IN THE SUPREME COURT OF THE STATE OF NEVADA

BENNETT GRIMES, Appellant, v. THE STATE OF NEVADA, Respondent.	No. 62385 **E-File**

REPLY TO FAST TRACK RESPONSE

I. BENNETT WAS PREVENTED FROM ARGUING SELF-DEFENSE.

A. Circumstantial Evidence Justified Instructions.

The State claims that the district court was within its discretion to deny Bennett Grimes' proffered self-defense instructions because: (1) there was "no evidence" that Aneka Grimes was the initial aggressor; and (2) Grimes "never even alleges" that he "acted out of fear of death or great bodily injury." Fast Track Response (FTR) at 6-7. However, in arguing there was "no evidence" to support the Defense theory of the case, the State conveniently ignores the majority of the circumstantial evidence relied on by the Defense. While discounting the fact that Aneka was yelling at Bennett to leave and wanted him to be "out of my life forever, gone" (FTR 7), the State makes no mention of the following evidence which also supported a self-defense instruction:

- Aneka was standing right next to the knife and knew the knife was there because she had just washed the dishes (III: 692, 747; V: 933).

- Aneka's DNA was found on the newly-cleaned knife handle but Bennett's was not. (VI: 991-9; 904: V. 934).
- Testimony and evidence placed Bennett almost exclusively by the front door while Aneka was standing beside the knife. (III: 685, 735-36, 750; V; 933, 1069, 1081-85).
- Stephanie did not see how the encounter began. (III: 735-38).
- It is illogical that Bennett would have dragged Aneka five-to-seven feet to stab her at the front door. (III: 669-70, 689; V: 934).
- Bennett's hand was injured and bleeding profusely. (III: 582)
- Aneka had no defensive wounds on her hands. (III: 630-31).
- Aneka was much smaller than Bennett, supporting that she would have been injured in a struggle over the knife. (V: 936, 1078).

Again, a criminal defendant has the "right to have the jury instructed on his theory of the case . . . **no matter how weak or incredible [the] evidence may be.**" **McCraney v. State**, 110 Nev. 250, 254 (1994) (citation omitted) (emphasis added). Although the State may take issue with the strength of the evidence, there was circumstantial evidence suggesting that Aneka was the initial aggressor who grabbed the knife and approached Bennett at the door, and the court erred in refusing to instruct the jury on that theory.

While the State also claims that Bennett failed to "point to any evidence that he acted out of fear of death or great bodily injury" and "never even alleges that this was the case," the State admits the district court did not address that element of self-defense. FTR at 5-6 (district court denied the self-defense instruction "because there was no evidence that Aneka was the initial aggressor or that she used deadly force against the Appellant").

Regardless, since circumstantial evidence supported the Defense theory that Aneka came at Bennett with a steak knife while upset that he wouldn't leave her apartment, it is safe to assume that, under those circumstances, Bennett would have had a "reasonable apprehension of great bodily harm". Cf. FTR at 6.

B. Forced to Choose between Fifth and Sixth Amendment Rights.

The State admits that the district court "instructed Appellant that he needed to assert *some* evidence in support of his theory" before he could get a self-defense instruction. FTR 8. However, in **McCraney v. State**, 110 Nev. at 255, the Nevada Supreme Court expressly found such a requirement unlawful:

> To require a defendant to introduce evidence in order to be entitled to a specific jury instruction on a defense theory would violate the defendant's constitutional right to remain silent by requiring that he forfeit that right in order to obtain instructions.

As in **McCraney**, because there was sufficient circumstantial evidence to warrant a self-defense instruction, the Court impermissibly forced Bennett to choose between his Fifth and Sixth Amendment rights when it told Bennett he "needed to assert *some* evidence in support of his theory" before it would instruct the jury on his theory of the case. See FTR at 8.

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C. Prevented from Arguing Theory of Case.

The State claims that Bennett was never prevented from arguing self-defense during closing. FTR 10. However, the record shows that the Court repeatedly and explicitly forbade the Defense from arguing that Mr. Grimes acted in self-defense, based on a mistaken belief that there was "no evidence" to support it:

- Mr. Grimes, there's absolutely no evidence, none, that she grabbed that knife, went after you, attempted to stab you and that somehow you acted in self defense and she received 21 stab wounds in self-defense. Okay? Everything else you've said, I agree you can argue all that. I'm not going to -- your attorneys can only argue the evidence and reasonable inferences of the evidence. They cannot make up a story. (V: 935)
- everything you said, you can argue his DNA wasn't on there. . . . And you can argue in her home, her DNA was on her knife. That's all fine. That doesn't bother me. It's when you take the leap and say she took . . . that knife in her hand and that she went after your client in an effort to stab him. (V: 938)
- So you cannot get up and argue to the jury what he may have said had he taken the stand. (V: 947)
- I'm just not going to let the attorneys basically make up a story. And if it's the truth, I'm not going to let them tell it because it wasn't testified to up there. (V: 950)

The Defense was not merely prevented from "arguing facts not in evidence." FTR at 10. The Defense was prohibited from arguing the **inference** – **based on the circumstantial evidence that had been admitted** – that Aneka was the initial aggressor with the knife and that Bennett acted out of fear of bodily

harm.[1] By forbidding the Defense from arguing that Bennett acted in self-defense in closing, the court violated Bennett's due process rights, his right to assistance of counsel and his right to present a defense.

II. FAILURE TO NOTIFY PARTIES OF JURY QUESTION.

The district court deprived Bennett of counsel at a critical stage of the proceedings, violating his state and federal constitutional rights to a fair trial and due process of law, by failing to notify the parties that the jury had a question of law before, *sua sponte*, deciding not to respond. The court's error was constitutional because it denied defense counsel the opportunity to persuade the court to respond to the jury's question. See **U.S. v. Barragan-Devis**, 133 F.3d 1287, 1289 (9th Cir. 1998). The deprivation of counsel occurred during a "critical stage" of proceedings, warranting automatic reversal. See **Musladin v. Lamarque**, 555 F. 3d 830, 843 (9th Cir. 2009); accord **Fields v. State**, 172 Md. App. 496 (Md. App. 2007) ("Because appellants and their trial counsel were completely unaware that this juror note was submitted to the court, appellants could not have made a knowing and

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[1] Although the State relies on **Glover v. Dist. Ct.**, 125 Nev. 691 (2009), that case is distinguishable. In **Glover**, defense counsel improperly asked the jury to draw a negative inference from the fact that the State did not introduce the defendant's videotaped statement into evidence.

intelligent waiver of their right to be present or to be represented by counsel during this critical stage.").

Citing **Scott v. State**, 92 Nev. 552 (1976), the State implies that the trial court had "discretion" to decide, **on its own**, to ignore the jury's note without any input from defense counsel. However, when this Court decided **Scott** nearly 40 years ago, it was not faced with the constitutional issue raised here.[2] While an abuse of discretion standard is certainly appropriate when the defense has been given an opportunity to be heard and the court has made a discretionary ruling against the defense, the court never has "discretion" to cut the defense out of the decision-making process altogether. Here, the court did not have discretion to ignore the jury's note without first giving the defense notice and an opportunity to be heard. To put it another way, only after notice and an opportunity to be heard could the court properly exercise its "discretion."

In **Musladin**, the Ninth Circuit explained exactly why it is so "critical" that counsel be present when formulating a response to a jury question:

> The "stage" at which the deprivation of counsel may be critical should be understood as the *formulation* of the response to a jury's request for additional instructions, rather than its delivery.

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[2] Indeed, **United States v. Cronic**, 466 U.S. 648 (1984), which held that a trial is unfair if the accused is denied counsel at a critical stage of his trial (the basis for **Musladin**), was not decided until eight years after **Scott**.

> Counsel is most acutely needed before a decision about how to respond to the jury is made, because it is the substance of the response -- or the decision whether to respond substantively or not -- that is crucial. . . .
>
> Musladin's case is a perfect example: Although the trial court merely referred the jury to the previously agreed-upon instructions, Musladin's trial counsel averred that, had he been present when the response was formulated, he would have urged the trial court to respond substantively.[3] Thus it is the missed opportunity to influence the trial court's response to a jury question that is the significant moment.
>
> Accordingly, were we reviewing the question before us de novo, we would find that Musladin was denied counsel at a "critical stage", thereby triggering Cronic's rule of automatic reversal.

Musladin v. Lamarque, 555 F. 3d 830, 843 (9th Cir. 2009) (internal citations omitted).

Notwithstanding the above legal analysis, the State discounts **Musladin** because the Court was unable to apply a *de novo* standard and found, under AEDPA, that the state court's decision was not "'contrary to, or an unreasonable application" of existing Supreme Court precedent. **Id.** However, because the Nevada Supreme Court has not yet issued an opinion about whether formulating a response to a jury question is a "critical stage", and can review this issue *de novo*, the Defense respectfully requests that the Court adopt the well-reasoned analysis in **Musladin** and reverse this case.

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[3] Defense counsel made the same proffer in his Motion for a New Trial. (I: 215).

Yet, even if this Court disagrees that counsel was denied during a "critical stage", the district court made a constitutional error that was not harmless beyond a reasonable doubt. See **Barragan-Devis**. 133 F. 3d at 1287 (failure to provide defendant with an opportunity to convince court to respond to jury note was constitutional error). In **Barragan-Devis**, the Ninth Circuit found the court's error was harmless beyond a reasonable doubt, primarily because the jury note in question did "not reveal any legal disorientation on the part of the juror", but instead reflected that the juror was having difficulty weighing the evidence. **Barragan-Devis**, 133 F. 3d at 1290. As a result, even if the defense had been given the opportunity to convince the Court to respond, there was no new legal instruction that the Court could have given – "at best he would have referred them again to the instructions and told them that he could not weigh the evidence or decide the case for them." **Id.** By contrast, in this case, the error was not harmless because the jury question showed that the jury was confused about a **legal issue** -- when the intent to commit burglary needed to be formed. (I: 215; V: 1008, 1067). This legal issue could have been clarified by an instruction that the necessary criminal intent must be present "at the very moment of entering" the building. See **People v. Hamilton**, 251 Cal.App.2d 506, 508 (Cal. App. 1967). Given the paucity of evidence that Bennett possessed felonious intent "at the very

moment of entering" Aneka's apartment, the State cannot show that the Court's error was harmless beyond a reasonable doubt.[4]

III. INSUFFICIENT EVIDENCE OF BURGLARY.

The State relies heavily on the statutory presumption that a person who "unlawfully" enters a building may "reasonably be inferred to have" entered with intent to commit burglary unless the jury is satisfied by an alternate explanation. (FTR at 18). While a jury is free to reject an alternate explanation for the unlawful entry, in this case, by sending a note to the judge asking whether "criminal intent [has] to be established before entering the structure" or if intent could "change during the chain of events", the jury demonstrated that it was leaning toward the defense explanation that intent was lacking at time of entry. Had the jury been instructed that intent must be present "at the very moment of entering" the building, the jury would have found Bennett not guilty of burglary.

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[4] The State makes too much of the fact that when the Court initially told the parties she had ignored the jury note, one of Bennett's two defense attorneys said "I think that would have been a correct response." FTR at 15. However, this off-the-cuff statement by trial counsel, made without any input from co-counsel, does not make it "extremely unlikely" that the defense would have suggested a clarifying instruction had it known of the jury's confusion during deliberations. C.f. FTR at 17. To the contrary, after consulting with co-counsel, trial counsel filed a motion for new trial, indicating that he would have asked for a clarifying instruction because "further direction would have been helpful in reaching a correct verdict in this case." (I: 215).

IV. CUMULATIVE ERROR.

As explained more fully in Bennett's Fast Track Statement, the cumulative effect of the trial court's errors violated Bennett's right to a fair trial. See **Valdez v. State**, 124 Nev. 1172, 1195-96 (2008).

CONCLUSION

Based on the foregoing arguments and on the Fast Track Statement, incorporated by reference herein, this Court must reverse and remand this case for a new trial.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By */s/ Deborah L. Westbrook*
DEBORAH L. WESTBROOK, #9285
Deputy Public Defender
309 South Third St., Ste. 226
Las Vegas, NV 89155-2610
(702) 455-4685

VERIFICATION

1. I hereby certify that this fast track reply 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 fast track statement has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this fast track reply complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 2,322 words.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 23rd day of October, 2013.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By *__/s/ Deborah L. Westbrook__*
DEBORAH L. WESTBROOK, #9285
Deputy Public Defender
309 South Third St., Ste. 226
Las Vegas, NV 89155-2316
(702) 455-4685

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 23rd day of October, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
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BENNETT GRIMES
NDOC No. 1098810
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

BY */s/ Carrie M.Connolly*
Employee, Clark County Public
Defender's Office