IN THE SUPREME COURT OF THE STATE OF NEVADA

BENNETT GRIMES, Petitioner, v. THE STATE OF NEVADA, Respondent.	Electronically Filed Mar 07 2019 02:16 p.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO: 74419

ANSWER TO PETITION FOR REVIEW

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, CHARLES W. THOMAN, and answers the Petition for Review in the above-captioned appeal. This Answer is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 7th day of March, 2019.

Respecfully submitted,

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

BY */s/ Charles W. Thoman*
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STATEMENT OF THE ISSUE(S)

1. Whether the Nevada Appeals Court erred by affirming the district court's denial of Appellant Bennett Grimes ("Grimes")'s post-conviction petition for writ of habeas corpus.

SUMMARY OF THE ARGUMENT

Grimes' Petition for Review ("PFR") improperly brings a new argument before this Court in a futile attempt to salvage his unfavorable ruling from the Court of Appeals. In the Order of Affirmance dated December 19, 2018, the Court of Appeals held that on all six claims of ineffective assistance of counsel brought in Grimes' post-conviction petition for writ of habeas corpus, Grimes failed to show that either trial counsel or appellant counsel were deficient in any way. Now, however, Grimes argues that the Court of Appeals misapprehended the effect of Jackson v. State, 128 Nev. 598, 611, 291 P.3d 1274, 1282 (2012) as applied to Grimes' convictions and subsequent sentencings, in that retroactively applying Jackson to Grimes constituted a common law Ex Post Facto Clause violation pursuant to Rogers v. Tennessee, 532 U.S. 451, 461, 121 S. Ct. 1693, 1700, 149 L. Ed. 2d 697 (2001). This claim has *never* been before any court until it was raised in the instant PFR: at the risk of a invoking a Seussian refrain, it was not brought prior to sentencing, nor was it brought in Grimes' Motion for a New Trial. It was not

brought on Grimes' direct appeal, nor was it brought in Grimes' Motion to Correct Illegal Sentence, nor in the Reply accompanying that motion. It was not brought in Grimes' Fast Track Appeal of the denial of his Motion to Correct Illegal Sentence, nor in that appeal's Reply. It also was not brought in the subject post-conviction Petition for Writ of Habeas Corpus, the Supplement thereto, nor his Reply; it was not even brought before the Court of Appeals in Grimes' appeal of the denial of his post-conviction Petition, nor was it brought his Reply. Thus, the Court of Appeals did not err in affirming the district court's decision denying Grimes' claims of ineffective assistance of counsel, as the Court made its legally accurate decision based on the facts and legal authority presented before it. This Court should thus decline to address Grimes' improperly-asserted new argument in this PFR and affirm the Court of Appeals' Order of Affirmance.

ARGUMENT

I. GRIMES' NEW ARGUMENT IS NOT PROPERLY BEFORE THIS COURT

This Court will refuse to consider arguments raised before it for the first time on appeal. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) ("This ground for relief was not part of appellant's original petition for post-conviction relief and was not considered in the district court's order denying that petition.

Hence, it need not be considered by this court."), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004); N. Nevada Ass'n of Injured Workers v. Nevada State Indus. Ins. Sys., 107 Nev. 108, 112, 807 P.2d 728, 730 (1991) (declining to address an issue on which the district court did not rule first). A party may not raise "new issues, factual and legal, that were not presented to the district court ... that neither [the opposing party] nor the district court had the opportunity to address." Schuck v. Signature Flight Support, 126 Nev. 434, 437, 245 P.3d 542, 545 (2010). Granting what is, in effect, extraordinary writ relief via a Petition for Review does not promote "sound judicial economy." Archon Corp. v. Eighth Judicial Dist. Court in & for Cty. of Clark, 407 P.3d 702, 710 (Nev. 2017); see also United States v. U.S. Dist. Court for S. Dist. of Cal., 384 F.3d 1202, 1205 (9th Cir. 2004) (declining to hear a waived argument on a petition for writ relief because petitioner could raise the issue again in the district court, on appeal, or in a second writ petition); Plata v. Schwarzenegger, 560 F.3d 976, 984 (9th Cir. 2009) ("It would be most inappropriate for this court to address [issues not properly raised in the district court] by the extraordinary writ of mandamus before the district court has dealt with them.").

In the instant PFR, Grimes argues—for the first time—that Rogers v. Tennessee, 532 U.S. 451, 461, 121 S. Ct. 1693, 1700, 149 L. Ed. 2d 697 (2001)

prevents the application of Jackson v. State, 128 Nev. 598, 291 P.3d 1274 (2012) to his crimes committed prior to the issuance of Jackson. PFR at 2. Unlike new arguments that are raised on appeal pursuant to an appellant's failure to bring such in a single district court hearing, Grimes had multiple opportunities in both the district court *and* in the appellate court to bring this argument for the courts' consideration and has utterly failed to do so. Indeed, counting all oral arguments and pleadings filed before both district and appeals court, Grimes has failed on *twelve* separate opportunities to fully brief and prepare the lower courts on this issue; were every failed opportunity to bring this issue in prior pleadings considered a bite at the proverbial apple, Grimes has eaten his apple long ago and may not ask this Court for another bite. After having the benefit of being able to build from years of prior filings challenging the Jackson issue Grimes, has no excuse for failing to argue this issue in the light of Rogers before either the district court or the appeals court. Thus, any potential relief Grimes may or may not be entitled to cannot and should not come via the instant vehicle of a Petition for Review of an Order of Affirmance limited solely to Grimes' claims of ineffective assistance of counsel.

In the event that this Court is entertaining new arguments that were not fully presented before either the district court or the appellate court, the State submits that the Court of Appeals was correct to deny Grimes' claims of ineffective assistance of

counsel regarding any alleged failure to argue his updated Ex Post Facto Clause claims for reasons that were not set forth in the Order of Affirmance.

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).

Grimes argued on appeal that trial and appellate counsel were ineffective for failing to argue that the application of Jackson to his case violated the Ex Post Facto Clause pursuant to Bouie v. City of Columbia, 378 U.S. 347, 347, 84 S. Ct. 1697, 1699, 12 L. Ed. 2d 894 (1964), which involved the judicial interpretation of a criminal statute; the Court of Appeals addressed these claims in the fourth and fifth sections of the Order of Affirmance. Order at 3, 4. The Order of Affirmance held that "[t]he holding in Jackson overturning Nevada's redundancy doctrine was not

the result of statutory interpretation. . . . Accordingly, any claim that applying Jackson violated ex post facto principles would have been futile."

In addition to that analysis, any claim that counsel was ineffective for failing to argue an Ex Post Facto Clause claim prior to sentencing or on direct appeal would have also been futile for another reason: despite having been found guilty by jury verdict prior to Jackson, Grimes' conviction would not have been final until after the issuance of Jackson; therefore, there is no question to resolve regarding retroactivity and the Ex Post Facto Clause. A conviction becomes final when judgment has been entered, the availability of an appeal has been exhausted and a petition for certiorari to the Supreme Court of the United States has been denied or the time for such a petition has expired. Colwell v. State, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002). While Jackson was issued in December of 2012, Grimes was adjudicated in February of 2013. Order of Affirmance at 2. For the purposes of a retroactivity analysis, Grimes cannot avail himself of a claim that Jackson was improperly applied retroactively if Jackson was issued prior to his conviction.

Additionally, the claim that Jackson was improperly applied retroactively brought either prior to sentencing or on direct appeal would not have been ripe. As Grimes' Ex Post Facto Clause claim challenges the validity of his conviction on Count 3, Battery With Use of a Deadly Weapon Constituting Domestic Violence in

Violation of a Protective Order, such a claim necessarily would not have been ripe until the conviction was final.

The Court of Appeals thus correctly determined that Grimes failed to demonstrate deficiency or prejudice, as such a claim would have been futile; counsel cannot be ineffective for failure to make futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Further, pursuant to Colwell, an Ex Post Facto Clause claim made at sentencing or on direct appeal would have been futile for two independent reasons that were not discussed by the Court of Appeals. The Court of Appeals' Order denying Grimes' claims of ineffective assistance of counsel was therefore correct, as Grimes did not and cannot demonstrate under Strickland that his counsel's representation fell below an objective standard of reasonableness, and that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different.

II. THE ORDER OF AFFIRMANCE CORRECTLY DENIED ALL CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

As referenced in Section I *supra*, Grimes' PFR is predicated on the notion that the Court of Appeals erred in denying his claims that counsel was ineffective for failing to argue that the application of Jackson to his conviction on Count 3 violates the Ex Post Facto Clause pursuant to Rogers. The extraordinary irony of this is that

even in Grimes' post-conviction Petition and on appeal, Grimes *also* failed to properly bring this argument. To quote the old adage, "when you point one finger, there are three pointing back at you." Grimes can neither present nor maintain a good-faith argument that his prior counsel was ineffective for failing to bring an argument he himself could not articulate until well after the time to bring such had passed.

Regardless of the irony of Grimes' instant claim, the Court of Appeals was correct in its analysis that Grimes' arguments regarding ineffective assistance of counsel regarding the Ex Post Facto Clause did not warrant relief. First, Grimes' position on appeal was illogical and failed to demonstrate that counsel was deficient. Grimes argued that trial counsel was deficient for failing to move the court to dismiss Count 3. However, the Court of Appeals did not err by affirming the Petition because Grimes failed to demonstrate that counsel was deficient. Grimes claimed that it was counsel's understanding that he could not be adjudicated guilty of both Count 1 and Count 3 because they were redundant.[1] However, Grimes' position was illogical because if that is the case, then counsel was not deficient for failing to move to vacate Count 3 during trial because (1) Grimes had not yet been convicted and such a

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

motion may have been redundant anyway, and (2) counsel was under the reasonable belief that Grimes could not be adjudicated of it. At the time of trial, waiting to challenge Count 3 until it became a live issue was a reasonable strategic decision that is now "almost unchallengeable." Dawson, 108 Nev. at 117, 825 P.2d at 596.

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

Second, even if Grimes was able to show that counsel was deficient, he could not demonstrate prejudice sufficient to warrant relief. Nothing in the record demonstrates that a motion to dismiss Count 3 would have been successful. Nowhere in the trial transcripts is there even a passing comment to a discussion that was had off the record. The evidence at the evidentiary hearing established that a motion to dismiss during trial would have likely been unsuccessful because even defense counsel believed that the State could put forth both counts to the jury.

Further, defense counsel acknowledged that this issue would not have been cognizable until after a jury verdict and after the district court adjudicated Grimes of both Counts 1 and 3. Thus, even if the district court *had* entertained such a motion, there is nothing to indicate that the motion would have been granted *prior to the jury ever finding Petitioner guilty on any count* other than counsel's statements after the fact. Further still, even if such a motion had been entertained, and even if the district court granted it, the result would have been error under Jackson.

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

Grimes also argued that counsel was deficient for raising a challenge to the sentence in a Motion to Correct Illegal Sentence rather than on appeal in the context of an Ex Post Facto Clause claim. There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir.

1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

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

While counsel certainly *could have* raised the Ex Post Facto Clause issue on direct appeal, counsel gave two persuasive reasons to think that it was a better strategic decision to raise the issue first in district court. First, counsel was engaged in the "winnowing out" of weaker arguments in favor of those that could have provided more relief. Jones, 463 U.S. at 751-52, 103 S. Ct. at 3313. Each of the

grounds raised on appeal could have resulted in a new trial or reversal of Grimes' conviction, while the Jackson issue could have, at most, overturned a portion of Grimes' sentence by vacating Count 3. Given both the professional diligence and competence required on appeal, counsel was justified in presenting the arguments with the potential to vacate Grimes' entire conviction rather than diluting those arguments, or cutting them entirely, in favor of a complex issue that would have required the vast portion of a fast track brief.

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

Grimes argued on appeal that counsel was deficient for actually raising the issue within a Motion to Correct Illegal Sentence. A motion to correct illegal sentence is appropriate when challenging the facial illegality of a sentence. Edwards

v. State, 112 Nev. 704, 918 P.2d 321, 324 (1996)). The district court's denial of Grimes' Motion, on the merits, does not make counsel ineffective for choosing to present the argument through that vehicle. Just because the district court denied Grimes' argument on the merits, and this Court held that the district court did not abuse its discretion in doing so, does not demonstrate either deficiency or prejudice. Given the extensive record created by the Motion to Correct Illegal Sentence, in addition to that created during Appeal 67598, had this Court found Grimes' arguments had merit it could easily have decided so by recognizing Grimes' argument in the Reply To Fast Track Statement and agreeing that facial invalidity was argued in order to reach the substantive merits. Instead, this Court decided to let the district court's decision stand with little to no additional comment.

Appellate counsel was not deficient, and even if appellate counsel were deficient the record indicates that this Court was unlikely to grant Grimes' relief. Thus, Grimes cannot demonstrate prejudice. Accordingly, the Court of Appeals did not err by affirming the denial Grimes' Petition on the grounds that Grimes had failed to establish ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, this Court should AFFIRM the Court of Appeal's Order of Affirmance.

Dated this 7th day of March, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for review or answer 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the type-volume limitations of NRAP 40, 40A and 40B because it is proportionately spaced, has a typeface of 14 points and contains 3,830 words.

Dated this 7th day of March, 2019.

Respecfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 7, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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