IN THE SUPREME COURT OF THE STATE OF NEVADA

BENNETT GRIMES, Appellant, v. THE STATE OF NEVADA, Respondent.	Electronically Filed Mar 13 2018 04:32 p.m. Elizabeth A. Brown Clerk of Supreme Court SUPREME COURT CASE NO. 74419 DISTRICT COURT CASE NO. C276163

APPELLANT'S OPENING BRIEF

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Appeal from Order Denying Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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RULE 26.1 DISCLOSURE

Pursuant to Rule 26.1, Nevada Rules of Appellate Procedure, the undersigned hereby certifies to the Court as follows:

1. Appellant Bennett Grimes is an individual and there are no corporations, parent or otherwise, or publicly held companies requiring disclosure under Rule 26.1;

2. Appellant Bennett Grimes is represented in this matter by the undersigned and the law firm of which counsel is the owner, Resch Law, PLLC, d/b/a Conviction Solutions. Appellant was represented below at trial and on direct appeal by the Clark County Public Defender and William Gamage, Esq.

DATED this 13th day of March 2018.

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

I. JURISDICTION

This is an appeal from the denial of a post-conviction petition for writ of habeas corpus in State v. Bennett Grimes, Case No. C276163. The written judgment of conviction was filed on February 21, 2013. 4 AA 814. The trial court's order denying post-conviction relief was filed November 20, 2017. 6 AA 1263. A timely notice of appeal was filed on November 2, 2017. 6 AA 1261. This Court has appellate jurisdiction over the instant appeal pursuant to NRS 34.575(1), NRS 34.830, NRS 177.015(1)(b), & NRS 177.015(3).

II. ROUTING STATEMENT (RULE 17)

It appears this matter is presumptively assigned to the Court of Appeals, as it is a post-conviction appeal which arises from a Category B felony. See NRAP 17(b)(1). However, this appeal raises an issue of statewide importance in that it alleges Jackson v. State, 128 Nev. Adv. Op. 55, 291 P.3d 1274 (2012) constitutes new law which is being applied against Appellant in violation of the state and federal Ex Post Facto Clauses. The State previously conceded this is an issue of statewide importance that should be decided by the Nevada Supreme Court by citing NRAP 17(a)(13),

(14). See 5 AA 1056. As such Appellant requests the Nevada Supreme Court retain jurisdiction and hear the merits of this matter.

III. ISSUES PRESENTED FOR REVIEW

A. Whether this Court should entirely disregard the alleged findings of fact and conclusions of law entered below where the trial court declined to make a single finding following an evidentiary hearing other than to deny the petition.

B. Whether trial or appellate counsel were ineffective in handling a redundant count prior to verdict or sentencing and/or failing to challenge the sentence on direct appeal as a violation of the Ex Post Facto Clause.

C. Whether trial counsel was ineffective in failing to argue that a steak knife is not a deadly weapon.

D. Whether appellate counsel was ineffective by failing to challenge the trial court's denial of a motion to dismiss based on failure to gather evidence.

E. Whether the cumulative effect of errors on direct appeal and the ineffectiveness of trial and appellate counsel warrant reversal of Appellant's convictions and sentences.

IV. STATEMENT OF THE CASE

Appellant Bennett Grimes ("Grimes") was charged by information with Count 1- Attempt Murder With use of a Deadly Weapon in Violation of Temporary Protective Order, Count 2- Burglary While in Possession of a Deadly Weapon in Violation of a Temporary Protective Order, and, Count 3- Battery with use of a Deadly Weapon Constituting Domestic Violence Resulting in Substantial Bodily Harm in Violation of Temporary Protective Order, for acts that allegedly occurred on July 22, 2011 at the home of his estranged wife Aneka Grimes. 1 AA 48. A several day trial commenced October 10, 2012. 1 AA 51. At the conclusion of the trial, Grimes was found guilty on all counts. 4 AA 774.

The State sought punishment based on the habitual criminal statute. 4 AA 776. The trial court ultimately imposed substantial sentences, including under the lesser habitual statute. 4 AA 814. A particular focus in this appeal is the sentence imposed on Count Three, which was eight to twenty years under the lesser habitual statute, consecutive to Count One. 4 AA 815.

Grimes filed a notice of appeal from his conviction and sentence. 4 AA 816. In addition to his direct appeal, Grimes also filed a motion to correct illegal sentence with the trial court on September 9, 2013. 4 AA 820. On February 27, 2014, this Court denied relief on all claims raised on direct appeal. 5 AA 1025. On February 26, 2016, this Court affirmed the trial court's denial of the motion to correct illegal sentence. 5 AA 1093.

On February 20, 2015, Grimes filed a proper person petition for writ of habeas corpus with the trial court. 4 AA 909. Counsel was appointed and a supplemental petition was filed on May 16, 2017. 5 AA 929. The trial court held an evidentiary hearing on Ground One of the supplemental petition on October 5, 2017. 6 AA 1138. The trial court denied all claims raised in the post-conviction proceedings, and an order to that effect was entered November 20, 2017. 6 AA 1263. Grimes now appeals from the denial of post-conviction relief.

V. STATEMENT OF FACTS

The facts relevant to this matter are primarily procedural and are somewhat complicated. It may be easiest to understand the overlapping

progression of various stages of the case if matter is organized with those stages grouped, regardless of chronology.

Trial Proceedings

Appellant was charged with stabbing and trying to kill his estranged wife. 1 AA 2. The evidence at trial established that police responded to Aneka Grimes' apartment where they found Appellant holding her in a headlock while repeatedly stabbing her with a steak knife. 2 AA 303-304. Aneka's testimony later established that the steak knife was hers and that Appellant did not have it on him when he entered her apartment. 2 AA 410. Aneka suffered multiple stab wounds but was released from the hospital with pain medication after a short two-day stay. 2 AA 406.

The knife was the subject of a pre-trial request to dismiss because when it was recovered by police, it was covered in blood and apparent fingerprints, yet no forensic testing was done to it. 1 AA 11. The trial court eventually denied the motion. 1 AA 45. The trial testimony ultimately revealed that Appellant's DNA was not found on the knife handle and Aneka's DNA was. 3 AA 632-633.

Post-Verdict and Sentencing Issues

The verdict was returned on October 15, 2012. 4 AA 774. On December 6, 2012, this Court decided Jackson v. State, 128 Nev. Adv. Op. 55, 291 P.3d 1274 (2012). Sentencing was held over two hearings in February, 2013. 4 AA 788. The bulk of the issues presented in this appeal concern the events of this narrow timeframe.

The February 7, 2013, sentencing was attended by Nadia Hojjat from the Public Defender's Office. As part of the defense argument, Ms. Hojjat argued Count Three was redundant and that she was "objecting to adjudication of Count 3 in this case, the battery with use of a deadly weapon constituting domestic violence resulting in substantial bodily harm in violation of a temporary protective order." 4 AA 796. The Court noted: "**You're right. I mean, does the State have any objection to it being dismissed?"** 4 AA 796 (Emphasis Added).

The State responded that an opinion "just came out" and provided a copy of this Court's decision in Jackson. 4 AA 796. The Court continued that it was "not quite sure you can be convicted of both. So I'd like to see

what the case says." 4 AA 797. The trial court judge specifically stated "I don't know that it would be a new law. But I don't know, let me read it first." 4 AA 797. As a result, the matter was continued to February 12. 4 AA 799.

Unfortunately, Ms. Hojjat could not be at the continued sentencing hearing, and it was instead attended by Roger Hillman. Mr. Hillman shallowly noted that the "Supreme Court's said what they've said" regarding Jackson. 4 AA 801. However, he did add that "my understanding is that the case wasn't published until after this case was over with. And I think that that changes things and the fact that it seems to be ex post facto to me." 4 AA 801. Mr. Hillman noted, and the trial court agreed, that he also recalled discussing Count Three merging while the trial was ongoing, but that said discussion was in chambers and there was no record of it. 4 AA 801.

At sentencing, the trial court seemed to reject the idea that Jackson was a new rule. The trial judge stated: "I'm not quite sure this is a new rule, it's not a new rule." 4 AA 802. Mr. Hillman stated "Yeah" and contended

"And in effect what that does, that makes us ineffective in our representations of the truth for Mr. Grimes." 4 AA 802. The State provided some argument that Jackson was not being applied ex post facto. 4 AA 802. Ultimately, Mr. Hillman did not outright move to dismiss Count Three. Instead, the trial court proceeded to sentence Appellant on all counts including Count Three, and, it ran Count Three consecutively to the other counts. 4 AA 812.

Direct Appeal

A timely notice of appeal was filed. 4 AA 816. The direct appeal was handled by Deborah Westbrook of the Public Defender's Office. The direct appeal contained no issues related to the dismissal, redundancy, or potential ex post facto nature of Count Three. 5 AA 962.

Motion to Correct Illegal Sentence

While the direct appeal was being litigated, the Public Defender's Office also filed a Motion to Correct Illegal Sentence on Appellant's behalf. 4 AA 820. The motion included a declaration by Ms. Hojjat concerning possible ineffectiveness regarding how the Jackson issue was dealt with.

This included specific reference to conversations during trial where "All parties agreed that the Defendant could not be adjudicated of both Count 1 and Count 3." 4 AA 822. Ms. Hojjat further contended that Mr. Hillman "objected to the adjudication of Count 3 based on the ex post facto application of Jackson" during the second sentencing hearing. 4 AA 822. The motion went on to argue that Count Three was redundant under the law in effect at the time Appellant committed the offenses, and that Jackson, which eliminated the redundancy doctrine in Nevada, was being applied in violation of the Ex Post Facto Clause. 4 AA 823-824.

The State opposed the motion, primarily arguing that an Ex Post Facto violation claim fell outside the narrow scope of claims which could be raised in a motion to correct illegal sentence. However, the State further contended that Jackson was not new law, and instead was "doctrinal housekeeping long foreshadowed" by this Court's prior decisions. 4 AA 856. The State later filed a supplemental response which, while heavily laced with personal attacks on Grimes' attorneys, continued to assert the Jackson decision was not unforeseeable or unexpected. 4 AA 867.

Argument on the motion was heard October 3, 2013. 4 AA 882. The trial court stated upon calling the case that "it's my position we resolved all of this at the time of sentencing. This is rearguing what we did at the time of sentencing." 4 AA 884. Counsel for Grimes disagreed, and went on to explain why the issue was presented in this motion and not on direct appeal, which were (1) the page limitations of fast track briefing, and (2) because the issue "needed to be preserved in a more proper fashion." 4 AA 888. Ultimately, counsel argued the primary point that "Applying Jackson at all in this case violates ex post facto." 4 AA 896.

The State's position was again that Jackson was not unforeseeable. 4 AA 900. Defense counsel continued to insist that the defense bar was "blindsided" by Jackson, which reversed "25 years" of redundancy caselaw. 4 AA 901. Ultimately, the trial court took the matter under advisement. A written order denying the motion was not issued until May 1, 2015. 4 AA 907. The order did not provide any insight as to the basis for the denial of the motion.

The denial of the motion was also appealed to the Nevada Supreme Court. 5 AA 1036. The State's first and main argument is particularly relevant to the instant appeal, because the State contended the motion was an improper attempt to rehear an issue already heard at the time of sentencing. 5 AA 1062 ("…the district court already considered at the sentencing hearing whether applying Jackson [citation omitted] and adjudicating Grimes guilty of both Counts 1 and 3 would constitute an ex post facto violation." The State further argued the motion to correct illegal sentence could not be used to assert an ex post facto claim. 5 AA 1064.

Ultimately, this Court denied the appeal from the motion to correct illegal sentence on the ground that the arguments fell outside the narrow scope of claims permissible in such a motion. 5 AA 1093.

The Missing Transcript

During the post-conviction proceedings, it came to light that the transcript from the February 7, 2013, sentencing hearing, although certified as complete and accurate, was in fact not so. An amended transcript from that sentencing hearing was filed on September 6, 2017. 5 AA 1123.

The issue with the transcript is that it was not complete: the case was recalled and further proceedings were had, but those proceedings were not originally transcribed. The previously un-transcribed portion of the hearing revealed that Ms. Hojjat had in fact argued to the court and stated her belief that the issue of whether Grimes could be adjudicated on Count 3 was discussed during the trial. 5 AA 1134. The trial court specifically stated "Oh, I'm sure it was, and I'm sure I said that it would be dismissed, okay?" 5 AA 1134. The court went on to state that it could not be held to that "if there's case law that says differently," referring to the Jackson decision. 5 AA 1135. Nonetheless, the trial court judge repeated several times that she did inform the parties during trial that Count 3 would be dismissed as redundant. 5 AA 1135.

Post-Conviction

In May, 2017, a supplemental post-conviction petition was filed that alleged the ineffectiveness of trial and appellate counsel with respect to several issues, including primarily the handling of the ex post facto issue. 5 AA 929. An evidentiary hearing was held on the ex post facto issues on

October 5, 2017. 6 AA 1138. Ms. Hojjat, Mr. Hillman, and Ms. Westbrook all testified as witnesses.

Mr. Hillman testified first, and explained the strategy at trial was that the defense expected Count Three to merge with Count One if Grimes was convicted of both. 6 AA 1145. Mr. Hillman explained that if Grimes was convicted on both counts, he would move at sentencing that Count Three be dismissed. 6 AA 1145. Mr. Hillman recalled a meeting in chambers during the trial wherein the court and State agreed that Count Three would merge with Count One. 6 AA 1147.

The trial judge interrupted during this line of questioning to note: " I mean, Jackson came out, which made it abundantly clear that they did not merge. Are you trying to get at whether there was an agreement?" 6 AA 1148. Mr. Hillman explained the defense did not move to dismiss Count Three during trial because of the belief of all parties that it would merge with Count One. 6 AA 1149.

With respect to the Jackson decision, Mr. Hillman explained that Ms. Hojjat had emailed him prior to the second sentencing with arguments she

wanted him to make. 6 AA 1150. The content of the email was to remind Mr. Hillman to argue that Jackson was new law and applying it to Grimes' case would be an ex post facto violation. 6 AA 1151. Mr. Hillman stated that he *did* argue that Jackson was ex post facto during the sentencing, but that he did not specifically move to dismiss Count Three at sentencing, and that he should have.[1]

The trial judge intervened to note that "Well, he was sentenced on Count 3, so if he asked for it to be dismissed it was clearly denied." 6 AA 1151. Mr. Hillman explored the issue further but the ultimate conclusion remained unchanged: He did use the words "ex post facto" at sentencing but did not specifically request Count Three to be dismissed. 6 AA 1152-1153. The trial court judge is correct also: To the extent this could be read as a challenge to Grimes being sentenced on Count Three, it was denied because the court proceeded to sentence Grimes on that count. 6 AA

[1] There were numerous admissions of ineffectiveness during the evidentiary hearing, which Appellant will track as they are discussed. This was admission #1.

1153.[2] Asked if he felt the issue was properly preserved for appellate review, Mr. Hillman vacillated and ultimately mused "I don't know that I was direct enough about it." 6 AA 1154.

At this point, the trial court again intervened with commentary that suggests the trial court judge did not believe Jackson constituted new law. 6 AA 1154. Mr. Hillman continued that he did in fact believe Jackson was a change in the law that affected cases on a go-forward basis. 6 AA 1155. Mr. Hillman also recalled that Ms. Hojjat did move to dismiss Count Three at the first sentencing hearing. 6 AA 1161. Asked specifically why no action was taken to dismiss Count Three between the time of the verdict and sentencing, Mr. Hillman admitted he should have "and I think that was a mistake."[3]

[2] It is worth noting here: The State has taken the position in these proceedings that the ex post facto issue with respect to Count Three was fully argued, litigated, and thus preserved by Mr. Hillman at the time of sentencing. 5 AA 1061-1062. The State has effectively conceded that this issue was properly preserved for appellate review at the time of sentencing.

[3] Admission of ineffectiveness #2.

Ms. Hojjat then testified, and she generally mirrored Mr. Hillman's testimony concerning the reasons for not requesting a merger prior to verdict. 6 AA 1168-1169. She further specifically documented the conversation in chambers where "everybody" agreed the counts would merge. 6 AA 1170. She also explained the effect of Jackson: that a new case came out now held Grimes could be convicted of both Count One and Count Three. 6 AA 1171.

Ms. Hojjat further explained that she attended the first sentencing, and that she moved to dismiss Count Three at that time based on the ex post facto nature of Jackson. 6 AA 1172. She explained that the trial court wanted to review Jackson, which is why a second sentencing was set. 6 AA 1173. She further explained that she emailed Mr. Hillman to make sure he would argue for dismissal of Count Three on ex post facto grounds. 6 AA 1173. Much later, Ms. Hojjat reviewed the transcript from the second sentencing, and found that Mr. Hillman did not argue the items recommended in the email. 6 AA 1175.

Ms. Hojjat noted that the ex post facto issue did not end up being raised on direct appeal, although she believed it "was a great issue." 6 AA 1176. Ms. Hojjat then provided an explanation that, after post-conviction proceedings were initiated, she realized that one of the transcripts was missing part of her argument from the first sentencing. 6 AA 1177. The trial court appeared surprised by the notion, and Ms. Hojjat explained that when the case was recalled at the first sentencing, although the transcript was certified as complete, it did not include the actual recalled portion of the argument. 6 AA 1179-1180.

It was for this reason that Ms. Hojjat recalled telling appellate counsel that the trial court had acknowledged the discussions in chambers about the dismissal of Count Three, yet there was no record of that discussion. 6 AA 1181. Ms. Hojjat went on to explain that the missing transcript portion did contain agreement by the trial court that Count Three was discussed in chambers and was agreed to be dismissed. 6 AA 1183. Ms. Hojjat explained that she ultimately figured all of this out by reviewing the court minutes, which did reference the recalled hearing. Ms. Hojjat explained

that appellate counsel could have also reviewed the court minutes and detected the missing transcript issue while the direct appeal was ongoing. 6 AA 1184.[4]

Ms. Hojjat explained that she had wanted Mr. Hillman to make ex post facto arguments and detrimental reliance arguments at sentencing. 6 AA 1184. Ms. Hojjat stated that she believed the ex post facto issue was sufficiently raised at sentencing, was preserved for appeal and "should've been appealed." 6 AA 1185.[5]

On cross-examination, there was a lengthy series of questions about whether Jackson was new law and what it meant if it wasn't. Ms. Hojjat repeatedly explained she felt it was new, but that if it wasn't, then she was ineffective to the extent that she advised Grimes that Count Three could ever merge with Count One. 6 AA 1207-1208. Ms. Hojjat stated on redirect that Jackson was in her view "completely unforeseeable." 6 AA 1210.

[4] Admission of ineffectiveness #3.
[5] Admission of ineffectiveness #4.

Finally, Deborah Westbrook testified about her work as the attorney who handled the direct appeal. Ms. Westbrook stated she was well familiar with Jackson because her husband (also a public defender) handled that case. 6 AA 1218. Ms. Westbrook also recalled the email discussed previously, in which Mr. Hillman was advised to make a record of the ex post facto issue and detrimental reliance issue. 6 AA 1218.

In a break from the prior testimony, Ms. Westbrook took the position that Mr. Hillman "conceded the ex post facto issue" at the second sentencing. 6 AA 1219.[6] This concession "made it so that I could not raise ex post facto in the direct appeal." 6 AA 1220.

As to the detrimental reliance issue, Ms. Westbrook explained that she had talked to Ms. Hojjat and was aware of conversations that alluded to a concession during trial that the counts would merge. 6 AA 1221. However, when Ms. Westbrook reviewed the transcripts, she "did not see evidence of any kind of concession by the Court as to that issue." 6 AA 1221. The lack of evidence of the discussion, now known to be the result of

[6] Admission of ineffectiveness #5.

the missing transcript discussed herein, meant that Ms. Westbrook had no basis to argue detrimental reliance on direct appeal. 6 AA 1221-1222.

Based on all of the above, Ms. Westbrook decided the best way to address the ex post facto and detrimental reliance issues was via a motion to correct illegal sentence. 6 AA 1223. Ms. Westbrook stated that she did consider the possibility that such claims were outside the scope of a motion to correct illegal sentence, but ultimately felt that was not the case. 6 AA 1224. She acknowledged that the Nevada Supreme Court ultimately did hold that those claims could not be raised in a motion to correct illegal sentence. 6 AA 1225.

Ms. Westbrook explained that about a month before the post-conviction evidentiary hearing is when she first learned that the transcript from the first sentencing, relied on during the direct appeal, was in fact incomplete. 6 AA 1225. Ms. Westbrook testified that if she had the full and complete transcript at the time of the direct appeal, "I would've been able to argue to the Supreme Court that there were assurances that Count 3

would be dismissed and that we relied on those." 6 AA 1227.[7] Ms. Westbrook reiterated that she was not aware of this missing transcript during the direct appeal and that she instead relied on the certification that it was a complete transcript. 6 AA 1228.

At the close of Ms. Westbrook's testimony, the trial court heard closing arguments from the parties. The relevant concerns are that the trial court noted its belief that it has "no authority to dismiss any charges." 6 AA 1245. The trial court also appeared to suggest it did not believe Jackson was new law. 6 AA 1250. However, there is no way to know what the actual basis was because the trial court made zero findings of fact or conclusions of law. The sum total of the trial court's decision was "[A]t this time the Court is going to deny the petition and the State of Nevada can prepare the order." 6 AA 1259.

Other relevant facts are discussed in the argument section of each claim.

[7] Admission of ineffectiveness #6.

VI. SUMMARY OF ARGUMENT

The transcript from the evidentiary hearing itself reveals the State questioned witnesses or made arguments that this Court's decision in Jackson "merely clarified" existing law at least eleven times. The order denying post-conviction relief, drafted exclusively by the State with no input from Grimes or the trial court, also rests on the same faulty premise. Further, the trial court's comments at the time of sentencing and during the post-conviction evidentiary hearing also reveal that the trial court did not feel that Jackson constituted new law.

However, this Court has repeatedly held, including in a decision issued while the post-conviction evidentiary hearing was underway, that Jackson overruled prior caselaw and thus constituted new law. The trial court erred on this point of law, and the trial court's denial of post-conviction relief cannot exist without that flaw. This Court should apply its prior precedents and readily determine that Jackson constituted new law which would necessarily give rise to the Ex Post Facto inquiry that the trial court refused to consider.

The evidentiary hearing established that trial counsel were, by their own admission, ineffective in failing to properly move to dismiss the redundant charge (Count Three), particularly after the verdict or at the time of sentencing. Further, appellate counsel failed to ensure she had the complete record of proceedings, and failed to raise the Ex Post Facto or detrimental reliance issues on direct appeal. Instead, appellate counsel raised them in a motion to correct illegal sentence, which this Court ultimately held was outside the scope of such a motion.

In summary, due to trial counsel's failure to cogently argue that Count Three be dismissed, appellate counsel's failure to challenge Count Three on direct appeal so the merits of it would be considered, and the trial court's continued rejection of Jackson as new authority, no court has ever squarely considered the question of whether applying Jackson to Grimes' convictions and sentences violated the Ex Post Facto Clause. They do, and this Court should order that Count Three be dismissed.

Grimes also seeks relief on his remaining claims, including that the cumulative effect of all errors of trial and appellate counsel rendered his

convictions and sentences fundamentally unfair. The complete disfunction of trial and appellate counsel's handling of the ex post facto issue resulted in a fundamentally unfair outcome wherein Grimes never received a hearing on the merits of his ex post facto or detrimental reliance claims.

VII. ARGUMENT

Ineffective assistance claims present mixed questions of law and fact and are subject to independent review. State v. Love, 109 Nev. 1136, 1139, 865 P.2d 322, 323 (1993); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102, 1107 (1996). A claim of ineffectiveness of counsel requires a showing that counsel acting for the defendant was ineffective, and that the defendant suffered prejudice as a result – defined as a reasonable probability of a more favorable outcome. Strickland v. Washington, 466 U.S. 668 (1984). To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102 (1996). Appellate

counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). Still, ineffectiveness may be found where counsel presents arguments on appeal while ignoring arguments that were clearly stronger. Suggs v. United States, 513 F.3d 675, 678 (7th Cir. 2008).

These errors deprived Grimes of his rights to Due Process and/or effective assistance of counsel under the United States and Nevada Constitutions and require either that Count Three be dismissed or that the entire conviction and sentence be vacated with the matter remanded for a new trial.

A. This Court should not give the district court's order any deference because the order was prepared by the State with no direction from the district court and was submitted to the district court *ex parte*.

The district court did not draft its own Findings of Fact, Conclusions of Law and Order, but instead signed a document that was submitted by the State with no direction or guidance. The district court made absolutely zero findings of law or fact following the evidentiary hearing. 6 AA 1259.

Under these circumstances, the findings and conclusions are not entitled to any deference.

"Findings of fact prepared by counsel and adopted by the trial court are subject to greater scrutiny than those authored by the trial judge." Alcock v. SBA, 50 F.3d 1456, 1459, n. 2 (9th Cir. 1995). Moreover, the district court's wholesale adoption of the State's proposed order, without any identifiable input by the district court, had long been held inappropriate. See Anderson v. Bessemer City, 470 U.S. 564, 572 (1985) ("We…have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record."); United States v. Marine Bancorporation, Inc., 418 U.S. 602, 615 at n. 13 (1974); United States v. El Paso Natural Gas Co., 376 U.S. 651, 656-57 at n. 4 (1964). Although verbatim adoption is not necessarily fatal to appellate review where the record reveals the basis for the court's findings, the practice of "'simply decid[ing] the case in favor of the plaintiff or the defendant, hav[ing] him prepare the findings of fact and conclusions of law and

sign[ing] them…has been denounced by every court of appeals save one…[District judges should] avoid as far as [they] possibly can simply signing what some lawyer puts under [their] nose[s]. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the court of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case.'" El Paso Gas Co., 376 U.S. at 657 n. 4 (quoting Judge J. Skelly Wright, D.C. Cir., Seminars for New Appt'd U.S. District Judges (1963), p. 166).

This Court has previously criticized lower courts for the exact same failing. Sheriff, Clark County v. Keeney, 106 Nev. 213, 216, 791 P.2d 55 (1990) (District court failed to specify basis for its decision or "expressly state its conclusions"), citing NRS 34.830; Byford v. State, 123 Nev. 67, 70-71, 156 P.3d 691 (2007) (Remanding post-conviction proceeding for further proceedings with instructions, where State unilaterally prepared the dispositive order, the district court should have "either drafted its own

findings of fact and conclusions of law or announced them to the parties with sufficient specificity to provide guidance to the prevailing party in drafting a proposed order").

There is no question here that the lower court provided no rationale for its ruling, and that the State took it upon itself to write a decision completely favorable to itself with no input from Grimes or the court. This is evident from the fact substantial parts of the "order" are simply cut-and-pasted from the State's answer and are posed as arguments, not as findings. See, footnotes: 6 AA 1268-1269. In any event, the trial court did not actually make any of the findings presented in the order submitted by the State.

The most basic requirement of due process of law under the State and Federal Constitutions is notice of an intended action and "an opportunity to be heard at a meaningful time and in a meaningful manner." Kelch v. Director, 107 Nev. 827, 831, 822 P.3d 1094 (1991) (quoting Matthews v. Eldridge, 424 U.S. 319, 333 (1976)). The actions of the State and district court in this case deprived Grimes of any semblance of due

process. As a result, the district court/State's "findings" should be given no deference by this Court. Moreover, as set forth below, the district court/State's findings are clearly erroneous and Grimes is entitled to relief.

B. Trial and appellate counsel were ineffective in handling redundant Count Three and their individual and combined errors regarding that count deprived Grimes of any meaningful opportunity to challenge the count under a redundancy, Ex Post Facto, and/or detrimental reliance theory.

As argued above, the order entered in this matter should be given no deference. The unilaterally drafted order does not even address all of the facts and arguments presented at the evidentiary hearing. If it did, it would be abundantly clear that Grimes is entitled to relief on his claim that Count Three must be dismissed as redundant, a violation of the Ex Post Facto Clause (which itself would be a violation of Grimes' Fifth and Fourteenth Amendment rights), and/or under a detrimental reliance theory.

1. At the time of Grimes' trial, it was undisputed that Count Three was subject to dismissal under this Court's then-existing redundancy framework.

As repeatedly testified to during the evidentiary hearing, the entire defense team believed that Count Three was subject to dismissal under

Nevada's then-existing redundancy law, and, that the State and court had agreed with that proposition during an unrecorded discussion while the trial was ongoing. The trial court later confirmed, as set out in the "missing transcript," that this discussion did in fact occur. 5 AA 1134.

The State/district court's order, again fully prepared by the State, incorrectly states that: "Indeed, reviewing the trial transcripts indicated that *absolutely nowhere on the record* did this Court indicate as much. Nowhere in the trial transcripts is there even a passing comment to a discussion that was had off the record." 6 AA 1269 (Emphasis in original). The State's unilateral order is clearly erroneous as to this critical fact, because the evidence from the evidentiary hearing and trial record overwhelming verify that the parties and court did agree, during trial, that Count Three must be dismissed under then existing precedent. Even in the order, the State continues to argue its case, suggesting that it "does not concede" Count Three was subject to dismissal. 6 AA 1268 at n.1.

The evidence here plainly establishes that the off-the-record meeting occurred and that the court agreed as a result of it that Count Three was

subject to dismissal. The State/district court's order goes on to focus on alleged tactical reasons the defense did not move, during trial, to dismiss Count Three. The order is completely silent as to counsel's failure to so move anytime after the verdict. 6 AA 1165 (Attack on Count Three "was a live issue after he was convicted, after the jury found him guilty"); 6 AA 1192 (Issue live "once the jury reached the verdict…"). Defense counsel collectively had no explanation for not moving to dismiss Count Three between verdict and sentencing other than they thought "we'd just do it at sentencing." 6 AA 1210. That position is further proof that the decision in Jackson was unforeseeable, as defense counsel perceived no urgency to dismiss a count that the trial court and State had already agreed should in fact be dismissed.

Indeed, Count Three was redundant to Count One under this Court's prior decision in Salazar v. State, 119 Nev. 224, 70 P.3d 749 (2003). There, this Court reversed a conviction it found redundant, specifically noting that redundant convictions are those multiple convictions that "as charged, punish the exact same illegal act." Id. at 228. Notably, in opposing the

original motion to correct illegal sentence, the State never argued that Counts One and Three were not redundant to one another. 4 AA 856. It has never been disputed that Counts One and Three purport to punish the exact same act: "stabbing at and into the body of the same Aneka Grimes" with a knife. 4 AA 832.

The trial court's ruling in the missing transcript, that Count Three was to be dismissed, was correct under the law in effect at the time of trial. Therefore, this Court should apply Salazar and find that Count Three was redundant to Count One, and the conviction and sentence for Count Three must be reversed.

2. Application of Jackson to Grimes' case is an Ex Post Facto Clause violation.

The most sensible reading of the State/district court's order denying post-conviction relief is that it did not find any Ex Post Facto violation arising from Jackson, because the State repeatedly urged that Jackson was not unforeseeable and instead was a mere clarification of then-existing law.

This position should have been forcefully rejected by the trial court and because it is wrong as a matter of law, this Court may correct it *de novo*.

As a brief primer, the Ex Post Facto and Due Process clauses of the federal and state constitutions prohibit infliction of "after the fact" laws or judicial decisions in certain circumstances. See U.S. Const. art. I, § 9, cl. 3 (Ex Post Facto Clause); U.S. Const. amend. XIV (Due Process Clause); Nev. Const. art. I, § 15 (Ex Post Facto Clause); Nev. Const. art. 1 § 8, cl. 5 (Due Process Clause). There are four types of Ex Post Facto laws that are constitutionally prohibited: (1) "Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action"; (2) "Every law that aggravates a crime, or makes it greater than it was, when committed"; (3) "Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed"; and (4) "Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender." Calder v. Bull, 3 Dall. 386, 390 (1798).

Because the Ex Post Facto Clause expressly limits legislative powers, it "does not of its own force apply to the Judicial Branch of government." Marks v. United States, 430 U.S. 188, 191 (1977). Nevertheless, both the United States Supreme Court and this Court have held that Ex Post Facto principles also apply to the judiciary through the Due Process Clause of the United States Constitution. Bouie v. Columbia, 378 U.S. 437 (1964); Stevens v. Warden, 114 Nev. 1217, 969 P.2d 945 (1998).

In Stevens, this Court set forth a three-part test for determining when a judicial decision violates Ex Post Facto principles: (1) the decision must have been "unforeseeable"; (2) the decision must have been applied "retroactively"; and (3) the decision must "disadvantage the offender affected by it." Stevens, 114 Nev. at 1221-22. Grimes would submit it cannot be reasonably questioned that Jackson came out after Grimes committed his offenses. As such, application of it to him is "retroactive." Likewise, there is no reasonable debate that Grimes is "disadvantaged" by the application of Jackson: Instead of Count Three being dismissed, it instead resulted in a consecutive eight to twenty year sentence.

The only remaining issue under Stevens is foreseeability. This Court has already held that if a line of cases is overruled, that overruling constitutes an unforeseeable decision for purposes of the Ex Post Facto analysis. Stevens, 114 Nev. at 1121.

While the State's arguments below regarding clarification were certainly clever, they are also entirely at odds with this Court's subsequent rulings that Jackson overruled Salazar and was thus an unforeseeable event under Stevens. A chronological approach may best illustrate this point.

In Jackson, this Court stated that "Consistent with Barton, [117 Nev. 686, 30 P.3d 1103 (2001)], we disapprove of Salazar, Skiba, Albitre, and their 'redundancy' progeny to the extent that they endorse a fact-based 'same conduct' test for determining the permissibility of cumulative punishment." Jackson, 291 P.3d at 1283. The use of "disapprove of" language in the decision is more suggestive of a break from prior precedent than it is that the law is being clarified. The disapproval of Salazar and related cases cannot reasonably be construed as anything other than an instruction to litigants not to rely on those case anymore.

However, to the extent any debate remained about this Court's intent in Jackson, it has been repeatedly made clear since that Jackson overruled the redundancy line of cases. In Byars v. State, 130 Nev. Adv. Op. 85, 336 P.3d 939, 949 (2014) (Emphasis added), this Court held:

> This court has disapproved of the "same conduct" theory, however, specifically mentioning the three cases cited by Byars in support of his argument. Jackson v. State, 128 Nev. ___, 291 P.3d 1274, 1282 (2012) (naming Salazar v. State, 119 Nev. 224, 228, 70 P.3d 749, 751-52 (2003), Skiba v. State, 114 Nev. 612, 616, 959 P.2d 959, 961 (1998), and Albitre v. State, 103 Nev. 281, 283-84, 738 P.2d 1307, 1309 (1987), **and overruling these cases and their progeny**). In light of our prior disapproval, we conclude that Byars' argument in this regard lacks merit.

This Court plainly stated in Byars that Jackson overruled Salazar and its related cases. If that were not enough, during the evidentiary hearing in this matter, this Court released for publication its decision in Sweat v. Eighth Judicial District Court, 133 Nev. Adv. Rep. 76, 403 P.3d 353 (2017). There, this court again repeated, citing Jackson, that the redundancy portion of Salazar "has been overruled. See Jackson, [citation omitted]." Id. at 353 at n. 3.

The State's "clarification" argument, and the district court's reliance upon it, were wrong as a matter of law. This Court may readily so conclude based on the repeated and published holdings that Jackson overruled the redundancy cases. Applying the correct law, this Court should easily find that the overruling of prior precedent was an "unforeseeable" event for purposes of an Ex Post Facto analysis. With that finding, Grimes meets the unforseeability, retroactivity and disadvantage requirements of Stevens. Application of Jackson to Grimes' case as a means of declining to apply Salazar constitutes an Ex Post Facto application of new law to Grimes and thus violates state and federal law as well as due process.

3. Trial counsel properly relied on the State and court's representations during trial that Count Three was redundant to Count One and would ultimately be dismissed in the even of conviction on both counts.

Yet another failing of the State/district court's order is that it really does not contain any findings of fact at all, much less anything specifically directed to the alleged representations by the State that it had agreed Count Three was redundant to Count One during trial. Trial counsel

specifically testified the in-chambers meeting where this was discussed was attended by prosecutors, and that they had no objection that Count Three would merge with Count One in the event of conviction on both. 6 AA 1170. The missing transcript confirms the trial judge's recollection of that outcome. 5 AA 1135. Yet, somehow, the findings of fact make no mention of these events.

This Court should readily find based on the record that not only was redundancy a live issue during Grimes' trial, but that the parties all previously recognized as much. That being the case, the State was bound by its prior agreement that Count Three would merge with Count One, because the defense relied upon that concept in its defense at trial.

Inconsistency of position by the government which impedes the Defendant's defense at trial results constitutes a miscarriage of justice. Siddiqi v. United States, 98 F.3d 1427, 1428 (2nd Cir. 1996). The State is bound by the promises it makes during trial proceedings. Santobello v. New York, 404 U.S. 257 (1971); see also People v. Quartermain, 16 Cal. 4th 600, 619 (1998) (error for State to use Defendant's statement during trial

having previously promised not to). Courts have acknowledged that the principles of Santobello apply whenever a defendant acts to his detriment in reliance upon governmental promises. United States v. Carrillo, 709 F.2d 35, 36 (9th Cir. 1983), United States v. Rodman, 519 F.2d 1058 (1st Cir. 1975).

Appellate counsel specifically testified at the evidentiary hearing that the only reason she did not raise this issue on appeal was that she could find no support for it in the record. 6 AA 1227. But such support **did** exist, it just had apparently not been properly transcribed. This Court should consider the detrimental reliance issue, either as a direct due process claim or in the context of appellate counsel's failure to ensure she was operating with a complete record for review. As argued below, the transcription error and incorrect certification by the reporter are external to the defense and should provide cause and prejudice for this Court to consider the claim that should have been raised on direct appeal as part of this proceeding. 6 AA 1245. Either way, the detrimental reliance issue was a meritorious issue which was not presented on direct review and this Court should easily

conclude that said reliance was consistent with the law in effect at the time of trial and therefore reasonable.

4. The individual and/or collective handling of the above issues constituted ineffective assistance of counsel.

The individual or collective effect of the errors described herein constituted ineffectiveness under Strickland. Unfortunately, even the three attorneys involved with the trial and direct appeal could not seem to agree at the evidentiary hearing on precisely what happened or how Grimes was affected. Still, their testimony establishes the overarching claim here: Grimes was deprived of any meaningful ability to have the merits of his claims concerning Count Three ruled upon by the trial court and Nevada Supreme Court.

It is troubling, for example, that Mr. Hillman was specifically armed with arguments to make at sentencing concerning the Ex Post Facto and detrimental reliance issues and then largely failed, without explanation, to make them. It is likewise troubling that neither of trial counsel sought to summarize on the record the bench conference during which all parties and

the Court agreed Count Three would merge with Count One. Trial counsel also failed to move to dismiss Count Three until after Jackson came out. While this is evidence in and of itself of that decision's unforseeability, effectively functioning counsel would have moved for dismissal, at the least, immediately following the verdict.

The performance on direct review was arguably worse. First, appellate counsel's conclusion that the Ex Post Facto issue was not properly preserved was unreasonable. Ms. Westbrook felt Mr. Hillman had conceded the Ex Post Facto issue, while Mr. Hillman felt he had preserved, at least at some basic level, an objection to Jackson being applied retroactively. There is merit to Mr. Hillman's position, as he *did* assert Jackson as being applied Ex Post Facto, and the trial court *did*, at least implicitly, reject that argument by sentencing Grimes on Count Three. See Richmond v. State, 118 Nev. 924, 59 P.3d 1249, 1254 (2002) (adopting "flexible" approach to determination if issue properly preserved for review). What matters here is Ms. Westbrook and Mr. Hillman cannot both be right: the issue was preserved or it was not. And whoever was wrong operated

ineffectively in depriving Grimes of his ability to assert and ultimately seek Nevada Supreme Court review of his Ex Post Facto claim.

However, there is more. Ms. Westbrook also failed to ensure she had a full and complete transcript and as it would turn out, the "missing transcript" was critically important in that it contained the necessary record to assert Grimes' detrimental reliance claim. The claim was forfeited on direct appeal because there was supposedly no adequate record of it. In truth, that record did exist which is a fact a complete and competent review of the record would have revealed. Grimes alternatively asserts that the missing transcript, to the extent it resulted from counsel's reliance on the court reporter's certification, arose from a fact external to the defense which would overcome application of NRS 34.810 or any other procedural bar, and allow this Court to hear the merits of the detrimental reliance claim as part of the instant appeal.

Finally, the decision to proceed with the Ex Post Facto issue via a motion to correct illegal sentence was also ineffective. The record is crystal clear that the motion, brought under case authority with which appellate

counsel claimed to be exceptionally familiar, asserted a claim that was not ultimately cognizable in such a motion. 6 AA 1224-1225.

The explanation that the motion to correct illegal sentence was necessary due to a lack of issue preservation does not hold water. Appellate counsel would have been aware on September 23, 2013, that the State had taken the position that the Ex Post Facto claim was "fully litigated and determined" at the time of sentencing. 4 AA 850. The direct appeal was decided on February 27, 2014. 5 AA 1025. Once appellate counsel was armed with the State's position that the Ex Post Facto issue was preserved for review, she should have known any "lack of preservation" issue was no longer valid. Appellate counsel could have moved to supplement the direct appeal based on the State's concession that the issue was preserved. See Buschauer v. State, 106 Nev. 890, 804 P.2d 1046 (1990), Schatz v. Devitte, 75 Nev. 124, 335 P.2d 783 (1959). See also NRAP 28(c) (Allowing a reply brief and stating; "[U]nless the court permits, no further briefs may be filed").

Grimes believes the issue was preserved at sentencing and the State's later concession is powerful evidence of that fact. But there is also no

denying the retroactive application of Jackson was discussed at the first sentencing hearing. 4 AA 797. In fact, the entire reason for the continued sentencing was so that the trial court could review Jackson to decide if it was "new law." 4 AA 797. At the continued hearing, the trial court held it was "not a new rule." 4 AA 802. While perhaps a more artful preservation was possible, the bare minimum was met here. Choosing to forgo the issue on direct appeal in favor of a motion to correct illegal sentence completely deprived Grimes of appellate review of the Ex Post Facto issue. And, Grimes has suffered prejudice as a result because, as explained herein, the Ex Post Facto issue must be decided in his favor.

These errors deprived Grimes of meaningful assertion and/or review of his claims concerning Count Three. Those claims have merit, and this Court should find counsel was individually or collectively ineffective and that Grimes was prejudiced as a result by way of his conviction and sentence for Count Three.

C. Trial counsel were ineffective in failing to argue that a steak knife is not a deadly weapon.

The "deadly weapon" used in this matter was a steak knife. The State argued at length during closing that a steak knife is a deadly weapon. 4 AA 705-707. The defense did not address the knife at all during closing. By contrast, during opening statement, the defense suggested that the evidence would show the injuries to the victim "were so superficial that she was discharged from the hospital a day and a half later." 2 AA 294. The trial testimony was in fact that the wounds inflicted were all treated with stiches and staples. 2 AA 380.

As previously explained by the Nevada Supreme Court, "a steak knife is not primarily designed or fitted for use as a weapon." Knight v. State, 116 Nev. 140, 993 P.2d 67, 72 (2000). As such, effective counsel had ample license under which to argue that a steak knife is not a deadly weapon during closing argument. The trial evidence, any particularly the fact any knife wounds were treated with stiches and staples, could have been used to support an argument that the deadly weapon enhancement should have been rejected by the jury. Had this argument been made, there is a

reasonable probability the jury would have rejected one or more of the deadly weapon enhancements, which would have constituted a more favorable outcome. Strickland, 466 U.S. at 687.

D. Appellate counsel was ineffective by failing to challenge the trial court's denial of a motion to dismiss based on failure to gather evidence.

Trial counsel filed a motion to dismiss based on the State's failure to test the knife in this case for either a bloody fingerprint found on the knife, or to test blood on the knife for DNA. 1 AA 10. The motion was subsequently denied. 1 AA 45. There is no question this issue was properly preserved for review by way of these procedural events. However, the denial of the motion was not raised on direct review.

Appellate counsel should have raised the denial of the motion as an issue on appeal because it had a reasonable probability of success. The State defended the motion on grounds that the defense was free to test the knife itself. 1 AA 20. However, as the defense explained, it believed the passage of time would have diminished the accuracy of any later testing. 1 AA 45.

The State also contended that the defense failed to show the fingerprint or DNA results were material evidence. 1 AA 18. But materiality as it pertains to a duty to preserve evidence means the "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479, 490 (1984). Even if the exculpatory value is not apparent, evidence which might be useful to the defense can also be protected from loss or destruction. Illinois v. Fisher, 540 U.S. 544, 548 (2004). This Court takes a slightly more relaxed approach in first considering whether there was a "reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different." Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111 (1998).

Testimony at trial confirmed that fingerprints and blood were visible on the knife, even as of the time of trial. 3 AA 513. The fingerprint was there when the knife was impounded. 3 AA 515. Likewise, the knife was

preserved for DNA testing. 3 AA 519. Therefore, it is clear the fingerprint and DNA evidence were apparent before the passage of time diminished the ability to conduct appropriate testing. Trial counsel contended that the failure to test this evidence at the time of collection, the only time it could in fact be accurately tested for fingerprints, constituted bad faith. 1 AA 13.

There is a reasonable probability this Court would have granted relief on this claim had it been raised on direct appeal. Strickland, 466 U.S. at 687. The knife had blood and bloody fingerprints on it when collected from the crime scene. As the trial attorney properly argued, it was the State's obligation to test this obvious evidence before the passage of time altered its reliability. 1 AA 39. Counsel specifically argued that the State was responsible for disproving a self-defense argument. 1 AA 41. However, the trial court ultimately did not allow the defense to present a self-defense argument; a decision this Court found to be an error on direct review. 5 AA 1028. Had the bad faith issue been raised alongside the self-defense issue on direct appeal, counsel could have explained that the question of bad faith was intertwined with the improper denial of Grimes' right to argue

self-defense. This Court's decision would then have had a reasonable probability of being different, as this Court rejected the self-defense argument solely on the ground it was harmless error. 5 AA 1028.

E. The cumulative effect of errors on direct appeal and the ineffectiveness of trial and appellate counsel warrant reversal of Appellant's convictions and sentences.

On direct appeal, this Court found it was error for Grimes to have been prevented from arguing self-defense, and error for improper testimony on knife wounds to be admitted. 5 AA 1029. This Court also alluded to, or held depending on the reading of the opinion, that it was also error for Grimes not to be advised of a jury note. 5 AA 1030. This Court did consider and reject a cumulative error claim on direct appeal. 5 AA 1033.

However, Grimes now presents this Court with a host of additional errors as a result of the post-conviction proceeding, and argues that their cumulative effect, along with the effect of errors on direct review, require the grant of post-conviction relief and a new trial. This Court has suggested that the cumulative effect of errors, including acts and omissions

by counsel, can combine to render a criminal defendant's trial unfair. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307 (2009); Buffalo v. State, 111 Nev. 1139, 1149, 901 P.2d 647 (1995) (Discussing effect of multiple acts of ineffectiveness by counsel). The Ninth Circuit Court of Appeals has certainly recognized such claims as a matter of federal law. Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). The Ninth Circuit has generally applied the language from Strickland in evaluating cumulative error, and asks if "there is a reasonable probability that, absent the deficiencies, the outcome of the trial might well have been different." Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995).

Here, the cumulative effect of errors related to Count Three has already been discussed at length. Applying the above authorities to those errors, it is plan that the combined actions and inactions of trial and appellate counsel, as a collective whole, deprived Grimes of his ability to have this Court (or any court) review the merits of his redundancy, Ex Post Facto, and detrimental reliance claims. While the arguments to pin blame for these events on individual counsel are set forth earlier herein, there is

also a compelling argument that counsel's combined mishandling of these issues worked to render Grimes' trial fundamentally unfair, i.e. he was denied trial or appellate review of important constitutional claims that would have resulted in the dismissal of Count Three.

In addition, the collective errors from direct appeal also bleed into the claims raised in this petition. Grimes was deprived of his ability to argue self-defense, which was compounded by a lack of testing of the steak knife by the state and a lack of argument that steak knife is not a deadly weapon by the defense. The combined effect of these errors prejudiced Grimes in that as a whole, they made it much more likely he would be convicted of the deadly weapon enhancements. There is a reasonable probability he would not have been so convicted had a comprehensive, constitutionally effective defense been advanced concerning the use of the steak knife.

VIII. CONCLUSION

For all of the reasons stated herein, Grimes requests this Honorable Court grant relief on his claims herein and either order that the conviction and sentence for Count Three be reversed and dismissed with prejudice, or that relief be granted in the form of a new trial on all charges.

DATED this 13th day of March 2018.

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
JAMIE J. RESCH
Attorney for Appellant

RULE 28.2 ATTORNEY CERTIFICATE

1. 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, including 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 upon 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.

2. I further 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 2016 in 14-point font of the Ebrima style.

3. I further certify 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 proportionally spaced, has a typeface of 14 points or more, and contains 9,938 words.

DATED this 13th day of March 2018.

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
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Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 13, 2018. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

STEVEN WOLFSON
Clark County District Attorney
Counsel for Respondent

ADAM P. LAXALT
Nevada Attorney General

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