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

APPEAL FROM JUDGMENT OF
THE HONORABLE MICHAEL MONTERO

SIXTH JUDICIAL DISTRICT COURT

APPELLANT'S REPLY BRIEF

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STATEMENT OF THE CASE

The Statement of the Case in Appellant's Opening Brief and the Statement of the Case in Respondent's Answering Brief are both accurate.

ROUTING STATEMENT

Appellant, STEVEN LAWRENCE DIXON states that the case is properly under the jurisdiction of the Nevada Court of Appeals. NRAP 17(b). This case involved conviction for a Category D felony, Fourth Degree Arson in violation of NRS 205.025. This is an appeal from the denial of postconviction relief without access to an evidentiary hearing.

STATEMENT OF FACTS

The only addition to the Statement of Facts from the Opening Brief that should be clarified is the District Court's Order denying postconviction relief.

In its Order, contrary to Respondent's allegation that counsel was not found ineffective, the Court found that counsel should have requested an instruction on voluntary intoxication to refute the specific intent of maliciousness that is required to support an arson conviction. RAB 4. 2AA 312. Instead, the court found that

Dixon did not meet the prejudice prong of Strickland. The court did not believe that a different result at trial would have occurred if the jury had been instructed on voluntary intoxication as it relates to formation of specific intent for arson. The district court did not grant an evidentiary hearing at which Dixon could have questioned counsel about his knowledge of voluntary intoxication and why counsel chose not to seek a favorable jury instruction that could have reduced the charge. 2AA 313. Instead, the district court found counsel's decision to be strategic. This was unsupported by any credible testimony.

Contrary to Respondent's allegations, the district court found that defense counsel should have sought a lesser included offense of destruction of property and that failure to do so was below the standard of care. RAB 10. The court again found that Dixon failed to prove the second prong of Strickland, the prejudice requirement and denied relief. 2AA 314-315. Again, the court denied Dixon the right to present witnesses, retain expert witnesses to demonstrate that the damage was minor and that the chain of evidence was insecure. But, the district court held Dixon to a burden of proof on prejudice that could not be met without the ability

to attend an evidentiary hearing.

In its Order, the District Court found that Dixon failed to demonstrate that trial counsel's decision not to object to bad act evidence was not a strategic decision. Yet, the court failed to grant Dixon an evidentiary hearing at which he could have questioned Mr. Stermitz about his preparation for trial, his knowledge of what bad act evidence the State was seeking to admit, when and how he was noticed of the bad act evidence and why he failed to file a motion in limine to exclude the bad act evidence and why counsel did not seek a limiting instruction on the proper use of the evidence if it was to be admitted. 2AA 316-318.

In its Order denying postconviction relief, the District Court held that Dixon failed to prove the prejudice prong and did not demonstrate that a different result would have occurred absent admission of the bad act evidence. 2AA 317.

The District Court complained in its Order that Dixon failed to provide a copy of the appellate briefs to the Court. This evidence is usually admitted at the evidentiary hearing, and there was not a hearing. 2AA 319.

ARGUMENT

1. The District Court's denial of postconviction relief without access to an evidentiary hearing by entry of its Order holding that Dixon failed to prove prejudice under the second prong of Strickland, in support of postconviction relief, violated Dixon's right to access to a fair hearing, due process and the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. The District Court improperly applied the prejudice prong of *Strickland.*

Standard of Review:

This court should review whether the district court appropriately denied the ineffective-assistance claims, giving deference to its factual findings but reviewing its legal conclusions de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). 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 question became whether there was a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different (prejudice). See also Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the *Strickland* test).

Argument:

The district court's Order, in and of itself, demonstrates that Dixon could have met his burden of proof if the matter proceeded to an evidentiary hearing.

The dismissal by way of Order without access to proving the claims was an abuse of discretion.

The showing required to satisfy the prejudice prong—a reasonable probability that the result of the proceeding would have been different—varies depending on the context, including the proceeding in which the allegedly deficient performance occurred and the nature of the deficient performance. See, e.g., *Missouri v. Frye*, 566 U.S. ___, ___, 132 S. Ct. 1399, 1409-10 (2012) . 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, NRS 34.724(1).

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). This is impossible to do if one cannot get into the court to present testimony. The Order repeatedly stated that Dixon failed to prove prejudice, but the time for proof is at the hearing. A postconviction petition would be thousands of pages long in many cases if each petition had to be supported by witness affidavits, depositions,

and other reports. The goal of the pleading in a postconviction is to set forth how the petitioner believes he was wronged by his trial and appellate counsel's representation. Dixon did that in his pleading and in the supplemental petition. The district court's dismissal without an evidentiary hearing cannot be supported by this court. Many of the factual findings of the court were relating to whether a decision by counsel was strategic. That is the proper subject of live testimony and cross-examination. That is not a subject that should be determined in the blind.

Respondent argued that defense counsel's decisions were strategic and virtually unchallengeable. RAB 8. Yet, those tactical conclusions were never the subject of review through testimony. Dixon believes the decisions were made improperly with an attorney that was unprepared for trial. Dixon believes those decisions were made by counsel who had not properly investigated the defense case, was unprepared to cross-examine his ex-wife and was surprised by her repeated statements of bad act evidence. Dixon believes that counsel failed to seek a limiting instruction because he did not expect such blatantly inadmissible character and bad act evidence to be the subject of the trial. The jury had no reason to hear that the victim accused Dixon of infidelity. It was nobody's business that Dixon had not paid the victim money for a house he claimed to be separate property. The jury should never have heard about any type of prior

domestic abuse allegations as they were far more prejudicial than probative. The jury should have been properly instructed under *Tavares* and its progeny. There should have been a hearing, the bad act evidence should have been noticed to the defense and this should have occurred prior to trial. It has to be prejudicial to a jury to hear this type of family law dispute evidence. Yet, defense counsel did not even seek a limiting instruction.

The district court abused its discretion when it failed to hold an evidentiary hearing. The district court applied the second prong of *Strickland* – the prejudice prong– improperly. Dixon met his burden of pleading.

When this court reviews this case, and reads that Dixon was intoxicated, it will have a hard time understanding why the jury was not instructed on the effect of voluntary intoxication upon the ability to form specific intent for arson, maliciousness. There can be no good reason not to instruct the jury. It was not strategic. It was the only viable defense.

The fact that counsel did not even attempt for the lesser included offense of property destruction cannot be justified. The district court abused its discretion when it failed to find prejudice for this error.

The bottom line is that the district court and Respondent are both relying upon strategic decisions when there is no record before this Court to determine

that defense counsel's actions in these failures were strategic in any way. It appears that defense counsel's actions were those of an unprepared attorney going through the motion of a trial, rather than well thought out choices.

In the cases in which this court upholds trial counsel's decisions as strategic, there were usually evidentiary hearings where defense counsel explained their strategy and advised the court whether the client was in agreement with the strategy. This case has no record. This Court should remand for an evidentiary hearing.

CONCLUSION

This Court should vacate the judgment of conviction and remand this case for a new trial. Alternatively, this Court should remand this case so that an evidentiary hearing could be heard by the court.

DATED this 19 day of March, 2024.

By: _____

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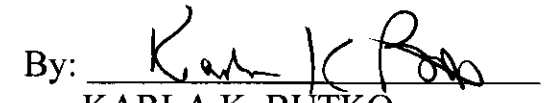
CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, entitled, "APPELLANT'S REPLY 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, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 15 pages and it meets the word and line counts found in the rules.

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. There are 11 typed pages; 1,945 words in this brief and 233 lines of type. The Brief has been prepared in Word Perfect, proportionally spaced type, 14 point Times New Roman type with 2.45 line spacing.

DATED this 14 day of March, 2024.

By: 

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, 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

X E Flex Delivery System of the Nevada Supreme Court

addressed as follows:

E Flex Delivery System of the Nevada Supreme Court

AND

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

DATED this 14th day of March, 2024.

Karla K Butko

KARLA K. BUTKO, ESQ.