IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL CHARLES COOKE,
Appellant,

v.

CHARLES DANIELS, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS,
Respondent.

CASE NO. 83578



Appeal from the Order Denying Petitions for Writ of Habeas Corpus
Fourth Judicial District Court, County of Elko
The Honorable Mason Simons, District Court Judge, Dept. 3

# APPELLANT'S OPENING BRIEF

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## STATEMENT OF JURISDICTION

This Court has jurisdiction over an order from the district court denying a postconviction petition for writ of habeas corpus pursuant to NRS 34.575(1). Thirty (30) days from the service of such an order is the deadline to file an appeal. NRS 34.575(1). However, under NRAP 4(d), "If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is delivered to a prison official for mailing on or before the last day for filing. If the institution has a notice-of-appeal log or another system designed for legal mail, the inmate must use that log or system to receive the benefit of this Rule."

The "Order Denying Post-Conviction Relief" was entered on August 16, 2021. *Joint Appendix 127.* Said order denying the petition was mailed to Daniel Charles Cooke on August 16, 2021. *Joint Appendix 133.* The notice of entry of that order was mailed to Mr. Cooke on August 25, 2021. *Joint Appendix 135.* The notice to appeal that order was filed on September 24, 2021. *Joint Appendix 143.* That notice of appeal was sent to this Court as well as opposing counsel on September 20, 2021. *Joint Appendix 144.*

NRS 178.482 says, "Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon the party and the notice or other paper is served by mail, 3 days shall be added to the prescribed period."

Pursuant to NRAP 4(a)(1), a notice of appeal must be filed "no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served" – mirroring the timeline articulated in NRS 34.575(1).

From the time the order denying the postconviction conviction for habeas corpus was mailed (August 16, 2021) to the date that Mr. Cooke mailed out his notice of appeal (September 20, 2021) constitutes thirty-five (35) days. However, the thirty-third (33rd) day after the date the said order was mailed was September 18, 2021 – which was a Saturday. As such, Mr. Cooke filed his notice of appeal on the following Monday and he filed this notice in a timely manner.

## ROUTING STATEMENT

Pursuant to NRAP 17(b)(3) and NRAP 17(b)(4), the two classes of postconviction appeals that are presumptively assigned to the Court of

Appeals of the State of Nevada are "appeals that involve a challenge to a judgment of conviction or sentence for offenses that are not category A felonies" and "appeals that involve a challenge to the computation of time served under a judgment of conviction, a motion to correct an illegal sentence, or a motion to modify a sentence."

Since the instant matter is an appeal that involves a challenge to a judgment of conviction and sentence that is not a category A felony (namely, Attempted Sexual Assault of a Child Under the Age of 16), this matter is presumptively assigned to the Court of Appeals. Mr. Cooke does not object to a reassignment of the instant matter to the Court of Appeals, accordingly.

## STATEMENT OF THE ISSUE

Did the district court commit reversible error in denying Daniel Charles Cooke's postconviction petition for writ of habeas corpus without the benefit of an evidentiary hearing?

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## STATEMENT OF THE CASE

Daniel Charles Cooke filed his "Petition for Writ of Habeas Corpus (Post-Conviction)" on April 9, 2018. *Joint Appendix 1.* A return to said petition was filed on December 1, 2020. *Joint Appendix 36.*

On November 24, 2020, the State filed its "Opposition to Motion for Bail Pending Review of Petition for Writ of Habeas Corpus (Post-Conviction)." *Joint Appendix 42.* The State filed this "out of an abundance of caution" and added that it would "otherwise await an order from the court regarding whether an answer to the writ should be filed although much of the State's response to the writ is encompassed herein." *Joint Appendix 43.*

The district court denied Mr. Cooke's postconviction petition for a writ of habeas corpus on August 16, 2021 without the benefit of an evidentiary hearing. *Joint Appendix 127-128.* On August 26, 2021, the Fourth Judicial District Court Clerk entered her "Notice of Entry of Decision or Order" pertaining to the denial of Mr. Cooke's petition. *Joint Appendix 134.*

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Mr. Cooke's filed his "Notice of Appeal" from the order denying postconviction relief on September 24, 2021. *Joint Appendix 143.*

This Court issued an "Order of Limited Remand for Appointment of Counsel for the Appellant." *Joint Appendix 145.* As a result of this order, undersigned counsel was appointed to represent Mr. Cooke on the instant appeal. *Joint Appendix 145.*

## STATEMENT OF THE FACTS

In his postconviction petition for writ of habeas corpus, Mr. Cooke explained that he told his counsel "to appeal the conviction in person and writing." *Joint Appendix 3.* More specifically, Mr. Cooke asked his counsel to appeal on the day of sentencing and told counsel to appeal in writing the very next week – all with no response from counsel. *Joint Appendix 5.* Mr. Cooke wrote a letter to Mr. Green that is part of the Joint Appendix. *Joint Appendix 20.*

Later in this petition, Mr. Cooke averred that the plea agreement that was used "was not valid nor was what the petitioner had agreed upon." *Joint Appendix 6.* Mr. Cooke also said that he never agreed to an 8-year minimum sentence. *Joint Appendix 8.* Mr. Cooke proceeded

to say that his counsel provided "false documents all in attempts to force petitioner into his plea and sentence." *Joint Appendix 12.* Mr. Cooke added that his counsel was "submitting a bogus, wrong, plea agreement at sentencing that petitioner did not and would not agree to." *Joint Appendix 16.*

While complaining about the tactics of the detective who was investigating this matter, Mr. Cooke articulated how he was "drunk and did not remember doing anything to his niece." *Joint Appendix 10.*

Attached to the Nevada Department of Corrections' "Return to Petition for Writ of Habeas Corpus" was the "Judgment of Conviction" that is the basis for this appeal. *Joint Appendix 36-41.* In this judgment of conviction, the Court stated that Mr. Cooke had pled to "Attempted Sexual Assault of a Child Who is Less Than 16 Years of Age, a Category B Felony." *Joint Appendix 39.* Mr. Cooke was sentenced to serve ninety-six to two hundred forty (96-240) months in the Nevada Department of Corrections. *Joint Appendix 39.*

The State, in its "Opposition to Motion for Bail Pending Review of Petition for Writ of Habeas Corpus (Post-Conviction)," the State accused

Mr. Cooke of ignoring statements he made during the plea canvass and refuted Mr. Cooke's claim that his sentence was illegal. *Joint Appendix 44.* Moreover, the State said that the "8 year minimum sentence [for Attempted Sexual Assault of a Child Under the Age of 16] was not mandatory, it was given at the discretion of the Judge and she even explained this to Cooke." *Joint Appendix 44.* The State concluded that Mr. Cooke's "rights were preserved and his claims are belied by the record." *Joint Appendix 45.*

Attached to that opposition was a transcription of the change of plea hearing on Mr. Cooke's underlying criminal case. *Joint Appendix 48-74.* At that hearing, Deputy Elko County District Attorney David Buchler was asked to "explain the elements of the crime, the maximum potential penalties, and whether it is probational?" *Joint Appendix 53.* Mr. Buchler, as to the penalty range, responded that "[t]he maximum penalty is 20 years in the Nevada State Prison. Oh, and I believe that the Defendant is waiving any right that he might otherwise have for probation." *Joint Appendix 54.* When the district court asked defense counsel Brian Green if probation was available for the offense to which

Mr. Cooke was entering a plea, Mr. Green answered in the negative. *Joint Appendix 54.*

When the district court canvassed Mr. Cooke as to the plea agreement, Mr. Cooke confirmed that he signed page 11 of that document on February 9, 2017. *Joint Appendix 57.* Mr. Green confirmed that the charge that Mr. Cooke agreed to plead guilty to was "attempted sexual assault of a child who is less than 16 years of age, a category B felony, as defined by NRS 200.366 and NRS 199.330." *Joint Appendix 59.* Pertaining to the penalty range, Mr. Green asserted that "[a]t the time of sentencing, Mr. Cooke will stipulate to a maximum sentence of 20 years imprisonment in NDOC, but both sides remain free to argue for the minimum amount of time the Court would order that he must serve before being eligible for probation." *Joint Appendix 59.*

During this hearing, Mr. Cooke informed the district court that "I did it because I was pretty drunk, and I didn't really know what I was doing." *Joint Appendix 66.* When asked if he had discussed the possibility of an intoxication defense with Mr. Cooke, Mr. Green said that he believed that Attempted Sexual Assault was a general intent

crime before the district court corrected him. *Joint Appendix 66.* Eventually, Mr. Green conceded that he did not discuss that defense with Mr. Cooke but the district court moved ahead with the proceedings notwithstanding. *Joint Appendix 66-67.*

The "Amended Memorandum of Plea Agreement" was filed on February 10, 2017. *Joint Appendix 76.* The sentencing range indicated in the plea agreement for Attempted Sexual Assault of a Child Who is Less than 16 Years of Age was eight to twenty (8-20) years in prison. *Joint Appendix 76-77.* It was articulated that probation was not an option for Mr. Cooke. *Joint Appendix 77.*

The judgment of conviction was filed on May 11, 2017 – fourteen (14) days after the sentencing hearing. *Joint Appendix 89-92.* Then district court judge Nancy Porter sentenced Mr. Cooke to the maximum sentence of eight to twenty (8-20) years in the Nevada Department of Corrections with credit for two hundred forty-four (244) days served. *Joint Appendix 90.*

Also attached to the State's "Opposition" was the transcription of Mr. Cooke's arraignment that was held on October 31, 2016. *Joint*

*Appendix 107.* At that hearing, Mr. Cooke was informed that he could face – on the Attempted Sexual Assault charge – eight to twenty (8-20) years in prison. *Joint Appendix 113-114, 116.*

The district court, through Judge Mason Simons, filed its "Order Denying Post-Conviction Relief" on August 16, 2021. *Joint Appendix 127-133.* The district court considered four separate claims of Mr. Cooke: (1) that his sentence of eight to twenty (8-20) years in prison was illegal, (2) that he was the subject of an illegal search and an illegal interrogation by law enforcement, (3) that his trial counsel Brian Green was ineffective, and (4) he was denied due process and was denied his right against cruel and unusual punishment. *Joint Appendix 128.*

Later in this order, Judge Simons stated that he would not order an evidentiary hearing because His Honor found Mr. Cooke's "claims to be lacking in merit, and to be belied by the record." *Joint Appendix 128.*

As to claim #1, Judge Simons stated that Mr. Cooke's sentence was within the statutory parameters and, as such, eight to twenty (8-20) years of imprisonment is a proper sentence. *Joint Appendix 128-129.*

As to claim #2, the district court denied Mr. Cooke's claim and cited the decision Tollett v. Henderson, 411 U.S. 258, 267 (1973), for the proposition that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Joint Appendix 129.*

As to claim #3 (ineffectiveness of defense counsel), the district court dismissed that claim in its entirety. *Joint Appendix 130-132.* The district court cited the plea agreement, which stated that the maximum penalty in prison was twenty (20) years and that the parties could argue as to the minimum sentence. *Joint Appendix 130.* The district court also highlighted the fact that Mr. Cooke waived his right to appeal "unless the appeal was based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings." *Joint Appendix 130.* The Court proclaimed, "Petitioner was also thoroughly advised of the possible penalties at the time of his change of plea" and that the "ultimate sentence given by the trial judge fell within the guidelines articulated in the plea agreement." *Joint Appendix 130-131.*

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The district court proceeded to say that Mr. Green's performance was not deficient. *Joint Appendix 131.* The lower court ascribed zero fault for Mr. Green failing to file a direct appeal because Mr. Cooke did not articulate any "reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings." *Joint Appendix 131.*

As to the issue of prejudice, the district court said that "[t]here is no suggestion within the Petition that the Petitioner was somehow deprived of a fair proceeding" and that this was "a case of buyer's remorse." *Joint Appendix 131.*

The lower court dismissed the idea "that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Joint Appendix 131.*

As for claim #4, the district court stated pithily that such a claim was a restatement of the prior three claims and, as such, is "belied by the record and are without merit." *Joint Appendix 132.*

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## SUMMARY OF ARGUMENT

The district court committed reversible error in denying Daniel Charles Cooke's postconviction petition for writ of habeas corpus without the benefit of an evidentiary hearing. An opportunity should have been afforded to Mr. Cooke to explain his decision to appeal as well as to Mr. Green to defend his inaction. The appeal would not have been futile because the plea agreement was insufficient to convey the full penalty range of the charge he pled guilty to. Moreover, an evidentiary hearing should have been ordered given that Mr. Green failed to discuss the possibility of a voluntary intoxication defense with Mr. Cooke notwithstanding Mr. Cooke's extreme intoxication during the incident.

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## ARGUMENT

**(1) The district court committed reversible error in denying Daniel Charles Cooke's postconviction petition for writ of habeas corpus without the benefit of an evidentiary hearing.**

NRS 34.724, which defines what a petition for writ of habeas corpus is in this jurisdiction, states:

> Any person convicted of a crime and under sentence of death or imprisonment who claims that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State, or who, after exhausting all available administrative remedies, claims that the time the person has served pursuant to the judgment of conviction has been improperly computed, may, without paying a filing fee, file a postconviction petition for a writ of habeas corpus to obtain relief from the conviction or sentence or to challenge the computation of time that the person has served.

The Sixth Amendment to the United States Constitution states the following:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;

to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

In Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005), citing Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996), this Court stated that a "claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review." This Court continued on, stating that "a district court's factual findings will be given deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong." Id., citing Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

To prevail on a claim of ineffective assistance of counsel, a petitioner (1) "must demonstrate that his trial or appellate counsel's performance was deficient, falling below an objective standard of reasonableness," and (2) "must show prejudice." Id. at 686, 1166-67, citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Kirksey at 987-88, 1107.

Pertaining to trial counsel, "prejudice is demonstrated by showing that, but for trial counsel's errors, there is a reasonable probability that the result of the proceedings would have been different." Id., citing Strickland at 694.

In Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984), citing Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981), this Court held a "defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record."

In Toston v. State, 127 Nev. 971, 980, 267 P.3d 795, 801-02 (2011), this Court reversed a district court's decision to deny a postconviction petition for writ of habeas corpus and ordered the district court to conduct an evidentiary hearing on an appeal-deprivation claim. This Court went on to say that "[i]f the district court determines that Toston was deprived of a direct appeal due to ineffectiveness of counsel, the district court shall provide Toston with the remedy set forth in NRAP 4(c)." Id.

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In Toston, this Court gave clear guidance about trial counsel's "constitutional duty to file a direct appeal in two circumstances: when requested to do so and when the defendant expresses dissatisfaction with his conviction, and that the failure to do so in those circumstances is deficient for purposes of proving ineffective assistance of counsel." Id. at 978, 800 (citations omitted).

There are various factors that must be considered when deciding if defense counsel "knew or should have known that his/her/their client wanted to appeal the conviction" in the context of a guilty plea:

> relevant circumstances may include whether the defendant received the sentence he bargained for as part of the plea (it would be reasonable to conclude that a defendant who received the bargained-for sentence would be satisfied with that sentence), whether the defendant reserved certain issues for appeal (the reservation of an issue for appeal reasonably indicates the defendant's desire to appeal), whether the defendant indicated a desire to challenge his sentence within the period for filing an appeal, and whether the defendant sought relief from the plea before sentencing (the filing of a presentence motion to withdraw a plea reasonably indicates dissatisfaction with the conviction).

Id. at 979-80, 801.

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This Court concluded that it could not affirm the lower court's decision to deny Toston's appeal-deprivation claim when Toston had outbursts at sentencing indicating his clear dissatisfaction with the sentence. Id. at 980, 801.

**(a) Failure of trial counsel to file a notice of appeal at the district court level**

In the instant case, Mr. Cooke did not just tell his attorney Brian Green orally that he wanted to appeal. Mr. Cooke went above and beyond that and made a written demand for Mr. Green to appeal. After Mr. Cooke conveyed his two demands to appeal, Mr. Green did not appeal.

Why did Mr. Green not file the appeal that Mr. Cooke demanded? We do not have the answer in the record and the reason that answer is not in the record is because Judge Simons denied an evidentiary hearing in direct contravention of Toston.

Did Mr. Green hear Mr. Cooke's oral demand for a direct appeal? Did Mr. Green receive Mr. Cooke's written demand for a direct appeal?

These are crucial questions that need to be answered in an evidentiary hearing before the district court judge.

The district court got ahead of itself by saying that it was "unclear what 'constitutional' or jurisdictional' grounds [Mr. Cooke] would have been relying on to [appeal], that would not have been barred by the terms of the plea agreement." The district court's lack of clarity was caused by the district court itself. Had the district court ordered an evidentiary hearing and concluded that Mr. Cooke demanded an appeal, the proper procedure would not been for the district court to zero in on the precise ground for the appeal. Rather, the remedy would be for Mr. Cooke to be allowed to proceed to a direct appeal pursuant to NRAP 4(c) – as this Court in Toston ruled.

The district court put the onus on Mr. Cooke to articulate "reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings" before it would be proper for the lower court to entertain an appeal-deprivation claim. That is absolutely incorrect. Toston does not require such a preliminary showing. If a criminal defendant demands a direct appeal in the

timeframe for appealing, his/her/their attorney **must** file the appeal – even if the defendant cannot personally articulate "reasonable constitutional, jurisdictional or other grounds."

Mr. Cooke contends that he did convey that demand and undersigned counsel has every expectation that Mr. Cooke would testify to that fact at an evidentiary hearing. Mr. Green needs to take the witness stand and answer under oath whether he received Mr. Cooke's oral demand for an appeal at the sentencing hearing and Mr. Cooke's written demand for an appeal.

**(b) Failure of trial counsel to adequately investigate the defense of voluntary intoxication**

NRS 193.330(1) indicates that an "act done with the intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime."

In Sharma v. State, 118 Nev. 648, 653, 56 P.3d 868, 871 (2002) (internal citation omitted), this Court said that "an attempt crime is a specific intent crime; thus, the act constituting [the] attempt must be done with the intent to commit that crime."

NRS 193.220 states in its entirety:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of the person's intoxication may be taken into consideration in determining the purpose, motive or intent.

This Court has cited NRS 193.220 in confirming that "voluntary intoxication can defeat specific intent." Kassa v. State, 485 P.3d 750, 758 (Nev. 2021).

For defense counsel to have come into a change of plea hearing on an Attempted Sexual Assault matter not knowing that an attempt is a specific intent crime is astounding. Even worse, defense counsel did not discuss the issue of voluntary intoxication by the time Mr. Cooke entered his guilty plea. Judge Porter should have put an immediate stop to the proceedings when Her Honor discovered that Mr. Cooke was being represented in this manner. Competent counsel should have been substituted in forthwith. Instead, Mr. Green was allowed to remain Mr. Cooke's counsel of record and Mr. Cooke got sentenced to the maximum

allowable punishment – eight to twenty (8-20) years – in the Nevada Department of Corrections.

Was Mr. Green's representation ineffective? Mr. Cooke firmly believes that with an evidentiary hearing, the evidence would support such a conclusion. It is hard to fully analyze the Strickland factors as it pertains to whether the lack of investigation as to voluntary intoxication prejudiced Mr. Cooke when the district court refuses to order an evidentiary hearing. At a bare minimum, it is easy to infer that Mr. Green's representation fell well below a reasonable attorney standard when he said (on the record, no less) that Attempted Sexual Assault was a general intent crime.

The State and the lower court reduced Mr. Cooke's claims as being "belied by the record" and meritless. It is hard for either the State or Judge Simons to make such an argument when the lower court is preventing Mr. Cooke for fully making that record. Denying Mr. Cooke an evidentiary hearing that would have allowed him to show prejudice flowing from Mr. Green's less-than-sound advice was reversible error. Mr. Cooke did not even need to make much of a record to that effect

when it was the **State** that provided the lower court with the transcription that showed Mr. Green's palpable misstatement of law.

**(c) The failure to advise Mr. Cooke as to the minimum sentence for Attempted Sexual Assault of a Child Under the Age of 16**

Under NRS 200.366(3), a defendant convicted of Sexual Assault on a Child Under the Age of 16 is a category A felony punishable by twenty-five (25) years to life in prison.

Pursuant to NRS 193.330(a)(1), a defendant who is convicted of an attempt to commit a category A felony shall be punished for a category B felony that entails "imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 20 years."

NRS 176A.100 (1)(a) bars the granting of probation for a person who is convicted of attempted sexual assault of a child who is less than 16 years of age.

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NRS 176.165 states, "[t]o correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea."

This Court said in Rubio v. State, 124 Nev. 1032, 1038, 194 P.3d 1224, 1228 (2008), that "[a] guilty plea is knowing and voluntary if the defendant has a full understanding of both the nature of the charges and the direct consequences arising from a plea of guilty."

In Harris v. State, 130 Nev. 435, 448, 329 P.3d 619, 628 (2014), that "[h]abeas corpus is the exclusive remedy to challenge the validity of the guilty plea after sentencing."

Unfortunately for Mr. Cooke, failing to advise Mr. Cooke of the voluntary intoxication defense was not the only omission that Mr. Green made that could be the basis for a finding of ineffectiveness of counsel. Mr. Green never (on the record, at least) advised Mr. Cooke of the minimum sentence for Attempted Sexual Assault. The court never canvassed Mr. Cooke as to the minimum sentence for Attempted Sexual Assault. The State did not advise Mr. Cooke of the minimum sentence for Attempted Sexual Assault. In sum, there is zero record of Mr. Cooke

having been advised of the minimum punishment for the crime for which he pled guilty. This is not a plea that was entered into "knowingly, intelligently, and voluntarily."

As such, an evidentiary hearing should be ordered to determine if Mr. Cooke should be able to withdraw his plea of guilty on this ground.

## CONCLUSION

The district court committed reversible error by summarily denying Daniel Charles Cooke's postconviction petition for writ of habeas corpus without the benefit of an evidentiary hearing.

Such an evidentiary hearing is required when there is an appeal-deprivation claim. Toston v. State permits nothing less than this affordance of due process to Mr. Cooke. The district court's ruling violates Toston in both letter and spirit.

Additionally, an evidentiary hearing is necessary to gauge whether the deficient performance of Mr. Cooke's criminal defense attorney Brian Green prejudiced Mr. Cooke. Mr. Green's lack of understanding that Attempted Sexual Assault is a specific intent crime falls below a reasonable attorney standard. Mr. Green should have

discussed the defense of voluntary intoxication but failed to do so because he mistakenly believed that Attempted Sexual Assault was a general intent crime.

Finally, an evidentiary hearing is necessary to ascertain Mr. Cooke's knowledge and intelligence as to the penalty range of Attempted Sexual Assault. There is no record that Mr. Green advised Mr. Cooke as to the mandatory minimum prison sentence (to-wit, two years of imprisonment). There is no excuse for the full penalty range to have been omitted from the guilty plea agreement. Once again, Mr. Green fell below a reasonable attorney standard. Mr. Green has some explaining to do in an evidentiary hearing as to why this happened.

DATED this 21st day of March, 2022.

BEN GAUMOND LAW FIRM, PLLC

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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Opening Brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 Century Schoolbook font.

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

[x] Proportionately spaced, has a typeface of 14 points or more, and contains 4,700 words; or

[ ] Monospaced, has 10/5 or fewer characters per inch, and contains ____ words or ____ lines of text; or

[x] Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that

this brief complies with all the 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 found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21st day of March, 2022.

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## CERTIFICATE OF SERVICE

(a) I hereby certify that this document was electronically filed with the Nevada Supreme Court on the 21st day of March, 2022.

(b) I further certify that on the 21st day of March, 2022, electronic service of the foregoing document shall be made in accordance with the Master Service List to Aaron Ford, Nevada Attorney General; and Tyler J. Ingram, Elko County District Attorney; and Chad B. Thompson, Deputy Elko County District Attorney.

(c) I further certify that on the 22nd day of March, 2022, this brief shall be mailed with postage prepaid to Daniel Charles Cooke, NDOC # 1178337, Lovelock Correctional Center, 1200 Prison Road, Lovelock, NV 89419.

DATED this 21st day of March, 2022.

Benjamin C. Gaumond, Owner
Ben Gaumond Law Firm, PLLC