

IN THE SUPREME COURT OF THE STATE OF NEVADA

BENNETT GRIMES,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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Supreme Court Case No. 74419

PETITION FOR REVIEW BY THE NEVADA SUPREME COURT

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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. QUESTION PRESENTED FOR REVIEW**

This Court's cases, and those of the United States Supreme Court, have held that the Due Process Clause prevents the judicial branch from achieving, through a legal interpretation both unexpected and indefensible by reference to the law previously expressed, what the legislative branch may not achieve under the Ex Post Facto Clause.

The question presented is whether the Court of Appeals violated the Due Process Clause of the Nevada Constitution or that of the United States when it retroactively applied to Grimes this Court's unexpected decision in Jackson v. State, 128 Nev. 598, 291 P.3d 1274 (2012), by refusing to find trial or appellate counsel ineffective for failing to challenge Grimes' conviction under this Court's redundancy framework, which was the law of the land when the offense was committed.

**II. REASONS REVIEW IS WARRANTED**

The Court of Appeals properly recognized that this Court's decision in Jackson was an unforeseeable change in the law. Exhibit, p. 2. But, the Court of Appeals' denial of relief conflicts with the decisions of this Court

and the United States Supreme Court. Such a result strikes at the foundation of every person's right to due process under the law, as clearly established by this Court in Stevens v. Warden, 114 Nev. 1217, 969 P.2d 945 (1998). Likewise, the Court of Appeals decision fails to mention, and hopelessly conflicts with, the Supreme Court's decisions in Bouie v. City of Columbia, 378 U.S. 347 (1964) and Rogers v. Tennessee, 532 U.S. 451 (2001).

This appeal raises a fundamental issue of statewide importance that could be called into effect anytime this Court breaks with prior precedent, as it did in Jackson. This Court should not wait for the federal courts to inevitably correct the Court of Appeals' decision as contrary to clearly established Supreme Court authority. See 28 U.S.C. §2254(d). Rather, this case presents an excellent vehicle in which to clarify that Nevada's Due Process protections limit the State's ability to punish retroactively a defendant in a manner not contemplated by the law at the time of the offense.

### III. ARGUMENT

The Due Process Clause's requirement that no State "shall deprive any person of life, liberty, or property, without due process of law," imposes on state courts many of the same restrictions that the Ex Post Facto Clause imposes on state legislatures. These two clauses ensure fundamental fairness, through notice and fair warning, and prevent arbitrary and vindictive use of the law. This Court has, in fact, recognized that the right protected by these clauses is largely identical. Stevens, 114 Nev. at 1221 ("This 'judicial ex post facto' prohibition prevents judicially wrought retroactive increases in levels of punishment in precisely the same way that the *Ex Post Facto Clause* prevents such changes by legislation").

Neither this Court nor the United States Supreme Court has ever held that these protections are only available when a judicial interpretation of a legislatively enacted statute is at stake. Both courts have routinely ruled to the contrary. In Stevens, this Court applied "ex post facto principles" to determine whether an unforeseeable judicial decision disadvantaged those affected by it. Id. at 1223. The Supreme Court stated that "If a state

legislature is barred by the *Ex Post Facto Clause* from passing such a law, it must follow that a State Supreme Court is barred by the Due Process clause from achieving precisely the same result by judicial construction." Bouie, 378 U.S. at 353.

To be sure, the issue in Bouie did involve a judicial interpretation of a statute. But any question of whether the *Ex Post Facto Clause* protections of due process could extend to judicial interpretations of a judicial decision was definitively answered in the affirmative in Rogers. There, the Supreme Court expressly held that due process limitations on the retroactive application of criminal statutes apply in "the common law context as well." Rogers, 532 U.S. at 461. Those limitations are that the judicial interpretation at issue must be "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." Id.

The issue here arises in a similar context. As the Court of Appeals explained, when Grimes' offenses occurred (and at the time the jury returned its verdict), "Nevada caselaw prohibited multiple convictions that arose from the same illegal act or course of conduct." Exhibit, p. 2, citing

Salazar v. State, 119 Nev. 224, 70 P.3d 749 (2003). That said, after the verdict was returned, but before sentencing, this Court issued the decision in Jackson. Exhibit, p. 2. Grimes had argued below that his conviction for Count 3 (battery with use of a deadly weapon constituting domestic violence resulting in substantial bodily harm in violation of a temporary protective order) was redundant to Count 1 (attempt murder with use of a deadly weapon in violation of a temporary protective order) and should have therefore been dismissed. Exhibit, p. 2.

The Court of Appeals denied relief on several variations of this claim, including that trial counsel was ineffective for failing to raise these issues at sentencing, that appellate counsel was ineffective for not raising it on appeal, and that the direct due process variant of the claim was procedurally barred. Exhibit, pp. 3-4. The Court of Appeals denied relief by finding these protections inapplicable unless a statute was at issue:

Fourth, Grimes claimed trial counsel should have argued at his sentencing hearing that the application of Jackson to his case violated the Ex Post Facto Clause. Grimes failed to demonstrate deficiency or prejudice. The Ex Post Facto Clause prohibits legislatures from enacting statutes that apply retroactively to the disadvantage of an offender.



Stevens v. Warden, 114 Nev. 1217, 1221, 969 P.2d 945, 948 (1998) (citing Lynce v. Mathis, 519 U.S. 433, 441 (1997)). Through the Due Process Clause, courts apply the same principles to judicial decisions, prohibiting the retroactive application of new and unexpected interpretations of statutes that would disadvantage an offender. See id. The holding in Jackson overturning Nevada's redundancy doctrine was not the result of statutory interpretation. See generally Jackson, 128 Nev. at 608-12, 291 P.3d at 1280-83 (adopting the test announced in Blockburger v. United States, 284 U.S. 299 (1932), as the sole test for a double jeopardy violation); see also Sweat v. Eighth Judicial Dist. Court, 133 Nev. \_\_, \_\_ n. 3, 403 P.3d 353, 355 n. 3 (2017) (noting Jackson overruled this portion of Salazar). Accordingly, any claim that applying Jackson violated ex post facto principles would have been futile. We therefore conclude the district court did not err by denying this claim.

Exhibit, pp. 3-4.

The Court of Appeals' decision conflicts with this Court's decision in Stevens, and the Supreme Court's decisions in Bouie and Rogers. Judicial interpretations of judicial decisions can violate the concomitant protections of the *Ex Post Facto* and *Due Process* clauses of the Nevada or United States Constitutions. While the decision below cited Stevens, it misapplied this Court's holding from that case to deny Grimes relief. The Court of Appeals never mentioned the Supreme Court's decisions in Bouie or

Rogers, and its ruling violates them as well.

It is beyond question that this Court's decision in Stevens considered retroactive application of a former Nevada Supreme Court decision (Biffath v. Warden, 95 Nev. 260, 593 P.2d 51 (1979)) which was later overruled. See Nevada Dep't of Prisons v. Bowen, 103 Nev. 477, 745 P.2d 697 (1987).

Moreover, the Supreme Court unambiguously recognized that retroactive application of common law decisions can violate the protections at issue. Rogers, 532 U.S. at 465. The Court of Appeals erred by denying relief on the narrow and incorrect ground that protections against retroactivity require interpretation of a statute: This Court and the United States Supreme Court have held to the contrary.

The correct question to ask was whether this Court's decision in Jackson was "unexpected and indefensible." The Jackson decision meets both these criteria. The Court of Appeals already determined that Jackson was unforeseeable because it overruled Salazar and other related redundancy cases. Exhibit, p.2. See Stevens, 114 Nev. at 1222-1223, n. 5.

Besides being unexpected, this Court's decision in Jackson was indefensible. This is not to say this Court was prohibited from overruling its prior precedents—certainly it can. But whether a new interpretation of caselaw was indefensible depends on how widespread and well-established the rule was. Rogers, 532 U.S. at 464. As an example, the decision at issue in Rogers involved a judicial rejection of a rule that had a “tenuous foothold” at the state level, such that it had never served as grounds for a decision within that state. Id.

By contrast, this Court already examined the history of the redundancy doctrine in Jackson, which appears to have arisen with this Court's decision in Albitre v. State, 103 Nev. 281, 738 P.2d 1307 (1987). Thus, while there were variations in the scope of the redundancy doctrine over the years, it existed as a matter of this Court's published precedent from at least 1987 until the 2012 decision in Jackson. Further, Jackson's rejection of the doctrine relied heavily on Blockburger; a 1932 decision. There was no reason for any prudent litigator to think a 1932 decision

would interfere with this Court's twenty-five plus year history of redundancy authority before Jackson was decided.

This Court's decision in Jackson was therefore "indefensible" in that it was unforeseeable and represented an unequivocal break with the State's clearly established precedents. This marked departure from prior caselaw is now being applied retroactively to Grimes, who had no notice at all when his offenses occurred that he could be subject to two consecutive punishments for a single course of conduct.

As a result, while the mechanism of relief could vary, the Court of Appeals erred by not granting relief on the underlying due process claim, or by failing to grant relief on the claims that trial and appellate counsel were ineffective for not making these arguments below. This Court should correct this error by granting the petition for review and ordering that Grimes' conviction for Count Three be dismissed as redundant to Count One under the law at the time the offense was committed and the verdict returned.

#### **IV. CONCLUSION**

The Court of Appeals' approach to retroactivity is of enormous significance. If its approach is permitted, the right to fair warning and due process would be rendered a nullity because an entire class of judicial decisions—those which do not squarely involve statutory interpretation—would be placed beyond review. This proposition contradicts this Court's prior precedents and those of the United States Supreme Court and should be corrected by this Court under Rule 40B.

DATED this 2nd day of January, 2019.

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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 1,803 words.

DATED this 2nd day of January, 2019.

RESCH LAW, PLLC d/b/a Conviction  
Solutions

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 January 2, 2019, electronic service of the foregoing document shall be made in accordance with the master service list as follows:

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ADAM P. LAXALT  
Nevada Attorney General



An Employee of RESCH LAW,  
PLLC, d/b/a Conviction Solutions

# EXHIBIT



IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BENNETT GRIMES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 74419-COA

**FILED**

DEC 19 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Bennett Grimes appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on February 20, 2015, and supplemental petition filed on May 16, 2017. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Grimes contends the district court erred by denying his claims that trial and appellate counsel were ineffective. To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*); see also *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (applying *Strickland* to claims of ineffective assistance of appellate counsel). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. Counsel cannot be ineffective for failing to raise futile claims. See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

First, Grimes claimed trial counsel should have argued the steak knife was not a deadly weapon. Grimes failed to demonstrate deficiency or prejudice. Grimes' jury was instructed in accordance with NRS 193.165(6)(b) that a deadly weapon is any instrument that, "under the circumstances in which it is used . . . is readily capable of causing substantial bodily harm or death." Grimes used the knife to stab his victim 21 times and at least twice nearly hit major arteries in the chest and neck areas, the victim was hospitalized as a result of Grimes' attack and subsequently had to undergo physical therapy and a surgery, and the jury was shown the extensive scarring caused by the attack. From this, it is clear Grimes used the knife in a manner readily capable of causing substantial bodily harm, and any argument from counsel that the knife was not a deadly weapon would have been futile. We therefore conclude the district court did not err by denying this claim.

Second, Grimes claimed trial counsel should have moved to dismiss count 3 prior to Grimes' sentencing hearing on the ground that it was redundant to count 1.<sup>1</sup> Grimes failed to demonstrate deficiency. Grimes did not demonstrate counsel was objectively unreasonable in planning to wait until sentencing to move to dismiss count 3. Grimes concedes *Jackson's* change in law was unforeseeable, and counsel cannot be ineffective for failing to predict an unforeseeable change in law. See *Nika*

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<sup>1</sup>At the time Grimes' jury returned its guilty verdicts in October 2012, Nevada caselaw prohibited multiple convictions that arose from the same illegal act or course of conduct. See *Salazar v. State*, 119 Nev. 224, 228, 70 P.3d 749, 751 (2003), *disapproved of by Jackson v. State*, 128 Nev. 598, 611, 291 P.3d 1274, 1282 (2012). *Jackson* was decided in December 2012, and Grimes was sentenced in February 2013.

*v. State*, 124 Nev. 1272, 1293-94, 198 P.3d 839, 854 (2008). We therefore conclude the district court did not err by denying this claim.

Third, Grimes claimed trial counsel should have argued at his sentencing hearing that count 3 should be dismissed because Grimes had detrimentally relied on the State's assertions during trial that count 3 would merge into count 1 should the jury return guilty verdicts as to both counts. Grimes' bare claim failed to demonstrate deficiency or prejudice. Grimes did not allege that counsel, who Grimes admits did not foresee the change in law, would have acted differently had the State not agreed during trial that the counts would merge. He thus failed to demonstrate that he relied on the State's agreement to his detriment. We therefore conclude the district court did not err by denying this claim. *See Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).<sup>2</sup>

Fourth, Grimes claimed trial counsel should have argued at his sentencing hearing that the application of *Jackson* to his case violated the Ex Post Facto Clause. Grimes failed to demonstrate deficiency or prejudice. The Ex Post Facto Clause prohibits legislatures from enacting statutes that apply retroactively to the disadvantage of an offender. *Stevens v. Warden*, 114 Nev. 1217, 1221, 969 P.2d 945, 948 (1998) (citing *Lynce v. Mathis*, 519 U.S. 433, 441 (1997)). Through the Due Process Clause, courts apply the same principles to judicial decisions, prohibiting the retroactive application of new and unexpected interpretations of statutes that would disadvantage an offender. *See id.* The holding in *Jackson* overturning Nevada's

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<sup>2</sup>To the extent Grimes raised detrimental reliance as an independent ground for relief, the claim was procedurally barred. *See* NRS 34.810(1)(b)(2). And for the reasons just discussed, Grimes failed to demonstrate good cause or actual prejudice. *See* NRS 34.810(1).

redundancy doctrine was not the result of statutory interpretation. See generally *Jackson*, 128 Nev. at 608-12, 291 P.3d at 1280-83 (adopting the test announced in *Blockburger v. United States*, 284 U.S. 299 (1932), as the sole test for a double jeopardy violation); see also *Sweat v. Eighth Judicial Dist. Court*, 133 Nev. \_\_\_, \_\_\_ n.3, 403 P.3d 353, 355 n.3 (2017) (noting *Jackson* overruled this portion of *Salazar*). Accordingly, any claim that applying *Jackson* violated ex post facto principles would have been futile. We therefore conclude the district court did not err by denying this claim.

Fifth, Grimes claimed appellate counsel should have raised the Ex Post Facto Clause claim on appeal instead of in a motion to correct an illegal sentence. For the reasons discussed above, we conclude counsel was not deficient for failing to raise this futile claim on direct appeal and Grimes was not prejudiced by counsel's ill-fated attempt to raise the claim in a motion to correct an illegal sentence. We therefore conclude the district court did not err by denying this claim.


Sixth, Grimes claimed appellate counsel should have challenged the district court's denial of Grimes' pretrial motion to dismiss for failure to gather evidence. Grimes failed to demonstrate deficiency or prejudice. The State gathered the evidence: the bloody steak knife. The gravamen of Grimes' complaint was that the State did not test the steak knife for fingerprints or DNA evidence. Grimes failed to demonstrate the State had an obligation to test the evidence. Further, Grimes failed to demonstrate the test results would have had a reasonable probability of changing the results of the proceeding. See *Daniels v. State*, 114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998) (holding dismissal of charges for failure to gather evidence is only a possibility where the failure was in bad faith and there is a reasonable probability of a different result had the evidence been

collected). We therefore conclude the district court did not err by denying this claim.

Finally, Grimes claimed the cumulative errors of trial and appellate counsel warrant relief. Even assuming any such errors could be cumulated, *see McConnell v. State*, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009) (noting the Nevada Supreme Court has never adopted a standard to evaluate such claims in postconviction proceedings), Grimes failed to demonstrate any error such that there was nothing to cumulate. We therefore conclude the district court did not err by denying this claim, and we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Michelle Leavitt, District Judge  
Resch Law, PLLC d/b/a Conviction Solutions  
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Eighth District Court Clerk