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Appellant,

VS.

Respondent.

Electronically Filed
Mar 20 2015 10:52 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

**APPELLANT’S MOTION TO WITHDRAW DUE TO CONFLICT OF
INTEREST AND REQUEST TO HAVE THE CASE REMANDED TO
DISTRICT COURT FOR APPOINTMENT OF NEW COUNSEL**

Comes Now Appellant BENNETT GRIMES, by and through Deputy Public Defender DEBORAH L. WESTBROOK, and moves this Honorable Court to allow the Public Defender's Office to withdraw from the above-entitled case and remand the case to District Court for appointment of new appellate counsel. This Motion is based upon the following Memorandum, the attached declaration of counsel, and all papers and pleadings on file herein.

DATED this 20th day of March, 2015.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By /s/ Deborah L. Westbrook
DEBORAH L. WESTBROOK, #9285
Deputy Public Defender
309 So. Third Street, Suite #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

1 **DECLARATION OF DEBORAH L. WESTBROOK**

2 1. I am an attorney licensed to practice law in the State of Nevada; I
3
4 am a deputy public defender assigned to handle the appeal of this matter; I am
5 familiar with the procedural history of this case.
6

7 2. On August 19, 2013, I submitted a Fast Track Statement on behalf
8 of Appellant Bennett Grimes, directly appealing his convictions in this case.

9 3. On September 9, 2013, trial counsel filed a Motion to Correct
10 an Illegal Sentence on behalf of Mr. Grimes. That Motion argued that Mr.
11 Grimes' sentence of 8 to 20 years on Count 1 (attempt murder) and a consecutive
12 8 to 20 years on Count 3 (battery) was an illegal *ex post facto* application of this
13 Court's ruling in **Jackson v. State**, 2128 Nev. Adv. Op. 55, 91 P.3d 1274 (2012).
14 This issue was **not** raised in Mr. Grimes' Fast Track Statement, but was instead
15 presented via Motion to Correct an Illegal Sentence.
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19 4. While Mr. Grimes' Motion to Correct an Illegal Sentence was
20 still pending, this Court affirmed Mr. Grimes' underlying convictions in an Order
21 of Affirmance dated February 27, 2014. The Remittitur was issued on March 24,
22 2014.
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25 5. For almost a year after the Remittitur was issued, Mr. Grimes
26 awaited a ruling from the District Court on his Motion to Correct an Illegal
27 Sentence. Eventually, when he could wait no longer, on February 20, 2015, Mr.
28 Grimes filed his Petition for Post-Conviction Relief in the District Court. In his

1 petition, Mr. Grimes accused the Clark County Public Defender's Office of
2 ineffective assistance of counsel in connection with his trial and sentencing
3 hearing. Specifically, Mr. Grimes accused the Public Defender's Office of being
4 ineffective in advising him prior to trial that he could not be convicted of *both*
5 Counts 1 and 3, based on then-existing Nevada law which deemed those Counts
6 redundant to one another because they were based on the same conduct. Mr.
7 Grimes also accused the Public Defender's Office of being ineffective by failing to
8 object to the verdict form based on then-existing law. Finally, Mr. Grimes accused
9 the Public Defender's Office of failing to adequately prepare for his sentencing
10 hearing where he received convictions which were redundant under the law in
11 effect at the time those crimes were committed.

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16 6. Less than a week after Mr. Grimes filed his Petition for Post-
17 Conviction Relief, the District Court denied Mr. Grimes' Motion to Correct an
18 Illegal Sentence on February 26, 2015.

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20 7. Because Mr. Grimes had a statutory right to a direct appeal
21 from the District Court's order, and in order to preserve Mr. Grimes' appellate
22 rights on that issue, I noticed the instant appeal on Mr. Grimes' behalf on March
23 16, 2015.

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8. On March 19, 2015, the District Court ordered the Public Defender's Office withdrawn as counsel of record from Mr. Grimes' case due to the conflict of interest created by Mr. Grimes' Petition for Post-Conviction Relief.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 20th day of March, 2015.

/s/ Deborah L. Westbrook
DEBORAH L. WESTBROOK

1 **POINTS AND AUTHORITIES**

2 **I. LAW AND ARGUMENT**

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4 "Every defendant has a constitutional right to the assistance of counsel
5 unhindered by conflicting interests" both at trial and on appeal. **Clark v. State**,
6 108 Nev. 324, 831 P.2d 1374 (1992) (citing **Holloway v. Arkansas**, 435 U.S. 475
7 (1978)); **Douglas v. California**, 372 U.S. 353(1963); **United States v. Moore**,
8 159 F.3d 1154 (9th Cir. 1998); U.S. Const. Amend. VI, Amend XIV; Nev.
9 Const. Art. 1, Sec. 8.¹

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12 In this case, the District Court found a conflict of interest between the Clark
13 County Public Defender's Office and Mr. Grimes. That conflict is related to Mr.
14 Grimes' concerns about the Clark County Public Defender's Office's handling of
15 the precise issue involved in this direct appeal -- whether Mr. Grimes' redundant
16 convictions for attempt murder and battery based on the same conduct violates *ex*
17 *post facto* principles where the crime was committed prior to this Court's ruling in
18 **Jackson v. State**. Where Mr. Grimes has accused the Clark County Public
19 Defender's Office of ineffective assistance in connection with litigating these very
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26 ¹ Although there is no right to a direct appeal under the United States Constitution
27 (**Griffin v. Illinois**, 351 U.S. 12, (1856); **Gary v. Sheriff**, 96 Nev. 78, 605 P.2d
28 212 (1980)), if a state provides appellate review, it must do so in a manner
consistent with Due Process and Equal Protection under the Fourteenth
Amendment. **See Griffin**. Accordingly, due process and the effective assistance of
an attorney apply on appeal. **Douglas v. California**, 372 U.S. 353 (1963).

1 issues in District Court, the Clark County Public Defender has an irreconcilable
2 conflict for purposes of this appeal.

3
4 Furthermore, when “the relationship between attorney and client completely
5 collapses, the refusal to substitute new counsel violates [defendant’s] Sixth
6 Amendment right to effective assistance of counsel.” Moore, 159 F.3d at 1158
7 (citations omitted). Mr. Grimes has accused the Clark County Public Defender’s
8 Office of being ineffective with respect to the very issue currently on appeal.
9 Under Moore, Mr. Grimes’ Sixth Amendment rights would be violated if he were
10 required to have the Clark County Public Defender’s Office represent his interests
11 in this direct appeal.
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15 II. CONCLUSION

16 Accordingly, the Public Defender’s Office asks to withdraw from this
17 appeal due to a direct conflict of interest and for the case to be remanded to
18 District Court for the appointment of new, conflict-free appellate counsel. The
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1 Public Defender's Office will give the new attorney copies of all compiled
2 research and the complete appendix. Until the Court rules on this motion, the
3 Public Defender's Office can take no further steps to complete the appeal due to
4 the conflict of interest.
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7 Respectfully submitted,
8 PHILIP J. KOHN
9 CLARK COUNTY PUBLIC DEFENDER

10 By /s/ Deborah L. Westbrook
11 DEBORAH L. WESTBROOK, #9285
12 Deputy Public Defender

13 **CERTIFICATE OF SERVICE**

14 I hereby certify that this document was filed electronically with the Nevada
15 Supreme Court on the 20th day of March, 2015. Electronic Service of the
16 foregoing document shall be made in accordance with the Master Service List as
17 follows:
18

19 ADAM LAXALT DEBORAH L. WESTBROOK
20 STEVEN S. OWENS HOWARD S. BROOKS

21 I further certify that I served a copy of this document by mailing a
22 true and correct copy thereof, postage pre-paid, addressed to:
23

24 BENNETT GRIMES
25 NDOC No. 1098810
26 c/o Southern Desert Correctional Center
27 P.O. Box 208
28 Indian Springs, Nevada 89070-0208

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