IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY BRIAN FROST, Appellant v. THE STATE OF NEVADA, Respondent	Docket No. 83065

Appeal From Dismissal of Petition for
Writ of Habeas Corpus (Post-Conviction)
Third Judicial District Court, Lyon County, Nevada

The Honorable John P. Schlegelmilch, District Court Judge

RESPONDENT'S ANSWERING BRIEF

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I. ROUTING STATEMENT

This is an appeal of a dismissal of a postconviction petition for writ of habeas corpus that involves a challenge to a judgment of conviction or sentence for offenses that are category A felonies. The case is neither presumptively retained by the Supreme Court nor presumptively assigned to the court of appeals. NRAP 17(a) and NRAP 17(b).

II. ISSUES PRESENTED FOR REVIEW

A. Was the District Court's Dismissal of the Petition an Abuse of Discretion in Violation of Petitioners Constitutional Rights?

B. Was Trial Counsel Ineffective at the Sentencing Stage of the Case?

C. Was the Guilty Plea Knowingly and Voluntarily Entered?

D. Did Trial Counsel Deprive Mr. Frost of his Right to Direct Appellate Review?

E. Was Trial Counsel Ineffective when Counsel Failed to Litigate the Inability of the Defense to Access the Telephone Involved and have it Inspected by a Defense Expert?

III. STATEMENT OF THE CASE

Appellant sufficiently sets forth the statement of the case.

IV. STATEMENT OF FACTS

Appellant sets for the facts necessary for the resolution of the issues on appeal, with the following additions.

At the arraignment hearing on April 29, 2019, the district court thoroughly canvassed Mr. Frost regarding his plea. AA 34-43. Frost admitted that he committed the acts alleged in the Information. AA 41. Frost provided a written statement in to the court at sentencing where he accepted responsibility for the offenses and apologized to the victims. AA 234-236.

Mr. Merrill represented Frost in the case until the arraignment in district court. Mr. Merrill visited Frost in the jail at least ten times to discuss the case. AA 134; 144. Mr. Merrill's representation ended after Frost waived his preliminary hearing. AA 135. Frost wanted to take a plea deal when Ms. Jordan, the co-defendant, showed up at the preliminary hearing and she was ready to testify. AA 136. Mr. Merrill never told Frost he had to take a plea deal and Mr. Merrill was ready to move forward with the preliminary hearing. AA 142.

Mr. Walther represented Frost at the arraignment and through sentencing. Mr. Walther met with Frost and Frost told him that he did not want to contest the charges and that he wished to move forward with the guilty plea agreement. AA 159. Mr. Walther did not recall any sort of conflict between Frost and himself during the representation. AA 160. Frost maintained with Mr. Walther that he

wanted to go forward with the guilty plea agreement. AA 160-61. Mr. Walther did not overbear the will of Frost, and Mr. Walther did not try to convince Frost or otherwise coerce him into signing or taking a plea agreement. AA 165. With respect to mitigation, Mr. Walther talked to Mr. Frost. AA 166. Mr. Frost never requested that Mr. Walther file an appeal. AA 167. Based on Mr. Walther's professional judgement there were not issues for appeal in the case. AA 171. At no time did Frost request to investigate anything further or that he desired a trial. AA 175. There was never any breakdown of the attorney client relationship between Mr. Walther and Frost. AA 176. Frost never expressed any desire to withdraw his plea or that he had any concerns with his plea. AA 181.

V. SUMMARY OF THE ARGUMENT

The district court properly denied and dismissed the petition for writ of habeas corpus concluding that trial counsel provided effective representation to Mr. Frost at all stages of the proceedings. The representation was reasonable and Mr. Frost was not prejudiced by the representation in this case. The district court conducted an evidentiary hearing on the petition and properly concluded that counsel provided effective representation to Mr. Frost and he failed to prove that the representation violated *Strickland.* This includes the claim that counsel was ineffective at sentencing. The information Frost says counsel should have presented in mitigation was available to the court in the presentence investigation

report and other documents in the record. There is also no indication that the mitigation Frost now request, had it been presented separately, would have changed the district court's sentence.

Frost also failed to establish that his plea was not entered voluntarily, intelligently and knowingly or that he entered his plea without a full understanding of the consequences, as evidenced by the thorough plea canvass, the written plea agreement, and the testimony of his counsel at the evidentiary hearing.

Frost also failed to establish his counsel was ineffective for not filing an appeal in the case and the district court properly concluded that Frost was advised of his appellate rights and never requested a direct appeal.

Lastly, Mr. Frost's claim that relief should be granted for the loss or destruction of the Mr. Frost's cell phone was properly dismissed because the cell phone was available until after sentencing and the cell phone was not destroyed.

The district court did not abuse its discretion in dismissing the petition.

VI. ARGUMENT

STANDARD OF REVIEW

A district court's resolution of ineffective assistance of counsel claims is reviewed de novo, giving deference to the district court's factual findings if "they are supported by substantial evidence and are not clearly wrong." *Lader v. Warden*, 121 Nev. 682, 686 (2005).

A. Was the District Court's Dismissal of the Petition an Abuse of Discretion in Violation of Petitioners Constitutional Rights

The United States Supreme Court has recognized and confirmed that "the right to counsel is the right to effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); *State v. Love* 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under the two-prong *Strickland* test, a defendant who challenges the adequacy of his or her counsel's representation must show (1) that counsel's performance was deficient and (2) that the defendant was prejudiced by this deficiency. *State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996); *Molina v. State*, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004).

"Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 787, 178 L. Ed. 2d 624 (2011).

"Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '(w)ithin the range of competence demanded of attorneys in criminal cases.'" *Jackson v. Warden, Nevada State Prison*, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

The court's role in reviewing ineffective assistance of counsel claims is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing *Cooper v. Fitzharris*, 551 F.2d 1162, 1166 (9th Cir. 1977)). The ineffective assistance of counsel analysis does not suggest that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." *Donovan*, 94 Nev. at 675, 584P.2d at 711. The court should also "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066.

The Constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one

and may disserve the interests of his client by attempting a useless charade." *United States v. Cronic*, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984). "Counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments." *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Counsel's strategy decisions are "tactical" decisions and will be "virtually unchallengeable absent extraordinary circumstances." *Id*. at 846, 921 P.2d at 280; see also *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." *Dawson v. State*, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992). Trial counsel alone and not the client has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." *Rhyne v. State*, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) citing *Wainwright v. Sykes*, 433 U.S. 72, 93, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

The petitioner has the burden of proof and must establish the facts underlying his ineffective assistance claim by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 1013, 103 P.3d 25, 33 (2004). There is a presumption that trial counsel discharged his duties. *Davis v. State*, 107 Nev. 600,

602, 817 P.2d 1169, 1170 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004).

Claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. *Id*. Petitioners must allege specific facts supporting the claims in the petition. Failure to allege specific facts rather than just conclusions is a basis for the petition to be dismissed. NRS 34.735(6).

Even if a petitioner can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice. A defendant who pleads guilty upon the advice of counsel may attack the validity of the guilty plea by showing that he received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution." *Molina v. State*, 120 Nev. 185, 190–91, 87 P.3d 533, 537 (2004). Guilty pleas are presumptively valid, especially when entered on advice of counsel, and a defendant has a heavy burden to show the district court that he did not enter his plea knowingly, intelligently, or voluntarily. *Id.* To establish prejudice in the context of a challenge to a guilty plea based upon an assertion of ineffective assistance of counsel, the petitioner must "demonstrate a reasonable probability that, but for counsel's errors,

he would not have pleaded guilty and would have insisted on going to trial." Id. at 191. Effective assistance of counsel extends to plea negotiations and the recommendation to accept a plea. *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012). Counsel must evaluate the plea agreement in terms of the evidence and other likely outcomes in the case and advise the petitioner accordingly.

This case involves a very egregious set of facts. Mr. Frost requested pictures of Ms. Jordan's two and four year old daughters, which led to a request for naked photos of the daughters. The PSI indicated that the co-defendant sent 13 pictures of the victims. There were messages back and forth between Ms. Jordan and Frost regarding him having sexual interaction with the two young victims. A separate motion is filed concurrent herewith for the Court Clerk to transmit the Presentence Investigation to assist the court in reviewing this case and information available to the district court at the time of sentencing.

Frost contends that his sentence should be reviewed. The sentence imposed in this case is within the penalties allowed by NRS 201.230. A sentence within the statutory limits is not cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience. *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996); *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221–22

(1979). "This court will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)." *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). Frost's argument regarding the sentence in this case is misplaced and is not relevant to a claim of ineffective assistance of counsel. Frost cannot raise a claim that the statute is unconstitutional or that this court can review the sentence on these facts.

The district court provided Frost with an evidentiary hearing. The district court evaluated the testimony of the witnesses, including Frost and his attorneys. The evidence supported the district court's findings, including, but not limited to: that Mr. Frost's testimony was not credible; that Mr. Frost chose to go forward with the plea after consultation with his attorneys; Frost was provided with all of the discovery; Mr. Merrill and Mr. Walther were prepared to go forward and Frost did not have a change of heart and wanted to go forward with the plea; Frost indicated his guilt in his two letters to the court; it is not credible that Mr. Frost requested anybody to file an appeal; Mr. Frost had several meetings with his attorneys and at no time did he make any objections; the district court allowed Frost additional time to review the case with his attorney. AA 257-258. The district court's factual findings regarding claims of ineffective assistance of counsel

are entitled to deference on subsequent review by this court. *Nika v. State*, 124 Nev. 1272, 1279, 198 P.3d 839, 844 (2008).

The factual findings are supported by the record in this case. The petitioner has the burden of proving his ineffective assistance of counsel claims. The district court properly determined that Frost had not proven his ineffective assistance of counsel claims and he was not entitled to relief. Frost has provided no law of factual basis for this Court to overturn the dismissal by the district court.

Counsel is also required to be effective in plea negotiations. "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012). In *Lafler* the parties agreed that counsel was ineffective for advising his client to reject a plea offer with the belief that they could prevail at trial. The case dealt mainly with the prejudice prong, however, it is also a reminder of counsel's role in the plea negotiation process and the requirement that counsel be effective and advise clients appropriately. Mr. Merrill and Mr. Walther fully discharged their duties in this regard with respect to the plea negotiation process. Each counsel carefully and fully evaluated the evidence after consultation with Mr. Frost. Had Mr. Merrill and Mr. Walther not recommended that Mr. Frost accept this plea agreement, he may well be before the court claiming that they were ineffective for not telling him to do so because the likelihood of conviction at trial

was significant based on the facts and evidence in this case. Mr. Frost faced a potential penalty of four life sentences with additional possible fines of up to $100,000 each on the two counts that were dismissed. NRS 200.720; NRS 200.750. In addition, the State was intending to file additional charges. AA 143. The attorneys representing Mr. Frost provided effective representation in this case and the representation did not fall below the *Strickland* standard and was reasonable under the circumstances.

B. Was Trial Counsel Ineffective at the Sentencing Stage of the Case?

Frost contends that his attorneys were ineffective at the sentencing stage because they did not provide sufficient mitigation. As a result, he claims that he received ineffective assistance of counsel. However, this argument fails because his counsel acted reasonably under the circumstances and Mr. Frost was not prejudiced by the district court decision.

"On appeal, this court generally will not disturb a district court's sentencing determination so long as it does not rest upon impalpable or highly suspect evidence. *Lloyd v. State*, 94 Nev. 167, 576 P.2d 740 (1978); *Silks v. State*, 92 Nev. 91, 545 P.2d 1159 (1976). Counsel is required to present mitigating evidence when such is available and it is beneficial to his client. However, as this court state,

> To require defense counsel to present mitigating evidence over the defendant's objection would be inconsistent with an attorney's paramount duty of loyalty to the client and would undermine the trust, essential for effective representation, existing between attorney and client. Moreover, imposing such a duty could cause some defendants who otherwise would not have done so to exercise their Sixth Amendment right of self-representation before commencement of the guilt phase in order to retain control over the presentation of evidence at the penalty phase, resulting in a significant loss of legal protection for these defendants during the guilt phase.

Kirksey v. State, 112 Nev. 980, 996, 923 P.2d 1102, 1112 (1996). Frost did not ask for additional time or additional mitigation witnesses. AA 166; 180. Based upon the information in the case, the communications from Mr. Frost, the presentence investigation report and other information, counsel acted reasonably in deciding not to present additional mitigation evidence.

In addition, Frost failed to identify any specific mitigation evidence which counsel could have presented in this case that was not already part of the record. Frost references information that was set forth in the Lake's Crossing Center reports completed as part of the competency evaluation, including mental health issues, homelessness, education, and employment. AA 20-32. The presentence investigation also provided information on these issues. The district court was aware of the mental health issues with Mr. Frost; aware of his employment history; aware of his education and other difficulties. The information referenced by Frost was already included in the information provided to the court as part of the sentencing. Trial counsel provided reasonable representation. In addition, Frost

cannot establish prejudice from the sentencing determination. He cannot show that the sentence would have been any different had this additional information been referenced or submitted during the sentencing hearing.

C. Was the Guilty Plea Knowingly and Voluntarily Entered?

Standard of Review:

The district court may grant a post-conviction motion to withdraw a guilty plea that was not entered knowingly and voluntarily in order to correct a manifest injustice. A guilty plea entered on advice of counsel may be rendered invalid by showing a manifest injustice through ineffective assistance of counsel. Manifest injustice may also be demonstrated by a failure to adequately inform a defendant of the consequences of his plea. This Court gives deference to the district court's factual findings, however, if not clearly erroneous and supported by substantial evidence. *Rubio v. State*, 124 Nev. 1032, 1039, 194 P.3d 1224, 1228–29 (2008).,

Argument

Frost argues that his guilty plea was not entered knowingly and intelligently and he should be allowed to withdraw his guilty plea. A 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. *Harris v. State*, 130 Nev. 435, 448, 329 P.3d 619, 628 (2014).

A guilty plea is presumptively valid, and the defendant has the burden to prove that the plea was not entered knowingly or voluntarily. The district court has the duty to review the entire record and determine whether the plea was valid under the totality of circumstances. This court will not overturn the lower court's decision absent a clear showing of an abuse of discretion. *Barajas v. State*, 115 Nev. 440, 442, 991 P.2d 474, 475 (1999). To determine the validity of the guilty plea requires the district court to look beyond the plea canvass to the entire record and the totality of the circumstances. *Rubio v. State*, 124 Nev. 1032, 1038, 194 P.3d 1224, 1228 (2008).

In this case, the district court reviewed the entire record and heard the testimony of Mr. Frost and his trial attorneys at the evidentiary hearing. The district court concluded, based upon the entire record and the testimony that "the plea in this case was voluntarily, knowingly and intelligently entered, and counsel for Petitioner provided reasonable representation during the plea process and that the representation did not violate the standards outlined in Strickland and its progeny. AA 259. The finding is supported by the record. The district court conducted a very thorough plea canvass that included an explanation of rights and an opportunity for the district court to determine that Mr. Frost understood the

consequences of the plea. AA 34-43. Mr. Frost understood that he was giving up his constitutional rights as outlined by the district court. AA 40. Mr. Frost indicated he understood the penalties. AA 38-39. Mr. Frost also executed a written plea agreement that outlined the consequences of the guilty plea. AA 237-241. Mr. Frost also answered affirmatively when the district judge asked if he was pleading guilty because he in fact committed the crime. AA 42.

Frost claims that his plea is rendered involuntary because his counsel was ineffective for failing to investigate and review Mr. Frost's telephone. During the evidentiary hearing, counsel explained the evidence they had reviewed with respect to the case. This included the Facebook Messenger and the information on Ms. Jordan's phone and the interview of Ms. Jordan. The evidence also included the messages back and forth between Ms. Jordan and Mr. Frost immediately prior to when Mr. Frost was arrested. AA 118-120. Both attorneys, Mr. Merrill and Mr. Walther testified that they never threatened or coerced Mr. Frost into taking a plea bargain. In fact, they both stated that they were prepared to go to trial and they advised Mr. Frost of that fact. The decision to plead guilty was Mr. Frost's decision alone, and he made that decision after consultation with his attorneys, not after any threats or coercion. The evidence against him was strong and he made a decision to minimize his exposure in the case. The district court heard the testimony of Mr. Frost and determined it was not credible. This court needs to

respect that finding based on the other evidence in the record in this case. The district court did not abuse its discretion when it concluded that Mr. Frost voluntarily, knowingly and intelligently entered his guilty plea.

D. Did Trial Counsel Deprive Mr. Frost of his Right to Direct Appellate Review?

Frost asks this court to find that counsel was ineffective for not filing an appeal. This Court has address the issue of effective assistance of counsel in determining whether counsel should file an appeal:

> Trial counsel does not have a constitutional duty to always inform his client of, or consult with his client about, the right to a direct appeal when the client has been convicted pursuant to a guilty plea. *Thomas v. State,* 115 Nev. 148, 150, 979 P.2d 222, 223 (1999); *see also Roe v. Flores–Ortega,* 528 U.S. 470, 479–80, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). That duty arises in the guilty-plea context only when the defendant inquires about the right to appeal or in circumstances where the defendant may benefit from receiving advice about the right to a direct appeal, "such as the existence of a direct appeal claim that has reasonable likelihood of success."

Toston v. State, 127 Nev. 971, 977, 267 P.3d 795, 799 (2011).

Frost's attorney Mario Walther testified that he would have discussed appellate rights with Mr. Frost when they went over the plea agreement. AA 166. Mr. Frost never requested an appeal with Mr. Walther. AA 167. Mr. Walther never received a request, written or verbal, from Mr. Frost to file an appeal in the case. Id. *Toston* addressed an entirely different situation where he alleged that

counsel misinformed him about his appeal rights. There is nothing similar in this case. You have the evidence that Mr. Walther said that he advised Mr. Frost of his appeal rights when he went over the plea agreement and Mr. Frost never requested an appeal. Nothing in the record suggests that Mr. Walther misinformed Mr. Frost about his appeal rights.

The district court found that petitioner's testimony was not credible and the record and testimony from counsel established that Mr. Frost did not request a direct appeal in the case. AA 259. This court cannot disturb that finding because Mr. Frost now wants an appeal. Counsel's representation in this regard did not fall below a reasonable standard. Mr. Frost did not timely request an appeal and the district court properly dismissed this claim.

E. Was Trial Counsel Ineffective when Counsel Failed to Litigate the Inability of the Defense to Access the Telephone Involved and have it Inspected by a Defense Expert?

Mr. Frost contends that counsel was ineffective for failing to litigate the inability of the defense to access Mr. Frost's telephone and have it inspected by a defense expert. Mr. Frost claims that the telephone would provide exculpatory evidence but it is unclear exactly what would be on the phone. Frost also claims that the State could have provided notice that the phone was being examined or

released. However, Frost does not explain how that notice would have resulted in any different outcome in the case.

The test for reversal on the basis of lost or destroyed evidence requires that the appellant show either 1) bad faith or connivance on the part of the government, or 2) prejudice from its loss. *Wood v. State*, 97 Nev. 363, 366, 632 P.2d 339, 340 (1981). "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).

The district court heard the testimony of Detective Pruitt in regards to the cell phone. Mr. Frost invoked his right to remain silent so Detective Pruitt did not ask for permission to search the phone. AA 113. The Washoe County Sheriff's Office did a search of the phone using software they have that enables them to bypass the password restrictions. Washoe County Detective Sawyer performed what they call a JTAG or chip-off. AA 113. The phone was not destroyed, however it would not be usable. The chip would still be able to be re-examined in the same fashion. AA 114. Mr. Frost would be able to hand over the password and law enforcement could possibly see what was on that phone. AA 115.

The district court found that the cell phone was available to counsel throughout the pendency of the criminal case until sentencing. At no point did counsel or Mr. Frost request additional analysis because Mr. Frost expressed a desire to plead guilty. AA 258. The claim that counsel was ineffective and should have further investigated the cell phone issue is a red herring. Frost does not show what information the cell phone contains that is exculpatory or that would impact this case or Frost's decision to plead guilty. Even if the cell phone did not contain child pornography, Frost was still aware of the evidence that the State had against him, including the messages and photographs and testimony of Ms. Jordan. Frost cannot establish that the State acted in bad faith or that the State violated any rights by executing the search warrant of the phone. The claim that the failure to secure the cell phone "reduced his ability to defend the charges against him" without more does not allow the district court to grant relief. It is not sufficient for the defendant to show only that examination of the evidence would be helpful in preparing his defense. *Boggs,* 95 Nev. at 913, 604 P.2d at 108.

VII. CONCLUSION

Mr. Frost asks this court to overturn the district court's decision on the Petition. He did not meet his burden to establish by a preponderance of the evidence that (1) counsels' performance was deficient and (2) that he was prejudiced by such deficient representation. He has not established either prong of

the Strickland standard in this case. Mr. Frost received effective assistance of counsel under the standards established by this Court. He received a fair plea agreement which, but for the hard and diligent work of his counsel, he would not have received and he may be facing a longer prison sentence. The district court treated Mr. Frost fairly and gave him every opportunity to review the case and consider his decision to plead guilty. The district court thoroughly canvassed Mr. Frost and Mr. Frost voluntarily, knowingly and intelligently entered his guilty plea after receiving sound advice from his counsel. Lastly, the cell phone evidence is not exculpatory and was available to the defense until after sentencing. The cell phone was not destroyed. It was not examined because Mr. Frost decided, wisely, to enter a plea.

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This is not a situation where this Court should second guess every decision that trial counsel made or to opine that they could have done better. For the forgoing reasons, the State respectfully requests this honorable Court to affirm the lower court's order dismissing the petition for writ of habeas corpus.

Date: December 13, 2021

/S/

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VIII. ATTORNEY'S CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6), and either the page- or type-volume limitations stated in NRAP 32(a)(7) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(A)(ii) it is proportionately spaced, has a typeface of 14 points or more, and contains 6,178 words and does not exceed 1,300 lines of text.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

/S/
Stephen B. Rye
District Attorney
Attorney for Respondent

IX. CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 13, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

KARLA BUTKO, ESQ.
Counsel for Appellant

AARON FORD
Nevada Attorney General

/S/
STEPHEN RYE
Lyon County District Attorney