IN THE SUPREME COURT OF THE STATE OF NEVADA



STEVEN LAWRENCE DIXON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 87091

D. Ct. CV0023141

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APPEAL FROM JUDGMENT OF
THE HONORABLE MICHAEL MONTERO

SIXTH JUDICIAL DISTRICT COURT

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# APPELLANT'S OPENING BRIEF

KARLA K. BUTKO
Attorney for Appellant
P. O. Box 1249
Verdi, Nevada 89439
(775) 786-7118
State Bar No. 3307
butkolawoffice@sbcglobal.net

KEVIN PASQUALE
Humboldt County District Attorney
Attorney for Respondent
P. O. Box 909
Winnemucca, NV 89446
(775)623-6363
ANTHONY GORDON

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## ROUTING STATEMENT

Steven Lawrence Dixon, Appellant, appeals from the denial of a first and timely post-conviction relief on a criminal case which involved a jury trial and verdict of guilt on one count of Arson, Fourth Degree, a Category D felony violation of NRS 205.025. There was no evidentiary hearing. Mr. Dixon was sentenced to 34 months in prison with parole eligibility after service of 12 months in prison. 1AA 237.

This case is properly under the jurisdiction of the Nevada Court of Appeals. NRAP 17(b)(3).

Mr. Dixon filed a Petition for Writ of Habeas Corpus on July 11, 2022. 1AA 240-249. The judgment of conviction was dated November 19,2018. The case proceeded on direct appeal and in Docket 77535, the Nevada Supreme Court affirmed the conviction by way of a written decision on May 6, 2021. See *Dixon v. State*, 137 Nev. Adv. Op. 19. The Remittitur issued on June 1, 2021. The prison law library clerk filed the petition in the wrong court for Mr. Dixon. 1AA 249. The district court found good cause for Mr. Dixon's refiling the Petition in

the correct court. 1AA 250.

On July 21, 2023, the District Court dismissed the postconviction litigation by its Order Denying Petition for Writ of Habeas Corpus (Postconviction). 2AA 309-330. The Notice of Entry of Order issued on July 21, 2023. 2AA 308. A timely notice of appeal was filed by Appellant on August 4, 2023. 2AA 331.

## JURISDICTION

This Court has jurisdiction over the direct appeal from the denial of post-conviction relief under NRS 34.575(1). The Order was a final order disposing of all issues on post-conviction. The District Court filed its Order Denying Petition and Supplemental Petition for Writ of Habeas Corpus (postconviction) on July 21, 2023. The notice of entry of order was filed on July 21, 2024. 2AA 308-330. A timely notice of appeal from the denial of post-conviction relief was filed by Mr. Dixon on August 4, 2023. 2AA 331.

## STATEMENT OF THE CASE

Mr. Dixon was charged by way of an Information filed on January 12,2018, with Count I: Arson, Fourth Degree, a Category D felony in violation of NRS

205.025 and with Count II: Child Abuse, Neglect or Endangerment, a gross misdemeanor violation of NRS 200.508. 1AA 1-5. The case proceeded to a two day jury trial. The jury returned a verdict of guilty on the Fourth Degree Arson charge and acquitted Mr. Dixon on Count II, the child endangerment charge. 1AA 234-35.

Mr. Dixon was sentenced to a prison term on the Arson charge. He was ordered to serve 34 months in prison with parole eligibility after serving 12 months. 1AA 236-239.

There was a direct appeal on the case. *Dixon v. State*, 137 Nev. Adv. Op. 19, decided on May 6, 2021. The Remittitur issued on June 1, 2021. The prison law clerk improperly filed the Petition for Writ of Habeas Corpus (postconviction) in the federal court system. 1AA 249. The district court found good cause for Mr. Dixon's refiling the Petition in the state district court. 1AA 250.

Counsel was appointed and a Supplemental Petition for Writ of Habeas Corpus (postconviction) was filed on December 22, 2022. The State did not file a

responsive pleading to either the Petition or the Supplemental Petition. No evidentiary hearing was granted by the district court.

On July 21, 2023, the District Court dismissed the postconviction litigation by its Order Denying Petition for Writ of Habeas Corpus (Postconviction). 2AA 309-330. The Notice of Entry of Order issued on July 21, 2023. 2AA 308. A timely notice of appeal was filed by Appellant on August 4, 2023. 2AA 331.

## STATEMENT OF FACTS

On December 13, 2017, Steven Dixon was in a live in relationship with the mother of his children, Melissa Mayden. The couple were going through marital stress and Mr. Dixon had asked Ms. Mayden to move out. Mr. Dixon made it clear that she should move out and the children and he would remain in the house. The couple were arguing in one of the bedrooms and the children were home listening to or ignoring their parents argument. Mr. Dixon had been drinking alcoholic beverages. Ms. Mayden knocked over the television. Exactly how that happened is difficult to ascertain. Mr. Dixon responded by picking up a lighter and lighting a plastic mirror that was hanging at about 6 feet high on the dining

room wall. The mirror was hung there to cover a hole in the sheetrock on the wall. The mirror suffered minor damage and melted. Mr. Dixon's mother, Sheila Swearingen, who was in the kitchen, responded by pouring water on the wall and extinguishing the fire. The fire department was not called. 1AA 25, 32, 37, 39, 42, 159-160.

Ms. Mayden left the residence with the children. On her way backing the vehicle out of the driveway, Mr. Dixon appeared and threw the beer bottle he had in his hands at the windshield of the vehicle. The beer bottle struck the car and Ms. Mayden and the children drove away. 1AA 46

The jury was also allowed to hear that Mr. Dixon wanted the title to a vehicle because he wanted to put the title into his mother's name. 1AA 30. The jury was allowed to hear that Mr. Dixon had another court case pending and when that court date happened, Mr. Dixon was breaking up with Ms. Mayden. 1AA 31-32. Ms. Mayden told the jury that Mr. Dixon borrowed her phone to make a call. Ms. Mayden did not recognize the number. She was upset and went outside. 1AA 34. Ms. Mayden expressed that she and her children did not have to lose

everything like they have before when the couple broke up. 1AA 40. Ms. Mayden made sure she told the jury that Mr. Dixon had attacked her son in a prior instance and that "he was doing that again". 1AA 41-42.

Ms. Mayden also told this jury that after the incident, Mr. Dixon called her at least 27-30 times, over and over and over. 1AA 50. Ms. Mayden stated she called police because of the threats on her phone from Mr. Dixon. 1AA 51. Ms. Mayden made sure she told the jury about Mr. Dixon's extra marital issue with a girl he was talking to on the side of their relationship. 1AA 52. She also stated, "You know, I've seen this man mad". 1AA 52.

The State did not file any type of document to notice out the bad act evidence that was admitted at the trial. There was no pre-trial Tavares hearing and the jury was never instructed on the proper use of bad act evidence.

Mr. Dixon testified that he did light the plastic mirror on fire while it was hanging on the wall but that he never intended to burn his home or have anyone get hurt. Mr. Dixon testified that he and Ms. Mayden had been arguing. He gave Ms. Mayden a move out ending date for their relationship. After that she flipped

the TV over and broke the TV. He picked up the torch and melted a plastic mirror that was on the wall. 1AA 184. Mr. Dixon denied that there was any damage to the wall or ceiling, other than smoke from the mirror fire. His Mother, Sheila Swearingen, threw a cup of water on it. 1AA 174. Mr. Dixon testified clearly that he was not trying to burn the house or the wall of the house, just destroy the mirror. 1AA 179.

The jury was not instructed on the proper use of bad act evidence, voluntary intoxication or a lesser included offense of destruction of personal property of another.

Ultimately, the jury convicted Mr. Dixon on the arson charge and acquitted him on the child endangerment charge. Mr. Dixon was sentenced to prison.

A petition for writ of habeas corpus (postconviction) was filed. Counsel was appointed and a supplemental petition for writ of habeas corpus (postconviction) was filed. The State did not file a responsive pleading. The District Court dismissed the postconviction action by written order. There was no evidentiary hearing. A timely notice of appeal was filed from the dismissal.

## STATEMENT OF THE ISSUES

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

   A. **THE DISTRICT COURT ERRED WHEN IT DETERMINED THAT MR. DIXON DEMONSTRATED THAT FAILURE TO INSTRUCT THE JURY ON VOLUNTARY INTOXICATION TO DEMONSTRATE THE STATE'S FAILURE TO PROVE THE SPECIFIC INTENT OF MALICE AS REQUIRED FOR AN ARSON CONVICTION WAS BELOW THE STANDARD OF CARE UNDER STRICKLAND BUT THAT MR. DIXON FAILED TO PROVE THE IMPROPER INSTRUCTION PREJUDICED THE VERDICT.**

   B. **THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION WHEN IT RULED THAT FAILURE TO INSTRUCT THE JURY ON A LESSER INCLUDED OFFENSE OF DESTRUCTION OF THE PROPERTY OF ANOTHER WAS BELOW THE STANDARD OF CARE UNDER STRICKLAND BUT THAT MR. DIXON FAILED TO PROVE PREJUDICE UNDER THE SECOND PRONG OF STRICKLAND.**

2. **APPELLATE COUNSEL WAS INEFFECTIVE WHEN APPELLATE COUNSEL FAILED TO RAISE CRITICAL ISSUES ON APPEAL INCLUDING ADMISSION OF PREJUDICIAL BAD ACT EVIDENCE, INSUFFICIENCY OF THE EVIDENCE, JURY INSTRUCTION ERROR AND LACK OF A CHAIN OF CUSTODY ON EVIDENCE, IN VIOLATION OF THE 5th, 6th& 14th AMENDMENTS.**

## ARGUMENT

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

**Standard of Review**:

A petitioner for post-conviction relief is entitled to an evidentiary hearing only if he supports his claims with specific factual allegations that if true would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984); see also *Bejarano v. Warden*, 112 Nev. 1466, 1471, 929 P.2d 922, 925 (1996). In *State v. Love*, 109 Nev. 1136, 865 P.2d 322 (1993), this Court reviewed the issue of whether or not a defendant had received ineffective assistance of counsel at trial in violation of the Sixth Amendment. The Court held that this question is a mixed question of law in fact and is subject to independent review and reiterated the ruling of *Strickland v. Washington*, 466 U.S. 668 (1984). The Nevada Supreme Court indicated that the test on a claim of ineffective assistance

of counsel is that of "reasonably effective assistance" as enunciated by the United States Supreme Court in *Strickland.*

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

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

Argument:

**A. THE DISTRICT COURT ERRED WHEN IT DETERMINED THAT MR. DIXON DEMONSTRATED THAT FAILURE TO INSTRUCT THE JURY ON VOLUNTARY INTOXICATION TO DEMONSTRATE THE STATE'S FAILURE TO PROVE THE SPECIFIC INTENT OF MALICE AS REQUIRED FOR AN ARSON CONVICTION WAS BELOW THE STANDARD OF CARE UNDER STRICKLAND BUT THAT MR. DIXON FAILED TO PROVE THE IMPROPER INSTRUCTION PREJUDICED THE VERDICT.**

The District Court agreed with Mr. Dixon that trial counsel's performance fell below the standard of care as found in the first test prong of *Strickland v.*

*Washington*, 466 U. S. 668 (1984) when defense counsel failed to have the jury instructed on voluntary intoxication and the ability to negate the malice requirement for an arson conviction. There was evidence that Mr. Dixon was drunk at the time of the fire.

Mr. Dixon was charged with Fourth Degree Arson in Count I and with Child endangerment in Count II. The jury convicted on the Arson charge and acquitted Mr. Dixon on the child endangerment charge. 1AA 200-201, 234-235.

Melissa Mayden, who was the live in girlfriend of Mr. Dixon on the date of the fire, testified that Mr. Dixon had been drinking and that he was acting cocky, wanting to argue with her. Mr. Dixon used foul language in his discussion with her. Ms. Mayden explained to the jury that she knew when Mr. Dixon had been drinking because they had been together a long time, his eye color changes, his demeanor and he smells when he drinks. 1AA 37. When the fire and the arguments ended, Mr. Dixon threw a beer bottle at Ms. Mayden's car as she left the driveway. 1AA 46, 85, 117. Jessica Dixon testified that her father, Mr. Dixon

was drinking beer. 1AA 119. Mr. Dixon admitted during his testimony that he had been drinking and had "a few" beers. 1AA 185.

The actual fire started by Mr. Dixon burned a plastic mirror. The fire was put out by his mother pouring three or four potfuls of water on the wall. 1AA 114. Sheila Swearingen, mother of Mr. Dixon, testified that only a plastic mirror was harmed, she threw a glass of water on it and threw it in the garbage. 1AA 160.

Steven Dixon testified at the jury trial. Mr. Dixon stated that he and Ms. Mayden had been arguing. He gave Ms. Mayden a move out ending date for their relationship. After that she flipped the TV over and broke the TV. He picked up the torch and melted a plastic mirror that was on the wall. 1AA 184. Mr. Dixon denied that there was any damage to the wall or ceiling, other than smoke from the mirror fire. His Mother, Sheila Swearingen, threw a cup of water on it. 1AA 174. Mr. Dixon testified clearly that he was not trying to burn the house or the wall of the house, just destroy the mirror. 1AA 179.

Mr. Dixon testified he had no intention of starting the house on fire. 1AA 187. Mr. Dixon told the jury that he intended to mess up the mirror and that it was a mistake and stupid.

There was no jury instruction on NRS 193.220, voluntary intoxication. There was no discussion that if Mr. Dixon was intoxicated it would impair his ability to have the criminal intent required to commit arson, i.e. malice. Arson is a specific intent crime so the State must prove the element of malice beyond a reasonable doubt. The failure to instruct the jury on the affect of voluntary intoxication upon the ability to form the intent of "maliciously" was prejudicial error.

**B. THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION WHEN IT RULED THAT FAILURE TO INSTRUCT THE JURY ON A LESSER INCLUDED OFFENSE OF DESTRUCTION OF THE PROPERTY OF ANOTHER WAS BELOW THE STANDARD OF CARE UNDER STRICKLAND BUT THAT MR. DIXON FAILED TO PROVE PREJUDICE UNDER THE SECOND PRONG OF STRICKLAND.**

**Standard of Review:**

An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). As noted *supra*, NRS 34.830 requires specific findings of fact and conclusions of law before an order dismissing a habeas petition can enter.

**Argument:**

The district court's order addressing the supplemental petition provides findings of fact for the grounds presented. The district court's order failed to address several of Mr. Dixon's claims raised in his Petition. Mr. Dixon contends that the findings of fact in the order are, in themselves, not sufficiently specific to satisfy NRS 34.830(1)'s specificity requirement.

There was no jury instruction provided to or sought by defense counsel for the lesser included offense of NRS 206.310, a misdemeanor offense of destruction of the personal property of another. Mr. Dixon's testimony was clear. His testimony was that he intended to harm the mirror of Ms. Mayden because she knocked over the TV and broke it. Mr. Dixon's testimony was an admission to the crime of destruction of property of another. Yet, defense counsel did not seek to have the jury instructed on an obvious lesser included offense.

The district court ruled that the omission of this jury instruction was below the standard of care under *Strickland* but held that Mr. Dixon failed to demonstrate prejudice. The district court dismissed this petition without access to an evidentiary hearing and then held that Petitioner "failed to present any evidence on the damage that occurred to the house or what efforts Petitioner made to extinguish the fire". 2AA 315.

The district court cannot have it both ways. If the court wanted additional evidence, there should have been an evidentiary hearing at which Mr. Dixon would have presented physical evidence in support of his allegations in his Petition. Mr. Dixon alleged that trial counsel was ineffective for failing to retain the services of an arson investigator to demonstrate the fire only affected the mirror. 1AA 244. Mr. Dixon alleged that the mirror admitted into evidence was not even the same mirror that was in the house on the date of the argument and fire. 1AA 244. Mr. Dixon alleged in both his Petition and in the Supplemental Petition that a motion to suppress the mirror should have been filed as there was no chain of custody and the mirror was delivered by Ms. Mayden to the police days after the incident. 1AA 244, 270-271.

Because the district court dismissed this postconviction action without holding an evidentiary hearing, the record is not supplemented with additional witnesses and an expert on fire charring.

Mr. Dixon alleged that trial counsel was ineffective for failing to fully investigate the fire by use of an expert arson investigator. These claims were summarily dismissed by the district court. Yet, the court held that Mr. Dixon did not present evidence in support of his petition allegations.

A review of the district court's order demonstrates that the court was more than willing to review the trial transcript evidence when it harmed Mr. Dixon's petition but that it refused to use the trial transcript to support Mr. Dixon's allegations. Examples of this occur when the district court repeatedly states that Mr. Dixon was arguing with his wife, drank several alcoholic beverages, set fire to a plastic mirror on the wall in his home and sat on the couch doing nothing to extinguish the fire. 2AA 313-315, 317, 320, 325. But Mr. Dixon's testimony, as well as that of his Mother and Daughter were that Sheila Swearingen was putting out the small fire with water. Mr. Dixon would not testify that he put out the fire.

Yet, in the same breath, the district court repeatedly held that Petitioner Dixon failed to attach the transcripts to his Petition and Supplemental Petition for Writ of Habeas Corpus, precluding review. This issue has recently arisen in the

postconviction litigation cases. Various district courts are refusing to acknowledge the trial file, docket entries and transcripts that exist in the criminal trial file. This causes unnecessary time and expense to postconviction cases. Many petitioners do not have a complete copy of their file. Recent bill requirements in Washoe County demonstrate that the county is upset at the expenses postconviction counsel incurs when sending an entire copy of the appellate appendices and briefs to their clients. Counsel has been requested to show proof of canceled checks for these expenses.

It is abundantly clear that the district court should not be the presiding judge on a criminal trial and then refuse to access the criminal case transcripts in rendering its decision on a postconviction claim. This must be an abuse of discretion.

A postconviction petitioner is entitled to evidentiary hearing when he asserts specific factual allegations that, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). The district court dismissed Mr. Dixon's petition on motion, without allowing discovery or conducting an evidentiary hearing.

There was no motion to dismiss filed by the State. There was no responsive pleading filed by the State. 2AA 310. The district court determined the

postconviction case without allowing Mr. Dixon the opportunity to present evidence in support of his allegations.

The allegations were specific in nature. Mr. Dixon's Petition alleged that counsel failed to adequately investigate, failed to retain an expert arson investigator witness, failed to litigation a suppression issue on his position that the mirror admitted into evidence was not the mirror that was involved in the fire, and that the search of his residence and entrance by the police was without his consent and without a warrant. 2AA 244.

The District Court's Order denying the postconviction did not address the issue of the failure to retain an expert on arson or the potential illegal search of Mr. Dixon's residence. the specificity requirement in NRS 34.830(1) also applies to conclusions of law. The language of the statute is "specific findings of fact and conclusions of law." NRS 34.830(1). Given that the modifier "specific" comes at the very beginning of the sentence, it should apply to all elements of the sentence. In other words, NRS 34.830(1) requires that before a habeas petition can be dismissed, the order must have <u>both</u> specific findings of fact and specific conclusions of law.

The Supplemental Petition raised legal issues which were supported by the trial record and references to pages in the trial transcript were provided for the

Court's review. 2AA 263-264. The arguments were supported by case authority and arguments of facts to support the allegations. 2AA 265-271. The Supplemental petition sought an evidentiary hearing at which Mr. Dixon could provide witnesses and evidence to support his ineffective assistance of counsel claims.

This case should be remanded so that an evidentiary hearing may be held. At that hearing, Mr. Dixon will be able to bring forth witnesses on how and when the police accessed Mr. Dixon's home to take pictures of the residence. Mr. Dixon will be able to prove that there was no damage to the residence. Mr. Dixon will be able to attack the chain of evidence relating to a mirror delivered to the police by his ex-significant other/ mother of his children.

The reason for NRS 34.830(1)'s specificity requirement is simple—defendants cannot appeal conclusory statements. Without knowing the district court's thought process, there's no way for defendants to determine if the district court relied upon suspect evidence or acted beyond its legal authority. In other words, failure to comply with NRS 34.830(1)'s specificity requirement constitutes an abuse of discretion.

## 2. APPELLATE COUNSEL WAS INEFFECTIVE WHEN APPELLATE COUNSEL FAILED TO RAISE TO RAISE CRITICAL ISSUES ON APPEAL INCLUDING ADMISSION OF PREJUDICIAL BAD ACT EVIDENCE, INSUFFICIENCY OF THE EVIDENCE, JURY INSTRUCTION ERROR AND LACK OF A CHAIN OF CUSTODY ON EVIDENCE, IN VIOLATION OF THE 5th, 6th& 14th AMENDMENTS.

**Standard of Review:**

In order to establish prejudice based on deficient assistance of appellate counsel, the petitioner must show that the omitted issue would have had a reasonable probability of success on appeal. *Lara v. State*, 120 Nev. 177, 183-84, 87 P.3d 528, 532 (2004) (citing *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114).

**Argument:**

Appellate counsel argued only one issue on direct appeal– the possibility of gender based *Batson* error by the State. This Court found that the State's action is deciding that if wanted a female alternate juror was improper and gender based. Since the juror excused by the State was an alternate juror and there were no alternate jurors seated on this short jury trial, the Nevada Supreme Court upheld the conviction. See *Dixon v. State*, 137 Nev. Adv. Op. 19, decided May 6, 2021.

Appellate counsel's approach left the remaining issues presented by this jury trial without review. Appellate counsel's approach constituted ineffective assistance of counsel.

Although deference is given to appellate counsel's decisions of which issues to raise on appeal, nonetheless, appellate counsel can be held ineffective if it fails to select proper claims for appeal. *Jones v. Barnes*, 463 U.S. 745 (1983).

Insufficiency of the evidence should have been litigated. When reviewing a challenge to the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

This record has scant evidence to support the allegation that Steven acted maliciously and evidence of Mr. Dixon being voluntarily intoxicated. The record may suffice for a destruction of property conviction but no value was ever proven

on the mirror. Appellate counsel should have attacked the insufficiency of the evidence.

Appellate counsel should have raised the question as to whether there was bad act evidence that prejudiced Mr. Dixon's right to a fair trial. There was so much bad act evidence as to Steven that the trial court abused its discretion by permitting evidence of uncharged bad acts without a limiting instruction. *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001), modified by *Mclellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008). This critical issue should have been raised on direct appeal.

The bad act evidence consisted of the following: That Mr. Dixon was facing charges for physically harming his son, that Melissa Mayden ran from Mr. Dixon because of her past experience with Mr. Dixon, that Mr. Dixon wanted Ms. Mayden to leave and he wanted the house and the children, that Mr. Dixon did not pay Ms. Mayden for any interest she may have had in the house, that Mr. Dixon had an extra marital affair and post incident threats made by Mr. Dixon. 1AA 40-41, 50-52.

The jury was not instructed under *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001), on how to properly utilize bad act evidence. Instead, Steven was painted as an abusive alcoholic who cheated on his wife and then threw his family out of the house.

The foundation laid by the State as to the chain of custody of the physical evidence regarding the mirror and its acquisition by the police did not satisfy *Burns v. Sheriff*, 92 Nev. 533, 534-35, 554 P.2d 257, 258 (1976). In *Sparks v. State*, 104 Nev. 316, 759 P.2d 180 (1988), the Nevada Supreme Court held that a conviction may be reversed when the state loses evidence if the defendant is prejudiced by the loss. In this matter, Steven told his attorney, Mr. Stermitz, that the mirror that they were putting into evidence was not the correct mirror. Defense counsel did not object and allowed the mirror to be admitted into evidence. The loss of the actual mirror prejudiced Steve's defense as the mirror had slight damage and helped substantiate his defense that there was no damage and no arson. Defense counsel should have forced the State to provide a chain of custody for where this mirror came from. The State could not have done so as the mirror

was in garbage that Steve was removing from a different location. The mirror was not the property of Melissa. Steve will testify to that at the hearing on this matter. See *Sorce v. State*, 88 Nev. 350, 352-53, 497 P.2d 902, 903 (1972).

If Mr. Dixon is correct and the mirror provided by Ms. Mayden to the police was not the actual mirror that was lit on fire, then the police department's failure to collect the true and actual mirror was grossly negligent. The State's investigation was so lacking and inept that it denied Mr. Dixon due process because it hampered his defense. *Crockett v. State*, 95 Nev. 859, 603 P.2d 1078 (1979).

Appellate counsel could have raised the issues regarding failure to instruct the jury on voluntary intoxication and a lesser included offense of property destruction but the review would have been for plain error due to trial counsel's failure to seek proper jury instruction.

The reality is that appellate counsel selected one serious legal issue and put only that issue forward on direct appeal. This Court should review the issues that were omitted on the direct appeal. When this Court reviews the remaining

argument, this Court will agree that the conviction should be vacated on the grounds of insufficient evidence.

## CONCLUSION

The district court's order is inadequate under NRS 34.830(1). The Order fails to address grounds raised by Mr. Dixon in his original in proper person petition. The case should be remanded with an instruction to provide Mr. Dixon with an evidentiary hearing.

Counsel's deficient performance was prejudicial, and the District Court's failure to so conclude was an objectively unreasonable application of *Strickland.* Trial counsel was ineffective under *Strickland* and in violation of due process and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The District Court abused its discretion when it dismissed this post-conviction action and denied relief to Mr. Dixon. Relief is warranted.

DATED this 4th day of December, 2023.

By: _____

KARLA K. BUTKO, ESQ.
ATTORNEY FOR APPELLANT
P. O. Box 1249
Verdi, NV 89439
(775) 786-7118
Nevada State Bar No. 3307

## CERTIFICATE OF COMPLIANCE

**I hereby certify that I have read this appellate brief, entitled, "APPELLANT'S OPENING BRIEF" and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rule of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.**

**I further certify that this brief complies with the page- or type- volume limitation of 32(a)(7)(A)(ii) because although, excluding the parts of the brief exempted by NRAP 32(a)(7)( c ), it does not exceed 30 pages it meets the word and type counts.**

**I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure. The document was prepared in Word Perfect, Times New Roman .14 font, with 2.45 line spacing to imitate Word. There are 25 typed pages; 5,256 words in this brief and 569 lines of type, proportionally spaced type print.**

DATED this 14th day of December, 2023.

By: Karla K. Butko

KARLA K. BUTKO, ESQ.
ATTORNEY FOR APPELLANT
P. O. Box 1249
Verdi, Nevada 89439
(775) 786-7118
Nevada State Bar No. 3307

## CERTIFICATE OF SERVICE

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

E Flex Delivery System of the Nevada Supreme Court

AND

United States Post Office Delivery, first class postage prepaid

AND email delivery to Anthony Gordon at anthony.gordon@humboldtcountynv.gov

addressed as follows:

Kevin Pasquale/ Anthony Gordon
Humboldt County District Attorney's Office
P. O. Box 909
Winnemucca, NV 89446

DATED this 4th day of December, 2023.

KARLA K. BUTKO, Esq.