANT: Yeah.

11 THE COURT: All right. Court finds that the
12 plea is freely, voluntarily and knowingly entered.

13 MR. SINNOTT: And, Your Honor, just for the
14 purpose of the clarity of the record, I know that you
15 canvassed him on the sex offender implication to the
16 guilty plea, but they're not specifically covered in
17 the guilty plea agreement that he signed.

18 So, I just want that very clear on the record
19 that he is subject to lifetime supervision, just going
20 over this in another case, I want to make sure that's
21 very clear.

22 THE COURT: I said he's subject to lifetime
23 supervision, he's subject to lifetime registration,
24 he's subject to -- that he's not eligible for parole,

1 has to complete a psychosexual evaluation. That was on
2 the list. I went through that.

3 Do you understand that?

4 THE DEFENDANT: Yeah.

5 THE COURT: All right. So sentencing will be
6 set for --

7 THE CLERK: June 17th.

8 THE COURT: -- June 17th.

9

10 (End of Proceedings.

11

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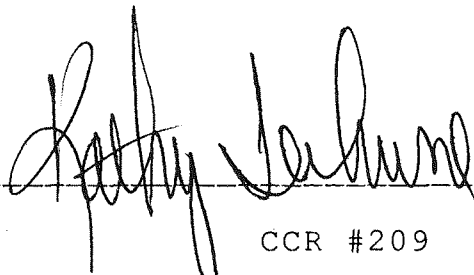
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CERTIFICATE

STATE OF NEVADA)
) SS.
CARSON CITY)

I, Kathy Terhune, CCR 209, do hereby certify
that I reported the foregoing proceedings; that the
same is true and correct as reflected by my original
machine shorthand notes taken at said time and place
before the Honorable John P. Schlegelmilch, District
Judge, presiding.

Dated at Carson City, Nevada, this
8th day of May, 2019.



CCR #209

FILED

2019 JUL -9 AM 11:02

TANYA SCHEIDT
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

John Peoples

CASE NO. 18-CR-01197

THE THIRD JUDICIAL DISTRICT COURT - THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

THE HON. JOHN SCHLEGELMILCH, DISTRICT JUDGE, PRESIDING

THE STATE OF NEVADA,

PLAINTIFF,

v.

TOMMY FROST,

DEFENDANT.

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

JUDGMENT AND SENTENCING

JUNE 17, 2019

COURTHOUSE

YERINGTON, NEVADA

REPORTED BY:

KATHY TERHUNE, CCR #209

1 APPEARANCES:

2 FOR THE STATE:

AUSTIN LUCIA
Deputy District Attorney
Courthouse
Yerington, NV 89447

5 DEFENDANT PRESENT IN COURT.

6 FOR THE DEFENDANT:

MARIO WALTHER
County Public Defender
15 Main Street
Dayton, NV 89403

9 FOR THE DEPARTMENT OF
10 PAROLE AND PROBATION:

ROCHELLE ALTARES-MCKENNA,
Parole/Probation Officer

11 NO OTHER APPEARANCES.

12

13

* * * * *

14

15

TRANSCRIPT OF PROCEEDINGS

16

17

THE COURT: State of Nevada versus Frost.

18

He's not back yet?

19

MR. MERRILL: Mr. Haslem's going to grab him.

20

MR. WALTHER: Mario Walther on behalf of

21

Mr. Frost, Your Honor, who's in custody.

22

THE COURT: All right. This is Case

23

18-CR-01197, State of Nevada versus Tommy Frost. This

24

is time set for sentencing.

1 Let the record reflect that the defendant
2 previously entered his plea on April 29th of 2019 to
3 two counts of lewdness with a child under the age of
4 14. This was time set for sentencing.

5 Has counsel received a copy of the presentence
6 investigation report, are they familiar with it and
7 ready to proceed?

8 MR. LUCIA: State has, and it is, Your Honor.

9 MR. WALTHER: Yes, Your Honor.

10 THE COURT: Any factual corrections by the
11 State?

12 MR. LUCIA: None by the State, Your Honor.

13 THE COURT: Any factual corrections by defense?

14 MR. WALTHER: No, Your Honor.

15 THE COURT: All right. So, aggravation by the
16 State.

17 MR. LUCIA: Your Honor, very simply on this
18 case, the State's just going to ask that you adopt the
19 recommendations of the PSI, which is a term on Count I,
20 of ten years to life. A term of Count II, ten years to
21 life. That Count II be run consecutive to Count I.
22 Thank you, Judge.

23 THE COURT: Okay. Mr. Walther, mitigation.

24 MR. WALTHER: Your Honor, we certainly hope --

1 Mr. Frost has indicated, if I may approach, I have a
2 letter for you as well, Your Honor, from Mr. Frost.

3 But, Mr. Frost has indicated that he wishes to
4 seek help and seek services while incarcerated.

5 These charges certainly stem from the same
6 occurrence. We would argue that they should be run
7 concurrently in order to allow Mr. Frost to prove
8 himself and attempt, Your Honor, to be qualified for
9 probation after ten, rather than 20.

10 Thank you, Your Honor.

11 THE COURT: Okay. Mr. Frost, anything you want
12 to tell me?

13 THE DEFENDANT: No, Your Honor.

14 THE COURT: Okay. The Court has reviewed the
15 letter provided by the defendant.

16 So is there any legal to show why judgment
17 should not now be pronounced against you?

18 MR. WALTHER: We have none, Your Honor.

19 THE COURT: All right. Hearing no legal cause
20 and based upon your plea of guilty, the Court does now
21 pronounce you guilty of the crime of lewdness with a
22 minor, two counts.

23 In accordance with the applicable statutes,
24 State of Nevada, in addition to \$25 administrative

1 assessment fee, attorney's fees in the amount of \$500,
2 DNA fee in the amount of \$150, DNA administrative
3 assessment of \$3.

4 You're sentenced to life with the possibility
5 of parole. Eligibility of parole beginning when a
6 minimum of ten years has been served as to Count I.

7 As to Count II, you're sentenced to life with
8 the possibility of parole with eligibility of parole
9 beginning with a minimum of ten years has been served
10 consecutive to Count I.

11 You're remanded to the sheriff to follow your
12 sentence. Also, you're placed on lifetime supervision
13 under the provisions as set forth in NRS 179E.460, that
14 will be a special sentence.

15 And that you are required to register as a sex
16 offender within 48 hours of your release from custody.

17 Okay. That's the order.

18 MR. LUCIA: Thank you, Judge.

19 MR. WALTHER: Thank you, Your Honor.

20
21 (End of Proceedings.)
22

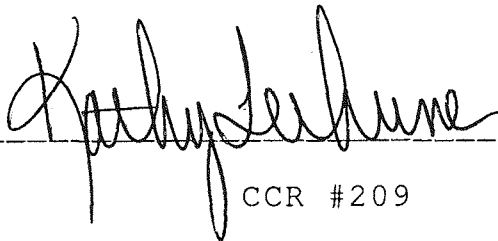
23 * * * * *
24

CERTIFICATE

STATE OF NEVADA)
) SS.
CARSON CITY)

I, Kathy Terhune, CCR 209, do hereby certify
that I reported the foregoing proceedings; that the
same is true and correct as reflected by my original
machine shorthand notes taken at said time and place
before the Honorable John P. Schlegelmilch, District
Judge, presiding.

Dated at Carson City, Nevada, this
6th day of July, 2019.



CCR #209

FILED

2019 JUL 12 PM 3:59

TANYA SCHEPNT
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Tanya Scheepnt

Case No. 18-CR-01197

Dept No. I

DA Case No. C18.0228

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

THE STATE OF NEVADA,

Plaintiff,

vs.

TOMMY BRIAN FROST,

Defendant.

JUDGMENT OF CONVICTION

On April 29, 2019 the above-named Defendant, **TOMMY BRIAN FROST**, Date of Birth: July 10, 1993, entered a Guilty plea of to the crime(s) of **COUNT I: LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN (14) YEARS OF AGE, a CATEGORY A FELONY**, in violation of **NRS 201.230(2) and NRS 195.020**, and **COUNT II: LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN (14) YEARS OF AGE, a CATEGORY A FELONY**, in violation of **NRS 201.230(2) and NRS 195.020**.

Further, that at the time the Defendant entered the plea, this Court informed the Defendant of the privilege against compulsory self-incrimination, the right to a speedy trial, the right to a trial by jury, the right to compulsory process to compel witnesses to testify on behalf of the Defendant, and the right to confront the accusers. That after being so advised, the Defendant stated that these rights were understood and still desired this Court to accept the plea of a Guilty.

1 Further, that at the time the Defendant entered a plea, and at the time of
2 sentencing, the Defendant was represented by MARIO WALTHER; also present in
3 Court were the Lyon County Clerk, or the duly appointed representative, the Sheriff of
4 Lyon County, or the duly appointed representative, the District Attorney of Lyon
5 County, Nevada, or the duly appointed representative, representing the State of
6 Nevada; and the Operations Supervisor, or the duly appointed representative,
7 representing the Division of Parole and Probation.

8 The Court having accepted the Defendant's plea, and having set the date of
9 June 17, 2019, as the date for imposing judgment and sentence and the Defendant
10 having appeared at such time, represented by counsel, and the Defendant having
11 been given the opportunity to exercise the right of allocution, and having shown no
12 legal cause why judgment should not be pronounced at that time.

13 This Court thereupon pronounced **TOMMY BRIAN FROST** guilty of the
14 crime(s) of **COUNT I: LEWDNESS WITH A CHILD UNDER THE AGE OF**
15 **FOURTEEN (14) YEARS OF AGE, a CATEGORY A FELONY, in violation of NRS**
16 **201.230(2) and NRS 195.020, and COUNT II: LEWDNESS WITH A CHILD UNDER**
17 **THE AGE OF FOURTEEN (14) YEARS OF AGE, a CATEGORY A FELONY, in**
18 **violation of NRS 201.230(2) and NRS 195.020.**

19 In accordance with the applicable statutes of the State of Nevada this Court
20 sentenced the Defendant to:

21 **Count I:** Imprisonment in the Nevada State Prison for a term of Life with the
22 possibility of Parole after Ten (10) Years; and

23 **Count II:** Imprisonment in the Nevada State Prison for a term of Life with the
24 possibility of Parole after (10) Years, consecutive to Count I.

25 **In the aggregate, a minimum term of Twenty (20) years and a maximum**
26 **term of Life.**

27 The Defendant is given credit for Three Hundred and Six (306) days of pre-
28 sentence incarceration time served. The Court further exonerated any bond heretofore
posted.

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In addition, said Defendant shall pay:

1. An Administrative Assessment in the amount of Twenty-five Dollars (\$25.00)
2. A DNA Fee in the amount of One Hundred Fifty Dollars (\$150.00)
3. A Genetic Marker Fee in the amount of Three Dollars (\$3.00)
4. An Attorney Fee in the amount of Five Hundred Dollars (\$500.00)

Pursuant to NRS 176.0913, Defendant must submit a biological specimen to determine genetic markers and/or secretor status.

Pursuant to NRS 176.0931, the Defendant is subject to lifetime supervision.

Pursuant to NRS 179D.460, the Defendant must register as a Sex Offender.

Therefore, the Clerk of the above-entitled Court is hereby directed to enter the Judgment of Conviction as a part of the record in the above-entitled matter.

DATED: This 12th day of July, 2019.


DISTRICT COURT JUDGE

Case No. 18-CR-01197

Dept. No. 1

IN THE Third JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF Lyon.

Tommy Frost
Petitioner,

v.

The State of Nevada
Respondent.

PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Ely State Prison, White Pine County

2. Name and location of court which entered the judgment of conviction under attack: Third Judicial District Court, Yerington Nevada 89447

3. Date of judgment of conviction: _____

4. Case number: 18-CR-01197

5. (a) Length of sentence: 20 to life

(b) If sentence is death, state any date upon which execution is scheduled: _____

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes _____ No ☒

If "yes", list crime, case number and sentence being served at this time: _____

7. Nature of offense involved in conviction being challenged: Lewdness with Minor Under age of 14

8. What was your plea? (check one):

(a) Not guilty _____ (b) Guilty ☒ (c) Nolo contendere _____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details: N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury _____ (b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No ☒

12. Did you appeal from the judgment of conviction? Yes _____ No ☒

13. If you did appeal, answer the following:

(a) Name of Court: _____

(b) Case number or citation: _____

(c) Result: _____

(d) Date of result: _____

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not:

I asked my attorney to file the appeal, he said he did
but came to find out he never filed it

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?

Yes _____ No ☒

16. If your answer to No. 15 was "yes", give the following information:

(a)(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes _____ No ☒

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes _____ No ☒

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such a result: _____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes _____ No ☒

Citation or date of decision: _____

(2) Second petition, application or motion? Yes _____ No ☒

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes _____ No ☒

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: N/A

(b) The proceedings in which these grounds were raised: _____

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

18. If any of the grounds listed in No. 's 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) NO

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes _____ No ✓

If yes, state what court and case number: _____

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Mario Walther

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes _____ No ✓

If yes, specify where and when it is to be served, if you know: _____

23. State concisely every ground on which you claim that you are being held unlawfully. summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground One: Ineffective Counsel

Supporting FACTS (Tell your story briefly without citing cases or law.): failed to investigate my case and disclosed possible defenses. Plus failed to come see me and answer any Mail or Phone calls

(b) Ground Two: Involuntariness of Plea

Supporting FACTS (Tell your story briefly without citing cases or law.): forced me into taking a guilty plea deal by scaring me into believing there was no defense

(c) Ground Three: Sixth amendment / right to full and complete defense / Brady violations

Supporting FACTS (Tell your story briefly without citing cases or law.): my attorney let the DA's destroy my phone which could have helped me prove my innocence

(d) Ground Four: _____

Supporting FACTS (Tell your story briefly without citing cases or law.): _____

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 20 day of the month of April, of the year 2020.



Signature of petitioner

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.



Petitioner

Attorney for petitioner

CERTIFICATE OF SERVICE BY MAIL

I, Tommy Frost, hereby certify pursuant to N.R.C.P. 5(b), that on this 20 day of the month of April, of the year 2020 I mailed a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** addressed to:

Respondent prison or jail official

Address

Attorney General
Heroes' Memorial Building
100 North Carson Street
Carson City, Nevada 89710-4717

District Attorney of County of Conviction

Address


Signature of Petitioner

FILED

2020 SEP -3 PM 2: 00

TANYA SCHEINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Andrea Andersen

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

STATE OF NEVADA,

Respondent,

vs.

TOMMY FROST,

Petitioner.

**MOTION TO DISMISS PETITION AND
AMENDED PETITION FOR WRIT OF
HABEAS CORPUS (POST-
CONVICTION)**

COMES NOW, the State of Nevada, by and through Stephen B. Rye, District Attorney of Lyon County, and Damian D.Q. Sinnott, Deputy District Attorney, and hereby submits this Motion to Dismiss Petition and Amended Petition for Writ of Habeas Corpus (Post-Conviction) and respectfully requests that this Honorable Court enter an order denying Petition and Amended Petition

This Motion is based on the attached Memorandum of Points and Authorities, all documents and pleadings on file in this case, and any evidence which may be produced at a hearing on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The conviction in this case arose from a string of text messages sent between Frost and his co-defendant Jessica Jordan. On August 15, 2018, Jessica Jordan went to the Lyon County Sheriff's Office, Fernley Substation to make a report of possible child pornography. Jordan met with Detective Eric Pruitt. During that meeting, she disclosed that she was in a relationship with Tommy Frost. Jordan informed Det. Pruitt that through a Facebook

1 Messenger conversation Frost asked her for explicitly sexual photographs of her daughters
2 (aged 2 and 4). Through that same conversation medium, Frost also asked to be allowed to
3 do sexual acts with Jordan's daughters, asked that her daughters be allowed to watch them
4 have sex, requested that he be allowed to teach her daughters how to masturbate, and
5 requested to lick Jordan and her daughters all over. After a lot of prodding by Frost, Jordan
6 took sexually explicit photographs of her daughters and sent them to Frost.

7 Det. Pruitt reviewed Jordan's phone. Based on the discussion with Jordan and the
8 review of messages on her phone, Det. Pruitt determined to arrest Frost. Det. Pruitt
9 coordinated with the Reno Police Department and arrested Frost in Reno on or about August
10 17, 2018. Frost immediately invoked his right to an attorney. Frost had a cell phone on his
11 person that was taken as evidence as part of this case.

12 Frost was set for a pretrial hearing on August 28, 2018 in the Canal Township Justice
13 Court, but the hearing was continued at the request of his attorney. Frost first appeared in
14 justice court on October 2, 2018. At that time, his attorney requested that Frost be evaluated
15 at Lake's Crossing. Frost waived up to district court on that day. On October 15, 2018, the
16 District Court ordered Frost to Lake's Crossing for a competency evaluation. After the
17 evaluation, Frost returned to District Court on November 26, 2018 and was deemed
18 competent to proceed with the criminal charges. He was remanded to the Canal Township
19 Justice Court for further proceedings. A preliminary hearing was set for March 5, 2019. On
20 that day, Frost accepted the offer by the State to plead guilty to 2 counts of Principal to
21 Lewdness with a Child Under the Age of Fourteen (14) years of age, in violation of NRS
22 201.230(2) and NRS 195.020, Category A felonies.

23 During the above proceedings, Det. Pruitt applied for and was granted search warrant
24 for Frost's phone on September 17, 2018. The next day and pursuant to the search warrant
25 Det. Pruitt, with the help of a detective from the Washoe County Sheriff's Office, removed the
26 memory chip from Frost's phone and attempted to download it. Det. Pruitt learned that
27 contents of the memory chip were likely encrypted. However, through the process of
28 attempting to download the memory chip, the chip was rendered unreadable. This process

1 was necessary because the phone was password protected, and Det. Pruitt was not provided
2 a password.

3 The District Court arraigned Frost on the charges on April 29, 2019. He was fully
4 canvassed on the charges, the possible penalties, lifetime supervision, and sex offender
5 registration. Frost admitted that he was pleading guilty because he was in fact guilty of the
6 charges and because he committed the charged acts. Frost signed a Guilty Plea Agreement
7 ("GPA") which was filed with the Court. Frost informed the Court that he had reviewed the
8 GPA, that he was familiar with it, and that his attorney had answered any questions he had
9 with regards to it. The GPA contained the following section:

10 The right to appeal the conviction, with the assistance of an attorney, either
11 appointed or retained, unless the appeal is based upon reasonable constitutional,
12 jurisdictional or other grounds that challenge the legality of the proceeding and
except as otherwise provided in subsection 3 of N.R.S. 174.035. *I understand
that a direct appeal in this case is not appropriate.* (emphasis added).

13 Frost's plea was entered into the record and found to be freely, voluntarily, and
14 knowingly entered. Sentencing was set for June 17, 2019. Frost submitted a statement with
15 the Presentence Investigation Report ("PSI") for sentencing. It stated:

16 I committed the offense because I was dumb and very self centered [sic]. There
17 is no excuse for what I did. I ruined 2 lives for my own selfish wants. I accept
18 everything that was said[,] and I take responsibility for my part. . . . I'm going
19 away to receive help and to become a better person. I never meant for any of this
to happen, but I'm not going to sit here and make excuses. I'm accepting
responsibility for my actions and what I have to so I can become a better person .
20 . . .

21 Frost was sentenced to 10 years to Life on each count (the mandatory sentence pursuant to
22 statute). The Court ran the sentences consecutively for an aggregate minimum term of 20
23 years. The State filed the Judgement of Conviction on July 12, 2019.

24 Petitioner filed his Petition for Writ of Habeas Corpus ("First Petition") on June 16,
25 2020. Petitioner's First Petition did not name and was not served on all the proper parties. The
26 Court granted Petitioner leave to file an Amended Petition naming all proper parties and
27 ensuring service on the same. Petitioner filed his Amended Petitioner for Writ of Habeas
28 Corpus (Post-Conviction) ("Amended Petition") on July 28, 2020.

II. Ineffective Assistance of Counsel Authority and Standard For Summary Dismissal.

A district court reviews claims of ineffective assistance of trial counsel under *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984); see also *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). Under *Strickland*, to prevail on a claim of ineffective assistance of trial counsel, a defendant must establish two elements: (1) counsel provided deficient performance, and (2) "the deficient performance prejudiced the defense." *Kirksey*, 112 Nev. 987, 923 P.2d at 107. To prove deficient performance, a defendant must show counsel's performance fell below an objective standard of reasonableness. *Id.* To prove prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Id.* at 988, 923 P.2d at 1107. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Counsel's performance is measured by an objective standard of reasonableness which takes into consideration prevailing professional norms and the totality of the circumstances. *Strickland*, 466 U.S. at 688; accord, *Homick v. State*, 112 Nev. 304, 913 P.2d 1280 (1996). An insufficient showing on either element of the *Strickland* standard requires denial of the claim. *Kirksey*, 112 Nev. at 988, 923 P.2d at 1107.

The court's view of counsel's performance must be highly deferential, with every effort being taken to eliminate the distorting effects of hindsight. *Strickland*, 466 U.S. at 689, 691. In making a fair assessment of counsel's performance, the trial court must reconstruct the circumstances of counsel's challenged conduct and evaluate that challenged act or omission from counsel's perspective at the time, while remaining perfectly mindful that counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689-90. Accordingly, trial counsel's strategic or tactical decisions will be "virtually unchallengeable absent extraordinary circumstances." *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (quoting *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990)). A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and a district court's factual findings regarding a claim of

1 ineffective assistance of counsel are entitled to deference on appeal. *Means v. State*, 120
2 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272,
3 278 (1994). Habeas claims must consist of more than bare allegations, and an evidentiary
4 hearing on a habeas petition is mandated only if a petitioner asserts specific factual
5 allegations not belied or repelled by the record. *Hargrove v. State*, 100 Nev. 498, 6986 P. 2d
6 222 (1984); *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008).

7 **III. ARGUMENT**

8 **A. The Original Petition Should Be Summarily Dismissed.**

9 *Ground 1*

10 Frost claims that he is innocent of the charges he pled guilty to. The record below¹
11 completely belies this claim. The record includes, but is not limited to, Frost's acceptance of
12 the plea offer, his thorough canvass by the District Court during his arraignment, the Guilty
13 Plea Agreement Frost signed and was thoroughly canvassed on, Frost's verbal plea and
14 discussion with the District Court about why he was pleading to the charges, and Frost's own
15 written statement appended to the Presentence Investigation Report. Pursuant to *Hargrove*
16 and *Nika, supra*, this ground is belied by the record and may be summarily dismissed at this
17 time.

18 *Ground 2*

19 In his second ground, Frost claims that his previous counsel was deficient for failing to
20 file a motion to dismiss based on an alleged *Brady* violation. Petitioner has failed to show that
21 the motion to dismiss was likely to succeed. If a motion to dismiss was not likely to succeed,
22 the result would not have been different. Thus pursuant to *Kirksey*, Petitioner has failed to
23 support his claim for relief and this ground may be summarily dismissed.

24 *Ground 3*

25 In his third ground, Frost claims he asked his attorney to file a direct appeal. Yet, he
26 fails to state what that appeal would have been based on. This case was the result of a guilty
27 plea. As noted in the guilty plea agreement, the appellate claims available to Frost were
28

¹ The State would request that the entire record from the criminal case be incorporated to this case.

1 limited. Frost was aware of those limitations. The record indicates that Frost did not want nor
2 request an appeal. The GPA specifically stated, "I understand that a direct appeal in this case
3 is not appropriate."

4 To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that
5 counsel's performance was deficient in that it fell below an objective standard of
6 reasonableness, and resulting prejudice such that the omitted issue would have a reasonable
7 probability of success on appeal. *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114. Appellate
8 counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463
9 U.S. 745, 751 (1983). Grounds 1 and 2 were either not available to Frost on direct appeal or
10 were meritless. As such, this ground may be summarily dismissed at this time.

11 **B. The Amended Petition Should Be Summarily Dismissed**

12 Petitioner's Amended Petition contained the exact same arguments as the First
13 Petition. Consequently, the Amended Petition may be summarily dismissed as well.

14 **IV. CONCLUSION**

15 Therefore, the State requests this Honorable Court Dismiss the First Petition and the
16 Second Petition without an evidentiary hearing.

17 Pursuant to NRS 239B.030, the undersigned hereby affirms that this document does
18 not contain any social security numbers.

19 DATED this 3rd day of September, 2020

20 Stephen B. Rye
21 Lyon County District Attorney

22 By: 

23 Damian D.Q. Sinnott
24 Deputy District Attorney

CERTIFICATE OF SERVICE

I certify that I am an employee of the Lyon County District Attorney's Office, and that on the date below I served a true and correct copy of the **Motion to Dismiss Petition and Amended Petition for Writ of Habeas Corpus (Post-Conviction)**, by the following:

- ☐ **MAIL:** By placing an original or true copy in a sealed envelope, postage fully prepaid, in a U.S. Postal Service addressed to the individual(s) and/or address(es) listed below
- ☐ **CERTIFIED MAIL:** By placing an original or true copy in a sealed envelope, postage fully prepaid, by certified mail with tracking numbers _____ in a U.S. Postal Service mailbox, addressed to the individual(s) and/or address(es) listed below
- ☒ **EMAIL:** By attaching a true copy to an email addressed to the individual(s) and/or email address listed below:

Addressed as follows:

Karla Butko
butkolawoffice@sbcglobal.net

DATED this 3rd day of September, 2020.



Employee of
Lyon County District Attorney's Office

FILED

2020 SEP 17 AM 11:02

TANYA SCHEIDT
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

ANDREA ANDERSEN DEPUTY

KARLA K. BUTKO, ESQ.
State Bar No. 3307
P. O. Box 1249
Verdi, NV 89439
(775) 786-7118
Attorney for Petitioner

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

TOMMY FROST,
Petitioner,

vs.

Case No. 20-CV-00635

THE STATE OF NEVADA,
Respondent.

Dept. No. 1

OPPOSITION TO MOTION TO DISMISS:
(PETITION & AMENDED PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)

COMES NOW, Petitioner, TOMMY FROST, by and through his counsel of record, KARLA K. BUTKO, LTD., as prepared and submitted by KARLA K. BUTKO, Esq., and presents the following Opposition to Motion to Dismiss the Petition & Amended Petition for Writ of Habeas Corpus (Post-Conviction). This opposition is based upon all documents and pleadings on file herein, the following Points and Authorities, and any argument and evidence to be presented at a hearing on this matter.

POINTS AND AUTHORITIES

Under *Strickland*, to prevail on a claim of ineffective assistance of trial counsel, a defendant must establish two elements: (1) that counsel provided deficient performance, and (2) "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668 (1984). Establishment of deficient performance requires a showing that counsel's performance

1 fell below an objective standard of reasonableness. To satisfy the second element, a defendant
2 must demonstrate prejudice by showing “a reasonable probability that, but for counsel's errors,
3 the result of the trial would have been different.” *Kirksey v. State*, 112 Nev. 980 at 987, 923
4 P.2d 1102 at 1107 (1996). Even though the *Kirksey* case was decided in 1996, it is routinely cited
5 by the Nevada Supreme Court. *Strickland v. Washington*, 466 U.S. 668 (1984).

6 The pleading standard is found in *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d
7 222, 225 (1984), which held that a postconviction petitioner is entitled to evidentiary hearing
8 when he asserts specific factual allegations that, if true, would entitle him to relief.

9 The petitioner must demonstrate the underlying facts by a preponderance of the evidence.
10 *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

11 The Nevada Supreme Court “has long recognized a petitioner's right to a postconviction
12 evidentiary hearing when the petitioner asserts claims supported by specific factual allegations
13 not belied by the record that, if true, would entitle him to relief.” *Mann v. State*, 118 Nev. 351,
14 354, 46 P.3d 1228, 1230 (2002), cited recently in *Berry v. State*, 131 Nev. Adv. Op. 96, decided
15 December 24, 2015. The *Mann* standard is in place at this point in time. See also *Hargrove*
16 *v. State*, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) for this longstanding principle.

17 In this case, Petitioner alleges that trial counsel was ineffective under the *Strickland* standard and
18 the 6th & 14th Amendments to the United States Constitution. A hearing is not required if factual
19 allegations are belied by the record. A claim is ‘belied’ when it is contradicted or proven to be
20 false by the record as it existed at the time the claim was made.” *Mann* at 118 Nev. at 354, 46
21 P.3d 1230.

22 Petitioner seeks an evidentiary hearing on all of the claims he raised in the Petition &
23 Amended Petition for Writ of Habeas Corpus (postconviction). The State has requested that this
24 Court dismiss the postconviction action in its entirety without access to court or an evidentiary
25 hearing. The State’s argument is that: Ground One is belied by the record as the guilty plea was
26 knowing and voluntary; Ground Two should be dismissed because Petitioner did not show it was

likely that his motion to dismiss would be granted and there is no prejudice; Ground Three
Petitioner knowingly waived a direct appeal.

GROUND ONE:

Evaluation of the guilty plea:

If the reason for pleading guilty has nothing to do with the defendant's guilt, then a plea is
not knowing, voluntary or intelligently given and should be set aside. See *State v. Smith*, 131
Nev. 628, 356 P.3d 1092 (2015)—affirming a grant of habeas relief.

The correct stage of the case to attack the validity of a guilty plea is on postconviction.
Any other approach would be legally invalid. The validity of a guilty plea may be challenged in
a post-conviction petition for a writ of habeas corpus, see NRS 34.810(1)(a) (recognizing that the
scope of claims available to challenge a conviction based upon a guilty plea include a claim that
the plea was involuntarily or unknowingly entered or that the plea was entered without the
effective assistance of counsel), as held in *Harris v. State*, 130 Nev. 435, 329 P.3d 619 (2014).
The post-conviction petition for a writ of habeas corpus provides the exclusive remedy for a
challenge to the validity of the guilty plea made after sentencing for persons in custody on the
conviction being challenged. NRS 34.724(2)(b).

The validity of a plea may be attacked by demonstrating ineffective assistance of counsel
under the Sixth Amendment. *Molina v. State*, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004). A
defendant is required to demonstrate "a reasonable probability that, but for counsel's errors, he
would not have pleaded guilty and would have insisted on going to trial." *Id.* 120 Nev. at 190-
91, 87 P.3d at 537. Mr. Frost testified that absent his counsel's deficiencies, he would have gone
to trial, and, presently, that he still wishes to go to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985)
The only remaining determination, then, is whether or not counsel's deficiencies fell below the
objective standard of care required by *Strickland*.

Further, for a guilty plea to be considered valid, it must be freely, voluntarily, and
knowingly made. *State v. Freese*, 116 Nev. 1097, 1106, 13 P.3d 442, 448 (2000). The entire

1 record and the totality of the circumstances must be evaluated to determine “a defendant's
2 comprehension of the consequences of a plea, the voluntariness of a plea, and the general validity
3 of a plea.” *Id.* The burden to demonstrate the insufficiency of the plea lies with Mr. Frost.
4 *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); *McConnell v. State*, 125 Nev. 243,
5 250, 212 P.3d 307, 312 (2009), as corrected (July 24, 2009).

6 Strategic decisions cannot be made before full investigation has occurred. Failure to
7 secure the telephone caused the inability to defend the charges. Failure to gain access to letters
8 which Ms. Jordan (State’s key witness) recanted her allegations and said she was sorry denied
9 Mr. Frost of his ability to defend the charges. Failure to bring forth the testimony of Mr. Frost’s
10 mother, whom Ms. Jordan told she had lied and was sorry about it, and that she lied because
11 there were voices in her head that told her to do so, deprived Mr. Frost of the ability to defend the
12 charges. Petitioner will testify that he wanted to go to trial and would not have accepted a plea to
13 20 years in prison without counsel’s actions in coercing him into accepting the plea offer. *Hill v.*
14 *Lockhart*, 472 U.S. 52 (1985). A hearing is mandated.

15 **GROUND TWO:**

16 **State’s Failure to Collect and Preserve Evidence:**

17 This case is certainly odd. The key allegations against Mr. Frost involve receipt of child
18 pornography on his telephone. Yet, that key piece of evidence was damaged by the State and no
19 evidence is available that the pornographic pictures were actually on Mr. Frost’s phone and sent
20 to him. This argument was brought in a two fold manner. First, that the State violated *Crockett*
21 and its progeny when it failed to collect exculpatory evidence for the Defendant. This was the
22 Defendant’s phone. He had no access to retain an expert and get the forensic data off the phone
23 to defend himself because the State’s expert rendered the phone unreadable when it broke into
24 the contents of the memory chip. Hence, there was evidence that the items were sent by Ms.
25 Jordan but no evidence that the items were actually received as sent by Mr. Frost’s phone.

26 If true, this would have been a complete defense to the charges.
27
28

Ms. Jordan stated in several letters to him that she knew he never did anything wrong and she was sorry. Ms. Jordan made inconsistent statements and told Mr. Frost's mother that she was sorry and lied because there were voices in her head that told her to lie.

A hearing should be held at which point the officers would testify to their actions in handling of the phone and memory chip and the Petitioner would be able to examine them under oath. At that point, the Court could determine whether this was negligence, gross negligence of obstruction of the defense case. 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). A hearing is mandated.

GROUND THREE:

Loss of right to direct appeal:

The State has put upon Mr. Frost the obligation to indicate that his appeal would be successful in order to justify having a direct appeal. That is not the standard at this point of the case. The standard for Mr. Frost is to prove that he wanted a direct appeal, that he told his attorney to appeal and that no appeal occurred. Whether he would be successful on direct appeal is not the proper inquiry for this Court. The proper inquiry is whether counsel knew that his client wanted a direct appeal. Win, lose or draw, if the client wants a direct appeal, the client gets one. Mr. Frost is entitled to a belated appeal. NRAP 4 (c).

Counsel must consult with the client about the procedures for and advantages and disadvantages of an appeal, and counsel's failure to do so is deficient performance for purposes of proving an ineffective assistance of counsel claim. U.S. Const. amend., VI; Roe v. Flores-Ortega, 528 U.S. 470, 477-81; Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999); and Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 659-60 (1999). Mr. Frost was deprived of his right to a direct appeal due to ineffective assistance of counsel, see Toston v. State, 127 Nev. 971, 267 P.3d 795 (2011).

A claim of ineffective assistance of appellate counsel is reviewed under the *Strickland*

1 test. In order to establish prejudice based on deficient assistance of appellate counsel, the
2 petitioner must show that the omitted issue would have had a reasonable probability of success
3 on appeal. Lara v. State, 120 Nev. 177, 183-84, 87 P.3d 528, 532 (2004) (citing Kirksey, 112
4 Nev. at 998, 923 P.2d at 1114). Sentencing questions are always the subject of direct appeal.
5 Had counsel litigated the destruction/loss of evidence to its conclusion, if lost, that would have
6 been the subject of appeal.


7 Mr. Frost will testify that he asked Mr. Walther to appeal his sentence and believed that a
8 notice of appeal had been filed. He recently discovered that there was no direct appeal. Hence,
9 he filed an inquiry with the Court. Mr. Frost argued that he was not advised about the ability of
10 an appeal but was told that a direct appeal in the case is not appropriate. Counsel had not
11 sufficiently investigated the case to conclude that an appeal was not appropriate. This pleading is
12 sufficient to trigger an evidentiary hearing on this claim. Misinformation about the client's
13 appellate rights may render the right to appeal and to counsel on appeal meaningless by deterring
14 a client from requesting a direct appeal, inquiring into the procedures for a direct appeal, or filing
15 an appeal. The allegations are not belied by the record on appeal and, if true, it would entitle
16 him to relief because prejudice would be presumed under *Lozada*. A hearing is mandated.

17 CONCLUSION

18 Mr. Frost pled his petition and amended petition clearly and supported it with mitigation
19 evidence. His allegations are concise. The allegations are not belied by the record. Mr. Frost
20 seeks an evidentiary hearing on the issues raised in his Petition and Supplemental Petition for
21 Writ of Habeas Corpus (postconviction).

22 Dated this 16th day of September, 2020.

23 By:


24 KARLA K. BUTKO, ESQ.
25 State Bar No. 3307
26 P. O. Box 1249
27 Verdi, NV 89439
28 (775) 786-7118
Attorney for Petitioner

CERTIFICATE OF SERVICE

Pursuant to NRCp 5, I certify that on this date I caused the foregoing document to be delivered to all parties to this action by

X placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada.
addressed as follows:

Nevada Attorney General's Office
100 N. Carson Street
Carson City, NV 89701-4717

Lyon County District Attorney's Office
31 S. Main Street
Yerington, NV 89447

Tommy Frost
Inmate 1220520
Ely State Prison
P. O. Box 1989
Ely, NV 89310

DATED this 16 day of September, 2020.

Karla K. Butko
KARLA K. BUTKO, ESQ.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the Social Security Number of any person.

DATED this 16 day of September, 2020.

Karla K. Butko
Karla K. Butko, Esq.

1 KARLA K. BUTKO, ESQ.
2 State Bar No. 3307
3 P. O. Box 1249
4 Verdi, NV 89439
5 (775) 786-7118
6 Attorney for Petitioner

FILED

2020 JUN 16 PM 1:31

TALLAHASSEE
COURT ADMINISTRATION
THIRD JUDICIAL DISTRICT

Victoria Tovar

7 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8
9 IN AND FOR THE COUNTY OF LYON

10 TOMMY FROST,

11 Petitioner,

12 vs.

Case No. 20-CN-00635

13 THE STATE OF NEVADA,

Dept. No. 1

14 Respondent.
15 _____/

16 PETITION FOR WRIT OF HABEAS CORPUS
17 (POST-CONVICTION)

18 This Petition is filed pursuant to Nevada Revised Statutes
19 34.735, et. seq.

20 1. Name of institution and county in which you are
21 presently imprisoned or where and how you are presently
22 restrained of your liberty: Petitioner is incarcerated at the
Ely State Prison in Ely, Nevada, #1220520.

23 2. Name and location of court which entered the judgment
24 of conviction under attack: Third Judicial District Court of the
State of Nevada, Lyon County, Nevada.

25 3. Date of judgment of conviction: July 12, 2019.

26 4. Case Number: 18-CR-01197.

27 5. (a) Length of sentence:
28

1 The Court sentenced Petitioner as follows:

2 Count III: Petitioner was sentenced to a maximum term of Life
3 in prison with the minium parole eligibility at 10 years in
4 prison and

5 Count IV: Petitioner was sentenced to a maximum term of Life in
6 prison with the minium parole eligibility at 10 years in prison
7 which created an aggregate sentence of life in prison with parole
8 eligibility after service of 20 years in prison. Petitioner was
9 ordered to be on lifetime supervision and sexual offender
10 registration.

11 (b) If sentence is death, state any date upon which
12 execution is scheduled: N/A

13 6. Are you presently serving a sentence for a conviction
14 other than the conviction under attack in this motion? Yes _____
15 No X

16 If "yes," list crime, case number and sentence being served
17 at this time:

18 7. Nature of offense involved in conviction being
19 challenged:

20 Two counts of Lewdness with a Minor under the age of 14, felony
21 violations of NRS 201.230(2), Category A felonies. The State
22 agreed to dismiss all other charges. The Parties were free to
23 argue for the sentence to run concurrently or consecutively.

24 8. What was your plea (check one)

25 (a) Not Guilty _____

26 (b) Guilty XX

27 (c) Guilty but mentally ill _____

28 (d) Nolo contendere _____

9. If you entered a plea of guilty or guilty but mentally
ill to one count of an indictment or information, and a not
guilty plea to another count of an indictment or information, or
if a plea of guilty or guilty but mentally ill was negotiated,
give details:

Petitioner pled guilty to two counts of Lewdness with a
Minor under the age of 14.

10. If you were found guilty after a plea of not guilty,
was the finding made by: (check one)

(a) Jury _____

(b) Judge without a Jury _____

11. Did you testify at the trial? Yes _____ No _____

1 12. Did you appeal from the judgment of conviction?

2 Yes _____ No XXX

3 13. If you did appeal, answer the following:

4 (a) Name of Court:

5 (b) Case number or citation:

6 (c) Result:

7 (d) Date of result:

8 Remittitur date:

9 (Attach copy of order or decision, if available.)

10 14. If you did not appeal, explain briefly why you did not:

11 Petitioner wanted to appeal his conviction. His attorney
12 failed to file a notice of appeal and further the appeal.
13 Petitioner asked counsel to file the notice of appeal but the
14 attorney failed to do so.

15 15. Other than a direct appeal from the judgment of
16 conviction and sentence, have you previously filed any petitions,
17 applications or motions with respect to this judgment in any
18 court, state or federal? Yes _____ No X

19 16. If you answer to No. 15 was "yes," give the following
20 information:

21 (a) (1) Name of court:

22 (2) Nature of proceeding:

23 (3) Grounds raised:

24 (4) Did you receive an evidentiary hearing on your
25 petition, application or motion? Yes _____ No _____

26 (5) Result:

27 (6) Date of result:

28 (7) If known, citations of any written opinion or
date of orders entered pursuant to such result:

(b) As to any second petition, application or motion,
give the same information

(1) Name of court: Nevada

(2) Nature of proceeding:

(3) Grounds raised:

(4) Did you receive an evidentiary hearing on your
petition, application or motion? Yes _____ No _____

(5) Result:

(6) Date of result:

(7) If known, citations of any written opinion or
date of orders entered pursuant to such result:

(c) As to any third or subsequent additional
applications or motions, give the same information as above, list

1 them on a separate sheet and attach.

2 (d) Did you appeal to the highest state or federal
3 court having jurisdiction, the result or action taken on any
petition, application or motion?

4 (1) First petition, application or motion? Yes _____ No

Citation or date of decision:

5 (2) Second petition, application or motion? Yes _____ No

Citation or date of decision:

6 (3) Third or subsequent petitions, applications or
motions? Yes _____ No _____

Citation or date of decision:

7
8 (e) If you did not appeal from the adverse action of any
petition, application or motion, explain briefly why you did not.
9 (You must relate specific facts in response to this question.
Your response may be included on paper which is 8½ by 11 inches
10 attached to the petition. Your response may not exceed five
handwritten or typewritten pages in length.

11 17. Has any ground being raised in this petition been
previously presented to this or any other court by way of
12 petition for habeas corpus, motion, application or any other
post-conviction proceeding? If so, identify: N/A

13 (a) Which of the grounds is the same:

14 (b) The proceedings in which these grounds were raised:

15 (c) Briefly explain why you are again raising these
grounds. (You must relate specific facts in response to this
question. Your response may be included on page which is 8½ by 11
16 inches attached to the petition. Your response may not exceed
give handwritten or typewritten pages in length.)

17 18. If any of the grounds listed in Nos. 23(a), (b), © and
18 (d), or listed on any additional pages you have attached, were
not previously presented in any other court, state or federal,
19 list briefly what grounds were not so presented, and give your
reasons for not presenting them. (You must relate specific facts
in response to this question. Your response may be included on
20 page which is 8½ by 11 inches attached to the petition. Your
response may not exceed give handwritten or typewritten pages in
21 length.)

22 19. Are you filing this petition more than 1 year following
the filing of the judgment of conviction or the filing of a
23 decision on direct appeal? If so, state briefly your reasons for
delay. (You must relate specific facts in response to this
24 question. Your response may be included on page which is 8½ by 11
inches attached to the petition. Your response may not exceed
25 give handwritten or typewritten pages in length.)

26 Petitioner states said Petition is timely filed (12/28/18) within

1 one year of the Remittitur.

2 20. Do you have any petition or appeal now pending in any
3 court, either state or federal, as to the judgment under attack?
Yes _____ No X

4 21. Give the name of each attorney who represented you in
5 the proceeding resulting in your conviction and on direct appeal:

6 Mario Walther, Esq., court appointed counsel through the Lyon
7 County Indigent contract represented Petitioner at all stages of
8 the District Court proceedings and during the time for perfecting
9 the direct appeal.

10 22. Do you have any future sentences to serve after you
11 complete the sentence imposed by the judgment under attack?
Yes _____ No X

12 If yes, specify where and when it is to be served, if
13 you know:

14 23. State concisely every ground on which you claim that
15 you are being held unlawfully. Summarize briefly the facts
16 supporting each ground. If necessary you may attach pages
17 stating additional grounds and fact supporting same.

18 Petitioner was deprived of effective assistance of counsel,
19 within the meaning of the 6th and 14th Amendments to the United
20 States Constitution:

21 (1) Ground one: Counsel was ineffective when counsel
22 coerced the guilty plea by threats which overbore the
23 Petitioner's will, causing a plea to be entered which was not
24 voluntary. Petitioner claims his plea constitutes manifest
25 injustice as he claims actual innocence on the charges and
26 believes that he was the victim of being staged by the Co-
27 Defendant herein.

28 (2) Ground Two: Counsel was ineffective when counsel failed
to move to dismiss the charges based upon the willful
failure/destruction of evidence by the police when the telephone
owned by the Petitioner was destroyed and unavailable for the
defense investigation on the charges.

(3) Ground Three: Counsel was ineffective when counsel
failed to perfect a direct appeal and appeal the sentence that
was imposed by the Court, said actions violated Brady v. Maryland
and the right to discovery under the Fifth Amendment.

1 POINTS AND AUTHORITIES

2 **Ground One: Involuntary guilty plea:**

3 Petitioner indicated that he was not guilty of this offense but pled guilty because his
4 attorney told him that there was no defense to the charge. Petitioner believed that if the
5 telephone was investigated by an expert that it would demonstrate that he did not instigate this
6 type of content on his phone and that he is not guilty of this charge. Petitioner asserts that he is
7 actually innocent of the charges.

8 An attorney must make reasonable investigation in preparation for trial, or make a
9 reasonable decision not to investigate. *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (Nev.
10 1996). Petitioner believes that the co-defendant was acting on her own behalf when she chose
11 to store and send illicit pictures over the telephone.

12 Defendants have a right to constitutional effective assistance of counsel that extends to
13 the plea bargain stage. This is proper in a system in which 97% of federal criminal cases and
14 94% of state criminal cases negotiate rather than proceed to trial. See *Missouri v. Frye*, 132 S.
15 Ct. 1399, at 1386-1387, (2012).

16 A guilty plea is knowing and voluntary if the defendant has a full understanding of both
17 the nature of the charges and the direct consequences arising from a plea of guilty. To determine
18 the validity of the guilty plea, the supreme court requires the district court to look beyond the
19 plea canvass to the entire record and the totality of the circumstances. The district court may
20 grant a post-conviction motion to withdraw a guilty plea that was not entered knowingly and
21 voluntarily in order to correct a manifest injustice. A guilty plea entered on advice of counsel
22 may be rendered invalid by showing a manifest injustice through ineffective assistance of
23 counsel. U.S. Const. amend. 6. Manifest injustice warranting withdrawal of a guilty plea may be
24 demonstrated by a failure to adequately inform a defendant of the consequences of entering the
25 plea. *Barajas v. State*, 115 Nev. 440, 442, 991 P.2d 474, 475 (1999). *Little v. Warden*, 117 Nev.
26 845, 849, 34 P.3d 540, 543 (2001); *United States v. Signori*, 844 F.2d 635, 638 (9th Cir. 1988);
27
28

1 see generally *Barajas*, 115 Nev. at 442, 991 P.2d at 476; *Paine v. State*, 110 Nev. 609, 619, 877
2 P.2d 1025, 1031 (1994), overruled on other grounds by *Leslie v. Warden*, 118 Nev. 773, 780-81,
3 59 P.3d 440, 445-46 (2002). See also *Bryant v. State*, *supra*.

4 Defense counsel's failure to promptly investigate and to thoroughly prepare will often
5 deny the accused his constitutional right to the effective assistance of counsel. See Powell v.
6 Alabama, 287 U.S. 45 (1932). Failure to secure the telephone caused the inability to defend the
7 charges. Failure to gain access to letters which Ms. Jordan recanted her allegations and said she
8 was sorry denied Mr. Frost of his ability to defend the charges. Failure to bring forth the
9 testimony of Mr. Frost's mother, whom Ms. Jordan told she had lied and was sorry about it, and
10 that she lied because there were voices in her head that told her to do so, deprived Mr. Frost of
11 the ability to defend the charges. Petitioner will testify that he wanted to go to trial and would not
12 have accepted a plea to 20 years in prison without counsel's actions in coercing him into
13 accepting the plea offer. *Hill v. Lockhart*, 472 U.S. 52 (1985).

14 Strategic choices made after less than complete investigation are reasonable precisely to
15 the extent that reasonable professional judgments support the limitations on investigation. In
16 other words, counsel has a duty to make reasonable investigations or to make a reasonable
17 decision that makes particular investigations unnecessary. In any ineffectiveness case, a
18 particular decision not to investigate must be directly assessed for reasonableness in all the
19 circumstances. Strickland v. Washington, 466 U.S. 668, 690-691 (1984).

20 A decision not to present a particular defense or not to offer particular mitigating
21 evidence is unreasonable unless counsel has explored the issue sufficiently to discover the facts
22 that might be relevant to his making an informed decision. Wiggins v. Smith, 539 U.S. 510, at
23 522-23 (2003); Stankewitz v. Woodford, 365 F.3d 706, 719 (9th Cir. 2004).

24 **Ground Two: Trial counsel was ineffective under the 6th & 14th Amendments when he**
25 **failed to move to dismiss the charges against Mr. Frost for willful failure to collect and**
26 **preserve evidence and destruction of evidence.**

Upon information and belief, the telephone for Mr. Frost was destroyed by the Government and was unable to be examined by a defense investigator. Petitioner will testify that in spite of this, he was advised by counsel Walther that he would lose the case and he should accept the plea offer.

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).

The Defendant must show that it could be reasonably anticipated that the evidence sought would be exculpatory and material to appellant's defense. It is not sufficient that the showing disclose merely a hoped-for conclusion from examination of the destroyed evidence, nor is it sufficient for the defendant to show only that examination of the evidence would be helpful in preparing his defense. *Boggs v. State*, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979) (citations omitted).

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.

Materiality “does not require demonstration by a preponderance” that disclosure of the evidence would have resulted in acquittal. *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Nor is it a sufficiency of the evidence test; a defendant need not show that “after discounting the inculpatory evidence in light of the undisclosed evidence, there would

1 not have been enough left to convict.” *Id.* at 434-35, 115 S.Ct. 1555. A reasonable probability is
2 shown when the nondisclosure undermines confidence in the outcome of the trial. *Id.* at 434, 115
3 S.Ct. 1555.

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

8 Information in the possession of other agencies is imputed *Brady* material and the State
9 has the obligation to reveal said exculpatory evidence to the defense in a timely manner.
10 Evidence also must be disclosed if it provides grounds for the defense to attack the reliability,
11 thoroughness, and good faith of the police investigation, to impeach the credibility of the state's
12 witnesses, or to bolster the defense case against prosecutorial attacks.” *Mazzan v. Warden*, 116
13 Nev. 48, at 67, 993 P.2d 25, at 37 (2000).

14 In the absence of a strong showing of state interests to the contrary, discovery must be a
15 two-way street. *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). The State may not insist that
16 trials be run as a “search for truth” so far as defense witnesses are concerned, while maintaining
17 “poker game” secrecy for its own witnesses.

18 In a criminal investigation, police officers generally have no duty to collect all potential
19 evidence. However, “ ‘this rule is not absolute.’ ” The Nevada Supreme Court has adopted a
20 two-part test to determine when dismissal of charges is warranted due to the State's failure to
21 gather evidence. *Daniels v. State*, 114 Nev. 261, 956 P.2d 111 (1998) and *Randolph v. State* ,
22 117 Nev. 970, 36 P.3d 424 (2001).

23 The State is held responsible for the actions of the police in their investigation stage of
24 the case. The Defendant, of course, had no ability to collect or preserve any of the evidence that
25 is complained of being destroyed. The Defendant must show either bad faith or connivance on
26 the part of the government or prejudice by the loss of the evidence. Where evidence is lost as a
27

1 result of inadequate governmental handling, a conviction may be reversed. *Crockett v. State*, 95
2 Nev. 859, 603 P.2d 1078 (1979).

3 The question is not how to prove that investigation into the telephone would provide
4 defense evidence. The question is why counsel would not secure the telephone for defense
5 testing to see if the delivery of the messages could be shown and the location of the telephone at
6 the time of the transmissions occurred when Mr. Frost was not in possession of the phone..

7 The witness in the case, Jessica Jordan, was a friend of Mr. Frost's. Ms. Jordan left in her
8 car and Mr. Frost forgot his backpack and phone in her car. Mr. Frost contacted Ms. Jordan
9 several times seeking the return of his phone. He had to use a payphone. He saw Ms. Jordan at
10 Hot August Nights and asked again for his phone. Ms. Jordan said she let her ex boyfriend use it
11 and it was stolen. They had an argument. Ms. Jordan offered to pay Petitioner for the phone.
12 She never did. On August 15th, Ms. Jordan returned the cell phone to Petitioner. All of their
13 messages had been deleted. Ms. Jordan stated in several letters to him that she knew he never
14 did anything wrong and she was sorry. Ms. Jordan made inconsistent statements and told Mr.
15 Frost's mother that she was sorry and lied because there were voices in her head that told her to
16 lie. The charge should have been subject to a motion to dismiss for the State's failure to secure
17 the evidence for both sides to investigate.

18 **Ground Three: Petitioner was deprived of his right to a direct appeal of the sentence**
19 **imposed by this Court due to counsel's failure to perfect an appeal, after the client**
20 **requested an appeal, in violation of the 6th and 14th Amendments.**

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

26 Counsel should have filed the notice of appeal within the 30 day time frame so as to
27
28

1 protect Petitioner's right to direct appellate review of his case. Petitioner need not demonstrate
2 that he would have won on direct appeal in order to demonstrate the loss of his right to have a
3 direct appeal. As such, Petitioner has the right to raise said issues in this proceeding. Lozada v.
4 State, 110 Nev. 349, 871 P.2d 944 (1994). Petitioner is entitled to raise issues relating to the
5 sentence which was entered by the Court to the Nevada Supreme Court and lost that right due to
6 counsel's failure to perfect a direct appeal.

7 Mr. Frost will testify that he asked Mr. Walther to appeal his sentence and believed that a
8 notice of appeal had been filed. He recently discovered that there was no direct appeal. Hence,
9 he filed an inquiry with the Court. Mr. Frost is entitled to a belated appeal. NRAP 4 (c).

10 **Ineffective assistance of counsel authority:**

11 In State v. Love, 109 Nev. 1136, 865 P.2d 322 (1993), the Nevada Supreme Court
12 reviewed the issue of whether or not a defendant had received ineffective assistance of counsel at
13 trial in violation of the Sixth Amendment. The Nevada Supreme Court held that this question is
14 a mixed question of law in fact and is subject to independent review. The Supreme Court
15 reiterated the ruling of Strickland v. Washington, 466 U.S. 668 (1984). The Nevada Supreme
16 Court indicated that the test on a claim of ineffective assistance of counsel is that of "reasonably
17 effective assistance" as enunciated by the United States Supreme Court in Strickland. The
18 Nevada Supreme Court revisited this issue in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504
19 (1984) and Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). The Nevada Supreme Court
20 has provided a two-prong test in that the Defendant must show first that counsel's performance
21 was deficient and second, that the Defendant was prejudiced by this deficiency.

22 In Smithart v. State, 86 Nev. 925, 478 P.2d 576 (1970), the Nevada Supreme Court held
23 that it will presume that an attorney has fully discharged their duties and that such presumption
24 can only be overcome by strong and convincing proof to the contrary. The court went on in
25 Warden v. Lischko, 90 Nev. 220, (1974), to hold that the standard of review of counsel's
26 performance was whether the representation of counsel was of such low caliber as to reduce the
27

1 trial to a sham, a farce or a pretense.

2 To state a claim of ineffective assistance of counsel, a defendant must demonstrate that
3 counsel's performance fell below the objective standard of reasonableness. *Lozada v. State*, 110
4 Nev. 349, 871 P.2d 944 (1994).

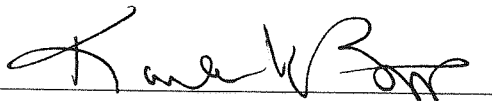
5 Prejudice is demonstrated where counsel's errors were so severe that there was a
6 reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
7 would have been different. A reasonable probability that, but for counsel's unprofessional errors
8 the result of the proceeding would have been different, is a probability sufficient to undermine
9 confidence in the outcome of the trial. *Riley v. State*, 110 Nev. 638, 878 P.2d 272 (1994).

10 Petitioner believes he can meet the burden of proof and is entitled to withdraw his plea or
11 alternatively gain a belated appeal.

12 WHEREFORE, Petitioner prays that the Court grant Petitioner an evidentiary hearing on
13 the issues raised herein and grant him the relief to which he may be entitled in this proceeding.
14 Petitioner asks this Court to consider the issues raised herein when reviewing this post-
15 conviction action.

16 Dated this 15th day of June, 2020.

17
18 By:



19 KARLA K. BUTKO, Esq.
20 State Bar No. 3307
21 Attorney for Defendant
22 P. O. Box 1249
23 Verdi, NV 89439
24 (775) 786-7118
25
26
27
28

1 VERIFICATION OF PETITION FOR WRIT OF HABEAS CORPUS
2 (POST-CONVICTION)

3 Comes now, KARLA K.. BUTKO, Court appointed attorney for
4 TOMMY FROST, Petitioner herein, and under penalty of perjury,
5 the undersigned declares that she knows the contents thereof;
6 that the pleading is true of her knowledge, except as to those
7 matters stated on information and belief, and as to such matters
8 she believes them to be true and that she has been authorized by
9 Petitioner to file this Petition on his behalf. Due to the
10 corona virus look-down of the prison, Mr. Frost is not able to
11 visit with counsel to sign the documents with counsel.

12
13 Dated this 15th day of June, 2020

14
15 By: 

16 KARLA K. BUTKO
17 Attorney at Law
18
19
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21
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25
26
27
28

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCp 5, I certify that on this date I caused the
3 foregoing document to be delivered to all parties to this action
by

4 X placing a true copy thereof in a sealed, stamped
5 envelope with the United States Postal Service at
6 Reno, Nevada.
addressed as follows:

7 Nevada Attorney General's Office
8 100 N. Carson Street
9 Carson City, NV 89701-4717

10 Lyon County District Attorney's Office
11 31 S. Main Street
12 Yerington, NV 89447

13 Tommy Frost
14 Inmate 1220520
15 Ely State Prison
16 P. O. Box 1989
17 Ely, NV 89310

18 DATED this 15 day of June, 2020.

19 Karla R. Butko
20 KARLA R. BUTKO, ESQ.

21 AFFIRMATION PURSUANT TO NRS 239B.030

22 The undersigned does hereby affirm that the preceding
23 document does not contain the Social Security Number of any
24 person.

25 DATED this 15 day of June, 2020.

26 Karla R. Butko
27 Karla R. Butko, Esq.

FILED

2020 JUL 30 AM 10:41

TANYA S. SCIRINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT
TANYA SCIRINE

KARLA K. BUTKO, ESQ.
State Bar No. 3307
P. O. Box 1249
Verdi, NV 89439
(775) 786-7118
Attorney for Petitioner

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

TOMMY FROST,

Petitioner,

vs.

Case No. 20-CV-00635

William "Bill" Gittere,
Warden, Ely State Prison &
THE STATE OF NEVADA,

Dept. No. 1

Respondent.

AMENDED PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)

This Amended Petition is filed pursuant to Nevada Revised Statutes 34.735, et. seq. And this Court's order herein:

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Petitioner is incarcerated at the Ely State Prison in Ely, Nevada, #1220520.

2. Name and location of court which entered the judgment of conviction under attack: Third Judicial District Court of the State of Nevada, Lyon County, Nevada.

3. Date of judgment of conviction: July 12, 2019.

4. Case Number: 18-CR-01197.

5. (a) Length of sentence:

1 The Court sentenced Petitioner as follows:

2 Count III: Petitioner was sentenced to a maximum term of Life in prison with the minium
3 parole eligibility at 10 years in prison and

4 Count IV: Petitioner was sentenced to a maximum term of Life in prison with the minium parole
5 eligibility at 10 years in prison which created an aggregate sentence of life in prison with parole
6 eligibility after service of 20 years in prison. Petitioner was ordered to be on lifetime supervision
7 and sexual offender registration.

8 (b) If sentence is death, state any date upon which execution is scheduled: N/A

9 6. Are you presently serving a sentence for a conviction other than the conviction
10 under attack in this motion? Yes _____
11 No X

12 If "yes," list crime, case number and sentence being served at this time:

13 7. Nature of offense involved in conviction being challenged:

14 Two counts of Lewdness with a Minor under the age of 14, felony violations of NRS 201.230(2),
15 Category A felonies. The State agreed to dismiss all other charges. The Parties were free to
16 argue for the sentence to run concurrently or consecutively.

17 8. What was your plea (check one)

18 (a) Not Guilty _____

19 (b) Guilty XX

20 (c) Guilty but mentally ill

21 (d) Nolo contendere _____

22 9. If you entered a plea of guilty or guilty but mentally ill to one count of an
23 indictment or information, and a not guilty plea to another count of an indictment or information,
24 or if a plea of guilty or guilty but mentally ill was negotiated, give details:

25 Petitioner pled guilty to two counts of Lewdness with a Minor under the age of 14.

26 10. If you were found guilty after a plea of not guilty, was the finding made by: (check
27 one)

28 (a) Jury _____

(b) Judge without a Jury _____

11. Did you testify at the trial? Yes _____ No _____

12. Did you appeal from the judgment of conviction?

Yes _____ No XXX

13. If you did appeal, answer the following:

(a) Name of Court:

(b) Case number or citation:

(c) Result:

(d) Date of result:

Remittitur date:

(Attach copy of order or decision, if available.)

1 14. If you did not appeal, explain briefly why you did not:

2 Petitioner wanted to appeal his conviction. His attorney failed to file a notice of appeal
3 and further the appeal. Petitioner asked counsel to file the notice of appeal but the attorney failed
4 to do so.

5 15. Other than a direct appeal from the judgment of conviction and sentence, have you
6 previously filed any petitions, applications or motions with respect to this judgment in any court,
7 state or federal? Yes _____ No X

8 16. If you answer to No. 15 was "yes," give the following information:

9 (a)(1) Name of court:
10 (2) Nature of proceeding:
11 (3) Grounds raised:
12 (4) Did you receive an evidentiary hearing on your petition, application or
13 motion? Yes _____ No _____
14 (5) Result:
15 (6) Date of result:
16 (7) If known, citations of any written opinion or date of orders entered pursuant
17 to such result:

18 (b) As to any second petition, application or motion, give the same information
19 (1) Name of court: Nevada
20 (2) Nature of proceeding:
21 (3) Grounds raised:
22 (4) Did you receive an evidentiary hearing on your petition, application or
23 motion? Yes _____ No _____
24 (5) Result:
25 (6) Date of result:
26 (7) If known, citations of any written opinion or date of orders entered pursuant
27 to such result:

28 (c) As to any third or subsequent additional applications or motions, give the same
information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the
result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes _____ No _____

Citation or date of decision:

(2) Second petition, application or motion? Yes _____ No _____

Citation or date of decision:

(3) Third or subsequent petitions, applications or motions? Yes _____ No _____
Citation or date of decision:

(e) If you did not appeal from the adverse action of any petition, application or motion,
explain briefly why you did not. (You must relate specific facts in response to this question.
Your response may be included on paper which is 8½ by 11 inches attached to the petition. Your
response may not exceed five handwritten or typewritten pages in length.

17. Has any ground being raised in this petition been

1 previously presented to this or any other court by way of petition for habeas corpus, motion,
2 application or any other post-conviction proceeding? If so, identify: N/A

(a) Which of the grounds is the same:

(b) The proceedings in which these grounds were raised:

3 (c) Briefly explain why you are again raising these grounds. (You must relate
4 specific facts in response to this question. Your response may be included on page which is 8½
5 by 11 inches attached to the petition. Your response may not exceed give handwritten or
6 typewritten pages in length.)

7 18. If any of the grounds listed in Nos. 23(a), (b), © and (d), or listed on any additional
8 pages you have attached, were not previously presented in any other court, state or federal, list
9 briefly what grounds were not so presented, and give your reasons for not presenting them. (You
10 must relate specific facts in response to this question. Your response may be included on page
11 which is 8½ by 11 inches attached to the petition. Your response may not exceed give
12 handwritten or typewritten pages in length.)

13 19. Are you filing this petition more than 1 year following the filing of the judgment of
14 conviction or the filing of a decision on direct appeal? If so, state briefly your reasons for delay.
15 (You must relate specific facts in response to this question. Your response may be included on
16 page which is 8½ by 11 inches attached to the petition. Your response may not exceed give
17 handwritten or typewritten pages in length.)

18 Petitioner states said Petition is timely filed (12/28/18) within one year of the Remittitur.

19 20. Do you have any petition or appeal now pending in any court, either state or federal,
20 as to the judgment under attack? Yes ____ No X

21 21. Give the name of each attorney who represented you in the proceeding resulting in
22 your conviction and on direct appeal:

23 Mario Walther, Esq., court appointed counsel through the Lyon County Indigent contract
24 represented Petitioner at all stages of the District Court proceedings and during the time for
25 perfecting the direct appeal.

26 22. Do you have any future sentences to serve after you complete the sentence imposed
27 by the judgment under attack?

28 Yes ____ No X

If yes, specify where and when it is to be served, if you know:

29 23. State concisely every ground on which you claim that you are being held unlawfully.
30 Summarize briefly the facts supporting each ground. If necessary you may attach pages stating
31 additional grounds and fact supporting same.

32 Petitioner was deprived of effective assistance of counsel, within the meaning of the 6th
33 and 14th Amendments to the United States Constitution:

34 (1) Ground one: Counsel was ineffective when counsel coerced the guilty plea by
35 threats which overbore the Petitioner's will, causing a plea to be entered which was not
36 voluntary. Petitioner claims his plea constitutes manifest injustice as he claims actual innocence
37 on the charges and believes that he was the victim of being staged by the Co-Defendant herein.

38 (2) Ground Two: Counsel was ineffective when counsel failed to move to dismiss the

1 charges based upon the willful failure/destruction of evidence by the police when the telephone
2 owned by the Petitioner was destroyed and unavailable for the defense investigation on the
3 charges.

4 (3) Ground Three: Counsel was ineffective when counsel failed to perfect a direct appeal
5 and appeal the sentence that was imposed by the Court, said actions violated *Brady v. Maryland*
6 and the right to discovery under the Fifth Amendment.

7 POINTS AND AUTHORITIES

8 **Ground One: Involuntary guilty plea:**

9 Petitioner indicated that he was not guilty of this offense but pled guilty because his
10 attorney told him that there was no defense to the charge. Petitioner believed that if the
11 telephone was investigated by an expert that it would demonstrate that he did not instigate this
12 type of content on his phone and that he is not guilty of this charge. Petitioner asserts that he is
13 actually innocent of the charges.

14 An attorney must make reasonable investigation in preparation for trial, or make a
15 reasonable decision not to investigate. *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (Nev.
16 1996). Petitioner believes that the co-defendant was acting on her own behalf when she chose
17 to store and send illicit pictures over the telephone.

18 Defendants have a right to constitutional effective assistance of counsel that extends to
19 the plea bargain stage. This is proper in a system in which 97% of federal criminal cases and
20 94% of state criminal cases negotiate rather than proceed to trial. See *Missouri v. Frye*, 132 S.
21 Ct. 1399, at 1386-1387, (2012).

22 A guilty plea is knowing and voluntary if the defendant has a full understanding of both
23 the nature of the charges and the direct consequences arising from a plea of guilty. To determine
24 the validity of the guilty plea, the supreme court requires the district court to look beyond the
25 plea canvass to the entire record and the totality of the circumstances. The district court may
26 grant a post-conviction motion to withdraw a guilty plea that was not entered knowingly and
27 voluntarily in order to correct a manifest injustice. A guilty plea entered on advice of counsel
28 may be rendered invalid by showing a manifest injustice through ineffective assistance of

1 counsel. U.S. Const. amend. 6. Manifest injustice warranting withdrawal of a guilty plea may be
2 demonstrated by a failure to adequately inform a defendant of the consequences of entering the
3 plea. *Barajas v. State*, 115 Nev. 440, 442, 991 P.2d 474, 475 (1999). *Little v. Warden*, 117 Nev.
4 845, 849, 34 P.3d 540, 543 (2001); *United States v. Signori*, 844 F.2d 635, 638 (9th Cir. 1988);
5 see generally *Barajas*, 115 Nev. at 442, 991 P.2d at 476; *Paine v. State*, 110 Nev. 609, 619, 877
6 P.2d 1025, 1031 (1994), overruled on other grounds by *Leslie v. Warden*, 118 Nev. 773, 780-81,
7 59 P.3d 440, 445-46 (2002). See also *Bryant v. State*, supra.

8 Defense counsel's failure to promptly investigate and to thoroughly prepare will often
9 deny the accused his constitutional right to the effective assistance of counsel. See *Powell v.*
10 *Alabama*, 287 U.S. 45 (1932). Failure to secure the telephone caused the inability to defend the
11 charges. Failure to gain access to letters which Ms. Jordan recanted her allegations and said she
12 was sorry denied Mr. Frost of his ability to defend the charges. Failure to bring forth the
13 testimony of Mr. Frost's mother, whom Ms. Jordan told she had lied and was sorry about it, and
14 that she lied because there were voices in her head that told her to do so, deprived Mr. Frost of
15 the ability to defend the charges. Petitioner will testify that he wanted to go to trial and would not
16 have accepted a plea to 20 years in prison without counsel's actions in coercing him into
17 accepting the plea offer. *Hill v. Lockhart*, 472 U.S. 52 (1985).

18 Strategic choices made after less than complete investigation are reasonable precisely to
19 the extent that reasonable professional judgments support the limitations on investigation. In
20 other words, counsel has a duty to make reasonable investigations or to make a reasonable
21 decision that makes particular investigations unnecessary. In any ineffectiveness case, a
22 particular decision not to investigate must be directly assessed for reasonableness in all the
23 circumstances. *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984).

24 A decision not to present a particular defense or not to offer particular mitigating
25 evidence is unreasonable unless counsel has explored the issue sufficiently to discover the facts
26 that might be relevant to his making an informed decision. *Wiggins v. Smith*, 539 U.S. 510, at
27
28

1 522-23 (2003); Stankewitz v. Woodford, 365 F.3d 706, 719 (9th Cir. 2004).

2 **Ground Two: Trial counsel was ineffective under the 6th & 14th Amendments when he**
3 **failed to move to dismiss the charges against Mr. Frost for willful failure to collect and**
4 **preserve evidence and destruction of evidence.**

5 Upon information and belief, the telephone for Mr. Frost was destroyed by the
6 Government and was unable to be examined by a defense investigator. Petitioner will testify that
7 in spite of this, he was advised by counsel Walther that he would lose the case and he should
8 accept the plea offer.

9 To meet the test for reversal because material evidence has been lost, the accused
10 must "show either (1) bad faith or connivance on the part of the government, or (2) prejudice
11 from its loss." *Crockett v. State*, 95 Nev. 859, 865, 603 P.2d 1078, 1081 (1979). The Defendant
12 must also show the evidence was exculpatory. Evidence which only suggests an alternative
13 theory for the defense and is not directly exculpatory is insufficient. See *Wood v. State*, 97 Nev.
14 363, 366-367, 632 P.2d 339, 341 (1981).

15 The Defendant must show that it could be reasonably anticipated that the evidence sought
16 would be exculpatory and material to appellant's defense. It is not sufficient that the showing
17 disclose merely a hoped-for conclusion from examination of the destroyed evidence, nor is it
18 sufficient for the defendant to show only that examination of the evidence would be helpful in
19 preparing his defense. *Boggs v. State*, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979) (citations
20 omitted).

21 *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny require a prosecutor to disclose
22 evidence favorable to the defense if the evidence is material either to guilt or to punishment. *Lay*
23 *v. State*, 116 Nev. 1185, 1194 (2000); See *Jimenez v. State*, 112 Nev. 610, 618-19, 918 P.2d 687,
24 692 (1996). Failure to do so violates due process regardless of the prosecutor's motive. *Id.* at 618,
25 918 P.2d at 692. Evidence is material if there is a reasonable probability that the result would
26 have been different if the evidence had been disclosed. *Id.* at 619, 918 P.2d at 692.

1 Materiality “does not require demonstration by a preponderance” that disclosure of the
2 evidence would have resulted in acquittal. *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555,
3 131 L.Ed.2d 490 (1995). Nor is it a sufficiency of the evidence test; a defendant need not show
4 that “after discounting the inculpatory evidence in light of the undisclosed evidence, there would
5 not have been enough left to convict.” *Id.* at 434-35, 115 S.Ct. 1555. A reasonable probability is
6 shown when the nondisclosure undermines confidence in the outcome of the trial. *Id.* at 434, 115
7 S.Ct. 1555.

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

12 Information in the possession of other agencies is imputed *Brady* material and the State
13 has the obligation to reveal said exculpatory evidence to the defense in a timely manner.
14 Evidence also must be disclosed if it provides grounds for the defense to attack the reliability,
15 thoroughness, and good faith of the police investigation, to impeach the credibility of the state's
16 witnesses, or to bolster the defense case against prosecutorial attacks.” *Mazzan v. Warden*, 116
17 Nev. 48, at 67, 993 P.2d 25, at 37 (2000).

18 In the absence of a strong showing of state interests to the contrary, discovery must be a
19 two-way street. *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). The State may not insist that
20 trials be run as a “search for truth” so far as defense witnesses are concerned, while maintaining
21 “poker game” secrecy for its own witnesses.

22 In a criminal investigation, police officers generally have no duty to collect all potential
23 evidence. However, “ ‘this rule is not absolute.’ ” The Nevada Supreme Court has adopted a
24 two-part test to determine when dismissal of charges is warranted due to the State's failure to
25 gather evidence. *Daniels v. State*, 114 Nev. 261, 956 P.2d 111 (1998) and *Randolph v. State* ,
26 117 Nev. 970, 36 P.3d 424 (2001).

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

7 The question is not how to prove that investigation into the telephone would provide
8 defense evidence. The question is why counsel would not secure the telephone for defense
9 testing to see if the delivery of the messages could be shown and the location of the telephone at
10 the time of the transmissions occurred when Mr. Frost was not in possession of the phone..

11 The witness in the case, Jessica Jordan, was a friend of Mr. Frost's. Ms. Jordan left in her
12 car and Mr. Frost forgot his backpack and phone in her car. Mr. Frost contacted Ms. Jordan
13 several times seeking the return of his phone. He had to use a payphone. He saw Ms. Jordan at
14 Hot August Nights and asked again for his phone. Ms. Jordan said she let her ex boyfriend use it
15 and it was stolen. They had an argument. Ms. Jordan offered to pay Petitioner for the phone.
16 She never did. On August 15th, Ms. Jordan returned the cell phone to Petitioner. All of their
17 messages had been deleted. Ms. Jordan stated in several letters to him that she knew he never
18 did anything wrong and she was sorry. Ms. Jordan made inconsistent statements and told Mr.
19 Frost's mother that she was sorry and lied because there were voices in her head that told her to
20 lie. The charge should have been subject to a motion to dismiss for the State's failure to secure
21 the evidence for both sides to investigate.

22 **Ground Three: Petitioner was deprived of his right to a direct appeal of the sentence**
23 **imposed by this Court due to counsel's failure to perfect an appeal, after the client**
24 **requested an appeal, in violation of the 6th and 14th Amendments.**

25 The constitutional right to effective assistance of counsel extends to a direct appeal.
26 Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective
27
28

1 assistance of appellate counsel is reviewed in the "reasonably effective assistance" test set forth
2 in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and Kirksey
3 v. State, 112 Nev. 980, 923 P.2d 1102 (Nev. 1996).

4 Counsel should have filed the notice of appeal within the 30 day time frame so as to
5 protect Petitioner's right to direct appellate review of his case. Petitioner need not demonstrate
6 that he would have won on direct appeal in order to demonstrate the loss of his right to have a
7 direct appeal. As such, Petitioner has the right to raise said issues in this proceeding. Lozada v.
8 State, 110 Nev. 349, 871 P.2d 944 (1994). Petitioner is entitled to raise issues relating to the
9 sentence which was entered by the Court to the Nevada Supreme Court and lost that right due to
10 counsel's failure to perfect a direct appeal.

11 Mr. Frost will testify that he asked Mr. Walther to appeal his sentence and believed that a
12 notice of appeal had been filed. He recently discovered that there was no direct appeal. Hence,
13 he filed an inquiry with the Court. Mr. Frost is entitled to a belated appeal. NRAP 4 (c).

14 **Ineffective assistance of counsel authority:**

15 In State v. Love, 109 Nev. 1136, 865 P.2d 322 (1993), the Nevada Supreme Court
16 reviewed the issue of whether or not a defendant had received ineffective assistance of counsel at
17 trial in violation of the Sixth Amendment. The Nevada Supreme Court held that this question is
18 a mixed question of law in fact and is subject to independent review. The Supreme Court
19 reiterated the ruling of Strickland v. Washington, 466 U.S. 668 (1984). The Nevada Supreme
20 Court indicated that the test on a claim of ineffective assistance of counsel is that of "reasonably
21 effective assistance" as enunciated by the United States Supreme Court in Strickland. The
22 Nevada Supreme Court revisited this issue in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504
23 (1984) and Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). The Nevada Supreme Court
24 has provided a two-prong test in that the Defendant must show first that counsel's performance
25 was deficient and second, that the Defendant was prejudiced by this deficiency.

26 In Smithart v. State, 86 Nev. 925, 478 P.2d 576 (1970), the Nevada Supreme Court held
27
28

1 that it will presume that an attorney has fully discharged their duties and that such presumption
2 can only be overcome by strong and convincing proof to the contrary. The court went on in
3 Warden v. Lischko, 90 Nev. 220, (1974), to hold that the standard of review of counsel's
4 performance was whether the representation of counsel was of such low caliber as to reduce the
5 trial to a sham, a farce or a pretense.

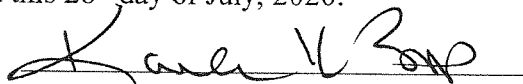
6 To state a claim of ineffective assistance of counsel, a defendant must demonstrate that
7 counsel's performance fell below the objective standard of reasonableness. *Lozada v. State*, 110
8 Nev. 349, 871 P.2d 944 (1994).

9 Prejudice is demonstrated where counsel's errors were so severe that there was a
10 reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
11 would have been different. A reasonable probability that, but for counsel's unprofessional errors
12 the result of the proceeding would have been different, is a probability sufficient to undermine
13 confidence in the outcome of the trial. *Riley v. State*, 110 Nev. 638, 878 P.2d 272 (1994).
14 Petitioner believes he can meet the burden of proof and is entitled to withdraw his plea or
15 alternatively gain a belated appeal.

16 WHEREFORE, Petitioner prays that the Court grant Petitioner an evidentiary hearing on
17 the issues raised herein and grant him the relief to which he may be entitled in this proceeding.
18 Petitioner asks this Court to consider the issues raised herein when reviewing this post-
19 conviction action.

20 Dated this 28th day of July, 2020.

21 By:



22 KARLA K. BUTKO, Esq.
23 State Bar No. 3307
24 Attorney for Defendant
25 P. O. Box 1249
26 Verdi, NV 89439
27 (775) 786-7118
28

1 VERIFICATION OF AMENDED PETITION FOR WRIT OF HABEAS CORPUS
2 (POST-CONVICTION)

3 Comes now, KARLA K. BUTKO, Court appointed attorney for
4 TOMMY FROST, Petitioner herein, and under penalty of perjury,
5 the undersigned declares that she knows the contents thereof;
6 that the pleading is true of her knowledge, except as to those
7 matters stated on information and belief, and as to such matters
8 she believes them to be true and that she has been authorized by
9 Petitioner to file this Petition on his behalf. Due to the
10 corona virus look-down of the prison, Mr. Frost is not able to
11 visit with counsel to sign the documents with counsel.

12
13 Dated this 28 day of July, 2020

14
15 By: 

KARLA K. BUTKO
Attorney at Law

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5, I certify that on this date I caused the
3 foregoing document to be delivered to all parties to this action
by

4 X placing a true copy thereof in a sealed, stamped
5 envelope with the United States Postal Service at
6 Reno, Nevada.
addressed as follows:


7 William "Bill" Gittere
8 Warden, Ely State Prison
P. O. Box 1989
Ely, NV 89301

9 Nevada Attorney General's Office
10 100 N. Carson Street
Carson City, NV 89701-4717

11 Lyon County District Attorney's Office
12 31 S. Main Street
Yerington, NV 89447

13 Tommy Frost
14 Inmate 1220520
Ely State Prison
15 P. O. Box 1989
Ely, NV 89301

16 DATED this 28 day of July, 2020.

17 
18 KARLA K. BUTKO, ESQ.

19
20 **AFFIRMATION PURSUANT TO NRS 239B.030**

21 The undersigned does hereby affirm that the preceding
22 document does not contain the Social Security Number of any
person.

23 DATED this 28 day of July, 2020.

24 
25 Karla K. Butko, Esq.

1 CASE NO. 20-CV-00635

2 DEPT. I

3
4 THE THIRD JUDICIAL DISTRICT COURT - THE STATE OF NEVADA
5 IN AND FOR THE COUNTY OF LYON

6 BEFORE THE HON. JOHN P. SCHLEGELMILCH, DISTRICT JUDGE,
7 PRESIDING

8
9
10 TOMMY FROST,

11 PETITIONER,

12 v.

13 WILLIAM "BILL" GITTERE,
14 WARDEN ELY STATE PRISON
15 AND
STATE OF NEVADA,

RESPONDENT.

16 ----- /

17
18 TRANSCRIPT OF PROCEEDINGS

19 WRIT OF HABEAS CORPUS POST CONVICTION

20 MARCH 23, 2021

21 COURTHOUSE

22 YERINGTON, NEVADA

23
24 Reported by:

KATHY TERHUNE, CCR 209

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INDEX PAGE

STATE'S WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
ERIC PRUITT	6	15	25	
MATTHEW MERRILL	28	36	49	
MARIO WALTHER	52	67		
STEPHEN MANNING	81	86		
TOMMY FROST	88	103		

EXHIBITS

PETITIONER'S:	PAGE
1, DEFENDANT'S PSI STATEMENT	125
2, LETTER	62
3, GUILTY PLEA AGREEMENT	50
4, SEARCH WARRANT APPLICATION	10
5, SEARCH WARRANT	
6, PRUITT'S REPORT	25

1
2
3
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APPEARANCES:

FOR THE STATE:

STEPHEN B. RYE
District Attorney
Courthouse
Yerington, NV 89447

DEFENDANT PRESENT IN COURT.

FOR THE DEFENDANT:

KARLA K. BUTKO, ESQ.
P.O. BOX 1249
VERDI, NV 89439

NO OTHER APPEARANCES.

* * * * *

1 MARCH 23, 2021, 9:30 A.M., YERINGTON, NEVADA.

2
3 -000-

4 TRANSCRIPT OF PROCEEDINGS

5
6 THE COURT: All right. So, this is Case
7 20-CV-00635, Frost versus Gittere, et al, on a petition
8 for post conviction relief, habeas corpus.

9 Okay. Ms. Butko, how are you today?

10 MS. BUTKO: Good. Thank you, Your Honor. Good
11 morning.

12 THE COURT: Good morning. All right.

13 So, go ahead.

14 MS. BUTKO: Thank you, Your Honor. I would
15 point out that my client is present in court, and he
16 understands that by speaking today and bringing this
17 case forward, that Mr. Merrill and Mr. Walther will
18 both be able to speak and talk about client
19 confidential information. I would also make sure that
20 the Court is going to take into consideration the
21 record in the criminal case, and I would ask you to do
22 that.

23 THE COURT: Okay. Fair enough.

24 MS. BUTKO: I would call Eric Pruitt.

1 THE COURT: All right. So, just for the
2 record. Any objection to that?

3 MR. RYE: No, Your Honor.

4 THE COURT: Okay. So --

5 MR. RYE: We agree with that.

6 THE COURT: -- the Court is going to
7 incorporate the entirety of the record from State of
8 Nevada versus Tommy Frost. That was case 18-CR-01197.

9 MS. BUTKO: Thank you, Your Honor.

10 THE COURT: Okay.

11 MS. BUTKO: I would call Eric Pruitt to the
12 stand.

13 THE COURT: Okay.

14 Deputy, you can just face the clerk, raise
15 right hand, and be sworn.

16 (Witness sworn.)

17 THE BAILIFF: Come this way.

18 THE COURT: Come on up over here.

19 You can take your mask off while you're
20 testifying.

21 THE WITNESS: Thank you, Judge,

22 ///

23 ///

24 ///

1 ERIC PRUITT,
2 called as a witness herein by the Petitioner,
3 having been first duly sworn, was examined
4 and testified as follows:
5
6 DIRECT EXAMINATION
7 BY MS. BUTKO:
8 Q Could you please state your full name for the
9 record?
10 A Deputy Eric Pruitt.
11 Q And how do you spell your last name?
12 A P-R --
13 THE COURT: Before we get too far, are going to
14 do witness exclusion?
15 MS. BUTKO: I don't think it's necessary,
16 Judge. Nobody wants --
17 THE COURT: And that's fine. Just -- I just
18 want to clarify. All right. Go ahead, continue.
19 MS. BUTKO: Thank you.
20 BY MS. BUTKO:
21 Q Please spell your last name?
22 A P-R-U-I-T-T.
23 Q What's your occupation?
24 A I'm a deputy sheriff with the Lyon County

1 Sheriff's Office.

2 Q How long have you been employed in that
3 capacity?

4 A I've been with the Lyon County Sheriff's Office
5 for six and a half years.

6 Q Did you have any involvement in investigation
7 with the defendant, Tommy Frost?

8 A I did.

9 Q What was your role in the investigation?

10 A I was a detective who was working the -- I was
11 the primary detective that was working the case
12 involving Jessica Jordan and him.

13 Q Do you recall the nature of the charges in the
14 case?

15 A Possession of child pornography, production,
16 and then some lewdness with a minor.

17 Q Were you present when Mr. Frost was arrested?

18 A I was.

19 Q Where did that occur?

20 A Wingfield Park in Reno, Nevada.

21 Q At the time of Mr. Frost's arrest, who else was
22 with you?

23 A A number of different Reno Police Department
24 personnel.

1 Q At that point in time did you have access to
2 Mr. Frost's telephone?

3 A It was seized from him at the time of his
4 arrest, the one that he had on his person, and a
5 backpack that contained an additional phone.

6 Q So, your testimony is there were two phones
7 seized that day at his arrest, correct?

8 A That's correct.

9 Q Did -- the one that was on his person, did you
10 scroll through that particular phone?

11 A No, it was locked, and there was no access to
12 the phone.

13 Q Was that phone placed into evidence?

14 A It was.

15 Q And do you recall what type of phone that was?

16 A It was a Motorola.

17 Q Now, concerning the phone in the backpack, do
18 you recall what type of phone that was?

19 A I don't.

20 Q Was that phone searched?

21 A No.

22 Q Now, did you obtain a search warrant in this
23 particular case?

24 A Yes.

1 Q And why did you do that?

2 A To attempt to download the phone's contents.

3 Q Officer Pruitt, I'm going to show you
4 Exhibit 4. Let me put my mask on and come up and say
5 hi.

6 Exhibit 4 is a copy of an application and
7 affidavits for search warrant. Do you recognize that
8 document?

9 A Yes.

10 Q Is that the application you prepared to search
11 Mr. Frost's phone?

12 A This is the second warrant that was done to
13 search his phone, but yes.

14 Q And why did you do a second warrant in this
15 case?

16 A Due to the fact that first -- after the first
17 warrant that was applied for by Detective Joiner to
18 search his phone and Ms. Jordan's phone, those two
19 phones -- Jordan's phone was downloaded successfully.
20 His phone had password protections on it, and it didn't
21 allow me to access the phone. I attempted to access
22 for a -- what would be a logical extraction. Having --
23 needing to have password and access the phone, I also
24 tried to access via Intuit loader, which goes in

1 through the boot process of the phone.

2 Both of those were unsuccessful due to
3 password -- due to the password protection on the
4 phone, and I didn't have the -- there were -- the
5 correct settings were not on the phone for me to access
6 it that way.

7 MS. BUTKO: Your Honor, I move for admission of
8 Exhibit 5, please.

9 THE COURT: Any objection?

10 MR. RYE: No objection, Your Honor.

11 THE CLERK: Five or four? I thought she said
12 five.

13 THE WITNESS: This is four.

14 MS. BUTKO: Is that four? I'm sorry. Four.

15 THE CLERK: Thank you.

16 THE COURT: Four. Four is admitted.

17 (Whereupon, Petitioner's Exhibit 4 was admitted
18 into evidence.)

19 MS. BUTKO: I should have it in front of me,
20 that would be easier. Thank you.

21 BY MS. BUTKO:

22 Q Now, at what point in time did you actually
23 search the phone of Mr. Frost? How long after his
24 arrest?

1 A The first attempt was I believe a couple of
2 days after his arrest. And then the second attempt was
3 about a month later.

4 Q So, during the search, the second search, the
5 month later, who was with you during that search?

6 A Detective Greg Sawyer.

7 Q And who is that?

8 A He's a -- he's a detective with Washoe County
9 Sheriff's Office. He works -- he's assigned to
10 Internet Crimes Against Children Task Force. He's a
11 cell phone forensic expert up there.

12 Q Was there any sort of a defense expert on
13 telephone encryption present when the phone was
14 searched the second time?

15 A No.

16 Q Was there any requests of your agency not to
17 search the phone with potential damage without the
18 defense being present?

19 A No.

20 Q Was Mr. Frost in custody when that search
21 occurred?

22 A Yes.

23 Q Did Mr. Frost give you permission to search his
24 phone?

1 A No.

2 Q Did you at any point after his arrest ask for
3 his permission to search the phone?

4 A No. He had invoked when I introduced myself
5 when I attempted to interview him after his arrest, and
6 from that point forward I didn't have any more contact
7 with Mr. Frost.

8 Q Did you have any defense attorneys contact you
9 and say that their client would be willing to just give
10 the password so that the cell phone could be accessed
11 by party to the case?

12 A No.

13 Q When the search warrant was executed the second
14 time, what happened?

15 A The second time we attempted to download the
16 phone using some software that he had that may be able
17 to bypass -- Detective Sawyer had that might have been
18 able to bypass the password restriction. It was
19 unsuccessful. At that point, we performed the -- what
20 would be called a JTAG or chip-off. And it is removing
21 the primarily chip from the phone, and you place it in
22 a carrier that locks it and allows you to access the
23 phone through the boot menu and go through that. And a
24 lot of times you're able to bypass the password

1 restrictions at that point.

2 Q Were you able to bypass the password
3 restriction?

4 A No. The encryption setup on the phone had been
5 enabled. And so, the boot program we were able to
6 access, but the user data was encrypted and partitioned
7 away from that, so we weren't able to access any of
8 that information.

9 Q And was the phone ultimately destroyed by that
10 attempt and effort?

11 A The phone would not be usable, but the chip
12 itself was not destroyed. The chip would again -- the
13 chip would still be able to be re-examined in the same
14 fashion.

15 Q So, let me make sure. I'm not an expert, and
16 I'm not a techie at all. So, let me make sure I
17 understand. If that chip was sitting here right now,
18 could we put it into a similar phone that Mr. Frost had
19 and see what's on that chip?

20 A Not in the same manner. You would be able to
21 examine it using one of the chip readers and accessing
22 it through plugging that into computer and running the
23 program through that computer. In essence you wouldn't
24 be able to put it back in another cell phone. You

1 would be able to place it into a chip reader that
2 connects through all the pins on the bottom of the --
3 on the bottom of the microchip, and then allows the
4 computer to try to run that program through the
5 computer itself.

6 Q And so, Mr. Frost would be able to hand over
7 the password and we could see what was on that phone,
8 correct?

9 A Possibly.

10 Q Did that ever happen?

11 A No.

12 Q Is the phone still evidence -- in evidence?

13 A No. It was released by the DA's Office.

14 Q Is the chip for the phone still in evidence?

15 A No.

16 Q After the arrest of Mr. Frost, did you have any
17 further contact with Jessica Jordan?

18 A I do not believe so.

19 Q Did you have any conversations with
20 Jessica Jordan where she indicated to you that she was
21 making up her connection with Mr. Frost on these
22 photographs?

23 A No.

24 Q So, just to be sure that I'm clear.

1 The evidence that you had against Mr. Frost
2 included Ms. Jordan's telephone, correct?

3 A Yes.

4 Q And Ms. Jordan's statement, correct?

5 A That's correct.

6 Q No statement from Mr. Frost?

7 A No.

8 Q And no pictures in his possession at the time
9 of his arrest?

10 A That's correct.

11 MS. BUTKO: That's all I have.

12 THE COURT: Okay. Thank you.

13 Mr. Rye?

14 MR. RYE: Thank you, Your Honor.

15

16 CROSS-EXAMINATION

17 BY MR. RYE:

18 Q Good morning --

19 A Morning.

20 Q -- Deputy Pruitt. I have just a few questions
21 for you in follow-up.

22 What's your experience and training with cell
23 phones?

24 A I'm a certified cell phone examiner with a

1 Smart Plus certification. And then I'm also certified
2 in Oxygen Forensics software for downloading and
3 forensic examination of phones.

4 Q And do you have practical experience, on the
5 job experience doing that analysis with cell phone?

6 A Yes.

7 Q How long have you done that?

8 A I believe I've been certified for about three
9 years now.

10 Q Do you have any idea how many phones you've
11 worked on during the course of that three years?

12 A Approximately 30 to 40.

13 Q And in this particular case -- just a little
14 background. We're not going to rehash all the facts.
15 But how did you become involved in this case against
16 Mr. Frost?

17 A Basically, I was actually at the Fernley
18 substation working on search warrant preparation in
19 another case. There was a call for service for patrol
20 that Ms. Jordan was out front and had information about
21 issues involving child pornography, and I went outside
22 and made contact with her.

23 Q And what did -- after you made contact with
24 her, where did your investigation go?

1 A It led to -- it led into the fact that she was
2 involved, along with Mr. Frost, in having pictures of
3 young children taken and lengthy discussions about what
4 types of pictures and how they wanted pictures taken
5 and discussions of sexual acts and desired sexual acts
6 between them and the children.

7 Q And when you were meeting with Ms. Jordan, was
8 there anything she showed you to confirm what she
9 telling you?

10 A She showed me her Facebook Messenger that
11 outlined all of everything she was explaining to me and
12 had been back and forth conversation between the two.

13 Q And when you say "the two"?

14 A Mr. Frost and Ms. Jordan.

15 Q So, when Ms. Butko asked you was there any
16 information linking Mr. Frost to this or statements or
17 anything, you observed on the Facebook Messenger
18 statements from Mr. Frost?

19 A That would be correct.

20 Q And generally, can you summarize for the Court
21 what those statements were?

22 A There were statements where he requested the
23 photos, initially. There were statements where he gave
24 direction as to what kind of photos he wanted. That he

1 wanted to have -- show all the parts, spread them
2 apart. Very descriptive about what he wanted them to
3 take -- how he wanted them to take pictures. There was
4 also messages that outlined how to coax the children
5 into doing it. And there were also messages about
6 that -- a number of messages back and forth between
7 Ms. Jordan and Mr. Frost that talked about the sexual
8 acts of involving the children or having the children
9 watch them or participate in sexual acts with
10 Ms. Jordan and Mr. Frost.

11 Q And in those Facebook Messenger did you
12 discover photographs?

13 A Yes.

14 Q And in your training and experience, were they
15 child pornography?

16 A Yes.

17 Q And so -- and did Ms. Jordan identify the
18 children in some of those photographs?

19 A Yes.

20 Q And who's children were they?

21 A They were hers.

22 Q So, after you reviewed that information and
23 spoke with Ms. Jordan, you arranged this meeting in
24 Reno with Mr. Frost?

1 A Yes.

2 Q How did that meeting come about?

3 A Ms. Jordan said that she's met with Mr. Frost

4 on numerous occasions. That she arranges to meet him

5 through the -- through Facebook Messenger, the thread

6 that she showed us with all the photos and the

7 conversations. She arranged to meet him at Wingfield

8 Park, and we respond -- and I -- Detective Joyner

9 remained with Ms. Jordan, and I responded to Reno and

10 met with Reno police, and we responded to the park and

11 located and arrested Mr. Frost.

12 Q And were messages going back and forth during

13 that time between Ms. Jordan and Mr. Frost?

14 A Yes.

15 Q And you confirmed that with Detective Joyner?

16 A Yes.

17 Q And so, when you arrived at Wingfield Park --

18 what was the park again?

19 A Wingfield Park, yes, sir.

20 Q Wingfield park? Okay.

21 And you met with Mr. Frost. You described the

22 phones he had on him. Did he have any other computer

23 devices?

24 A Not that I remember, no.

1 Q So, no other way to communicate other than by
2 cell phone?

3 A That'd be correct.

4 Q And so, you confronted him and took possession
5 of the cell phone at that time?

6 A Yes.

7 Q Okay. And then you talked about a first search
8 warrant. What was that about?

9 A That was applying for a search warrant for
10 Ms. Jordan's phone and Mr. Frost's phone.

11 Q Would that be standard in an investigation like
12 this?

13 A Yes.

14 Q After you received the search warrant, what did
15 you do?

16 A I down -- used Oxygen Forensic software to
17 download Ms. Jordan's phone, and then I also used -- I
18 attempted to use Oxygen Forensic software to download
19 Mr. Frost's phone.

20 Q And you talked a little bit about that on
21 direct. But just a brief overview of what that Oxygen
22 Forensic download is and what you're trying to do?

23 A Okay. So, depending on the settings and the
24 phone and those sort of things, you're able to access

1 different parts of the phone, different information
2 from the phone depending on how the phone is. Whether
3 the phone is rooted, commonly known as jail broken,
4 which releases a lot of the restrictions that
5 internally prevent different parts of the phone from
6 talking to each other. You can get varying degrees of
7 information off the phone based on those things.

8 So, there's what's called a logical extraction
9 or a full physical extraction. If you have access and
10 the ability, you can perform what's called the full
11 physical extraction which creates a mirrored template
12 of what the phone is. The same way that like a
13 computer forensics person will mirror a hard drive, and
14 then work within the mirrored hard drive to search for
15 evidence, and the original hard drive doesn't get
16 messed with.

17 Q You were not able to do either one of those
18 with Mr. Frost's?

19 A Negative.

20 Q And so, based upon that, you applied for the
21 additional warrant, correct?

22 A That is correct.

23 Q And is that standard procedure in a case like
24 this?

1 A Especially with the fact that we were going to
2 take the phone apart and do those things, we were going
3 to damage property that Mr. Frost owned at that point.
4 The phone would not be usable as a phone any longer.
5 We want to make sure. Not to mention the fact that my
6 original search warrant had expired at that point. So,
7 I was going to take that warrant and then -- and damage
8 his property, I wanted to ensure that I had a warrant
9 that authorized those actions.

10 Q And you coordinated with Reno Police Department
11 because they have the expertise to do that?

12 A Yes. It was with Greg, Detective Greg Sawyer
13 with Washoe County Sheriff's Office.

14 Q I'm sorry. Washoe County Sheriff's Office.
15 And so, and were there reasons in this
16 particular case that you really needed to try to get
17 into that phone if it was possible?

18 A Yes. During the conversations between
19 Mr. Frost and Ms. Jordan, there was mention of other
20 potential victims of Mr. Frost. Mr. Frost claimed that
21 he had had set -- attempting to persuade Ms. Jordan to
22 have her children participate in sex acts with him.

23 He claimed that he had had six prior
24 girlfriends that had had their children join them

1 during sexual acts. In furtherance of this claim, he
2 sent her a photograph of another child with next to no
3 clothing on on a bed.

4 Q And so, once you received the warrant, did you
5 meet with the Washoe County Sheriff's Office?

6 A Yes.

7 Q And you were present, I think you told
8 Ms. Butko, when you -- when the chip-off was done?

9 A That's correct.

10 Q Have you ever observed one of those previously?

11 A No, that was the first one. I -- the reason I
12 talked to Detective Sawyer is -- he's their cell phone
13 expert up there. He works with the Internet Crimes
14 Against Children Task Force. He does far more
15 examinations than me and had a greater depth of
16 experience and knowledge in the field than I did. So,
17 I relied on him to give me guidance about where I
18 should go with that.

19 Q Okay. And so, then you -- once you received
20 that information from the detective in Washoe County,
21 what did you do?

22 A We -- that's when I applied for the -- I spoke
23 with him about it. He said I might be able to get into
24 it with this software, but I may not. And then we

1 could do the chip-off if not, and I said okay. Because
2 the common practice, and this is through my training
3 and through his training is, is that a chip-off a lot
4 of times can bypass the password restrictions on a
5 phone.

6 Q And that was the intention for applying for
7 that kind of search warrant?

8 A Yes.

9 Q And once that was done and determined that you
10 were unable to get the information off the phone, what
11 happened with the phone and the chip that was removed?

12 A They were placed back into evidence.

13 Q So, they were given back to you?

14 A Yes.

15 Q And then you booked them into the evidence --

16 A Yeah. I took them back and booked them back
17 into the evidence vault.

18 Q At Lyon County Sheriff's Office?

19 A Yeah.

20 MR. RYE: I don't have any other questions,
21 Your Honor.

22 THE COURT: Any follow-up on that, Ms. Butko?

23 MS. BUTKO: Briefly, Your Honor. Thank you.

24 ///

REDIRECT EXAMINATION

BY MS. BUTKO:

Q Do you recall the date that you actually executed the search warrant, the second one, on Mr. Frost's phone?

A I believe it was September 19th, but my report details that.

MS. BUTKO: Your Honor, may I approach?

THE COURT: Yes.

MS. BUTKO: Thank you.

BY MS. BUTKO:

Q Deputy Pruitt, I'm showing you Petition's Exhibit 6. I'm asking you to look at that document.

Does looking at that document refresh your recollection of the date?

A September 18th.

Q And does Exhibit 6 appear to be a true and accurate copy of your report on that?

A Yes.

MS. BUTKO: Your Honor, I move for admission of Exhibit 6.

MR. RYE: No objection.

THE COURT: It's admitted.

(Whereupon, Petitioner's Exhibit 6 was admitted)

1 into evidence.)

2 BY MS. BUTKO:

3 Q During your investigation of this case, did you
4 investigate the background of Jessica Jordan as well?

5 THE COURT: What -- that's six you said?

6 THE WITNESS: Sorry.

7 MS. BUTKO: Yes, Your Honor. Thank you.

8 THE COURT: That's the officer's report?

9 MS. BUTKO: Yes.

10 THE COURT: Okay.

11 BY MS. BUTKO:

12 Q Did you investigate the background of
13 Jessica Jordan?

14 A If I remember correctly, I ran criminal
15 histories on both subjects during the course of the
16 investigation.

17 Q Do you know if she was on probation at the time
18 she made these claims against Mr. Frost?

19 A I don't believe she was.

20 Q And her children, did you note whether they had
21 been victims of prior crimes from other boyfriends with
22 Ms. Jordan?

23 A Not that I was aware of.

24 Q Did you find that out later?

1 A I don't remember whether or not there was any
2 other previous incidents.

3 Q Okay. Now, the actual phone itself, which
4 would be the hard evidence against Mr. Frost, you were
5 never able to see the contents of that phone?

6 A That's correct.

7 Q And those contents do not exist as we sit here
8 today?

9 A The contents would still exist. They would
10 just -- they've been released to another party.

11 Q So, they're not in the custody of the police
12 department or the District Attorney's Office?

13 A That's correct.

14 Q And was the defense ever advised that those
15 items were being released?

16 A I have no idea whether they were advised. That
17 would be between the prosecution and defense.

18 Q And do you know who they were released to?

19 A I believe they were released to
20 Jessica Jordan's mother.

21 Q Okay. Thank you.

22 MS. BUTKO: That's all I have.

23 MR. RYE: Nothing based on that, Your Honor.

24 THE COURT: Okay. Thank you, Deputy.

1 Is he subject to recall?

2 MR. RYE: No, Your Honor.

3 THE WITNESS: Do you want these, Your Honor?

4 THE COURT: Yeah, just leave them right there.

5 MS. BUTKO: Your Honor, I have no objection.

6 THE COURT: You're released from further
7 testimony in this matter. You can go if you'd like.

8 THE WITNESS: Thank you, Your Honor.

9 THE COURT: Stick around if you want to. It's
10 up to you. It's an open court proceeding.

11 MS. BUTKO: Thank you, Your Honor. I would
12 call Matt Merrill to the stand, please.

13 THE COURT: Mr. Merrill, come forward. Please
14 be sworn by the clerk.

15 (Witness sworn.)

16

17 MATTHEW MERRILL,
18 called as a witness herein by the Petitioner,
19 having been first duly sworn, was examined
20 and testified as follows:

21

22 DIRECT EXAMINATION

23 BY MS. BUTKO:

24 Q Good morning.

1 A Good morning.

2 Q Could you please state your full name?

3 A Yes. Matthew Merrill.

4 Q And what is your occupation?

5 A I'm an attorney.

6 Q And where do you work currently?

7 A With the Lyon County District Attorney's

8 Office.

9 Q What was your occupation in August 2019?

10 A I was a Lyon County public defender.

11 Q And where was your office?

12 A In Dayton, Nevada.

13 Q How long did you hold that position?

14 A Approximately two years.

15 Q Were you a licensed attorney in the State of

16 Nevada in 2018?

17 A I was.

18 Q And were you a licensed attorney in the State

19 of Nevada in 2019?

20 A I was.

21 Q Did you have other attorneys who also worked

22 with your office?

23 A I did. I had Adam Wynott, who worked with my

24 office and Mario Walther.

1 Q Okay. Did you come to know a person named
2 Tommy Frost?

3 A I did.

4 Q You did you meet him?

5 A I met him, I was assigned or appointed to
6 represented him from the Fernley Canal Township Justice
7 Court.

8 Q Were you appointed at the very onset of his
9 arrest?

10 A There was a co-defendant, Ms. Jessica Jordan.
11 And so, I believe it was a few days after his arrest,
12 perhaps maybe even a week, until I was appointed. I
13 would have been appointed as a conflict counsel.

14 Q Do you recall approximately what date you would
15 have received the case?

16 A I don't. I know it's in my file. It's in the
17 courtroom. If you want -- wish to refresh my
18 recollection, I certainly can. But I don't remember
19 the exact date.

20 Q Okay. Did you meet with Mr. Frost at the
21 Justice Court stage of this case?

22 A Yes, I did.

23 Q Did you review the discovery in this case?

24 A I did.

1 Q Did you take any steps to have Mr. Frost's
2 Motorola phone examined by a defense expert?

3 A No, not during the point I had the case.

4 Q Did Mr. Frost tell you that he would provide
5 you with the password for that phone?

6 A No.

7 Q Did you ask him?

8 A I do not believe so.

9 Q Did Mr. Frost tell you there would be nothing,
10 no pornography on that phone?

11 A I do not believe so.

12 Q Did you ever see any pictures of any type in
13 your discovery that were actually taken from the phone
14 of Mr. Frost?

15 A Taken from his personal cell phone?

16 Q Yes.

17 A No.

18 Q What did the discovery consist of on this case?

19 A So, discovery was, we had Jessica Jordan, who
20 had some sort of relationship with Mr. Frost. There
21 was a conversation via Facebook Messenger that
22 Mr. Frost was asking for pictures of her two daughters.
23 Specifically of their vaginas and of vaginas spread
24 usually in very interesting positions. He had

1 conversations for pages and pages regarding how those
2 positions are supposed to be done, their relationship
3 between each other, between Mr. Frost and Ms. Jordan.
4 And that went on and on, and that was done via Facebook
5 Messenger. Which in my mind was very important given
6 that it wasn't a text message from an actual phone. It
7 was through an account listed as the defendant, or
8 Mr. Frost, in this case.

9 Ms. Jordan went to -- my understanding is
10 Ms. Jordan went to the Lyon County Sheriff's Office,
11 and basically told one of the detectives there that
12 this conversation happened, and Ms. Jordan took these
13 photographs on behalf of Mr. Frost's request and sent
14 them to him. And that's kind of how the case began.

15 She was in custody at the time when I had the
16 case, and she was appointed an attorney. My
17 understanding was that the District Attorney's Office
18 at that point cut a deal with her to testify against
19 Mr. Frost, and she was willing to testify about her
20 involvement with the case, her taking photographs on
21 behalf of his request, and the conversations that she's
22 had with him.

23 Q At no time in your discovery did you receive
24 any evidence that Mr. Frost had ever touched these two

1 little girls, correct?

2 A That he specifically touched?

3 Q Correct.

4 A No.

5 Q Did you receive a letter from Jessica Jordan in
6 which she recanted her allegations against Mr. Frost?

7 A I saw Mr. Frost probably in jail at least ten
8 times. And on one occasion, and perhaps more than one,
9 he provided me with letters that he identified as
10 coming from Ms. Jessica Jordan to himself. He provided
11 those letters to me. I at no time had any conversation
12 with her, as she was represented. And so, I received
13 from Mr. Frost maybe 10, 15 letters.

14 Q In those letters did Jessica Jordan still
15 profess her love for Mr. Frost?

16 A Yes. They were still planning to get married
17 and had conversations, just I found them somewhat
18 delusional at this point.

19 Q Did you have personal discussions with
20 Mr. Frost about whether he should or should not accept
21 a plea bargain from the State?

22 A Yes. So, we went over the entire case. At one
23 point, and I have a letter from him, where he
24 specifically asked for a deal from the State. Of

1 course, we discussed all our options, and yes, we did
2 discuss a plea deal.

3 Q At what point did your representation of
4 Mr. Frost stop and Mr. Walther's begin?

5 A So, I believe at least once Mr. Walther came
6 with me to the jail, and I introduced Mr. Walther to
7 Mr. Frost. My involvement in the case ended after he
8 waived his preliminary hearing. I believe I did go see
9 him down at the jail maybe once or twice after that
10 point, but I did not handle any District Court
11 hearings.

12 Q Now, I want to be sure that I'm clear because I
13 think Mr. Frost waived at one point for competency
14 evaluation and waived at another point for a plea
15 bargain; am I right?

16 A That's correct.

17 Q And so, your representation of him ceased when
18 he waived for the plea bargain?

19 A That's correct.

20 Q So, during your discussions of a plea bargain
21 with Mr. Frost, what did you tell him?

22 A Well, I mean, we had -- we had lots of
23 conversations. One I'm sure we discussed about his --
24 about the evidence. I'm sure we went over his

1 constitutional rights. I go over those with every
2 single client, his options, his defenses. We went over
3 all that.

4 And we showed up at the preliminary hearing,
5 and Ms. Jordan showed up and was ready to testify, and
6 Mr. Frost wanted to at that point take a plea deal.
7 And so, that's what happened on the day of the
8 preliminary hearing.

9 Q So, questions regarding the actual search
10 warrant executed on the phone, which was on
11 September 17th -- 18th of 2018, were you ever advised
12 that there was going to be a second search warrant
13 executed on the telephone of Mr. Frost?

14 A I believe that was probably at the very initial
15 stages when I had the case, and I don't recall if I
16 ever was notified that there was going to be a second
17 search warrant.

18 Q Did you consider bringing in a defense expert
19 to gain access to the contents of the telephone?

20 A Yes. So, I did want to hire an investigator.
21 We didn't get that far in the case. We were wanting to
22 get through the preliminary hearing, and we wanted to
23 see what the evidence was. We wanted to see what she
24 was going to testify to. And that was something -- be

1 something we would obtain later on.

2 Q So, if the State had told you hey, we're going
3 to execute this search warrant on your client's phone
4 and it might just blowup on us, there might be nothing
5 left, what steps would you have taken to investigate?

6 A Would you like me to speculate?

7 Q You weren't noticed that they were opening that
8 phone and it could destroy it, right?

9 A So, I don't -- I don't recall any time being
10 noticed that the -- that the phone was going to be
11 opened up. If the phone was going to be opened up,
12 typically what I would have done is I would have
13 requested to be there, maybe have an expert there. I
14 just, I wasn't informed, so I don't -- I couldn't tell
15 you.

16 MS. BUTKO: That's all I have, Your Honor.

17 THE COURT: Mr. Rye?

18 MR. RYE: Thank you, Your Honor.

19

20 CROSS-EXAMINATION

21 BY MR. RYE:

22 Q You represented Mr. Frost from approximately
23 August 2018, until April 2019, correct?

24 A I think that's correct.

1 Q And after you represented Mr. Frost,
2 Mr. Walther took over the case?

3 A That's correct.

4 Q Can you describe briefly how that transition
5 worked with respect to Mr. Frost?

6 A With Mr. Walther --

7 Q Yes.

8 A -- taking over?

9 Q Yes.

10 A So, I believe Mr. Walther started in my law
11 firm the end of November, beginning of December of the
12 prior year. We had a good relationship. We talked
13 about the case on numerous occasions prior to the
14 actual handoff. Myself and Mr. Walther, I believe, we
15 both went to the jail. And usually on cases,
16 especially involving Category A's, I would do kind of a
17 soft handing off where Mr. Walther would be introduced
18 to the defendant. We would talk about the case, and
19 Mr. Walther would then take over.

20 Q Now, in this particular case, you were
21 appointed to represent Mr. Frost, correct?

22 A Correct.

23 Q And then shortly thereafter, you had a series
24 of meetings with Mr. Frost regarding the case?

1 A That's correct.

2 Q You reviewed the discovery with him?

3 A Yes.

4 Q Did that include the Facebook Messenger pages?

5 A Yes. I gave him all the discovery, and he
6 specifically gave me all the pictures that I gave him.
7 Those pictures included the Facebook Messenger
8 pictures, including the two females, juvenile females,
9 bent over exposing their genitalia. He gave those back
10 to me in a white envelope that I still have.

11 Q And so, he knew the evidence against him,
12 correct?

13 A Yes.

14 Q And at no time did he raise any issues about
15 that evidence not involving him, correct?

16 A Well, at certain points prior to going to
17 Lake's Crossing and perhaps after, I mean, he was
18 concerned about the evidence, I would definitely say.
19 I mean, there was definitely discussions that we had
20 regarding the evidence. I don't know if that answered
21 your question or not.

22 Q Okay. So, at some point you decided to request
23 that he be sent to Lake's Crossing. How did that come
24 about?

1 A So, Mr. Wynott in my office had a conversation
2 with Mr. Frost's mom, who indicated that he had mental
3 health history through his juvenile years, perhaps
4 schizophrenia, ADHD, depression, that sort of thing.
5 And with my conversations -- even before we ever met at
6 the Justice Court, I came down to the jail and met with
7 Mr. Frost, and I also had concerns.

8 So, after both of those, Mr. Wynott then went
9 down to the jail, wrote notes in the file to indicate
10 that the Lake's Crossing is most like appropriate.
11 That was my evaluation as well. Given a Category A
12 felonies and discussions with mother, we decided that
13 was the appropriate decision to go.

14 Q Okay. And what was the result of the Lake's
15 Crossing evaluation?

16 A So, Lake's Crossing evaluation came back. It
17 was Dr. Bissett did one of the evaluations. He
18 specifically called me regarding the case. He had some
19 concerns about it. We received a report back. The
20 report that came back was a recommendation for the
21 Court to find Mr. Frost competent. There were -- part
22 of the evaluation done by Dr. Bissett included perhaps
23 his evaluation that indicated Mr. Frost maybe feigning
24 some of his mental health history and perhaps the

1 extent of his mental health history. Specifically not
2 remembering certain events and some other -- some other
3 issues.

4 So, I had a conversation with Dr. Bissett
5 regarding that. He did come back to District Court
6 here, was found competent and remanded back to the
7 Justice Court.

8 Q And you met with Mr. Frost regarding the
9 competency evaluation when he was in custody, correct?

10 A Yes. So, I made specific notes that I met with
11 the defendant. We went over the evaluation in custody
12 day before we came to District Court here. He
13 understood the evaluation and agreed that he was
14 competent and be bound back downstairs.

15 Q And when you met with him to discuss that, you
16 had no concerns about his mental health interfering
17 with that decision; is that correct?

18 A That's correct.

19 Q And so, once he was found competent and
20 remanded back to Justice Court, did you continue to
21 meet with Mr. Frost?

22 A I did.

23 Q And you indicated at some point he wanted to
24 discuss a plea deal?

1 A Yes. So, initially with all -- with all my
2 clients, we would discuss the case, discuss kind of
3 what they want to do, what they're looking for. This
4 is a case that we talked to the State about to try to
5 work out some negotiation. Almost on every case there
6 is some sort of negotiation that happens. This was no
7 no different. I specifically have a letter from him
8 asking for a plea negotiation.

9 Q And so, after you received that letter, did you
10 meet with him at all at the jail?

11 A I'm sure I did. I can't tell you specific
12 dates. But I met with him over ten times.

13 Q Okay. And then it come time for the
14 preliminary hearing. Were you prepared to do the
15 preliminary hearing on that date?

16 A I was prepared. The State was there. The jail
17 showed up with co-defendant. At that point, my
18 recollection is Mr. Frost kind of saw what he was up
19 against, and then requested at that point to me to ask
20 the State for negotiation.

21 Q And at any time did you tell Mr. Frost at the
22 time of the preliminary hearing that he had to waive
23 his preliminary hearing?

24 A No. We were set to do it.

1 Q And after he told you that he wanted to make a
2 deal, what did you do in the case?

3 A So, Mr. Damian Sinnott was handling the matter.
4 After he told me he wanted to make a deal, I talked to
5 Mr. Sinnott. I'm sure it probably didn't happen in the
6 courtroom. I can't recall exactly. There was some
7 discussions that Mr. Sinnott apparently may decide to
8 file additional charges, not just the ones that were in
9 the criminal complaint at that point. I talked to
10 Mr. Sinnott, and we worked out a negotiation.

11 Q And based on your review of the discovery to
12 that point, it was your understanding that it would be
13 reasonable to file additional charges based on what was
14 contained in the discovery, correct?

15 A Correct. It was definitely possible that there
16 would be additional charges coming. Especially
17 depending on what she testified to at the preliminary
18 hearing.

19 Q Now, at the -- I think we are -- you already
20 testified to this, but just to clarify, you had already
21 reviewed the discovery and met with Mr. Frost several
22 times prior to the decision to waive the preliminary
23 hearing?

24 A Yes. Over ten times. Every time I went down

1 to the B Pod in the jail, even if I wasn't there
2 specifically to visit him, he would be knocking on the
3 window, wanted me to come over and talk to him. So,
4 not only the ten or more times I specifically went down
5 to talk to him, but additional times that I did not
6 mark down because he was wanted to talk to me in the
7 B Pod.

8 Q Now, so, he waived the preliminary hearing in
9 the Justice Court. Were you present when he did that?

10 A I was.

11 Q What happened after he waived the preliminary
12 hearing?

13 A So, after he waived the preliminary hearing, he
14 was bound over. I can't tell you exactly, but usually
15 it's about a week and a half afterwards when the
16 Information is prepared, and they come up to District
17 Court. I can't tell you offhand if I met with him
18 before, but I know he did want to continue the
19 arraignment in District Court for a period of two weeks
20 I believe to discuss the Information, go over the
21 guilty plea agreement.

22 Q And what -- when he requested the additional
23 time, what was your response?

24 A I requested the additional time here in

1 District Court. It may have been done by stipulation.
2 I can't recall offhand. But we requested additional
3 time, and it was granted.

4 Q And is that typically what you do in a case
5 when your client asks for additional time?

6 A Right. Yes.

7 Q And so, after you asked for the additional
8 time, what happened?

9 A So, at that point, I can't recall if
10 Mr. Walther was involved at that point. But if you
11 requested additional time, on a -- on a case like with
12 a Cat A, this is a case I would definitely make a point
13 to go down, visit him several days beforehand, and make
14 sure I resolve any questions, concerns that he had.

15 Q Now, did you review at all his criminal history
16 during the course of your representation?

17 A I do not believe I had his criminal history at
18 the beginning. I seen the PSI at some point. But I
19 don't -- I don't think I saw the criminal history
20 before.

21 Q Now, there was some discussion about the cell
22 phone and the preservation of evidence. You didn't
23 have -- you were not aware that they were doing the
24 search warrant for the phone, correct?

1 A That's correct.

2 Q And in this case, you made a professional
3 decision not to do additional investigation regarding
4 the phone based on the evidence in the plea agreement?

5 A That's correct. When we -- like I said, when
6 we first met with him, we discussed with mom some
7 mental health history, and then he was bound over to
8 Lake's Crossing for an evaluation. At that point the
9 case was somewhat in holding. I knew it was going to
10 go most likely to preliminary hearing based on the
11 severity of the case. He really wanted to see what the
12 evidence was going to be prior, or see what the
13 evidence was going to be at the preliminary hearing,
14 and those were steps that we were going to take if it
15 was going to proceed to a jury trial.

16 Q Now, you indicated also that Mr. Wynott worked
17 for you during that period?

18 A That's correct.

19 Q And did he also have communications with
20 Mr. Frost?

21 A He did. He met with him at least one time.

22 Q And in a case where you have Mr. Wynott
23 meeting, do you guys confer about the case in those
24 meetings during the course of the representation?

1 A Yes. All -- especially a case such as this,
2 the severity, we would have met, discussed the case.
3 And I probably directed him to specifically come down
4 here, which is why he came down and spoke to Mr. Frost.

5 Q Now, in the course of your criminal defense
6 practice, have you had occasion to represent people
7 with mental health?

8 A Yes.

9 Q And sometimes with mental illness to the point
10 that you can't communicate with them?

11 A That's correct.

12 Q Now, in this particular case you had some
13 concerns with Mr. Frost was your testimony. At any
14 point in your representation did you believe he had
15 mental illness to the point that he did not understand
16 what you were asking or discussing with him?

17 A I knew he definitely had mental health issues
18 going on. It was not the severity of perhaps other
19 individuals where they are clearly not there. I had
20 concerns that he may have been, Mr. Frost, may more
21 delusional than perhaps some other clients.

22 The Lake's Crossing, why we went that way, was
23 one, severity of the case; two, that there was
24 allegations from family that he may have schizophrenia,

1 and may have been off his medication for a significant
2 amount -- period of time. And additionally talking
3 with Mr. Frost, those same allegations came across.
4 So, we wanted to make sure he was competent to proceed.

5 Q And after that evaluation, you were comfortable
6 when you dealt with Mr. Frost up until you handed the
7 case off to Mr. Walther?

8 A Yes.

9 Q At no point did you feel the need
10 professionally to have him reevaluated or sent back to
11 Lake's Crossing?

12 A No. After he came back from Lake's Crossing, I
13 think it was a period of time of perhaps maybe a month
14 before the preliminary hearing. It appeared that he
15 understood what his rights were. I had no concerns
16 during the preliminary hearing, or at least when we
17 were at the preliminary hearing, for his waiver.

18 Q Now, you talked briefly about some letters that
19 Mr. Frost gave you when you visited him one time in the
20 jail, or maybe on several times? I wasn't clear on
21 that.

22 A It was at least one time. Perhaps it was more
23 than one time that he handed me letters.

24 Q And as part of your representation of

1 Mr. Frost, did you review those letters?

2 A I did.

3 Q Did you meet with Mr. Frost and discuss those
4 letters?

5 A We discussed the whole case, including the
6 letters. He was convinced that the letters proved his
7 innocence.

8 Q And did that change your professional opinion
9 regarding the representation and the decision of
10 Mr. Frost to plead guilty in this case?

11 A No. In fact, I mean, it did present perhaps
12 maybe a few issues on cross-examination of the
13 co-defendant. However, reading those letters, she was
14 clearly delusional as far as both of them still wanting
15 to get married, not ever having much contact with each
16 other. She goes back and forth that someone may have
17 framed them, including her boyfriend.

18 But then indicates that the children told
19 somebody in the family that photographs of -- naked
20 photographs were taken of the children. And so, they
21 present a lot of issues. It wasn't a clear-cut letter.
22 It never said he's 100 percent innocent. That's not
23 what they ever said.

24 Q So, based on your discussions with Mr. Frost,

1 review of the evidence, and your professional judgment,
2 you were comfortable with his decision to plead guilty?

3 A Yes.

4 MR. RYE: No other questions, Your Honor.

5 THE COURT: Ms. Butko?

6 MS. BUTKO: Thank you. Thank you, Your Honor.

7

8 REDIRECT EXAMINATION

9 BY MS. BUTKO:

10 Q Do you recall whether you were actually in
11 court on the day of the plea of this case?

12 A I don't think so. And the reason was if I was
13 then working for the District Attorney's office, I
14 would have specifically left the courtroom on a case
15 such as this, and I did that on several different
16 cases.

17 Q So --

18 MS. BUTKO: Your Honor, may I approach?

19 THE COURT: Yes.

20 BY MS. BUTKO:

21 Q I have Exhibit 3 here, which is the guilty plea
22 agreement. And I ask you to look at this document.

23 On the last page of that document, is that your
24 signature?

1 A That is Mario Walther's.

2 Q And it says for you, correct?

3 A That's correct.

4 Q So, on this date is it your belief that you
5 were still working in your defense practice, correct?

6 A Yes. I did not start the DA's Office until
7 May.

8 MS. BUTKO: And, Your Honor, I move for
9 admission of Exhibit 3.

10 MR. RYE: No objection, Your Honor. It's also
11 part of the record in the criminal case that you've
12 taken notice of.

13 THE COURT: Okay. It's admitted.

14 (Whereupon, Petitioner's Exhibit 3 was admitted
15 into evidence.)

16 BY MS. BUTKO:

17 Q Did you have any assistance or give any
18 assistance in preparing the case for sentencing?

19 A Not specifically besides just, you know,
20 analyzing the case. I didn't speak to any -- I
21 attempted to contact -- grandfather called my office at
22 one point prior to sentencing while the case was still
23 ongoing, wanted to pass a message to me. I called him
24 back. I think it went straight to voicemail.

1 I didn't have any specific -- I didn't
2 specifically work on the sentencing, no.

3 Q Do you recall whether you did any investigation
4 into the background of Jessica Jordan?

5 A Not prior to preliminary hearing, I don't
6 believe so besides just what was in the police report
7 and speaking with her attorney.

8 Q And who was her attorney?

9 A Aaron Mouritsen.

10 MS. BUTKO: That's all I have, Your Honor.

11 THE COURT: Okay. Anything on that, Mr. Rye?

12 MR. RYE: No, Your Honor.

13 THE COURT: Is Mr. Merrill free to go?

14 MS. BUTKO: Yes, Your Honor.

15 MR. RYE: Yes, Your Honor.

16 THE COURT: Okay. Mr. Merrill, you're released
17 from further testimony in this matter.

18 MS. BUTKO: Could you leave Exhibit 3 there?
19 Mr. Walther will be using it as well. Thank you.

20 I would call Mario Walther, please.

21 THE COURT: Mr. Walther. Come up. Be sworn.

22 (Witness sworn.)

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MARIO WALTHER,
called as a witness herein by the Petitioner,
having been first duly sworn, was examined
and testified as follows:

DIRECT EXAMINATION

BY MS. BUTKO:

Q Could you please state your full name?

A Mario Walther.

Q And what was your occupation in August of 2019?

A I was -- 2000 -- August of 2019?

Q Yes.

A I was practicing law as an attorney.

Q And what type of practice did you have?

A In 2000 -- August of 2019, I was working with
Brad Johnston.

Q As a licensed attorney?

A Yes.

Q Were you a licensed attorney in Nevada in 2018?

A I was.

Q Were you a licensed attorney in Nevada in 2019?

A Yes, I was.

Q Did you at some point in time work with
Matt Merrill Law?

1 A I did. I believe I left Mr. Johnston's firm in
2 November of 2018. I believe I started working with
3 Mr. Merrill in mid-December.

4 Q Do you know a person named Mario -- I'm sorry.

5 THE COURT: I'm a little confused.

6 MS. BUTKO: Okay.

7 THE COURT: Okay. So, you left Johnston in
8 '18?

9 THE WITNESS: I believe so. I'm trying to
10 remember the dates right now.

11 THE COURT: Because you said August 2019. All
12 right. So, the date --

13 THE WITNESS: Was it -- was the question August
14 2019?

15 BY MS. BUTKO:

16 Q 2019, yes.

17 A Okay.

18 Q We're trying to narrow down the time that --

19 A Sure. Sure.

20 THE COURT: And you said you left his office in
21 2018. So, I want to get this clarified.

22 THE WITNESS: Yeah, I would have left --

23 MS. BUTKO: Thank you, Judge.

24 THE WITNESS: -- November '18. Started with

1 Mr. Merrill I believe in December of '18. August of
2 '19, I was running my own practice, I believe.

3 BY MS. BUTKO:

4 Q Okay. So, let's clarify.

5 At the point in time, did you meet Mr. Frost at
6 some point in time?

7 A Yes.

8 Q And how is it you met him?

9 A So, when I began working with Mr. Merrill,
10 initially I was handling a number of civil cases and
11 bringing in other work to his firm and would cover the
12 public defense contract and assist him in some of his
13 private criminal defense cases as well.

14 I believe the first time I met Mr. Frost was in
15 Fernley Justice Court. I believe it would have been
16 set for status or a pretrial and was covering that
17 calendar for Mr. Merrill that day. And I set a prelim
18 on behalf of Mr. Frost.

19 Q Now, as part and parcel of representing
20 Mr. Frost on this case, did you review the discovery of
21 the case?

22 A Yes, as well as had conversations with
23 Adam Wynott and Mr. Merrill in regards to the case,
24 their conversations and their representation.

1 Q Did you take any steps to review the contents
2 of the Motorola phone that Mr. Frost had in his
3 position when he was arrested?

4 A I did not. At that time, Mr. Merrill was the
5 primary attorney on the case at that time. It was
6 never contemplated that I would be handling the
7 preliminary hearing or anything of that nature.

8 Q Did Mr. Frost tell you he would provide the
9 password to his phone so it could be opened?

10 A He did not.

11 Q Did you ask him to?

12 A I did not.

13 Q Did Mr. Frost tell you there would be no child
14 pornography on his Motorola phone?

15 A So, those conversations would have occurred
16 between Mr. Frost and Mr. Merrill. I do recall at some
17 point a conversation with Mr. Merrill early on, again
18 when I was not involved, that Mr. Frost wished to set a
19 prelim, move forward with the case.

20 Q So, just to make sure I'm clear.

21 Mr. Merrill was handling the preliminary
22 investigation up through the time of the preliminary
23 hearing date, correct?

24 A Yes.

1 Q And so, at the point in time when this search
2 warrant was executed in September of -- let's see,
3 September of '18, you were not involved in this case?

4 A I was not working with Mr. Merrill in
5 September.

6 Q Okay. Did you file any type of motions on this
7 case?

8 A I did not.

9 Q Did you consider filing a motion to dismiss
10 based upon police destruction of the evidence?

11 A I did not.

12 Q Did you ever speak with Jessica Jordan about
13 this case?

14 A I did not. She was represented I believe by
15 Mr. Mouritsen at the time.

16 Q Did you speak with Mr. Mouritsen about this
17 case?

18 A Not in detail. So, the juncture I came in was
19 I was introduced to a number of Mr. Merrill's PD
20 clients, as well as some private defense cases he had
21 had, that those clients wished me to continue their
22 cases. On the PD side, I was coming in and going to be
23 taking over the contract. And Mr. Merrill introduced
24 me to a number of clients at that time, including

1 Mr. Frost. That would have been -- that meeting would
2 have occurred prior to the arraignment and after the
3 waiver of a preliminary hearing.

4 At that point I had been advised of the
5 negotiations that had occurred, the request of
6 Mr. Frost to negotiate the case, and confirming what
7 direction Mr. Frost wanted to go. My recollection is
8 that his arraignment was -- his initial arraignment was
9 continued, and the conversation with Mr. Frost was are
10 we setting the trial and moving forward with hiring an
11 investigator and preparing for trial or you still wish
12 to go forward with the plea negotiations that were in
13 large part between yourself, Mr. Merrill, and the
14 District Attorneys? It was confirmed to me by
15 Mr. Frost that he wished to move forward with the
16 guilty plea agreement.

17 Q Did you advise Mr. Frost in any way whether he
18 should or should not accept the guilty plea offer from
19 the State?

20 A Sure. I know that -- I believe at the
21 arraignment date, Mr. Merrill was still at -- he was
22 still under Merrill Law, the PD contract was. And the
23 guilty plea agreement, being on his firm pleading
24 paper, prepared by his staff at that time.

1 I was brought up to speed on the conversations
2 that had occurred between Mr. Merrill and Mr. Frost.
3 And as I recall, told that Mr. Frost waived his prelim,
4 wished to take a guilty plea agreement. I had reviewed
5 the discovery available. Mr. Frost confirmed to me
6 that he did not wish to contest the charges, that he
7 wished to move forward with the guilty plea agreement.

8 Q In front of you you have Exhibit 3.

9 A Yeah.

10 Q Do you recognize that document?

11 A I do.

12 Q Is that your signature on the last page of that
13 document?

14 A It is.

15 Q And you indicate on that document that you're
16 signing it for Matt Merrill Law Firm, correct?

17 A Yes.

18 Q Did you go through this document with
19 Mr. Frost?

20 A I did. And I -- looking at page 2, I recall
21 there was a I guess typo, if you will. It originally
22 stated that he was eligible for probation. I wrote
23 "not" there. I initialed it, Mr. Frost initialed it,
24 and Damian Sinnott initialed it on the date of the

1 arraignment.

2 Now, going over the guilty agreement with
3 Mr. Frost, he was in a holding cell downstairs on the
4 date that it was signed. I recall David Bass at the
5 time had -- was -- who was going to be an associate of
6 mine once Mr. Merrill left, was with me. That I could
7 not get into the holding cell. I recall reading it in
8 its entirety to Mr. Frost, as well as holding it to the
9 window. I recall Mr. Frost essentially stating he knew
10 what the deal was, didn't want to hear it. And I said
11 well, I'm handling this today, and we need to go over
12 that. And I went over it in its entirety.

13 Q Do you recall whether you advised Mr. Frost
14 whether you thought the court would run the sentences
15 concurrently or consecutively?

16 A I recall advising Mr. Frost that the court had
17 the discretion to do either, and that we were free to
18 argue at sentencing whether they ran concurrently or
19 consecutively. That it was my belief that the DA's
20 would be asking for consecutive time.

21 Q Now, during your representation of Mr. Frost,
22 did he get upset with you and ask you to get off his
23 case?

24 A I don't recall at any point being requested to

1 not be on Mr. Frost's case.

2 Q Did he send a letter to the court seeking your
3 removal?

4 A Not to my recollection.

5 Q Do you ever recall there being any sort of a
6 Young Hearing where the court went through a canvass to
7 see if your relationship, attorney/client relationship
8 could be repaired?

9 A I don't recall that.

10 Q Did you do any investigation into the
11 background of Jessica Jordan?

12 A I did not.

13 Q Did you read the --

14 A I mean, other than what was in the discovery.
15 I didn't pull her background or we never had an
16 investigator on the -- on the case.

17 Q Did you read the letters from Jessica Jordan to
18 Mr. Frost proclaiming her love and wished that they
19 would still get married?

20 A I have read those letters, yes.

21 Q Did that effect your decision on whether her
22 credibility was at stake at a jury trial?

23 A It certainly brought forth issues as to what
24 the nature of Mr. Frost and Ms. Jordan's relationship

1 was. However, when I went to confirm which direction
2 Mr. Frost wanted to go, he continually advised me he
3 wanted to go the route of the guilty plea agreement.

4 Q After the date of the plea and prior to
5 sentencing, did you discuss with Mr. Frost ways to
6 mitigate the sentence?

7 A I don't recall that. I -- as typical behavior
8 and practice, I would have asked, you know, if he would
9 have anybody that he would want to testify on his
10 behalf, if he would like to make a statement, those
11 types of things. Never received any of that
12 information from Mr. Frost.

13 MS. BUTKO: May I approach, Your Honor?

14 THE COURT: Yeah.

15 BY MS. BUTKO:

16 Q I'm showing you Exhibit 2, and this is a letter
17 from Mr. Frost to the court regarding sentencing.

18 Have you seen that letter before?

19 A I believe so.

20 Q Were you present when that letter was written
21 by Mr. Frost?

22 A I was not.

23 Q Did you give him thoughts that he should
24 express to the court for sentencing and explain that he

1 should write a letter or any type of that advice?

2 A I don't recall. I certainly almost always
3 discuss with a client that they have a right to make a
4 statement, that they can do that at the time of
5 sentencing or they can write a letter if they wish.
6 But I do not recall any specifics of a discussion with
7 Mr. Frost as to the contents of his statements.

8 MS. BUTKO: Your Honor, I move for admission of
9 Exhibit 2.

10 THE COURT: Okay.

11 MR. RYE: No objection, Your Honor.

12 THE COURT: It's admitted. It's also in the
13 Court file.

14 (Whereupon, Petitioner's Exhibit Number 2 was
15 admitted into evidence.)

16 BY MS. BUTKO:

17 Q Did you meet with Mr. Frost at the time the
18 Presentence Report was being prepared?

19 A I would have been present when the packet was
20 handed to him. I don't -- I don't believe I was
21 present while he was filling that out. Typically, when
22 a client is handed the packet, either at that time or
23 after the arraignment in the jail, I will explain that.
24 I'm happy to go over it with them to review any

1 statements they wish to make. But I was not present
2 when Mr. Frost filled that out, no.

3 MS. BUTKO: Your Honor, may I approach?

4 THE COURT: Uh-hum.

5 MS. BUTKO: May I approach?

6 THE COURT: Yes.

7 MS. BUTKO: I hate these things.

8 BY MS. BUTKO:

9 Q I'm showing you Exhibit 1. This is the
10 defendant's statement attached to the Presentence
11 Report.

12 Have you seen that document?

13 A I have.

14 Q Were you with Mr. Frost when he completed that
15 document?

16 A Again, I was not present with Mr. Frost when he
17 completed his PSI questionnaire or statement.

18 Q So, when the Parole and Probation folks went to
19 interview Mr. Frost, you weren't personally present?

20 A No.

21 Q Do you know if there was anybody from the law
22 office of Matt Merrill present at that interview?

23 A I do not know.

24 Q Did you at any time talk to Mr. Frost about the

1 chance that he could get 5 to 15 years in prison?

2 A I went over with Mr. Frost that the potential
3 sentence on the counts that he had plead to prior to
4 signing the guilty plea agreement and after signing the
5 guilty plea agreement were life with the possibility of
6 parole after ten.

7 Q So, Mr. Frost in his petition put forth that he
8 was confused and thought that a sentence of 5 to 15
9 years was available to him. Do you know where he would
10 have thought that was available on this particular
11 charges?

12 A Absolutely not.

13 Q Did you discuss other charges that might have
14 netted that kind of a sentence?

15 A No.

16 Q Do you believe you overrode the will of
17 Mr. Frost to get him to plead guilty?

18 A No. In fact, with Mr. Frost, as I do in all
19 cases, I always say, "Do you want to go to trial or you
20 want to still take this offer? I'm happy to do
21 either." Certainly never tried to convince him or
22 otherwise coerce him into signing or taking a plea
23 deal.

24 Q Did you have any conversation with Mr. Frost's

1 parents concerning this case?

2 A I don't recall ever being contacted or making
3 contact with Mr. Frost's parents.

4 Q What steps did you take to locate mitigation
5 evidence for sentencing?

6 A I would have talked to Mr. Frost. I would have
7 asked him if there was anybody that could provide
8 favorable information on his behalf as to his character
9 or anything else. And I was -- I don't recall ever
10 being provided with any of that.

11 Q Did you discuss appellate rights with
12 Mr. Frost?

13 A I would have done so, as I do in every case, in
14 going over the guilty plea agreement. Again, I read
15 the whole thing to him. In every matter, when I go
16 over a paragraph that discusses waiving your right to
17 an appeal except from jurisdictional or constitutional
18 grounds, I advise the client that we will pay close
19 attention to the canvass at the arraignment as well as
20 to everything that happens between then and sentencing,
21 and inform them whether or not appellate issues of that
22 nature have arisen.

23 Q Did Mr. Frost tell you that he wanted to
24 appeal?

1 A No.

2 Q Did you tell him that if he was unhappy with
3 the sentence he could appeal that sentence?

4 A Again, the extent of the appellate conversation
5 would have been surrounding the paragraph in the guilty
6 plea agreement about waiving his right to appeal except
7 for on jurisdictional and constitutional grounds, that
8 we would monitor those, and we would discuss them if
9 those issues arose. We never identified any of those
10 issues, and I never received a request, written or
11 verbal, from Mr. Frost to file an appeal.

12 Q Did you have any contact with Mr. Frost after
13 the sentencing date?

14 A I believe so. At the time -- and I don't
15 recall the exact number, but at the time I had I think
16 four or five defendants in the B Pod where Mr. Frost
17 was located. And I believe I saw him after that date.
18 I can't recall.

19 Q Were you ever advised that Mr. Frost's cell
20 phone and its contents were being released to the
21 co-defendant's mother?

22 A No.

23 MS. BUTKO: That's all I have, Your Honor.

24 THE COURT: Mr. Rye, I'm going to hold off on

1 cross-examination for a moment, and we're going to take
2 a brief recess. Okay?

3 MR. RYE: Thank you, Your Honor.

4 THE COURT: So, ten minutes.

5 (Recess.)

6 THE COURT: All right. Mr. Rye, go ahead.

7 MR. RYE: Thank you, Your Honor.

8

9 CROSS-EXAMINATION

10 BY MR. RYE:

11 Q Good morning, Mr. Walther.

12 A Good morning, Mr. Rye.

13 Q Now, you met Mr. Frost for the first time at
14 the Fernley Justice Court?

15 A Correct.

16 Q And then you met with him on several occasions
17 from that time forward until the case was concluded?

18 A Correct.

19 Q Now, you talked a little bit about the B Pod
20 and meeting with defendants at the B Pod. Can you
21 explain how that works?

22 A Yes. So, charges of this nature, specifically
23 charges involving any allegations of lewdness or sexual
24 conduct with minors, the majority -- unless there's

1 some security issue, the majority of those male clients
2 are housed in the B Pod.

3 So, you want details on how we meet with them?

4 Q No. So, sometimes you will have meetings with
5 them that maybe aren't scheduled or something like
6 that?

7 A I would say the majority of them aren't
8 scheduled just simply because there's -- prior to this
9 year, there was not really a way to inform the client
10 you were coming down. So, they didn't necessarily know
11 unless you said I've got to come back on such and such
12 date. So, you would -- you know, when you go down to
13 the jail, you typically are meeting with a number of
14 clients both in B Pod and elsewhere. You get let into
15 the pod. The client gets let out to a table and
16 discuss whatever you're there to discuss with them.

17 In B Pod specifically and specifically at that
18 time, there were a number of clients. So, whenever we
19 would go down there, we would -- even if it was to meet
20 one, we would typically be discussing other matters
21 with a number of other clients in there. And that
22 would either be through the door or then you would go
23 back to the intercom and ask for that specific client
24 to be let out to have further discussion.

1 Q And so, can a client ask to meet with you when
2 you're in the B Pod?

3 A Absolutely.

4 Q And so, you can hear them, "Mr. Walther, I need
5 to speak with you"?

6 A Yes.

7 Q Now, I'm just -- so, I'm kind of starting at
8 the end of Ms. Butko's questions. But dealing with the
9 appeal, with respect to Mr. Frost's requesting appeal,
10 he never requested one in writing, correct?

11 A No.

12 Q Never requested one orally to you?

13 A No.

14 Q Never -- when you were in the B Pod weekly or
15 more after the sentencing, he never asked you "I need
16 to talk to you about an appeal"?

17 A No.

18 Q Nobody else in his family contacted you
19 regarding an appeal?

20 A I don't recall being contacted by any family in
21 this case.

22 Q And based on your professional judgment of the
23 case and your representation, there were no issues for
24 appeal in this case, correct?

1 A That's correct.

2 Q And with respect to Mr. Frost and his appeal
3 rights, you handled this the same way you do in every
4 other case when you represent somebody?

5 A Correct.

6 Q And there were no notes at all in your file of
7 any indication of an appeal?

8 A No.

9 Q Now, with respect to the arraignment, by the
10 time you met with him at the District Court -- or at
11 the holding cell prior to the arraignment, you had a
12 few meetings with Mr. Frost?

13 A Yes. One specifically would have been the
14 introduction with Mr. Merrill. And I believe Mr. Bass
15 and myself had also done some rounds in the jail,
16 including Mr. Frost, at the time he came in.

17 Q Now, do you represent other clients with mental
18 health issues and mental illness?

19 A Yes.

20 Q And in your dealings with Mr. Frost, did you
21 exhibit any signs -- based on your experience and
22 professional judgment, any sign that would lead you to
23 believe that mental health or mental illness was
24 interfering with Mr. Frost's right to understand or

1 ability to understand what was going on in the case and
2 your representation?

3 A So, if I understand it correctly, you're asking
4 me if I observed any --

5 Q Right.

6 A -- signs from him, correct?

7 Q Right.

8 A I did not. All of my interactions with
9 Mr. Frost, he seemed coherent and seemed to understand
10 what was going on. So much so, that at the signing and
11 reading of the guilty plea agreement, I recall that he
12 didn't want me to go over it, and I stated that I had
13 to, so I did.

14 Q Talk just a little bit about what you do in a
15 normal -- the usual case when you meet with a client
16 prior to a District Court arraignment with respect to
17 the plea agreement and that proceeding.

18 A Yeah. Well, I mean, it depends on where
19 they're at. So, but in each and every case, I have
20 them read it. I also go over the -- generally go over,
21 you know, what the deal is, what it does and doesn't
22 do, what the sentencing may or may not be if there's a
23 particular deal on that, whether we're free to argue,
24 what the potential outcomes are. I go over their

1 constitutional rights, the rights they're waiving. I
2 discuss what the appellate rights are at that point,
3 everything of that nature. In this case, the guilty
4 plea agreement was read in its entirety.

5 Q And did Mr. Frost have any questions regarding
6 the plea agreement?

7 A Not that I recall.

8 Q Did he express any concerns at that point about
9 moving forward with the plea agreement?

10 A No.

11 Q What about when you got into the courtroom for
12 the arraignment, did Mr. Frost express any concerns
13 about moving forward with the plea agreement?

14 A Not that I recall. I'm not absolutely certain
15 on this, but given the circumstances of where he was
16 when it was gone over and read to him, I believe that
17 the corrections that were initialed to the guilty plea
18 agreement as well as his signature would have occurred
19 upstairs.

20 Q And what about after he entered his plea, was
21 there any discussion from Mr. Frost to you he was
22 concerned about entering his plea?

23 A No.

24 Q That he didn't understand what the plea was

1 about?

2 A That was never expressed to me, no.

3 Q Now, prior to you having this discussion with
4 Mr. Frost on the arraignment date, did you have a
5 chance to review the discovery?

6 A Yes.

7 Q And you had looked at the --

8 A As well as, as I previously stated,
9 conversations with Mr. Wynott and Mr. Merrill about the
10 history of them dealing with the case. So, it was
11 brought up to speed on the discussions with the
12 District Attorney, et cetera, and Mr. Frost himself.

13 Q And then you also had a chance to review the
14 discovery, including the Facebook message --

15 A Yes.

16 Q -- Messenger chat that was part of the
17 discovery?

18 A Yes.

19 Q And based upon your professional judgment, was
20 it -- did you think that Mr. Frost was making a
21 reasonable decision entering his plea?

22 A Yes. I mean, I certainly had no reservations
23 based upon the evidence of him going forward with the
24 plea. But it would have been expressed to him, as I

1 always do, that it's your right whether we go left or
2 right. I'm happy to do a trial. I'm happy to carry
3 this through the negotiations. What do you want to do?

4 Q And he told you he wanted to carry through with
5 negotiations?

6 A Correct. At no time was I ever asked or
7 requested by Mr. Frost to investigate anything further,
8 that he wanted a trial set, nothing of that nature. It
9 was always confirmed to me that he wished to go forward
10 with the negotiations.

11 Q And at no time did you coerce him into taking
12 the plea?

13 A Absolutely not.

14 Q You made no threats to him?

15 A No.

16 Q And you said your associate, Dave, was there
17 also?

18 A He was present during -- he may have been here
19 at sentencing, too. I can't recall that. He was
20 present during the reading of the guilty plea
21 agreement. I don't believe David was practicing before
22 the court at that time yet, but he certainly was making
23 the rounds in the jail, coming to the District Court,
24 kind of getting familiar with how we get access to

1 clients, et cetera.

2 Q Now, there was some discussion about the
3 attorney/client relationship with Mr. Frost. Was there
4 any breakdown of that relationship?

5 A Not between me and Mr. Frost.

6 Q You were able to represent him through the
7 arraignment without any difficulty?

8 A Yes.

9 Q Through the sentencing without any difficulty?

10 A Yes.

11 Q Okay. Now, did Mr. Frost identify any
12 mitigation evidence that he wanted you to present at
13 sentencing?

14 A He did not. The extent of I believe the
15 request from Mr. Frost was that, you know, he wished to
16 take advantage of any and all programing that may be
17 available to him. I believe I related that at
18 sentencing.

19 Q Were you contacted by any family members
20 regarding sentencing?

21 A Not that I recall.

22 Q Did Mr. Frost ask you to reach out to any
23 family members regard sentencing?

24 A Not that I recall.

1 Q Now, with respect to the letters that you
2 reviewed, you testified I believe that those did not
3 change your position on either the arraignment, the
4 plea, or the sentencing; is that correct?

5 A Correct.

6 Q Now, you were provided a couple of exhibits,
7 and I think you have them up there still.

8 Now, the first is Exhibit Number 1. It's the
9 statement that Mr. Frost wrote regarding the
10 Presentence Investigation?

11 A Yes.

12 Q Correct? Now, did you have a chance to review
13 that prior to sentencing?

14 A Yes. It was a part of the PSI, and -- which I
15 read in its entirety. I always do.

16 Q And so, you read -- and it says, I'll just read
17 the first line, "I committed the offense because I was
18 dumb and very self-centered"?

19 A Correct.

20 Q And so, at any time did Mr. Frost indicate that
21 he didn't write this statement?

22 A No.

23 Q Any time he indicated he want to withdraw this
24 statement?

1 A No.

2 Q Any time that he indicated to you that he was
3 forced by somebody to write this statement?

4 A No.

5 Q Now, did you ever tell him that he had to
6 confess to the crimes and fall on his sword in this
7 letter?

8 A No.

9 Q Do you do that with -- is it normal practice
10 you let them write what they want and if they have
11 questions you'll assist with that?

12 A I always advise a client that if they have
13 questions about the PSI while they're filling it out,
14 that they should ask me. That they certainly can ask
15 me. That I'm not ever going to tell them what to say,
16 but I will review the information. I was never -- it
17 was never requested by Mr. Frost that I be a part of
18 filling out any of the PSI information.

19 Q And when you reviewed the PSI and the
20 statement, there was no indication to you that there
21 was any issue with how Mr. Frost handled himself in
22 that process?

23 A No.

24 Q Now, with respect to Exhibit Number 2, did you

1 have this letter prior to sentencing?

2 A Again, I don't recall. I may have. I likely
3 did. But I do not recall.

4 Q And again, this was written to the judge. Did
5 you ever instruct Mr. Frost that he had to write this
6 letter?

7 A No.

8 Q And again, it looks like he's admitting that
9 he's guilty of the crimes that were against him?

10 A That's what it appears to state, yes.

11 Q And this -- again, same questions. You never
12 asked him to write this letter?

13 A No.

14 Q Never forced him to write this letter?

15 A No. I probably advised him that he had the
16 opportunity to make a statement, but I certainly never
17 advised him that he had to or what to say.

18 Q Now, you indicated you were not present when --
19 at the interview with the Presentence Investigation
20 Report?

21 A I was not.

22 Q Is that the normal practice for you?

23 A I mean, certainly if a client wanted me there,
24 I'd be there. But typically, we are not present during

1 the PSI interview.

2 Q And this particular case, you made a judgment
3 that it wasn't necessary for you to be there?

4 A Correct.

5 Q And did anything that you saw in the PSI prior
6 to sentencing indicate that you needed to gather
7 additional information or make any changes prior to
8 sentencing hearing?

9 A No.

10 Q And your professional judgment, you were
11 prepared to move forward with sentencing?

12 A Yes.

13 Q You had -- were not aware of any specific
14 mitigation evidence that you would present other than
15 the argument and the information contained in the
16 record?

17 A That's correct.

18 Q And at no time prior to or during the
19 sentencing did Mr. Frost ask for additional time or
20 additional witnesses?

21 A No.

22 Q Now, at any time in your meetings with
23 Mr. Frost, prior to or at sentencing, did Mr. Frost
24 express a desire to withdraw his plea or to -- to

1 withdraw his plea?

2 A No.

3 Q Any time did he express concerns with the entry
4 of his plea?

5 A No.

6 Q Any time did he express that he felt he was
7 threatened or coerced to enter his plea?

8 A No.

9 Q Were there any indications in your meetings
10 with Mr. Frost on the day of sentencing that he was
11 under some sort of mental illness or mental health
12 issue that he did not understand what was happening?

13 A I never had any circumstances arise that
14 indicated that.

15 Q Did you review the Presentence Investigation
16 with Mr. Frost? How does that work?

17 A Typically, either the day of sentencing, if I
18 haven't had it prior to then, or the week before, the
19 weekend before, if I'm in receipt of it, I would have
20 gone over it with Mr. Frost. I go over it with the
21 clients to ensure that it's accurate.

22 Q In this particular case, you determined in
23 conjunction with Mr. Frost that it was accurate?

24 A I was never advised that anything needed to be

1 corrected, no.

2 Q Including his statement attached?

3 A Correct.

4 MR. RYE: I don't have any other questions,
5 Your Honor.

6 MS. BUTKO: Nothing further, Your Honor.

7 THE COURT: Okay. Thank you, Mr. Walther.

8 THE WITNESS: Thank you, Your Honor.

9 THE COURT: You're excused from further
10 testimony in this matter.

11 Please remember in public areas of the
12 courtroom you're supposed to be wearing a mask. Thank
13 you.

14 MS. BUTKO: Thank you, Your Honor.

15 I would call Steve Manning, please, to the
16 stand.

17 THE COURT: Mr. Manning, please come forward.

18 (Witness sworn.)

19

20 STEPHEN MANNING,

21 called as a witness herein by the Petitioner,

22 having been first duly sworn, was examined

23 and testified as follows:

24

DIRECT EXAMINATION

BY MS. BUTKO:

Q Could please state your full name and spell your last name for the reporter?

A Stephen Manning. M-A-N-N-I-N-G.

Q And it's Stephen with a P-H?

A P-H, yes.

Q Did you know Tommy Frost?

A Yes, I do.

Q How do you know him?

A That is my stepson.

Q How long have you know Tommy Frost?

A I've been knowing Tommy for about 15 years.

Q Is there some time recently that you returned to the Yerington locale? Can you describe that for the Court?

A I didn't understand the question.

Q Okay. Let me make it more clear.

During the time this case was actually being prosecuted, you were not residing in the Yerington area, correct?

A That's correct.

Q And where were you residing?

A I was residing in Reno, Nevada.

1 Q When did you return back to Yerington?

2 A I came back to Yerington to find out that my
3 son was associating with somebody here in Fernley.

4 Q And what timing was that?

5 A I'm going to say around beginning of September.

6 Q Of what year?

7 THE COURT: So, can I ask. Was that Yerington
8 or Fernley?

9 MS. BUTKO: Well, we're going to go into that.
10 Because it's Fernley and Fallon and Yerington.

11 THE COURT: Because I just heard Fernley.

12 MS. BUTKO: Yes.

13 THE COURT: His son in Fernley. And you asked
14 him if he was in Yerington. So, let's -- and so,
15 somehow we got to Fernley from Yerington.

16 MS. BUTKO: Right. I'm just trying --

17 THE COURT: So, he never answered that he was
18 in Yerington.

19 MS. BUTKO: Thanks, Judge. I'll try to narrow
20 it down.

21 THE COURT: Okay.

22 MS. BUTKO: Okay.

23 BY MS. BUTKO:

24 Q So, let's make sure we're clear. You were

1 living Reno?

2 A Uh-hum.

3 Q And your son, Tommy Frost, was living where?

4 A Tommy had just came back from Hawaii. He had
5 returned from being stranded on -- in Hawaii.

6 Q And where did he return to?

7 A He came to Nevada.

8 Q And what part of Nevada?

9 A He went to Fallon, I do believe.

10 Q Now, from there you said he was associated with
11 a person in Fernley, Nevada, correct?

12 A Well, she was in Fallon.

13 Q And what person are you discussing?

14 A Her name -- it was a girlfriend of Tommy's.
15 Her name was Shanice.

16 Q Do you also know Jessica Jordan?

17 A I don't know her personally, but I know of her.

18 Q Okay. Did you have a conversation with
19 Jessica Jordan about this case?

20 A Oh, I did. Jessica out of the blue called my
21 wife's cell phone while she was incarcerated in Lyon
22 County.

23 Q And did you talk about whether the allegations
24 she made against Mr. Frost were true and correct?

1 MR. RYE: Objection, hearsay.

2 MS. BUTKO: It is hearsay, but it's to
3 corroborate a lack of investigation that was done by
4 the defense attorneys. So, I kind of want to get into
5 the conversation, and then ask if he was ever contacted
6 by any defense attorneys on this case.

7 THE COURT: So, you're saying it's got
8 independent basis?

9 MS. BUTKO: It's not for the truth of the
10 matter. Certainly, it's the bottom line. It's for --

11 THE COURT: It's for investigative purposes?

12 MS. BUTKO: Correct.

13 THE COURT: Okay. You can ask the question.

14 MS. BUTKO: Thank you.

15 BY MS. BUTKO:

16 Q What did your conversation with Jessica Jordan
17 entail?

18 A At first it was really a -- at first it was
19 hostile. My wife answered her phone, and I was like
20 surprised on the phone call because I thought it was
21 Tommy because it was coming from the facility here in
22 Yerington. I took the phone from my wife, and I was
23 hostile about the phone call, why she was calling us.
24 She was just really quick to apologize about the

1 situation that she had put -- came forth to me and my
2 wife. She was apologizing for what they had caused or
3 what they had -- she had done to cause this issue.

4 Q Did she say at any point that the charges
5 against Mr. Frost were untrue?

6 A She said -- she stated that Tommy had become a
7 pawn in her situation that had escalated out of
8 control.

9 Q And did you receive any sort of contact from a
10 defense investigator on this case to talk about your
11 conversation with Ms. Jordan?

12 A No, I never did.

13 Q Is this the first time you've had a chance to
14 bring that to light?

15 A Yes.

16 MS. BUTKO: That's all I have, Your Honor.

17 THE COURT: Mr. Rye?

18 MR. RYE: Just briefly, Your Honor.

19

20 CROSS-EXAMINATION

21 BY MR. RYE:

22 Q Mr. Manning, did you ever go forward to the
23 police?

24 A No.

1 Q That's fine. Were you aware that Mr. Frost had
2 written in two letters submitted to the Court that he
3 had committed these crimes and was guilty of those?

4 A Yes.

5 MR. RYE: I don't have any other questions,
6 Your Honor.

7 MS. BUTKO: Nothing further, Your Honor.

8 THE COURT: Thank you, Mr. Manning.

9 THE WITNESS: Thank you, sir.

10 MS. BUTKO: Your Honor, we call my client,
11 Tommy Frost.

12 THE CLERK: Raise your right hand, please.

13 (Witness sworn.)

14 THE BAILIFF: Do you want these removed from
15 the witness desk?

16 THE COURT: You can pass them to the clerk.

17 MS. BUTKO: Oh, he might need those, Your
18 Honor.

19 THE COURT: Oh, okay.

20 MS. BUTKO: Probably use those.

21 THE COURT: I don't know which one's they are.

22 THE CLERK: Exhibit 1, 2 and 3.

23 THE COURT: Go ahead, Ms. Butko.

24 MS. BUTKO: Thank you, Your Honor.

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TOMMY FROST,
called as a witness herein by the Petitioner,
having been first duly sworn, was examined
and testified as follows:

DIRECT EXAMINATION

BY MS. BUTKO:

Q Could you please state your full name?

A Tommy Frost.

Q Are you in custody?

A Yes, ma'am.

Q And where are you in custody?

A At NNCC right now, ma'am.

Q Is that part of Nevada Department of
Corrections?

A Yes, ma'am.

Q Do you have any charges other than the charges
in this case to serve?

A No, ma'am.

Q Who was your attorney on this case?

A I had many people on it. And I know
Matt Merrill and Mario Walther were the two main, but I
don't know all the other names. But numerous people
showed up trying to talk to me.

1 Q Let's discuss your relationship with
2 Matt Merrill.

3 How often did you do see Mr. Merrill?

4 A Not very often. I tried to call him. I tried
5 to write him. No responses. The only time I ever got
6 his attention is when he came to the door, and he
7 always pushed me off. And I -- no matter how many
8 times I tried, I got pushed off by him. The only time
9 he showed up I think was two or three times to give me
10 the discovery and to ask if I wanted to take a deal.
11 That's pretty much all he came. He never talked to me
12 about nothing.

13 Q Did he discuss the evidence against you?

14 A Briefly. But he was quick get out of the room
15 from talking to me.

16 Q Did you offer to give him the password to your
17 phone?

18 A Yes, I did. I told him there was nothing to
19 hide on it. That I'm willing to give whatever they
20 need.

21 Q Did he accept your offer?

22 A He said he'll look into it, and that's the end
23 of it. That's all I heard from him.

24 Q Did you agree that the State could look into

1 your phones with that same password?

2 A Yeah. They -- I told them they could look into
3 it. I have nothing to hide at all.

4 Q Is there child pornography on your telephone?

5 A No.

6 Q Did you discuss plea offers with Mr. Merrill?

7 A I did because I -- at the beginning I felt he
8 wasn't representing me, and I didn't know what else to
9 do. No matter how hard I tried to talk to him, tried
10 to explain stuff to him. I had tried to have my family
11 reach out to him many times, and no responses at all to
12 nothing. So, I did ask that because I feel like it
13 would be an easier way to go to prison and get a new
14 attorney because I told him I didn't want him as my
15 attorney. He still came.

16 Q When was the last time you actually saw
17 Mr. Merrill?

18 A The last time was at the -- if I'm not
19 mistaken, it was at the pretrial when he was sitting
20 there talking to me.

21 Q Was that before the preliminary hearing?

22 A That's what I'm talking about, preliminary
23 hearing.

24 Q Okay. Is that the day you waived preliminary?

1 A Unfortunately, yes.

2 Q Did you provide him with letters from
3 Jessica Jordan written to you?

4 A Yes, ma'am.

5 Q Was the gist of those letters that Ms. Jordan
6 still loved you?

7 A Yes.

8 Q Did she still want a relationship with you?

9 A Yes. And she said that she was sorry for what
10 she did and that -- and she asked many times why I was
11 in -- why I was locked up in jail. She asked -- I
12 shouldn't be in jail in the letters. So...

13 Q Now, on the date that you were actually
14 arrested, do you recall that date?

15 A Yes.

16 Q What date was that?

17 A Pretty sure it was August 15th, 2018.

18 Q And was that in downtown Reno?

19 A Yes, it was.

20 Q How many officers arrested you?

21 A I remember the four that grabbed me off the
22 ground for sure. But there was many cars parked there.
23 And there was more at the car. So, I'm not exactly
24 sure on the amount.

1 Q Was Officer Pruitt there?

2 A I don't know who that is to be --

3 Q Did you --

4 A -- honest.

5 Q -- see that gentleman that testified --

6 A Oh.

7 Q -- first this morning?

8 A I'm pretty sure he was there. But they were --

9 he looked different if he was.

10 Q Okay.

11 A I can't exactly recall if he was there or not.

12 Q So, on the day that you were arrested was your

13 property that you had with you confiscated?

14 A Yes, it was.

15 Q Was your Motorola cell phone confiscated?

16 A Yes, it was.

17 Q So, the police officers talk about text

18 messenger?

19 A Yes.

20 Q Photographs and messages between yourself and

21 Jessica Jordan. Were those messages between you and

22 Ms. Jordan?

23 A It says that it was from the Facebook, but I

24 don't -- the first time I ever saw those messages was

1 in county jail. I had no -- I didn't even know about
2 the messages until -- I didn't know why I was arrested
3 until county jail.

4 Q Did you tell Mr. Merrill that?

5 A Yes, I did.

6 Q Did you tell Mr. Walther that?

7 A Yes, I did.

8 Q Did they respond with further investigation?

9 A No. They showed me the messages, and they said
10 well, it's your Facebook, it's your name. So, that's
11 all they have to have against you. That's what I was
12 told by them.

13 Q Did you know who authored those texts?

14 A When I got my phone back, I was told by Jessica
15 that it was at her boyfriend's -- or her ex-boyfriend's
16 house. I just got out of the prison. That she let him
17 use the phone.

18 Q So, where was your phone?

19 A Last thing I heard was in Fernley by her
20 house -- at her house. She had it.

21 Q How did you lose your phone?

22 A So, we got in an argument in Reno, and I left
23 my backpack in her car, and she took everything of
24 mine, backpack and everything. And I was stranded in

1 Reno, and I ended up staying at a family member's house
2 overnight there because I had nowhere to go.

3 Q When did that happen?

4 A I think it was about August 12th or August 11th
5 is when the argument happened. I'm not exactly sure if
6 that's positive exact date though, but it was around
7 that time.

8 Q How did you get your phone back so that it was
9 in your possession when you were arrested?

10 A She brought it to me on the morning of
11 August 15th about 4:00 o'clock in the morning. I was
12 sleeping in the park, and she showed up and handed me
13 my stuff.

14 Q So, were you in custody while you were pending
15 trial in this case? Did you stay in the Lyon County
16 Jail --

17 A Yes.

18 Q -- the whole time?

19 A I was booked in the Lyon -- or Washoe County
20 Jail first, and I stayed there overnight. And then the
21 next morning Lyon County came to get me.

22 Q The rest of the time you remained in jail?

23 A Yes.

24 Q How often did Mr. Walther visit you at the

1 jail?

2 A Not very often at all. Same thing as him. I
3 tried many times writing him, reaching out to him on
4 the phone -- his phone. I had money on the phone, and
5 I would try to call his office, the office. They never
6 accept the calls ever.

7 Q Did you explain to the court about your
8 representation?

9 A I told him that -- I told him that I wanted a
10 new attorney. And I told my parents the same thing,
11 and they tried to reach out to him and tell him the
12 same thing, and no one could get ahold of him.

13 Q Did he ever put you in front of the judge to
14 talk about your relationship and whether it had
15 deteriorated?

16 A No.

17 Q So, you entered a plea of guilty on this case,
18 correct?

19 A Yes.

20 Q Why did you do that?

21 A I feel like I was forced into it to be honest.
22 Because I wanted to go to trial, but as soon as I got
23 my discovery -- the first day I got my discovery, he
24 threw it on the table and he said, "You're screwed

1 pretty much." And that was his -- it wasn't exact
2 words. He said the F word, but I'm not going to, you
3 know. But -- and I feel like after that I was like
4 okay, and then I tried to talk to him after that. He
5 went over it briefly real quick. And then I feel like
6 he was trying to set me up because he left pictures,
7 the pictures and everything, in my possession, and I
8 feel like he was trying to set me up because -- and
9 then I went and returned them at court, and I asked him
10 why did you give me these? Like I feel like he was
11 against me.

12 And then after many times him coming, I was
13 like I got letters for you. And he never brought them
14 up in court, the letters. He never told anything
15 about -- he never went over the letters with me. He
16 never told me about any of them. He just said I'll
17 read them and that's it.

18 Q And that was Mr. Merrill, correct?

19 A Yes.

20 Q Okay. So, in your paperwork you put in that
21 you believed a sentence of 5 to 15 years was available
22 on the charge?

23 A Yes, because he came and offered deals, and
24 talking about if I plead and whatever. And I guess I

1 misunderstood him. But he was explaining stuff to me,
2 and I have a hard time understanding. Like you have to
3 really like break it down and explain stuff to me
4 because I have a hard time understanding. That's why I
5 was in special ed my whole life and had to have one on
6 one attention with talking to people because I have a
7 hard time understanding. So, and what I got from what
8 he said was that.

9 Q So, when the court advised you that this
10 possibly carried life in prison with the term of ten
11 years on each count, did you tell your attorney, I need
12 time, I didn't understand that?

13 A I did. And that's when it was waived in the --
14 I told him that I wanted to go over it again, that I
15 feel like -- I feel like something's wrong. I told him
16 I feel like it was wrong, and that I shouldn't get this
17 much time for, you know. And so, but after that, he
18 never talked to me about nothing.

19 Q So, that was why the extra two weeks happened?

20 A Yeah, he postponed it to talk to me, yeah. For
21 further talking.

22 Q Did he come and talk to you after that court --

23 A Yeah, but not about anything important at all.

24 Q Did Mr. Walther tell you that you could

1 actually get two life sentences and 20 years in prison
2 on this?

3 A He didn't exactly explain it to me. He said
4 that's what it carries, that there's a possibility.
5 But he never told me that's what I was going to get at
6 the time of -- when I was signing anything.

7 Q Now, you have Exhibit 3 in front of you,
8 correct? And that's the guilty plea agreement form?

9 A Yes.

10 Q Did you sign that document?

11 A I signed that it in -- it was in court, and I
12 had no time to talk to him about it. I was trying
13 to -- I was trying talk to him when he was next to me,
14 and I was pretty much getting pushed off is how I feel
15 about it.

16 Q He testified pretty clearly that while there
17 wasn't a chance for you two to talk about the document,
18 that he read it to you. Do you recall that?

19 A He read it to me, and I told him I wanted to
20 see him in person. I wanted to sit down and talk to
21 him about it. He told me if he were to sit down and
22 talk to me, he would have to postpone the court date.
23 And I told him for what? Why can't you just sit down?
24 He said he didn't have time for it. But he did briefly

1 do it, but I was not understanding what he was saying.
2 Like I was having a hard time understanding, and I kept
3 asking him questions, and he was just, I feel like he
4 was pushing me off, trying to quick and read it. And
5 I -- and I wasn't able to like ask him anything like
6 how I feel about it.

7 Q Did you actually sign the document?

8 A I did, but I didn't really understand it. Like
9 he briefly read it to me, and then threw it under the
10 door and told me to sign it. And I was trying to go
11 over it, and he told me if I wait any longer, he's
12 going to have to postpone the court because it was
13 right before they took me upstairs.

14 Q So, when the court went through the pre-canvass
15 with you, the judge asked you if you actually committed
16 this crime, right?

17 A Yes.

18 Q Did you tell the judge, no, I'm innocent?

19 A No, I didn't. I paused at first, and I wanted
20 to say I didn't, but I knew that if I did say that,
21 we're back at all over again, and I would be stuck with
22 the same situation, the same attorney, and go through
23 the same thing again. I feel like it was a losing
24 situation no matter any way around it.

1 Q So, in front of you you have Exhibit 2, which
2 is a letter you wrote to the court?

3 A Yes.

4 Q Did you write that letter to the judge?

5 A Yes, I did.

6 Q How did that come about?

7 A Well, after talking to my attorney, to Walther,
8 I asked him what's the best way to go about it, what
9 should I do? And he said -- I told him if I write a
10 letter to the judge, how would he respond to it? And
11 he's like -- and then he's like I'm not sure. But then
12 he told me that if I express gratitude and apologize,
13 that I might get less time in the courts. And so, I
14 listened to what he said, and I wrote the letters.

15 Q So, in Exhibit 2 you apologize for your
16 conduct?

17 A Yes.

18 Q Which makes you look guilty.

19 A Yes.

20 Q Was that your intention?

21 A No, it wasn't.

22 Q What was your intention?

23 A My intention was to -- it was not I was guilty
24 of the crime. I was guilty because I knew her, and I

1 just -- I worded it wrong. Like I was not trying to
2 say I was guilty of the crimes. I was -- I was guilty
3 of not saying nothing or like standing up for myself in
4 the courts. Like I was -- I was not trying to find
5 guilty of those crimes. Because in the heart I'm not
6 guilty of it, and it was so hard to even write that
7 letter to the courts. I like had to force myself to do
8 it because I knew I wasn't being honest about it.

9 Q So, Exhibit 1 is a statement that you wrote as
10 part of your Parole and Probation document. Do you
11 recall writing that?

12 A Yeah, I wrote that.

13 Q And who was present when you wrote that?

14 A Nobody at all. But I was told to be honest,
15 and to -- same thing. Because the judge can -- the
16 judge is going to read this. And so, in my eyes, it
17 was -- how I feel was the same way as the letter. If
18 the judge is going to read this, he said the last --
19 least time you're going to get is if you be honest or
20 say -- or say you're sorry pretty much about what
21 happened, and so I did. And again, that was so hard to
22 write because I'm not guilty of it.

23 Q Now, at the time of your arrest, how many
24 telephones did you have in your possess?

1 A I had two.

2 Q And did you ever see the possession of those
3 two separate phones documented in the police report?

4 A Only one.

5 Q Do you know where the other telephone is?

6 A No. None of my stuff -- none of my stuff was
7 documented in evidence at all except the phone and the
8 backpack. Nothing inside at all.

9 Q Were you ever asked to consent to the release
10 of your property --

11 A No.

12 Q -- to the co-defendant's mother?

13 A No, I wasn't.

14 Q Would you have agreed to that?

15 A No, I wouldn't have. I have no communication.
16 I don't even know her mom.

17 Q Now, concerning your appellate rights.

18 A Right.

19 Q Did Mr. Walther talk to you about appealing?

20 A He brought it up and said that there's a
21 possibility if -- I don't know the exact words he put
22 it, but he said that he'll watch for it and everything.
23 And I told him right there, I want to appeal. No
24 matter how on this goes, I want to come back to the

1 courts, and I want a -- I want a different attorney,
2 and I want to have a fair chance.

3 Q Did he agree that he would appeal for you?

4 A He said that he'll look into it, and if I get
5 sentenced to whatever, that he'll start the appeal
6 process for me.

7 Q Did he ever appeal?

8 A No.

9 Q When did you find out he did not appeal?

10 A Middle of 2020 when the year -- it was coming
11 up on close to a year, and I had no paperwork, no
12 nothing. And I knew something was wrong because I
13 haven't got no information about the courts. So, I had
14 somebody help me file the motion for the habeas corpus
15 you guys started because I knew he didn't do it for me.

16 MS. BUTKO: That's all I have, Your Honor.

17 THE COURT: Mr. Rye?

18 MR. RYE: Thank you, Your Honor.

19

20 CROSS-EXAMINATION

21 BY MR. RYE:

22 Q Now, Mr. Frost, you completed the 11th grade,
23 correct?

24 A I didn't graduate. I'm not sure if I completed

1 the 11th. I think I was behind still.

2 Q Okay. But you went to high school?

3 A Yeah.

4 Q And was that in -- where was that?

5 A All over. I went to many different high
6 schools. I went to like three different high schools.

7 Q And then you moved to Hawaii at some point?

8 A Yes.

9 Q Now, in 2011, as a juvenile you were convicted
10 of lewd or lascivious -- or adjudicated a lewd and
11 lascivious act with a child under 14, correct?

12 A Yes.

13 Q And you were committed to Juvenile Probation;
14 is that correct?

15 A Yes.

16 Q Now, with respect to your employment history,
17 PSI indicates that you've worked at Jeff's Welding in
18 Hawaii?

19 A Yes.

20 Q Have you had other occupations?

21 A I worked at Target, and I worked at McDonald's.
22 So, I've had like three or four jobs, yes.

23 Q And you moved back to Reno to take care of your
24 mother?

1 A I came -- I came down to Reno, was to see my
2 son -- my stepson.

3 Q Okay. Now, in this particular case, you were
4 Facebook Messengering on your phone with Jessica to set
5 up a meeting at the park, correct?

6 A So, that's what I thought was just to meet up
7 and -- because we would hangout on occasions.

8 Q Right. So, you were using your phone --

9 A Just --

10 Q -- messaging back and forth with her --

11 A Yeah, because --

12 Q -- to meet at the park?

13 A Just briefly. It was probably like 30 minutes
14 worth of messaging, and she said that she wanted to
15 come down and hang out. And she asked where I was, and
16 I said the park, and that was it.

17 Q Okay. And so, during the course of that
18 messaging is when the police showed up and arrested
19 you?

20 A Yes. That's -- it was probably about three or
21 four hours after the messages the police showed up. I
22 told them I would be waiting at Wingfield Park for her,
23 and instead the police show up probably about a few
24 hours later.

1 Q Okay. But the police and the messages were
2 happening the same day?

3 A Yeah, I think.

4 Q Now, you were arrested, taken into custody and
5 appointed an attorney in this case, correct?

6 A Yes.

7 Q Mr. Merrill?

8 A Yes.

9 Q And so, you were provided a copy of the
10 discovery, you indicate, by Mr. Merrill?

11 A Probably like a month or so, or a month and a
12 half after being arrested, yes.

13 Q Okay. And it's your testimony that he dropped
14 the discovery on the table and used the F word when he
15 was talking to you?

16 A Yes, he -- yes. That response --

17 Q You're sure of that?

18 A Yes.

19 Q Okay.

20 A I'm sure.

21 Q And then when he -- you had appeared in the
22 Justice Court a couple of times by the time that
23 happened; is that right?

24 A As soon as I appeared the -- it was after the

1 competency. So, yeah, I went to Justice Court at least
2 once or twice.

3 Q Okay. And then you came up to the District --

4 A District.

5 Q -- Court because you were going to Lake's
6 Crossing --

7 A Lake's Crossing.

8 Q -- right?

9 A After Lake's Crossing is when I got the
10 discovery.

11 Q Okay. So, you were in front of the Justice of
12 the Peace at Fernley Justice Court?

13 A Yes.

14 Q Came to the District Court in front of this
15 judge?

16 A Yes.

17 Q Then you went to Lake's Crossing?

18 A Yes.

19 Q Then you came back to this court in front of
20 the judge?

21 A Yes.

22 Q At no point did you express to the court any
23 frustration or disappointment with Mr. Merrill,
24 correct?

1 A I was not --

2 Q It's a yes or no question.

3 A No.

4 Q Did you ever say --

5 A No.

6 Q -- to the judge here that you were disappointed
7 with Mr. Merrill?

8 A No, but I stated to him though in court.

9 Q I -- my question is --

10 A Yeah, but it's not --

11 Q -- (unintelligible) --

12 A -- to the judge.

13 Q Please just answer my question.

14 A No, not to the judge.

15 Q Okay. You never said anything to the judge in
16 Fernley Justice Court, correct?

17 A No, not to the judge.

18 Q And then you met -- you had hearings in front
19 of the judge again in Fernley Justice Court prior to
20 the preliminary hearing, correct?

21 A Yes.

22 Q And then at the preliminary hearing you signed
23 your waiver of preliminary hearing, correct?

24 A Pretty much by force.

1 Q But you were in -- did you sign it the
2 courtroom?

3 A I signed in courtroom room, yes.

4 Q And you were present with the judge in the
5 courtroom when you signed it?

6 A Yes, but I didn't know if I was able to speak
7 out in court. I was told it was contempt of court if I
8 speak out, so I did not. I spoke to him and him only
9 when we were in the court, and he would not relay
10 nothing I told to him.

11 Q Okay. And so, then you came up to the District
12 Court. You requested additional time to discuss the
13 case with Mr. Merrill, correct?

14 A Yes.

15 Q And you were before the judge at that time
16 also, correct?

17 A Yes, but still I didn't know I was able to talk
18 to the judge.

19 Q I understand. But you -- and then you came
20 back for the arrangement, correct?

21 A Yes.

22 Q Mr. Walther read the plea agreement in its
23 entirety to you, correct?

24 A I wouldn't say in its entirety no. I would not

1 say that.

2 Q And you appeared before this court?

3 A Yes.

4 Q The judge asked you a series of questions,
5 correct?

6 A Yes.

7 Q And were you honest with the judge --

8 A No.

9 Q -- that day?

10 A No, I wasn't.

11 Q You didn't answer any of the questions
12 truthfully?

13 A No, I was not.

14 Q Okay. And so, we're supposed to believe what
15 you say today because you're telling the truth now?

16 A I understand that. But I'm telling the truth
17 now because I'm -- I -- from the heart, it was -- it
18 was wrong to lie. I should have just told him that,
19 but I feel like I had no other choice. I feel like I
20 was being pressured and force into doing it. Because I
21 was told if I didn't, I would spend almost the rest of
22 my life in prison. So, me not knowing nothing, I
23 believed him, and that's how -- and then he -- it was
24 pretty much a scare tactic. It made me do it. If it

1 wasn't for that, I would not --

2 Q Not the judge though, right? The judge --

3 A No, my attorney.

4 Q -- asked you questions?

5 A Yeah. And I lied to him, yes.

6 Q And he went over in great detail the plea
7 agreement?

8 A Yes.

9 Q And you were listening to the judge?

10 A Yes, I was.

11 Q You were responding to his questions?

12 A Yes.

13 Q You understood what he was asking you?

14 A I didn't -- I understood most of it, but not
15 all of it. I still -- I had -- I kept on asking my
16 attorney like what does this mean, what does this mean?
17 Like I still --

18 Q During the course of the arraignment --

19 A During --

20 Q -- hearing?

21 A During the course of the guilty thing and at
22 the sentencing I still was asking my attorney, and I
23 did not understand it.

24 Q Now, when the judge asked you if you

1 committed -- in fact committed the crime, you told him
2 in April, 2019, that yes, you committed the crime?

3 A Yes, I did. But --

4 Q And then when you did your Presentence
5 Investigation, you met with the Division of Parole and
6 Probation?

7 A I didn't meet with nobody. They just dropped
8 the paper off pretty much and asked me a couple of
9 questions and left. So, I don't count that as a
10 meeting in no way.

11 Q Okay. And then you wrote a statement to the
12 judge dated April 29th, it's in front of you there,
13 Exhibit Number 1?

14 A Yes.

15 Q Do you see that?

16 A Yes.

17 Q That's your writing?

18 A Yes, it is.

19 Q And the first sentence is "I committed the
20 offense"?

21 A I was advised to write that.

22 Q Right. My question is --

23 A Yes, I wrote it.

24 Q -- the first sentence says --

1 A Yes.

2 Q -- you committed the offense?

3 A Yes.

4 Q Nowhere in that letter did you say you have any
5 issue with your attorney?

6 A I -- no. Not in the letter, no.

7 Q Nowhere in that letter do you say I'm concerned
8 that I'm entering a plea of guilty to a crime I didn't
9 commit?

10 A No.

11 Q And then on April 13th, 2019, you wrote another
12 letter to the judge?

13 A Yes, I did. And I was advised again to write
14 it.

15 Q Okay. And in that letter, again, you committed
16 that you -- or you admitted that you committed this
17 crime?

18 A Yeah, but it wasn't -- I wasn't saying I
19 committed -- exactly committed that crime at that time.
20 But that's how -- like I don't word things very well.
21 I don't -- I'm don't know how to put things down. It's
22 not how I'm trying to say them. So, the way it's said
23 was not exactly how it was supposed to be said. I
24 miss -- I miss put it down on the paper. Like I did it

1 wrong.

2 Q At no time during the sentencing hearing did
3 you tell the court that these letters were not what you
4 wrote, correct?

5 A Again, I told my attorney --

6 Q It's a yes or no questions.

7 A I told my attorney, and he did not relay --

8 Q It's yes or no question.

9 A No.

10 Q Did you ever tell the court?

11 A No, I didn't.

12 Q Did you ever send another letter to the court
13 after this letter?

14 A I did actually. I sent it to my attorney, and
15 it never got to the courts.

16 Q My question is did you --

17 A But --

18 Q -- ever send another letter to the court?

19 A So, it's considered to send to the courts, yes.

20 Q My question is did you --

21 A I sent -- I sent it to my attorney to give --

22 Q Okay.

23 A -- to the court.

24 Q It's a --

1 A So, that's a yes.

2 Q So, the answer is no, you --

3 A To give to the court --

4 Q -- you never sent it?

5 THE COURT REPORTER: Can you guys talk up?

6 MS. BUTKO: Objection, argumentative.

7 THE COURT: Just --

8 THE WITNESS: I --

9 THE COURT: -- answer the question.

10 THE WITNESS: So, I --

11 MR. RYE: So, I'm going to ask -- let me ask

12 the question again.

13 THE COURT: I understand where you're going.

14 MR. RYE: Then you can direct him to answer the

15 question.

16 THE WITNESS: Okay. Not directly to the

17 courts, but I did send one to the courts.

18 THE COURT: Okay. He didn't send it to the

19 court.

20 MR. RYE: Thank you.

21 BY MR. RYE:

22 Q Now, at the sentencing hearing you didn't --

23 you chose not to make a statement?

24 A I asked him to, and he advised me not to.

1 Q Now, you were in B Pod the whole time you
2 were --

3 A No.

4 Q -- in jail?

5 A No, I was not.

6 Q When were you in B Pod?

7 A Off and on. I was in B Pod when I first got
8 there, and then I went to max, to E. And then I went
9 back to B Pod and back to E again. And then before I
10 left, I was in B again. So, I went back and forth
11 throughout the whole time.

12 Q Okay. So, at sentencing you were in B?

13 A Sentencing I was in B, yeah.

14 MR. RYE: I don't have any other questions,
15 Your Honor.

16 THE COURT: Ms. Butko?

17 MS. BUTKO: No, Your Honor. Thank you.

18 THE COURT: Okay. Thank you, sir.

19 Anything else, Ms. Butko?

20 MS. BUTKO: No, Your Honor.

21 THE COURT: Okay. Mr. Rye, anything?

22 MR. RYE: No, Your Honor.

23 THE COURT: Okay. Argument.

24 MS. BUTKO: We're ready. I'll try to go

1 reasonably slow.

2 Your Honor, this is a very straightforward
3 petition for habeas corpus. It has short claims, and
4 the evidence you've heard this morning is very
5 straightforward as well. So, I'm not going to belabor
6 the point because I know you're bright, and I know you
7 read the file before you came in here.

8 So, the question for the Court I think that's
9 key is the issue of the phone and the lack of defense
10 investigation, the lack of the ability of the defense
11 to examine the evidence before it was destroyed by the
12 State. I went and took the time to look back at the
13 file to make sure that I'm accurate on dates.

14 Mr. Merrill was appointed on 8-20 of 18. And
15 the search warrant of phone was 9-18 of 18, and the
16 defense was not asked to be present with experts ready
17 at a critical stage where evidence could be destroyed
18 by police officers performing these downloads on these
19 phones. Phones are very fragile and when they do these
20 downloads it's quite common that the phone is destroyed
21 and all the evidence on it disappears.

22 Mr. Frost testified clearly there would be no
23 child or pornography on that phone. There's no
24 evidence to the contrary. And he was advised to take

1 the two life pleas with ten years each on a case where
2 there's not a phone in evidence attaching him to the
3 actual messaging between him and Ms. Jordan. It's a
4 rather unusual prosecution because one half of the side
5 of the conversation electronically is missing. And so,
6 I think that's where the destruction of evidence
7 question comes in.

8 I thought we'd actually have the phone here
9 today, and we were going to try to figure out how to
10 get it to go. I'm not very techie, but I was willing
11 to give it a great go. My client has the password
12 obviously, and the phone has been, unbeknownst to us,
13 released to the co-defendant's mother. And I don't
14 know how in the world that could happen.

15 That is obviously not standard in the industry.
16 I don't think that I've ever seen that. So, I can't
17 give you the fact that there's -- what I wanted to do
18 was corroborate my client's testimony with the phone
19 proving that there's no pornography on this phone.

20 Then what we have is Ms. Jordan's testimony.
21 She's the accomplice. She's the co-defendant. She
22 indeed went to prison. And her testimony only that she
23 was actually talking with my client and not someone
24 else. And we have Facebook Messengering. We don't

1 have anything from the company showing that we have
2 legitimately received these messages. You have a back
3 and forth, but it didn't necessarily have to be
4 Mr. Frost.

5 And so, I understand it's an interesting case
6 because often times my clients take a big plea and the
7 damage that goes with that plea, comes back and say I
8 didn't do this, but I didn't see another way out. I
9 thought I was going to rot in prison so I took the
10 deal. And then they go I didn't do this. And that's
11 where we stand. So, I would submit it.

12 THE COURT: Mr. Rye?

13 MR. RYE: Your Honor, the State would request
14 that you deny the petition for failure to prove the
15 ineffective assistance of counsel, the standard set
16 forth by Nevada law. In the supplemental petition
17 there are three grounds raised. I guess four grounds,
18 but three primary grounds in the supplemental.

19 The first is that counsel was ineffective when
20 counsel coerced a guilty plea by threats which overbore
21 the petitioner's will. The testimony today established
22 clearly in the State's mind that there was none of that
23 happened. You heard from Mr. Merrill and Mr. Walther,
24 the process they went through. You also can see the

1 record that Mr. Frost was before the court numerous
2 times in this case. That he in fact requested a
3 continuance prior to the arraignment. At no point was
4 there any hesitation expressed to either counsel,
5 according to their testimony, or to the court. The
6 court may know note in the transcripts or records that
7 there was any problem with Mr. Frost understanding the
8 proceedings or what was going on.

9 In fact, when he you review the transcript, it
10 flows such that it would be evident he did understand
11 and there were no issues. This court would obviously
12 take steps if there was concerns of the voluntariness
13 of the plea. The record simply shows none. So, ground
14 one should be dismissed.

15 Ground two, regarding the willful destruction
16 of evidence by the police when the telephone was
17 destroyed. In this case the testimony today from
18 Detective Pruitt was the phone was not destroyed. A
19 search warrant was obtained. That was not challenged
20 for reasons stated by counsel.

21 Again, professional judgment decisions. Based
22 on an evaluation of the evidence, the facts of case,
23 meeting with Mr. Frost, speaking with co-counsel for
24 the co-defendant -- or counsel for the co-defendant,

1 each attorney made a professional judgment that this
2 was a plea that was appropriate and voluntary. The
3 phone is not necessary to that plea. The testimony
4 from Detective Pruitt was this was Facebook Messenger,
5 which would not necessarily be on the phone. The
6 messaging was going on, and that's how the meeting was
7 setup at the park where he was arrested. The only
8 thing he had was the phone. There would be no benefit
9 for the phone as far as his plea went.

10 As Mr. Merrill testified, there were additional
11 charges that could have been filed based on the
12 evidence that was presented in the file, and that
13 evidence was reviewed with Mr. Frost by Mr. Merrill.
14 And it was determined by Mr. Frost to take the plea
15 deal after discussions with counsel.

16 Also important to note is that Mr. Merrill
17 testified he was prepared to do the preliminary
18 hearing. In fact, was ready to go and the witnesses
19 were there, and that's when Mr. Frost decided to accept
20 the plea bargain after consultation and discussion with
21 his attorney. At no point did he raise every -- any
22 concerns with what the attorneys had done.

23 As far as investigation, at no point did he
24 request additional evidence, mitigation investigation,

1 anything such as that. Both attorneys testified before
2 the court today that in their judgment there was no
3 additional investigation required. Mr. Merrill testify
4 that he believed additional charges could be brought
5 forward based on the evidence that was provided to him
6 as discovery, and that was shared with Mr. Frost.

7 The phone is not -- does not somehow make the
8 plea involuntary, does not mean that the counsel was
9 ineffective in this particular case, and that count
10 should be dismissed.

11 As far as the perfecting an appeal, you heard
12 from Mr. Walther his normal process in cases. That he
13 was in that the B Pod on a regular basis as a public
14 defender in May and June of 2019. That at no point did
15 he receive an oral request, a written request, or a
16 message, or any request at all from family or otherwise
17 that he file an appeal on behalf of Mr. Frost. He also
18 indicated that based on his review of the record,
19 representation in the case, and understanding of Nevada
20 law there would be no legal basis for an appeal.
21 Understanding that if it's requested, he still has to
22 do it. But based on the evidence before this court,
23 there's simply no evidence that an appeal was requested
24 that's credible.

1 Mr. Frost comes before you today and asks you
2 to believe his testimony today in its entirety and to
3 disregard everything he said in the case up to this
4 point. And the record just does not support that, Your
5 Honor. Based upon that, we would ask that you
6 disregard his testimony, or consider it in context with
7 the other attorney's testimony and find that the
8 attorney's testimony is credible, that there was no
9 conflict in the representation, there were no issues of
10 ineffective representation, and that ground three also
11 be dismissed.

12 THE COURT: Okay. Ms. Butko?

13 MS. BUTKO: I submit, Your Honor.

14 THE COURT: Okay. So, all right.

15 So, the standard before the Court is in
16 relation to effective assistance of counsel, of course
17 is Strickland. Court finds that the defendant's -- or
18 the petitioner's testimony is just not credible in the
19 circumstances of this case. The canvass in relation to
20 the plea was clear.

21 The testimony of counsel was very
22 straightforward in relation to proceeding with the case
23 and the things they can and can't do. They were
24 prepared to go to preliminary hearing. It was the

1 defendant's choices at that -- Petitioner's choice at
2 that point to pursue a plea agreement, which they did.
3 Which would have been multiple counts unless they had
4 gone forward with trial. I believe that originally he
5 was charged with five counts -- or four counts rather.
6 And then the District Attorney indicated that it was
7 his intention to file more.

8 Pornography has very little bearing on this
9 case. He plead to lewdness, not possession of
10 pornography. It was never charged in this matter. It
11 wasn't even charged at the Justice Court level. The
12 communications occurred in relation to the lewdness
13 offenses over the Facebook Messenger. Therefore, they
14 wouldn't be on his phone. It would be in the cloud in
15 Facebook.

16 So, there was no indication of exchange of
17 pornography or any messaging back and forth between the
18 two by text. Everything was done or over Facebook. He
19 never contested that that was in fact his Facebook page
20 or his Facebook Messengering. So, he was provided with
21 each and every piece of the discovery in this
22 particular matter, and he indicated so. And he became
23 concerned because he was provided with stuff that he
24 didn't think he should have in the jail. Which he

1 shouldn't have. But his attorney came back and removed
2 it from his possession. So, he didn't have no problem
3 there.

4 Yeah, you don't give that kind of -- you can
5 show it to them real quick and say, but you don't leave
6 those kind of pictures in the jail.

7 MS. BUTKO: Agreed, Your Honor.

8 THE COURT: But one way or another, he was
9 provided with all the -- all the discovery in this
10 case.

11 In relation to the search of the phone, it was
12 reviewed by an independent magistrate, Judge Matthews.
13 Judge Matthews did not require notification prior to
14 execution of the warrant. And even though I got the
15 application for the warrant, I did not get the actual
16 search warrant, just provided me the application. The
17 search warrant is maintained at the Justice Court.

18 MS. BUTKO: Oh, Your Honor, I did bring it as
19 Exhibit 5. I didn't admit.

20 THE COURT: So, in --

21 MS. BUTKO: State have any objection?

22 MR. RYE: I don't have any objection.

23 MS. BUTKO: Yeah.

24 THE COURT: Be nice to have the search warrant.

1 MS. BUTKO: I absolutely did bring it. Let me
2 put my mask on so as not to contaminate the planet with
3 my cooties.

4 THE COURT: Did you get -- did you get shot up
5 yet?

6 MS. BUTKO: I did. Regretfully so.

7 THE COURT: If you got shot, you don't need to
8 put your mask on.

9 MS. BUTKO: I haven't seen a study that says
10 that yet.

11 THE COURT: No, it says -- there is. Studies
12 show that there is no transmission.

13 The magistrate approved no announcing. Also
14 approved the warrant search. That was a computer. Do
15 I agree that the sheriff's department likely should
16 have notified the district attorney and counsel that
17 they were going to research the phone or attempt to
18 research the phone? Probably. Is that required? Not
19 if the independent magistrate allows it to occur.

20 There was probable cause at the time the search
21 warrant was issued to believe that there maybe evidence
22 on the phone. The testimony -- the uncontroverted
23 testimony in this courtroom is that the phone was not
24 "destroyed". It was just not accessible anymore with

1 the programs that they had at the time.

2 Mr. Merrill's testimony was clear. He was
3 prepared to go forward. Mr. Walther's testimony was
4 clear. He was prepared to go forward in the event
5 Mr. Frost had a change of heart, which he didn't. The
6 Court's canvass was specific and upfront. The Court's
7 sentencing, there's two letters that were provided by
8 the defendant indicating guilt in this particular
9 matter. One that was submitted to the Court at the
10 sentencing. The other one that was submitted to the
11 Court with the Presentence Investigation.

12 The defendant was requested and whether or not
13 he wanted to make a statement in mitigation or
14 allocution in relation to this offense, and he declined
15 to do so. Instead opting to present the Court with a
16 letter that was admitted. What was it, six?

17 MS. BUTKO: Two.

18 THE COURT: Two?

19 MS. BUTKO: Yes.

20 THE COURT: So, the Court finds that will
21 there's no ineffective assistance of counsel that
22 doesn't meet the Strickland standard on either ground.

23 I would -- I would just note that the phone was
24 available during the whole process of this case for

1 further investigation.

2 So, and as to the appeal, the Court just does
3 not find it credible that the defendant requested
4 anybody to file an appeal on his behalf at any time up
5 to and including following the sentencing in this
6 particular matter. There is no written or oral
7 statements showing that an appeal -- that he had
8 requested an appeal. And even so, if he had requested
9 an appeal, the Court finds that -- well, he didn't
10 request an appeal, so I'm not even going to go there.

11 So, with all that being said, the petition for
12 habeas corpus post-conviction is denied.

13 His claim of factual innocence is unpersuasive
14 as to his aiding and abetting acts of lewdness. And as
15 the Court indicated, he never plead nor was he ever
16 charged with, even in the Justice Court that I could
17 tell, in the criminal complaint with possession of
18 pornography. So, that's a red herring. He was charged
19 with aiding and abetting in the procuring of lewd acts
20 with children. He admitted to that, told the Court he
21 did that.

22 Court was very specific with him at the time of
23 his plea as to whether or not he partook in getting
24 these pictures taken of the children, and he admitted

1 it, said he did it. Not only admitted the facts
2 underlying the complaint, but verified to the Court
3 that he plead guilty because he in fact did it, and he
4 was pleading guilty because he in fact did it.

5 At every course of the proceedings the
6 defendant had every opportunity to make any objections.
7 None were made in any of the proceedings in this
8 particular matter. And the request to continue the
9 arraignment was actually made by written stipulation by
10 Mr. Merrill at the request of his client so that they
11 could fully go over. That was made on March 26th by
12 stipulation.

13 His arraignment -- his arraignment wasn't set
14 until April 1st, which gave him additional -- the Court
15 reset it for April 29th. There was an additional month
16 that was set out to ensure that the defendant was fully
17 notified as to the ramifications of his plea. Which
18 were fully canvassed at the time of the Court's
19 arraignment.

20 So, writ of habeas corpus is denied.

21 Do the order, Mr. Rye. Provide me a copy of
22 the order.

23 MR. RYE: Thank you, Your Honor.

24 MS. BUTKO: Your Honor, can I see it before it

1 goes to you?

2 THE COURT: Absolutely you can, Ms. Butko.

3 MS. BUTKO: Thank you. I appreciate that.

4 THE COURT: Get to me -- all right. So,
5 because I made my ruling from the bench, the habeas
6 statute requires that I file the order within 30 days.
7 Because of the ruling from the bench -- doesn't do
8 that. It doesn't say that if I don't rule from the
9 bench I can keep it under submission for at least --

10 MS. BUTKO: I have one that's been under
11 submission since November of '19 with our Chief Judge
12 at Washoe.

13 THE COURT: So --

14 MR. RYE: Your Honor, I should be able to get
15 it to Ms. Butko within two weeks.

16 THE COURT: All right. So, please do so.

17 MR. RYE: You'll still have a couple of weeks
18 to review.

19 THE COURT: All right. If you want to put me
20 on -- put, not me, but my judicial assistant on the
21 e-mail chain when you transmit it to her for her review
22 that would be good. And then I'll give you an
23 opportunity to object to it. Submit it to me following
24 that in both Word or WordPerfect and PDF forms just in

1 case. Okay?

2 MS. BUTKO: Thank you, Your Honor.

3 THE COURT: Just in case I want to make some
4 changes.

5 MS. BUTKO: Okay.

6 THE COURT: Okay? Which I've been known to do.

7 MS. BUTKO: Yes, that is true.

8 THE COURT: Okay. All right.

9 So, just because they write a proposed order,
10 doesn't mean that I sign off on it even though they're
11 both in agreement with it. Sometimes I say oh.

12 MS. BUTKO: In other courtrooms I've just given
13 up objecting. You can write anything you want. We'll
14 talk about it on appeal.

15 THE COURT: All right. So, that's the order.
16 Thank you.

17 MS. BUTKO: Thank you, Your Honor.

18 THE COURT: Have a good day.

19

20 (End of Proceedings.)

21

22 * * * * *

23

24

CERTIFICATE

STATE OF NEVADA)
) SS.
CARSON CITY)

I, Kathy Terhune, CCR 209, do hereby certify
that I reported the foregoing proceedings; that the
same is true and correct as reflected by my original
machine shorthand notes taken at said time and place
before the Honorable John P. Schlegelmilch, District
Judge, presiding.

Dated at Carson City, Nevada, this
30th day of March, 2021.



CCR #209

DEFENDANT STATEMENT

Write in your own words the circumstances of your offense, why you committed the offense, your present feelings about your situation, and why you may be suitable for probation if eligible. A copy of this statement will be sent to the judge. Write or print clearly. If using a pencil, please write as dark as possible. If you do not want to submit a written statement, still initial that you acknowledge all changes to the PSI must be made prior to sentencing.

I committed the offense because I was dumb and very self centered. There is no excuses for what I did. I ruined 2 lives for my own selfish wants. I accept everything that was said and I take responsibility for my part. I feel like I should take this time to write to the victims of this case. I'm very sorry for everything that happened. I should have been there for you guys and be a father figure but I wasn't. I was very self centered and dumb. It was not myself and I'm so sorry. You guys mean a lot to me and I failed you guys. I'm going away to receive help and become a better person. I never meant for any of this to happen. But I'm not going to sit here and make excuses. I'm accepting full responsibility for my actions and do what I have to so I can become a better person. I know when I get out I'll be different because I'm going to do everything plus more so I can be a somebody in life. And so I can become a better brother and son to my family. I'm not only going to better myself for me I'm also going to do it for the community. I want everyone around me to be able to feel safe and not have to fear about me being around.

Per Nevada Supreme Court opinion in Stockmeier v. State, any changes to your Presentence Investigation Report must be made at or before sentencing. The information used in your Presentence Investigation Report may be reviewed by federal, state and/or local agencies and used for future determinations to include, but not limited to, parole consideration. TF (Defendant initials)

Signature



Date

04-29-19

To the honorable District Judge,

I'm writing this letter to explain my actions. I'm not going to sit here and make up excuses for my actions. I'm guilty of the crimes that are against me. I messed up and committed these awful crimes. I wish I can take them back but I can't. I'm going to take the time in Prison to better myself for my family and the community. I've never been in trouble as a adult and I was doing good working a full time job since 18. I hope that I can get my charges ran concurrently. I understand I should be punished to the full punishment. I messed up but I know I can better myself and I know that I can do a lot to better myself in 10 years. Once on parole I'm going to stay out of trouble and do all my programs that I have to. While in Prison I'm going to finish school work full time and do all programs available to me.

Lastley I would like to express
my sincere regrets for the distress
caused to the victims by this case.
Thank you for taking the time to read
this letter to the courts.

Signed 

Date 05-13-19

FILED

2019 APR 29 PM 3:17

TANYA SCHAEFER
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Harry Thomas

1 CASE NO.: 18-CR-01197

2 DEPT. NO.: I

3
4
5 IN THE THIRD JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF LYON
7

8 THE STATE OF NEVADA,

9 Plaintiff,

10 vs.

GUILTY PLEA AGREEMENT

11 TOMMY BRIAN FROST,

12 Defendant.
13 _____/

14 I hereby agree to plead guilty to Two (2) Counts of PRINCIPAL TO LEWDNESS WITH
15 A CHILD UNDER THE AGE OF FOURTEEN (14) YEARS, a Category A Felony, in violation
16 of N.R.S. 201.230(2) and N.R.S. 195.020, as more fully alleged in the charging document
17 attached hereto as Exhibit "1".

18 My decision to plead guilty is based upon the plea agreement in this case which is as
19 follows:

20 The State has agreed that in exchange for my plea of guilty to the above charges, the State
21 will dismiss all other charges arising from this criminal episode.

22 I understand that if the State of Nevada has agreed to recommend or stipulate to a
23 particular sentence or has agreed not to present argument regarding the sentence, or agrees not to
24 oppose a particular sentence, such agreement is contingent upon my appearance in Court on the
25 initial Arraignment date and any subsequent Court dates. I understand that if I fail to appear for
26 the scheduled hearings or I commit a new criminal offense, prior to sentencing, the State of
27 Nevada would regain the full right to argue any lawful sentence and to reinstate the original
28 charges if, appropriate.

1 CONSEQUENCES OF THE PLEA

2 I understand that by pleading guilty, I admit the facts which support all the elements of
3 the offense(s) to which I now plead as set forth in Exhibit "1".

4 I understand that as a consequence of my plea of guilty to Two (2) Counts of PRINCIPAL
5 TO LEWDNESS WITH A CHILD UNDER THE AGE OF FOURTEEN (14) YEARS, I may be
6 imprisoned in the State Prison for life with the possibility of parole, with eligibility for parole
7 beginning when a minimum of ten (10) years has been served and that I may be fined up to a
8 maximum of Ten Thousand Dollars (\$10,000.00) for each count.

9 I understand that the law requires me to pay an Administrative Assessment Fee.

10 I understand that, if appropriate, I will be ordered to make restitution to the victim of the
11 offense(s) to which I am pleading guilty and to the victim of any related offenses which is being
12 dismissed or not prosecuted pursuant to this agreement. I will also be ordered to reimburse the
13 State of Nevada for any expenses related to my extradition, if any.

14 I understand that I am eligible for probation ^{not May 4/29/2012} for the offense to which I am pleading guilty.
15 I understand that, except as otherwise provided by statute, the question of whether I receive
16 probation is in the discretion of the sentencing judge

17 I understand that if more than one sentence of imprisonment is imposed and I am eligible
18 to serve the sentences concurrently, the sentencing judge has the discretion to order the sentences
19 served concurrently on consecutively.

20 I understand that information regarding charges not filed, dismissed charges, or charges to
21 be dismissed pursuant to this agreement may be considered by the judge at sentencing.

22 I have not been promised or guaranteed any particular sentence by anyone. I know that
23 my sentence is to be determined by the Court within the limits prescribed by statute. I
24 understand that if my attorney or the State of Nevada or both recommend any specific
25 punishment to the Court, the Court is not obligated to accept the recommendation.

26 I understand that the Division of Parole and Probation of the Department of Motor
27 Vehicles and Public Safety may or will prepare a report for the sentencing judge before
28 sentencing. This report will include matters relevant to the issue of sentencing, including my

1 criminal history. I understand that this report may contain hearsay information regarding my
2 background and criminal history. My attorney and I will each have the opportunity to comment
3 on the information contained in the report at the time of sentencing.

4 I understand that should I fail to comply with the plea negotiations in the District Court,
5 the District Attorney may reinstate original charges.

6 **WAIVER OF RIGHTS**

7 By entering my pleas of guilty, I understand that I have waived the following rights and
8 privileges:

9 1. The constitutional privilege against self-incrimination, including the right to
10 refuse to testify at trial, in which event the prosecution would not be allowed to comment to the
11 jury about my refusal to testify.

12 2. The constitutional right to a speedy and public trial by an impartial jury, free of
13 excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the
14 assistance of an attorney, either appointed or retained. At trial the State would bear the burden of
15 proving beyond a reasonable doubt each element of the offense charged.

16 3. The constitutional right to confront and cross-examine any witnesses who would
17 testify against me.

18 4. The constitutional right to subpoena witnesses to testify on my behalf.

19 5. The constitutional right to testify in my own defense.

20 6. The right to appeal the conviction, with the assistance of an attorney, either
21 appointed or retained, unless the appeal is based upon reasonable constitutional, jurisdictional or
22 other grounds that challenge the legality of the proceeding and except as otherwise provided in
23 subsection 3 of N.R.S. 174.035. I understand that a direct appeal in this case is not appropriate.

24 **VOLUNTARINESS OF PLEA**

25 I have discussed the elements of all of the original charge(s) against me with my attorney and
26 I understand the nature of the charge(s) against me.

27 I understand that the State would have to prove each element of the charge(s) against me at
28 trial.

1 I have discussed with my attorney any possible defenses, defense strategies and
2 circumstances which might be in my favor.

3 All of the foregoing elements, consequences, rights, and waiver of rights have been
4 thoroughly explained to me by my attorney.

5 I believe that pleading guilty and accepting this plea bargain is in my best interest, and that
6 a trial would be contrary to my best interest.

7 I am signing this agreement voluntarily, after consultation with my attorney, and I am not
8 acting under duress or coercion or by virtue of any promises of leniency, except for those set forth
9 in this agreement.

10 I am not now under the influence of any intoxicating liquor, a controlled substance or other
11 drug which would in any manner impair my ability to comprehend or understand this agreement or
12 the proceeding surrounding my entry of this plea.

13 My attorney has answered all my questions regarding this guilty plea agreement and its
14 consequences to my satisfaction and I am satisfied with the services provided by my attorney.

15 DATED: This 29 day of April, 2019.

16
17 

18 TOMMY BRIAN FROST
Defendant

19 AGREED TO:
20 This 29 day of April, 2019.

21 
22 DAMIAN D.Q. SINNOTT, Esq.
Deputy District Attorney, Lyon County

23 **CERTIFICATE OF COUNSEL**

24 I, the undersigned, am the attorney for the Defendant named herein and as an officer of
25 the court hereby certify that:

26 1. I have fully explained to the Defendant the allegations contained in the charge(s)
27 to which guilty pleas are being entered.

28 ///

2. I have advised the Defendant of the penalties for each charge and the restitution that the Defendant may be ordered to pay.

3. All pleas of guilty offered by the Defendant pursuant to this agreement are consistent with the facts known to me and are made with my advise to the Defendant and are in the best interest of the Defendant.

4. To the best of my knowledge and belief, the Defendant:

a. Is competent and understands the charges and the consequences of pleading guilty as provided in this agreement.

b. Executed this agreement and will enter all guilty pleas pursuant hereto voluntarily.

c. Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time of the execution of this agreement.

DATED: This 29 day of April, 2019.

MATTHEW K. MERRILL, ESQ.
Nevada State Bar No. 13537
Lyon County Public Defender
Merrill Law, PLLC
15 W. Main Street
Dayton, NV 89403
(775) 246-7721
Attorney for Defendant

188W 00018

**CANAL TOWNSHIP JUSTICE COURT
COUNTY OF LYON, STATE OF NEVADA**

FILED

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT

2018 SEP 17 A 11:39

State of Nevada }
 } ss:
County of Lyon }

LYON COUNTY MUNICIPAL COURT

CLERK

I, Erik Pruitt being first duly sworn, and under penalty of perjury, on oath say and depose the following:

1. I am a peace officer employed by the Lyon County Sheriff's Office and have been so employed for about 4 years. I am currently assigned to the Special Investigations Unit and have been so assigned for over 1 year.
2. I have been continuously employed as a Law Enforcement Officer in the State of Nevada for 9 years and 9 months.
3. I have completed the Nevada State Peace Officers Standards and Training, and I am category I and III certified. I have received roughly 1000 (plus) hours of additional training in Nevada Criminal Law and Criminal Investigations. I have investigated roughly 300 plus felony cases including, Possession of Child Pornography.
4. The information here in set forth comes from personal knowledge in that I conducted an investigation into the criminal offense of Possession of Child Pornography, a felony as described by NRS 200.730 and Use of a Minor in the Production of Pornography, a felony described by NRS 200.710.
5. In support of my assertion as to the existence of probable cause, the following facts are offered based upon my personal knowledge, or where indicated, based upon information given to me, which I believe to be reliable and truthful.
6. On August 15, 2018, I made contact with JESSICA JORDAN while at the Lyon County Sheriff's Office Substation in Fernley, Nevada. JORDAN had responded to the substation to make a report regarding child pornography. JORDAN relayed she was engaged in a relationship with a male subject, identified as TOMMY FROST. JORDAN said she has dated FROST for about the last month. JORDAN began to explain FROST had begun to want to have sex with her children and he had explicit photos of her children. When I asked questions about this JORDAN said she had taken the photos and explained she had sent them via Facebook messenger. JORDAN said she hoped we would work with her on the fact she had taken the

pictures. JORDAN said she had taken the pictures at her residence in Fernley. I later learned JORDAN lives at 556 Osprey Drive in Fernley, Nevada.

7. I asked JORDAN to speak with me in our interview room which is audio and video recorded. JORDAN agreed to speak with me in the interview room. Detective JOYNER joined me in the interview room. JORDAN provided the following information during the course of the interview. During the course of the interview probable cause was developed to arrest JORDAN and JORDAN was informed of this fact. The interview was stopped and JORDAN was advised of her Miranda Rights and she said she understood. JORDAN chose to waive her rights and continue speaking with Detective JOYNER and I. JORDAN also allowed me to look at the contents of her phone during the interview. I took several photographs of a conversation between her and FROST.

8 JORDAN told me during the course of the relationship, FROST began to ask for pictures of her two daughters, ages 2 and 4, her in known as Victim#1 18LY03666 (4 year old) and Victim#2 18LY03666 (2 year old). JORDAN relayed FROST said he was going to make her a baby book with the pictures of her kids. JORDAN said on August 9, 2018, FROST began to ask for nude pictures of her daughters. JORDAN told me FROST persisted and she finally did as he asked and sent him pictures of her 2 daughters in the bath. JORDAN had sent 13 photos of the both Victim#1 18LY03666 and Victim#2 18LY03666. The first 10 photos were of the girls naked in the bath or sitting on the edge of the bath. There were messages in the thread before and between the pictures such as "Send close ups", "Both of them", "Everything", "Tell them to sit on the edge take close ups", "Show the parts". After sending several naked pictures, JORDAN then sends 3 close-up naked pictures of her children's naked vagina's. FROST messages "Take better of Victim#1 18LY03666". JORDAN replies "She's dressed". FROST replies "I don't care, take it, pull it down make her bend over the bed than so she don't have to fully undress". These pictures were clearly sexual portrayals used to gratify the desires or lust of FROST.

9. JORDAN explained FROST was not satisfied and asked for more explicit pictures. During the conversations FROST asks her to send explicit photos of her daughter numerous times. This continued until JORDAN sent FROST four more photos of Victim#2 18LY03666 nude. One of the photos was of Victim#2 18LY03666 in the fetal position. There were 2 photos of Victim#2 18LY03666 bending over exposing her butt and vagina. There was a fourth picture with a close-up of Victim#2 18LY03666's vagina spread open. FROST sent messages during and before the pictures such as "Say bend over and take pics and they get a surprise." When JORDAN made an excuse to do it later with his help he told her "No do it now". FROST also messaged "Tell them if they do it they get ice cream". After JORDAN sent FROST a picture of the 2 year old he replied "What's that u can't see anything" to the first photo. When JORDAN said Victim#2 18LY03666 was uncomfortable he replied "Make it a game". FROST told her "I need one of her spreading the lips" and "I wanna see inside her pussy close up". FROST also sent a message saying "I need one of Victim#1 18LY03666 with her lips spread". After the last picture JORDAN messaged "She just ran off and Victim#1 18LY03666 is crying". During the

conversation, JORDAN even talks about the best way to take pictures of her child's vagina spread.

10. It is clear from the conversations, FROST was involved in the planning and pictures being taken and was telling JORDAN how to coax the children into cooperating with the nude explicit pictures. The pictures I was shown from the message thread were clearly sexual portrayals of children under the age of 18. There were also messages where FROST was asking to have the children watch JORDAN and him have sex. There were also messages where FROST talked about the 2 girls, JORDAN and him participating in sexual acts together to include oral sex. FROST sent messages where he stated he wanted to "Lick all the parts" and one where he wanted them to "Suck his cock". Several times FROST told JORDAN to make sure she deletes these messages afterward. It is clear FROST knew these messages and pictures were not okay.

11. There were hundreds of messages discussing sexual acts and pictures sent and received between FROST and JORDAN. JORDAN replied several times asking if he liked the pictures. JORDAN seemed happy that FROST was pleased with the pictures. JORDAN seemed to be actively engaged in the discussions where they spoke about having sex with the children and her.

12. There were also messages talking about FROST having done this before and he sent a picture of a young girl clearly under ten with her shirt pulled about half way up in underwear. FROST said this was a girl who joined him and his ex-girlfriend previously.

13. JORDAN said the picture from the profile was clearly FROST and was the person she had met with on over 10 occasions. JORDAN knows this to be his profile and had arranged to meet with him via this profile. JORDAN said FROST made statements about having done this type of activity to include the pictures and sexual acts with the children of 6 previous girlfriends. There were messages to this effect in the message thread.

14. JORDAN was asked if she knew this was wrong and she said yes. When asked why she did she replied she does not do well at not giving into other people's demands. JORDAN clearly knew this activity was wrong and illegal as during the conversation she talks about getting in trouble for the pictures. JORDAN was arrested and transported to the Lyon County Jail.

15. JORDAN said FROST hangs out in the Wingfield Park in Reno. I contacted Reno Police and requested their assistance. JORDAN agreed to assist Detective JOYNER and I in arresting FROST. JORDAN contacted FROST via Facebook messenger text. FROST stated he was in the park.

16. FROST was located and arrested at Wingfield Park in Reno, Nevada. FROST was taken to the Reno Police Department. I spoke with FROST and identified myself. FROST immediately requested a lawyer. I informed FROST of his charges and he wanted to speak with

me but I told him we could no longer talk as he requested an attorney. FROST was taken and booked into the Washoe County Jail.

17. On August 16, 2018, Detective JOYNER applied for and was granted a search warrant in the Canal Township Justice Court for a forensic download of JORDAN's phone and FROST's phones. I performed a download of JORDAN's phone. I was unable to gain access to FROST's phone due to it being locked.

18. I spoke with Detective SAWYER with the Washoe County Sheriff's Office. Detective SAWYER has access to and more training in accessing cellular phones. Detective SAWYER stated he could likely perform what is known as a "chip off". This is physically removing the memory storage device for the phone and downloading it directly bypassing the lock on the operating software which prevented the download I attempted. Detective SAWYER agreed to help with this process. This would allow for the recovery of evidence from the crime and may assist in identifying other victims of FROST, since he claimed in text messages he had 6 other women take photographs and their children participate in sex acts. FROST had also sent a picture of another child to demonstrate he had done this in the past. This process will damage the phone but will allow for the recovery of best evidence for the current case and any ongoing investigations.

19. There is Probable Cause to believe that a search of a black Motorola Moto cell phone IMEI# Unknown, seized from FROST during his arrest, will provide direct physical evidence proving the crimes listed above was perpetrated by TOMMY FROST.

20. That for the purposes of this affidavit, this Affiant further states and informs the Court:

- A. Unless otherwise specifically indicated, the term "cellular telephone" refers to the electronic devices that house the central processing unit ("CPU"), along with any internal storage devices, such as SD cards, internal communications devices capable of sending/receiving electronic mail, along with any other hardware stored or housed internally or externally. This hardware refers to a SIMS card or a secure digital card. "Cellular telephone" refers to hardware, software, and data contained in the main unit and removable media, such as the SIMS card, secure digital card, or other memory storage devices.
- B. That "cellular telephone" also refers to any device that stores names, addresses, calendars, schedules, digital images, videos, incoming registry, outgoing registry, incoming messages, outgoing messages, web activity, e-mail, and other electronically stored information, and all peripherals. These electronic devices are also capable of sending images and videos to other electronic devices through the Internet and/or through an email account. These devices will typically store the above-listed information until it

is deleted by a user or owner. The information, which includes both software applications and data, is typically stored on physical hard drives, in the Random Access Memory (RAM), SIMS (Subscriber Identity Module) card, removable smart cards, secure digital media card, micro secure digital media card, infrared storage device, Bluetooth storage device, etc.

- C. That "cellular telephone" refers to all equipment which can collect, analyze, create, display, convert, store, conceal, or transmit electronic, magnetic, optical, or similar computer impulses or data. Hardware includes, but is not limited to, any data-processing devices. Internal and peripheral storage devices, translator-like binary devices, and other memory storage devices, peripheral input-output devices, such as secure digital media card, SIMS card, and other external storage devices, as well as any devices, mechanisms, or parts that can be used to restrict access such as physical keys and locks.
- D. That "cellular telephone" refers to digital information which can be interpreted by a computer and any of its related components to direct the way they work. Software is stored in electronic, magnetic, optical, or other digital form. It commonly includes programs to run operating systems, applications, such as word processing, graphics, or spreadsheet programs, utilities, compilers, interpreters, and communications programs.
- E. That "cellular telephone" related documentation refers to written, recorded, printed, or electronically stored material which explains or illustrates how to configure or use a cellular telephone, software, or other related items.
- F. "Cellular telephone", as used herein, is defined pursuant to, as "an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device".
- G. "Cellular telephone", as used herein, consists of all equipment which can receive, capture, collect, analyze, create, display, convert, store, conceal, or transmit electronic, magnetic, or similar computer impulses or data.
- H. "Cellular telephone", as used herein, is digital information which can be interpreted by a computer and any of its related components to direct the way they work. Computer software is stored in electronic, magnetic, or other digital form. It commonly includes programs to run operating systems, applications, and utilities.
- I. "Cellular telephone", as used herein, consists of information or items designed to restrict access to or hide computer software, documentation, or data. Data security devices may consist of hardware, software, or other programming code. A password (a string of alpha-numeric characters) usually operates a sort of digital key to "unlock" particular data security devices. Data security hardware may include encryption devices,

chips, and circuit boards. Data security Page 4 of 9 software of digital code may include programming code that creates "test" keys or "hot" keys, which perform certain preset security functions when touched. Data security software or code may also encrypt, compress, hide, or "booby-trap" protected data to make it inaccessible or unusable, as well as reverse the process to restore it; "Internet Protocol address" or "IP address" refers to a unique number used by a computer to access the Internet. IP addresses can be dynamic, meaning that the Internet Service Provider (ISP) assigns a different unique number to a computer every time it accesses the Internet. IP addresses might also be static, if an ISP assigns a user's computer a particular IP address which is used each time the computer accesses the Internet.

J. "Electronic Media Storage" as used herein means any device designed to or capable of storing data or holding data in electronic format.

21. It is my opinion that the "Cellular Telephone" will contain call logs, SMS data, images, files, text messages, video, images, both saved and deleted of the suspects TOMMY FROST. The data will provide historical data including images, videos, web searches, saved and deleted files relating to the above listed crime(s).

22. Therefore, based on my training, experience, and the above facts, I believe I have substantial probable cause to believe the above described evidence will be found on the a black Motorola Moto cell phone IMEI# Unknown, seized from FROST during his arrest.

Based on the aforementioned information and investigation, I believe grounds for the issuance of a search warrant exist as set forth in NRS 179.015 through 179.115 inclusive.

I, the affiant, hereby request a search warrant be issued for the search of black a black Motorola Moto cell phone IMEI# Unknown, seized from FROST during his arrest. The "Cellular Phone" may contain the following but not limited to retained/deleted calls, retained/deleted images, videos, Internet searches, photography, drawings, email messages, SMS messages, Non SMS text messages, chat room user data, any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means.

The affiant further claims the physical search of above cellular telephone will also include a forensic data dump to access the phones physical memory chip.

Subscribed and Sworn to
Before me this 17th day of September 2018



Justice of the Peace
Canal Township Justice Court

Affiant – Erik Pruitt



188W 00018

**CANAL TOWNSHIP JUSTICE COURT
COUNTY OF LYON, STATE OF NEVADA** **FILED**

State of Nevada}

: SS

Search Warrant

County of Lyon}

2018 SEP 17 A 11:39

FERRELL MUNICIPAL COURT

CLERK

The State of Nevada, to any Sheriff, Deputy Sheriff, or any other law enforcement officer in the County of Lyon or the State of Nevada;

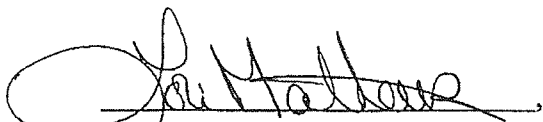
Proof by Affidavit having been made before me this 17th Day of September, 2018 by Detective Erik Pruitt, said affidavit being attached hereto and incorporated herein by reference, that there is Probable Cause to believe that black Motorola Moto cell phone IMEI# Unknown, seized from FROST during his arrest will contain evidence relating to the above listed crimes:

You are therefore, commanded to make an immediate search a black Motorola Moto cell phone IMEI# Unknown, seized from FROST during his arrest, currently in the possession of the Lyon County Special Investigations Unit for the above listed evidentiary articles.

AND TO SEIZE IT IF FOUND and bring it forthwith before me, or this court, at the courthouse of this court. The Affidavit in support of this Search Warrant is attached to this Search Warrant and was sworn to and subscribed before me this 17th day of September at 11:37 A.M./P.M. Wherefore, I find probable cause for the issuance of this Search Warrant and do issue it.

NIGHT SEARCH APPROVED: YES (X) NO ()

KNOCK AND ANNOUNCE WITHOUT WAITING FOR A RESPONSE: YES () NO (X)


Justice of the Peace
Canal Township Justice Court

09/24/18
08:22

Lyon County Sheriffs Office
Law Supplemental Narrative:

4429
Page: 1

Details

Incident Number 18LY03666
Sequence Number 3

Name Pruitt E V
Date 08:59:41 09/20/18

Narrative

(See below)

Change the field below to override a master case report in the Done Partition with your agencies override code if needed preceeded by "
When no longer needed, remove the code.

Override partiton

= = = = =

Narrative:

CRIME/INCIDENT TYPE:

Child Pornography

NARRATIVE:

On September 17, 2018, I applied for and was granted a search warrant with the Canal Township Justice Court for the removal and download of the memory chip from TOMMY FROST's cell phone.

On September 18, 2018, I met with Detective SAWYER with the Washoe County Sheriff's Office. Detective SAWYER removed the memory chip from FROST's phone and attempted to download it. We learned the contents were likely encrypted and we were unable to access any user data stored in the device.

250 6
LYDA 0066

Nothing further at this time.

EVIDENCE:

None

ATTACHMENTS:

Search Warrant

CONCLUSIONS/RECOMMENDATIONS:

Forward to the Lyon County District Attorney's Office.

REPORTING OFFICER AND ID:

Erik Pruitt 5708

FILED

2021 JUN -3 PM 3:53

TANYA SCEIRINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

TANYA SCEIRINE

Case No. 20-CV-00635

Dept. No. 1

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

TOMMY FROST,

Petitioner,

vs.

NOTICE OF ENTRY OF
ORDER

THE STATE OF NEVADA,

Respondent.

NOTICE OF ENTRY OF ORDER DENYING PETITION FOR WRIT OF HABEAS
CORPUS (POST-CONVICTION)

Please take notice that on the 19th day of May, 2021, the
Court entered its Order Denying Petition for Writ of Habeas
Corpus (Post-Conviction). A true and correct copy of the same is
attached hereto.

DATED this 3rd day of June, 2021.

TANYA SCEIRINE

CLERK OF COURT

BY:

/S/
Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of THIRD JUDICIAL DISTRICT COURT, and that on this date I deposited for mailing, the foregoing document, addressed to the following:

KARLA K. BUTKO
P. O. BOX 1249
Verdi, NV 89439

TOMMY F ROST
Inmate 1220520
NNCC
P. O. Box 7000
Carson City, NV 89702-7000

Stephen Rye
Lyon County District Attorney's Office
31 S. Main Street
Yerington, NV 89447

DATED this 4th day of June, 2021.


Clerk of Court

1 Case No. 20-CV-00635

2 Dept. No. I

3
4
5
6 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF LYON
8

9 TOMMY FROST,

10 Petitioner,

11 vs.

12 William "Bill" Gittere, Warden,
13 Ely State Prison &
14 THE STATE OF NEVADA,

15 Respondent.

**ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)**

16 This matter came before the Court and March 23, 2021, on Petitioner's Petition for Writ
17 of Habeas Corpus and the Amended Petition for Writ of Habeas Corpus (Post-Conviction). The
18 Petitioner appeared with his counsel, Karla Butko, Esq. Stephen B. Rye, Lyon County District
19 Attorney, appeared representing the interests of Respondents and the State of Nevada. The
20 Court has reviewed the pleadings on file, considered the evidence and arguments of the parties
21 presented at the trial and has considered and incorporates the entirety of the record in Case
22 18-CR-001197. The Court issued its findings and Order.

23 **I. LEGAL STANDARDS**

24 A district court reviews claims of ineffective assistance of trial counsel under *Strickland*
25 *v. Washington*, 466 U.S. 668, 686-87 (1984); *see also Kirksey v. State*, 112 Nev. 980, 987, 923
26 P.2d 1102, 1107 (1996). Under *Strickland*, to prevail on a claim of ineffective assistance of trial
27 counsel, a defendant must establish two elements: (1) counsel provided deficient performance,
28 and (2) "the deficient performance prejudiced the defense." *Kirksey*, 112 Nev. 987, 923 P.2d at

1 107. To prove deficient performance, a defendant must show counsel's performance fell below
2 an objective standard of reasonableness. *Id.* To prove prejudice, a defendant must
3 demonstrate "a reasonable probability that, but for counsel's errors, the result of the trial
4 would have been different." *Id.* at 988, 923 P.2d at 1107. "A reasonable probability is a
5 probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.
6 Counsel's performance is measured by an objective standard of reasonableness which takes
7 into consideration prevailing professional norms and the totality of the circumstances.
8 *Strickland*, 466 U.S. at 688; accord, *Homick v. State*, 112 Nev. 304, 913 P.2d 1280 (1996). An
9 insufficient showing on either element of the *Strickland* standard requires denial of the claim.
10 *Kirksey*, 112 Nev. at 988, 923 P.2d at 1107.

11 The court's view of counsel's performance must be highly deferential, with every effort
12 being taken to eliminate the distorting effects of hindsight. *Strickland*, 466 U.S. at 689, 691.
13 In making a fair assessment of counsel's performance, the trial court must reconstruct the
14 circumstances of counsel's challenged conduct and evaluate that challenged act or omission
15 from counsel's perspective at the time, while remaining perfectly mindful that counsel is
16 "strongly presumed to have rendered adequate assistance and made all significant decisions in
17 the exercise of reasonable professional judgment." *Id.* at 689-90. Accordingly, trial counsel's
18 strategic or tactical decisions will be "virtually unchallengeable absent extraordinary
19 circumstances." *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (quoting
20 *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990)). A petitioner must demonstrate
21 the facts underlying a claim of ineffective assistance of counsel by a preponderance of the
22 evidence, and a district court's factual findings regarding a claim of ineffective assistance of
23 counsel are entitled to deference on appeal. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25,
24 33 (2004); *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

25 A guilty plea is knowing and voluntary if the defendant has a full understanding of both
26 the nature of the charges and the direct consequences arising from a plea of guilty. To
27 determine the validity of the guilty plea, the Supreme Court requires the district court to look
28 beyond the plea canvass to the entire record and the totality of the circumstances. The district

1 court may grant a post-conviction motion to withdraw a guilty plea that was not entered
2 knowingly and voluntarily in order to correct a manifest injustice. A guilty plea entered on
3 advice of counsel may be rendered invalid by showing a manifest injustice through ineffective
4 assistance of counsel. U.S. Const. amend. 6. Manifest injustice warranting withdrawal of a
5 guilty plea may be demonstrated by a failure to adequately inform a defendant of the
6 consequences of entering the plea. *Barajas v. State*, 115 Nev. 440,442, 991 P.2d 474,475
7 (1999). *Little v. Warden*, 117 Nev. 4 845, 849, 34 P.3d 540, 543 (2001); *United States v.*
8 *Signori*, 844 F.2d 635, 638 (9th Cir. 1988); see generally *Barajas*, 115 Nev. at 442,991 P.2d at
9 476; *Paine v. State.*, 110 Nev. 609,619, 877 6 P.2d 1025, 1031 (1994), overruled on other
10 grounds by *Leslie v. Warden*, 118 Nev. 773,780-81, 7 59 P.3d 440, 445-46 (2002). See also
11 *Bryant v. State*, supra.

12 To meet the test for reversal because material evidence has been lost, the accused must
13 "show either (1) bad faith or connivance on the part of the government, or (2) prejudice from
14 its loss." *Crockett v. State*, 95 Nev. 859, 865,603 P.2d 1078, 1081 (1979). The Defendant must
15 also show the evidence was exculpatory. Evidence which only suggests an alternative theory
16 for the defense and is not directly exculpatory is insufficient. See *Wood v. State*, 97 Nev. 14
17 363,366-367,632 P.2d 339,341 (1981). The Defendant must show that it could be reasonably
18 anticipated that the evidence sought would be exculpatory and material to appellant's defense.
19 It is not sufficient that the showing disclose merely a hoped-for conclusion from examination
20 of the destroyed evidence, nor is it sufficient for the defendant to show only that examination
21 of the evidence would be helpful in preparing his defense. *Boggs v. State*, 95 Nev. 911,913,604
22 P.2d 107, 108 (1979) (citations omitted).

23 FINDINGS OF FACT

24 1. The Petitioner was convicted of two counts of Lewdness with a Child Under the
25 Age of Fourteen (14), and sentenced to life in prison with the possibility of parole after ten (10)
26 years, consecutive to one another, resulting in an aggregate sentence of parole after twenty
27 (20) years. Third Judicial District Court Case Number 18-CR-01197.

28 2. The Judgment of Conviction was filed on July 12, 2019.

1 3. The Petitioner filed a Petition for Writ of Habeas Corpus. The Court appointed
2 Karla Butko, Esq. at attorney to represent Petitioner and counsel filed an Amended Petition
3 for Writ of Habeas Corpus (Post-Conviction).

4 4. The State filed a Motion to Dismiss the Petition.

5 5. The Court held an evidentiary hearing Petition and Amended Petition on March
6 23, 2021.

7 6. Matthew Merrill, Esq. and Mario Walther, Esq. testified at the hearing as the
8 counsel for Mr. Frost during the justice court and district court proceedings in the criminal
9 matter.

10 7. Lyon County Deputy Sheriff Erik Pruitt, Stephen Manning and the Petitioner
11 each testified in the proceeding. Deputy Pruitt testified as to the examination of the cell phone
12 and the process used by the examiner. The Court finds that defense counsel and the Petitioner
13 were not notified about the process for examining the phone in advance, but the law does not
14 require any particular notice.

15 8. The Court also considered the exhibits offered during the course of the hearing,
16 including the Petitioner's Exhibits 1-6.

17 9. The Court considered the testimony at the evidentiary hearing and makes the
18 following findings:

19 a. Mr. Frost's testimony is not credible under the circumstances of this case.
20 The canvass by the district court at the plea hearing was clear. The testimony of counsel
21 was very straightforward in relation to proceeding with the case and the things they can
22 and can't do. Mr. Frost chose to go forward with the plea after consultation with his
23 attorneys.

24 b. Mr. Frost was provided with all of the discovery in this case. The
25 discovery could not be left with him at the jail given the pornographic nature of some of
26 the discovery.

1 c. The search warrant for search of the cell phone was reviewed by an
2 independent magistrate, Judge Lori Matheus. There was probable cause at the time the
3 search warrant was issued to believe that there may be evidence on the phone.

4 d. The uncontroverted evidence is that the phone was not "destroyed." It
5 was just not accessible anymore with the programs that they had at the time.

6 e. Mr. Merrill and Mr. Walther both testified that they were prepared to go
7 forward in the event that Mr. Frost had a change of heart, and the testimony and record
8 in the criminal case establish that Mr. Frost did not have a change of heart and he
9 wanted to go forward with the plea.

10 f. Mr. Frost penned two letters to the Court at the sentencing, one
11 submitted to the Court at the time of sentencing and one submitted to the Court with
12 the Presentence Investigation Report. In the letters Mr. Frost indicated guilt in this
13 case. The Court asked Mr. Frost if he desired to make a statement in mitigation or
14 allocution in relation to the case, and Mr. Frost declined to do so.

15 g. The Court reviewed the letters in relation to the post-conviction claims.

16 h. The cell phone was available to counsel throughout the pendency of the
17 criminal case until sentencing. At no point did counsel or Mr. Frost request additional
18 analysis because Mr. Frost always expressed a desire to plead guilty.

19 i. The Court does not find it credible that Mr. Frost requested anybody to
20 file an appeal on his behalf. There is no written or oral statements showing that he had
21 requested an appeal.

22 j. Mr. Frost's claim of factual innocence is unpersuasive as to his aiding and
23 abetting acts of lewdness. At the time of plea in the district court, the Court was very
24 specific with Mr. Frost as to whether or not he partook in getting these pictures taken of
25 the children and he admitted it, and said he did it. Not only did Mr. Frost admit to the
26 facts, but he verified to the Court that he pled guilty because he in fact did it and was
27 pleading guilty because he in fact did it.
28

1 k. At every course of the proceedings the defendant had every opportunity to
2 make any objections and Mr. Frost did not make any. The record establishes that the
3 Court allowed Mr. Frost additional time to review the case with his attorney. Mr.
4 Merrill and Mr. Walther both testified that they had several meetings with Mr. Frost.

5 l. The Court fully canvassed Mr. Frost regarding his plea. He was provided
6 with ample time to review the same with his attorneys, including reviewing the
7 ramifications of his plea.

8 ORDER

9 The Court applies the legal principles to the facts in this case. The Court concludes that
10 the Petitioner has failed to meet his burden on each of the grounds raised in the Petition and
11 Amended Petition. First, the Court concludes that the plea in this case was voluntarily,
12 knowingly and intelligently entered, and counsel for Petitioner provided reasonable
13 representation during the plea process. Representation did not violate the standards outlined
14 in *Strickland* and its progeny.

15 Petitioner did not establish that counsel was ineffective or fell below the *Strickland*
16 standard for failing to preserve the cell phone for examination. As stated above, the Court
17 concludes that the evidence was available and counsel made a reasonable determination based
18 on the facts of this case that no further investigation or review of the cell phone was necessary.

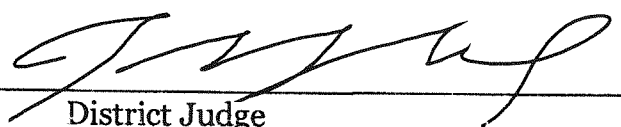
19 Third, Petitioner failed to establish that he requested an appeal or that counsel was
20 ineffective for not filing an appeal in this case. Petitioner's testimony in this case was not
21 credible and the record and testimony from counsel establish that Petitioner did not request a
22 direct appeal in this matter.

23 Finally, Petitioner has not established factual innocence in this case. The Court has
24 reviewed the entire record in the criminal case, this case and the Court has also considered the
25 testimony and evidence presented at the evidentiary hearing. Based upon the documents,
26 arguments and record, Petitioner has not established factual innocence, even if the Petitioner
27 properly presents that matter to the Court.

1 In sum, Petitioner received effective assistance of counsel throughout these
2 proceedings. The Court concludes that Petitioner has not met his burden with respect to any
3 grounds in the Petition and Amended Petition.

4 Good cause appearing, and based on the foregoing, the Petition for Habeas Corpus,
5 Post-Conviction, is DENIED.

6 DATED this 19th day of May, 2021.

7
8 
9 _____
District Judge

1 Case No. 20-CV-00635

2 Dept. No. I

FILED

2021 JUN 10 AM 11:07

TANYA SCHEIDT
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Lindsey McCabe

3
4
5 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

6 IN AND FOR THE COUNTY OF LYON

7 TOMMY FROST,

8 Petitioner,

NOTICE OF APPEAL

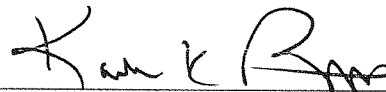
9 vs.

10 THE STATE OF NEVADA,

11 Respondent.
12 _____/

13 NOTICE IS HEREBY GIVEN that TOMMY FROST, the
14 Petitioner/Appellant above-named, by and through his counsel,
15 KARLA K. BUTKO, ESQ., hereby appeals to the Supreme Court of
16 Nevada, from the Order Denying Petition for Writ of Habeas Corpus
17 (Post Conviction) dated May 19, 2021, with Notice of Entry of
18 Order dated June 3, 2021.

19 DATED this 8th day of June, 2021.

20 

21 KARLA K. BUTKO
22 P. O. Box 1249
23 Verdi, NV 89439
24 (775) 786-7118
25 Attorney for Appellant
26 State Bar No. 3307
27

CERTIFICATE OF SERVICE

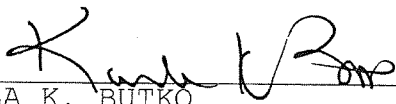
I, KARLA K. BUTKO, hereby certify that I am an employee of KARLA K. BUTKO, LTD., and that on this date I served by United States Postal Service, First Class postage paid, the foregoing document, addressed to the following:

Tommy Frost, #1220520
NNCC
P. O. Box 7000
Carson City, NV 89702-7000

Stephen Rye
Lyon County D. A.'s Office
31 S. Main Street
Yerington, NV 89447

Nevada Attorney Generals Office
Habeas Division
100 N. Carson St.
Carson City, NV 89702

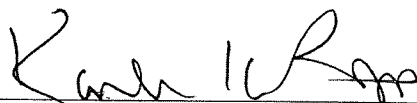
DATED this 8th day of June, 2021.


KARLA K. BUTKO

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document DOES NOT CONTAIN the Social Security Number of any person.

DATED this 8th day of June, 2021.


KARLA K. BUTKO

[illegible]

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