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 REPLY BRIEF

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ARGUMENT

(1) Daniel Charles Cooke demanded an appeal and an evidentiary hearing should be ordered.

The State argues that the instant case does not warrant a remand for an evidentiary hearing because this case is not analogous to Toston v. State, 127 Nev. 971, 267 P.3d 795 (2011). *Respondent's Answering Brief 7-8.* The State faults Mr. Cooke for not having the type of "outburst" that was indicated in Toston. *Respondent's Answering Brief 7.*

The idea that Mr. Cooke expressed no dissatisfaction with the sentence is belied by the record. Mr. Cooke, through his legal counsel, made it abundantly clear that he was entering into negotiations wherein the defense would not be bound to recommend the maximum sentence of eight to twenty (8-20) years in the Nevada Department of Corrections. *Respondent's Appendix 6-7.* The idea that Mr. Cooke was anything less than dissatisfied with an eight to twenty (8-20) year sentence given that negotiating position is easy to dispel. Of course, Mr. Cook was dissatisfied with the maximum sentence – especially

when he withdrew from a previously negotiated settlement that would have required him to stipulate to the maximum sentence. *Respondent's Appendix 6-7.*

The State selectively cites to the record by focusing on a written demand for an appeal that preceded the sentencing date. *Respondent's Answering Brief 8.* The State neglects to refer to the portion of the Joint Appendix wherein Mr. Cooke stated on his petition that he "ask[ed] [his] attorney the day of sentencing to appeal and sent him a letter that next week stating I wanted to appeal and he would not respond." *Joint Appendix 5.*

Any defect with regards to the date of the demand letter is more than cured by the fact that Mr. Cooke clarified that said letter was sent the week after sentencing, not the year before sentencing.

The State says that Mr. Cooke's assertion that he requested an appeal of his defense attorney was not "factual" and, as such, "Cooke was not entitled to an evidentiary hearing." *Respondent's Answering Brief 8.* It is easy for the State to argue that a demand to appeal is not "factual" when an evidentiary hearing was not held in the first place.

However, it is hard for the State to justify the district court's denial of an evidentiary hearing when Mr. Cooke was unjustifiably denied the ability to establish the "factual" nature of said demand. Put another way, the State complains about the lack of an evidentiary basis for the demand for an appeal when the State contributed to this situation by fighting against Mr. Cooke's ability to have an evidentiary hearing. The State cannot have it both ways.

Even without the demand letter in the record, Mr. Cooke's claim in the petition itself justified an evidentiary hearing on this basis. The State does not even try to defend the district court's rationale for denying the evidentiary hearing – specifically, the fact that Mr. Cooke did not explain the grounds for an appeal. *Joint Appendix 131.* Nowhere in the case law of Nevada does one's right to appeal a conviction get restricted by a defendant's lack of articulation as to the precise grounds for appeal.

In rejecting the idea that Mr. Cooke should have had an evidentiary hearing, the State focuses exclusively on the demand letter

and overlooks the fact that Mr. Cooke gave oral notice to his counsel that an appeal needs to be filed.

While undersigned counsel can understand the zeal of the State in securing a conviction against someone who is accused of Attempted Sexual Assault on a Minor, this understanding does not extend to the State's desire to deny Mr. Cooke his day in court on the postconviction habeas petition. The State's position that would keep Mr. Cooke from having an evidentiary hearing (and that would allow Mr. Cooke to more fully develop his claims) must be rejected.

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 that a "defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record."

The State argues that the letter demanding an appeal "is a letter predating sentencing, not filed, bearing no hallmarks of trustworthiness, and belied by the record in his conduct and actions at sentencing." *Respondent's Answering Brief 8.* What action of Mr.

Cooke's would have been consistent with waiving a direct appeal? No action exists. As such, it is hard to comprehend the State's argument in this regard. Mr. Cooke never expressed one iota of satisfaction with having been given the absolute maximum level of incarceration.

The State's commentary on a lack of trustworthiness is ironic because it is actively preventing Mr. Cooke for having the very type of hearing (namely, an evidentiary hearing) that would afford Mr. Cooke the opportunity to take the witness stand so that the trustworthiness of the letter as well as Mr. Cooke could be tested.

As for its citation to Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999), the State is correct. "The burden is on the client to indicate to his attorney that he wishes to pursue an appeal." Id. at 20, 660.

Mr. Cooke is more than happy to meet his burden at an evidentiary hearing and is confident that he will meet that burden when he has the opportunity to put on evidence as well as witnesses – including his former defense counsel. However, the State wants to deny this opportunity to meet this burden. This position is untenable and does not comport with due process.

CONCLUSION

Appellant Daniel Charles Cooke reaffirms his position that the district court erred in denying him an evidentiary hearing on his postconviction petition for writ of habeas corpus. This is especially the case with the appeal deprivation claim.

Mr. Cooke wants an opportunity to make a full record as to his allegation that his imprisonment is illegal. The State has made it abundantly clear in its Answering Brief that it wants that opportunity to be denied. Due process requires otherwise.

DATED this 26th day of May, 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply 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 Reply Brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 Century Schoolbook font.

2. I further certify that this Reply 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 1,052 words; or

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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 26th day of May, 2022.

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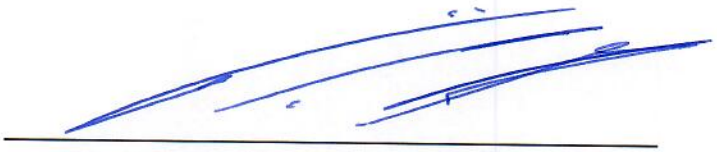
CERTIFICATE OF SERVICE

(a) I hereby certify that this document was electronically filed with the Nevada Supreme Court on the 26th day of May, 2022.

(b) I further certify that on the 26th day of May, 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 27th day of May, 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 26th day of May, 2022.



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