

IN THE SUPREME COURT OF THE STATE OF NEVADA

BENNETT GRIMES,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Supreme Court Case No. 74419

APPELLANT'S REPLY BRIEF

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

The State's answering brief does not even attempt to address several of Grimes' core arguments. A responding party's failure to answer issues presented in the opening brief can operate as a waiver of any argument against those issues. Myers v. United States, 673 Fed. Appx. 749, 752 (9th Cir. 2016). This Court has taken an even dimmer view, and has gone so far as to hold that the State's failure to respond to issues via its answering brief, operates as a concession to the merits of those issues. Polk v. State, __ Nev. __, 233 P.3d 357, 360 (2010), citing NRAP 31(d).

Here, the State did acknowledge that Grimes has raised important constitutional claims such as ineffective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. Answering Brief, p. 7. But Grimes also raised a claim, and in fact his chief complaint in this matter is, that under the Ex Post Facto Clause of the United States and Nevada Constitutions the application of Jackson v. State, 128 Nev. Adv. Op. 55, 291 P.3d 1274 (2012) to his case was unconstitutional. The State's answering brief **does not even mention the**

Ex Post Facto Clause. This Court should readily construe this concession to mean the State has now admitted, as it must, that applying Jackson retroactively to Grimes' case is a violation of the Ex Post Facto clause. The trial court's rejection of the Ex Post Facto issue during post-conviction proceedings on grounds that Jackson was a mere clarification of law is, as conceded by the State, indefensible.

Second, Grimes asserts a claim that his rights to due process and a fair trial were violated when the defense detrimentally relied on the State's agreement, during a conference in chambers during the trial, that Count Three would be dismissed. The Answering Brief barely mentions this claim at all, and only does so when it suggests there was no evidence to support this off the record agreement. However, the Opening Brief contained detailed references to the testimony of two of Grimes' trial attorneys, and comments by the Court that confirmed that this discussion indeed did occur. 5 AA 1134. To be sure, Grimes believes his trial attorneys were ineffective in failing to properly memorialize this important, off the record agreement, but there is ample evidence upon which to find the discussion

occurred and agreement made.

The State also makes no effort to rebut Grimes' detrimental reliance theory. It is well settled that counsel in a criminal trial may rely on promises made by the State in formulating the defense of the case. The only reason a detrimental reliance issue was not raised on direct appeal was that appellate counsel believed the issue was not properly preserved. But Grimes has proven that this belief was faulty, and was entirely based on the fact a key transcript which preserved the issue was missing. Opening Brief, p. 9. The State's answering brief does not mention this detrimental reliance theory at all, does not mention the missing transcript at all, and should again be construed to concede those undisputed issues.

One thing the Answering Brief does do is attempt to defend appellate counsel's performance on grounds that 1) the Ex Post Facto issue wasn't that important since it would not result in a new trial, or, 2) the motion to correct illegal sentence was the proper vehicle for challenging the Ex Post Facto claim concerning Count Three, and the trial court properly denied the motion on the merits. Answering Brief, p. 15.

Neither of the defenses asserted by the State find any support in the record. The concept that appellate counsel properly “winnowed” out the meritorious Ex Post Facto issue is completely at odds with the record and applicable law. First, at no time did appellate counsel indicate that she failed to raise the issue on direct appeal because the other issues were better. The failure to raise the Ex Post Facto issue on direct appeal was purely a function of appellate counsel’s mistaken belief that the issue was not preserved for review. 6 AA 1220.

Second, the concept that the asserted issues were better than the Count Three issue because they could have resulted in a new trial is at odds with clearly established federal authority, in that the Supreme Court has already held that “any amount of [additional] jail time has Sixth Amendment significance;” Lafler v. Cooper, 132 S.Ct. 1376, 1386 (2012), citing Glover v. United States, 531 U.S. 192, 203 (2001). Here, the consecutive nature of Count Three nearly doubled Grimes’ incarceration from a minimum of thirteen years on Count One, to a minimum of twenty-one years – the original thirteen years plus the eight year minimum of

Count Three. There was no tactical basis provided for failing to seek relief that could cut Grimes' sentence in half, other than the misguided belief that the issue had not been preserved.

Third, the State now appears to suggest it was great lawyering on appellate counsel's part to exclusively litigate the Count Three issue via a motion to correct illegal sentence. This Court should hold the State accountable to its original arguments below, which strongly and successfully contended that the motion to correct illegal sentence was a procedurally improper means of raising the issue. 4 AA 851. The State's new position is completely at odds with what it argued to the trial court, which is reason alone to reject the arguments currently being advanced. New Hampshire v. Maine, 532 U.S. 742, 749 (2001) ("[W]here a party assumed a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formally taken by him").

Fourth, the trial court never ruled that the motion to correct illegal sentence was denied on the merits. As noted in the opening brief, the order denying the motion just said the motion was denied. 4 AA 908. Further, this Court's decision on appeal, which was the last (and only) reasoned decision on the topic, plainly held that the motion was denied on procedural grounds. 5 AA 1092. There is nothing in the record from which to conclude that Grimes' original motion was denied on the merits.

Taken as a whole, Grimes is entitled to relief on a claim that appellate counsel was ineffective. Grimes was plainly prejudiced by the issues surrounding Count Three, because the conviction and sentence for Count Three has resulted in a substantially longer period of incarceration. Further, the State urged below, and this Court found, that issues regarding Count Three were not properly raised in a motion to correct illegal sentence. The State may not now change its feelings on that issue simply because it now finds itself in a position of having to defend appellate counsel's conduct.

Finally, to reiterate an important point from the opening brief, the State conceded below that the Ex Post Facto claim was "fully" litigated at

sentencing. 4 AA 850. While that concession arose after the filing of the opening brief on direct appeal, it was made while appellate proceedings were ongoing. Appellate counsel should then have been fully aware that she was mistaken as to her issue preservation concerns; those concerns being the only thing that prevented the issue from being raised on direct appeal in the first instance. If the issue had been raised on direct appeal, this Court would have been compelled to find an Ex Post Facto violation and to overturn the conviction and sentence imposed in Count Three.

While the issue has certainly taken the “long way around,” the Ex Post Facto issue is now squarely before this Court for a decision, and the State has not advanced any reason to deny it. Grimes should be granted relief on his claims that his conviction and sentence for Count Three were unconstitutionally imposed in violation of the Ex Post Facto Clause or in violation of a promise by the State to dismiss the count upon which Grimes relied to his detriment.

II. CONCLUSION

Grimes requests this Honorable Court utilize its supervisory authority to order that the judgment of conviction be modified to overturn and dismiss the conviction and sentence imposed pursuant to Count Three.

NRS 177.265; Holbrook v. State, 90 Nev. 95, 518 P.2d 1242 (1974). Grimes also requests relief be granted on any of his other claims raised in the opening brief including relief in the form of a new trial.

DATED this 2nd day of May, 2018.

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RULE 28.2 ATTORNEY CERTIFICATE

1. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied upon is found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.
2. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font of the Ebrima style.
3. I further certify this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 1,461 words.

DATED this 2nd day of May, 2018.

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By: 


JAMIE J. RESCH
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 2, 2018. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

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