IN THE SUPREME COURT OF THE STATE OF NEVADA

BENNETT GRIMES, Appellant, vs. THE STATE OF NEVADA, Respondent.	Supreme Court Case No. 74419

APPELLANT'S APPENDIX VOLUME 6 PAGES 1138-1276

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Bennett Grimes, Case No. 74419

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. BENNETT GRIMES, Defendant.	CASE#: C-11-276163-1 DEPT. XII

BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE

THURSDAY, OCTOBER 5, 2017

RECORDER'S TRANSCRIPT OF HEARING:
EVIDENTIARY HEARING
PETITION FOR WRIT OF HABEAS CORPUS [POST-CONVICTION]

APPEARANCES:

For the State: AGNES M. LEXIS, ESQ.
Chief Deputy District Attorney

For the Defendant: JAMIE J. RESCH, ESQ.

RECORDED BY: KRISTINE SANTI, COURT RECORDER

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LAS VEGAS, NEVADA, THURSDAY, OCTOBER 5, 2017, 10:45 A.M.

THE COURT: Good morning.

MR. RESCH: Good morning.

MS. LEXIS: Good morning.

THE COURT: Okay. State versus Bennett Grimes. Mr. Grimes is present; he's in custody. This is on for an evidentiary hearing. Are you ready to proceed?

MR. RESCH: Yes. Thank you.

THE COURT: Okay.

MS. LEXIS: The State is as well. Good morning.

THE COURT: Good morning. Go ahead.

MR. RESCH: All right. Are we excluding the other witnesses?

THE COURT: If you invoke the exclusionary rule.

MR. RESCH: Let's do that.

THE COURT: All right, the exclusionary rule has been invoked. Everyone that's going to be called as a witness can step outside and wait to be called. Who are you going to call first?

MR. RESCH: Roger Hillman.

THE COURT: All right, you can stay in Mr. Hillman.

MR. HILLMAN: Thank you.

THE COURT: And you know we're just going forward on that Count 3 issue.

MR. RESCH: That's all we're going to talk about.

THE COURT: All right. I just want to make sure everyone's clear.

MR. RESCH: This is Chris. He's another attorney interested in –

THE COURT: Okay. Just –

MR. RESCH: – doing post-conviction work, so he's just going to hang out and check it out.

THE COURT: That's fine. I just wanted to make sure he wasn't a witness.

MR. RESCH: No problem.

ROGER HILLMAN

[Having been called as a witness, being first duly sworn, testified as follows:]

THE COURT CLERK: Thank you. Please be seated. Could you –

THE COURT: Good morning.

THE COURT CLERK: – please state and spell –

THE WITNESS: Good morning.

THE COURT CLERK: – your name for the record.

THE WITNESS: Roger, R-o-g-e-r, Hillman, H-i-l-l-m-a-n.

THE COURT CLERK: Thank you.

MR. RESCH: One moment. I'm having trouble finding something.

DIRECT EXAMINATION

BY MR. RESCH:

Q All right, good morning. How are you employed?

A I'm semi-retired right now.

Q I'm sorry. I should have –

A I used to work –

Q I should have realized that. Okay.

A I used to work for the Public Defender's Office.

Q When did you retire?

A May 3rd of 2016.

Q You were an attorney there?

A Yes, I was.

Q So I take it you were licensed in Nevada?

A Yes, I was.

Q And what year were you first licensed?

A 1987.

Q Are you familiar with Bennett Grimes seated next to me?

A Yes, I am.

Q Do you remember handling his trial in October of 2012?

A Yes, I do.

Q Do you recall what the allegations were?

A I remember he was charged with Attempt Murder with Use and also Battery with Use. There might've been a couple other enhancements for Counts 1 and 3. I don't remember what Count 2 was off the top of my head.

Q Okay. Do you recall there were three counts total?

A Yes.

Q All right. So prior to trial, did you identify any legal issues that you felt could be raised concerning Counts 1 and Count 3?

A Well, it was – my understanding was, based upon the nature of the charges, the allegations that were made and the elements of the crimes, that Counts 1 – if he was convicted of Count 3 that it would merge into Count 1 because the elements are – the elements of Count 3 are similar or the same as the elements of Count 1. And I told him. I told Mr. Grimes

that.

MR. RESCH: Okay. And I guess before we proceed we ought to make clear Mr. Grimes is waiving the attorney-client privilege –

THE COURT: Oh, okay.

MR. RESCH: – here today too.

THE COURT: Mr. Grimes –

MR. RESCH: – yes.

THE COURT: – you understand that you are waiving your attorney-client privilege between you and Mr. Hillman and –

MR. RESCH: And Nadia Hojjat and Deborah Westbrook.

THE COURT: Right – the attorneys that represented you in the underlying trial because you have filed this petition; do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And so they're going to be able to talk about things that they normally would not be able to talk about because you filed this petition; do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you discussed that with your lawyer?

THE DEFENDANT: Yes, ma'am.

THE COURT: And that's what you want to do; you want to waive that privilege?

THE DEFENDANT: Correct.

THE COURT: Okay. Go ahead.

MR. RESCH: Thank you.

///

BY MR. RESCH:

Q All right. So you did identify this issue of merger prior to the trial?

A Yes

Q All right. Did you take any steps – any steps prior to the trial to merge or dismiss Count 3 in any way?

A I don't think that we did.

Q Did you have any strategy going into the trial as to how you would be handling Count 3?

A Only if he was convicted of both counts that 3 would merge into 1.

Q And what --

A And he would only be sentenced on one of – or on Count 1 if he was convicted of both.

Q So considering that he might be convicted on both, what was the plan going into the trial for if that happened?

A At sentencing we just would ask that Count 1 merge in – or excuse me – Count 3 merge with Count 1, and that there not be any sentence on that or that it be dismissed.

Q Now do you remember the verdict form in this case?

A Yes, vaguely.

Q All right. Would it help your memory to talk about it if you're able to take a look at it?

A I think I could remember it well enough, but if I needed to I'll ask you.

Q All right, sounds good. Do you recall that it listed all three

counts?

A Yes, it did.

Q Were there any discussions during the trial that you can recall regarding whether or not all three counts should be listed on the verdict form?

A I think Nadia – or Ms. Hojjat and I talked about that, but I don't recall what our conversation was.

Q Do you ever recall discussing the issue of Count 3 being dismissed or merging with Count 1 with the State and/or the Judge during the trial?

A Seems like we spoke about that on several occasions, yes –

Q Okay.

A – in chambers when we were trying to work out jury instructions. And it seemed like the State and us talked about that, but I can't give you specific time or a date when we did.

THE COURT: Okay. But I just want to make sure it's clear. Everyone understands that the law changed between – oh, I don't – there was a case that came out between conviction and sentencing.

MR. RESCH: Of course.

THE COURT: Right?

MR. RESCH: Yeah, we'll –

THE COURT: The *Jackson* case.

MR. RESCH: We'll get to that.

THE COURT: Okay.

MR. RESCH: I understand.

///

BY MR. RESCH:

Q So with regard to this meeting, you think that was something that happened in chambers or would it had been on the record in court?

A I don't know that we made a record of it. I would hope that I would have made a record of what we talked about in chambers after we came out of chambers. I don't think the Judge's chambers was set up to make a record at that time. And I believe I made a record of some things we talked about in chambers, but I don't recall if I talked about the merger or made a record of it or not. I probably did not.

Q Do you recall who the State's representatives were when this issue was discussed?

A Ms. Botelho and Patrick Burns.

Q Was there any agreement amongst the parties or the Court at that time, that you can recall, with regard to how Count 3 would be dealt with?

A Well, my recollection is that we all agreed that it was going to merge into Count 1 if he was found guilty of both.

Q And to your knowledge -- as you sit here today, do you have any knowledge that a record of those discussions was in fact made after they occurred?

A No.

THE COURT: And I'm just going to ask you: why would that even matter?

MR. RESCH: Well – okay.

THE COURT: I mean, let's just say there – I'm trying to figure out what you're getting at because what – so what?

MR. RESCH: Okay. Well –

THE COURT: 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?

MR. RESCH: Well, that's part of the allegation –

THE COURT: Like some kind of, I guess –

MR. RESCH: – in the petition with regard to Count 3 is that –

THE COURT: Okay.

MR. RESCH: – to some extent this was agreed upon. And defense attorneys are allowed to rely on agreements by the State or, you know, that may come up during the trial. And if everybody –

THE COURT: Okay.

MR. RESCH: – agreed, hey, we're going to merge this count, then that informs his strategy –

THE COURT: But everybody can't agree –

MR. RESCH: – of not dealing with it sooner.

THE COURT: – to not comply with the law.

MR. RESCH: Okay, but part of the issue is –

THE COURT: Okay.

MR. RESCH: – at the time of this so-called meeting the law was that it would've merged and, therefore, the question is why not deal with it then; why not change the verdict form? That's ultimately –

THE COURT: Okay.

MR. RESCH: – what we're getting to here, so –

THE COURT: All right. Perfect. Thank you.

MR. RESCH: Thank you.

BY MR. RESCH:

Q Now do you, in fact, recall the ultimate verdict?

A Yes.

Q Okay. And it was guilty on all counts?

A Yes, it was.

Q Do you have any explanation here today for why you didn't move to dismiss Count 3 prior to the verdict or perhaps omit Count 3 from the verdict form?

A I didn't think it was necessary because I believed it was going to merge under any circumstances.

Q And that's based on the agreement you had in chambers with the parties and the Court?

A Partially, and based upon what the law was at the time.

Q Now, to your knowledge, how many times was the matter before the Court for sentencing?

A I think it was two times. I don't – I wasn't present the first time and Ms. Hojjat wasn't present the second time.

Q Okay. So it was on once and continued?

A Yes, it was.

Q Did you, in fact, handle the sentencing on February 12th of 2013?

A If that was the second time, then, yes, I did.

Q Okay. So, yes, now we've alluded to it here, but are you aware of some change in the law between the time of the verdict and the time of the sentencing that would have affected your handling of Count 3?

A Certainly. The Supreme Court said that those counts in this particular case would not merge.

Q Now prior to February 12th, 2013, did you coordinate in any way with anyone else at the Public Defender's Office about how that change in the law would be addressed?

A Yeah. Ms. Hojjat sent me an email regarding that.

MR. RESCH: I have a copy of it here and I'd like to have marked as, I guess, it would be Exhibit A.

THE COURT: Of course. Sure.

MR. RESCH: All right, may I approach?

THE COURT: You may.

MR. RESCH: Thank you.

THE COURT: Any objection to its admission?

MS. LEXIS: No, Your Honor.

THE COURT: Okay. It can be admitted.

MS. LEXIS: Thank you.

MR. RESCH: Wonderful.

[Defense Exhibit 1, Admitted]

BY MR. RESCH:

Q All right. So I'm showing you what's been now marked and admitted as Exhibit 1. Do you recognize that as a copy of the email you received from Nadia?

A Yes.

Q And what was the purpose of the email?

A To suggest arguments that should be made at sentencing

regarding the issue of Count 3 merging with Count 1.

Q And, specifically, did she mention to you about arguing that that would be an ex post facto application of that new law if it were to be applied to Count 3 in Bennett's case?

A Yes.

Q Now at sentencing did you, in fact, make that ex post facto argument that's discussed in this email?

A I believe I did reference it being ex post facto.

Q Okay. Did you move to dismiss Count 3 during the sentencing?

A I didn't.

Q Is there any reason why?

A I should have. I did not do it. No reason.

Q To your knowledge, you feel you did raise the ex post facto argument during that sentencing?

A Yes.

Q Did the Judge make any ruling on it?

A I don't recall.

THE COURT: Well, he was sentenced on Count 3, so if he asked for it to be dismissed it was clearly denied.

MR. RESCH: Okay. I understand.

THE COURT: Right?

MR. RESCH: Just trying to test his knowledge of it, of course.

THE COURT: Okay. Sorry. Sorry.

MR. RESCH: That's fine. I mean ultimately –

THE COURT: You're doing fine, counsel. Sorry.

MR. RESCH: Thank you.

BY MR. RESCH:

Q All right. So sticking with the sentencing on February 12th, is it your recollection that you didn't – you did not move to dismiss Count 3 at that time?

A I don't believe I did.

Q Okay. But you do think you referenced it as being ex post facto application?

A I think I did.

Q If you took a quick look at the sentencing transcript would it refresh your memory –

A Yes, it would.

Q – as to whether you made that argument?

MR. RESCH: All right. May I approach?

THE COURT: You may.

MR. RESCH: Do you want one of these? It's February 12th.

MS. LEXIS: I think I have one. Thank you.

THE WITNESS: Okay.

BY MR. RESCH:

Q Do you see where you used the words ex post facto at all?

A Page 2, line 15.

Q Okay. All right. And so you did say and I'm – it seems to be ex post facto to me; that's what you said?

A Yes, sir.

Q Okay. But you didn't actually move the Court to take any action

based on that?

A No, I didn't.

Q Do you think that you should've?

A Yes, I should.

Q Okay. Just going back to the email, is that in fact what Nadia wanted you to do at that sentencing?

A Yes.

Q Now do you recall anything about the sentence that was actually imposed?

A Yes. I believe he was maxed out on all counts and all counts were run consecutive.

Q Specifically, to your knowledge, was Count 3 run consecutive to Count 1?

A Yes, and to Count 2.

Q And did you – did you make, to your knowledge, any argument at the sentencing – well, let's call it an objection to the fact that Count 3 was run consecutive to Count 1?

A Well, I asked to run – that Count 3 run concurrent with Counts 1 and 2, but I don't know that I objected to it running consecutive.

Q I take it you know who Deborah Westbrook is?

A Yes.

Q Okay. Did you have any conversations with her after the judgment regarding the appellate process?

A I don't recall talking with her very much about the appeal on this case. I suspect she spoke with Ms. Hojjat, since they were on a personal

level more closely associated than I was with Ms. Westbrook.

Q All right. And is it your position, as you sit here today, that the ex post facto issue regarding Count 3 was preserved for review based on the arguments you made at the sentencing?

A I can't say that it was. I don't know that I was direct enough about it. I should've objected to it based on it being ex post facto, instead of just mentioning it. I probably should've moved to dismiss Count 3 immediately after the trial, rather than waiting for the sentencing. That might've solved this problem.

Q And would the change in the law that we discussed have been of any detriment to Mr. Grimes if, in fact, an ex post –

THE COURT: I know you're calling it a change in the law. Are you just assuming it was a change in the law, because it appears to me the Supreme Court just said it didn't violate our redundancy statutes or the double jeopardy clause, right?

MR. RESCH: No, I'm calling it a change in law. The law –

THE COURT: What did it change?

MR. RESCH: – was one thing, and then it changed, and now it's another thing.

THE COURT: What did it change? What did it overrule?

MR. RESCH: The redundancy aspects of double jeopardy law within the State of Nevada.

THE COURT: So it would've had to overrule a case, correct?

MR. RESCH: Well, *Salazar*, I mean, is the sort of –

THE COURT: It overrules, okay.

MR. RESCH: – go-to redundancy case.

THE COURT: Okay.

BY MR. RESCH:

Q Do you follow this discussion?

A Yes.

Q Okay. You're familiar with *Salazar* and the redundancy doctrine, as it existed at the time of the trial?

A Well, I knew what it meant to be in this particular case. Yes.

Q Okay. And it was the change in the law which affected the viability of that doctrine going forward, right?

A It seemed to be that way to me. Yes.

MR. RESCH: Okay. I'll pass the witness at this time.

THE COURT: Thank you.

Cross-examination.

MS. LEXIS: Yes, Your Honor.

CROSS-EXAMINATION

BY MS. LEXIS:

Q Mr. Hillman, you did not handle the initial sentencing date prior to February 12th, 2013; is that right?

A That's correct.

Q Okay. Ms. Hojjat actually appeared before this Court on that prior date; is that right?

A Yes.

Q Okay. And then it was continued based on Ms. Hojjat. Is it your recollection that the sentencing was continued due to Ms. Hojjat raising the

issue of – well, the State raising the issue of *Jackson* and Ms. Hojjat moving to dismiss Count 3?

A Yes.

Q Okay. So in a sense – in a sense that issue had been previously raised and you were here to handle the continuation of the sentencing; is that right?

A Yes.

Q Okay. Is it your testimony here today that something occurred. You – prior to trial, or at least during trial, you were of the understanding that Count 3 would merge with Count 1; is that right?

A Yes.

Q Okay. And from the onset of handling Mr. Grimes' case from beginning to at least the trial point you were of that understanding as to the current state of the law or the state of the law at the time?

A Yes.

Q Okay. And as the Court previously mentioned, after verdict but before sentencing *Jackson vs. State* came out; is that right?

A Yes.

Q Okay. And you testified on direct examination that there were essentially two reasons why you didn't move to dismiss Count 3 or move to omit it from the verdict form. Do you recall what you said on direct examination?

A I don't remember exactly what I said, but –

Q Okay. It wasn't necessary because you thought it would merge?

A Right.

Q Okay. And meaning merge, did you feel at that point that you could move to dismiss Count 3, as you did ultimately after – or prior to sentencing?

A Yes. I think I could've moved to dismissed Count 3 before sentencing.

Q Okay. And were you operating under that assumption throughout the entire trial?

A That thought never occurred to me because I felt the law was well established that it – Count 3 was going to merge with Count 1 no matter what.

Q Okay.

A I did not foresee the Supreme Court changing that.

Q Okay. So, based on your understanding of the state of the law at that time, you made a strategic decision to challenge either the merging or the dismissal of Count 3 at sentencing?

A I wish I thought that well ahead. I think I was just lazy and dropped the ball.

Q Okay. You indicated on direct examination that you should have moved to dismiss Count 3 right after trial. Why do you say that?

A To protect Mr. Grimes' rights to make sure something like this didn't happen.

Q Okay. However, the remedy – or you did ultimately move to dismiss this particular count, Count 3, at sentencing, correct?

A Yes.

Q How would raising it right after trial have better preserved this

issue for Mr. Grimes?

A The law hadn't change right after trial.

Q Okay.

A And I think that all the parties were in agreement that it was going to merge, so our argument to dismiss that count would've been stronger.

Q Okay. But ultimately it was raised at sentencing?

A It was.

Q Okay. And --

THE COURT: So wouldn't that have preserved it for any appellate review, Mr. Hillman?

THE WITNESS: Meaning what, Judge? I don't –

THE COURT: If you moved to dismiss Count 3 at the time of – because we're getting – we're parsing –

THE WITNESS: I see.

THE COURT: You didn't move for it after – I guess we're talking about after the verdict came in and prior to sentencing.

THE WITNESS: Mm-hmm.

THE COURT: But at the time of sentencing you moved to dismiss it. I understand how your – I understand your testimony; that you would've had a stronger argument for the Court to grant it prior to *Jackson* coming out, but wouldn't the – moving to dismiss it at Count 3 – would that not preserve it for appellate purposes?

THE WITNESS: I would think so.

THE COURT: Okay.

MS. LEXIS: Okay. Court's brief indulgence.

BY MS. LEXIS:

Q So the Court made a decision though at sentencing; is that correct?

A Yes.

Q And adjudicated the Defendant guilty of all three counts that he was found guilty of; is that right?

A Yes.

Q Okay. And you did raise that particular issue during sentencing; is that right?

A Yes, I did.

Q Okay. Mr. Hillman, at some point – I mean you didn't have a crystal ball in between – during trial, in between, you know, verdict and sentencing, where you would've been able to foresee this particular clarification of the law, I mean did you?

A No. I had no idea.

Q Okay. And so at the time of – at the time – both before trial, during trial and even in the months leading up to sentencing, you were advising the Defendant of the law, as you understand it?

A Yes.

Q Okay. But you would agree with me, there was no way for you to foresee this particular clarification?

A I don't know if I agree with there's no way. If I had been more up-to-date on what was before the Supreme Court, I might have foreseen it, but I wasn't.

Q Okay. And so --

A And I didn't foresee it.

Q Okay. You were not aware that the *Jackson* case was even being reviewed by the Nevada Supreme Court?

A No, I wasn't.

Q Okay. But certainly your understanding was the current state of the law at that time was that the counts would merge?

A Yes.

Q And you advised him based on your understanding of that?

A Yes.

Q So with that understanding, moving to your strategy, or at least your decision to move to dismiss it at sentencing, would've still been viable; is that right, absent the clarification of the law in *Jackson*?

A We hoped it was. Yes. That's what we did.

MS. LEXIS: I have nothing further. Thank you.

THE COURT: Any redirect?

MR. RESCH: Yes. Thank you.

REDIRECT EXAMINATION

BY MR. RESCH:

Q All right. So I'm a little mixed up. I could've swore on direct you said you did not move to dismiss Count 3 at sentencing, but now it sounds like we're talking about you did?

A I don't remember.

Q Okay. Would it refresh you to take a look at that transcript –

A Sure.

Q – and perhaps you still have it in front of you?

A Sure.

MS. LEXIS: I think that's a misunderstanding.

THE WITNESS: Yeah. I think –

MS. LEXIS: On cross I indicated that Ms. Hojjat had moved to dismiss it –

THE COURT: Oh, okay.

MS. LEXIS: – at the February 7th, 2013, sentencing, which was continued to the February 12th date, which Roger – Mr. Hillman handled.

THE WITNESS: And that's my understanding too. I think when Ms. Botelho said did you move to dismiss, I was thinking Ms. Hojjat and I at some point during the proceedings. I don't recall that I ever specifically asked to dismiss Count 3.

BY MR. RESCH:

Q Okay. So just so we're clear, you didn't but you think maybe Ms. Hojjat did?

A Yes.

Q Okay. Now, as an attorney, do you feel that you're under any obligation to predict when a line of cases will be overruled by the Nevada Supreme Court?

A I do now. I didn't then; although I should've been more up-to-date on what was before the Supreme Court, I suppose.

Q Well, just because it came up, do you – you're familiar with the *Jackson* case, obviously, that changed –

A Yes.

Q – all these things?

A Yes.

Q I mean is it your understanding that that somehow clarified existing law, or do you believe that was, in fact, a new way of doing things?

A Oh, to me, it was a new way of doing things.

Q And with that in mind, was there – I mean when we talk about trial strategy, is there any particular benefit to Mr. Grimes to keep Count 3 around as long as possible?

A Yes. We were hoping that he would be found guilty of Count 3 and not guilty of Count 1.

Q Okay. But when that didn't happen, did that strategy of waiting to do anything about Count 3 still exist?

A Not particularly. I just assumed it was going to merge into Count 1, so I didn't see any need to do anything with it, and I think that was a mistake.

MR. RESCH: All right, no further questions. Thank you.

THE COURT: Any recross?

MS. LEXIS: Just very briefly.

RECROSS EXAMINATION

BY MS. LEXIS:

Q Mr. Hillman, the Battery with the Deadly Weapon Resulting in Substantial Bodily Harm, that carries a penalty of a minimum of 2 years and a maximum of 15 years; is that right?

A I believe so.

Q Okay. The Attempt Murder with Use of a Deadly Weapon, however, carries a penalty of 2 to 20 years as to the Attempt Murder, and

an additional 1 to 20 years concerning the deadly weapon enhancement; is that your understanding?

A Yes.

Q Okay. So when counsel asked you just a little while ago about what would have justified leaving that Count 3 on the verdict form, you indicated that you were hoping that the jury would find him guilty of the charge that carried the lesser penalty, the 2 to 15 years, rather than the Attempt Murder with Use of a Deadly Weapon, which carried a substantially larger potential sentence; is that right?

A Yes.

Q Okay. So that was, in fact, a strategic decision at that time, correct?

A Yes.

Q Okay. As a practicing attorney for many years, are you of the understanding, or at least would you agree with me that Attempt Murder is a more difficult charge to prove, at least for the State, because it carries an intent element?

A Okay. I'll agree with that.

Q Okay. And so, by way of leaving Count 3 alive on the verdict form, you were essentially trying to give the jury an out; is that right?

A Yes, a compromised verdict.

Q Right. If they were say to not, you know, find that there was intent, at least there was something that carried a much lesser penalty for them to adjudicate him or to find him guilty of?

A Yes.

Q Also, concerning Counts 1 and Counts 3, would you agree with me that that particular issue would not have been a cognizable or live issue subject to a motion to dismiss at least after – subject to a motion to dismiss until after he had been adjudicated guilty of both?

A Oh, yeah. Until he'd been adjudicated of both, yes.

Q Okay. So it was not even an issue, technically, that could be raised prior to a jury verdict – or prior to a jury finding him guilty of both and then the State seeking to adjudicate him guilty of both?

A Well, I mean before the trial we could've attacked it in a Writ of Habeas Corpus, but other than that, no.

Q Okay.

THE COURT: How could you have attacked it in a pre-conviction Writ of Habeas Corpus when you can only challenge probable cause?

THE WITNESS: Well, if we could've come up with an argument there was no probable cause for that count, then we could have attacked that count. I don't recall if we filed a Writ of Habeas Corpus or not. I don't recall there being any issues for a writ, but I don't recall.

BY MS. LEXIS:

Q Okay. But certainly as, you know, your handling of the case progressed and as you were going into trial – okay, let's pretend it's like the first day of trial – you were under the belief that it would merge and he could not be adjudicated guilty of both counts?

A Correct.

Q If a jury returned a verdict of guilty as to both counts?

A Correct.

Q And the plan was to challenge it at sentencing?

A Correct.

Q When he would be subject to adjudication by the Court pursuant to the jury's verdict?

A Yes.

Q It was at that time that it became a live issue?

A Oh, I think it was a live issue after he was convicted, after the jury found him guilty.

Q Okay. But would you agree with me that he's pretty much in the same situation, absent you foreseeing a clarification of the law, the challenge was still – the challenge is essentially the same right after he gets convicted by the jury and then up to sentencing –

A I –

Q – absent the change – your foreseeing the change or the clarification of the law?

A No, I disagree. I think that, again, had I filed a motion to dismiss or a motion to merge those counts before the *Jackson* case came out, I think it may have been granted.

Q Okay. But, as a strategic decision, you, Ms. Hojjat proceeded with trial, the way we just discussed; is that right?

A Yes.

MS. LEXIS: Okay. I have nothing further. Thank you.

THE COURT: Thank you very much, Mr. Hillman. Thank you for being here, nice to see you.

THE WITNESS: Good to see you. Do you want the exhibit?

THE COURT: Oh, of course. Of course. Thank you.

THE WITNESS: And I'll return the transcript to counsel.

THE COURT: What does that mean semi-retired? Where are you if you're not –

THE WITNESS: I'm pro –

THE COURT: – fully retired?

THE WITNESS: I'm pro temming in lower level in some of the –

THE COURT: I have seen your name.

THE WITNESS: – Justice Courts and stuff. It's nice not going to work every day.

MR. RESCH: I wouldn't know.

THE COURT: He's got to rub it in.

MS. LEXIS: I know.

Bye, Roger.

THE WITNESS: See you.

MR. RESCH: Thank you.

Well, we're going to do Nadia Hojjat next.

THE COURT: Thank you.

MR. RESCH: Thank you.

NADIA HOJJAT

[Having been called as a witness, being first duly sworn, testified as follows:]

THE COURT CLERK: Thank you. Please be seated. Could you please state and spell your name for the record.

THE WITNESS: Nadia Hojjat, N-a-d-i-a H-o-j-j-a-t.

THE COURT CLERK: Thank you.

DIRECT EXAMINATION

BY MR. RESCH:

Q All right, good morning.

A Good morning.

Q How are you employed?

A I am a public defender at the Clark County Public Defender's Office.

Q How long have you worked there?

A Six years.

Q I take it you're – well, you work there as an attorney?

A Yes.

Q So, all right. You're licensed in Nevada?

A Yes.

Q How long have you been licensed in Nevada?

A Six years.

Q Are you familiar with Bennett Grimes seated next to me?

A Yes.

Q Do you remember handling his trial in October of 2012?

A I do.

Q All right. Do you recall what the allegations against him were?

A I believe it was Attempt Murder with Use of a Deadly Weapon, Burglary with Use of a Deadly Weapon and Battery Resulting in Substantial Bodily Harm with Use of a Deadly Weapon, all of them in violation of a TPO, I think.

Q Okay. And so there were three counts total?

A Yes.

Q Focusing on Count 3 among those, did you take any steps prior to the trial to dismiss Count 3?

A I did not.

Q Did you have any strategy going into the trial as to how you were going to handle Count 3?

A It was my understanding under the law that Count 3 needed to be dismissed because – well, okay, let me back up.

Q Sure.

A My understanding was that Count 1 and Count 3 could not both be adjudicated, and so the strategy was we were – which if he was convicted of both, Count 3 needed to be dismissed. If Count 1 was acquitted, then Count 3 would stand. And so that was our understanding of the law; that was what we advised him.

Q Okay. Now is there an element to this where there was some advantage to be had by having all three counts be presented to the jury?

A I don't remember.

Q Okay.

A Like I don't remember that there was an advantage to presenting all three counts. No.

Q Do you recall the verdict form in this case?

A Yes.

Q Do you recall that it listed all three counts?

A Oh, wait. Okay. I think maybe I do remember.

Q All right. Okay, tell us.

A I think it might've been that we wanted the jury to acquit on Count 1 and convict on Count 3.

Q Okay.

A I think the point was to not – we didn't want them to convict on Count 3, obviously, but I think that – I think we wanted, if they were inclined to convict on something, to convict on a lesser count, if that makes sense.

Q Sure. And fair to say, Attempt Murder was the most serious charge he was facing?

A Yes.

Q Nonetheless, were there any discussions during the trial regarding Count 3 that you can recall between the parties and the Court?

A Yes.

Q Okay. Can you explain that to us?

A Yes. So I remember we were in chambers because jury instructions were settled in chambers before we came out on the record and made our records, and I remember the conversation was whether we were going to put Count 3 as a lesser included of Count 1. And so, basically, it would've been like all of the Attempt Murder and the potential lessers and then the Battery and the potential lessers, because our understanding of the law was that the Battery at that time was a lesser included of the Attempt Murder if it was – you know, the injury happened, but it wasn't with the intent to murder. And so the discussion was: are we going to have all of these things under Count 1 as just one really, really long Count 1 with a whole bunch of different options, or are we going to have them as two

separate counts with the understanding that he can't be adjudicated of both counts and Count 3 will just be dismissed, if he's convicted.

Q Okay. And so what was the discussion about in chambers?

A That was the discussion in chambers.

Q Oh, okay.

A That was – like we were all trying to decide how we wanted the verdict form to look and whether we wanted everything to be like a long Count 1. Like that was the conversation we were having in chambers.

Q Do you recall any acknowledgment by the Court or by the State that, in fact, Count 3 would merge into Count 1?

A Yes, absolutely. Everybody – like, my recollection is everybody was in agreement that these two merged; he couldn't be adjudicated of both. And that's why the conversation we were trying to have was figuring out how to present it to the jury in the least confusing manner with the understanding that he could never be adjudicated of both, but they needed to have the option of convicting him of the Battery and not the Attempt Murder, but if he was convicted of both, then the Battery would go away.

Q Do you recall who the State's representatives were during this meeting?

A Agnes – at the time she was Botelho – Agnes Botelho and Patrick Burns.

Q Was there any objection by the State to the concept that Count 3 would somehow merge with Count 1?

A I don't remember an objection. No.

Q Now, to your knowledge, prior to the verdict, was any record

made of this discussion that took place in chambers?

A No.

Q Was there –

A And I think it was because we were all on the same page. I just didn't think that I needed to make a record because there was no – you know, I made a record about everything that there was a dispute over or everything that there was some sort of disagreement or a potential – you know what I mean? Anything that had like an actual – everybody wasn't in complete agreement over. But because everybody was in complete agreement I didn't think I needed to make a record, I guess.

Q Okay. Do you recall the ultimate verdict?

A Yes. He was convicted of all three counts.

Q Now, to your knowledge, how many times was the matter before the Court for sentencing?

A I remember two sentencing dates.

Q Do you recall handling the first such date on February 7th of 2013?

A Yes.

Q Are you aware of a change in the applicable law that you can recall between the time of the verdict and the sentencing that would've affected Mr. Grimes' case?

A Yes. A new case came out.

Q Can you explain what you recall about it?

A So the old case law was, again, everything that I was discussing, which was that these two counts, he couldn't be adjudicated of both for the same action. I mean, obviously, if it was two completely different actions

that's a different conversation, but here it was the same action. He couldn't be adjudicated of both. The Battery would have to – Count 3 would have to be – just completely go away if he was adjudicated of Count 1.

Between trial and sentencing this new case came out, and I want to say the case is *Jackson*, that said that now he could be adjudicated of both. And so the State showed up on the morning of sentencing with the case and provided me with a copy of the case, and then I moved to dismiss Count 3 and then the case started being discussed.

Q All right. So this is on February 7th of 2013?

A Yes.

Q And you're telling us you moved at that time to dismiss Count 3?

A I did, yes.

Q What was the basis for that motion?

A I mean the basis for that motion was the understanding – first of all, the applicable law at the time that we went to trial was that he could not be convicted of both counts and so I didn't – to me, *Jackson* was irrelevant because it was ex post facto, which is why I still believe that I had the right to move to dismiss Count 3, because the law at the time we went to trial is the law that should apply to the Defendant. So I moved to dismiss Count 3. And then also we had all agreed. Everybody had discussed and the Court had told us and we had been assured that Count 3 was going to be dismissed. He was not going to be adjudicated of Count 3. So I believe that I was in the right to move to dismiss Count 3.

Q Do you recall if the Court granted the motion at that time?

A No. The Court wanted the chance to read the *Jackson* decision

and so the sentencing date was passed.

Q Is that how we ended up with a second sentencing date?

A Yes.

Q Were you able to be at that second sentencing date?

A I was not. I think I was in trial at the time, so I couldn't make it to the second sentencing date.

Q Okay. And Mr. Hillman handled that second sentencing date?

A Yes.

Q Did you arm him with any knowledge or arguments that you wanted him to make prior to the second sentencing date?

A I did. I sent him the arguments that I believed needed to be made in order to make our record very, very clear that we believed that Mr. Grimes was entitled to have Count 3 dismissed. And because I believed that it was an ex post facto issue, I believed that it was a federal issue as well, and so I wanted him to make a record and also federalize it so that we were clear we believed this count needed to be dismissed and all the reasons why we needed it to be dismissed.

MR. RESCH: Do we have our exhibit?

THE COURT: Of course.

MR. RESCH: May I approach, or may you hand that to her, one or the other?

THE COURT: Of course.

MR. RESCH: Thank you.

THE WITNESS: Thank you, Your Honor.

THE COURT: You bet.

BY MR. RESCH:

Q All right. So you have our Exhibit 1 in front of you?

A Yes.

Q Is that the email that you sent Roger with regard to what you wanted him to do at that sentencing?

A This is the relevant portion of that email. Yes.

Q Okay. And again, that was to argue that it was an ex post facto violation?

A Yes. I believed it was ex post facto and also that we had relied on representations from both opposing counsel and the Court that it was going to be dismissed. And so I believed it was ex post facto and also fundamentally unfair and a due process violation given our reliance and that – I mean, realistically, the final step being that we had relied on it and we had also advised Mr. Grimes on it. We had advised him numerous times that he couldn't be adjudicated of that count. And so my final thing was it's a violation of his rights under the Sixth Amendment if we've been advising him incorrectly this whole time essentially.

Q Now when you say relied on it, are you talking about relying on the discussion in chambers where everybody agreed that Count 3 would merge with Count 1?

A Yes.

Q Did you eventually review a transcript of Mr. Hillman's argument on February 12th?

A Eventually, yes.

Q Do you ever have occasion to talk to him about the things that he

argued on February 12th?

A I did not talk to him about it. I didn't.

Q Do you have any knowledge that he, in fact, perhaps did not argue some of things that you recommended in your email?

A Yes. Yeah, he didn't.

Q Did you ever talk to him about why he neglected to make those arguments?

A I did not. I didn't feel like it was my place to kind of scold the senior attorney, I guess.

Q Sure. But, fair to say, there were some arguments you wanted to make with regard to ex post facto and they didn't get made?

A Yes.

Q Was there an appeal from the Judgment of Conviction?

A There was.

Q Do you remember who handled that?

A It started with David Westbrook and then – I don't know that he actually filed anything. I think very soon after he was assigned the appeal he was transferred over to the sexual assault unit and Deborah Westbrook became the appellate attorney on the case.

Q Are you familiar with the issues that were raised on direct appeal?

A I am.

Q To your knowledge, was an ex post facto challenge to Count 3 raised on direct appeal?

A No.

Q That is to say it was not raised?

A It was not raised.

Q Okay. Do you have any – did you have any input into the decision as to what issues would be raised on direct appeal?

A I did not.

Q As the trial attorney, would it have been your preference that the ex post facto issue be raised on direct appeal?

A Absolutely. I thought it was a great issue. Obviously, I sent an entire email about it.

Q Do you have any knowledge as to the reasons it was not raised on direct appeal?

A I have after the fact been told. I mean, to be totally honest, I actually didn't know it wasn't raised until after the decision came out, and then I was confused why the decision didn't include it and then –

Q The decision on Mr. Grimes' direct appeal?

A Yes, the – like the Nevada Supreme Court's decision. It was only after the decision came out that I found out that ex post facto was not raised.

Q What did you do when you learned that?

A I mean I was taken back.

Q All right. Let's shift topics a little bit. Did you at some point become aware that there was a potential error with regard to one of the transcripts in this case?

A Yes.

Q And can you explain how you discovered that?

A Sure. After this hearing was set, you reached out to me and you

asked me to review notes because I was going to have to testify. And so I was going through Odyssey looking at the court minutes and I saw that the February 7th date said that I had recalled the case, and that immediately stood out to me because I remember being told that I didn't make a good detrimental reliance record. And that was shocking to me because I had thought that I had made a detrimental reliance record. And so as soon as I saw that the case was recalled, I realized what must've happened, and so then I reached out to you and I said there's a second transcript out there. Because I read the first transcript and it wasn't in there and I was confused, and so I reached out to you and I said there's a second transcript and then –

Q This was with regard to your appearance at the February 7th, 2013, sentencing?

A Yes.

MR. RESCH: All right, I have one more exhibit, 2. May I approach and –

THE COURT: Of course.

MR. RESCH: Thank you.

THE COURT: Of course.

[Off-record colloquy between the Court and clerk]

THE COURT: That's okay. We did numbers instead of letters, just so you know.

MS. LEXIS: Okay.

MR. RESCH: It's okay. I'll just --

THE COURT: So sorry about that.

MS. LEXIS: Thank you.

THE COURT: So it's Number 2?

THE COURT CLERK: Yes, Your Honor.

MR. RESCH: Thank you.

THE WITNESS: Thank you.

BY MR. RESCH:

Q All right, so we've handed you what's been marked as Exhibit Number 2. Do you recognize that as a copy of the amended transcript from the hearing that you handled on February 7th, 2013?

A Yes.

Q Have you had occasion to read that, either now or prior to court?

A I have prior to court. Yes.

Q Does Exhibit 2 fully and fairly set forth the court proceedings of February 7th, 2013, including the previously omitted portion?

A Yes.

MR. RESCH: I'll offer Exhibit 2 into evidence.

THE COURT: What are you talking about? There was a portion of the transcript that was omitted?

THE WITNESS: Yes.

THE COURT: So the entire sentencing hearing transcript was not together?

THE WITNESS: So what happened was –

If I can answer.

MR. RESCH: Okay, feel free to explain. Sure.

THE WITNESS: If I can explain. So what happened was I showed up to the first sentencing hearing.

THE COURT: Right.

THE WITNESS: The case was called. We made some records. Your Honor passed it because you wanted a chance to read *Jackson*.

THE COURT: Sure.

THE WITNESS: I, apparently, ten minutes later asked to recall the case to –

THE COURT: On February 7th?

THE WITNESS: On February 7th.

THE COURT: Okay.

THE WITNESS: -- to say some more things.

THE COURT: Okay.

THE WITNESS: When the transcript was produced and provided to our appellate attorneys the recall was never produced. My appellate attorneys never had the second part where I recalled it and said a bunch of other stuff. So my appellate attorneys were under the impression – they never knew that I said these other things and I made this other record. We didn't find out until this hearing was set and Mr. Resch reached out to me and asked me to review the notes and I'm reading Odyssey and I see that it says the case was recalled. And because I'd read the transcript, I immediately knew that the recall was not in the transcript, so I reached out to him and I said something is missing. And then he reached out to Your Honor's court recorder and Your Honor's court recorder produced an amended that now has the second part that my appellate attorneys never saw.

THE COURT: Okay. Thank you.

MR. RESCH: May Exhibit 2 be admitted at this time.

MS. LEXIS: No objection.

THE COURT: Of course. It's admitted.

[Defense Exhibit 2, Admitted]

THE COURT: They couldn't read that it said case was recalled?

MR. RESCH: Okay. That –

THE COURT: I'm just wondering.

MR. RESCH: That's what we're here to talk about.

THE COURT: It says case recalled?

THE WITNESS: The transcript does not. You would have to have gone into Odyssey and looked for the minutes in Odyssey to see the case recalled. The transcript just ended. It said proceeding concluded at 9:50 a.m. and nothing else, and then it certified that it was a complete copy of the transcript. The only reason I found it is because I was asked to review the notes, so I went back into the minutes in Odyssey and then I saw case recalled. So they never knew.

THE COURT: Okay.

THE WITNESS: They were under the impression they had the full transcript.

THE COURT: It was certified as a complete transcript.

THE WITNESS: It was certified as a complete transcript.

THE COURT: Okay.

THE COURT RECORDER: Judge, whoever typed it didn't –

THE COURT: That –

THE COURT RECORDER: – type the second part.

THE COURT: That's okay.

BY MR. RESCH:

Q Okay. And just – I mean it's not just looking at the minutes. You were there and you recall making arguments that, for whatever reason, you didn't see in the transcript?

A I was there. Yes. And I remember telling my appellate attorney, it was like I swear I talked about this. Like the judge said on the record that she remembers this conversation – that she's sure this conversation in chambers happened. I don't think she said she remembered, but I remember having a conversation with the judge in which the Court said, I'm sure that did happen; that sounds right; yes, I'm sure I said that. And they kept telling me that's not in the transcript.

Q Okay. Well –

THE COURT: Oh, my goodness.

BY MR. RESCH:

Q All right, let's not spoil the surprise. So referencing page 12 of the transcript, are there portions of the now produced missing part which are relevant to the issue of Count 3, being ex post facto, in your view as the trial attorney?

A Yes, absolutely. Page 12 –

Q Could you explain?

A Starting on line 11 of page 12 was not in the original transcript. It's – what it is – so the original transcript, line 10, proceedings concluded at 9:50 a.m., and then it was certified as complete.

MR. RESCH: I'm sorry. And I don't mean to interrupt.

THE WITNESS: Oh, sorry.

MR. RESCH: Does the Court want a copy to follow along?

THE COURT: Do you have it? That would be great.

MR. RESCH: Yeah.

THE COURT: Thank you. Do you mind?

MR. RESCH: No.

MS. LEXIS: No.

THE COURT: Okay, thank you. Thank you very much.

MR. RESCH: Thank you.

THE WITNESS: So page –

MR. RESCH: All right, please continue.

THE WITNESS: So page 12, line 10, proceedings concluded at 9:50 a.m., and that was all –

THE COURT: Page 10?

THE WITNESS: Page 12 –

THE COURT: Okay.

THE WITNESS: – line 10.

THE COURT: All right.

THE WITNESS: It says proceedings –

THE COURT: Okay.

THE WITNESS: – concluded at 9:50 a.m.

THE COURT: Oh, and then recalled.

THE WITNESS: And that was the end. The original transcript that was the end and then it said certification that it was a complete transcript. It was only when I reached out to Mr. Resch and then Mr. Resch reached out

the court recorder, that the court recorder said, you know what, there is something else and this amended was produced. So everything after line 10 is now the new amended that was just produced a couple of weeks ago. It's brand new.

THE COURT: Okay.

THE WITNESS: And what this shows is that I did, in fact, say, I believe we had this conversation. I don't know whether it was on the record or in chambers, but I believe we had this conversation. And the Court said, line 23, I'm sure it was; I'm sure that it would've been dismissed; okay. So it was all of this – what I had been telling my appellate attorneys, which is that we had this conversation in chambers and the Court assured us this count was going to be dismissed. It just never made it into the transcript, for some reason.

BY MR. RESCH:

Q All right. Now to your knowledge of appellate proceedings –

A Mm-hmm.

Q – you have a general understanding. Well, tell us; that issues have to be preserved. There's no ability to really go outside the record for direct appeal?

A Right, yes. Yes.

Q Okay.

A I understand that I needed to have said something down here in the lower court. I needed something in the record in the lower court for the appellate attorney to be able to file the appeal on the issue.

Q All right. And up until a couple weeks ago this important portion

where you made these arguments concerning Count 3 wasn't available to anyone, including the appellate attorneys?

A Right. I mean I think I made the ex post facto argument earlier, but this whole conversation of me saying I believe we discussed this; I'm not sure whether it was on the record, but I think we discussed it and the Court saying I'm sure it was; I'm sure we did say it was going to be dismissed, that was not available to the appellate attorneys.

Q Although, to be fair, Ms. Westbrook could've reviewed the court minutes, just like you did, and detected this issue?

A I suppose so.

Q Now is the argument that you wanted Mr. Hillman to advance at the continued sentencing consistent with what you argued to the Court on February 7th, 2013?

A What I wanted him to say on –

Q Yes.

A Yes. I mean what I said on February 7th is ex post facto and we detrimentally relied, and that's what I wanted him to continue saying at his sentencing date, this is ex post facto and we detrimentally relied.

Q To your knowledge, did he cogently make either of those arguments?

A Not really.

Q As the trial attorney on the case, do you feel the argument that you advanced on February 7th of 2013 would have been sufficient to preserve for appellate review issues concerning Count 3 an ex post facto application?

A I thought my record was sufficient. I thought that I said the words ex post facto. I said this is ex post facto. I thought I made the record. Yes.

Q All right.

A I thought that it should've been appealed.

MR. RESCH: All right, I'll pass the witness at this time. Thank you.

THE COURT: Cross.

MS. LEXIS: Yes, Your Honor

CROSS-EXAMINATION

BY MS. LEXIS:

Q Hi.

A Hi.

Q Ms. Hojjat, would you agree with me that at least in terms of leaving Count 3 and Count 1 on the verdict form that was a strategic decision by yourself and Mr. Hillman?

A What do you mean?

Q Okay. You were given the option, basically two options, if I understand you correctly, or at least your testimony on direct examination. When we were in the back discussing jury instructions and discussing this particular issue, as you testified to, my understanding, at least from your testimony, is that you had two options, right? Option number one was ask the Court to essentially list the Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm in Violation of TPO as a lesser included of Count 1, correct?

A Yes.

Q Okay. So that's one choice?

A Yes.

Q The second option was to leave Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm in Violation of TPO on the verdict form, correct?

A As Count 3.

Q As Count 3.

A It was always going to be on the verdict form no matter what. It was just whether it was going to be underneath the Attempt Murder –

Q Okay.

A – as Count 1's lesser included or whether it would be its own separate Count 3.

Q Right, okay.

A Yes.

Q And so weighing those two options, right, you and Mr. Hillman decided to leave it as a separate Count 3, correct?

A I mean, to be totally honest, no, like we weren't weighing options. It was kind of, the conversation in the back was: is this just going to be really confusing for the jury to figure out what's going on? Like, and it was the conversation we were all having. It wasn't – like me and Mr. Hillman never discussed that. We never had our own private conversation about it. We never like – it wasn't, like, a let's talk this out, let's huddle, let's think what we should do. It was, literally, we were in the back, it came up during conversation with the Court and all the parties and everybody was kind of,

like, it's going to be really confusing because it's going to be a really long Count 1, so let's just leave them as two separate counts.

Q Okay. However, you just testified on direct examination, however though, that you wanted to leave Count 3 available as an option because you wanted the jury to have the option of convicting Mr. Grimes of the lesser offense of Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm in Violation of TPO, correct?

A Right. To clarify, I was asked why I didn't move to dismiss the count pretrial. I wanted a Battery on the verdict form somewhere, absolutely. I didn't really care where it was. My point was: I didn't move to dismiss it to just have it completely gone, because I wanted them to have that option somewhere on the verdict form.

Q Okay.

A Yeah.

Q And so certainly though, a decision, or at least you and Mr. Hillman, or perhaps all parties, decided to move – ultimately that was your choice though. You and Mr. Hillman's choice, whether you would request that that be listed as a lesser included of Count 1 or as a separate charge, correct?

A We just kind of were – like, yeah, it just didn't seem like a big deal. We just didn't really –

Q Okay, but my –

A – think it through, I guess.

Q – question is: ultimately the decision was made to leave Count 3 as a separate charge?

A Yes.

Q Okay. And you testified on direct examination that you, perhaps Mr. Hillman as well, wanted to give the jury the option of convicting on a lesser count. Because you would agree with me that Battery with a Deadly Weapon Resulting in Substantial Bodily Harm carries less of a penalty compared to the Attempt Murder with Use of a Deadly Weapon in Violation of TPO, correct?

A I agree, it carries a lesser penalty. Yes.

Q Okay. All right, so you wanted the jury to convict, if they were going to convict, of the lesser Count 3, correct?

A Absolutely. I mean we wanted the jury to acquit Count 1. That was our number one priority.

Q Acquit Count 1, okay.

A Yes.

Q And so ultimately that decision was made to leave Count 3 as is, as a separate count, correct, for the reasons we've already discussed?

A Yes.

Q Okay. Would you not agree with me that that is a strategic decision, at least in terms of considering what you want the jury to do, finding the Defendant guilty, if they were going to find him guilty, at least of the lesser count, as opposed to the top charge, as we call it?

A I guess here's the thing. Here's where like I'm – I agree with you – like, no, okay. I don't think it was a strategy decision for me personally. Like I – there was no strategy involved in whether we're going to put it as a lesser of Count 1 or as Count 3. Like, I completely disagree. That was not

strategy. That was just – like, we didn't think it made difference. We were indifferent to it almost. You know what I mean? It was literally a conversation of is this going to confuse the jury or is it just too long? Yes. It was a strategy decision not to move to dismiss the Battery and not have it on the verdict form at all. To just have the options of Attempt Murder and Burglary, that was a strategy decision. I do agree with you on that. But I think you're – you know what I mean? I think the two issues are getting mixed. They're two different issues for me.

Q So you're saying that it wasn't a strategy – you didn't want the jury to convict him of the lesser included; is that what you're saying?

A What I'm saying is I wanted Battery on the form somewhere. That was a strategy decision. Where Battery –

Q Okay. And it was, right?

A Where –

Q It was actually placed as Count 3, correct?

A Yes. That I agree with you –

Q All right, so at least that part –

A – was a strategy decision.

Q – you can agree me.

A Yes.

Q You just said that was part of the strategy –

A That part, but you –

Q – to have it on the verdict form someway, somehow?

A Someway, somehow, yes, absolutely.

Q Which it was?

A Yes. That was a strategy decision.

Q Okay, all right. And then you testified that in between at least the verdict and sentencing *Jackson* came out, correct?

A Yes.

Q Okay. And let's see. You testified that at least going into trial you were of the understanding that Count 3 would merge –

A Yes.

Q – with Count 1?

A Yes.

Q Okay. And I think you corrected yourself on direct examination. You indicated that your understanding of the law was that the Defendant could not be adjudicated of both?

A Correct.

Q All right. And you advised him of such?

A Yes.

Q Okay. Was that – as you sit here today, was that, in fact, your understanding of the current state of the law at that time?

A Yes.

Q Okay. So he could not be adjudicated of both?

A Yes.

Q Okay. And it was not until after verdict and sentencing, right, the first the time, that *Jackson* came out, correct?

A Yes.

Q And there's been a – there's a difference in words, but, you know, the Defense is arguing it changed the law; we're arguing that it

clarified it. One way or another, there was a change at least in the law in the State of Nevada?

A I believe there was a change in the law. Yes.

Q Okay. Or a clarification, if we use our words, right, with *Jackson*?

A I don't think it was a – like, I think it was a change in the law.

Q Okay. And that was not, obviously, something that you could have foreseen?

A No.

Q All right. And so you advised Mr. Grimes, as least to the best of your ability, based on your understanding of the current state of the law at the time that you advised him?

A Yes.

MS. LEXIS: Okay. Court's brief indulgence.

BY MS. LEXIS:

Q And you indicated that you did not move to dismiss that particular Count 3 prior to trial –

A Mm-hmm.

Q – again, because you wanted at some point a Count 3 or a Battery with a Deadly Weapon Resulting in Substantial Bodily Harm in Violation of TPO as one of the options for the jurors to consider?

A Yes. And, I mean, like, realistically, I don't think we had a legal basis to move to dismiss Count 3.

Q Okay.

A Because while they couldn't – my understanding of the law is, while he couldn't be adjudicated of both, the State had every right to have it

somewhere on the verdict form, because what if he was acquitted of the Attempt Murder. You know what I mean? That's why our understanding of the law was that's a post-trial motion.

Q Right. Okay. And thank you for that clarification, because I mean, essentially, you can't be held ineffective for not challenging or filing frivolous motions. If you didn't feel like you had sufficient legal standing to challenge this issue prior to trial, certainly you can't be held to ineffective for failing to do so; would you agree with me?

A I'd agree.

Q Okay. So no legal basis before trial and you just articulated that you felt this was a post-trial issue –

A It was a sentencing issue.

Q – because adjudication was key, right?

A It's an adjudication issue.

Q Okay. Which is why you raised it before sentencing when he was about to be adjudicated pursuant to the jury's verdict, correct?

A Exactly, yes.

Q So, at least in your analysis, this issue became live or cognizable once the jury rendered a verdict and the Court was about to adjudicate?

A Yeah. I mean probably once the jury rendered the verdict is the moment it became cognizable, I guess I'd say.

Q Okay.

A Yeah.

Q Okay. But certainly he – defendants are adjudicated at sentencing?

A Yeah.

Q Okay. And adjudication seems to be the word, at least the buzz word in terms of the –

A That's why I did it –

Q – the live issue?

A – when I did it. Yeah.

Q Okay. And, in fact, you did after, or at least at sentencing, you did preserve the – this – you moved to dismiss this particular count –

A I did.

Q – correct?

A Yes.

Q Okay. And *Jackson* was brought up?

A Yes.

Q Okay. So you preserved that particular issue for appeal?

A I said ex post facto, I believe.

Q Okay. Ex post facto you did preserve that particular issue on appeal?

A I believe I did.

Q Okay. And you also preserved the issue of – at least based on the amended transcript of proceedings, you also preserved the issue of detrimental reliance, correct?

A I believe I did.

Q But you would agree with me that *Jackson* came out after any conversations or any kind of, at least in your words, agreements were reached?

THE COURT: It was decided December 6th, 2012, just for the record.

MS. LEXIS: Okay.

THE WITNESS: Yes.

MS. LEXIS: Okay.

THE COURT: And the verdict was October.

THE WITNESS: Yes.

MS. LEXIS: Okay, all right.

THE COURT: October 15th, 2012.

MS. LEXIS: Okay.

BY MS. LEXIS:

Q And at least now with the amended transcript of proceedings, starting on page 12, you pointed out to the Court on direct that there were some statements that perhaps the Court was under the understanding that it would be dismissed. Do you see that?

A Yes. I think the Court makes it very clear that we were told it would be dismissed.

Q Okay. But you would agree with me that at least when that particular statement was made *Jackson* had not gone into effect yet, the initial statement that it was going to be dismissed, which would've been in October during trial?

A I would agree that the law changed.

Q Okay. And certainly on page 14 the Court – do you have it with you –

A Mm-hmm.

Q – page 14?

A Mm-hmm.

Q Somehow, at least prior to that you requested transcripts; is that right?

A Yes.

Q Okay. And the very end of page 14 the Court indicates, at least line 15 –

A Mm-hmm.

Q – but that's probably all you want is to know whether there was an agreement, okay, because I don't recall that. Do you see that?

A Yes. I do see that.

Q Okay. So, at least in terms of the Court's representations on what she understood the State's position to be, she didn't recall whether the State agreed or not?

A She did not recall the State's position. She remembered her position

MS. LEXIS: Okay. Court's brief indulgence.

BY MS. LEXIS:

Q And I'm not sure if I already asked this, but, to your understanding, you advised Mr. Grimes of the merger redundancy issue, correct?

A Yes.

Q Okay. And at the time of your advice, you were advising him based on at least your understanding of the current state of the law?

A Yes.

Q Okay. And as you sit here today, was that an accurate statement of the law as you understood it back when you advised him?

A Yes. You're asking me whether, as I sit here today, I think I advised him correctly about the –

Q Yes.

A Yes.

Q Yes.

A I think I advised him about the state of the law at the time that it was.

Q Okay. And certainly you couldn't have advised him of something that had not yet happened. You couldn't have foreseen this particular change or alteration?

A I could not have foreseen it.

THE COURT: Why would you think you would be ineffective then?

THE WITNESS: I didn't – I don't think –

THE COURT: I mean because in your memo you write, you think that you would be ineffective.

THE WITNESS: No, so –

THE COURT: I mean how could you be effective when you're clearly – and you're advising your client based on what you believe the state of the law to be before the Supreme Court issues the *Jackson* decision?

THE WITNESS: So here's where my memo is based on.

THE COURT: Okay.

THE WITNESS: There's some case law, *Lafler and Frye* –

THE COURT: Okay.

THE WITNESS: – that say that if we incorrectly advise a defendant, like we tell him that he can – he can't be adjudicated of the Battery, and then he is in fact adjudicated of the Battery and run consecutive, the way it happened here, *Lafler* and *Frye* say that he is deprived of his rights under the Sixth Amendment to effective assistance of counsel. And so I wasn't necessarily saying that –

THE COURT: But you didn't advise him wrongly.

THE WITNESS: But I advised him of a thing that didn't happen to him. I – like, I agree with you. I don't think that I – I wasn't trying to hurt him. I didn't do anything to –

THE COURT: Of course not.

THE WITNESS: Right.

THE COURT: Of course not.

THE WITNESS: But the state of the law is that he has a right to know what can happen to him. And so it only goes one of –

THE COURT: Regardless of what the current state of the law is?

THE WITNESS: Well, it turns into either it's ex post facto or I was supposed to know about it. It's one or the other, right? If I was supposed to know about it, then it wasn't ex post facto. But if I wasn't supposed to know about it, then how is it not ex post facto? If I could not have foreseen that the law was going to change in such a way, if I wasn't obligated to know it, then how can it apply to him, which is why I put the memo the way I did? Like I think it's ex post facto and I think it's fundamentally unfair to him in a due process violation, but if it's not those things, then it comes – it

falls on me. It has to be one or other because it's – it doesn't fall on him. That was the point I was trying to make in my memo. He's entitled to either the law at the time he went to trial, or if the Court finds that *Jackson* was the law at the time that he went to trial, then I messed up by not telling him about it. That was what I meant in my memo.

BY MS. LEXIS:

Q Okay. But you couldn't have told him about something that you didn't know about, correct?

A Right. That's why my position was it was ex post facto.

Q Okay, all right. And so are you familiar with *Calder vs. Bull,* which outlines the four factors for ex post facto?

A From law school.

Q Okay. Because you state in your memo, to attempt to retroactively apply the new harsher law to Mr. Grimes is the very definition of ex post facto, and you stated that here.

A I did state that.

Q Okay. Was that based on your research in consideration of *Calder vs. Bull*?

A Oh, I can't remember if I looked up *Calder vs. Bull* or not.

Q Okay. Does this sound right? Factor number one, every law that makes an action done before the passing of the law and which was innocent when done criminal and punishes such action is ex post facto. Would you agree with that?

A I would need to see the whole opinion. Like I would need to read the whole opinion.

Q Okay. I mean it's a list of factors or circumstances where it would be considered ex post facto.

A Okay.

Q It was in our brief. Would you agree with me that was part of at least one of the factors?

A I would really need to read the whole opinion.

Q Okay.

A Like, because I think –

Q Okay.

A – disagreeing on what the law says is kind of what we all do as lawyers, right?

Q Okay. Have you had an opportunity to look at the briefing in this particular case? I don't have the decision printed, but would you have any reason to disagree with what was briefed by the State on page 6 of the State's opposition to Defendant's Motion to Correct Illegal Sentence filed on September 23rd, 2013?

A I have not reviewed the briefings from 2013 since 2013.

Q Okay.

A And I mean – I don't mean to disrespect the State. I'm not saying you guys, like, misrepresent.

Q Mm-hmm.

A I'm just saying, I think that intelligent people disagree on the law all the time. That's kind of what we do as defense attorneys and prosecutors. So I'm not going to agree with you on –

Q Okay.

A – your brief's interpretation of the law.

MS. LEXIS: Okay. I don't think it's actually – let me –

May I approach, Your Honor?

THE COURT: Yeah.

MS. LEXIS: We're not actually –

THE COURT: Sorry. I didn't mean to giggle. Sorry.

MS. LEXIS: – interpreting. It's page 6 of September 23rd, 2013, filing, the State's opposition.

MR. RESCH: So I'm just going to lodge an objection to this; that there's no foundation for this and it's not relevant. The brief says what it says and she can say if it says it or not, but she hasn't been asked about the viability of these arguments going forward in the Motion to Correct Illegal Sentence.

THE COURT: I'm not sure where she's going, so can I just see where she's going before I entertain your objection?

MR. RESCH: Okay, sure.

THE COURT: Okay.

MR. RESCH: Thank you.

THE COURT: So, I mean, you're asking her to review your brief?

MS. LEXIS: Yes, Your Honor.

THE COURT: Okay.

MS. LEXIS: It just outlines the four different factors. She's been speaking about ex post facto and her –

THE COURT: Well, I don't want her to have to give a – I don't want you to quiz her on –

MS. LEXIS: All right.

THE COURT: – case law.

MS. LEXIS: All right, all right.

THE COURT: Okay.

MS. LEXIS: All right.

BY MS. LEXIS:

Q At least in your memo you indicated that you believed this to be ex post facto, correct?

A Yes. And looking at – I mean looking at what you just showed me, I probably would've thought it was under prong – again, I don't know that that's the full opinion. I don't know that that's everything –

Q Mm-hmm.

A – but just what I saw was prong two.

Q Mm-hmm.

A If you could read it out loud. Sorry.

Q Every law that aggravates a crime or makes it greater than it was when committed.

A Right. I probably would've thought it fell under that because at the time that it was committed it would've been either an Attempt Murder with Use or a Battery with Use with Substantial, but now after *Jackson* it's both. So that aggravates it, so that, in my mind, would've been the ex post facto.

THE COURT: Before *Jackson* you believe that –

THE WITNESS: That –

THE COURT: – Count 3 was a lesser included of Attempt Murder

based on what?

THE WITNESS: Based on *Salazar v. State*.

THE COURT: Not redundant? I mean I'm – there's a difference, in my opinion, between redundant convictions and a true lesser included.

THE WITNESS: Okay. So I should clarify then.

THE COURT: Okay.

THE WITNESS: I thought it was both. Based on *Salazar*, I think that – I believed that it needed to be dismissed. He couldn't be adjudicated of both because it was both redundant and a lesser included.

THE COURT: Okay.

BY MS. LEXIS:

Q But you certainly wanted the jury to have the option of considering the Battery?

A Yes.

Q Battery with a Deadly Resulting in Substantial?

A Yes.

MS. LEXIS: Court's brief indulgence.

BY MS. LEXIS:

Q Did you advise Mr. Grimes of the potential penalty for Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm?

A Yes. Well, we advised him of the 2 to 15.

Q Okay. And then in violation of TPO, that was another aggravator, correct?

A I don't think – okay, so this was the part that I was – and it's been a really long time, so I don't remember, but I thought it – I thought it

was a 2 to 15 is what we advised him of.

Q Okay.

A That seems to be my recollection of the advisement.

Q Okay. And so you were not aware – you know that he was also charged with Burglary in Violation of TPO, correct?

A Yes. And I think on the Burglary we advised him that it was a – I want to say a – it's been a really long time. I don't remember the exact numbers –

Q A 1 to 10 but with a deadly weapon –

THE COURT: But you clearly advised him on the punishments for each offense, right?

THE WITNESS: Yes. Yes –

THE COURT: Okay.

THE WITNESS: – advised him on the punishments for each offense.

BY MS. LEXIS:

Q Okay. And did you advise him that, whether it be, you know, the Burglary or the Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm count, certainly the Court had the ability and the discretion to sentence him to consecutive or concurrent sentences as to those charges?

A So here's what I remember. I remember we didn't think he was going to get convicted of the Burglary. We were really surprised by the Burglary conviction.

Q Okay.

A That was actually the –

THE COURT: You – I'm sorry. You didn't think he'd be convicted of both Attempt Murder and the Battery?

THE WITNESS: The Battery or the Burglary.

THE COURT: Okay.

THE WITNESS: We didn't think he was going to get convicted of the Burglary. We were surprised he was –

THE COURT: The Battery or the Burglary? You thought he'd be convicted of Attempt Murder?

THE WITNESS: [No audible response.]

THE COURT: Yes?

THE WITNESS: Yes. Yes.

THE COURT: Okay.

THE WITNESS: We did not think he was going to be convicted of the Burglary because we thought the evidence was overwhelming that he didn't go there with the intention to hurt her.

THE COURT: Okay.

THE WITNESS: We were surprised by the conviction and surprised that it wasn't reversed on insufficiency of the evidence. So I – I'm sure we told him what the potential penalties were each for each charge, but I remember conversations of, realistically, we don't think you'll be convicted of the Burglary; the Battery is going to merge, so what we're really looking at is the Attempt Murder.

BY MS. LEXIS:

Q Okay. But my question was: did you advise him that the Court had the ultimate discretion in considering – let's say he gets convicted of,

you know, multiple counts, whether it be both the Count 1 and Count 3, but also the Count 2, that the Court had discretion to at least adjudicate him guilty of – or to at least run the sentences concurrent or consecutive?

A Yes. We definitely advised him of that.

Q Okay. And in this particular case –

A And to clarify, I didn't tell him he was going to get a not – like nobody told him he was going to get a not guilty on the Burglary. That's not what I'm saying, but what I'm saying is I know that our focus was the Attempt Murder. That was the conversation. And I remember –

Q And that was the top charge?

A And that was the only charge that we really thought was viable.

Q Okay. Excuse me. I lost my thought, my train of thought here. Okay. So you advised him, though, concurrent versus consecutive?

A Yes.

Q Okay. And he seemed to understand that?

A Yes.

Q You indicated, in your memo at least, our advisements to him of the potential penalties is rendered wrong if both counts are adjudicated.

A Mm-hmm.

Q And then you indicated that you would be rendered ineffective, correct?

A Mm-hmm.

Q Okay.

THE COURT: Are those both yeses?

THE WITNESS: Yes. I'm sorry. Yes.

THE COURT: Thank you.

THE WITNESS: Yes.

BY MS. LEXIS:

Q And I think we've already talked about that he has a right – oh, excuse me – he has a right – that last paragraph starts with, Mr. Grimes has a right to be properly advised by counsel of the potential penalties he's facing?

A Yes.

Q And you did that. That's what we just went over, right?

A Well –

Q The potential penalties?

A We only did it if *Jackson* didn't apply, but if *Jackson* applied and *Jackson* wasn't new law, then we didn't, right?

Q Okay. But certainly you were – when you were advising him, at least your testimony today is, that he couldn't be adjudicated of both, so he couldn't be sentenced of both, but you advised him of the potential penalties, correct, the 2 to 15, as you testified to?

A Yes. We advised him of the potential penalty of each individually. Yes.

Q Okay. And it said you didn't object – you didn't – you said you would be ineffective because you didn't object to the verdict form at the time of the trial, but we talked about that already; is that right? You didn't – you wanted Count 3 to be listed separately, or at least a decision was made that Count 3 be listed separately and not as a lesser included, correct?

A I mean here's the problem. You keep asking – like it's – the

reading of *Jackson* matters, right? Like if you're asking me if *Jackson* – I still believed *Jackson* was new law. So I'm answering your questions as if I believe *Jackson* was new law, but if we're going to say *Jackson* was not new law and that it can apply to Mr. Grimes, then, no. I did not – then that changes everything, right? I didn't properly advise him. I didn't object when I should've objected. Like that changes everything.

Q Right, but what this really hinges on is you knowing about *Jackson*, and you couldn't have known about it because the crucial time that we're talking about, at least my questioning right now, was either before trial or during trial when *Jackson* didn't apply?

A I – yes.

Q Okay.

A I agree with you. I could not – my position is I could not have known about it because –

Q All right, all right.

A – yeah.

Q And so when you put here that you did not object to the verdict form at the trial – at the time of the trial –

A Right.

Q – and asked for the Battery charge to be a lesser included of the Attempt Murder, you said that makes you ineffective?

A Here's what I was trying to – can I basically tell you the record I was trying to ask him to make? This is what I was trying to ask him to tell the Court. I was trying to ask him to tell the Court to say, Judge, when we went into this trial our understanding of the law was these two counts

cannot both be adjudicated. We acted based on an understanding of the law that these two counts cannot be adjudicated. We advised him of his potential penalties based on our understanding. We acted within the trial in failing to object to the verdict form based on that understanding. We did all sorts of things based on our understanding of the law. If the Court is now going to say, you know what, *Jackson* can apply retroactively and it's not ex post facto, then we did all sorts of stuff wrong.

Now do I think we did all sorts of things wrong? I don't, because I think that I advised him of the law at the time of the trial. But if Your Honor's going to say the law – that I was wrong about the law at the time of the trial – because it's only one of two ways, right? I was right or I was wrong. If I was right, then it shouldn't apply to him. If I was wrong, then I was ineffective. That's the record I was trying to ask Mr. Hillman to make.

Q Okay. I'm sorry. Are you saying you didn't object to the verdict form because you understood the current state of the law wouldn't have required you to do so?

A Here's what I'm saying. Like here's what I was trying to get him to say. What I was trying to get him to say was: if *Jackson* had come out midtrial I would've objected to that verdict form, absolutely. If *Jackson* had been the state of the – you know what I mean? Like it – it wasn't an issue for me because in my mind there was no other way this was going to happen and everybody in the back –

THE COURT: Well, you would've objected to the verdict form and it would've been overruled because *Jackson* seems clear. I mean I'm just wondering. So what? *Jackson* comes out. You object to the verdict form

and it gets overruled, right?

THE WITNESS: Well, I would've – I mean and it depends on when *Jackson* came out, but you're right. You're right. It would've made a difference based on what the situation was, but *Jackson* hadn't come out at the time.

THE COURT: Well, that's what I'm just saying. You just said if *Jackson* would've come out and I knew about it I would've objected. What good would that objection have done? It would've been overruled.

THE WITNESS: That's a really good point. I guess what I should say is my failure to object harmed him now that *Jackson* came out.

THE COURT: How?

THE WITNESS: Because had I objected – because *Jackson* hadn't come out at the time, had I objected and asked the Court to put it as a lesser under Count 1, Your Honor was ready and willing at that time to do it. We would've gotten that. Count 3 would've been gone.

MS. LEXIS: I think – I'll move on.

THE COURT: Okay.

MS. LEXIS: I think we made a sufficient record on that one.

BY MS. LEXIS:

Q And you didn't handle the appeal, correct?

A I did not. That's correct.

MS. LEXIS: Court's brief indulgence.

I have no more questions for this witness. Thank you.

THE COURT: Any redirect?

MR. RESCH: Just real brief. Thank you.

REDIRECT EXAMINATION

BY MR. RESCH:

Q Okay. So if the verdict was on October 15th, 2012, why not say goodbye to the jury and then make a record, something along the lines of well, Judge, are we dismissing Count 3 now or are we doing it at sentencing, something like that?

A I wish I could tell you. I just – I thought we'd do it at sentencing.

Q Are you in agreement – and I think you explained this, but just so we're clear. Do you believe that unforeseeability is a component of an ex post facto analysis?

A Yes.

Q And you've said over and over that the *Jackson* decision was unforeseeable to you?

A To me, it was completely unforeseeable. We were floored by it.

Q Now are you in agreement that with regard to Count 3, ultimately, not only did the Court run it consecutive but also a small habitual sentence was imposed?

A That's correct.

Q Okay. So do you, as the trial attorney, find that to be prejudicial to Mr. Grimes?

A I mean –

THE COURT: Of course she does.

MR. RESCH: Okay. Well, that's what we're here to say.

THE WITNESS: No offense but, yes. Yes.

MR. RESCH: Very well. All right, nothing further. Thank you.

THE WITNESS: Thank you.

THE COURT: Any recross?

RECROSS EXAMINATION

BY MS. LEXIS:

Q Ms. Hojjat, going into trial you knew that the Defendant was subject to habitual adjudication, correct, or treatment?

A I don't remember if I knew.

Q Okay.

A I'll be honest, I don't remember.

Q You don't recall him having two prior felony convictions for DV related offenses?

A So here's what I remember. I remember seeing them on the PSI and they were from California and I remember – because you got to remember I wasn't first chair on this case.

Q Mm-hmm.

A So I don't know what the original pretrial – like if you have it and I could see it, whatever the pretrial service is, the original one, like that is done at the time of intake –

THE COURT: But the State filed a notice, right?

MS. LEXIS: Yes.

THE COURT: Okay.

MS. LEXIS: I believe we did.

BY MS. LEXIS:

Q And also during –

A Did you file it prior to sentencing?

Q During discussions, at least with the Defendant and when he – do you recall the Defendant being canvassed as to whether he was going to be taking the stand in this case?

A Yes.

Q Okay. And do you recall at that time that there was a discussion concerning his two prior felony convictions and whether they would be raised or whether he would be impeached with these prior felony convictions?

A I don't recall, but if you're saying it happened I don't have a reason to doubt you.

Q Okay. Ultimately he chose not to testify –

A He did. That's correct.

Q – to your knowledge, correct?

A Yes.

Q All right. So at some point did you or Mr. Hillman, to your knowledge, advise him of his potential adjudication under the small habitual criminal?

A I don't remember. And that's why I'm saying I don't remember if I knew about those felonies because I don't remember doing it.

Q Okay.

A But if we knew about the felonies then we would've. My practice is if I know that a person's eligible I advise them always. I just don't remember that.

Q Okay. Counsel asked you about why you didn't raise that particular – why you didn't move to dismiss immediately after verdict.

A Mm-hmm.

Q And I think we're beating a dead horse, but I'll ask you one more time. Adjudication was the key term in this particular – in that analysis, correct?

A I didn't think I needed to do it after the verdict.

Q Okay. All right, and it was cognizable after a judge adjudicated him guilty of those charges?

A That was my understanding.

MS. LEXIS: Nothing further. Thank you.

THE COURT: Okay. Can the –

MR. RESCH: Nothing further.

THE COURT: Thank you very much for being here.

THE WITNESS: Thank you, Your Honor.

THE COURT: And thanks for your testimony. You may step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: Do you have any further witnesses?

MR. RESCH: Yes. Deborah Westbrook is here. We'll call her next.

THE COURT: Okay. Because I think if you do, it's 10 after 12:00, we're going to take a recess.

MR. RESCH: Oh, okay. Sorry.

THE COURT: Okay.

MR. RESCH: Yes. She's the last witness.

THE COURT: All right. How long do you think she'll take?

MR. RESCH: Fifteen minutes.

THE COURT: Well, you say 15 minutes and then it's going to go two hours.

MR. RESCH: Well, I will take 15 minutes. There may be an additional –

THE COURT: Right.

MR. RESCH: – 15 minutes it sounds like.

THE COURT: So why don't we recess for lunch. And can you come back at 1:45?

MR. RESCH: Okay, sure.

THE COURT: Okay.

MR. RESCH: All right, thank you.

THE COURT: All right, thank you.

MS. LEXIS: Thank you.

[Recess taken from 12:11 p.m. to 2:09 p.m.]

THE COURT: You may call your next witness.

MR. RESCH: Thank you.

THE COURT: Thank you.

MR. RESCH: Debra Westbrook is here.

THE WITNESS: Hello.

THE COURT: Thank you for waiting, Ms. Westbrook.

THE WITNESS: Oh, not a problem.

THE COURT: I know you were here this morning.

THE WITNESS: Well, let's see. I've never done this before. I'm not sure – let's see. I guess I can lower this so that I'm not – oh, wait. That

didn't really work.

THE COURT: Are you not comfortable in the chair?

THE WITNESS: There we go. I just want to be – I want to have my knees underneath the –

THE COURT: Sure, no problem.

THE COURT CLERK: Please stand and please raise your right hand.

DEBORAH WESTBROOK

[Having been called as a witness, being first duly sworn, testified as follows:]

THE COURT CLERK: Thank you. Please be seated. Could you please state and spell your name for the record.

THE WITNESS: It's Deborah Westbrook, D-e-b-o-r-a-h, Westbrook, W-e-s-t-b-r-o-o-k.

THE COURT CLERK: Thank you.

MR. RESCH: All right, thank you.

DIRECT EXAMINATION

BY MR. RESCH:

Q How are you employed?

A I am an appellate attorney with the Clark County Public Defender's Officer.

Q How long have you worked there?

A I've worked there since June of 2013.

Q I take it you're licensed in Nevada?

A I am.

Q When were you licensed?

A I believe it was April of 2005 and before that I was licensed in

Washington State in 2002.

Q Are you familiar with Bennett Grimes seated next to me?

A I am.

Q Now you handled the appeal from his October 2012 trial; is that it?

A I did.

Q Okay. Do you recall what he was convicted of?

A He was convicted of Attempted Murder with Use of a Deadly Weapon, a Burglary and I believe it was Battery with Intent to or with Substantial Bodily Harm with Use of a Deadly Weapon.

Q Okay, close enough.

A Yeah.

Q How do you normally go about deciding what issues you want to raise in an appeal?

A So I read the entire record. I look at, you know, what I think is going to be the strongest, what is going to have the likelihood of getting a reversal. I look at how the record was preserved. I research and review the law to see if I have grounds for asserting the issues where there were objections made. You know then I go through and I will make an outline, so I'll outline the entire case. I go through and I outline the transcripts, and then I make separate notes of, you know, what I see are the main issues. And then I'll go through and begin, you know, researching and writing them and then cross off things when – you know if the research doesn't support the issue that I want to raise, then I won't raise it. Those are some of the steps that I take.

Q Do recall requesting the transcripts in this case?

A I did not request the transcripts in this case because I actually came

into the office after the transcripts had already been requested. I started in June of 2013. The transcripts had been requested by my husband, David Westbrook, who was the original attorney of record for the appeal for Bennett Grimes. And I'm aware that what he typically does and what he did in this case was he asked Carrie Connolly, who is our appellate team secretary, to go and ask for transcripts of every single – you know every single court appearance that was made, you know the entirety of the transcript.

And then she would go prepare that, you know the transcript request form. He'd sign it. It would be submitted. And that was done in the case before I actually got the materials. When I got the case I actually had the appendix. She – what Carrie will do is, once she receives everything, she puts it all into an appendix and the appendix is given to the appellate team attorney who is responsible for the case, and in that case it was transferred from him to me.

Q All right, so in this case all of the transcripts were ordered. They just weren't ordered by you?

A Exactly.

Q Okay. Do you remember how many times the matter was before the Court for sentencing?

A Twice.

Q Do you recall which attorneys handled those proceedings?

A So the first sentencing proceeding was handled by Nadia Hojjat and the second sentencing proceeding was Roger Hillman.

Q Are you generally aware of a change in the law relevant to Count 3 of the verdict that took place after the verdict?

A Yes, because I had spoken to Nadia at length about that issue. Actually, before I started reviewing the transcripts I was aware of that issue and the *Jackson* case which is at issue. That was actually my husband's case that he handled at the Supreme Court. So I was well aware of the *Jackson* decision and the three of us all discussed it at length before I had prepared the appeal.

Q All right. So, generally speaking, that change in law, that was something you knew as part of the appeals process?

A As part of the appeals process, exactly.

Q Turning to the sentencing handled by Roger Hillman, were you aware of any instructions to him from anyone at the Clark County Public Defender regarding how he should argue issues concerning Count 3?

A Yes. Nadia had sent me a copy of the email that she had sent to Roger the night before the sentencing, where she had indicated to him specific objections that he was supposed to make, the specific record that he was supposed to make on the ex post facto issue and on a detrimental reliance issue that had to do with fundamental fairness. So I was aware that those arguments were supposed to be made the following day.

MR. RESCH: Do we have our exhibit around here? Thank you.

May I approach?

THE COURT: You may.

BY MR. RESCH:

Q I think it's actually Exhibit 1. Is that the email that you're talking about?

A Yes. So this – she had sent me an electronic version of this. And

the Clark County archiving system actually began deleting emails from our system. Now we can only retain six months' worth of emails, so I no longer have the actual one that she sent me in 2013. I was able to find this by pulling the file and this was, like, right on top.

Q Oh, okay. And this is what she wanted Roger to do?

A This is what she wanted Roger to do.

Q Is this email something you would've reviewed as part of your appellate process?

A It was. It was.

Q What effect did it have on your decisions in terms of how to proceed with the appeal?

A Well, so, essentially, I was aware that this was what was supposed to have been argued at the sentencing and I was also aware of what, in fact, was argued at sentencing on the first date and on the second date.

So going to the first date, I believe it was the 7th, February 7th, Nadia came in and she had objected to the adjudication of Count 3. And I believe the District Attorney at that time raised the *Jackson* case and said, you know, because of *Jackson* the District Attorney believed that he could be sentenced on both, Count 1 and Count 3. And the Court wanted additional time to take that issue under advisement, so the issue wasn't finally resolved until the next – you know the next date, which is February 12th, the day after this email was sent.

I'm aware that Roger during that hearing essentially conceded the ex post facto issue. Based on my review of the record, he indicated that he felt that if not legally then practically there was an ex post facto issue and

essentially agreed with the Court that the law did not change because of *Jackson,* and then he advised the Court that it was okay at that point to sentence Bennett. And in my view, he conceded the issue and made it so that I could not raise ex post facto in the direct appeal.

Q All right, now let's back up just one second. How did what's described in the email differ from what Roger ended up actually doing?

A So in the email it makes it very clear. I mean the email says, in terms of the case that Agnes is citing, which is the *Jackson* case, it is ex post facto, as our trial had already concluded before this case was published. Thus, at the time that Mr. Grimes was tried for his crimes the law of the land was that the Battery count must be subsumed by the Attempt Murder. To attempt to retroactively apply the new, harsher law to Mr. Grimes is the very definition of ex post facto.

What Roger needed to do at the hearing was argue that legally there was a change in the law; that the law was different before *Jackson* and the law was different after *Jackson* in order to properly preserve that issue so that I could raise it on appeal. What ended up happening, he essentially set it up so that had I wanted to raise that, or had I raised that issue on appeal, the Supreme Court would have said you conceded this. It's you conceded to the Court that it's not legally ex post facto. It's only practically ex post facto and that makes us ineffective. So, basically, what he argued was that it's not really ex post facto; it's just that we were ineffective. And I did not feel that I could bring that issue to the Supreme Court in the state that it was in.

Q All right. And in terms of the detrimental reliance issue, and, again, I'm talking during the appellate process –

A Exactly.

Q – what information was available to you with regard to that claim?

A So I had talked to Nadia and she had advised me that, you know, she had spoken with the Court and that this was something that all the parties agreed and the Court agreed was going to be dismissed and that had been discussed during the trial. When I reviewed the transcripts I did not see evidence of any kind of concession by the Court as to that issue. I didn't see the evidence of that in the bare record that I had been given, you know, by our appellate team secretary. There was nothing in there that supported that, other than Nadia saying, yeah, we discussed this and I think Roger mentioning, yeah, we discussed this, but there was nothing definitive, the way that this email really spelled everything out.

So the decision was made at that point. You know I talked to Nadia. I talked to David. I talked to Howard Brooks, who's the head of the appellate team. Both David and Howard agreed that the issue most likely had been conceded by counsel at that hearing and the best thing that we could do was bring the issue up again via the Motion to Correct an Illegal Sentence, because that would give the Court an opportunity to actually rule on the issue.

Because as I – you know, as I look back again at the transcript of that sentencing hearing, Roger didn't ask the Judge to do anything. Roger did not request relief in any form. He didn't request that the charge or that that count be dropped. He didn't request that the count be dismissed. He didn't request that there be no time associated with that count. He didn't actually ask for any relief from the Court. So it's very difficult to say on appeal that there was an error by the Court when counsel didn't ask for something to be done in

the first place.

Q Okay. So with regard to what Roger argued then, do I have it right that you – you did consider the arguments that he raised and rejected the idea that he had preserved this issue for review?

A Exactly.

Q Did you give any thought to raising the issue for plain error review on direct appeal?

A So I didn't think that the state of the record – with what little information was in there, I didn't think the state of record would be amenable to prevailing on that issue. So had we – my belief was had we raised it the Supreme Court would've said you conceded this. I mean, yes, you did use the words ex post facto and, yes, counsel at the previous hearing had objected to adjudication of Count 3. In my experience, with the Supreme Court they tend to – you know they tend to notice when there have been – you know what they see as concessions. And I felt that the Supreme Court would find that that was a concession and that we would not be able to prevail on the ex post facto issue.

As to the detrimental reliance issue, I didn't feel that there was enough in the record to actually show how we relied because, I mean, there were comments, I believe, that Roger had made that he – we did things – if we would've done things differently, I think he said, but he didn't say what he would've done differently. So I felt that the record was incomplete in terms of the Supreme Court being able to say, oh, yes, this was a harmful error because, you know, they would've – he would've done – counsel would've done x or y differently. So I felt that I needed to put the contents of this email into the

record and I needed to give the Judge an opportunity to actually consider it and make a decision, and I felt that that would be the best – that would be the best likelihood of a positive outcome for Bennett.

Q Okay. And when you say the Judge in the record, you mean here and now?

A I'm sorry?

Q Here and now is when you want the Judge to consider this?

A Oh, as – yes, now as well. But in terms of why we did it as a Motion to Correct an Illegal Sentence, the – my intent in doing that was to get the issue in front of Judge Leavitt so she would have an opportunity to see exactly how we did rely, so she would see, you know, how serious of an issue it was, because I didn't feel that counsel had made that clear to her.

Q But did you give any thought during the appellate process to the issue of whether or not the ex post facto challenge to Count 3 would be outside the permissible bounds of a Motion to Correct Illegal Sentence?

A So, having spoken with David Westbrook, my husband, he actually had handled the *Haney* case, which was also a Motion to Correct an Illegal Sentence case, he had raised constitutional issues in that case, in addition to raising, you know, a statutory construction type issue. And the Supreme Court when it ruled, they did not say that it was improper, that it was an improper vehicle that he had used, so, and I'm not aware of any case where the Supreme Court has actually held in a published decision that you can't use a Motion to Correct an Illegal Sentence as this type of – as a vehicle for this sort of thing.

There was, like, 19 – there was a 1970's case, the *Anderson* decision, where it didn't involve a facial invalidity. It involved a statute that

said you could sentence somebody to death, and then the Supreme Court overruled the death penalty. And so there's, you know, judicial authority that made the sentence illegal and the Supreme Court was able to consider that. In *Haney,* the interesting thing there is there was no facial invalidity in the *Haney* case. *Haney* involved a couple of – you know it involved statutory interpretation and legislative intent. And the Supreme Court, even though there may be dicta in the *Edwards* case that says we only look at facial invalidities, the Court actually went beyond that dicta in *Edwards* in the *Haney* decision. So we felt that we were on solid ground in being able to do what we did.

Q In the end, then was the ex post facto issue actually raised on direct appeal?

A The ex post facto issue was not raised on direct appeal. No. We chose to put it into a Motion to Correct an Illegal Sentence.

Q Was that Motion to Correct Illegal Sentence, was that granted or denied by the trial Court?

A It was denied by the trial Court, but we don't know the basis for the denial because I think the order was – the order didn't make the basis clear. So we don't know if the Court ruled jurisdictionally or if the Court ruled on the merits.

Q Did you appeal the denial of that order?

A We did.

Q Okay. And what was the result from the Nevada Supreme Court?

A The Nevada Supreme Court ironically cited *Haney* and said that we were jurisdictionally barred and –

Q So ex post facto was not a claim that they could consider as part of

a Motion to Correct Illegal Sentence?

A That's what they found, but I don't – you know had I still been on the appeal at that point, I probably would've petitioned for a rehearing and asked them to reconsider the *Haney* issue.

Q All right. I gather you perhaps still disagree with their conclusion, but they are nonetheless the final word on Nevada law issues?

A They are, but, again, there's been no published Supreme Court decision that says you can't – that holds that you cannot do what we did.

Q All right, and let's go back to just a mere month ago. Did you recently become aware that there was a discrepancy in one of the transcripts that you used as part of your review of this appeal?

A I did.

Q All right, can you explain what you learned?

A So I learned that – Nadia had been assuring me up and down that she had had a conversation with the Court, where the Court had said, I will not adjudicate on Count 3, I will not adjudicate on Count 3, and I didn't see it anywhere in the record. It didn't exist in the record, as far as I was concerned, and then somehow a month ago the court recorder transcribed an additional transcript of – apparently there was a recall of the case on the same day as one of the transcripts that we had requested and during that recall the Court had indicated that it had told the parties it was going to get rid of Count 3 multiple times.

THE COURT: I'm not sure that that's what the transcript says.

MS. LEXIS: No.

THE COURT: But –

THE WITNESS: Okay. That's what I –

THE COURT: Right.

THE WITNESS: That's how I –

THE COURT: I mean –

THE WITNES: That's how I read it.

MR. RESCH: All right, let's take a – starting on this –

THE COURT: I think I agreed with her. If you said I said it, then I believe you that I said it.

MR. RESCH: Okay. Let's make sure we're all on the same page.

THE WITNESS: Okay.

MR. RESCH: May I approach and –

THE COURT: But I also asked her to get the transcript in order to show me because I did not have any recollection of it.

MR. RESCH: All right, may I approach? She –

THE COURT: Sure.

MR. RESCH: Okay. Sorry. She –

THE WITNESS: Yeah. I don't have it in front of me.

MR. RESCH: She doesn't have it in front of her.

THE WITNESS: Thank you.

BY MR. RESCH:

Q All right, so with Exhibit 2 in front of you, is that, in fact, the amended transcript that you would've reviewed approximately a month ago?

A Yes, it is.

Q Okay. How, if at all, would what you have there as Exhibit 2 have affected your decision-making during the appeals process?

A So it wouldn't have changed my argument on ex post facto, but it would have allowed me to raise a detrimental reliance and fundamental fairness argument on direct appeal.

Q And how is that?

A Given the representations of the Court in this document or how I interpret what the Court said, I feel that 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.

Q Okay. If I were to ask you to turn to page 12, where the so-called new stuff is, are there specific portions of the transcript following that that would be relevant to that issue?

A So from line 19 – beginning at line 19, where Ms. Hojjat says, Your Honor, I believe that this issue of the – whether he could be adjudicated of Count 3 or not was discussed on the record during the case, and so I wanted to order the transcripts of the case and perhaps request it – The Court: Oh, I'm sure it was, and I'm sure I said that it would be dismissed, okay? Ms. Hojjat: I believe so, and so I wanted to order the transcripts for – The Court: But you can't hold me to that if there's case law that says differently. I agree with you. I am – I absolutely am sure I said it. Ms. Hojjat: Okay. The Court: So I don't think you need a transcript to prove that I said it. Ms. Hojjat: Very well, Your Honor. The Court: Because I'm pretty sure I said it. Ms. Hojjat: Thank you, Your Honor. The Court: Okay.

And then I don't know if there's anything else. I think that that – that was the main portion that I would've been relying on.

Q All right. And as the appellate, the portion that you just referred to

would've been sufficient, in your view, to preserve the issue of detrimental reliance to be raised on direct appeal?

A Exactly. And the – it's the fundamental fairness, due process argument that was raised in the Motion to Correct an Illegal Sentence as the final issue. I could've – I feel that that portion of the transcript would've enabled me to make that argument more persuasively to the Supreme Court in a direct appeal.

Q But were you aware while the appeal was ongoing that this portion of the transcript was missing?

A I was not.

Q And just so we're clear, when – you first learned that a month ago, or when did you first learn that?

A I first learned that this portion of the transcript was missing a month ago when the court recorder filed an errata and then submitted the amended transcript. We had actually received a certificate from the court recorder around the time that the appeal was filed stating that all the requested transcripts had been produced. So, you know, we had relied on the representations that we received from the court recorder that we had everything.

MR. RESCH: All right, I'll pass the witness at this time. Thank you.

THE COURT: Cross-examination.

MS. LEXIS: Thank you.

CROSS-EXAMATION

BY MS. LEXIS:

Q Good afternoon.

A Good afternoon.

Q I'm not as familiar with the record, so let me start out by asking you: was the detrimental reliance, fundamental fairness, or due process argument that you've been talking about, was that raised in the Motion to Vacate –

A Correct the Illegal Sentence?

Q – Correct Illegal Sentence?

A It was. That was, like, the last page of it, I think.

Q Okay. I thought I read that somewhere. Okay. So you read the entire record?

A Uh-huh.

Q Okay. And is that a yes?

A Yes.

Q Okay.

A Sorry.

Q And as, you know, the appellate attorney assigned to this particular case, you, as you indicated on direct examination, looked for the strongest arguments that would have perhaps caused a reversal?

A Correct.

Q Okay. And you also looked up preservation, which you talked about on direct examination; is that right?

A Correct.

Q And also researching?

A Yes.

Q Okay. And after doing all of that – and correct me if I'm wrong.

You were aware of the detrimental reliance issue, whether it was on the record or not, as well as the ex post facto issue, prior to you working on the appeal; is that right?

A Yes.

Q Okay. And you had spoken with Ms. Hojjat, particularly about the detrimental reliance issue concerning the record and all that stuff, prior to working on the appeal, right?

A I had.

Q Okay. And ultimately you decided not to raise those two issues in the actual appeal; is that right?

A That's correct.

Q But it's not like those issues were just, you know, kind of pushed to the side and not followed up with. Would you agree with me?

A I would agree. Yeah. I was actually drafting both the appeal and the Motion to Correct an Illegal Sentence at the same time.

Q Okay. So, fair to say, you chose – based on preservation, research, everything that you understood about the record, you chose the strongest arguments for appeal; is that right?

A That's correct.

Q And chose what you thought would be a viable option in terms of raising the issue. You chose to raise the detrimental reliance issue and the ex post facto issue on a Motion to Correct Illegal Sentence?

A That's correct.

Q Okay. And that kind of gave you two bites at the apple essentially. I mean you got to – well, it got you to at least raise more issues than you

would've been able to raise on direct appeal?

A I could have requested that the Court, you know, grant me full briefing had I wanted to put them both in the appeal.

Q Okay.

A But I didn't feel that I could raise the issues on direct appeal because of the concession that had been made by Roger and because the record didn't have enough to support the detrimental reliance argument at that point.

Q And so for those reasons, you thought that was the weaker – weaker arguments, correct?

A In terms of the direct appeal, yes.

Q Okay. And it would not have had a likelihood of success, compared to the other issues that you felt were stronger?

A On the state of the record at the time, I didn't feel that it would – those – that those issues would have been successful on direct appeal.

Q Okay. And so did you – did you draft the Motion to Vacate the Illegal Sentence?

A I did. I drafted it initially with input from Nadia. We sent drafts back and forth and she eventually signed her name to it.

Q Okay. And so is it your opinion, as you sit here today, that that issue – at least as we stand here today that issue – those – both those issues were fully briefed and litigated?

A I feel that we presented those issues to the Court. I don't know to what extent they were actually considered, on the merits or jurisdictionally. So I don't know the answer to that.

Q Okay. But were they briefed sufficiently?

A I believe they – the only thing I would add is the new – there's that new transcript, which I would want to have. You know for this issue to be fully briefed, it would need to take into account the statements that were made on the record in that missing transcript.

Q Okay. But raised?

A Correct.

Q Certainly. And argued.

You're familiar with the transcripts from the actual argument?

A I am.

Q I believe it was Mr. Westbrook –

A Yes.

Q – that argued it with Mr. Burns. You're familiar with that?

A Yep, I am

Q Okay. Certainly arguments by both sides, lengthy arguments?

A Yes.

Q Okay. And concerning the Motion to Correct the Illegal Sentence, ultimately that was denied by this Court?

A It was.

Q Okay. And it was appealed?

A It was.

Q All right. And ultimately the Nevada Supreme Court affirmed Judge Leavitt's denial of that motion, right?

A It did.

MS. LEXIS: Okay. Court's brief indulgence.

BY MS. LEXIS:

Q When you started your appeal or before you wrote the appeal, filed the direct appeal in this particular case, you were already aware of the change in the law; is that right?

A I was.

Q Or the clarification of the law?

A The change.

Q You had spoken with Ms. Hojjat?

A I had.

Q Okay. And so at that point, based on the holding in *Jackson*, did you say this on direct examination, that also changed your assessment as to whether or not that would have been a – that should've been an issue that you would've raised on direct appeal, the likelihood of success on that issue, given the *Jackson* decision?

A So the only reason I did not feel that that issue had a likelihood of success was Roger's representations on the record; otherwise I felt that it was a strong issue.

Q Okay. And I'm sorry. Do you have the sentencing transcript from –

A The amended transcript of proceedings, February 7th, Exhibit 2?

Q Do you have the one from February 12th?

A I do not –

Q Okay.

A – not in front of me.

MS. LEXIS: Has it been admitted?

MR. RESCH: No.

MS. LEXIS: Okay.

MR. RESCH: I didn't show –

THE COURT: Do you want it?

MS. LEXIS: I have one. I can –

THE COURT: Pardon?

MS. LEXIS: I have one.

THE COURT: Oh, okay.

MS. LEXIS: May I approach your clerk?

THE COURT: Sure.

MS. LEXIS: Thank you.

[Off-record colloquy between the Court and clerk]

BY MS. LEXIS:

Q And while we're marking the exhibit as State's Exhibit 1 –

THE COURT CLERK: Is that okay?

THE COURT: It's okay. All our exhibits are numbers today.

[State's Exhibit 1, Admitted]

BY MS. LEXIS:

Q When you say that you believe Mr. Hillman had conceded the issue of both ex post facto and also detrimental reliance –

A He didn't raise detrimental reliance. He only – my reading of the record is that he conceded ex post facto by telling the Court that if not legally then it's practically ex post facto, and then he said, and what that makes us – that makes us ineffective –

Q Okay.

A – in effect that makes us ineffective.

Q Okay.

A So those statements, to me, indicated that he did not believe in the legal merits of the argument; that he only believed in the practical effect of the argument and he agreed with the Court – with the Court's assessment that *Jackson* did not create a new rule. And that's how I understood the record that he had made.

Q Okay. I – okay. So you remember him saying, it seems to be ex post facto, to me, if not practically? Do you remember him saying that?

A I do.

Q Okay. And he also talked about how he spoke with the Defendant. And at the very end of that paragraph, if I could approach –

A Sure.

Q – page 2, do you recall Mr. Hillman then saying, and if I remember correctly, when we were settling jury instructions in chambers, we talked specifically about Count 3 merging? Do you remember that?

A I do see that.

Q Okay.

A But it doesn't say that he – you know that there was any steps taken in reliance on that.

Q Okay.

A It was just a discussion that was had.

Q Okay.

A It doesn't – it didn't – to me that was not sufficient to establish a detrimental reliance argument.

Q Okay. But that was mentioned, right?

A It was.

Q Okay. And ultimately on February 12th, 2013, the Court heard arguments from both sides and ultimately went forward with sentencing?

A Yes.

Q Okay. And there's actually another part of this transcript where Judge Leavitt asks Mr. Hillman, I mean – it's on page 4, line 10 – I mean you agree that I have to sentence him first? And Mr. Hillman said, correct.

A Exactly.

Q Okay. And you read that as a concession?

A That was also – yeah. He conceded that the Court couldn't address whether he was ineffective, couldn't address – he didn't actually ask for any relief. He just said, go ahead and sentence.

Q Okay. Were you aware of Ms. Hojjat and Mr. Hillman's position that this particular issue couldn't really be challenged until after the Defendant had been found guilty of both Counts 1 and 3 and prior to or as the Court was about to adjudicate the Defendant guilty of Counts 1 and 3?

A I'm not sure I understand the question.

Q Okay.

A I –

Q Would you agree with me that this particular issue, whether it was ex post facto, it was not a cognizable issue until the jury returned a verdict of both counts and then the Court subsequently tried to adjudicate him guilty of both counts?

A I – honestly, I don't know. I don't know the answer to that.

Q Okay. Let me phrase it a little more simply. Adjudication would have been necessary, meaning sentencing –

A Correct.

Q – prior to being able to truly challenge the sentence on a Judgment of Conviction. Would you agree with me?

A Yeah. I mean you can't file a Motion to Correct an Illegal Sentence until after the – you know until after there's a JOC.

Q Correct. And in this particular case you, as the attorney –

A Correct.

Q – appellate attorney, thought that the relief from the denial of Mr. Hillman and Ms. Hojjat's motion to dismiss at sentencing, you thought – you sought relief under a Motion to Correct the Illegal Sentence, correct?

A Yeah. They didn't – I don't believe they made a motion to dismiss at any point.

Q Okay. Are you familiar with – there were two sentencing dates.

A Right. She objected, but she didn't move to dismiss anything.

MS. LEXIS: Court's brief indulgence.

THE WITNESS: And I think you're looking for page – what page 9, line 9?

BY MS. LEXIS:

Q Okay. So you were looking for actual statements moving to dismiss?

A Exactly. There was no motion to dismiss made at either of those hearings.

Q Okay. But maybe we're mincing words here, but on page 10 she

says, we are actually objecting to adjudication of Count 3 in this case. Do you see that?

A I do.

Q Okay.

A I'm aware of that.

Q Okay.

A But she didn't mention ex post facto.

Q Okay. Okay. Regardless of the reason for not raising the ex post facto rule, as we, you know – or the ex post facto alleged violation in the direct appeal – did you also indicate on direct examination that you didn't believe there was, for whatever reason, a reasonable probability of success on appeal, given that issue?

A Based on the concession, I didn't believe that there was a reasonable likelihood of success.

Q Okay. So you made a call, reading the transcripts and you read Mr. Hillman's statements as a concession?

A I did.

Q And you also stated on direct examination that you felt the Motion to Correct Illegal Sentence was the appropriate venue, being that Judge Leavitt was most familiar with both the facts and the initial raising of the issue during sentencing?

A I don't know if that's the reason I gave, but I agree with that.

Q And so is it your testimony that you don't believe this Court considered that Motion to Correct Illegal Sentence on the merits?

A Honestly, I don't know what the basis for the Court's decision was,

since it wasn't spelled out for the parties. So I can't speak to that.

Q Did your reply actually argue facial invalidity of the sentence?

A We did.

Q On direct examination when you said you felt you were on solid ground in filing the Motion to Correct Illegal Sentence, what did you mean?

A I felt that it was a – that was a proper vehicle, you know, to raise that issue, since relief hadn't previously been requested of the Court on that – on the basis of ex post facto and detrimental reliance. I felt that we could do so via the Motion to Correct an Illegal Sentence. And the reason I felt that was because, you know, my husband had successfully done so in *Haney* and he advised me he was able to do that in several other cases.

Q Okay. So you had a reasonable basis or – to believe that that was the proper avenue for raising this issue?

A Yes.

Q And, in fact, raised it?

A I did.

Q And then appealed the denial of that particular motion –

A That's correct.

Q – to the Nevada Supreme Court? Okay.

Now are you familiar with the actual claim by Mr. Grimes in his supplemental Petition for Writ of Habeas Corpus alleging ineffective assistance of counsel or appellate counsel for not challenging the sentence or for challenging the sentence via Motion to Correct Illegal Sentence? I mean that's the basis upon which he is challenging your effectiveness. You're aware of that, right?

A Correct.

Q Okay. But today your testimony is that you felt that was – the Motion to Correct Illegal Sentence was the appropriate avenue for raising ex post facto and detrimental reliance, given the state and totality of the record?

A That's correct.

MS. LEXIS: Okay, nothing further. Thank you.

THE COURT: Any redirect?

MR. RESCH: Thank you.

REDIRECT EXAMINATION

BY MR. RESCH:

Q All right, just put this in *Strickland* terms –

A Okay.

Q – but for Roger's ineffectiveness when it came to preserving the ex post facto issue for direct appeal, would you have raised it on direct appeal?

A Had he made the record that he was supposed to make, as demonstrated in Exhibit 1, I would have raised it on direct appeal.

Q Is that also because you – you would've raised it because you thought it had a reasonable chance of success?

A Yes.

MR. RESCH: Nothing further. Thank you.

THE COURT: Any recross?

RECROSS EXAMINATION

BY MS. LEXIS:

Q Didn't you state on direct examination that it – something about it wouldn't have changed your briefing of ex post facto, meaning you wouldn't

have raised that particular issue on direct appeal anyway?

A So what I'm saying is: had Roger made the record that he was supposed to make, as set forth in the email, I would not have needed to in effect resurrect the issue via a Motion to Correct an Illegal Sentence. The issue would've been properly preserved had he said what Nadia asked him to say in this email.

Q Okay.

A Then I could've – then it would've been fully preserved. I could've raised it on direct appeal without any issues.

Q Okay. I guess I misunderstood you, because I have down in my notes that it wouldn't have changed – it wouldn't have changed your challenge for ex post facto because you thought ex post facto, that issue could be – you were on solid ground in raising that issue on a Motion to Correct Illegal Sentence?

A I wouldn't have needed to file a Motion to Correct an Illegal Sentence. I would've been able to put it all in the direct appeal had Roger not conceded it at sentencing and had he also made the record that he was asked to make.

Q Right. But you would still agree with me that, even as you sit here today, you believe the Motion to Correct Illegal Sentence is an appropriate venue – avenue for challenging that particular issue?

A I could have, but there's no – there would've been no reason to do that because the issue – had he already said to the Judge, dismiss Count 3 because of ex post facto, I wouldn't need to file a Motion to Correct an Illegal Sentence. That would have been taking – trying to take a second bite at the

apple because the Court would've already been asked to do something based on the ex post facto basis. Then it wouldn't have – it would have made no sense to file a Motion to Correct an Illegal Sentence had the record been what it was supposed to be.

Q Okay. Is it your believe or is it your testimony that the ex post facto issue and detrimental reliance issue were properly preserved in the District Court, such that you had – you preserved it for a Motion to Correct Illegal Sentence, but it wasn't properly preserved on a direct appeal?

A So we needed to give the Judge a chance to rule. I mean before you can really raise an issue to the Supreme Court you need to give the Judge a chance to issue a ruling, and I did not feel that Roger gave the Court a chance to do what it needed to do on this matter by – through his concession.

Q Which was what? Do –

A That *Jackson* didn't change; that *Jackson* just told us we were doing it wrong before and he agreed that it wasn't a new law and that he agreed that it just meant we were ineffective. He never actually said to the Court, hey, these are the reasons why *Jackson* changed the law, the way we went through in the briefing. The Court never got any kind of briefing or any kind of explanation until we filed the Motion to Correct an Illegal Sentence. That would've enabled the Court to actually look at it step by step under the factors that you look at to decide if something is ex post facto. That was never presented to the Court and the Court needed to see that. But had he raised that issue properly at the sentencing hearing, there would've been no need to do that and I could've taken it straight up.

Q Okay. But I guess my question is: the mentioning of it by Mr.

Hillman, ex post facto and a little bit about the detrimental reliance, you felt that was enough of a record, such that you could now challenge it by way of a Motion to Correct Illegal Sentence?

A I don't think there needed to have been anything in the record to challenge it by a Motion to Correct an Illegal Sentence because you can raise that at any time.

Q After sentencing?

A After sentencing.

Q Okay. Which is what the Court ultimately – what you viewed as a concession, was the Court asking, would you agree with me that I have to sentence him first before we can truly ferret out this issue? I mean isn't that what that transcript says?

A That talks about ineffectiveness, as far as I understood, but.

Q I mean it was – it's Mr. Hillman's – well, let me ask you this. Would you agree that in order to raise ineffective assistance of counsel he would have to be sentenced first and go through the proper post-conviction?

A Absolutely.

Q Okay. And before a Judgment of Conviction, which would lay out a sentence, can be appealed, of course, he has to be adjudicated guilty. Would you agree?

A Correct.

Q Okay. And thus before you can file a Motion to Correct an Illegal Sentence or an alleged illegal sentence he would have to be adjudicated?

A Correct.

Q And that's sentenced, right? Yes?

A Yes.

MS. LEXIS: Okay. I have nothing further.

THE COURT: Any other questions for this witness?

MR. RESCH: Nothing further. Thank you.

THE COURT: Thank you very much for being here.

THE WITNESS: Thank you.

THE COURT: Thank you for your testimony. You may step down and you are excused.

Do you have any further witnesses?

MR. RESCH: No further witnesses. Thank you.

THE COURT: Okay. Do you want to argue?

MR. RESCH: Yes, sure.

THE COURT: Sure. Go ahead then.

THE WITNESS: I was about to walk out.

THE COURT: Thank you.

MR. RESCH: Yeah, thank you.

CLOSING ARGUMENT

BY MR. RESCH:

All right, so you've heard our evidence. I think there's a lot going on here and, well, it's a real Perry Mason moment with this transcript. I've never had anything like that happen before. And it made me think back to the insurance defense days when you would be able to bill for insuring the accuracy of a transcript. Well, maybe there's some value in that beyond just generating income. This is the kind of thing that could've been detected if somebody had compared the minutes to what was actually received.

Now, nonetheless, I fully accept that there is a certificate from the court reporter that says we gave you all the transcripts. And so perhaps it's reasonable to rely on that, but what it could do for us is say, well, the reason this wasn't raised on direct appeal is because it couldn't have been. There was an impediment and it's the fact that this transcript is missing, which contains some really important information in terms of Nadia's arguments regarding Count 3. Now that we have it, everything is viewed in the fullest light possible and it's sort of a Hallmark reason for why we should even have an evidentiary hearing. It's really great that that kind of thing can come out now.

Now that it has, I feel like the whole thing is wrapped in this little bit of theatre of the absurd type conduct. There's so many mistakes to go around that maybe we don't even approach it as saying any one person was particularly ineffective. We certainly have accumulative error claim before the Court and it could pertain to Count 3. Nadia and Roger, okay. There's this great meeting in chambers and it sounds like from the record and the record that we have, and I am not one to say, look, Judge, you're bound by your comments. I mean but there's certainly some indications in the record –

THE COURT: But I just want to make sure that the record is clear. You don't believe that I can dismiss a count – I mean I'm not the charging authority – that the State is not in agreement with. I have no authority to dismiss any charges.

MR. RESCH: Okay. Here –

THE COURT: I mean you agree with that, right?

MR. RESCH: Here's what I believe – sure –

THE COURT: Okay.

MR. RESCH: – that you could have this meeting in chambers and everybody could say, hey, Count 3 is redundant, so what are we going to do with it? Oh, yeah, we'll dismiss it after the case is over. Okay. And everybody sort of informally agreed to that. What would've been great is for them to come back out on the record and say, hey, you know, Judge, I'd like to make a record of the meeting in chambers; we all agreed to dismiss Count 3. So that didn't happen and now we're left here trying to recreate this event that happened four years ago. Particularly in light of the new transcript, we have some pretty good information. It sounds like the Court actually has some recollection that there was this – at least this discussion, if not an actual –

THE COURT: Well, sure. It appears I had some recollection, absolutely.

MR. RESCH: Yeah, okay. So that makes it – to me that's evidence that that conversation occurred. And, frankly, one would expect that if the State wasn't in agreement with what at the time was pretty established Hallmark law, 25 years of redundancy law going backwards, it kind of sounds like, yeah, they would've spoken up if they didn't agree with that. It makes the most sense here to conclude that that conversation happened and that agreement was made and the trial attorneys relied on it. That would make the most sense for why they didn't make a record of this otherwise mundane fact. It was something that everyone agreed to, and that's kind of the way Roger explained it.

And then we've got a second issue, which is Nadia can't be there for the second sentencing, so she arms Roger with all the information he needs. He could've just appeared in front of this Court and read that email. That

probably would've done the job and we wouldn't be here today. And for whatever reason, he barely approaches the topic. Now I have to deal with post-conviction claims regarding appellate ineffectiveness from time to time and occasionally I've run into the Nevada Supreme Court says, well, you didn't make a cogent argument and so we're not going to consider something. And I kind of think that's what we had here with Roger.

Certainly he mentions – he uses the words ex post facto in a string, but you just heard from Ms. Westbrook the explanation of, well, yeah, but. You know it's kind of in passing and there's no – there's no follow through in terms of what he wants the Court to do or how the law ought to be applied. It's great that he – and I sort of agree with Ms. Westbrook. The touching nature of his barely approaching the topic makes you wonder at this stage, four years later, did he even believe that there was an argument to be made, which is just mind-blowing, considering what Nadia had told him just mere days before that sentencing.

So then I take all that and I get to Ms. Westbrook, and she's still here, but we're going to say some things about her. You know there's two issues here, one is: this could have been detected and we heard some testimony about that from the other witnesses; that, you know, maybe if one had gone through the minutes and been like, wait, the matter was recalled, but I don't see that in the transcript; I should look into that. Okay. Well, that would have been one way to approach it, and then maybe the issue could've been raised on direct appeal. And I think we pretty clearly heard that the issue isn't that these are bad appellate issues. It's that there's no record upon which to raise them. If there had been a record, they could've been raised and they

would've been good issues.

And the other thing is Ms. Westbrook ends up choosing the strategy of going with the Motion to Correct Illegal Sentence. She mentioned *Edwards,* and I know the Court is familiar with it, and it's sort of a line that gets rolled out all of the time, the facial invalidity of sentences. It sounded like she considered that that could happen and just rejected the concept that it would apply, but the Nevada Supreme Court decides what the law is in Nevada and they made it pretty clear in this case, this was the wrong vehicle. It should've been raised on direct appeal. And I hope that ship sailed, but they said – the Nevada Supreme Court said – you should've raised this on direct appeal.

Well, how is that anything other than a mistake? That's when it needed to be raised. And if the issue is, well, you know she couldn't have raised it, she didn't know about it, okay. Well, maybe to the extent that, you know – and the State kind of alludes to a procedural bar with that issue. I would certainly suggest we've overcome that here, where the evidence was not available at the time of the direct appeal. If it was and it had been fully prepared, Ms. Westbrook has already explained, the arguments at the first sentencing would've allowed her to preserve the ex post facto issue and present it to the Nevada Supreme Court on direct appeal.

Now there's one more –

THE COURT: So if counsel – if appellate counsel was ineffective and your client was prejudiced what is your remedy?

MR. RESCH: Well, the granting of the writ can take a broad form. So, you know, this Court is called upon to decide the two issues: was counsel ineffective and what was the prejudice? The prejudice is sitting here with a 20-

year sentence that he didn't see coming.

THE COURT: No. I'm called upon to determine the *Strickland* standard.

MR. RESCH: Sure.

THE COURT: You know did counsel's conduct fall below the objective reasonable standard and then was –

MR. RESCH: Well, so you could –

THE COURT: – there also prejudice? So what would be your remedy?

MR. RESCH: Well, you could conclude then that the issue – it was ineffective to not raise the issue on direct appeal. Had it been raised it would've been granted by the Nevada Supreme Court and by granted I mean Count 3 would've been dismissed. I think if we harken back, this whole redundancy issue, you know, is the child of double jeopardy. So the issue really is that the count should've been dismissed under the double jeopardy clause. It just happens in Nevada for a very long period of time that had an additional component to it, which was *Salazar* and the redundancy doctrine. Now, apparently in light of *Jackson,* we're simply going with straight double jeopardy. Are the claims identical under *Blockburger*? That wasn't the case at the time.

I would further suggest one more thing, that we put this in our supplement on page 26, *Byars vs. State*, which came out in 2014, is the Nevada Supreme Court explaining, we changed the law back in *Jackson*. And they said very specifically, we overruled these cases and their progenies citing *Salazar* and other redundancy cases. So I realize what the State is trying to do here and we've certainly heard a lot of discussion about the law being clarified.

You know that's just not the case. The Nevada Supreme Court has said, we overruled those cases. Nothing could be – it's the very definition of unforeseeable when a line of cases is overruled. That is not something you can cease coming, even if Roger thought he could take time –

THE COURT: Well, they –

MR. RESCH: – out of his day to read every pending case.

THE COURT: They said, we disapprove it to the extent they endorse a fact-based, same conduct test for determine the permissibility of cumulative punishment.

MR. RESCH: Okay. Well –

THE COURT: That's what they said in *Jackson*.

MR. RESCH: Oh, right. Well, okay. So *Jackson* may –

THE COURT: Rather the facts or evidence in a specific case, a proper focus is on legislative authorization.

MR. RESCH: Okay. *Jackson* may be used as the phrase disapproving, but in *Byars* very shortly after that the Nevada Supreme Court says *Jackson* overruled those cases. That's at 336 P.3d 939 and it was page 949 or try page 26 of our supplement.

THE COURT: To the extent they endorse a fact-based, same conduct test. I think we're getting in – I think we agree on the same thing. I think we agree.

MR. RESCH: It's a new way of doing things. I guess that's my position; that this isn't, well, you were doing it wrong before, so start doing it right now. It's the end of the line. It's like when the Nevada Supreme Court so-called changed the definition of First Degree Murder. This is the law going

forward and so, sure, you do it that way from then on, but what you can't do, and this is what ex post facto is designed to protect –

THE COURT: I'm not sure they changed the definition of First Degree Murder. They said the *Kazalyn* instruction didn't properly instruct the jury on all three elements. I don't think they ever changed the definition of – it always required wilful, deliberate and premeditation.

MR. RESCH: Well, okay. You know and they were collapsed under *Kazalyn*. And I don't want to get distracted with that whole mess, but it's just an example that came to mind of, you know, when the law changed. And so here is another example of the law changing is what I'm suggesting.

That by definition – and Nadia tried to explain this to great ends – that, you know, it's either a case of we didn't foresee it, in which case it's ex post facto, or we should've foreseen it, in which case we're ineffective. The latter of those arguments is essentially what Mr. Grimes has argued in his proper person petition. What I have argued is the former and I think not to, you know – again, both issues are before the Court.

But I think the better way to approach it is probably to say, if in fact we now know that *Jackson* overruled *Salazar* in that line of cases, then it's unforeseeable and that's one of the elements of ex post facto, which I – let's see here – which I will suggest certainly *Calder vs. Bull* informs what ex post facto means. But as we explained in the briefing in pages 24 and 25 and as held in *Stevens vs. Warden* here in Nevada, there's a slightly different question when it comes to judicial applications. And *Stevens* said, well, let's ask if the decision was unforeseeable, the decision is being applied retroactively and if it disadvantages the offender.

I would certainly submit that we meet all three of those factors here. The only one there was any debate about at all was the unforeseability, but, again, that's been resolved by the *Byars* decision that came out afterwards. There isn't any question that it's being retroactively applied, and I argued this the first time we were here on this. The buy-in is at the time the crime is committed. The offender has the right to know, well, how much trouble am I going to be in if I engage in this conduct? That's what makes it ex post facto by definition. Now he's suddenly in a substantial, almost doubled sentenced, which wasn't contemplated by his trial attorneys at any point in time based on the law as it existed at the time of the trial.

So for all of those reasons, I would suggest that we could either blame it on one person if we want to. Perhaps Roger could've done a better job preserving it and Nadia should've made a record, Ms. Westbrook should've raised this on direct appeal, or I would frankly suggest the culmination of those errors has simply led to where we are today. Mr. Grimes's sentence is fundamentally unfair. It would've absolutely been dismissed if somebody had spoken up right after the verdict and just said, hey, Judge, we were going to collapse those claims, remember that discussion we had in chambers? And that would've been the end of it. Instead here we are trying to reconstruct it four years later, which suggests someone was ineffective, if not all three attorneys. You ought to grant the petition and dismiss Count 3 as part of the relief. All right, thank you.

THE COURT: Thank you.

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CLOSING ARGUMENT

BY MS. LEXIS:

Your Honor, as to the claim that trial counsel was deficient for not moving to dismiss Count 3 at trial, I think the evidentiary hearing this afternoon established a few things: one, that a motion to dismiss during trial would have unlikely been successful. That's because, as Ms. Hojjat, I believe, testified, she indicated that she and Mr. Hillman both thought that the State could put forth both counts to the jury; that we had every right to have the jury decide Battery with Use of a Deadly Weapon and Substantially Bodily Harm, along with the violation of TPO, along with the Attempt Murder with Use of a Deadly Weapon, whether it be as a lesser included or whether it be as a separate charge.

And so another concession or another issue raised by Mr. Hillman and Ms. Hojjat's testimony is that they both acknowledge that they believe this particular issue would not have been cognizable until after a jury verdict and after the Court was moving to adjudicate the Defendant of both Counts 1 and 3. There was testimony that the Court offered to put it as a lesser included, but they didn't want to use the words strategic, but for one reason or another, whether it be, oh, it's too confusing to a jury to have it as a lesser included under Count 1, so we decided to leave it as a Count 3 option. That's a strategic reason. They had a reason for wanting it as a separate charge going into jury verdict.

THE COURT: Well, I think it's clear. They wanted him to be acquitted of the Attempt Murder.

MS. LEXIS: Exactly.

THE COURT: And, if anything, convicted on the Battery charge.

MS. LEXIS: Yes, Your Honor.

Also, the evidence has ferreted out that both defense counsels, Ms. Hojjat and Mr. Hillman, had a reasonable belief that the Defendant could not be adjudicated of both Counts 1 and 2 and thus they had no reason to try to raise it before trial, knowing that it was cognizable after verdict, post adjudication. Again, it was a strategic decision. As the Court indicated, they wanted to be able to offer Count 3 in hopes that the jury would acquit on Count 1, the more serious count of Attempt Murder with Use of a Deadly Weapon in Violation of TPO. Again, the issue was not cognizable until the jury verdict and the Court adjudicated the Defendant.

So, I believe, at least on the record ferreted out today that both Mr. Hillman and Ms. Hojjat advised him as to their belief of the current existence – state of the law. They advised him of his penalties. And they did everything they could without a crystal ball knowing – without ever knowing that *Jackson* could potentially clarify a certain issue that had been an issue in the District Courts, which necessitated the clarification in *Jackson*.

Also, concerning Mr. Hillman's lack of – alleged lack of making a record on February 12th, 2013 – I think that is belied by the record. I think Mr. Hillman was aware that Ms. Hojjat moved or objected to adjudication of Count 3. And whether or not the word dismissed was used, she objected to him being adjudicated of that. The remedy is, if you were to grant her objection, would've been to dismiss Count 3 or not adjudicate him of that, meaning that it would've been a useless charge. Mr. Hillman did talk about ex post facto. He did talk about Count 3 potentially merging with Count 1, as shown on page 2 of the transcript. And the Court did have an opportunity at that time to consider

arguments both on *Jackson, Blockburger, Strickland*, and then Mr. Burns comes in and starts to argue ex post facto, *Calder vs. Bull*, the four categories.

So I would actually disagree; however, I would disagree with appellate counsel's analysis that it wasn't properly preserved. However, I mean she's presumed to be effective.

THE COURT: Sure.

MS. LEXIS: She looked at the record and she made her – she made an assessment. And I don't think her assessment falls below a level of competence that's expected of appellate counsels. I think she was actually rather diligent. She read through the entire record, considered the preservation issue, which is more than I can say a lot of, you know, appellate attorneys do. She looked for the strongest arguments that required reversal. Preservation was an issue. And, while we can disagree, I guess Monday morning quarterback, you know, you can disagree with it. She had a reasonable basis to believe that, and so I don't think she was – I don't think Mr. Hillman failed to preserve the issue for appeal at all and I don't believe that Ms. Westbrook was necessarily precluded from raising it on direct appeal, which leads me to my next point.

In fact, Mr. Grimes did – he suffered no prejudice, which is, as the Court indicated, the second prong of *Strickland*. It was not as if he was not able to raise or brief or litigate the ex post facto issue. It's not as if he wasn't able to raise or litigate the alleged detrimental reliance issue. He wasn't able to – he did not. And I'll submit to the Court that they just decided not to raise that, those two issues on direct appeal, in favor of the stronger arguments, which were ultimately raised. But it's not as if, you know, appellate counsel

just failed to raise the issue in its entirety. It didn't just fall by the wayside. Appellate counsel actually filed a separate motion before this Court and articulated the reasons for doing so.

Mr. Westbrook, when he argued this particular issue before Your Honor, said that he was winnowing out weaker arguments in favor of those that would have provided more relief and he also indicated that the issue required additional briefing and that this Court would be best equipped to decide the issue on the first [indiscernible] in light of the arguments already presented during sentencing. Now that – that's a – those are reasonable reasons to want to put that before the Court. And, as Ms. Westbrook indicated, she believed she was on solid ground; that she could have raised both those issues in a Motion to Correct Illegal Sentence. And the Court, of course, entertained briefing, additional arguments, considered all of the *Calder vs. Bull* facts and ultimately denied it.

And, as Mr. Westbrook indicated, or as our supplemental – or our response to the supplemental briefing filed July 17th, 2017, indicated, they knew that if it was – if that particular motion was unsuccessful that particular order from the Court could be appealed. And so those two issues that they're claiming he was prejudiced because he was – it wasn't raised on direct appeal – the record is actually to the contrary. It was fully briefed, giving full – given full time and attention by this Court and considered both on the jurisdictional level, as well as on the merits. And ultimately the Nevada Supreme Court decided to affirm the Court's denial, but certainly Ms. Westbrook had a reasonable basis for believing she was on solid ground.

I don't think any of these attorneys' conduct or their performance

fell below the level of competency, as stated in *Strickland*, and certainly there has been no prejudice on the Defendant. He was apprised of the law, as it existed. He was aware of the consequences. He was aware that he was a two-time convicted felon going into this. And so I just – I don't think they've met the prejudice prong, you know let alone the actual performance prong. So I would submit on that.

THE COURT: Anything else, counsel?

MR. RESCH: Okay, just super brief.

REBUTTAL CLOSING ARGUMENT

BY MR. RESCH:

Okay. With regard to Ms. Westbrook, and she's still here, I would still suggest the strategy of, well, we're going to try this ex post facto issue in a Motion to Correct Illegal Sentence is akin to trying – driving your car off a cliff and seeing if you fly. No. You're going to go straight to the bottom of the ravine, because the Nevada Supreme Court has already made it clear that you can't raise this type of constitutional due process argument in a Motion to Correct Illegal Sentence. If there was some glimmer of hope that you could, it doesn't preclude her from doing the one thing that is certain to get review of the issue, which is to raise it on direct appeal.

So there was nothing that stopped her from doing both, if that was the question. I think, but at the end of the day we already know, it was improper to raise it in a Motion to Correct Illegal Sentence. That's been resolved. It should've been raised on direct appeal, and if it had been, I suggest to this Court, it would've been granted. This is an ex post facto application. To say that Mr. Grimes isn't prejudiced, I don't even understand how to

respond to that. He's doing an extra 20 years in prison.

And with regard to Roger, here's one thing you didn't hear a strategic explanation for. In fact, he had no answer for, why didn't he raise any of the issues that Nadia told him to raise in that email? Now he all but said, whoops, I made a mistake; I should've raised those issues. Well, yeah, then the issue would've been preserved and somebody like Deborah could've come around and said, great, this is a well-preserved issue, I can't wait to raise it on direct appeal, where it will surely be successful.

So, again, there's individual ineffectiveness. There's group ineffectiveness. The combined sum of it all means Mr. Grimes is sitting here doing an extra 20 years in prison that he absolutely should not be doing.

THE COURT: It's actually 8. It's the – I mean it's 8 to 20.

MR. RESCH: Eight to 20, okay.

THE COURT: It's the extra –

MR. RESCH: Okay.

THE COURT: I – it was the 12 to 35 and then the – I'm sorry.

MR. RESCH: Okay. No. It's –

THE COURT: It's the 8 to 20.

MR. RESCH: Eight to 20.

THE COURT: Plus the consecutive.

MR. RESCH: Okay. It was a habitual, so I think it was just 8 to 20 for Count 3.

THE COURT: Right, because Count 1 was 12 to 35 and the 3 was – Count 3 was run consecutive.

MR. RESCH: Right, okay.

THE COURT: So I know you're saying 20, but it was an 8 to 20, right?

MR. RESCH: Eight to 20, okay.

THE COURT: Okay.

MR. RESCH: Count 3, 8 to 20, but it's consecutive, so every minute of it counts, versus, you know, if it had been dismissed just the original count, 12 to 35. All right, I'll submit it with that. Thank you so much.

THE COURT: Okay. At this time the Court is going to deny the petition and the State of Nevada can prepare the order.

MS. LEXIS: Thank you.

THE COURT: Thank you very much.

MR. RESCH: All right, thank you.

THE COURT: Thank you.

MS. LEXIS: Thank you.

[Off-record colloquy between the Court and clerk]

MS. LEXIS: Thank you.

THE COURT: We got all of our exhibits though?

MS. LEXIS: You have it?

THE COURT CLERK: Yeah.

THE COURT MARSHAL: Yes, ma'am.

THE COURT: Okay.

MR. RESCH: Shoot, before we all –

THE COURT: I just wanted to make sure that all the exhibits are here because – oh, one –

MR. RESCH: Before we disappear, can I be appointed for the

appeal?

THE COURT: I was just going to say that. Do you want to be appointed for the appeal?

MR. RESCH: Yes, thank you.

THE COURT: The answer is yes. You present the order and I'll sign it.

MR. RESCH: All right, thank you.

THE COURT: Okay.

MS. LEXIS: Thank you.

[Proceedings concluded at 3:18 p.m.]

* * * * *

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.

Kristine Santi

KRISTINE SANTI
Court Recorder

BENNETT G. GRIMES 1098810
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV. 89070.

8TH JUDICIAL DISTRICT COURT OF
NEVADA, CLARK COUNTY

MOTION TO APPEAL DENIAL OF HABEAS CORPUS (WRIT FOR POST-CONVICTION)

BENNETT GRIMES
PETITIONER
VS.
THE STATE OF NEVADA
RESPONDENT

CASE NO. C-11276163-1
DEPT NO. XII

COMES, NOW APPELLANT, BENNETT G. GRIMES, APPEALS THE DECISION OF DENIAL, OF HIS HABEAS CORPUS, WRIT FOR POST-CONVICTION, HEARD AND ARGUED ON THE FIFTH DAY OF OCTOBER, BY TRIAL AND SENTENCING JUDGE HON. MICHELLE LEAVITT.

DATED ON THE 31ST OF OCTOBER 2017.

APPELLANT,
Bennett G. Grimes
#1098810
BENNETT G. GRIMES

RECEIVED
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CLERK OF THE COURT

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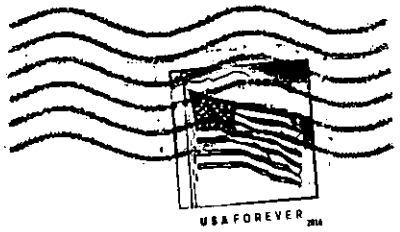

ATTN: CLERK FOR COUNTY OF CLARK.

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BENNETT GRIMES,
#2762267

Defendant.

CASE NO: C-11-276163-1

DEPT NO: XII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: OCTOBER 5, 2017
TIME OF HEARING: 10:30 AM

THIS CAUSE having come on for hearing before the Honorable MICHELLE LEAVITT, District Judge, on the 5th day of October, 2017, the Petitioner being present, REPRESENTED BY JAMIE J. RESCH, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through AGNES M. BOTELHO, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

On September 14, 2011, the State of Nevada charged Bennett Grimes ("Defendant") 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). 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.

A jury trial commenced on October 10, 2012, and on October 15, 2012, a Clark County jury returned a verdict of guilty on each of the three charges.

On February 12, 2013, Defendant 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. Defendant received 581 days credit for time served. The District Court entered the Judgment of Conviction on February 21, 2013.

On March 18, 2013, Defendant filed a Notice of Appeal. On February 27, 2014, the Nevada Supreme Court issued an Order of Affirmance in Defendant's appeal. The date of remittitur was March 24, 2014.

On September 9, 2013, Defendant filed a Motion to Correct Illegal Sentence. On September 23, 2013, the State opposed that Motion. This Court heard the Motion on September 26, 2013, but continued the hearing so that the parties could file replies. On October 3, 2013, Defendant filed a Reply, the State filed a Sur-reply, and the Court heard additional argument. This Court indicated that a decision would issue via minute order. On February 26, 2015, this Court denied Defendant's Motion to Correct Illegal Sentence via minute order. On May 1, 2015, a written order denying the same was filed.

On February 20, 2015, Defendant filed a pro se Petition for Writ of Habeas Corpus claiming his trial counsel was ineffective. On April 21, 2015, Defendant was appointed

counsel. On July 21, 2016, at Defendant's request, the District Court set a briefing schedule ordering Defendant's Supplemental Petition for Writ of Habeas Corpus due on August 18, 2016, the State's Response due on October 29, 2016, and Defendant's Reply due on November 9, 2016. The matter was set for hearing on November 15, 2016.

On August 25, 2016, Defendant filed three pro se motions to add additional grounds to and request an evidentiary hearing on his February 20, 2015, Petition for Writ of Habeas Corpus. The State opposed those three motions on September 8, 2016. On September 15, 2016, this Court struck those motions as fugitive documents.

On September 23, 2016, Defendant filed a motion to discharge his attorney. That motion was denied on October 18, 2016.

On November 15, 2016, this Court ordered Defendant's attorney withdrawn from the case and appointed instant counsel. On January 17, 2017, this Court set a briefing schedule for the Petition for Writ of Habeas Corpus. On May 16, 2017, Defendant filed a Supplemental Petition for Writ of Habeas Corpus. ("Petition") The State responded on July 17, 2017. Defendant filed his Reply on August 7, 2017. On August 24, 2017, the Court ordered an evidentiary hearing on the issue regarding Count 3. The hearing took place on October 5, 2017. At the hearing, Roger Hillman, Nadia Hojjat, and Debora Westbrook testified.

I. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

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).

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a. Trial Counsel Was Not Deficient For Not Moving To Dismiss Count 3 At Trial

Petitioner argues that trial counsel was deficient for failing to move the court to dismiss Count 3. Petition at 21. Petitioner fails to demonstrate that counsel was deficient.

First, Petitioner's position is illogical and fails to demonstrate that counsel was deficient. Petitioner begins his argument by citation to authority that states that counsel's deficiency is to be judged in light of the law existing "at the time" of the challenged conduct. Petition at 20 (quoting Smith v. Murray, 477 U.S. 527, 536 (1986)). According to Petitioner, the law existing during trial suggested that Petitioner could not be adjudicated guilty of both Count 1 and Count 3 because they were redundant.[1] Petition at 15; see generally Defendant's Motion To Correct Illegal Sentence, filed September 9, 2013, Defendant's Reply In Support Of Motion To Correct Illegal Sentence, filed October 3, 2013, Transcript of Proceedings: Sentencing, Thursday, February 7, 2013. If that is the case, then counsel was not deficient for failing to move to vacate Count 3 during trial because (1) Petitioner had not yet been convicted and such a motion may have been redundant anyway, and (2) counsel was under the reasonable belief that Petitioner could not be adjudicated of it anyway. 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.

Indeed, if Petitioner's argument is correct, "counsel's failure to anticipate a change in the law does not constitute ineffective assistance of counsel even where 'the theory upon which the court's later decision is based is available, although the court had not yet decided the issue.'" Nika v. State, 124 Nev. 1272, 1289, 198 P.3d 839, 851 (2008). Put differently, if Petitioner is right that the law at the time prevented Petitioner from being adjudicated guilty of both Count 1 and 3, then counsel had no reason to raise the issue during trial and cannot be ineffective for failing to do so. Alternatively, if Petitioner is wrong and Jackson merely

[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. Adv. Op. 55, 291 P.3d 1274 (2012), merely clarified existing law. State's Opposition to Defendant's Motion to Correct Illegal Sentence, filed September 23, 2013, State's Surreply in Support of Opposition to Defendant's Motion to Correct Illegal Sentence, filed October 3, 2013.

clarified, but did not change, the law, then counsel cannot have been ineffective for failing to argue incorrect law.

Second, even if Petitioner could show that counsel was deficient, Petitioner cannot demonstrate prejudice sufficient to warrant relief. Absolutely nothing in the record demonstrates that this Court would have entertained a motion to dismiss Count 3 at that time, despite counsel's affidavit that this Court "repeatedly stated that Mr. Grimes could not be adjudicated guilty of both Counts 1 and 3." Petition at 18. Indeed, reviewing the trial transcripts indicates 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. Further, even if this 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 this Court had granted it, the result would have been error under Jackson.

Either way, based on the law Petitioner claims was in effect during trial, Petitioner 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).

b. Appellate Counsel Was Not Deficient For Challenging The Sentence Via A Motion To Correct Illegal Sentence

Petitioner argues that counsel was deficient for raising a challenge to the sentence in a Motion To Correct Illegal Sentence rather than on appeal. Petition at 21-22.[2]

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

[2] Petitioner appears to argue that arguments during sentencing and within the Motion To Correct Illegal Sentence were the actions of post-conviction counsel. Petition 21-22. The State will respond as if that is the case, but the arguments apply equally if these actions should more properly be attributed to trial counsel.

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 this 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 Petitioner's conviction, while the Jackson issue could have, at most, overturned a portion of Petitioner's 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 Petitioner's 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; After all, even here counsel has spent 27 pages briefing the issue.

Second, Counsel's reasoning that the issue required additional briefing, and the belief that this 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 (and, if Petitioner's unsupported arguments are believed, having

discussed the issue off the record with counsel) this 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.

Petitioner also argues that counsel was deficient for actually raising the issue within a Motion to Correct Illegal Sentence. Petition at 22. As Petitioner states, a motion to correct illegal sentence is appropriate when challenging the facial illegality of a sentence. Id. (quoting Edwards v. State, 112 Nev. 704, 918 P.2d 321, 324 (1996)). Indeed, Petitioner *extensively* argued that adjudicating him guilty of both Count 1 and Count 3 was facially illegal. see generally Defendant's Motion To Correct Illegal Sentence, filed September 9, 2013, Defendant's Reply In Support Of Motion To Correct Illegal Sentence, filed October 3, 2013, Transcript of Proceedings: Sentencing, Thursday, February 7, 2013, Fast Track Statement, Appeal 67598, filed July 2, 2015, *and especially* Reply To Fast Track Statement, Appeal 67598, filed September 29, 2015. Counsel was correct that the Motion to Correct Illegal Sentence spawned extensive briefing, far outside that permitted even by a non-fast-track appeal, and numerous hearings by this Court. That this Court denied Petitioner's claims, on the merits, does not make counsel ineffective for choosing to present the argument through that vehicle. And, while the Nevada Supreme Court eventually found that "Grimes does not allege the facial invalidity of the sentence," that finding was clearly at odds with the Reply To Fast Track Statement that extensively and clearly *did* argue the facial invalidity of the sentence. Cf. Order of Affirmance Appeal 67598, filed February 26, 2016; Reply To Fast Track Statement, Appeal 67598, p. 5-8, filed September 29, 2015.

Once again, just because this Court denied Petitioner's argument on the merits, and the Nevada Supreme Court held that this Court did not abuse its discretion in doing so, a bad outcome does not demonstrate either deficiency or prejudice. Indeed, given the extensive record created by the Motion to Correct Illegal Sentence, in addition to that created during Appeal 67598, had the Nevada Supreme Court found Petitioner's arguments had merit it could

easily have decided so by recognizing Petitioner's argument in the Reply To Fast Track Statement and agreeing that facial invalidity was argued in order to reach the substantive merits. Instead, the Nevada Supreme Court decided to let this Court's decision stand with little to no additional comment.

Because appellate counsel was not deficient, and because even if appellate counsel were deficient the record indicates that the Nevada Supreme Court was unlikely to grant Petitioner relief and Petitioner therefore cannot demonstrate prejudice, Petitioner's claims are denied.

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).

Petitioner cites to Knight v. State, 116 Nev. 140, 993 P.2d 67, 72 (2000), for the proposition that Petitioner could reasonably argue that a steak knife is not a deadly weapon. Petition at 27. This argument is preposterous. While a steak knife, without more, might not necessarily be a deadly weapon, here Petitioner stabbed the victim 21 times with the weapon and left scars so severe that this 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.

Transcript of Proceedings Sentencing, February 12, 2013 p. 7. Further, the jury convicted Petitioner of attempted murder. Judgment of Conviction, February 21, 2013. By definition, the jury must have believed that Petitioner 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. Petitioner's counsel was already placed in the exceedingly difficult position of arguing that Petitioner did not intend to kill the victim because he somehow failed to kill her after stabbing her 21 times. Transcript of Proceedings Jury Trial - Day 4, p. 20 ln. 21-25, October 15, 2012. Further arguing that the method in which the knife was used was not likely to lead to death or substantial bodily harm risked the jury believing that no arguments counsel made could be credible.

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, Petitioner cannot demonstrate prejudice because no reasonable juror could have believed both that Petitioner attempted to murder the victim with a steak knife and that the steak knife was not, as used, a deadly weapon. Therefore, Petitioner's claim is dismissed.

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

Petitioner argues that appellate counsel should have argued, during the first appeal, that this Court erred in denying his Motion To Dismiss For Failure To Gather Evidence. Petition at 28-30. The law cited in Section b, supra, ln. 1-15 applies once again.

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. Petitioner concedes that any DNA or fingerprint evidence was properly preserved, even until trial. Petition at 29. Further, Petitioner has not demonstrated that the State had any obligation whatsoever to test the knife for DNA or fingerprints. Petitioner does not contend that the State prevented him from testing the knife at any time. Instead, Petitioner simply chose not to. Given that Petitioner did not test the knife, despite its availability, Appellate counsel could not reasonably argue that the State was under any obligation to perform Petitioner's discovery for him.

If, however, Petitioner is arguing that Appellate counsel should have claimed ineffective assistance of counsel in the first appeal, based on Petitioner's 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, by the Nevada Supreme Court.

Finally, this 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, Petitioner's DNA and/or fingerprints could have been found on the knife – an outcome not beneficial for the Petitioner 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 Petitioner's. In fact, given that Petitioner 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, not the Petitioner's. As such, Petitioner fails to demonstrate how testing the knife would have led to a better outcome at trial. Petitioner makes a bare assertion that, had Appellate counsel raised the issue, Petitioner would have somehow "enjoyed a more favorable outcome" on appeal, but utterly fails to indicate how the Nevada Supreme Court could have found as much given that (1) the knife was available for Petitioner to test, (2) the State was under no obligation to test the knife, and (3) the knife was not actually tested. Petition at 29-30. Such a bare assertion is insufficient to warrant relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Therefore, Petitioner's claim is denied.

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

Petitioner asserts a claim of cumulative error in the context of ineffective assistance of counsel.[3] The Nevada Supreme Court has never held that instances of ineffective assistance

[3] Once again, any alleged cumulative error outside of the context of an ineffective assistance of counsel claim is not properly brought in a Petition for Writ of Habeas Corpus and should be denied. " Franklin, 110 Nev. at 752, 877 P.2d at 1059. "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an

of counsel can be cumulated. However, even if they could be, it would be of no moment as there was no single instance of ineffective assistance in Petitioner's case. 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, Petitioner's 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 Petitioner stabbed the victim 21 times in front of numerous people, including a police officer. Transcript of Proceedings Jury Trial - Day 2, p. 25-26, October 11, 2012. Additionally, there was no error, so there is nothing to cumulate. While the crimes of which Petitioner was convicted are serious, serious crimes of which a defendant is convicted absent error are not sufficient, by themselves, to warrant relief. While Petitioner 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 Petitioner's conviction. Therefore, Petitioner's claim is denied.

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earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans, 117 Nev. at 646-47, 29 P.3d at 523.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus shall be, and it is, hereby denied.

DATED this 9th day of November, 2017.

DISTRICT JUDGE

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

BY _____ FOR
CHARLES W. THOMAN
Deputy District Attorney
Nevada Bar #12649

CERTIFICATE OF SERVICE

I certify that on the 20th day of Nov, 2017, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

JAMIE RESCH, ESQ.
jresch@convictionsolutions.com

BY _____
Secretary for the District Attorney's Office

jm/L2

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S APPENDIX

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 13th day of March, 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's Office
Adam P. Laxalt, Nevada Attorney General
Jamie J. Resch, Resch Law, PLLC d/b/a Conviction Solutions

By:_____
Employee, Resch Law, PLLC d/b/a Conviction Solutions