IN THE SUPREME COURT OF THE STATE OF NEVADA

BENNETT GRIMES, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 74419

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

JAMIE J. RESCH, ESQ.
Nevada Bar #007154
Resch Law, PLLC dba
Conviction Solutions
2620 Regatta Drive, Suite 102
Las Vegas, Nevada 89128
(702) 483-7360

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar #012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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ROUTING STATEMENT

This appeal is appropriately retained by the Court of Appeals pursuant to NRAP 17(b)(1) because it is a post-conviction appeal that involves a conviction of a Category B felony.

STATEMENT OF THE ISSUE

I. Whether the district court erred by denying Appellant's Petition for Writ of Habeas Corpus.

STATEMENT OF THE CASE

On September 14, 2011, Appellant Bennett Grimes was charged by way of Information as follows: Count 1 – Attempt Murder with Use of a Deadly Weapon in

Violation of Temporary Protective Order (Felony – NRS 200.010, 200.030, 193.330, 193.165, 193.166); Count 2 – Burglary in Violation of Temporary Protective Order (Felony – NRS 205.060, 193.166); and Count 3 – Battery with Use of a Deadly Weapon Constituting Domestic Violence Resulting in Substantial Bodily Harm in Violation of Temporary Protective Order (Felony – NRS 200.481.2e, 193.166). 1 AA 1 – 3. On September 21, 2011, the State filed an Amended Information amending Count 2 to Burglary While in Possession of a Firearm in Violation of a Temporary Protective Order. 1 AA 4 – 6.

A jury trial commenced on October 10, 2012. 1 AA 51. On October 15, 2012, the jury returned a verdict of guilty on all charges. 4 AA 774 – 75.

On February 12, 2013, Grimes was sentenced as follows: on Count 1 to a maximum of 20 years with a minimum parole eligibility of 8 years in the Nevada Department of Corrections (NDOC), plus a consecutive term of a maximum of 15 years with a minimum parole eligibility of 5 years in the NDOC for use of a deadly weapon; on Count 2 to a maximum of 20 years with a minimum parole eligibility of 8 years in the NDOC, to run concurrent to Count 1; and on Count 3 to a maximum of 20 years with a minimum parole eligibility of 8 years in NDOC, to run consecutive to Counts 1 and 2. 4 AA 814 – 15. Grimes received 581 days credit for time served. Id. The District Court entered the Judgment of Conviction on February 21, 2013. Id.

On March 18, 2013, Grimes filed a Notice of Appeal. 4 AA 816 – 19. On February 27, 2014, the Nevada Supreme Court issued an Order of Affirmance. Remittitur issued on March 24, 2014. 5 AA 1024 – 35.

On September 9, 2013, Grimes filed a Motion to Correct Illegal Sentence. 4 AA 820 – 30. On September 23, 2013, the State filed its Opposition. 4 AA 848 – 57. On October 3, 2013, Grimes filed a Reply. 4 AA 869 – 81. The State filed a Sur-Reply on October 3, 2013. 4 AA 863 – 68. The district court heard argument on October 3, 2013 and indicated that a decision would issue via minute order. 4 AA 902. On February 26, 2015, the district court denied Grimes' Motion to Correct Illegal Sentence via minute order and on May 1, 2015, an Order was issued. 4 AA 907 – 08. Grimes then filed a Notice of Appeal. The Nevada Supreme Court affirmed the district court's decision and Remittitur issued on March 25, 2016. 5 AA 1092 – 96.

On February 20, 2015, Grimes filed a pro per Petition for Writ of Habeas Corpus claiming his trial counsel was ineffective. 4 AA 909 – 22. On May 16, 2017, Grimes filed a Supplemental Petition for Writ of Habeas Corpus. 5 AA 929 – 1096. The State filed its Response on July 17, 2017. 5 AA 1097 – 1110. Grimes filed his Reply on August 7, 2017. 5 AA 1111 – 14. The district court heard argument on August 24, 2017 and granted a limited evidentiary hearing. 5 AA 1115 – 21. The district court held the evidentiary hearing on October 5, 2017 and denied the Petition.

6 AA 1138 – 1260. The Findings of Fact, Conclusions of Law and Order was filed on November 20, 2017. 6 AA 1263 – 76. Grimes filed a Notice of Appeal on November 9, 2017 and his Opening Brief on March 13, 2018. The State responds herein.

STATEMENT OF THE FACTS

The charges stem from Grimes' conduct on July 22, 2011. 2 AA 296. Prior to that day, Grimes and the victim, Aneka Grimes, had been married for over six years. 2 AA 382. They separated in 2011 and Aneka obtained a Temporary Protective Order on July 7, 2011. 2 AA 383 – 84. Defendant was served with the Order on July 8, 2011. Id.

On July 22, 2011, Aneka and her mother arrived home from buying a new car. 2 AA 385 – 86. Upon entering Aneka's apartment, Grimes forced the door open behind them and gained entry into the residence. 2 AA 387 – 88. Grimes began arguing with Aneka in an attempt to reconcile their relationship. 2 AA 388 – 89.

While they were arguing, Aneka's mother called her husband, who then called the police. 2 AA 391. Just prior to police arriving, Grimes snapped. 2 AA 397 – 400. He grabbed a steak knife from the kitchen and attacked Aneka. Id. He put her in a headlock and began stabbing her. Id. Grimes stabbed Aneka 20 times in the chest, neck, arms, back, face, and head. 2 AA 358 – 59.

Grimes' attempt to kill Aneka was only thwarted when Las Vegas Metropolitan Police Department Officer Bobby Hoffman saw Grimes attacking Aneka and tackled him to the ground as he was attempting to plunge the knife into Aneka's neck. 2 AA 301 – 07. Officer Hoffman then took Grimes into custody. 2 AA 312.

SUMMARY OF THE ARGUMENT

Grimes claims the district court erred in not granting his Petition for Writ of Habeas Corpus. The district court's Findings of Fact, Conclusions of Law and Order should not be disregarded. The district court complied with the relevant law and issued an order in compliance with NRS 34.830 and consistent with its decision. Further, Grimes has failed to demonstrate any prejudice resulting from the order. Therefore, this Court should not disregard the district court's order. The district court did not err by denying Grimes' Petition for Writ of Habeas Corpus. Trial counsel was not ineffective for not moving to dismiss count 3 at trial because it would have been unsuccessful. Grimes also fails to establish prejudice. Appellate counsel was not deficient for challenging the sentence via a Motion to Correct Illegal Sentence. While counsel certainly could have raised the issue on appeal, counsel gave two persuasive reasons to think that it was a better strategic decision to raise the issue first in district court. Counsel was not deficient for not arguing that a steak knife was not a deadly weapon because Grimes stabbed the victim 21 times and was convicted

of attempted murder. Appellate counsel was not deficient for deciding not to argue that the district court erred in denying Grimes' Motion to Dismiss for Failure to Gather Evidence because it would have been futile. There was no cumulative error as there were no errors. Accordingly, the district court did not err by denying Grimes' Petition for Writ of Habeas Corpus.

ARGUMENT

I. THE DISTRICT COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER SHOULD NOT BE DESREGARDED

Grimes claims that this Court should disregard the district court's Findings of Fact, Conclusions of Law and Order because the district court signed a document submitted by the State with no direction or guidance. AOB 23.

NRS 34.830(1) states that "[a]ny order that finally disposes of a petition, whether or not an evidentiary hearing was held, must contain specific findings of fact and conclusions of law supporting the decision of the court." In Foster v. Sheriff of Carson City, this Court found that even though the "district court's order [was] devoid of any findings of fact and thus [did] not strictly satisfy NRS 34.830(1), the record provide[d] sufficient information from which this court may review the claims" and found that the defendant "fail[ed] to demonstrate prejudice resulting from the order." 390 P.3d 660, 2017 WL 1023853 (2017).

Here, the district court complied with NRS 34.830(1) because the order contained specific findings of fact and conclusions of law supporting its decision.

Further, the district court followed standard Eighth Judicial District Court practice. The district court held argument and ruled based upon the pleadings. The district court then denied the Petition, consistent with the pleadings and ordered the State to prepare the order. The Findings of Fact, Conclusions of Law and Order, which the State presented and the district court signed, was no more than the pleading that was ruled upon, in the form of an order. Thus, the Findings of Fact, Conclusions of Law and Order were consistent with the ruling. The district court had the opportunity to amend anything that was inconsistent with its decision and Grimes could have objected to anything he found inconsistent. However, none of that occurred and the district court signed and entered the order.

Accordingly, the district court complied with the relevant law and issued an order in compliance with NRS 34.830 and consistent with its decision. Further, Grimes has failed to demonstrate any prejudice resulting from the order. Therefore, this Court should not disregard the district court's order.

II. THE DISTRICT COURT DID NOT ERR BY DENYING GRIMES' PETITION FOR WRIT OF HABEAS CORPUS

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel."

Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "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, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel 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).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel 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). This analysis does not mean 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." Id. To be effective, 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).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "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); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "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.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, 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. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

a. The District Court Did Not Err in Finding that Trial Counsel Was Not Ineffective for Not Moving to Dismiss Count 3 at Trial

Grimes argues that trial counsel was deficient for failing to move the court to dismiss Count 3. AOB 35 – 42. However, the district court did not err by denying the Petition because Grimes failed to demonstrate that counsel was deficient.

Grimes claims that it was counsel's understanding that he could not be adjudicated guilty of both Count 1 and Count 3 because they were redundant.[1] AOB 28 – 42. However, Grimes' position is illogical because if that is the case, then counsel was not deficient for failing to move to vacate Count 3 during trial because (1) Grimes had not yet been convicted and such a motion may have been redundant anyway, and (2) counsel was under the reasonable belief that Grimes could not be

[1] The State does not concede that this was actually the state of the law existing at the time, and has previously argued that Jackson v. State, 128 Nev. 598, 291 P.3d 1274 (2012), merely clarified existing law. 4 AA 848 – 57, 863 – 68.

adjudicated of it. At the time of trial, waiting to challenge Count 3 until it became a live issue was a reasonable strategic decision that is now "almost unchallengeable." Dawson, 108 Nev. at 117, 825 P.2d at 596.

If Grimes was correct that the law at the time prevented him from being adjudicated guilty of both Count 1 and 3, then counsel had no reason to raise the issue during trial and could not be ineffective for failing to do so. Nika v. State, 124 Nev. 1272, 1289, 198 P.3d 839, 851 (2008). Alternatively, if Grimes was incorrect and Jackson merely clarified, but did not change, the law, then counsel could not have been ineffective for failing to argue incorrect law. 128 Nev. 598, 291 P.3d 1274. Accordingly, the district court did not err in finding that counsel was not ineffective.

Second, even if Grimes was able to show that counsel was deficient, he could not demonstrate prejudice sufficient to warrant relief. Nothing in the record demonstrates that a motion to dismiss Count 3 would have been successful. Nowhere in the trial transcripts is there even a passing comment to a discussion that was had off the record. The evidence at the evidentiary hearing established that a motion to dismiss during trial would have likely been unsuccessful because even defense counsel believed that the State could put forth both counts to the jury. 6 AA 1253. Further, defense counsel acknowledged that this issue would not have been cognizable until after a jury verdict and after the district court adjudicated Grimes of both Counts 1 and 3. Id. Thus, even if the district court *had* entertained such a

motion, there is nothing to indicate that the motion would have been granted *prior to the jury ever finding Petitioner guilty on any count* other than counsel's statements after the fact. Further still, even if such a motion had been entertained, and even if the district court granted it, the result would have been error under Jackson.

Based on the law Grimes claims was in effect during trial, he cannot demonstrate that counsel was deficient for failing to move to dismiss Count 3 because the decision to wait until it was a live issue was "[w]ithin the range of competence demanded of attorneys in criminal cases." Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975). Accordingly, the district court did not err in denying the Petition.

b. Appellate Counsel Was Not Deficient for Challenging The Sentence Via A Motion to Correct Illegal Sentence

Grimes argues that counsel was deficient for raising a challenge to the sentence in a Motion to Correct Illegal Sentence rather than on appeal. AOB 39 – 42.

There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second

prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314.

While counsel certainly *could have* raised the issue on appeal, counsel gave two persuasive reasons to think that it was a better strategic decision to raise the issue first in district court.

First, counsel was engaged in the "winnowing out" of weaker arguments in favor of those that could have provided more relief. Jones, 463 U.S. at 751-52, 103 S. Ct. at 3313. Each of the grounds raised on appeal could have resulted in a new trial or reversal of Grimes' conviction, while the Jackson issue could have, at most, overturned a portion of Grimes' sentence by vacating Count 3. Given both the professional diligence and competence required on appeal, counsel was justified in

presenting the arguments with the potential to vacate Grimes' entire conviction rather than diluting those arguments, or cutting them entirely, in favor of a complex issue that would have required the vast portion of a fast track brief.

Second, counsel's reasoning that the issue required additional briefing, and the belief that the district court would be best equipped to decide the issue on the first instance in light of arguments already presented during sentencing, was reasonable. Having already heard the arguments of counsel, the district court was readily familiar with the issue and, if the sentence were illegal, could more easily correct it. Further, if counsel was unsuccessful, the denial of the Motion to Correct Illegal Sentence could be, and in fact was, appealed. Therefore, counsel was not deficient in deciding not to include the issue within the limited confines of a fast track brief.

Grimes argues that counsel was deficient for actually raising the issue within a Motion to Correct Illegal Sentence. AOB 39 – 42. A motion to correct illegal sentence is appropriate when challenging the facial illegality of a sentence. Edwards v. State, 112 Nev. 704, 918 P.2d 321, 324 (1996)). The district court's denial of Grimes' Motion, on the merits, does not make counsel ineffective for choosing to present the argument through that vehicle.

Just because the district court denied Grimes' argument on the merits, and this Court held that the district court did not abuse its discretion in doing so, does not

demonstrate either deficiency or prejudice. Given the extensive record created by the Motion to Correct Illegal Sentence, in addition to that created during Appeal 67598, had this Court found Grimes' arguments had merit it could easily have decided so by recognizing Grimes' argument in the Reply To Fast Track Statement and agreeing that facial invalidity was argued in order to reach the substantive merits. Instead, this Court decided to let the district court's decision stand with little to no additional comment.

Appellate counsel was not deficient, and even if appellate counsel were deficient the record indicates that this Court was unlikely to grant Grimes' relief. Thus, Grimes cannot demonstrate prejudice. Accordingly, the district court did not err by denying Grimes' Petition.

c. Counsel Was Not Deficient for Not Arguing that A Steak Knife Was Not A Deadly Weapon when Petitioner Stabbed The Victim 21 Times with One

A "deadly weapon" is "[a]ny instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; or [a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death." NRS 193.165(6)(a)-(b).

Grimes cites to Knight v. State, 116 Nev. 140, 993 P.2d 67, 72 (2000), for the proposition that a steak knife is not a deadly weapon. AOB 43. This argument is preposterous. While a steak knife, without more, might not necessarily be a deadly weapon, here Grimes stabbed the victim 21 times with the weapon and left scars so severe that the district court, at sentencing, stated that the scars remained visible years later:

> I sat up here and watched that woman testify and looked over at her and saw that – just looking at her, not even trying, and I saw the horrible horrendous scars left on her, like, area that you can see just in normal clothing. Horrific scars that she has to live with the rest of her life. I think the girl's lucky that she's alive, if you want my opinion. How many times was she stabbed? … I mean, 21 times. 21 times.

4 AA 806. Further, the jury convicted Petitioner of attempted murder. 4 AA 814 – 15. By definition, the jury must have believed that Grimes was attempting to kill the victim in order to convict him of attempted murder. In that context, anything at all, from a pencil to a pillow, could be considered a deadly weapon.

Trial counsel was not deficient for failing to make a futile argument. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Further, even if counsel were somehow deficient, Grimes cannot demonstrate prejudice because no reasonable juror could have believed both that Grimes attempted to murder the victim with a steak knife and that the steak knife was not, as used, a deadly weapon. Therefore, the district court did not err in denying Grimes' Petition for Writ of Habeas Corpus.

d. Appellate Counsel Was Not Deficient For Deciding Not To Argue That This Court Erroneously Denied Appellant's Motion To Dismiss For Failure To Gather Evidence

Grimes argues that appellate counsel should have argued, during the first appeal, that the district court erred in denying his Motion to Dismiss for Failure to Gather Evidence. AOB 44.

Appealing this issue would have been frivolous, and was appropriately "winnow[ed] out." Jones, 463 U.S. at 751-52, 103 S. Ct. at 3313. Grimes concedes that any DNA or fingerprint evidence was properly preserved, even until trial. AOB 44 – 46. Further, Grimes has not demonstrated that the State had any obligation whatsoever to test the knife for DNA or fingerprints. Grimes does not contend that the State prevented him from testing the knife at any time. Instead, Grimes simply chose not to. Given that Grimes did not test the knife, despite its availability, appellate counsel could not reasonably argue that the State was under any obligation to perform Grimes' discovery for him.

If, however, Grimes is arguing that appellate counsel should have claimed ineffective assistance of counsel in the first appeal, based on Grimes' failure to test the knife, such a claim still fails because an ineffective assistance of counsel claim is not appropriately raised on appeal. Franklin, 110 Nev. at 752, 877 P.2d at 1059. Therefore, such a claim would have been summarily denied, if it were even considered at all.

Finally, the district court did not err in denying the motion in the first instance. A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Were the knife tested, only two outcomes were possible. First, Grimes' DNA and/or fingerprints could have been found on the knife – an outcome not beneficial for Grimes and one that would not have led to a more favorable outcome at trial. Second, the DNA and/or fingerprint test could have been inconclusive and/or could have failed to identify the DNA and/or fingerprint on the knife as Grimes'. In fact, given that Grimes merely received a scratch on his finger, while he stabbed the victim 21 times with the knife, in all probability at least the apparent blood on the knife was the victim's. As such, Grimes fails to demonstrate how testing the knife would have led to a better outcome at trial. Grimes fails to indicate how the Nevada Supreme Court could have found as much given that (1) the knife was available for Grimes to test, (2) the State was under no obligation to test the knife, and (3) the knife was not actually tested. Such a bare assertion is insufficient to warrant relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Therefore, the district court did not err by denying Grimes' Petition.

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III. CUMULATIVE ERROR DOES NOT APPLY BECAUSE THERE WERE NO ERRORS

Grimes asserts a claim of cumulative error in the context of ineffective assistance of counsel. AOB 47 – 49. The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; and it is the State's position that they cannot. However, even if they could be, there was no single instance of ineffective assistance needed to cumulate. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, Grimes' claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Furthermore, any errors that occurred at trial were minimal in quantity and character, and a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

Here, the issue of guilt was not close because Grimes stabbed the victim 21 times in front of numerous people, including a police officer. 2 AA 301 – 07. Additionally, there was no error, so there is nothing to cumulate. While the crimes of which Grimes was convicted are serious, serious crimes of which a defendant is convicted absent error are not sufficient, by themselves, to warrant relief. While

Grimes addresses the fact that the Nevada Supreme Court found some errors on appeal, all errors which the Nevada Supreme Court found were harmless beyond a reasonable doubt and did not affect the integrity of his conviction. Therefore, the district court did not err by denying Grimes' Petition.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's ruling and deny Grimes' appeal.

Dated this 10th day of April, 2018.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Charles W. Thoman*
CHARLES W. THOMAN
Deputy District Attorney
Nevada Bar #012649
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
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)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 4,912 words and 21 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 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.

Dated this 10th day of April, 2018.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Charles W. Thoman*
CHARLES W. THOMAN
Deputy District Attorney
Nevada Bar #012649
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 10th day of April, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

JAMIE J. RESCH, ESQ.
Counsel for Appellant

CHARLES W. THOMAN
Deputy District Attorney

/s/ J. Garcia
Employee, Clark County
District Attorney's Office

CWT/Stephanie Getler/jg