

1                                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2  
3   BENNETT GRIMES,

4                                   Appellant,

5                                   v.

6  
7   THE STATE OF NEVADA,

8                                   Respondent.

)       No. 67598  
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Electronically Filed  
Jul 02 2015 01:05 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

9  
10                                   **APPELLANT'S APPENDIX VOLUME VI PAGES 1089-1250**

11   PHILIP J. KOHN  
12   Clark County Public Defender  
13   309 South Third Street  
14   Las Vegas, Nevada 89155-2610

15   Attorney for Appellant

STEVE WOLFSON  
Clark County District Attorney  
200 Lewis Avenue, 3<sup>rd</sup> Floor  
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Attorney General  
100 North Carson Street  
Carson City, Nevada 89701-4717  
(702) 687-3538

Counsel for Respondent

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**Case No. 67598**

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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Felony/Gross Misdemeanor**

## COURT MINUTES

September 26, 2013

C-11-276163-1      State of Nevada  
vs  
Bennett Grimes

September 26, 2013      8:30 AM      All Pending Motions  
(9/26/2013)

HEARD BY: Leavitt, Michelle

COURTROOM: RJC Courtroom 14D

COURT CLERK: Susan Jovanovich

RECORDER: Yvette G. Sison

REPORTER:

## PARTIES

<b>PRESENT:</b>	Hojjat, Nadia	Deputy Public Defender
	Public Defender	
	State of Nevada	Plaintiff
	Trippiedi, Hagar	Deputy District Attorney

## JOURNAL ENTRIES

DEFT'S MOTION TO CORRECT ILLEGAL SENTENCE...DEFT'S MOTION TO STRIKE AS  
UNTIMELY THE STATE'S OPPOSITION TO DEFT'S MOTION TO CORRECT ILLEGAL SENTENCE

Deft. not present; incarcerated in Nevada Department of Corrections (NDC). At request of parties, COURT ORDERED, matters are CONTINUED.

NDC

10/03/13 8:30 A.M. DEFT'S MOTION TO CORRECT ILLEGAL SENTENCE...DEFT'S MOTION TO STRIKE AS UNTIMELY THE STATE'S OPPOSITION TO DEFT'S MOTION TO CORRECT ILLEGAL SENTENCE

PRINT DATE: 09/26/2013

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Minutes Date: September 26, 2013



**DISTRICT COURT  
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

## COURT MINUTES

October 03, 2013

C-11-276163-1                  State of Nevada  
vs  
Bennett Grimes

October 03, 2013      8:30 AM      All Pending Motions  
(10/03/2013)

HEARD BY: Leavitt, Michelle

COURTROOM: RJC Courtroom 14D

COURT CLERK: Susan Jovanovich

RECORDER: Sandra Pruchnic

REPORTER:

## PARTIES

<b>PRESENT:</b>	Burns, J. Patrick	Deputy District Attorney
	Public Defender	
	State of Nevada	Plaintiff
	Westbrook, P. David	Deputy Public Defender

## JOURNAL ENTRIES

Deft. not present; incarcerated in Nevada Department of Corrections (NDC).

Deft's Reply In Support Of Motion To Correct Illegal Sentence FILED IN OPEN COURT.

DEFT'S MOTION TO STRIKE AS UNTIMELY THE STATE'S OPPOSITION TO DEFT'S MOTION TO  
CORRECT ILLEGAL SENTENCE

Mr. Westbrook objected to State's Opposition having been filed untimely, and argued as to Rule 3.20 (c). Court stated it will consider the issue, based on substance. Mr. Westbrook advised he did not receive the written response from State. COURT ORDERED, Motion to strike DENIED.

DEFT'S MOTION TO CORRECT ILLEGAL SENTENCE

Arguments by counsel in support of Motion. Further arguments regarding DCR 13, Jackson and Edwards cases, NRS 176.555, dicta in Edwards, Anderson vs. State, foreseeability, ex post facto,

PRINT DATE: 10/03/2013

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Minutes Date:

October 03, 2013

Blockburger case, redundancy no longer being applicable in double jeopardy, and fundamental of fairness. Mr. Westbrook additionally argued as to the Salazar Skiba case, Barton case, Stevens vs. Warden standard, and there being prejudice on an illegal sentence. Arguments regarding Calder vs. Bull. Mr. Westbrook requested the Battery with Use of Deadly Weapon felony charge be dismissed, and argued as to the 5th Amendment Due Process clause. Colloquy as to Judgment of Conviction. Mr. Burns opposed the Motion, and argued regarding jurisprudence. Thereafter, Mr. Burns submitted on the pleadings. Mr. Westbrook made reply arguments. Upon Court's inquiry, Mr. Westbrook requested Count 3 be dismissed, as illegal. COURT ORDERED, the Reply will be reviewed, and a decision by Minute Order will issue from Chambers. Mr. Westbrook objected to consecutive time being imposed on Count 3, and not concurrent time. Court stated it reviewed the Judgment of Conviction, and Count 3 is to run consecutive, therefore, the Judgment of Conviction was correct.

NDC

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Felony/Gross Misdemeanor**

**COURT MINUTES**

**February 10, 2015**

C-11-276163-1      State of Nevada  
                                 vs  
                                 Bennett Grimes

**February 10, 2015      8:30 AM      Defendant's Status Check on Court's Order**

**HEARD BY:** Leavitt, Michelle

**COURTROOM:** RJC Courtroom 14D

**COURT CLERK:** Susan Jovanovich  
                                 Keri Cromer/kc

**RECORDER:** Kristine Cornelius

**PARTIES**      Schwartz, Michael J.  
**PRESENT:**      State of Nevada  
                                 Westbrook, P. David

Attorney for the State of Nevada  
Plaintiff  
Public Defender

**JOURNAL ENTRIES**

- Defendant not present. Colloquy regarding what specific motion was to be addressed. Mr. Westbrook requested a continuance. COURT SO ORDERED.

NDC

2/17/15; 8:30 AM: DEFENDANT'S STATUS CHECK ON COURT'S ORDER (DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE)

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Felony/Gross Misdemeanor**

## COURT MINUTES

February 17, 2015

C-11-276163-1      State of Nevada  
vs  
Bennett Grimes

**February 17, 2015      8:30 AM      Deft's Status Check On Court's Order**

**HEARD BY:** Leavitt, Michelle

**COURTROOM:** RJC Courtroom 14D

**COURT CLERK:** Susan Jovanovich

**RECORDER:** Kristine Cornelius

**REPORTER:**

## PARTIES

**PRESENT:** State of Nevada Plaintiff  
Trippiedi, Hagar Deputy District Attorney

## JOURNAL ENTRIES

Deft. not present; incarcerated in Nevada Department of Corrections (NDC). Mr. Westbrook not present. COURT ORDERED, matter OFF CALENDAR. Court to issue a decision by written order or minute order.

NDC

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Felony/Gross Misdemeanor**

**COURT MINUTES**

**February 26, 2015**

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C-11-276163-1      State of Nevada  
                                 vs  
                                 Bennett Grimes

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February 26, 2015      3:00 AM      Minute Order Re: Deft's  
   Motion To Correct Illegal  
   Sentence

**HEARD BY:** Leavitt, Michelle

**COURTROOM:** RJC Courtroom 14D

**COURT CLERK:** Susan Jovanovich

**RECORDER:**

**REPORTER:**

**NO  
PARTIES  
PRESENT:**

**JOURNAL ENTRIES**

Minute Order Re: Deft's Motion To Correct Illegal Sentence

The Court, having reviewed the Motion To Correct Illegal Sentence, hereby DENIES the Motion. The State to prepare the order.

CLERK'S NOTE: A copy of the above minute order has been provided to Deputy District Attorney Patrick Burns, Esq., and Deputy Public Defender P. David Westbrook, Esq. /// sj

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Felony/Gross Misdemeanor**

## COURT MINUTES

**March 19, 2015**

C-11-276163-1                      State of Nevada  
vs  
Bennett Grimes

**March 19, 2015      8:30 AM      Defendant's Motion to Withdraw Due to Conflict  
and Motion to Appoint New Counsel**

HEARD BY: Leavitt, Michelle

**COURTROOM:** RJC Courtroom 14D

**COURT CLERK:** Susan Jovanovich  
Shelley Boyle (sb)

**RECORDER:** Kristine Cornelius

## PARTIES

**PRESENT:** O'Halloran, Rachel Attorney for State  
Westbrook, Deborah L., ESQ Attorney for Deft.

## JOURNAL ENTRIES

- Deft. not present. Ms. Westbrook argued in support of the Motion. There being no objection from the State, COURT ORDERED, Motion GRANTED, counsel WITHDRAWN; and a Status Check SET.

NDC

04/02/15 8:30 A.M. STATUS CHECK: DEFENDANTS PRESENCE

CLERK S NOTE: A copy of this Minute Order was mailed to Deft. at:  
Bennett Grimes #2762267  
PO BOX 208  
Indian Springs, NV 89070

CLERK'S NOTE: Deft's address was updated and a copy of this Minute Order mailed to Deft. / sb  
04/08/15

PRINT DATE: 04/08/2015

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Minutes Date: March 19, 2015

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Felony/Gross Misdemeanor****COURT MINUTES****April 02, 2015**

C-11-276163-1      State of Nevada  
vs  
Bennett Grimes

**April 02, 2015****8:30 AM****Status Check****Status Check: Deft's  
Presence****HEARD BY:** Barker, David**COURTROOM:** RJC Courtroom 14D**COURT CLERK:** Susan Jovanovich /SJ  
Shelley Boyle**RECORDER:** Kristine Cornelius**REPORTER:****PARTIES**

<b>PRESENT:</b>	Grimes, Bennett	Defendant
	O'Halloran, Rachel	Deputy District Attorney
	Public Defender	
	Shaygan-Fatemi, Kambiz	Deputy Public Defender
	State of Nevada	Plaintiff

**JOURNAL ENTRIES**

Deft. present in custody, and appearing in proper person. Court reviewed the case, including the prior Motion to withdraw as counsel being the Public Defender, which was granted. Discussions between Court and Deft. regarding history of the case, pending appeal on the denial of Deft's Motion to correct illegal sentence, and appointment of counsel being sought by Deft. in this case for post-conviction proceedings. Court stated it could not find the remittitur in the file. Mr. Shaygan advised he can look into this for the Court. Deft. stated he already has legal counsel for the Supreme Court case, being Ms. Westbrook, this is post-conviction relief (PCR) in the instant case, and he needs a lawyer for the PCR. CONFERENCE AT BENCH. Court advised Deft. regarding the conversation made during the Bench Conference; and further advised Deft. parties believe the procedural problem is Judge Leavitt already granted the Motion to withdraw for the Public Defender, he cannot have one lawyer appointed and handling the appeal aspect of the case, and have a different lawyer appointed for the aspect in the District Court case. Mr. Shaygan requested two weeks to look into this further

**PRINT DATE:** 04/02/2015**Page 1 of 2****Minutes Date:** April 02, 2015

and get in touch with Ms. Westbrook to make better representations to the Court. COURT ORDERED, matter SET for status check; Deft. does not need to appear for the next scheduled hearing. Court noted, Deft. will be kept informed by minute orders sent by Clerk, or by his attorney. FURTHER, Deft. will have counsel appointed for the post-conviction relief by Judge Leavitt, and Judge Leavitt can make a decision on this, when the concerns get cleared up. Deft. inquired if a video conference can be done. Court stated there is no mechanism for this and the Court cannot do that.

NDC

4/14/15 8:30 A.M. STATUS CHECK: STATUS OF CASE / NEW COUNSEL FOR DEFT.

CLERK'S NOTE: A copy of the above minute order, including a copy of the minute order dated March 19, 2015 was delivered by regular mail to: Bennett Grimes, #1098810, P.O. Box 208, Indian Springs, Nevada 89070. /// 4/08/15 sj



**DISTRICT COURT  
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

April 14, 2015

C-11-276163-1      State of Nevada  
                                 vs  
                                 Bennett Grimes

April 14, 2015      8:30 AM      Status Check: Status Of  
                                 Case / New Counsel For  
                                 Deft.

HEARD BY: Leavitt, Michelle

COURTROOM: RJC Courtroom 14D

COURT CLERK: Susan Jovanovich / SJ  
                         Shelley Boyle

RECORDER: Kristine Cornelius

REPORTER:

**PARTIES**

<b>PRESENT:</b>	Grimes, Bennett	Defendant
	Laurent, Christopher J.	Chief Deputy District Attorney
	Public Defender	
	State of Nevada	Plaintiff
	Westbrook, P. David	Deputy Public Defender

**JOURNAL ENTRIES**

Mr. Westbrook advised Public Defender had a conflict in the case, further noting Public Defender filed the Notice of Appeal and the Supreme Court has defense counsel on record. Additionally, Deft. filed his own Notice of Appeal, and this Court did not prepare the written order yet on the denial of Deft's Motion to correct illegal sentence. Court stated Deft. appealed the Court's decision on the Motion to correct, and also filed a pro per Petition for writ of habeas corpus, claiming Public Defender was ineffective. Upon Court's inquiry, Mr. Westbrook requested new counsel be appointed before the Order denying the Motion to correct illegal sentence is prepared and filed. Following discussions, Mr. Laurent advised State can get the Order denying Deft's Motion to correct done, and Mr. Burns can handle this. Mr. Westbrook requested the case be continued for new counsel to be substituted in from Mr. Christensen's office, and for the Public Defender to be released from this case. Statements by Deft. Mr. Westbrook advised Public Defender filed a Motion to withdraw with the

PRINT DATE: 04/14/2015

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Minutes Date: April 14, 2015

Supreme Court, which was denied, and thereafter, the written order was prepared indicating Supreme Court had no jurisdiction on the case, as the jurisdiction is still in District Court. Deft. indicated the ineffective assistance of counsel claim is from the direct appeal not being filed from the Petition for writ of habeas corpus. Court advised Deft. when ineffective assistance of counsel claims are raised during sentencing or trial, a conflict is created with the Public Defender. Thereafter, Court NOTED, a ruling was made that Deft. will need new counsel appointed for post-conviction proceedings. COURT ORDERED, Public Defender REMOVED from the case; matter CONTINUED for new counsel to be appointed from Drew Christensen's office; hearing SET for confirmation. Deft. will not need to appear at the next scheduled hearing.

CASE RECALLED after Court concluded the calendar. Mr. Westbrook not present. Deft. inquired on issues with the Judgment of Conviction, stating if the Court imposed concurrent time on his sentence, due to the Judgment of Conviction stating the sentence differently from the Court's notes. Court clarified to Deft. he has no access to this Court's notes, and the Judgment of Conviction stands.

NDC

4/21/15 8:30 A.M. STATUS CHECK: STATUS OF CASE / NEW COUNSEL FOR DEFT. & CONFIRMATION OF APPOINTED COUNSEL

CLERK'S NOTE: A copy of the above minute order has been delivered by facsimile to the office of Drew Christensen, Esq., for counsel to be appointed. /// sj

CLERK'S NOTE: Clerk reviewed Judgment of Conviction and the record; and determined the Judgment of Conviction clearly reflects the sentence imposed by Court at time of sentencing. /// sj

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Felony/Gross Misdemeanor****COURT MINUTES****April 21, 2015**

C-11-276163-1      State of Nevada  
                                 vs  
                                 Bennett Grimes

**April 21, 2015      8:30 AM      Status Check: Status Of  
Case / New Counsel For  
Deft. & Confirmation Of  
Appointed Counsel**

**HEARD BY:** Leavitt, Michelle**COURTROOM:** RJC Courtroom 14D

**COURT CLERK:** Susan Jovanovich /SJ  
Shelley Boyle

**RECORDER:** Kristine Cornelius**REPORTER:****PARTIES**

<b>PRESENT:</b>	Demonte, Noreen	Deputy District Attorney
	Gamage, William H.	Attorney for Defendant
	State of Nevada	Plaintiff

**JOURNAL ENTRIES**

Deft. not present; incarcerated in Nevada Department of Corrections (NDC). Presence WAIVED. Mr. Gamage advised he will accept the appointment and confirm. Discussions as to two appeals having been filed with the Nevada Supreme Court, one being from the Public Defender's office on this Court's decision on the Motion to correct illegal sentence, and the other appeal having been filed by Deft. in proper person. At request of Mr. Gamage, COURT ORDERED, Mr. Gamage APPOINTED as counsel of record for Deft; Mr. Gamage will be allowed to take over both appeals. FURTHER, Public Defender is officially WITHDRAWN by Court on all matters as to Deft. Mr. Gamage requested Public Defender to prepare a copy of the entire case file; and COURT SO ORDERED. At request of counsel, COURT ADDITIONALLY ORDERED, status check hearing SET for Mr. Gamage to meet with Deft. on the case, and provide the Court a status on file review; Mr. Gamage may also seek additional relief, including a briefing schedule to file pleadings addressing post-conviction relief, if appropriate.

PRINT DATE: 04/21/2015

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Minutes Date: April 21, 2015

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NDC

5/19/15 8:30 A.M. STATUS CHECK: FILE REVIEW

PRINT DATE: 04/21/2015

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Minutes Date: April 21, 2015

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Felony/Gross Misdemeanor**

**COURT MINUTES**

**May 19, 2015**

C-11-276163-1      State of Nevada  
                                 vs  
                                 Bennett Grimes

**May 19, 2015      8:30 AM      Status Check: File Review**

**HEARD BY:** Gonzalez, Elizabeth      **COURTROOM:** RJC Courtroom 14D

**COURT CLERK:** Susan Jovanovich

**RECORDER:** Patti Slattery

**REPORTER:**

**PARTIES**

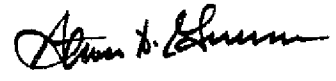
<b>PRESENT:</b>	Demonte, Noreen	Deputy District Attorney
	Garnage, William H.	Attorney for Defendant
	Grimes, Bennett	Defendant
	State of Nevada	Plaintiff

**JOURNAL ENTRIES**

At request of counsel, COURT ORDERED, matter CONTINUED for another status check.

NDC

6/18/15 8:30 A.M. STATUS CHECK: FILE REVIEW

  
CLERK OF THE COURT

1 PHILIP J. KOHN, PUBLIC DEFENDER  
2 NEVADA BAR NO. 0556  
3 309 South Third Street, Suite 226  
4 Las Vegas, Nevada 89155  
5 (702) 455-4685  
6 Attorney for Defendant

7 **DISTRICT COURT**  
8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA, )

10 Plaintiff, )

11 v. )

12 BENNETT GRIMES, )

13 Defendant. )

CASE NO. C-11-276163-1

DEPT. NO. XII

DATE: 9 / 26 / 13

TIME: 8 : 30 AM

14 **DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE**

15 COMES NOW Defendant BENNETT GRIMES, by and through Deputy Public Defender  
16 NADIA HOJJAT, and hereby respectfully requests that this Honorable Court immediately correct  
17 the previous illegal sentence and file an Amended Judgment of Conviction.

18 This Motion is made and based upon all the papers and pleadings on file herein, the  
19 attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

20 DATED this 9<sup>th</sup> day of September, 2013

21 PHILIP J. KOHN  
22 CLARK COUNTY PUBLIC DEFENDER

23 By: /s/ Nadia Hojjat  
24 NADIA HOJJAT, #12401  
25 Deputy Public Defender  
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## DECLARATION

NADIA HOJJAT makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am the Deputy Public Defender assigned to represent the Defendant Bennett Grimes in the instant matter, and am familiar with the facts and circumstances of this case.

2. On October 25, 2011, the State filed its Second Amended Information charging Mr. Grimes with three Counts -- Count 1: Attempt Murder With Use of a Deadly Weapon In Violation of a Temporary Protective Order; Count 2: Burglary While In Possession of a Deadly Weapon in Violation of a Temporary Protective Order; and Count 3: Battery with Use of a Deadly Weapon Constituting Domestic Violence Resulting in Substantial Bodily Harm in Violation of a Temporary Protective Order. **Exhibit 1 (Second Amended Information).** The State charged Count 1 (Attempt Murder) and Count 3 (Battery) based on the exact same illegal act: the act of "stabbing at and into the body of the said ANEKA GRIMES" with a knife on July 22, 2011.

3. After reviewing the Information and the crimes charged, my co-counsel and I advised Mr. Grimes that he could not be adjudicated and sentenced on both Counts 1 and 3 because they were "redundant" under existing Nevada Supreme Court precedent (e.g., Salazar v. State, 119 Nev. 224, 70 P.3d 749 (2003)) because they punished the exact same criminal act: the act of "stabbing at and into the body of the said ANEKA GRIMES".

4. I did not foresee that the Nevada Supreme Court would overturn Salazar v. State and reject the "redundancy" doctrine which had been applied in Nevada since 2003. During trial, I had an opportunity to object to the verdict form and request that Count 3 (Battery) be listed as a lesser included offense of Count 1 (Attempt Murder). The Court indicated that it would have granted this request had I made it. However, I did not make this request because, under the law as it existed at the time, Counts 1 and 3 were "redundant" and, regardless of whether they were listed together on the verdict form, Mr. Grimes could not have been convicted and sentenced for both crimes. Additionally, during trial the Court repeatedly stated that Mr. Grimes could not be adjudicated guilty of both Counts 1 and 3. During the settling of jury instructions in the judicial

1 chambers of this Honorable Court, there was discussion of whether Count 3 would be presented to  
2 the jury as a lesser included option of Count 1. It was determined by the Court, the State, and  
3 defense counsel that the jury verdict form for Count 1 was already sufficiently long and that  
4 placing Count 3 as a lesser included was unnecessary. All parties agreed that the Defendant could  
5 not be adjudicated of both Count 1 and Count 3. Based on these conversations and repeated  
6 assurances from this Honorable Court and the State that, in the event of a conviction on both  
7 counts, Count 3 would be dismissed, defense counsel agreed to have them presented to the jury as  
8 two separate counts.

9           5.       A jury found Mr. Grimes guilty of all three counts on October 15, 2012. On  
10 the morning of February 7, 2013, I appeared before this Court at Mr. Grimes' sentencing hearing.  
11 At that time, I advised the Court that I was objecting to the adjudication of Count 3. I reminded  
12 the Court "that there was some talk of this during the trial" and the Court agreed, stating, "You're  
13 right. I mean, does the State have any objection to it being dismissed?" Although the State had  
14 never previously objected to Count 3 being dismissed in our prior discussions with the Court, and  
15 had in fact agreed in chambers that Count 3 would be dismissed in such circumstances, the State  
16 informed the Court that it was now objecting to Count 3 being dismissed and directed the Court's  
17 attention to the Nevada Supreme Court's December 6, 2012 ruling in Jackson v. State, 291 P.3d  
18 1274, 128 Nev. Adv. Opp. 55 (2012). At that point, the Court continued the sentencing until  
19 February 12, 2013 so that it could review the Jackson decision.

20           6.       Because I was not present at Mr. Grimes' sentencing on February 12, 2013,  
21 I have attached a transcript of that hearing to this motion. **Exhibit 2 (Transcript of Proceedings,**  
22 **February 12, 2013).** However, based on my review of the transcript, I am aware that my co-  
23 counsel R. Roger Hillman objected to the adjudication of Count 3 based on the *ex post facto*  
24 application of Jackson to Mr. Grimes' case and the fact that defense counsel had relied on the prior  
25 law in advising Mr. Grimes and in preparing and presenting his case at trial. **Exhibit 2 at 2-3.**  
26 Notwithstanding these objections, the Court proceeded to sentence Mr. Grimes on both Counts 1  
27 and 3. As to Count 1 (Attempt Murder), the Court sentenced Mr. Grimes to a term of 8 to 20  
28 years plus a consecutive term of 5 to 15 years for the weapons enhancement. As to Counts 2 and



1 3, the Court sentenced Mr. Grimes pursuant to the small habitual criminal statute. For Count 2, the  
2 Court sentenced Mr. Grimes to a term of 8 to 20 years concurrent to Count 1. For Count 3, the  
3 Court sentenced Mr. Grimes to a term of 8 to 20 years consecutive to Counts 1 and 2.

4 7. It is my belief, as set forth herein, that Mr. Grimes' sentence on Count 3 is  
5 illegal for the following reasons: (1) because the redundancy doctrine set forth in Salazar v. State,  
6 governs Mr. Grimes' sentence in this case; (2) because the Court erroneously applied Jackson to  
7 Mr. Grimes' sentence in violation of the judicial *ex post facto* doctrine; and (3) because the  
8 application of Jackson to Mr. Grimes' sentence was fundamentally unfair.

9 I declare under penalty of perjury that the foregoing is true and correct. (NRS  
10 53.045).

11 EXECUTED this \_\_\_\_ day of \_\_\_\_\_, 2013.

12  
13 /s/ Nadia Hojjat  
14 NADIA HOJJAT

15 **MEMORANDUM OF POINTS AND AUTHORITIES**  
16 **IN SUPPORT OF MOTION TO CORRECT AN ILLEGAL SENTENCE**

17  
18 **I. JURISDICTION.**

19 NRS 176.555 gives this Court the authority to "correct an illegal sentence at any time."  
20 See also Passanti v. State, 108 Nev. 318, 831 P.2d 1371 (1992) ("the district court has inherent  
21 authority to correct an illegal sentence at any time").

22 **II. ARGUMENT.**

23 **A. The Redundancy Doctrine of Salazar v. State Governs Mr. Grimes' Sentence in this**  
24 **Case.**

25 In Salazar v. State, 119 Nev. 224, 228, 70 P.3d 749, 751 (2003), the Nevada Supreme  
26 Court ruled that "where a defendant is convicted of two offenses that, as charged, punish the exact  
27 same illegal act, the convictions are redundant" and a defendant cannot be punished for both  
28 offenses without violating the Double Jeopardy Clause of the United States Constitution.

1 Described as the “redundancy doctrine”, the rule in Salazar required the courts to apply a fact-  
2 based “same conduct” test (in addition to a traditional Blockburger analysis) when determining the  
3 permissibility of cumulative punishment under different statutes. See Jackson v. State, 291 P.3d  
4 1274, 1282, 128 Nev. Adv. Op. 55, -- (2012). Under Salazar, “multiple convictions *factually*  
5 based on the same act or course of conduct cannot stand, even if each crime contains an element  
6 the other does not.” Jackson, 291 P.3d at 1280, 128 Nev. Adv. Op. at -- (emphasis in original).  
7 When Salazar was in effect, Nevada courts were required to determine “whether the material or  
8 significant part of each charge is the same even if the offenses are not the same” under  
9 Blockburger. Salazar, 119 Nev. at 227-28, 70 P.3d at 751. Where the factual “gravamen” of two  
10 different offenses was the same, a defendant could not be punished for both offenses under Salazar  
11 -- even if the statutes in question passed the Blockburger test. Id. At 228, 70 P.3d at 752  
12 (defendant could not be punished for *both* battery and mayhem because the “gravamen” of both  
13 offenses – cutting the victim which resulted in nerve damage – was the same for both offenses).

14 Nevada’s “redundancy doctrine” remained in effect from June 11, 2003 until December 6,  
15 2012 when the Supreme Court issued its *en banc* ruling in Jackson v. State. In Jackson, the Court  
16 rejected the defendants’ redundancy challenges under Salazar and directed Nevada courts to apply  
17 a strict Blockburger analysis when faced with Double Jeopardy questions going forward. 291 P.3d  
18 at 1282, 128 Nev. Adv. Op. at --. As a result of the ruling in Jackson, courts may no longer apply  
19 the “redundancy doctrine” when considering a Double Jeopardy challenge. Instead, Nevada courts  
20 must analyze Double Jeopardy issues as follows:

21 If the Legislature has authorized – or interdicted – cumulative punishment, that  
22 legislative directive controls. Absent express legislative direction, the Blockburger  
23 test is employed. Blockburger licenses multiple punishment unless, analyzed in  
terms of their elements, one charged offense is the same or a lesser-included offense  
of the other.

24 Jackson, 291 P.3d at 1282-83, 128 Nev. Adv. Op. at --. Under Blockburger, the court must  
25 determine “whether each offense contains an element not contained in the other; if not, they are the  
26 ‘same offence’ and double jeopardy bars additional punishment and successive prosecution.”  
27 Jackson, 291 P.3d at 1978, 128 Nev. Adv. Op. at -- (citing United States v. Dixon, 509 U.S. 688,  
28 696, 113 S.Ct. 2849 (1993)).

1       **B. The Court Erroneously Applied Jackson v. State to Mr. Grimes' Sentence in**  
2       **Violation of the Judicial Ex Post Facto Doctrine.**

3       It is undisputed that Salazar v. State was still good law on July 22, 2011, which was the  
4       date that Mr. Grimes committed the offense at issue in this case. This Court's refusal to apply the  
5       redundancy doctrine set forth in Salazar v. State violated Mr. Grimes' constitutional rights under  
6       the *Ex Post Facto* and Due Process clauses of the federal and state constitutions. See U.S. Const.  
7       art I, § 9, cl. 3 (*Ex Post Facto* Clause); U.S. Const. amend. XIV (Due Process Clause); Nev. Const.  
8       art 1, § 15 (*Ex Post Facto* Clause); Nev. Const. art. 1 § 8, cl. 5 (Due Process Clause).

9       There are four types of *ex post facto* laws that are constitutionally prohibited: (1) "Every  
10      law that makes an action done before the passing of the law, and which was innocent when done,  
11      criminal; and punishes such action"; (2) "Every law that aggravates a crime, or makes it greater  
12      than it was, when committed"; (3) "Every law that changes the punishment, and inflicts a greater  
13      punishment, than the law annexed to the crime, when committed"; and (4) "Every law that alters  
14      the legal rules of evidence, and receives less, or different, testimony than the law required at the  
15      time of the commission of the offence, in order to convict the offender." Calder v. Bull, 3 Dall.  
16      386, 390 (1798). Because the *Ex Post Facto* Clause expressly limits legislative powers, it "does  
17      not of its own force apply to the Judicial Branch of government." Marks v. United States, 430  
18      U.S. 188, 191, 97 S. Ct. 990 (1977). Nevertheless, both the United States Supreme Court and the  
19      Nevada Supreme Court have held that *ex post facto* principles also apply to the judiciary through  
20      the Due Process Clause. Bouie v. Columbia, 378 U.S. 437, 353-54, 84 S. Ct. 1697 (1964)  
21      (observing that the Due Process Clause precludes courts "from achieving precisely the same  
22      result" through judicial construction as would application of an *ex post facto* law); accord Stevens  
23      v. Warden, 114 Nev. 1217, 969 P.2d 945 (1998).

24      In Stevens v. Warden, the Nevada Supreme Court set forth a three-part test for determining  
25      when a judicial decision violates *ex post facto* principles: (1) the decision must have been  
26      "unforeseeable"; (2) the decision must have been applied "retroactively"; and (3) the decision must  
27      "disadvantage the offender affected by it." 114 Nev. at 1221-22, 969 P.2d at 948-49. Analyzing the  
28      three Stevens factors, it is clear that this Court's application of Jackson - rather than Salazar - when  
determining Mr. Grimes' sentence in this case violated the judicial *ex post facto* doctrine.

1 First, the Nevada Supreme Court's wholesale abandonment of the "redundancy doctrine" --  
2 which was good law in Nevada for nearly 10 years -- was not foreseeable. Defendants have relied  
3 on Salazar and related cases to obtain the dismissal of redundant charges for nearly a decade and  
4 would have continued to do so had the Supreme Court not ruled as it did in Jackson. The decision  
5 in Jackson was by no means a foregone conclusion. Indeed, even the Jackson court recognized  
6 that other jurisdictions currently employ redundancy-type tests in evaluating the propriety of  
7 multiple punishments for a single act. See Jackson, 291 P.3d at 1283 n. 10, 128 Nev. Adv. Opp. at  
8 -- (citing State v. Swick, 279 P.3d 747, 755 (N.M. 2012) and State v. Lanier, 192 Ohio App.3d  
9 762, 950 N.E.2d 600, 603 (2011)). In this very case, this Honorable Court was prepared to  
10 dismiss Count 3 based on redundancy principals, right up until the point where the State raised the  
11 Jackson decision as a basis for rejecting redundancy.

12 Second, there can be no doubt that Jackson was applied retroactively in Mr. Grimes' case.  
13 When determining whether a decision is being applied "retroactively", Nevada courts look to  
14 "what [the defendant] could have anticipated at the time he committed the crime." Stevens, 114  
15 Nev. at 1221, 969 P.2d at 948 ("the relevant date of inquiry is the date that [defendant] committed  
16 the offense"). In this case, Mr. Grimes committed the offense on July 22, 2011, almost a year-and-  
17 a-half before the Nevada Supreme Court's decision in Jackson, at a time when Salazar was still  
18 good law. Therefore, Jackson is being applied retroactively in this case. See Stevens, 114 Nev. at  
19 1222, 969 P.2d at 948-49.

20 Finally, Mr. Grimes has been disadvantaged by the Court's application of Jackson instead  
21 of Salazar at sentencing in this case. Up until the State raised the Jackson decision at sentencing  
22 on February 7, 2013, this Court was prepared to dismiss Count 3 because it was redundant of  
23 Count 1. Throughout trial, the Court acknowledged to the parties that Mr. Grimes could not be  
24 adjudicated on both Counts 1 and 3. Under Salazar, the "gravamen" of Counts 1 and 3 as charged  
25 in the Second Amended Information is the exact same act -- "stabbing at and into the body of the  
26 said ANEKA GRIMES" with a knife on July 22, 2011. See Salazar, 119 Nev. at 228, 70 P.3d at  
27 752 (defendant could not be punished for *both* battery and mayhem because the "gravamen" of  
28 both offenses -- cutting the victim which resulted in nerve damage -- was the same for both

1 offenses). Since Mr. Grimes would not have been convicted of both Counts 1 and 3 under Salazar,  
2 Mr. Grimes was disadvantaged by the Court's application of Jackson at sentencing to impose a  
3 consecutive 8 to 20 year sentence on Count 3. See Stevens 114 Nev. at 1222-23, 969 P.2d at 949  
4 ("assuming applying Bowen to Stevens would increase his sentence, we conclude that to do so  
5 would violate the Due Process Clause"). Accordingly, Mr. Grimes' conviction and sentence on  
6 Count 3 violates the judicial *ex post facto* doctrine and must be vacated.

7 In Ex. Parte Scales, the *en banc* Court of Criminal Appeals of Texas faced a remarkably  
8 similar issue to the one at bar. Ex. Parte Scales, 853 S.W.2d 856 (Ct. Crim App. Tex. 1993) (*en*  
9 *banc*). At the time that Donald Scales committed the crimes at issue in his case (possession of a  
10 prohibited weapon and aggravated assault), the Texas Court of Criminal Appeals still applied the  
11 "carving doctrine" which barred "multiple prosecutions and convictions 'carved' out of a single  
12 criminal transaction." 853 S.W.2d at 586-87. At some point thereafter, the court abandoned the  
13 "carving doctrine". *Id.* at 587. Mr. Scales petitioned for a writ of habeas corpus on the basis that  
14 the court's retroactive abandonment of the "carving doctrine", which led to his successive  
15 prosecution and conviction for aggravated assault, was barred by *ex post facto* principles. In ruling  
16 that the "carving doctrine" was a substantive rule of law which should have been applied to Mr.  
17 Scales, the Court observed:

18 In this very case, applicant is now liable to conviction for two offenses, or more.  
19 Under the carving doctrine, if he engaged in only one criminal transaction, he  
20 would be liable to only one criminal conviction because, under the carving doctrine,  
21 the transaction was the offense. Likewise, where he might once have been exposed  
22 only to the punishment prescribed for unlawfully carrying a weapon, he must now  
23 expect to face the punishment prescribed for aggravated assault as well, even  
24 though he may have committed but a single criminal transaction. And finally,  
25 where the law once entitled him to prevent prosecution for aggravated assault after  
26 a conviction for the same criminal transaction, he is now denied the benefit of this  
27 substantive defensive theory. Therefore our decision to make the abandonment of  
28 the "carving doctrine" retroactive in Ex Parte Clay violated the Due Process Clause  
of the Federal Constitution.

853 S.W.2d at 588. Here, as in Ex Parte Scales, Mr. Grimes faced an additional criminal  
conviction and sentence for battery that would not have been permissible under Salazar. Indeed,  
"where he might once have been exposed only to the punishment prescribed for [attempted  
murder], he must now expect to face the punishment prescribed for [battery] as well", even though  
the "gravamen" of both offenses was the same under Salazar. 853 S.W.2d at 855. Accordingly,

1 this Court must vacate Mr. Grimes' redundant conviction and sentence for battery pursuant to the  
2 *Ex Post Facto* and Due Process clauses of the federal and state constitutions. See U.S. Const. art I,  
3 § 9, cl. 3 (*Ex Post Facto* Clause); U.S. Const. amend. XIV (Due Process Clause); Nev. Const. art  
4 1, § 15 (*Ex Post Facto* Clause); Nev. Const. art. 1 § 8, cl. 5 (Due Process Clause).

5 **C. The Court's Application of Jackson was Fundamentally Unfair to Mr. Grimes under**  
6 **the Fifth Amendment.**

7 The Fifth Amendment Due Process Clause "guarantees that a criminal defendant will be  
8 treated with the fundamental fairness essential to the very concept of justice." U.S. v. Valenzuela-  
9 Bernal, 458 U.S. 858, 872, 102 S.Ct. 3440 (1982) (internal quotations and citation omitted); see  
10 also U.S. Const. amend. XIV (Due Process Clause); Nev. Const. art. 1 § 8, cl. 5 (Due Process  
11 Clause). In the instant case, it is fundamentally unfair to Mr. Grimes for the Court to convict and  
12 sentence him on Count 3 (Battery). Both prior to and during trial, Defense Counsel advised Mr.  
13 Grimes that he could not be convicted and sentenced on both Counts 1 and 3 based on then  
14 existing law. During trial, Defense Counsel could have objected to the verdict form and requested  
15 that Count 3 be listed as a lesser included offense of Count 1. Had Defense Counsel done so, the  
16 Court would have granted such request which would have prevented Mr. Grimes from being  
17 convicted and sentenced on both counts. However, Defense Counsel chose not to do so with the  
18 understanding that the Court would later dismiss Count 3 at time of sentencing, in the event of a  
19 conviction on both Counts 1 and 3. Given Mr. Grimes' reliance on existing law, and his  
20 reasonable expectation that the Court would later dismiss Count 3 as promised, it is fundamentally  
21 unfair for Mr. Grimes to be convicted and sentenced on that count.

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DATED this 9<sup>th</sup> day of Sept, 2013.

By: /s/ Nadia Hojjat  
NADIA HOJJAT, #12401  
Deputy Public Defender

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**NOTICE OF MOTION**

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the  
above and foregoing Motion on for hearing before the Court on the 26 of SEPTEMBER, 2013,  
at 830 A a.m./p.m..

DATED this 9<sup>th</sup> day of Sept, 2013.

PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Nadia Hojjat  
NADIA HOJJAT, #12401  
Deputy Public Defender

**CERTIFICATE OF ELECTRONIC FILING**

I hereby certify that service of the above and foregoing was made this 9<sup>th</sup> day of  
Sept, 2013, by Electronic Filing to:

District Attorneys Office  
E-Mail Address:

[Signature]  
Secretary for the Public Defender's Office

**CERTIFICATE OF ELECTRONIC FILING**

I hereby certify that service of the above and foregoing was made this 9<sup>th</sup> day of  
Sept, 2013, by Electronic Filing to:

District Attorneys Office  
E-Mail Address:  
PD.Motions@ccdanv.com

[Signature]  
Secretary for the Public Defender's Office





CLERK OF THE COURT

1 **INFO**  
2 **DAVID ROGER**  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 **SHAWN MORGAN**  
6 Deputy District Attorney  
7 Nevada Bar #0010935  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,  
10 Plaintiff,  
11 -vs-  
12 BENNETT GRIMES,  
13 #2762267  
14 Defendant.

Case No: C-11-276163-1  
Dept No: XII

**SECOND AMENDED  
INFORMATION**

15 STATE OF NEVADA }  
16 COUNTY OF CLARK } ss.

17 DAVID ROGER, District Attorney within and for the County of Clark, State of  
18 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

19 That BENNETT GRIMES, the Defendant(s) above named, having committed the  
20 crimes of **ATTEMPT MURDER WITH USE OF A DEADLY WEAPON IN**  
21 **VIOLATION OF A TEMPORARY PROTECTIVE ORDER (Felony - NRS 200.010,**  
22 **200.030, 193.330, 193.165, 193.166); BURGLARY WHILE IN POSSESSION OF A**  
23 **DEADLY WEAPON IN VIOLATION OF A TEMPORARY PROTECTIVE ORDER**  
24 **(Felony - NRS 205.060, 193.166) and BATTERY WITH USE OF A DEADLY**  
25 **WEAPON CONSTITUTING DOMESTIC VIOLENCE RESULTING IN**  
26 **SUBSTANTIAL BODILY HARM IN VIOLATION OF A TEMPORARY**  
27 **PROTECTIVE ORDER (Felony - NRS 200.481.2e; 193.166), on or about the 22nd day of**  
28 July, 2011, within the County of Clark, State of Nevada, contrary to the form, force and

1 effect of statutes in such cases made and provided, and against the peace and dignity of the  
2 State of Nevada,

3 COUNT 1 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON IN  
4 VIOLATION OF TEMPORARY PROTECTIVE ORDER

5 did then and there, without authority of law, and malice aforethought, willfully and  
6 feloniously attempt to kill ANEKA GRIMES, a human being, by stabbing at and into the  
7 body of the said ANEKA GRIMES, with a deadly weapon, to-wit: a knife, in violation of a  
8 Temporary Order for Protection against Domestic Violence issued by the District Court,  
9 Family Division, of the State of Nevada in Case No. T-11-134754-T.

10 COUNT 2 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON IN  
11 VIOLATION OF A TEMPORARY PROTECTIVE ORDER

12 did then and there wilfully, unlawfully, and feloniously enter, and thereafter gain  
13 possession of a deadly weapon, to-wit: a knife, with intent to commit assault and/or battery  
14 and/or to commit substantial bodily harm and/or murder, that certain building occupied by  
15 ANEKA GRIMES, located at 4325 West Desert Inn, Las Vegas, Clark County, Nevada, in  
16 violation of a Temporary Order for Protection against Domestic Violence issued by the  
17 District Court, Family Division, of the State of Nevada in Case No. T-11-134754-T.

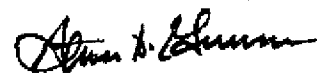
18 COUNT 3 - BATTERY WITH USE OF A DEADLY WEAPON CONSTITUTING  
19 DOMESTIC VIOLENCE RESULTING IN SUBSTANTIAL BODILY HARM  
20 IN VIOLATION OF TEMPORARY PROTECTIVE ORDER

21 did then and there wilfully, unlawfully, and feloniously use force or violence upon  
22 the person of his spouse, former spouse, or any other person to whom he is related by blood  
23 or marriage, a person with whom he is or was actually residing, a person with whom he has  
24 had or is having a dating relationship, a person with whom he has a child in common, the  
25 minor child of any of those persons or his minor child, to-wit: ANEKA GRIMES, with use  
26 of a deadly weapon, to-wit: a knife, by stabbing at and into the body of the said ANEKA

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# EXHIBIT B



CLERK OF THE COURT

1 RTRAN

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DISTRICT COURT  
CLARK COUNTY, NEVADA

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8 STATE OF NEVADA,

CASE NO. C276163

9

Plaintiff,

DEPT. XII

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11 vs.

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13 BENNETT GRIMES,

14

Defendant.

15

BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE  
TUESDAY, FEBRUARY 12, 2013

16

**TRANSCRIPT OF PROCEEDINGS**  
**SENTENCING**

17

18

**APPEARANCES:**

19

For the State:

AGNES M. BOTELHO, ESQ.  
J. PATRICK BURNS, ESQ.  
Deputy District Attorneys

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21

For the Defendant:

R. ROGER HILLMAN, ESQ.  
Deputy Public Defender

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RECORDED BY: KERRY ESPARZA, COURT RECORDER

1 TUESDAY, FEBRUARY 12, 2013 AT 10:00 A.M.

2  
3 THE COURT: State of Nevada versus Bennett Grimes. He's present, he is in  
4 custody. This is on for sentencing.

5 And Mr. Hillman, were you made aware of what the issue was last  
6 time?

7 MR. HILLMAN: Yes, Judge.

8 THE COURT: Okay. And you've read the *Jackson* case?

9 MR. HILLMAN: Yes, Judge.

10 THE COURT: Okay. What's your -- are you in agreement?

11 MR. HILLMAN: Well, the Supreme Court's said what they've said on this.

12 THE COURT: Right.

13 MR. HILLMAN: However, my understanding is that the case wasn't published  
14 until after this case was over with. And I think that that changes things and the fact  
15 that it seems to be ex post facto to me.

16 THE COURT: Well --

17 MR. HILLMAN: If not practically --

18 THE COURT: Okay.

19 MR. HILLMAN: -- I mean, if not legally, at least practically. Because  
20 Mr. Grimes and I have talked about this very issue very first time we talked about  
21 the elements of the case, potential punishment. It affected the way we prepared for  
22 this case, it affected the way we presented this case. And if I remember correctly  
23 when we were settling jury instructions in chambers, we talked specifically about --

24 THE COURT: Uh-huh.

25 MR. HILLMAN: -- Count 3 merging.

1 THE COURT: Okay. I'm not quite sure this is a new rule, it's not a new rule.  
2 I mean, the Supreme Court basically just analyzed it under *Blockburger*. So it  
3 wouldn't be a retroactive, it means we were doing things wrong before. Right?  
4 That's all it means to me is that we were just doing it wrong.

5 MR. HILLMAN: Yeah. And in effect --

6 THE COURT: And the Supreme Court says don't do it wrong anymore.

7 MR. HILLMAN: And in effect what that does, that makes us ineffective in our  
8 representations of the truth for Mr. Grimes.

9 MR. BURNS: Your Honor, if I could respond to that. I'll respond to the ex  
10 post facto issue. The law interpreting *Strickland* is abundantly clear that counsel is  
11 not ineffective for failing to anticipate changes in the law. And I think that's exactly  
12 what Mr. Hillman and Ms. Hojjat were doing. They were clearly not in fact to this  
13 case.

14 As to whether or not this would constitute an ex post facto law, you -- it  
15 doesn't fit into any of *Calder versus Bull's* four categories.

16 THE COURT: Uh-huh.

17 MR. BURNS: It's not a law as that term of art would be construed for an ex  
18 post facto analysis. The law is very clear from the U.S. Supreme Court *California*  
19 *Department of Corrections versus Morales* that just because a Defendant ends up  
20 being exposed to a worse situation, that these procedural changes are bad for him  
21 doesn't mean it's an ex post facto violation.

22 And just as juris prudential clarification, it's certainly not a type of -- it's  
23 not a change in a new law, and more importantly the quantum of punishment  
24 attached to his conduct has not changed. So it doesn't meet any of *Calder versus*  
25 *Bull's* four categories which the U.S. Supreme Court has admonished ex post facto

1 analysis should not go beyond.

2 THE COURT: Okay. And everyone agrees -- I know last time there was  
3 some concern, you only get one enhancement.

4 MS. BOTELHO: Yes, Your Honor.

5 THE COURT: So how does the State want to proceed?

6 I mean, I can't rule on any issue about being ineffective --

7 MR. HILLMAN: Right. Not at this point in time.

8 THE COURT: -- you agree, right?

9 MR. HILLMAN: Sure.

10 THE COURT: I mean, you agree that I have to sentence him first?

11 MR. HILLMAN: Correct.

12 THE COURT: Okay. All right.

13 So Mr. Grimes, you understand today's the date and time set for entry  
14 of judgment, imposition of sentencing.

15 THE DEFENDANT: Yes.

16 THE COURT: Any legal cause or reason why judgment should not be  
17 pronounced against you at this time?

18 THE DEFENDANT: No.

19 THE COURT: By virtue of the verdict returned by the jury in this matter, I  
20 hereby adjudicate you guilty of Count 1, attempt murder with use of a deadly  
21 weapon in violation of a temporary protective order.

22 Count 2, burglary while in possession of a deadly weapon in violation of  
23 a temporary protective order.

24 Count 3, battery with use of a deadly weapon, constituting domestic  
25 violence resulting in substantial bodily harm in violation of a temporary protective

1 order.

2 So how is the State going to proceed?

3 MS. BOTELHO: Your Honor, as in the previous date, we asked as to the  
4 attempt murder, we asked for 8 to 20 years just for the attempt murder as to that.  
5 With regard to any enhancement, we ask for the deadly weapon enhancement, we  
6 ask for a consecutive 20 -- 8 to 20 years as to that charge.

7 As to Count 2, battery -- or excuse me, burglary with a deadly weapon  
8 with a temporary protective -- violation of temporary protective order, we asked for  
9 treatment under small habitual which is an 8 to 20, consecutive to Count 1.

10 With Count 3, we asked also for small habitual treatment, 8 to 20 years  
11 consecutive to Counts 1 and 2. With us asking for the small habitual treatment kind  
12 of doesn't necessitate the deadly weapon violation of TPO finding or any  
13 enhancement.

14 THE COURT: Okay. Do you have your priors to prove up?

15 MS. BOTELHO: We gave that to the Court at the last hearing --

16 THE COURT: Okay.

17 MS. BOTELHO: -- Your Honor. They've been marked as exhibits. There  
18 were no objections [Indiscernible].

19 THE COURT: That's right. There -- Mr. Hillman, there's no objection to the  
20 priors?

21 MR. HILLMAN: I assume Ms. Hojjat looked over them and talked about it.  
22 So.

23 THE COURT: Okay. Do you want, I'll get them for you. I just want to make  
24 sure there's no objection.

25 MR. HILLMAN: If they've been marked and admitted, I'm sure that they were



1 reviewed --

2 THE COURT: Okay.

3 MR. HILLMAN: -- and any record needed to be made was made at that time.

4 THE COURT: Okay. So basically the State's asking for the small habitual as  
5 to all three counts?

6 MS. BOTELHO: As to Counts 2 and 3, Your Honor. We're asking for -- not  
7 habitual treatment on Count 1 which is the attempt murder with use. We're asking  
8 for 8 to 20 on the attempt murder and a consecutive 8 to 20 on the deadly weapon.

9 THE COURT: Oh, okay. All right. It's basically kind of the same thing,  
10 though. All right.

11 MS. BOTELHO: Yes.

12 THE COURT: That you're asking me to utilize the deadly weapon  
13 enhancement.

14 MS. BOTELHO: Yes, Your Honor.

15 THE COURT: Okay. Got it.

16 Mr. Grimes, do you want to say anything? I have to tell you, I'm a little  
17 disappointed in your statement when you said that we're all making just too big of a  
18 deal about this.

19 THE DEFENDANT: I don't remember saying that.

20 THE COURT: Do you want me to read it to you?

21 THE DEFENDANT: She -- I didn't state that for word for word for her.

22 THE COURT: You think we're making too big of a deal of this and you  
23 deserve probation.

24 THE DEFENDANT: I never told her that it wasn't a serious crime or anything,  
25 I said that --

1 THE COURT: I didn't say that.

2 THE DEFENDANT: No, she said that -- that I -- [indiscernible].

3 THE COURT: I think and it's a quote -- let me just read it to you. It's page 7,  
4 quote: I think people are taking this case more serious than it was.

5 THE DEFENDANT: Well, I think the charges filed were excessive.

6 THE COURT: You've got to be kidding me. How -- you stabbed that woman  
7 numerous times.

8 MR. HILLMAN: Mr. Grimes and I have talked about this exact point. And I  
9 think what happened is there was a bit of miscommunication in that Mr. Grimes  
10 when he went over to Anika's house didn't expect the things to turn out like they did  
11 and that's how --

12 THE COURT: I believe that would probably be true, but it did. Okay. I  
13 believe maybe that's true that you went over there but you didn't expect things to  
14 turn out the way they did, but they did.

15 I sat up here and watched that woman testify and looked over at her  
16 and saw that -- just looking at her, not even trying, and I saw the horrible horrendous  
17 scars left on her, like, area that you can see just in normal clothing. Horrific scars  
18 that she has to live with the rest of her life. I think the girl's lucky that she's alive, if  
19 you want my opinion. How many times was she stabbed? It was --

20 MS. BOTELHO: 21.

21 THE COURT: Pardon?

22 MS. BOTELHO: 21.

23 THE COURT: I mean, 21 times. 21 times. I mean, at some point a voice of  
24 reason has an opportunity to take over and say, ooh, you know, she's going to die.  
25 In front of her mother. Her mother couldn't even protect her from you while her

1 father sat on the phone and listened to the horror that was transpiring.

2 And you have no hope with that girl, you understand that, right? She's  
3 divorcing you, if she hasn't divorced you already.

4 THE DEFENDANT: I heard it was final. So.

5 THE COURT: Pardon?

6 THE DEFENDANT: Our papers are already final.

7 THE COURT: Okay. All right. So you get -- you've got to move on. Okay.  
8 Do you want to say anything prior to sentencing? Because I'm telling you, I don't  
9 think anybody is making this a bigger deal. I think that what happened that day, I  
10 think that girl, I think it's a miracle that she's alive. And I think that police officer, I  
11 think he saved her life because I don't think you were going to stop.

12 THE DEFENDANT: Um.

13 THE COURT: If you're not going to stop with someone's mother there. You  
14 know. It took someone with a gun pointing --

15 THE DEFENDANT: I apologize to the situation that took place --

16 THE COURT: -- it to your head --

17 THE DEFENDANT: -- Your Honor.

18 THE COURT: -- and threaten to kill you.

19 THE DEFENDANT: I take responsibility for what happened there that day,  
20 but all the details don't add up correctly. Like police officers doing this or that or  
21 what happened --

22 THE COURT: Okay. 21 stab wounds don't lie. The doctor, she doesn't have  
23 a dog in this fight. She just happens to be the doctor on duty that the trauma patient  
24 gets brought into. And she talked -- do you remember her testimony?

25 THE DEFENDANT: I never physically had possession of that knife in the first

1 place.

2 THE COURT: Oh, for the love of all that's good in this world. So she stabbed  
3 herself 21 times.

4 THE DEFENDANT: No, we were tussling over the knife.

5 THE COURT: No, no, no, no, no, no, no, no. You can't tussle over a knife  
6 and get 21 stab wounds and you get a scratch on your finger. That's what you got.

7 THE DEFENDANT: Yeah, well, she initiated --

8 THE COURT: You did not get a stab wound, you got a scratch.

9 THE DEFENDANT: But initiated the fight is her first swinging the knife at me.

10 THE COURT: So she was swinging the knife at you?

11 THE DEFENDANT: She swung it at me which initiated a struggle and then  
12 wrestling to get the knife loose.

13 THE COURT: Okay. And everybody's a liar, everybody that saw you  
14 stabbing her.

15 THE DEFENDANT: No one saw -- no one saw anything. No testimony --

16 THE COURT: Her mother did.

17 THE DEFENDANT: She didn't see anything. Neither did the cops.

18 THE COURT: Her mother was there the whole time.

19 Okay. Do you understand that 21 stab wounds is 21 stab wounds?

20 THE DEFENDANT: I understand.

21 THE COURT: That you just sound stupid today by saying that you tussled  
22 with a knife and you came out with an itty bitty scratch? An itty bitty scratch. I'll get  
23 the picture out. Because you came out with an itty bitty scratch and she came out  
24 with 21 stab wounds and horrific scars that I saw with her sitting there with normal  
25 clothes on. Horrific scars.

1 Any wit -- I mean, you stab someone in the chest, they die -- they can  
2 die. It's a miracle that woman didn't die, 21 stab wounds. It is a miracle she didn't  
3 die. You don't get 21 stabs from tussling. So. I mean, I thought after the trial and  
4 you'd heard all the evidence that you would, you know, give up the tussling with the  
5 knife story.

6 THE DEFENDANT: Waver from what actually happened.

7 THE COURT: Okay. Even though it's impossible.

8 THE DEFENDANT: That's an opinion --

9 THE COURT: Unless she stabbed herself.

10 THE DEFENDANT: No. That's an opinion based on someone --

11 THE COURT: It's impossible based upon the facts.

12 THE DEFENDANT: -- looking from the outside in.

13 THE COURT: Okay. I sat here and listened to it every day. It's impossible  
14 based on the facts. Absolutely impossible. But.

15 Mr. Hillman.

16 MR. HILLMAN: Judge, that's been Mr. Grimes' position from when we first  
17 talked about it was that she came at him with a knife. And as I argued to the jury,  
18 they were the result of two people fighting with a knife.

19 THE COURT: And maybe she did. But 21 stab wounds isn't --

20 MR. HILLMAN: And I wasn't there. I mean, that was -- that's always been a  
21 problem, it's always been a problem with this case and --

22 THE COURT: Uh-huh.

23 MR. HILLMAN: -- Bennett and I talked about that as well.

24 The State is in fact asking for 40 to 100 years on this particular case. If  
25 Anika Grimes had died as a result of her wounds, that's pretty much the sentence

1 he would get for first-degree murder with use would be 40 years to life. That's not  
2 what happened here.

3 THE COURT: Problem is, this guy has a history of beating up on women.

4 MR. HILLMAN: She has -- she was stabbed 21 times, she went to the  
5 hospital, she had some sutures, she left the next day. And I admit, it could have  
6 been much worse than it was.

7 THE COURT: Sure.

8 MR. HILLMAN: But I'm thinking that the top end of the sentencing scheme  
9 should be saved for those who are the worst of the worst. Bennett Grimes should  
10 not have gone over to that apartment, we've talked about it. He had a temporary  
11 restraining order. But they had this before where they were on the outs, he'd gone  
12 back, they worked things out.

13 He had gotten a new job, he took the proof that he had a new job to  
14 kind of smooth the domestic relationship out, he wanted to talk to her about that. He  
15 didn't hide in the bushes and wait for them. He didn't break down the door. He  
16 pushed his way in or they gave up talking to him and stepped away and he stepped  
17 in. He didn't bring a weapon --

18 THE COURT: I agree.

19 MR. HILLMAN: -- to this. The weapon was in the apartment. And there's  
20 some dispute in Bennett's mind about how the whole thing started. Bennett  
21 Grimes -- and there was a problem with the burglary as well in that I think that that  
22 burglary while in possession of a deadly weapon confused the jury to a great extent.  
23 Hojjat spoke with the jurors afterwards and several of them said we didn't think that  
24 he went there with the intent to do anything but he got the knife after so he  
25 committed burglary with intent.

1           And I didn't cover that very well in my closing argument because I still  
2 think that the evidence shows that Bennett went over there not with the intent to  
3 commit any particular crime. And that's a real problem in this case.

4           We sent letters to Your Honor from his family, from his friends. I've  
5 spoken a lot with his family, he's got a loving family. He's a young man, he's only  
6 34 years of age. He's got two children.

7           THE COURT: Well, and I can't figure out because your wife is a lovely -- your  
8 ex-wife is a lovely woman.

9           MR. HILLMAN: The children are --

10          THE COURT: I couldn't figure it out.

11          MR. HILLMAN: -- are currently living with Bennett's parents.

12          THE COURT: But they're not -- they're another wife's children.

13          MR. HILLMAN: They're Anika's children, no.

14          THE COURT: Okay.

15          MR. HILLMAN: Bennett understands that there's nothing between him and  
16 Anika anymore. We talked about that several months ago, so that's completely over  
17 with. But these children are going to grow up without seeing Bennett as well. And  
18 that's due in large part to Bennett's own activities and his own actions and he  
19 understands that as well.

20                 But what I'm going to ask you to do is to just -- if we're talking 8 to 20s,  
21 let's run them concurrent. That will put him eligible for parole at the age of 42. It will  
22 give the Department of Parole and Probation a lot of time to keep him on parole if  
23 they deem him worthy of parole. And that would be my request.

24          THE COURT: Okay. In accordance with the laws of the state of Nevada, this  
25 Court does now sentence you as follows, in addition to a \$25 administrative

1 assessment, \$150 DNA fee, order that you submit to genetic marker testing.

2 As to Count 1, the attempt murder charge, the Court is going to  
3 sentence you to a term of 8 to 20 years in the Nevada Department of Corrections,  
4 plus a consecutive term of 5 to 15 years in the Nevada Department of Corrections,  
5 based upon the factors enumerated in NRS 193.165, subsection 1.

6 As to Count 2, Count 3, the Court is going to make a determination that  
7 is just and appropriate to treat you as a habitual criminal and sentence you under  
8 the habitual criminal statute, the small habitual.

9 As to Count 2, sentence you to 8 to 20 years in the Nevada Department  
10 of Corrections to run concurrent to Count 1.

11 Count 3, 8 to 20 years in the Nevada Department of Corrections to run  
12 consecutive to Count 1 and 2.

13 How much credit does he have?

14 MR. HILLMAN: Sorry, I didn't figure that out before. Looks like he has 581.

15 THE COURT: 581 days credit for time served.

16 I'm sorry, did anybody have victim statements? I apologize.

17 MR. HILLMAN: That was done before.

18 THE COURT: Okay. I know it was done before and I know it was done in  
19 front of Judge Barker and it was preserved, but I would absolutely allow the victims  
20 to speak today.

21 MR. BURNS: Thank you, Your Honor. But I believe only Earl, the father, was  
22 going to speak.

23 THE COURT: Okay.

24 MR. BURNS: So Anika did not plan to speak so I think everything's included  
25 in the record.



1 THE COURT: Okay. I didn't see Anika here.

2 Are you Anika's father?

3 THE DEFENDANT'S FATHER: I'm his father.

4 THE COURT: I'm sorry?

5 THE DEFENDANT'S FATHER: I'm Bennett Grimes' father.

6 THE COURT: Okay. I apologize. Okay. Thank you, sir.

7 THE DEFENDANT'S FATHER: No, that's okay, Judge.

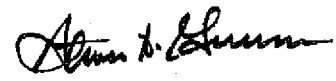
8 THE COURT: Thank you.

9 [Proceeding concluded at 10:20 a.m.]

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21 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual  
22 recording in the above-entitled case.

23 

24 Jill Jacoby  
25 Court Recorder

  
CLERK OF THE COURT

**OPPM**  
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DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,

-vs-

BENNETT GRIMES,  
#2762267 Defendant.

CASE NO: C-11-276163-1

DEPT NO: XII

**STATE'S OPPOSITION TO DEFENDANT'S  
MOTION TO CORRECT ILLEGAL SENTENCE,**

DATE OF HEARING: September 26, 2013  
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, District Attorney,  
by and through PATRICK BURNS, Deputy District Attorney, and files this STATE'S  
OPPOSITION TO DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE.  
This opposition is made and based upon all the papers and pleadings on file herein, the  
attached points and authorities in support hereof, and oral argument at the time of hearing, if  
deemed necessary by this Honorable Court.

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1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 On September 14, 2011, the State of Nevada charged Defendant Bennett Grimes  
4 (Grimes) with: Count 1 – Attempt Murder with Use of a Deadly Weapon in Violation of  
5 Temporary Protective Order (Category B Felony – NRS 200.010; 200.030; 193.330;  
6 193.165; 193.166); Count 2 – Burglary While in Possession of a Deadly Weapon (Category  
7 B Felony – NRS 205.060; 193.166); and Count 3 – Battery with a Use Deadly Weapon  
8 Constituting Domestic Violence Resulting in Substantial Bodily Harm in Violation of  
9 Temporary Protective Order (Category B Felony – NRS 200.481(2)(e); 193.166). The State  
10 filed a Third Amended Information just prior to trial. Trial commenced on October 10, 2012,  
11 and concluded on October 15, 2012, with the jury returning a guilty verdict on all three  
12 counts. The jury deliberated approximately two hours before returning its verdict. On  
13 October 23, 2012, Grimes filed a motion for a new trial. That motion was denied on  
14 November 6, 2012.

15 The Court sentenced Grimes on February 12, 2013, and his judgment of conviction  
16 was filed on February 21, 2013. As to Count 1, the Court sentenced Grimes to eight (8) to  
17 twenty (20) years in the Nevada Department of Corrections (NDOC) with a consecutive term  
18 of five (5) to fifteen (15) years NDOC. Based on his two prior felony domestic violence  
19 convictions from California, the Court then adjudicated Grimes as a habitual criminal on  
20 Counts 2 and 3 and imposed sentences of eight (8) to twenty (20) years on each count. The  
21 Court ordered that Count 2 would run concurrent to Count 1 and Count 3 would run  
22 consecutive to Count 1. Grimes's total aggregate sentence is twenty-one (21) to fifty-five  
23 (55) years NDOC.

24 On March 18, 2013, Grimes filed in the district court his notice of appeal. Grimes  
25 filed his fast track statement before the Nevada Supreme Court on September 9, 2013. The  
26 State has not yet filed its response to Grimes's fast track appeal. The same day that Grimes's  
27 appellate attorney filed his fast-track statement in the Nevada Supreme Court (and roughly  
28 seven (7) months after Grimes's notice of appeal was filed), one of his trial attorneys filed

1 this "Motion to Correct Illegal Sentence," which Grimes seeks an adjudication of while his  
2 direct appeal is pending. The State's opposition follows.

### 3 ARGUMENT

#### 4 **I. Grimes's Motion Is Not Properly Before the Court Because It Essentially** 5 **Requests the Court to Reconsider a Legal Issue Already Fully Litigated** 6 **and Determined at His Sentencing Hearing, And He Fails to Establish** 7 **Even a Prima Facie Basis for Reconsideration**

8 Grimes's motion is a thinly veiled attempt to have the Court reconsider a legal issue  
9 already fully litigated and determined at his sentencing hearing. His motion fails to even  
10 make a request for consideration, much less attempt to justify why leave to reconsider should  
11 be granted under the substantive requirements of the rule governing such requests. There is  
12 no basis for the Court to grant leave for reconsideration because the Court already considered  
13 at the sentencing hearing whether applying Jackson v. State, 291 P.3d 1274 (2012), and  
14 adjudicating Grimes guilty of both Counts 1 and 3 would constitute an ex post facto  
15 violation.

16 District Court Rule 13(7), governing "Rehearing of Motions,"  
17 provides:

18 No motion once heard and disposed of shall be renewed in the  
19 same cause, nor shall the same matters therein embraced be  
20 reheard, unless by leave of the court granted upon motion  
21 therefor, after notice of such motion to the adverse parties.

22 "District Court Rule (DCR) 13(7) provides that a motion for reconsideration or rehearing  
23 may be made with leave of the court." Arnold v. Kip, 123 Nev. 410, 416, 168 P.3d 1050,  
24 1054 (2007). Rehearing is warranted where the Court "has overlooked or misapprehended  
25 material facts or questions of law or when [it has] overlooked, misapplied, or failed to  
26 consider legal authority directly controlling a dispositive issue[.]" Great Basin Water  
27 Network v. State Eng'r, 126 Nev. Adv. Op. 20, 234 P.3d 912, 913-914 (2010) (discussing  
28 standard applicable to appellate analog NRAP 40(c)(2)).

As demonstrated from the sentencing transcript attached to his motion, Grimes's ex  
post facto challenge to being sentenced on both Count 1 and 3 was considered by the Court  
and rejected on the merits. Restyling his claims as a motion to correct illegal sentence does

1 nothing to entitle him to a reconsideration of that prior determination, particularly not when  
2 Grimes could have, but failed to, include this claim in his currently pending direct appeal,  
3 the opening brief for which was filed the same day as this motion. The absence of Ms. Hojjat  
4 during the sentencing argument on this ex post facto claim does not warrant reconsideration,  
5 nor does the presentation of Grimes's single persuasive authority from another jurisdiction.  
6 See Def.'s Mot. at 8 (arguing the persuasive impact of Ex parte Scales, 853 S.W.2d 586  
7 (Tex. Crim. App. 1993). That case was published in 1993 and it is not the Court's fault that  
8 Grimes waited *seven (7) months* to bring it to the Court's attention. Moreover, that merely  
9 persuasive authority—which has never been cited by another jurisdiction—is not a “legal  
10 authority directly controlling a dispositive issue,” which would warrant reconsideration.  
11 Great Basin Water Network, supra. Thus, Grimes's motion should be summarily denied due  
12 to his failure to seek and inability to justify reconsideration of the Court's legal  
13 determination at his sentencing.

14 **II. Grimes's Motion Presents Claims Not Cognizable in a Motion to Correct**  
15 **Illegal Sentence; He Is Attempting to Use This Motion to Cure His Waiver**  
16 **of Appellate Arguments That Should Have Been Preserved During the**  
17 **Course of His Trial and Presented on Direct Appeal**

18 **A. The Narrow Substantive Scope of Claims Cognizable in a Motion to**  
19 **Correct Illegal Sentence**

20 NRS 176.555, governing “Correction of illegal sentence,” provides that “[t]he court  
21 may correct an illegal sentence at any time. A motion to correct an illegal sentence looks  
22 only to see if the sentence is illegal upon its face. Edwards v. State, 112 Nev. 704, 708, 918  
23 P.2d 321, 324 (1996). The Court in Edwards further explained:

24 A motion to correct an illegal sentence is an appropriate vehicle  
25 for raising the claim that a sentence is facially illegal at any time;  
26 such a motion cannot be used as a vehicle for challenging the  
27 validity of a judgment of conviction or sentence based on alleged  
28 errors occurring at trial or sentencing. Issues concerning the  
validity of a conviction or sentence, except in certain cases, must  
be raised in habeas proceedings.  
Id. at 707, 918 P.2d at 324.

29 An “illegal sentence” is one which is at variance with the controlling sentencing statute, or  
30 “illegal” in a sense that the court goes beyond its authority by acting without jurisdiction or

1 imposing a sentence in excess of the statutory maximum provided. Id. (quoting Allen v.  
2 United States, 495 A.2d 1145, 1149 (D.C. 1985) (quoting Prince v. United States, 432 A.2d.  
3 720, 721 (D.C. 1981); Robinson v. United States, 454 A.2d 810, 813 (D.C. 1982)).

4 Grimes's ex post facto/due process challenge to the procedure followed at his  
5 sentencing hearing is not substantively within the scope of a motion to correct illegal  
6 sentence as recognized by the Nevada Supreme Court in Edwards. He does not attempt to  
7 demonstrate any facial invalidity in his judgment of conviction. The Nevada Supreme Court  
8 has expressly held that the type of claims Grimes makes in his motion are not cognizable in a  
9 motion to correct illegal sentence. The Court has noted that "such a motion cannot be used as  
10 a vehicle for challenging the validity of a judgment of conviction or sentence *based on*  
11 *alleged errors occurring at trial or sentencing.*" Edwards, 112 Nev. at 707, 918 P.2d at 324  
12 (emphasis added). Having already filed a twenty-seven (27) -page fast track statement,  
13 Grimes is likely attempting to improperly use this motion as a vehicle for obtaining  
14 additional appellate review of issues omitted from his direct appeal. Whether he is  
15 attempting to subvert those appellate rules or merely failed to include this claim in his direct  
16 appeal, he cannot pursue the issue now through a motion to correct illegal sentence. Cf. id. at  
17 708 n.2-709, 918 P.2d at 325 n.2.<sup>1</sup> Thus, Grimes's motion should be summarily denied  
18 without further analysis because it raises a claim not cognizable in the "very narrow scope"  
19 of a motion to correct illegal sentence.

20 ///

21 \_\_\_\_\_  
22 <sup>1</sup> ("We have observed that defendants are increasingly filing in district court documents  
23 entitled "motion to correct illegal sentence" or "motion to modify sentence" to challenge the  
24 validity of their convictions and sentences in violation of the exclusive remedy provision  
25 detailed in NRS 34.724(2)(b), in an attempt to circumvent the procedural bars governing  
26 post-conviction petitions for habeas relief under NRS chapter 34. We have also observed that  
27 the district courts are often addressing the merits of issues regarding the validity of  
28 convictions or sentences when such issues are presented in motions to modify or correct  
allegedly illegal sentences without regard for the procedural bars the legislature has  
established. If a motion to correct an illegal sentence or to modify a sentence raises issues  
outside of the very narrow scope of the inherent authority recognized in this Opinion, the  
motion should be summarily denied...").

1           **III. Even Assuming This Motion is Substantively and Procedurally Proper,**  
2           **Grimes's Rights Under the Ex Post Facto and Due Process Clauses Were**  
3           **Not Violated by the Court Imposing Sentences on Both Counts 1 and 3**

4           **A. Standard for Determining the Existence of an Ex Post Facto/Due**  
5           **Process Violation Under Calder/Bouie**

6           Laws that retroactively alter the definition of crimes or increase the punishment for  
7 crimes constitute violations of the prohibition on ex post facto punishments. Miller v.  
8 Ignacio, 112 Nev. 930, 921 P.2d 882 (1996). An ex post facto law is defined exclusively as a  
9 law falling into one of the four categories delineated in Calder v. Bull, 3 U.S. 386, 390, 3  
10 Dall. 386, 1 L.Ed. 648 (1798). See Carmell v. Texas, 529 U.S. 513, 537-39, 120 S.Ct. 1620,  
11 1635 (2000); Collins v. Youngblood, 497 U.S. 37, 41-42, 110 S.Ct. 2715, 2718-2719 (1990).  
12 As Calder explained, ex post facto laws include the following:

- 13           (1) Every law that makes an action, done before the passing of  
14           the law, and which was innocent when done, criminal; and  
15           punishes such action;  
16           (2) Every law that aggravates a crime, or makes it greater than it  
17           was, when committed;  
18           (3) Every law that changes the punishment, and inflicts a greater  
19           punishment, than the law annexed to the crime, when committed;  
20           and  
21           (4) Every law that alters the legal rules of evidence, and receives  
22           less, or different, testimony, than the law required at the time of  
23           the commission of the offence, in order to convict the offender.

24           The Calder categories provide "an exclusive definition of ex post facto laws," Collins, 497  
25 U.S. at 42, 110 S.Ct. at 2719, and the United States Supreme Court has admonished that it is  
26 "a mistake to stray beyond Calder's four categories." Carmell, 529 U.S. at 539, 120 S.Ct.  
27 1620 (2000)). There is no clear formula for determining whether a statute increases the  
28 degree of punishment for a particular crime, Miller, 112 Nev. at 933, 921 P.2d at 883 but  
"after Collins, the focus of the ex post facto inquiry is not on whether a legislative change  
produces some ambiguous sort of 'disadvantage,'...but on whether any such change alters  
the definition of criminal conduct or increases the penalty by which a crime is punishable."  
California Department of Corrections v. Morales, 514 U.S. 499, 506 n.3, 115 S.Ct. 1597,  
1602 n.3 (1995). Mechanical changes that may impact a defendant's sentence are not per se  
ex post facto. Id. at 508-509, 115 S.Ct. at 1603-1604. Likewise, statutes that disadvantage

1 defendants are not ex post facto if they are only procedural in nature. Dobbert v. Florida, 432  
2 U.S. 282, 97 S.Ct. 2290 (1977) (no ex post facto violation in retroactively applying change  
3 to procedure for capital sentencing determinations).

4 The constitutional protection against ex post facto laws applies, as a matter of due  
5 process under the Fifth Amendment, equally to judicial pronouncements and doctrines.  
6 Marks v. U.S., 430 U.S. 188, 191-92, 97 S.Ct. 990, 993 (1977); Bouie v. City of Columbia,  
7 378 U.S. 347, 353-354, 84 S.Ct. 1697, 1703 (1964) (“(A)n unforeseeable judicial  
8 enlargement of a criminal statute, applied retroactively, operates precisely like an ex post  
9 facto law, such as Art. I, § 10, of the Constitution forbids...If a state legislature is barred by  
10 the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court  
11 is barred by the Due Process Clause from achieving precisely the same result by judicial  
12 construction.”). Ex post facto analysis under the due process clause hinges upon whether the  
13 judicial pronouncement or doctrinal change constitutes an “unforeseeable judicial  
14 construction” of the law. Marks, 430 U.S. at 192-193, 97 S.Ct. at 993. To constitute a due  
15 process violation, the new judicial pronouncement or doctrinal change must be “unexpected  
16 and indefensible by reference to the law which had been expressed prior to the conduct in  
17 issue[.]” Bouie, 378 U.S. at 354, 84 S.Ct. 1697 (citation omitted).

18 **B. Application of Jackson’s Disapproval of the Salazar-Skiba**  
19 **Redundancy Analysis Does Not Constitute an Ex Post Facto**  
20 **Law/Due Process Violation**

21 As already determined by this Court at sentencing, Grimes obviously cannot locate  
22 his alleged ex post facto violation in any of the four Calder categories. Further, he cannot  
23 demonstrate that Jackson’s change in the law was so unforeseeable that its application to him  
24 constitutes a due process violation under Bouie. Application of Jackson did nothing to  
25 change the amount of punishment attaching to the crimes Grimes committed. Grimes’s sole  
26 legal justification for invalidating his Count 2 conviction is a reference to the Texas case, Ex  
27 parte Scales, 853 S.W.2d 586 (Tex. Crim. App. 1993). Putting aside that Ex parte Scales has  
28 never once been cited outside of Texas and deals with a doctrine never employed in Nevada,  
there are a number of factors that seriously diminish its persuasive value. Under Bouie’s ex



1 post facto due process test, Grimes cannot establish a similar claim that disapproval of the  
2 Salazar-Skiba redundancy analysis is an “unforeseeable judicial construction” of the law  
3 “unexpected and indefensible by reference to the law which had been expressed prior to the  
4 conduct in issue[.]” Marks, Bouie, supra. Unlike the redundancy analysis developed in  
5 Nevada, Texas’s carving doctrine at issue in Ex parte Scales was almost a century old at the  
6 time it was doctrinally abandoned in 1982. See Ex parte McWilliams, 634 S.W.2d 815 (Tex.  
7 Crim. App. 1980) (“There is no definitive statement of the carving doctrine; it is a nebulous  
8 rule applied only in this jurisdiction. Initially, carving was applied when the two offenses  
9 charged contained common material elements or when the two offenses required the same  
10 evidence to convict. Herera v. State, 35 Tex.Cr.R. 607, 34 S.W. 943 (1896). This Court  
11 added the ‘continuous act or transaction’ test in Paschal v. State, 49 Tex.Cr.R. 111, 90 S.W.  
12 878 (1905).”). Conversely, the Salazar-Skiba redundancy analysis (if it even constitutes a  
13 doctrine per se) was a jurisprudential outlier consisting of two “conclusory,” opinions, which  
14 arose beginning in 1998. Jackson v. State, 291 P.3d at 1282 (noting Skiba “exhibits the same  
15 conclusory analysis as Salazar.”). Further, the Nevada Supreme Court noted that the  
16 redundancy doctrine it was overturning is “unique” in the sense that only Nevada follows it.  
17 Id. at 1280.

18 Even more importantly, the Nevada Supreme Court in Jackson outlined how the  
19 United States Supreme Court had likewise vacillated between “same elements” and “same  
20 conduct” and ultimately made the same doctrinal change the Nevada Supreme Court decided  
21 to embrace first in Barton v. State, 117 Nev. 686, 30 P.3d 1103 (2001), overruled on  
22 unrelated grounds by, Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006), and again in  
23 Jackson. Our Court explained this inevitable progression in Jackson:

24 Like Nevada, the United States Supreme Court has vacillated on  
25 whether to pursue, in addition to Blockburger’s “same elements”  
26 test, a “same conduct” analysis in assessing cumulative  
27 punishment...a mere three years after Grady, the Court overruled  
28 it outright, reasoning that Grady was “not only wrong in  
principle; it has already proved unstable in application.” Dixon,  
509 U.S. at 709, 113 S.Ct. 2849; Id. at 711 & n. 16, 113 S.Ct.  
2849 (noting the multiple authorities criticizing Grady because it  
“contradicted an ‘unbroken line of decisions,’ contained ‘less

1 than accurate' historical analysis, and ha[d] produced  
2 'confusion.'" (quoting Solorio v. United States, 483 U.S. 435,  
3 439, 442, 450, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987)).  
4 In Barton, this court retraced the Supreme Court's path in Grady  
5 and Dixon and endorsed Dixon's "same elements" approach, to  
6 the exclusion of Grady's "same conduct" approach. Barton, 117  
7 Nev. at 694-95, 30 P.3d at 1108. Although Barton arose in the  
8 context of lesser-included-offense instructions, id. at 687, 30  
9 P.3d at 1103, its stated holding applies to other contexts as well,  
10 including specifically, to questions of "whether the conviction of  
11 a defendant for two offenses violates double jeopardy," "whether  
12 a jury finding of guilt on two offenses was proper," and "whether  
13 two offenses merged." Id. at 689-90, 30 P.3d at 1105. Indeed,  
14 the principal "same conduct" case Barton overrules, Owens v.  
15 State, 100 Nev. 286, 680 P.2d 593 (1984), is a double  
16 jeopardy/cumulative punishment case. And Barton states its  
17 holding categorically: "To the extent that our prior case law  
18 conflicts with the adoption of the elements test, we overrule  
19 Owens v. State and expressly reject the same conduct approach  
20 *that has been used in various contexts*"; "[j]ust as the United  
21 States Supreme Court found [Grady's ] same conduct test to be  
22 unworkable ..., we too conclude that *eliminating the use of this*  
23 *test will promote mutual fairness.*" Barton, 117 Nev. at 694-95,  
24 30 P.3d at 1108-09 (emphases added).

25 Jackson, 291 P.3d at 1280-1281 (emphasis original).

26 Essentially then, the Court in Jackson was saying that Barton had already overturned the  
27 "same conduct" mode of analysis relied on in Salazar-Skiba. It is quizzical then that Grimes  
28 claims the disapproval of Salazar-Skiba was an "unforeseeable judicial construction" of the  
law "unexpected and indefensible by reference to the law which had been expressed prior to  
the conduct in issue," when Jackson merely followed the path already staked out in the  
Nevada Supreme Court's own jurisprudence. Indeed, Jackson, far from constituting an  
"unforeseeable," "unexpected," and "indefensible" change of law, was instead a bit of  
doctrinal housekeeping long foreshadowed by the approaches of every court, including the  
United States Supreme Court and the Nevada Supreme Court's own precedents. Because  
Barton in 2001 had already "eliminat[ed]" the "same conduct" redundancy test for all  
"contexts," Grimes cannot with a straight face say that Jackson was "unforeseeable,"  
"unexpected," and "indefensible." Under Marks and Bowie, supra, if he cannot make that  
showing, his ex post facto/due process challenge goes nowhere. Thus, Grimes utterly fails to  
demonstrate application of Jackson to him constitutes an ex post facto/due process violation.

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DATED this 23rd day of September, 2013.

BY /s/ Patrick Burns  
PATRICK BURNS  
 Deputy District Attorney  
 Nevada Bar #11779

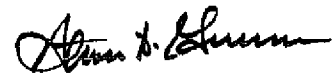
I hereby certify that service of State's Opposition to Defendant's Motion to Correct Illegal Sentence, was made this 23rd day of September, 2013, by facsimile transmission to:

Nadia Hojjat, Deputy Public Defender  
Fax# 471-1527  
Nadia.hojjat@clarkcountynv.gov

BY /s/Stephanie Johnson  
Employee of the District Attorney's Office

ORIGINAL

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09/24/2013 11:47:04 AM

  
CLERK OF THE COURT

1 PHILIP J. KOHN, PUBLIC DEFENDER  
2 NEVADA BAR NO. 0556  
3 309 South Third Street, Suite 226  
4 Las Vegas, Nevada 89155  
5 (702) 455-4685  
6 Attorney for Defendant

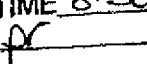
7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,  
10  
11 Plaintiff,  
12  
13 v.  
14 BENNETT GRIMES,  
15  
16 Defendant.

CASE NO. C-11-276163-1

DEPT. NO. XII

DATE: September 26, 2013  
TIME: 8:30 a.m.

DEPARTMENT XII  
NOTICE OF HEARING  
DATE 9-26-13 TIME 8:30  
APPROVED BY 

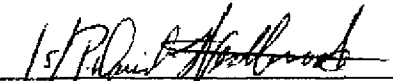
17 **DEFENDANT'S MOTION TO STRIKE AS UNTIMELY THE STATE'S OPPOSITION TO**  
18 **DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE**

19 COMES NOW Defendant BENNETT GRIMES, by and through Deputy Public Defender  
20 NADIA HOJJAT, and hereby respectfully requests this Honorable Court, on Order Shortening  
21 Time, to strike the untimely-filed State's Opposition to Defendant's Motion to Correct Illegal  
22 Sentence pursuant to EDCR 3.20(c) and 3.60.

23 This Motion is made and based upon all the papers and pleadings on file herein, the  
24 attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

25 DATED this 24th day of September, 2013

26 PHILIP J. KOHN  
27 CLARK COUNTY PUBLIC DEFENDER

28 By   
NADIA HOJJAT, #12401  
Deputy Public Defender

**DECLARATION OF COUNSEL**

NADIA HOJJAT makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am the Deputy Public Defender assigned to represent the Defendant Bennett Grimes in the instant matter, and am familiar with the facts and circumstances of this case.

2. On September 9, 2013, I caused to be filed Defendant's Motion to Correct Illegal Sentence, at which time a hearing was set before this Honorable Court at 8:30 a.m. on September 26, 2013. My office served a copy of that Motion on the State the very same day.

3. Pursuant to EDCR 3.20 (c), the State's written Opposition was due "within 7 days after the service of the motion", on or before September 16, 2013. The State failed to file or serve any Opposition within the mandatory 7-day timeframe.

4. Instead, on the morning of September 23, 2013 – a full week after the deadline for filing and serving a written Opposition, and only 3 days before the scheduled hearing on Defendant's Motion – the State filed and served an untimely Opposition.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief (NRS 53.045).

EXECUTED this 24th day of September, 2013.

  
NADIA HOJJAT

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**NOTICE OF MOTION**

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the  
above and foregoing Motion on for hearing before the Court on the 26th of September 2013, at  
8:30 a.m.

DATED this 24th day of September, 2013.

PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

By   
NADIA HOJJAT, #12401

Deputy Public Defender

**RECEIPT OF COPY**

RECEIPT OF COPY of the above and foregoing Motion for Additional Credit for  
Time Served is hereby acknowledged this 24th day of September, 2013.

CLARK COUNTY DISTRICT ATTORNEY

By 

**CERTIFICATE OF ELECTRONIC SERVICE**

I hereby certify that service of the foregoing, was made this 24th day of September, 2013

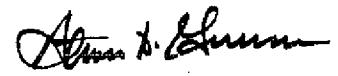
to:

Clark County District Attorney's Office  
PDMotions@ccdavn.com

Judge Leavitt  
DEPT12LC@clarkcountycourts.us;

By: /s/ Joel Rivas  
Employee of the Public Defender's Office





CLERK OF THE COURT

**REPLY**

STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
PATRICK BURNS  
Deputy District Attorney  
Nevada Bar #11779  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-0968  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,

-vs-

BENNETT GRIMES,  
#2762267

Defendant.

CASE NO: C-11-276163-1

DEPT NO: XII

**STATE'S SURREPLY IN SUPPORT OF OPPOSITION TO DEFENDANT'S  
MOTION TO CORRECT ILLEGAL SENTENCE**

DATE OF HEARING: October 3, 2013

TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, District Attorney,  
by and through PATRICK BURNS, Deputy District Attorney, and files this STATE'S  
SURREPLY IN SUPPORT OF OPPOSITION TO DEFENDANT'S MOTION TO  
CORRECT ILLEGAL SENTENCE. This surreply is made and based upon all the papers and  
pleadings on file herein, the attached points and authorities in support hereof, and oral  
argument at the time of hearing, if deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On September 14, 2011, the State of Nevada charged Defendant Bennett Grimes  
4 (Grimes) with: Count 1 – Attempt Murder with Use of a Deadly Weapon in Violation of  
5 Temporary Protective Order (Category B Felony – NRS 200.010; 200.030; 193.330;  
6 193.165; 193.166); Count 2 – Burglary While in Possession of a Deadly Weapon (Category  
7 B Felony – NRS 205.060; 193.166); and Count 3 – Battery with a Use Deadly Weapon  
8 Constituting Domestic Violence Resulting in Substantial Bodily Harm in Violation of  
9 Temporary Protective Order (Category B Felony – NRS 200.481(2)(e); 193.166). The State  
10 filed a Third Amended Information just prior to trial. Trial commenced on October 10, 2012,  
11 and concluded on October 15, 2012, with the jury returning a guilty verdict on all three  
12 counts. The jury deliberated approximately two hours before returning its verdict. On  
13 October 23, 2012, Grimes filed a motion for a new trial. That motion was denied on  
14 November 6, 2012.

15 The Court sentenced Grimes on February 12, 2013, and his judgment of conviction  
16 was filed on February 21, 2013. As to Count 1, the Court sentenced Grimes to eight (8) to  
17 twenty (20) years in the Nevada Department of Corrections (NDOC) with a consecutive term  
18 of five (5) to fifteen (15) years NDOC. Based on his two prior felony domestic violence  
19 convictions from California, the Court then adjudicated Grimes as a habitual criminal on  
20 Counts 2 and 3 and imposed sentences of eight (8) to twenty (20) years on each count. The  
21 Court ordered that Count 2 would run concurrent to Count 1 and Count 3 would run  
22 consecutive to Count 1. Grimes's total aggregate sentence is twenty-one (21) to fifty-five  
23 (55) years NDOC.

24 On March 18, 2013, Grimes filed in the district court his notice of appeal. Grimes  
25 filed his fast track statement before the Nevada Supreme Court on September 9, 2013. The  
26 State has not yet filed its response to Grimes's fast track appeal. The same day that Grimes's  
27 appellate attorney filed his fast-track statement in the Nevada Supreme Court (and roughly  
28 seven (7) months after Grimes's notice of appeal was filed), one of his trial attorneys filed

1 this "Motion to Correct Illegal Sentence," which Grimes seeks an adjudication of while his  
2 direct appeal is pending. The State filed its opposition on September 23, 2013. Argument  
3 was heard on October 3, 2013. Although he was clearly aware of the undersigned's presence  
4 in the courtroom, defense counsel waited until beginning his argument to provide a copy of  
5 his reply brief. Thus, the State is filing this surreply to address a critical problem in the  
6 defense's sandbagged reply brief.

### 7 ARGUMENT

#### 8 **Grimes's Reply Brief Falsely Claims that Nevada Has Adopted a** 9 **Standard for Finding Judicial Ex Post Facto Violations, Which Is Less** 10 **Demanding than the Federal Constitutional Standard Announced in** 11 **Marks and Bouie**

12 Grimes is clearly sensitive to his inability to show that Jackson's doctrinal  
13 clarification does not amount to an unforeseeable, indefensible, and unexpected shift in  
14 doctrine. Thus, to evade the actual legal standard and lighten his burden, he tries to convince  
15 the Court that the federal standard is not applicable and he can thus make an ex post facto  
16 showing with much less than what would be required under the federal standard. In fact,  
17 there is no such distinction between the two standards because the Nevada Supreme Court  
18 applies an identical standard. Grimes's reply brief intentionally misrepresents and selectively  
19 quotes the Nevada Supreme Court's decision in Stevens v. Warden, 114 Nev. 1217, 969 P.2d  
20 945 (1998). He suggests that Bouie and the associated federal cases do not apply and writes  
21 the following:

22 In Stevens [] the Nevada Supreme Court held that a judicial  
23 decision would violate ex post facto principles if: (1) it was  
24 unforeseeable...Yet the State wholly ignores Stevens and claims  
25 (based on Bouie) that a judicial decision must instead be  
26 "unexpected and indefensible by reference to the law which had  
27 been expressed prior to the conduct in issue" before it will  
28 violate due process. Not surprisingly, *the test outlined by the  
Nevada Supreme Court in Stevens is far less stringent than the  
Bouie standard set forth by the State in its Opposition [sic].  
Stevens merely requires that the judicial decision be  
"unforeseeable" to violate ex post facto principles.*  
Def. Reply at 7:5-17 (citations omitted, emphasis added).

///

1 In actuality, the Nevada Supreme Court embraces all those concepts: unforeseeability,  
2 unexpectedness, and indefensibility in its ex post facto analysis of judicial doctrinal changes.  
3 The Court only needs to review Stevens's textual rendering of the ex post facto rule to see  
4 that Grimes's attorney either did not read Stevens or decided to lie to the Court about what it  
5 said. The Nevada Supreme Court wrote in Stevens:

6 The [United States] Supreme Court has explained that:

7 To fall within the ex post facto prohibition, a law must be  
8 retrospective-that is, "it must apply to events occurring before its  
9 enactment"-and it "must disadvantage the offender affected by  
10 it," by altering the definition of criminal conduct or increasing  
11 the punishment for the crime.

Lynce v. Mathis, 519 U.S. 433, 441, 117 S.Ct. 891, 137 L.Ed.2d  
63 (1997) (quoting Weaver v. Graham, 450 U.S. 24, 29, 101  
S.Ct. 960, 67 L.Ed.2d 17 (1981)).

12 By its terms, the Ex Post Facto Clause is a limitation on legislative powers and  
13 "does not of its own force apply to the Judicial Branch of government." Marks  
14 v. United States, 430 U.S. 188, 191, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977).  
15 However, the Supreme Court has held that ex post facto principles apply to the  
16 judicial branch through the Due Process Clause, which precludes the judicial  
17 branch "from achieving precisely the same result" through judicial  
18 construction as would application of an ex post facto law. Bouie v. Columbia,  
19 378 U.S. 347, 353-54, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964); see also United  
20 States v. Burnom, 27 F.3d 283, 284 (7th Cir.1994); Forman v. Wolff, 590 F.2d  
21 283, 284 (9th Cir.1978). This "judicial ex post facto" prohibition prevents  
22 judicially wrought retroactive increases in levels of punishment in precisely the  
23 same way that the Ex Post Facto Clause prevents such changes by legislation.  
24 See Dale v. Haeberlin, 878 F.2d 930, 934 (6th Cir.1989); see also Devine v.  
25 New Mexico Dep't of Corrections, 866 F.2d 339, 344-45 (10th Cir.1989)  
(concluding that "the underpinnings of the ex post facto clause compel  
applying it full force to courts when they enhance punishment by directly  
delaying parole eligibility").

**The Supreme Court has explained that "[i]f a judicial construction of a  
criminal statute is 'unexpected and indefensible by reference to the law  
which had been expressed prior to the conduct in issue,' it must not be  
given retroactive effect." Bouie, 378 U.S. at 354, 84 S.Ct. 1697 (citation  
omitted); see also Holguin v. Raines, 695 F.2d 372, 374 (9th Cir. 1982) ("the  
principle of fair warning implicit in the ex post facto prohibition requires that  
judicial decisions interpreting existing law must have been foreseeable"). As  
we expressly recognized in Bowen, our decision to overrule the Biffath line of  
cases was not foreseeable. Bowen, 103 Nev. at 481 n.4, 745 P.2d at 700 n.4.**

Stevens, 114 Nev. at 1221, 969 P.2d at 948.

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1 Why in Stevens would the Nevada Supreme Court quote Bouie's "unexpected" and  
2 "indefensible" language if that caselaw does not form part of state constitutional law as  
3 developed by our Supreme Court? Grimes's attorney appears to be more concerned with  
4 winning an argument than giving the Court an accurate statement of the law because he  
5 could not actually read Stevens and then write that "the test outlined by the Nevada Supreme  
6 Court in Stevens is *far less stringent than the Bouie* standard set forth by the State in its  
7 Opposition," Def. Reply at 7:12-13 (emphasis added)—at least not with any integrity as an  
8 attorney or officer of the court.

9 Grimes's resort to intentionally misleading the Court about the applicable legal  
10 standard betrays how weak his foreseeability analysis is. He goes on to cherry pick a number  
11 of authorities and claim they demonstrate how firmly established the disapproved Skiba-  
12 Salazar line of cases is. The best analysis of whether Jackson's doctrinal change was  
13 unforeseeable, unexpected, or indefensible is achieved by looking to the decision itself and  
14 the Nevada Supreme Court's analysis that the doctrinal "same conduct" test relied upon by  
15 Skiba and Salazar had already been disapproved in Barton. See State's Opposition at 8:24-9-  
16 13 (excerpting Jackson, 291 P.3d at 1280-1281). That will likely lead to a more accurate  
17 legal determination of unforeseeability, unexpectedness, and indefensibility than parsing the  
18 cherry-picked authorities cobbled together by Grimes's integrity-challenged attorney.

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DATED this 3rd day of October, 2013.

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

**CERTIFICATE OF FACSIMILE TRANSMISSION**

David Westbrook, Deputy Public Defender  
Fax # 471-1527

11F13012X/jpb/sj/L-2

ORIGINAL

1 PHILIP J. KOHN, PUBLIC DEFENDER  
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3 309 South Third Street, Suite 226  
4 Las Vegas, Nevada 89155  
5 (702) 455-4685  
6 Attorney for Defendant

FILED IN OPEN COURT  
STEVEN D. GRIERSON  
CLERK OF THE COURT

OCT - 3 2013

BY,   
SUSAN JOVANOVIH, DEPUTY

DISTRICT COURT  
CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA, )

8 Plaintiff, )

9 v. )

10 BENNETT GRIMES, )

11 Defendant. )

CASE NO. C-11-276163-1

DEPT. NO. XII

DATE: October 3, 2013

TIME: 8:30 a.m.

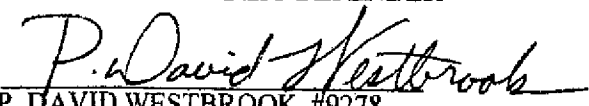
12  
13 **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO CORRECT ILLEGAL**  
14 **SENTENCE**

15 COMES NOW Defendant BENNETT GRIMES, by and through Deputy Public Defender  
16 NADIA HOJJAT, and hereby submits Defendant's Reply in Support of Motion to Correct Illegal  
17 Sentence. This Reply is made and based upon all the papers and pleadings on file herein and oral  
18 argument at the time set for hearing this Motion.

19 DATED this 3rd day of October, 2013

20 PHILIP J. KOHN  
21 CLARK COUNTY PUBLIC DEFENDER

22 By:

  
23 P. DAVID WESTBROOK, #9278  
24 Deputy Public Defender  
25  
26  
27  
28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2  
3 I. **DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE IS NOT**  
4 **PRECLUDED BY DISTRICT COURT RULE 13(7)**

5 Relying on Nevada District Court Rule ("DCR") 13 (7), the State argues that because the  
6 *ex post facto* application of Jackson v. State, 291 P.3d 1274 (2012), was discussed at Mr. Grimes'  
7 sentencing hearing, Mr. Grimes is now precluded from raising the issue again without first filing a  
8 "motion for reconsideration or rehearing" pursuant to DCR 13. Opposition at 3-4. While the State  
9 makes a creative argument, by its express terms, DCR 13 simply does not apply here. DCR 13  
10 sets forth the procedure for filing and responding to written motions in Nevada's district courts  
11 where there is not otherwise a procedure related to such motions in the local court rules. As the  
12 Court is aware, the purpose of Nevada's District Court Rules is to  
13

14 cover the practice and procedure in all actions in the district courts of all districts  
15 where no local rule covering the same subject has been approved by the supreme  
16 court. Local rules which are approved for a particular judicial district shall be  
17 applied in each instance whether they are the same as or inconsistent with these  
18 rules.

19 DCR 5 (emphasis added).

20 DCR 13 is entitled: "Motions: Procedure for making motions; affidavits; renewal,  
21 rehearing of motions". Significantly, the entirety of District Court Rule 13 deals with the filing  
22 and service of written motions and related documents:

23 1. All motions shall contain a notice of motion, with due proof of the  
24 service of the same, setting the matter on the court's law day or at some other time  
25 fixed by the court or clerk.

26 2. A party filing a motion shall also serve and file with it a  
27 memorandum of points and authorities in support of each ground thereof. The  
28 absence of such memorandum may be construed as an admission that the motion is  
not meritorious and cause for its denial or as a waiver of all grounds not so  
supported.



1           3.     Within 10 days after the service of the motion, the opposing party  
2 shall serve and file his written opposition thereto, together with a memorandum of  
3 points and authorities and supporting affidavits, if any, stating facts showing why  
4 the motion should be denied. Failure of the opposing party to serve and file his  
5 written opposition may be construed as an admission that the motion is meritorious  
6 and a consent to granting the same.

7           4.     The moving party may serve and file reply points and authorities  
8 within 5 days after service of the answering points and authorities. Upon expiration  
9 of the 5-day period, either party may notify the calendar clerk to submit the matter  
10 for decision by filing and serving all parties a written request for submission of the  
11 motion on a form supplied by the calendar clerk. A copy of the form shall be  
12 delivered to the calendar clerk, and proof of service shall be filed in the action

13           5.     The affidavits to be used by either party shall identify the affiant, the  
14 party on whose behalf it is submitted, and the motion or application to which it  
15 pertains and shall be served and filed with the motion to which it relates . . .

16           6.     Factual contentions involved in any pre-trial or post-trial motion  
17 shall be initially presented and heard upon affidavits. . . .

18           7.     No motion once heard and disposed of shall be renewed in the same  
19 cause, nor shall the same matters therein embraced be reheard, unless by leave of  
20 the court granted upon motion therefore, after notice of such motion to the adverse  
21 parties.

22 DCR 13.

23           In the Eighth Judicial District Court, there is already an express rule governing the filing of  
24 written motions in criminal cases: EDCR 3.2. Because there is already a local rule governing the  
25 filing of motions in this jurisdiction, DCR 13 is not applicable in the Eighth Judicial District Court.  
26 See DCR 5 (stating that where a local court rule covers the same subject matter as a DCR, the local  
27 rule applies).<sup>1</sup> In any event, even if DCR 13 did apply, there was never any written motion filed  
28 at the time of sentencing that this Court could "reconsider" or "rehear" pursuant to DCR 13 (7).

<sup>1</sup> Although the State relies Arnold v. Kip, 123 Nev. 410, 168 P.3d 1050 (2007), a civil case originating in Washoe County's Second Judicial District Court, to suggest that DCR 13 applies, the Supreme Court cited to DCR 13 in that case because the Washoe District Court Rules expressly incorporated DCR 13 into its own local court rules. See Arnold, 123 Nev. at 416, 168 P.3d at 1054 ("Washoe District Court Rule 12(8) incorporates DCR 13(7) and sets forth deadlines for seeking reconsideration"). By contrast, EDCR 3.2 makes no mention whatsoever of DCR 13.

1 While it is true that the parties briefly discussed the *ex post facto* implications of Jackson during  
2 the sentencing hearing, and the Court requested time to review Jackson in chambers, Mr. Grimes  
3 never filed any written motion with the Court that would even arguably bring him within the ambit  
4 of the DCR 13. Accordingly, Mr. Grimes was not required to file a "motion for reconsideration"  
5 in lieu of the instant Motion to Correct an Illegal Sentence.

6 **II. DEFENDANT'S MOTION REQUESTS RELIEF THAT MAY BE GRANTED**  
7 **PURSUANT TO NRS 176.555.**

8 The plain language of NRS 176.555 allows this Honorable Court to "correct an illegal  
9 sentence at any time." NRS 176.555 (emphasis added). Not only does the Court have inherent  
10 authority to correct an "illegal" sentence at any time, but it also has the inherent authority to  
11 correct "a sentence that, although within the statutory limits, was entered in violation of the  
12 defendant's right to due process." Passanisi v. State, 108 Nev. 318, 321, 831 P.2d 1371, 1372  
13 (1992). Nevertheless, the State argues that Mr. Grimes cannot avail himself of NRS 176.555  
14 based on *dicta* from a 1996 case called Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324  
15 (1996), which is limited by the express holding of another case.

16  
17 Edwards was sentenced in 1988 after pleading guilty to five counts of attempted sexual  
18 assault. After filing a petition for post conviction relief in 1990 and two petitions for post  
19 conviction habeas relief in 1990 and 1991 (all of which were denied), Edwards eventually filed a  
20 "motion for modification of an illegal sentence" in 1994. In support of his motion, Edwards  
21 claimed that "the district court sentenced him based on incomplete and untrue facts", namely that  
22 "his promiscuous stepdaughter seduced him one night and he mistook his stepdaughter for his  
23 wife." Edwards, 112 Nev. at 705, 918 P.2d at 323. After the trial court denied his motion,  
24 Edwards filed an untimely notice of appeal. After the Supreme Court entered an order to show  
25 cause why his untimely appeal should not be dismissed, Edwards argued that the underlying  
26 motion should be treated as a "petition for writ of habeas corpus" to save his case from summary  
27  
28

1 dismissal. Edwards, 112 Nev. at 706, 918 P.2d at 323. The Supreme Court recognized, "[t]he sole  
2 issue before this court is whether the appeal period in this case is governed by NRAP 4(b) or NRS  
3 34.575(1)", the habeas statute. Id. Ultimately, the Supreme Court ruled that because Edwards  
4 filed a "motion for modification of an illegal sentence" instead of a habeas petition, his appeal was  
5 governed by NRAP 4(b) and, therefore, untimely. 112 Nev. at 709, 918 P.2d at 325. Although the  
6 opinion does contain *dicta* about what constitutes an "illegal sentence" for purposes of NRS  
7 176.555, that dicta is not controlling, and it is certainly not the "express" holding misrepresented  
8 by the State in its Opposition. See Opposition at 5:7-11 ("The Nevada Supreme Court has  
9 expressly held that the type of claims Grimes makes in his motion are not cognizable in a motion  
10 to correct illegal sentence.") (emphasis added).

12 Notably, the State relies on Edwards for the proposition that an "'illegal sentence' is one  
13 which is at variance with the controlling sentencing statute, or 'illegal' in a sense that the court  
14 goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the  
15 statutory maximum provided." Opposition at 4:27-5:3. Although the State suggests that Mr.  
16 Grimes cannot challenge his sentence unless it is "at variance with the controlling sentencing  
17 statute", the Nevada Supreme Court has long recognized that a district court may correct a  
18 sentence which is illegal as a result of controlling *judicial* precedent. See, Anderson v. State, 90  
19 Nev 385, 528 P.2d 1023 (1974). In Anderson, the Nevada Supreme Court did expressly hold that  
20 the district court had jurisdiction under NRS 176.555 to resentence an appellant to life without the  
21 possibility of parole (instead of death), based on a United States Supreme Court ruling that the  
22 death penalty was unconstitutional. As the Nevada Supreme Court observed:

25 After Furman<sup>2</sup> rendered the death penalty void, life imprisonment without the  
26 possibility of parole became the maximum sentence that could be imposed in  
27 Nevada against a person convicted of first degree murder. NRS 176.555 provides  
that a district court 'may correct an illegal sentence at any time.' The district judge

28 <sup>2</sup> Furman v. Georgia, 408 U.S. 283 (1972).

1 was authorized to resentence the appellant and invoke the penalty of life without the  
2 possibility of parole, it being the only lawful penalty which could have been entered  
upon the conviction and finding of the jury that Anderson should receive the  
maximum sentence permitted by law.

3 Anderson, 90 Nev. at 389, 528 P.2d at 1025. Accordingly, based on Anderson, in order to  
4 determine whether a sentence is "illegal on its face", courts can and must look beyond the statutory  
5 authority to ensure that the sentence is also appropriate under controlling case law. Here, Mr.  
6 Grimes is arguing that Salazar v. State, 119 Nev. 224, 228, 70 P.3d 749 (2003), controls the  
7 sentence imposed in this case and, therefore, that the sentence imposed is facially illegal because it  
8 is contrary to the holding in Salazar. See NRS 176.555. Furthermore, Mr. Grimes is arguing that  
9 his due process rights were violated when the Court sentenced him on Counts 1 and 3 after  
10 assurances from both the Court *and the State* during trial that Mr. Grimes would not be adjudicated  
11 and sentenced on both counts. See Passanisi, 108 Nev. at 321, 831 P.2d at 1372 (court has  
12 inherent authority to correct "a sentence that, although within the statutory limits, was entered in  
13 violation of the defendant's right to due process.") Again, all of these arguments are cognizable  
14 in a motion to correct illegal sentence, and the State's arguments to the contrary fail.

### 15 16 17 **III. APPLICATION OF JACKSON VIOLATES JUDICIAL EX POST FACTO** 18 **DOCTRINE**

19 In its Opposition, the State initially argues that Mr. Grimes "cannot locate his alleged ex  
20 post facto violation in any of the four Calder<sup>3</sup> categories" and that the Court properly sentenced  
21 him on both Counts 1 and 3. Opposition at 7:20-21. However, as the State should be aware, since  
22 this case involves a judicial decision as opposed to a legislative change, Calder v. Bull is not  
23 controlling. See, e.g., Marks v. United States, 430 U.S. 188, 191, 97 S. Ct. 990 (1977) (the *Ex*  
24 *Post Facto* Clause does not "of its own force apply to the Judicial Branch of the Government");  
25 Bouie v. Columbia, 378 U.S. 437, 353-54, 84 S. Ct. 1697 (1964) (*ex post facto* principles apply to  
26  
27

28  
<sup>3</sup> Calder v. Bull, 3 Dall. 386, 390 (1798).

1 the judiciary through the Due Process Clause). Instead, the Nevada Supreme Court analyses the  
2 *ex post facto* application of judicial decisions using the three-part test set forth in Stevens v.  
3 Warden, 114 Nev. 1217, 961 P.2d 945 (1998), which the State conveniently ignores in its  
4 Opposition.<sup>4</sup>

5 In Stevens v. Warden, the Nevada Supreme Court held that a judicial decision would  
6 violate *ex post facto* principles if: (1) it was "unforeseeable"; (2) it was being applied  
7 "retroactively"; and (3) it "disadvantage[d] the offender affected by it." Stevens, 112 Nev. at 1221-  
8 22, 969 P.2d at 948-49. Yet the State wholly ignores Stevens and claims (based on Bouie) that a  
9 judicial decision must instead be "unexpected and indefensible by reference to the law which had  
10 been expressed prior to the conduct in issue" before it will violate due process. Opposition at 7:14-  
11 17. Not surprisingly, the test outlined by the Nevada Supreme Court in Stevens is far less stringent  
12 than the Bouie standard set forth by the State in its Opposition. Stevens merely requires that the  
13 judicial decision be "unforeseeable" to violate *ex post facto* principles. Stevens, 112 Nev. at 1221-  
14 22, 969 P.2d at 948-49 (finding a due process violation, in part, because "our decision to overrule  
15 the Biffath line of cases was not foreseeable").

16 It is well-settled that states may offer greater constitutional protections than those afforded  
17 by the federal government. See, e.g., Cooper v. California, 386 U.S. 58, 87 S.Ct. 788 (1967) ("Our  
18 holding, of course, does not affect the State's power to impose higher standards on searches and  
19 seizures than required by the Federal Constitution if it chooses to do so."); Oregon v. Kennedy,  
20 456 U.S. 667, 681, 102 S. Ct. 2083, 2092 (1982) (state constitutions can provide additional rights  
21  
22  
23  
24

25 <sup>4</sup> Even if Calder *did* control, Mr. Grimes' position is that when the Court refused to apply Salazar  
26 (which was controlling law in effect at the time the crimes were committed in this case), the Court  
27 violated the second and third Calder categories. The redundant adjudication inflicted "a greater  
28 punishment, than the law annexed to the crime, when committed," and made the number of crimes  
for which Mr. Grimes could be adjudicated guilty "greater than it was when committed." Calder, 3  
Dall. at 390. Again, Calder is the wrong standard here, but Grimes meets it nonetheless.

1 for their citizens). Because Stevens is the controlling precedent in this jurisdiction and because it  
2 is more protective of individual liberties than Bowie, the Court must apply Stevens in this case.

3 **A. Mr. Grimes was disadvantaged by the application of Jackson.**

4 Perhaps recognizing the futility of such an argument, the State does not even bother to  
5 argue that Mr. Grimes was not "disadvantaged" by the Court's application of Jackson in this case.  
6 The State tacitly concedes that, right up until the Jackson decision came out, both the Court and  
7 the State were prepared for the dismissal of Count 3 based on redundancy principals. Indeed,  
8 when the parties were settling jury instructions in chambers, both the Court and the State *agreed*  
9 that Mr. Grimes could not be adjudicated on both Counts 1 and 3, and that if he were convicted of  
10 both counts, Count 3 would be dismissed. Mr. Grimes is now serving an additional, *consecutive*  
11 eight (8) to twenty (20) year sentence on Count 3 as a result of Jackson. The State cannot claim  
12 "with a straight face" that Mr. Grimes was not "disadvantaged" by the application of Jackson at  
13 sentencing. See Stevens, 112 Nev. at 1223, 969 P.2d at 949 (holding that "if the computation  
14 pursuant to Bowen is less favorable to Stevens (*i.e.*, Stevens must spend more time in prison), then  
15 application of Bowen violates due process").  
16  
17

18 **B. Jackson was retroactively applied to Mr. Grimes.**

19 Likewise, the State does not dispute that Jackson was applied retroactively to Mr. Grimes  
20 in this case. Mr. Grimes committed the offense in question on July 22, 2011, almost one and a half  
21 years before Jackson came out. When the crime was committed, Salazar's redundancy doctrine  
22 was still good law. Therefore, Jackson was applied retroactively to Mr. Grimes. See Stevens, 114  
23 Nev. at 1222, 969 P.2d at 948-49.  
24

25 **C. Jackson was not foreseeable.**

26 The only real argument advanced by the State in its Opposition is that Jackson was  
27 somehow "foreseeable" to everyone. Opposition at 7-10. To make this claim, the State relies on  
28

1 a September 2001 case, Barton v. State, 117 Nev. 686, 30 P.3d 1103 (2001), which held that a  
2 strict Blockburger "same elements" approach would apply when settling jury instructions on lesser  
3 included offenses. See Barton, 117 Nev. at 694, 30 P.3d at 1108 ("we . . . adopt the elements test  
4 of Blockburger/Lisby for the determination of whether lesser included offense instructions are  
5 required.") (emphasis added). Importantly, the Nevada Supreme Court's holding in Barton did  
6 not apply beyond the limited context of jury instructions. Indeed, it *could* not – because the only  
7 issue before the Court in that case was whether a lesser-included jury instruction was required by  
8 the Double Jeopardy clause, and the Nevada Supreme Court does "not have constitutional  
9 permission to render advisory opinions." See City of N. Las Vegas v. Cluff, 85 Nev. 200, 201, 452  
10 P.2d 461, 462 (1969) (citing Nev.Const. art. 6, s 4).

12 Nevertheless, the State claims that Jackson was foreseeable because "Barton had already  
13 overturned the 'same conduct' mode of analysis relied on in Salazar-Skiba". (Opposition at 9:14-  
14 16). This a gross and transparent mischaracterization of the law.

16 Indeed, just **one month** after Barton, in October of 2001, the Nevada Supreme Court –  
17 again sitting *en banc* – held that a strict Blockburger analysis was inappropriate when determining  
18 whether multiple aggravating circumstances in support of a death sentence were impermissibly  
19 redundant. Servin v. State, 117 Nev. 775, 32 P.3d 1277 (2001) (*en banc*). There, our Supreme  
20 Court reaffirmed Nevada's redundancy doctrine and held that, even though the crimes of home  
21 invasion and burglary were distinct under Blockburger, it was "improper to find the aggravating  
22 circumstance of burglary and the aggravating circumstance of home invasion" when "both are  
23 based on the same facts." Servin, 117 Nev. at 789; 32 P.3d at 1287. In Court's own words:

25 Here, however, despite the different elements which burglary and home invasion  
26 require in the abstract, the actual conduct underlying both aggravators was  
27 identical. **This court's reasoning in invalidating redundant convictions is**  
28 **pertinent.** In such a case we consider "Whether the gravamen of the charged  
offenses is the same such that it can be said that the legislature did not intend  
multiple convictions. . . . The question is whether the material or significant part of

1 each charge is the same even if the offenses are not the same. Thus, where a  
2 defendant is convicted of two offenses that, as charged, punish the exact same  
illegal act, the convictions are redundant.”

3 Servin, 117 Nev. at 789-90, 32 P.3d at 1287 (quoting State of Nevada v. Dist. Ct., 116 Nev. 127,  
4 136, 994 P.2d 692, 698 (2000)) (emphasis added). It is clear, based on Servin, that Barton did  
5 nothing to delegitimize Nevada’s unique redundancy doctrine, which remained firmly in place  
6 until Jackson was issued in 2012.

7 Nearly two years *after* Barton, the Nevada Supreme Court decided Salazar v. State, 119  
8 Nev. 224, 70 P.3d 749 (2003). In Salazar the Nevada Supreme Court reversed an appellant’s  
9 “redundant” conviction for battery with use of a deadly weapon because the Court held – again,  
10 notwithstanding Blockburger – that it would reverse “redundant convictions that do not comport  
11 with legislative intent.” Salazar, 119 Nev. at 227, 70 P.3d at 751.

12 While the State implies that Barton somehow “overturned” Salazar, we know that cannot  
13 be true, because Barton came out two years *before* Salazar. Furthermore, while the State claims  
14 that Skiba v. State<sup>5</sup> was also “overturned” by Barton, the Skiba decision was never once *mentioned*  
15 in Barton. Notably, Nevada’s redundancy doctrine dates all the way back to 1987, in a case called  
16 Albitre v. State, 103 Nev. 281, 738 P.2d 1307 (1987), where the Nevada Supreme Court  
17 recognized that a defendant is “entitled to relief from redundant convictions that do not comport  
18 with legislative intent.”<sup>6</sup> Yet, Albitre is not mentioned a single time in Barton, either positively or  
19 negatively. Indeed, the words “redundancy” and “redundant” do not appear anywhere in the  
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25 <sup>5</sup> Skiba v. State, 114 Nev. 612, 959 P.2d 959 (1998) (applying redundancy analysis and reversing  
26 one of “the two convictions arising from Skiba’s single act of hitting McKenzie with a broken beer  
bottle causing substantial harm”)

27 <sup>6</sup> Although counsel noted in her motion that the redundancy doctrine “was good law in Nevada for  
28 nearly 10 years”, that statement was incorrect. (See Motion at 7:1-2) The Salazar decision had  
been around for nearly 10 years; however, the redundancy doctrine actually dates back to 1987  
with Albitre, 103 Nev. 281, 738 P.2d 1307, and possibly earlier.



1 Barton decision. This is because Barton did not touch Nevada's "redundancy" analysis, and the  
2 State knows it.

3 Although the State argues that it was "inevitable" that the Nevada Supreme Court would  
4 overrule redundancy analysis, the fact remains that the majority of other jurisdictions still employ  
5 a fact-based, redundancy-type analysis in evaluating the propriety of multiple punishments for a  
6 single act. See, e.g., State v. Swick, 279 P.3d 747, 755 (N.M. 2012); State v. Lanier, 192 Ohio  
7 App.3d, 762, 950 N.E.2d 600, 603 (2011); United States v. Chipps, 410 F.3d 438, 447 (8th  
8 Cir.2005)(Impulse Test); United States v. Ansaldi, 372 F.3d 118, 124 (2d Cir.), cert. denied, 543  
9 U.S. 949, 125 S.Ct. 364, 160 L.Ed.2d 266 and cert. denied, 543 U.S. 960, 125 S.Ct. 430, 160  
10 L.Ed.2d 324 (2004)(Impulse Test); United States v. Hope, 545 F.3d 293, 296 (2008)(Moments of  
11 Possession); Rofkar v. State, 273 P.3d 1140 (Alaska 2012)(citations omitted)(Same  
12 Conduct/Hybrid Test).  
13

14 If it were so "foreseeable" that redundancy analysis would be overruled, why is the word  
15 "redundancy" never once mentioned in the Barton decision? Why did the *en banc* Nevada  
16 Supreme Court reaffirm the "redundancy" doctrine just one month after Barton? Why did the  
17 Barton opinion say nothing about Albitre? Why did the Barton court ignore Skiba? If it were so  
18 "foreseeable" that redundancy analysis would be abandoned, why did the State agree multiple  
19 times during trial that Counts 1 and 3 were redundant and that Mr. Grimes could not be  
20 adjudicated guilty of both? The answer is clear: the Jackson ruling was not foreseeable; not  
21 even to the prosecution.  
22

23 Redundancy doctrine was not just a flash in the pan – it had been good law in Nevada for  
24 over 25 years, and was similar to the Texas "carving doctrine" at issue in Ex Parte Scales, 853  
25 S.W.2d 856 (Tex. Crim. App. 1993) (*en banc*). Contrary to the State's claim, redundancy doctrine  
26 was not just a "jurisprudential outlier", but a doctrine that was long recognized and applied by  
27  
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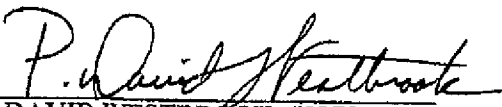
1 Nevada courts – including this one – prior to the decision in Jackson. Like the defendant in Ex  
2 Parte Scales, when this longstanding doctrine was judicially abandoned and retroactively applied,  
3 Mr. Grimes faced an additional criminal conviction and sentence that could not previously have  
4 been imposed upon him. And just as in Ex Parte Scales, Mr. Grimes' due process rights were  
5 violated when this Court retroactively applied Jackson at sentencing. Because Mr. Grimes could  
6 not lawfully be convicted and sentenced on both Counts 1 and 3, the Court must vacate Mr.  
7 Grimes' redundant convictions in this case. See U.S. Const. art I, § 9, cl. 3 (*Ex Post Facto*  
8 Clause); U.S. Const. amend XIV (Due Process Clause); Nev. Const. art. 1, § 15 (*Ex Post Facto*  
9 Clause); Nev. Const. art. 1 § 8, cl. 5 (Due Process Clause).

11 **IV. STATE CONCEDES THAT APPLICATION OF JACKSON IS**  
12 **FUNDAMENTALLY UNFAIR IN THIS CASE.**

13 The State does not even address Mr. Grimes' final argument that the Court's application of  
14 Jackson was fundamentally unfair to Mr. Grimes under the Fifth Amendment. The State's failure  
15 to address this argument can be construed as "an admission that that the motion is meritorious and  
16 a consent to granting of the same." See EDCR 3.20. Accordingly, for all the foregoing reasons,  
17 Mr. Grimes respectfully requests this Court to correct the sentence, vacating the conviction and  
18 sentence on Count 3, and to file a Second Amended Judgment of Conviction in this case.

19  
20 DATED this 3rd day of October, 2013.

21 PHILIP J. KOHN  
22 CLARK COUNTY PUBLIC DEFENDER

23 By:   
24 P. DAVID WESTBROOK, #9278  
25 Deputy Public Defender  
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**RECEIPT OF COPY**

RECEIPT OF COPY of the above and foregoing DEFENDANT'S REPLY IN  
SUPPORT OF MOTION TO CORRECT ILLEGAL SENTENCE is hereby acknowledged this 3rd  
day of October, 2013.

CLARK COUNTY DISTRICT ATTORNEY

By: \_\_\_\_\_

1 EXPR  
2 PHILIP J. KOHN, PUBLIC DEFENDER  
3 NEVADA BAR NO. 0556  
4 309 South Third Street, Suite 226  
5 Las Vegas, Nevada 89155  
6 (702) 455-4685  
7 Attorney for Defendant

*Alvin D. Lamm*  
CLERK OF THE COURT

NEVADA SUPREME COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

CASE NO. C276163/Appeals 62835

DEPT. NO. XII

BENNETT GRIMES,

Defendant.

ORDER FOR TRANSCRIPT

14 *my* IT IS HEREBY ORDERED that the certified court reporter/recorder ~~Susan~~  
15 *Lustig Cornelia* ~~Lovanovitch~~, prepare at State expense, a transcript of the proceedings for case C276163 heard on  
16 October 3, 2013 in District Court Department 12.

18 DATED this 20 day of November, 2014.

*[Signature]*  
DISTRICT COURT JUDGE

21 Submitted by:  
22 PHILIP J. KOHN  
23 CLARK COUNTY PUBLIC DEFENDER

24 By *Roger Hillman*  
R. ROGER HILLMAN, #3076  
Deputy Public Defender

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DEPARTMENT 12

**CERTIFICATE OF MAILING**

The forgoing Ex Parte Order was served by mailing a copy thereof, first class mail,  
postage prepaid on the 21<sup>ST</sup> day of November, 2014 to the following:

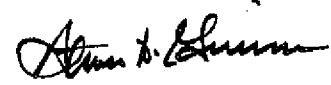
Susan Jovanovich, Court Reporter  
Nevada Supreme Court XXII  
200 Lewis Avenue  
Las Vegas, Nevada 89155



An Employee of the  
CLARK COUNTY PUBLIC DEFENDER'S OFFICE

1 **ORDR**  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
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11 Attorney for Plaintiff

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CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,  
11 Plaintiff,

12 -vs-

13 BENNETT GRIMES,  
14 #2762267,

Defendant.

CASE NO: C-11-276163-1

DEPT NO: XII

15  
16 ORDER DENYING DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE

17 DATE OF HEARING: February 26, 2015  
18 TIME OF HEARING: 3:00 A.M.

19 THIS MATTER having come on for hearing before the above entitled Court on the  
20 26th day of February, 2015, no parties present, without argument, based on the pleadings and  
21 good cause appearing therefor,

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

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APR 18 2015  
DEPT. 12

WA2011FV1301211F13012-ORDR-(GRIMES\_BENNETT)-001.DOCX

1 IT IS HEREBY ORDERED that the Defendant's Motion to Correct Illegal Sentence,  
2 shall be, and it is Denied.

3 DATED this 21 day of April, 2015.

4  
5   
6 DISTRICT JUDGE *us*

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

10 BY  *for*

11 LISA L. AICH  
12 Chief Deputy District Attorney  
13 Nevada Bar #005056  
14

15 CERTIFICATE OF SERVICE

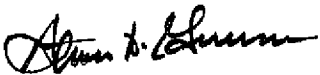
16 I certify that on the 13th day of April, 2015, I mailed a copy of the foregoing Order  
17 Denying Defendant's Motion to Correct Illegal Sentence to:

18 David Westbrook, Deputy Public Defender  
19 309 South Third Street #226  
20 Las Vegas, Nevada 89155

21 BY 

22 Theresa Dodson  
23 Secretary for the District Attorney's Office  
24  
25  
26  
27  
28

td/dvu

  
CLERK OF THE COURT

1 RTRAN

2  
3  
4 DISTRICT COURT  
5 CLARK COUNTY, NEVADA

6 THE STATE OF NEVADA,

7 Plaintiff,

8 vs.

9 BENNETT GRIMES,

10 Defendant.  
11

CASE NO: C276163

DEPT. NO: XII

12  
13 BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE  
14 THURSDAY, OCTOBER 3, 2013

15 **RECORDER'S TRANSCRIPT RE:**  
16 **DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE**  
17 **DEFENDANT'S MOTION TO STRIKE AS UNTIMELY THE STATE'S OPPOSITION**  
18 **TO DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE**

19 APPEARANCES:

20 For the State:

JOHN PATRICK BURNS, ESQ.  
Deputy District Attorney

21  
22 For the Defendant:

P. DAVID WESTBROOK, ESQ.  
Deputy Public Defender

23  
24  
25 RECORDED BY: SANDRA PRUCHNIC, COURT RECORDER



1 THURSDAY, OCTOBER 3, 2013; 9:19 A.M.

2  
3 THE COURT: State of Nevada versus Bennett Grimes, C276163.

4 Good morning.

5 MR. BURNS: Good morning, Your Honor.

6 MR. WESTBROOK: Good morning, Your Honor.

7 THE COURT: Go ahead. It's your motion.

8 MR. WESTBROOK: Well, Your Honor, we have two motions on today.

9 The first one, which would make the second one easier, is my motion to strike  
10 as untimely the State's opposition. As you know, it was filed out of time. I  
11 think that it should be stricken under EDCR 3.20(c). And my motion to correct  
12 an illegal sentence should be considered unopposed. Also I saw no answer to  
13 my motion to strike as untimely the State's opposition either.

14 THE COURT: I'm going to consider the issue based on the substance, so  
15 go ahead.

16 MR. WESTBROOK: Okay. So that initial motion to strike is denied?

17 THE COURT: It's denied.

18 MR. WESTBROOK: All right, thank you, Your Honor. And I didn't get  
19 actually an opposition from the State to my motion to strike. Did the Court get  
20 one? No one?

21 THE COURT: I don't know.

22 MR. BURNS: I didn't file one.

23 THE COURT: I can disregard their opposition –

24 MR. WESTBROOK: You can.

25 THE COURT: – if you want me to.

1 MR. WESTBROOK: You're right. You're right, Your Honor.

2 THE COURT: And I'm still not going to grant yours, because we – I – it's  
3 my position we resolved all of this at the time of sentencing. This is rearguing  
4 what we did at the time of sentencing.

5 MR. WESTBROOK: Actually, Your Honor, it's a brand new and special  
6 argument that I'd like to present to you today.

7 THE COURT: Okay. Go ahead.

8 MR. WESTBROOK: Okay. First of all, Your Honor, as a preliminary –

9 THE COURT: Everybody's creative today. I love it.

10 MR. WESTBROOK: Oh, I'm not creative. Actually, I'm just reading the  
11 statutes and law directly. Look, you'll find no creativity in this entire argument,  
12 only reading the actual law.

13 THE COURT: Okay.

14 MR. WESTBROOK: I'm going to substitute the creativity that Mr. Burns  
15 showed in his answer with actual law. That's my focus today. First, as a  
16 preliminary matter, Your Honor – oh, I can back that up, Judge. You'll see. It's  
17 exciting stuff.

18 As a preliminary matter, there's no question that a motion to correct  
19 an illegal sentence is correct here and that the Court has jurisdiction. Do you  
20 need me to address that, Your Honor?

21 THE COURT: No.

22 MR. WESTBROOK: Okay. Thank you, Your Honor.

23 I know that the State talked about DCR 13 and quoted a case from  
24 Washoe County. DCR 13 is not our rule here; it's EDCR.

25 THE COURT: We follow the District Court Rules too, just so you know.

1 MR. WESTBROOK: Yeah, but we follow the Eighth Judicial District Court  
2 Rules.

3 THE COURT: Yes, we do.

4 MR. WESTBROOK: Yeah.

5 THE COURT: But we also follow those rules. Those are District Court  
6 Rules.

7 MR. WESTBROOK: Correct.

8 THE COURT: And then EDCRs are local rules. They're both applicable.

9 MR. WESTBROOK: And when there's a local rule on point, we always  
10 follow the local rule. And so the DC doesn't apply in this case anyway. But,  
11 regardless, the Court knows it has jurisdiction in this case, so I'll move on to  
12 the other stuff.

13 This is an ex post facto violation to apply *Jackson* in this case,  
14 because *Jackson* was decided after this case. I am intimately familiar with  
15 *Jackson*, Your Honor, because it's my case. I'm here today because Nadia  
16 unfortunately was, you know, called away to a trial, so I'm kind of pinch hitting  
17 today. But *Jackson* was my case. I wrote the brief on the case. I wrote the  
18 supplemental briefs on the case, and I wrote the writ of certiorari.

19 THE COURT: You lost Jackson?

20 MR. WESTBROOK: What was that?

21 THE COURT: You lost Jackson?

22 MR. WESTBROOK: I didn't lose the trial, but, yeah, I lost everything else.  
23 It's been a horrible experience. I've completely screwed the entire defense  
24 community. It's all on me. Sorry, guys. Okay. But I also wrote the writ of  
25 certiorari, which has gotten through the first committee. The State was

1 ordered to respond, which is –

2 THE COURT: Okay.

3 MR. WESTBROOK: – an incredible event that hardly ever happens. And  
4 it's right now in committee and, you know, depending on the shutdown, it may  
5 or may not actually get heard this week. Since the Court has accepted the  
6 State's –

7 THE COURT: Well, I'm sure the Supreme Court employees aren't on  
8 furlough.

9 MR. WESTBROOK: I'm sorry, Your Honor? Yeah. Can you order us  
10 actually to go home with pay like Congress did?

11 THE COURT: I doubt they're on furlough.

12 MR. WESTBROOK: If I may, since the Court has –

13 THE COURT: These people aren't getting paid. Those federal employees  
14 that are on furlough are not getting paid.

15 MR. WESTBROOK: Oh, I agree with that. Congress is getting paid  
16 though.

17 THE COURT: They're getting paid. Of course they're getting paid.

18 MR. WESTBROOK: They give themselves a sweet paid vacation.

19 If I may approach, Your Honor, I actually have a reply brief, which,  
20 you know, I would request that after our argument the Court might want to dig  
21 into the reply brief and maybe issue an opinion later. I can approach the State  
22 with a copy.

23 THE COURT: Okay.

24 MR. WESTBROOK: And may I approach, Your Honor, with –

25 THE COURT: Sure.

1 MR. WESTBROOK: I'll give you a courteous copy and I can approach  
2 with one to file.

3 THE COURT: Sure. Thank you.

4 MR. WESTBROOK: This is a reply brief. And when I said that I'm  
5 quoting the actual law and that Mr. Burns in his brief did not, the reply brief  
6 really spells it out, but I'd like to go over it here today. The first thing obviously  
7 was the DCR 13 and the Washoe County case. We've already dispensed with  
8 that.

9 Mr. Burns is opposing the motion based on part on a citation to  
10 *Edwards versus State*, 112 Nev. 704 (1996). Okay. And what he says in his  
11 response is very troubling. He says that the express holding, express holding of  
12 *Edwards* was that NRS 176.555 applies only to sentences that are facially at  
13 variance with the controlling sentencing statute. Two problems with that:  
14 Number one, it's not legally true and, number two, it wasn't even the holding of  
15 *Edwards*. Okay. It was dicta that appeared in *Edwards*. *Edwards* had nothing  
16 to do with the topic at hand. And, in fact, the controlling law is *Anderson*  
17 *versus State*, which expressly holds – unlike *Edwards*, which is what Mr. Burns  
18 is bringing up is complete dicta. It expressly holds that the Nevada Supreme  
19 Court recognizes that the District Court may correct a sentence which is illegal  
20 as a result of controlling judicial precedent.

21 The statute on hand here is very simple and there's nothing,  
22 including and especially *Edwards*, limiting it. All it says is one sentence. The  
23 Court may correct an illegal sentence at any time. It doesn't say a facially  
24 illegal sentence per statute. It doesn't limit it in any way. An illegal sentence  
25 can be illegal for many reasons. One reason can be because it's facially illegal.

1 For example, it violates the 40 percent rule. Another reason could be because  
2 of the incorrect application of judicial precedent. That's true in *Anderson*.  
3 *Edwards* doesn't deny that, and *Edwards* doesn't even address that on a  
4 holding. So calling that a holding is a complete misstatement of the case. If  
5 you read it, it expressly limits its holding to a topic that we're not even  
6 discussing today.

7 THE COURT: What happened – I mean what happened on direct appeal?  
8 Because he was sentenced.

9 MR. WESTBROOK: He's on direct appeal, Your Honor.

10 THE COURT: You took it up on direct appeal and –

11 MR. WESTBROOK: Well, what happened on direct appeal is we made the  
12 motion to correct an illegal sentence in this case. As you recall, Your Honor –

13 THE COURT: Oh, it's on direct appeal right now

14 MR. WESTBROOK: It is, Your Honor, yes, on a fast track, which is also a  
15 limitation as well. You know when you're doing a fast track you have a limited  
16 page count.

17 THE COURT: Sure.

18 MR. WESTBROOK: You have to go with issues that –

19 THE COURT: Right. And this issue you didn't include in your direct  
20 appeal.

21 MR. WESTBROOK: We didn't include this in the direct appeal. Yeah, for  
22 very good reason, number one, because the limitations of fast track and,  
23 number two, because it needed to be preserved in a more proper fashion. I  
24 think you needed a written motion on this, Your Honor, because when *Jackson*  
25 came out, as you might recall throughout the entire trial – and I'll talk about

1 foreseeability in a second, because that's the linchpin here to the ex post facto  
2 argument. During the entire trial the District Attorneys and Your Honor and the  
3 defense all agreed that these battery with a deadly weapon charges would have  
4 to be merged or vacated, and, in fact, Your Honor actually said that you would  
5 put them in as a lesser included if it was requested by the defense, which it  
6 was not.

7           So for the entire trial everybody was ready to follow the redundancy  
8 analysis, follow *Salazar*, and do the thing that we've been doing for at least 25  
9 years in this jurisdiction, which is vacate those as redundant. That was what  
10 everyone was prepared to do. That's what Mr. Burns agreed to do, and that's  
11 what was going to happen. Obviously, Mr. Grimes thought that's what's going  
12 to happen and strategy decisions were made in the case based on that  
13 happening.

14           Then *Jackson* comes out. People are unfamiliar with it. It's a brand  
15 new case. And having, you know, written the writ of certiorari on it, I can say  
16 it's a very dense and difficult to understand case. It's internally self-  
17 contradictory, and it's very difficult to get a handle on. And what happened  
18 was it – a handle wasn't gotten on it at this hearing. All *Jackson* does is one  
19 thing and one thing only when you get right down to it. What it does is it  
20 departs from our double jeopardy precedence and says that redundancy analysis  
21 is no longer a part of double jeopardy. Now it does not just correct an old  
22 mistake. It's an actual departure. Because if you read the opinion, it says we  
23 are now disfavoring the old way of doing things. We are disfavoring *Salazar*  
24 and *Skiba* and *Albitre*, all right?

25           There was no warning whatsoever that the Court was going to do

1 that. We were – oh, no water. We were shocked –

2 THE COURT: Go ahead.

3 MR. WESTBROOK: No. There was – it's empty unfortunately.

4 THE COURT: I'll get you some water.

5 MR. WESTBROOK: That's okay. I'll soldier on, Your Honor.

6 THE COURT: Can I have some water?

7 I'll get you some water so you can keep going.

8 MR. WESTBROOK: When we got the supplemental briefing in the case, it  
9 looked like what the Supreme Court was going to do was adopt *Chipps*, which  
10 is an Eighth Circuit case or –

11 THE COURT: Okay.

12 MR. WESTBROOK: And there was another companion case from the  
13 Fifth Circuit they were considering as well. And so the entire focus was not are  
14 we going to get rid of redundancy analysis. The focus is are we going to add it  
15 officially as part of double jeopardy analysis, or are we going to put it as some  
16 other analysis, not that it was going to be eliminated.

17 And when *Jackson* came out, what the *Jackson* court decided is  
18 what we've been doing, the path we've been on, which has been a progression  
19 since the '30s frankly. You know we had a whole different country and a lot  
20 fewer laws when *Blockburger* came out a long time ago, and it's a very  
21 mechanical rule. Compare the statutes, try to find something that doesn't fit in  
22 each statute, and if so, they're two different crimes. I mean it's an incredibly  
23 mechanical process. And what courts have found out over the years is that a  
24 lot of injustice and fundamental unfairness occurs when you apply a mechanical  
25 process. And many courts, in fact the majority of courts, still have a factual



1 redundancy-style analysis when they're doing double jeopardy, and we did too  
2 for the last 25 years and beyond that in fact.

3         *Jackson* just reverses that and takes us right back down to ground  
4 zero, *Blockburger*, but that's all that it does. It doesn't – and the opinion is  
5 pretty clear on this. It doesn't take away redundancy analysis for purposes of  
6 Fifth Amendment fundamental fairness. And I think that having just received  
7 the opinion and having gotten no written objection on the opinion – which is  
8 another thing too. The rule cited to by Mr. Burns only applies to written  
9 motions and not oral motions or oral objections. When the Court got it, it  
10 seemed like the Court was being directed that you can't vacate these redundant  
11 sentences, and that's not what the opinion says at all.

12         What it says is you can't do it under double jeopardy analysis,  
13 because redundancy in Nevada is no longer part of double jeopardy analysis.  
14 Well, the Fifth Amendment's pretty big. It's due process and it also requires  
15 fundamental fairness. And in the opinion the Court says that they're not  
16 overruling cases where you're looking for the unit of prosecution. And it has  
17 nothing to do with fundamental fairness, because fundamental fairness wasn't  
18 an issue in *Jackson*. And the reason it wasn't an issue is because I didn't bring  
19 it up. I didn't need to because we had *Salazar* and the law was on our side.  
20 Unfortunately, the law changed. So it wasn't a correction. It wasn't  
21 foreseeable in any way, shape, or form. And I [indiscernible] no foreseeable,  
22 because really that's the key to this entire thing: Was it foreseeable?

23         And I'd like to point out another thing that's very misleading about  
24 the State's response. On the question of foreseeability, the State refers to a  
25 case called *Barton*, all right? And amazingly the State says, and I quote,

1 "Barton had already overturned the same conduct mode of analysis relied on in  
2 *Salazar-Skiba*." Okay. So he's saying it overturned *Salazar*. This is  
3 fascinating, because *Barton* came out two years before *Salazar*. I have never in  
4 my life, Your Honor, seen a case overturn a future case. It doesn't happen,  
5 because we don't have time machines or crystal balls.

6 What happened was this opinion, which also wasn't topical and  
7 wasn't on point – it doesn't say what Mr. Burns says that it says, all right? But  
8 this opinion was not relied on by the *Salazar* court. And, in fact, a month later  
9 in an en banc opinion the Nevada Supreme Court reaffirmed that it was still  
10 using redundancy analysis in a death penalty case, vacating it in part. So the  
11 citation to *Barton* is completely misleading and completely untrue. It couldn't  
12 possibly overturn *Salazar*. In fact, it wasn't even about redundancy.

13 If you read the entire opinion, the word redundancy does not appear  
14 in it. The word *Skiba*, which was supposedly overturned, does not appear in it.  
15 The word *Albitre* does not appear in the opinion. And he's claiming that it  
16 overrules the case that came out two years later. You cannot rely on *Barton* to  
17 prove that this was foreseeable in some way, because the Nevada Supreme  
18 Court has never relied on *Barton* for this issue. So that was incredibly  
19 misleading.

20 The fact is there was no clue, nobody had a clue, including this  
21 Honorable Court during the trial, including the State during the trial, that this  
22 law would change, but change it did. And applying that change to the –

23 THE COURT: But this is so important, but you didn't even file it in your  
24 direct appeal.

25 MR. WESTB ROOK: Yes. I didn't file it in the --

1 THE COURT: Okay.

2 MR. WESTBROOK: – direct appeal, Your Honor. And the reason I didn't  
3 file it in the direct appeal was multifaceted, but this is an appropriate way to  
4 bring it up to the Court. I didn't think that the issue had been fully briefed in  
5 the court.

6 THE COURT: Okay.

7 MR. WESTBROOK: And I want to – I know that Your Honor reads  
8 everything that I give you.

9 THE COURT: Uh-huh.

10 MR. WESTBROOK: Because I was in your courtroom for many years a  
11 long time ago, back when I still had the same size suit, and now I've had to go  
12 up a size. Okay. I put on a little weight, all right?

13 But I know that you read everything I give you, always. And in this  
14 case I didn't think that you had necessarily a fair chance to review it, because  
15 *Jackson* was new to you, if I'm not mistaken. It looked like that from the  
16 transcript. You know it wasn't my trial. I know it was new to Mr. Hillman,  
17 who I think got it for the first time the day that it was discussed. And its  
18 holding was misrepresented by the State. It does not say that you cannot  
19 dismiss these charges. All it does is limit the double jeopardy analysis. It  
20 doesn't limit any other kind of analysis.

21 And the fact is the reason why redundancy exists and the reason  
22 why every single jurisdiction in this country has considered a fact-based,  
23 redundancy analysis and most have adopted it – and there's a long string  
24 citation in my reply brief which shows you all the different jurisdictions that  
25 have a fact-based, redundancy-style analysis under different names but exactly

1 the same type of analysis. The reason is because courts have figured out that  
2 it is unjust [sic] to give people multiple convictions for what is essentially the  
3 same act, and that's what happened in this case. There is –

4 The battery with use of a deadly weapon in this case is the  
5 underlying facts for the attempted murder. And even though that might not  
6 survive a *Blockburger* analysis, a strict *Blockburger* analysis, they're still  
7 redundant factually. And it's still unfair to convict and sentence somebody, and  
8 in this case sentence them to consecutive, for something that was one single  
9 act at one single time with one single victim.

10 THE COURT: Right. And I didn't. He was sentenced to concurrent time.

11 MR. WESTBROOK: I believe that the – he got a consecutive time on the  
12 habitual offender treatment on the battery with a deadly weapon charges.

13 MR. BURNS: That's correct. The burglary went concurrent.

14 MR. WESTBROOK: Now, obviously, if that was a mistake, Your Honor –

15 THE COURT: Well, I'm just looking at my notes and it says concurrent.

16 MR. WESTBROOK: Well, the judgment of conviction didn't say that, Your  
17 Honor, so obviously if –

18 THE COURT: Okay. I'm just looking at my notes. My notes could be  
19 wrong.

20 MR. WESTBROOK: Oh, I understand, Your Honor.

21 THE COURT: I'm just telling you I'm looking at my notes and it looks –  
22 my notes say – I mean the – obviously, the deadly weapon was run  
23 consecutive. He was sentenced under the habitual statute.

24 MR. WESTBROOK: Sure.

25 THE COURT: Count one – as to count three – I have count three running

1 concurrent to count one and two.

2 MR. WESTBROOK: And, Your Honor, it's possible that there was a  
3 mistake in the JOC, which, frankly, would be more along the lines of what the  
4 Court was saying all along, which – that, you know, it was willing to dismiss  
5 these counts or to include them as lesser includeds [sic] if the instruction was  
6 requested. I was actually surprised when I was reading through it, and, again,  
7 you know I apologize. I wasn't the trial counsel, so you know I wasn't involved  
8 in the conversations. I was surprised to see that you held them consecutive,  
9 because even if you couldn't vacate them I felt that you would hold them  
10 concurrent and so just, you know, from my knowledge of how the Court  
11 operates. And when I saw that they were consecutive in the JOC, it was  
12 confusing to me.

13 So if that was actually scrivener's error, then that could be  
14 corrected and that would –

15 THE COURT: I don't know.

16 MR. WESTBROOK: – at least help.

17 THE COURT: I shouldn't have opened my mouth. I was just going by my  
18 notes.

19 MR. WESTBROOK: I understand, Your Honor.

20 THE COURT: My notes could be wrong.

21 MR. WESTBROOK: Well, you should always open your mouth. It's your  
22 courtroom, Judge.

23 Okay. But the issue is: *Jackson* doesn't require you not to vacate  
24 them. All *Jackson* does is it limits the double jeopardy analysis, and that's it,  
25 period. It's a very limited opinion in that regard.

1 And, finally, as to the issue of fundamental fairness, even though  
2 the Court has accepted the State's opposition in this case, there's not one word  
3 about fundamental fairness. The arguments on fundamental fairness are  
4 unaddressed. And as unaddressed, I think the Court is free to rule without  
5 opposition on it. And it is fundamentally unfair. I think we all know this. And  
6 under fundamental fairness doctrine you have to look at the case for what it is  
7 and decide what is fair. He has a due process right under the Fifth Amendment  
8 and under Article 1, Section 8, of the Nevada Constitution to fundamental  
9 fairness and to due process. Applying *Jackson* at all in this case violates ex  
10 post facto.

11 And one more thing that Mr. Burns got wrong in his opposition is he  
12 gives you the wrong standard for the application of ex post facto. He says it's  
13 *Calder versus Bull*. That is bull, because it's not controlling in this case. That  
14 only applies to legislative action, and it's a stricter standard because it is  
15 legislative action. The correct case is *Stevens versus Warden*, 114 Nev. 1217.  
16 It is a far less stringent standard. It requires, number one, that the act be  
17 unforeseeable and not all of the other flowery language that's used in *Calder*;  
18 number two, that it was being applied retroactively, which of course it was  
19 because of the dates. That's a mechanical issue. And it disadvantaged the  
20 offender affected by it.

21 Even if only the weapons charges were consecutive in this case or  
22 meant to be consecutive, then it still disadvantages him. Even if everything's  
23 run concurrent it disadvantages him, because it adds to his record. It affects  
24 the way he's treated in the prison. It affects what programs he's available for,  
25 and it gives him another habitual offender adjudication, which will affect him

1 down the road. So he's prejudiced by it without question. The only question  
2 here is unforeseeability.

3 And, interestingly, again, in the opposition filed by the State he  
4 doesn't address *Stevens versus Warden*. That's the standard here. He doesn't  
5 say a word about it. Instead he says that it's *Calder versus Bull*. He does a  
6 *Calder versus Bull* analysis and ignores the actual law. The actual law is  
7 *Stevens versus Warden*. So, in reality, even in accepting the opposition, you  
8 actually don't have an opposition from the State, because not one time did he  
9 actually apply the correct law in these cases. Instead he pretended that dictum  
10 withholding. He pretended that the dictum was applying to analysis that it  
11 doesn't really apply to. And he says that cases that are filed by the Supreme  
12 Court two years earlier can overrule cases two years later, which is a factual  
13 and legal impossibility.

14 I'm asking you to grant our motion to correct an illegal sentence,  
15 vacate the battery with a deadly weapon charges, which I think was the  
16 Court's intention all along in this case. *Jackson* does not prohibit Your Honor  
17 from doing this. It is the only thing that is fundamentally fair under the Fifth  
18 Amendment and the Nevada due process clause. And if there's any other  
19 questions the Court has about that entire process, I'd be glad to answer them.

20 THE COURT: Okay. Go ahead.

21 MR. BURNS: And, Your Honor, I – the State will submit an amended JOC  
22 that will reflect which counts were run consecutively and concurrently, just so  
23 that's –

24 THE COURT: Well, I just looked at the JOC. The JOC says consecutive.  
25 That's why I was looking for the minutes.

1 MR. BURNS: Well, I think that it doesn't – you identified today, which  
2 myself and Mr. Westbrook obviously didn't clue into, that it's actually the  
3 burglary. So we'll submit that amended JOC, and that's kind of a different  
4 issue.

5 MR. WESTBROOK: Your Honor, I object to that, to changing it to the  
6 burglary being consecutive.

7 MR. BURNS: Well, it's not –

8 MR. WESTBROOK: I mean that's not the ruling on the JOC.

9 MR. BURNS: It's not going to be changed. It's just that I don't know the  
10 JOC reflects what Your Honor ordered at sentencing.

11 THE COURT: Okay.

12 MR. BURNS: And that's what the JOC should reflect.

13 THE COURT: Well, I'll make sure it does.

14 MR. WESTBROOK: Legally the JOC is controlling.

15 THE COURT: Not if it's wrong. Are you kidding me? If it's not wrong, I  
16 change – if it's not correct, I change it. The JOC is not controlling if it's wrong.

17 MR. WESTBROOK: I understand, Your Honor.

18 THE COURT: If I made a mistake in the JOC, it's my obligation to fix it.

19 MR. WESTBROOK: You're correct, Your Honor. I agree. I would like to  
20 review the sentencing transcript, which I don't think I have in front – actually, I  
21 might have it in front of me.

22 THE COURT: Oh, of course.

23 MR. BURNS: Which is attached to your motion.

24 MR. WESTBROOK: Is it? Great. As I said, I'm –

25 MR. BURNS: Should I wait for him to do that?



1 THE COURT: – pinch hitting for Nadia, but, no, you can go ahead and  
2 argue while I read. I'm fine with that.

3 MR. BURNS: Okay. And, Your Honor, I don't really have too much to  
4 add. I don't know that this motion warrants the amount of talking that's  
5 occurred today.

6 Now I'd first note that – let's talk about this question of *Barton* and  
7 whether or not the State was suggesting that – well, let's talk about the  
8 standard first. And he's right. *Calder versus Bull* applies to legislative  
9 enactments. But what the State cites to is the law from *Bouie* and *Marks*,  
10 other cases that talk about doctrinal changes, jurisprudential changes, when  
11 those constitute ex post facto violations. And that's made pretty clear in the  
12 State's standard and it's in the brief, and I guess Mr. Westbrook just must have  
13 missed that.

14 And the standard, contrary to his description of it as being  
15 something that is much less – you know much more favorable for the defense –  
16 is actually he has a much more higher burden to surmount. Because it says  
17 that the doctrinal change must be so indefensible, unexpected, unforeseeable,  
18 that it constitutes a due process violation and that so – and he hasn't analyzed  
19 anything in those terms. But when you look at it – and I won't ask you to – I  
20 won't try and construe the authorities outside of the *Jackson* decision. I'll just  
21 ask the Court to look at the *Jackson* decision. Look at the Nevada Supreme  
22 Court's construction of its own doctrines.

23 And then look at that and say well, the way that the Nevada  
24 Supreme Court's talking about *Barton*, *Skiba*, and *Salazar* and these other  
25 cases, same conduct versus same elements, did the Nevada Supreme Court

1 really think that it was making an indefensible, unforeseeable, unexpected  
2 change in the jurisprudence? And it's pretty clear not. And when Mr.  
3 Westbrook starts prattling on about how I said *Barton* overturns *Salazar* and  
4 *Skiba*, he might want to actually read what I read – what I wrote in my motion.  
5 It says: Essentially then the Court in *Jackson* was saying that *Barton* had  
6 already overturned the same conduct mode of analysis relied on in *Skiba* and  
7 *Salazar*. Maybe an inartful use of overturned but not suggesting that a case  
8 was overturning cases that hadn't even come out yet.

9 But it's clear when you look at what the Nevada – how the Nevada  
10 Supreme Court's interpreting its own jurisprudence. It's not unforeseeable, not  
11 unexpected. And it's not going to be terribly important in this case, because  
12 he's still going to be doing the 22 years that you sent him to. And I'll just  
13 submit the rest.

14 THE COURT: Anything else?

15 MR. WESTBROOK: And, Your Honor, if the Supreme Court overturned  
16 the redundancy motive analysis, then why did they apply it en banc in a murder  
17 case, a death penalty murder case en banc, 30 days after that case was  
18 decided? They didn't – they overturn nothing. In fact, it wasn't even the  
19 holding of that case. Mr. Burns is misrepresenting what the holding of the case  
20 was by talking about dictum in the case. Dictum and holding are two different  
21 things. And what was clear is that they were applying the redundancy analysis  
22 in an en banc death penalty case 40 days after *Barton*, and yet Mr. Burns says  
23 somehow that's a clue as to where the Court was going. And how many years  
24 after *Barton* did it take for the Court to get there? Sixteen years.

25 I don't get top marks in math, but it seems to me like if this was

1 such an out of control train running towards reversal we might have had a  
2 single opinion in 16 years, which we didn't have. We had nothing. We were  
3 blindsided by this, Your Honor, completely blindsided. Nobody, including the  
4 State, thought that we were going to reverse 25 solid years of precedence and  
5 go the opposite direction and bust the State of Nevada from this redundancy  
6 standard, this fairness standard, back down to a straight mechanical application  
7 of *Blockburger*. And Mr. Burns has not pointed to a single case that shows that  
8 this was foreseeable, not one. *Barton* does not qualify. He's completely  
9 misrepresented the holding of *Barton*, completely.

10 Furthermore, as far as him talking about reading his actual brief, I  
11 read his actual brief, which is how I know he didn't even address the proper  
12 foreseeability standard. He didn't even address *Warden*. He didn't address  
13 *Warden*. He talked about auxiliary standards which don't apply in this case.  
14 And now he's saying it's obvious if you read my motion, and that's very  
15 cavalier. And I guess it might sound good in his head, but in reality he read the  
16 law, he chose the wrong laws, he addressed the wrong laws, and then at the  
17 end of the day he left the actual standard completely unaddressed.

18 THE COURT: Okay. So the bottom line is: You're not seeking to correct  
19 a sentence; you're seeking to dismiss count three.

20 MR. WESTBROOK: No, Your Honor. I'm saying it's all illegal and so I'm  
21 seeking to dismiss the illegal sentence.

22 THE COURT: The entire thing.

23 MR. WESTBROOK: Yeah, the non – yeah, exactly.

24 THE COURT: The only issue is with count three.

25 MR. WESTBROOK: Yes, that's correct, Your Honor.

1 THE COURT: Okay. You're seeking to dismiss count three?  
2 MR. WESTBROOK: That's correct, Your Honor.  
3 THE COURT: You're saying it merges into the – into count one.  
4 MR. WESTBROOK: That's correct.  
5 THE COURT: Correct?  
6 MR. WESTBROOK: Yes.  
7 THE COURT: Okay. So I want an opportunity to read your reply brief, so  
8 I'll issue a minute order.  
9 MR. WESTBROOK: Sounds good, Your Honor. Thank you.  
10 THE COURT: Thank you.  
11 MR. BURNS: Thank you, Your Honor.  
12 MR. WESTBROOK: And for the record, Your Honor, I would object to  
13 changing anything from concurrent to – or concurrent to consecutive either  
14 based on this motion.  
15 THE COURT: I went back and looked – I looked at the transcript. It looks  
16 like – he was accurate; it's consecutive.  
17 MR. BURNS: Okay.  
18 THE COURT: Count three was to run consecutive.  
19 MR. BURNS: All right.  
20 MR. WESTBROOK: Thank you, Your Honor.  
21 THE COURT: Okay. So my notes were wrong, so no big deal, just like I  
22 thought.  
23 MR. WESTBROOK: Thanks, Judge.  
24 ///  
25 ///

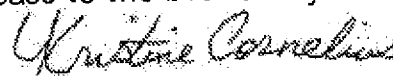
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THE COURT: It just means my notes were wrong.

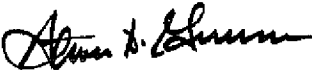
[Proceedings concluded at 9:45 a.m.]

\* \* \* \* \*

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.



Kristine Cornelius,  
Court Recorder

  
CLERK OF THE COURT

1 RTRAN

2  
3  
4 DISTRICT COURT  
5 CLARK COUNTY, NEVADA

6 THE STATE OF NEVADA,

7 Plaintiff,

8 vs.

9 BENNETT GRIMES,

10 Defendant.  
11

CASE NO: C276163

DEPT. NO: XII

12  
13 BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE  
14 TUESDAY, FEBRUARY 10, 2015

15 **RECORDER'S ROUGH DRAFT TRANSCRIPT RE:**  
16 **DEFENDANT'S STATUS CHECK ON COURT'S ORDER**

17  
18 APPEARANCES:

19 For the State:

MICHAEL J. SCHWARTZER, ESQ.  
Deputy District Attorney

21 For the Defendant:

22 DAVID P. WESTBROOK, ESQ.  
Deputy Public Defender

23  
24  
25 RECORDED BY: KRISTINE CORNELIUS, COURT RECORDER

1 TUESDAY, FEBRUARY 10, 2015; 9:27 A.M.

2  
3 THE COURT: State of Nevada versus Bennett Grimes, C276163.

4 MR. WESTBROOK: Your Honor, I believe he's in NSP. We're just here  
5 for the – to get the Court's order today on the motion that was filed earlier in  
6 this case.

7 THE COURT: You know what? I tried – I had my staff – I didn't know  
8 what this was on for. We couldn't figure out what it was on for and I pulled up  
9 – Mr. Hillman just put a setting slip on and we tried to figure out – I tried to  
10 figure out what order you were looking at.

11 MR. WESTBROOK: Well, there was a motion filed.

12 THE COURT: There was a –

13 MR. WESTBROOK: It was actually –

14 THE COURT: There was a transcript order.

15 MR. WESTBROOK: Right.

16 THE COURT: There was an order for transcripts back in December and  
17 she said that was granted and the transcript had been filed, but she couldn't  
18 find anything else that was pending.

19 MR. WESTBROOK: There was a – there was never a ruling on our motion  
20 for – based on the *Jackson* case, which was argued quite a long time ago, I  
21 think like eight months ago. And, you know, I was just here – I just did the  
22 motion and argued the motion, but I wasn't managing it day to day because it  
23 was – you know that part of it was the trial attorneys.

24 THE COURT: Well, why wouldn't you just call me up, Mr. Westbrook?

25 MR. WESTBROOK: I think that – yeah. I wasn't the one handling it. It

1 was actually – it was Nadia who was handling it. I think she was in touch with  
2 your clerk and I think it just fell through the cracks, as far as getting an actual  
3 order. But I don't know if you were granting or denying, but either way we  
4 would need a written order. Certainly if it was – if our motion was going to be  
5 denied, we need a written order so that we could appeal it.

6 [Colloquy between the Court and clerk]

7 THE COURT: Okay. It's the motion to correct the illegal sentence?

8 MR. WESTBROOK: That's correct, Your Honor.

9 THE COURT: So I'll – I did not know, because my staff told me the only  
10 thing was – I asked. I said what order are they looking for and I was told there  
11 was nothing. So I apologize for that.

12 MR. WESTBROOK: And, you know what, that's probably our fault for not  
13 making it clear and I apologize for that.

14 THE COURT: Well, and we even pulled the setting slip and it was just a –

15 MR. WESTBROOK: Okay.

16 THE COURT: It just basically said: status check on Court's order. And  
17 we couldn't find any pending – so sorry about that.

18 MR. WESTBROOK: That's all right. That's all right. Would you like to  
19 just set a status check so you can review the file or –

20 THE COURT: Sure.

21 MR. WESTBROOK: Okay, great.

22 THE COURT: You want one week?

23 MR. WESTBROOK: Yeah, sure. That's fine, whatever the court needs.

24 THE COURT: All right, then we'll just make sure it doesn't fall through  
25 the cracks, so if we put it back on in one week.



1 MR. WESTBROOK: I'll handle it accordingly, Judge.

2 THE COURT: Okay. Yeah, but you can just call us. You don't have to  
3 put this on.

4 MR. WESTBROOK: Okay.

5 THE CLERK: February 17<sup>th</sup> at 8:30.

6 MR. WESTBROOK: And, Your Honor, if you want to just make that a day  
7 for issuing the order.

8 THE COURT: Okay.

9 MR. WESTBROOK: I don't see any reason to have – we're not going to  
10 be doing any argument. You'll just review the –

11 THE COURT: I agree.

12 MR. WESTBROOK: – the thing. We've already made our argument on  
13 the record, so.

14 THE COURT: Okay.

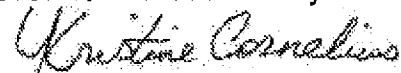
15 MR. WESTBROOK: Okay. So February 17<sup>th</sup>, 8:30, for the order. Thank  
16 you, Your Honor.

17 THE COURT: Thank you.

18 [Proceedings concluded at 9:30 a.m.]

19 \* \* \* \* \*

20 ATTEST: I hereby certify that I have truly and correctly transcribed the  
21 audio/visual proceedings in the above-entitled case to the best of my ability.

22 

23 Kristine Cornelius,  
24 Court Recorder  
25

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 62835  
District Court Case No. C276163

**FILED**

**MAR 27 2014**

*Tracie Lindeman*  
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of conviction AFFIRMED."

Judgment, as quoted above, entered this 27<sup>th</sup> day of February, 2013.

C-11-276163-1  
CCJA  
NV Supreme Court Clerks Certificate/Judgm  
3622208



IN WITNESS WHEREOF, I have subscribed  
my name and affixed the seal of the Supreme  
Court at my Office in Carson City, Nevada this  
March 24, 2014.

Tracie Lindeman, Supreme Court Clerk

By: Sally Williams  
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 62835

**FILED**

FEB 27 2014

TRADIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

**ORDER OF AFFIRMANCE**

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon in violation of a temporary protective order; burglary while in possession of a deadly weapon in violation of a temporary protective order; and battery with the use of a deadly weapon constituting domestic violence resulting in substantial bodily harm in violation of a temporary protective order. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. Appellant Bennett Grimes raises five claims of error.

First, Grimes contends that there was insufficient evidence to support his burglary conviction. We review the evidence in the light most favorable to the prosecution and determine whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Here, evidence was presented that Grimes forced his way into his estranged wife's apartment shortly after she and her mother returned home in violation of a temporary protective order against him. Grimes stood near the front door begging and pleading with his wife to take him



14-06537

back. A woman's voice could be heard on the 911 recording repeatedly telling Grimes to leave the apartment. Grimes' wife stood about five to seven feet away from the front door, near the kitchen counter, while her mother waited outside on the balcony for the police to arrive. When the mother heard her daughter scream out, "Mom, he's stabbing me," she turned around and saw her daughter on the ground near the front door with Grimes on top of her. According to the victim, Grimes walked over to the kitchen counter, grabbed a knife from a drying rack next to the kitchen sink, and dragged her back to the front door before stabbing her 21 times.

We conclude that a rational juror could infer from these circumstances that Grimes entered the apartment with the intent to commit assault or battery, gained possession of a deadly weapon, and violated a temporary protective order. See NRS 193.166; NRS 205.060(1), (4). The jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the conviction. *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); *Buchanan v. State*, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (circumstantial evidence alone may sustain a conviction); *McNair*, 108 Nev. at 56, 825 P.2d at 573 ("[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses.").

Second, Grimes contends that the district court erred by (1) placing him in a position where he had to choose between remaining silent and forfeiting his right to present his theory of self-defense or taking the witness stand, (2) refusing to instruct the jury on self-defense, and (3) prohibiting him from arguing his theory of self-defense to the jury. So long as there is some evidence, "[a] defendant has the right to have the

jury instructed on a theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be, regardless of who introduces the evidence and what other defense theories may be advanced." *Brooks v. State*, 124 Nev. 203, 211, 180 P.3d 657, 662 (2008); *Earl v. State*, 111 Nev. 1304, 1308, 904 P.2d 1029, 1032 (1995); *Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983). "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." *McCraney v. State*, 110 Nev. 250, 255, 871 P.2d 922, 925 (1994). "During closing argument, trial counsel enjoys wide latitude in arguing facts and drawing inferences from the evidence." *Jain v. McFarland*, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993); see also *State v. Green*, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965) ("The prosecutor [has] a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows.").

Grimes' theory of self-defense was that the victim came at him with a knife to get him to leave the apartment, a struggle ensued, and he overpowered her in self-defense fearing for his life. In support of this theory, Grimes cited evidence that the victim's DNA was found on the knife handle, the knife had been recently washed and was sitting in the drying rack, only the victim knew where the knife was located because it was not readily visible behind the kitchen counter bar top, the victim was standing next to the knife while Grimes was standing five to seven feet away begging the victim to take him back, and his DNA was not found on the knife. Grimes also wanted to argue that the victim's version of the

events was not credible because there was no reason for Grimes to drag the victim back to the front door before stabbing her. The district court refused to instruct the jury on self-defense and prohibited Grimes from presenting his theory to the jury because he did not testify and, even though Grimes could place the victim with the knife, the court “[could not] think of any logical inference that gets her going after him with the knife in a deadly manner.” We disagree. A rational juror could certainly conclude that a woman who grabs a knife after her estranged husband breaks into her apartment in violation of a temporary protective order might use that knife to injure him. Grimes’ testimony was not needed in order for him to argue self-defense and ask the jury to draw favorable inferences from the evidence. If Grimes’ reasoning was faulty, “such faulty reasoning is subject to the ultimate consideration and determination by the jury.” *Green*, 81 Nev. at 176, 400 P.2d at 767. We conclude that the district court erred by denying Grimes an instruction on self-defense and prohibiting him from asking the jury to draw inferences supporting his theory of self-defense.

However, we conclude that this error was harmless beyond a reasonable doubt. See *Valdez v. State*, 124 Nev. 1172, 1188-89, 196 P.3d 465, 476 (2008) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Even if the jury would have believed that the victim attacked Grimes with a knife, Grimes was only permitted to use “[r]esistance sufficient to prevent the offense.” NRS 193.240. A reasonable juror could not have believed that, once Grimes wrestled the knife away from the victim, it was necessary for him to stab her 21 times to defend himself. See *Pineda v. State*, 120 Nev. 204, 212, 88 P.3d 827, 833 (2004) (right to self-defense exists when there is a reasonably perceived apparent danger or actual

danger); *State v. Comisford*, 41 Nev. 175, 178, 168 P. 287, 287 (1917) (amount of force justifiable is that a reasonable man would believe is necessary for protection); *People v. Hardin*, 102 Cal. Rptr. 2d 262, 268 n. 7 (Ct. App. 2000) (right to use force in self-defense ends when danger ceases). Furthermore, Grimes had a duty to retreat before using deadly force because he did not have a right to be present at the location where he used deadly force, see NRS 200.120(2)(b), and was actively engaged in conduct in furtherance of criminal activity, see NRS 200.120(2)(c); NRS 33.100; NRS 200.591(5)(a). There was no evidence that Grimes attempted to leave the apartment at any time before the altercation. For these reasons we conclude that Grimes is not entitled to relief on this claim.

Third, Grimes contends that the district court erred by refusing his request to strike the testimony of a crime scene analyst who was not noticed as an expert on knife wounds. The witness opined that, based on her experience photographing and viewing self-inflicted knife wounds, the wound to the right index finger of Grimes' hand was an incised wound that was consistent with what might happen when a knife slips in a person's hand. Grimes objected because the crime scene analyst was not qualified to offer an opinion as to how knife wounds might occur. This objection was overruled. When the State continued to question the witness about defensive wounds, Grimes again objected, this time based on lack of notice. The district court concluded that the witness could not testify about knife wounds because the State did not notice the witness as an expert in knife wounds or provide Grimes with a curriculum vitae. However, the district court refused to instruct the jury to disregard the expert's testimony about knife slips because it "[did not] think that was expert testimony" and Grimes did not object to that testimony based on

lack of notice. While we agree that the basis for Grimes' initial objection was not lack of notice, we conclude that the district court abused its discretion by denying Grimes' request to strike the testimony and allowing the unnoticed expert's opinion about how Grimes sustained his wounds to be considered by the jury. Grimes made the proper objection moments after his initial objection was overruled and the justification for striking both statements made by the State's expert was the same. Although the district court erred, we conclude that this error was harmless for the same reasons discussed above.

Fourth, Grimes contends that the district court's failure to disclose a jury note to counsel violated his constitutional right to due process and Sixth Amendment right to counsel at every critical stage of the proceedings. During deliberations the jury sent a note to the district court and asked whether "criminal intent [has] to be established before entering the structure, or can intent change during the chain of events for the charge of burglary?" Without informing or consulting with counsel, the district court chose not to answer the jury's question, noting after the jury verdict that, "I didn't respond to it because my only response would have been [to] continue to deliberate and look at the instructions." The jury had already been instructed that, "[e]very person who *enters* any apartment . . . , *with the intent* to commit assault or battery . . . is guilty of Burglary." (Emphasis added.) Grimes' counsel responded to the district court's untimely disclosure by telling the court, "I think that would have been a correct response." Three weeks later Grimes filed a motion for a new trial explaining that, "[i]n retrospect, defendant feels that more clarification would have aided the jury in coming to an accurate verdict."



Grimes relies on two Ninth Circuit cases to argue that the district court's failure to notify defense counsel about the jury's inquiry violated his constitutional rights and requires automatic reversal of his burglary conviction. See *Musladin v. Lamarque*, 555 F.3d 830, 842 (9th Cir. 2009); *United States v. Barragan-Devis*, 133 F.3d 1287, 1289 (9th Cir. 1998). He omits decisions from other federal circuits that may undermine his contention. See, e.g., *United States v. Widgery*, 778 F.2d 325, 329 (7th Cir. 1985) ("A judge's failure to show jurors' notes to counsel and allow them to comment before responding violates Fed. R. Crim. P. 43(a), not the constitution."). But cf., *Moore v. Knight*, 368 F.3d 936, 940 (7th Cir. 2004). Regardless, decisions of the federal district court and panels of the federal circuit court of appeals are not binding on Nevada courts. *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970). Even if we applied the Ninth Circuit's analysis to the district court's decision not to notify Grimes about the juror note, he would not be entitled to relief because any error was harmless beyond a reasonable doubt.<sup>1</sup> Three factors are typically cited in evaluating harmlessness in the context of jury notes in the Ninth Circuit: (1) "the probable effect of the message actually

---

<sup>1</sup>To the extent that Grimes argues that the Ninth Circuit would apply a "rule of automatic reversal," we note that the panel of the Ninth Circuit that decided *Musladin* affirmed the state court's application of the harmless error standard by agreeing that the state court's decision "was not objectively unreasonable." *Musladin*, 555 F.3d at 842-43. Their proposed application of a "rule of automatic reversal" is dicta. *Id.*; see also *United States v. Mohsen*, 587 F.3d 1028, 1032 (9th Cir. 2009) ("We never suggested that all errors regarding jury communications during deliberations were subject to automatic reversal."); *United States v. Arroyo*, 514 F. App'x 652, 655 (9th Cir. 2013) (reviewing jury note error to determine whether it is harmless beyond a reasonable doubt), *cert. denied sub nom. Zepeda v. United States*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 191 (2013).

sent"; (2) "the likelihood that the court would have sent a different message had it consulted with appellants beforehand"; and (3) "whether any changes in the message that appellants might have obtained would have affected the verdict in any way." *Barragan-Devis*, 133 F.3d at 1289 (internal quotation marks omitted); *United States v. Frazin*, 780 F.2d 1461, 1470 (9th Cir. 1986). Because the district court did not send a message to the jury, there is nothing to suggest that it did anything to influence the jury's decision. Furthermore, counsel told the district court that he would have only asked it to tell the jury to re-read the instructions that had already been given, had the district court consulted with him before the verdict. And, in light of the wide discretion given to the district court in responding to a jury's questions, counsel may not have succeeded in persuading the court to provide such an answer. See *Scott v. State*, 92 Nev. 552, 555, 554 P.2d 735, 737 (1976) (district court's refusal to answer a question already answered in the instructions is not error). Even if counsel was successful at persuading the district court, such a response is unlikely to have changed the jury's verdict. Therefore, any violation of Grimes' constitutional rights caused by the district court's failure to disclose the jury note was harmless beyond a reasonable doubt and Grimes is not entitled to relief on this claim. Although Grimes is not entitled to relief on this claim, we caution the district court that it has an obligation to inform counsel of any questions that arise during jury deliberations before the jury returns its verdict regardless of whether the district court intends to answer those questions.

Fifth, Grimes contends that cumulative error warrants reversal. "When evaluating a claim of cumulative error, we consider the following factors: (1) whether the issue of guilt is close, (2) the quantity

and character of the error, and (3) the gravity of the crime charged.” *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (internal quotation marks omitted). Having considered these factors we conclude that the cumulative effect of any errors does not entitle Grimes to the reversal of his convictions, and we

ORDER the judgment of conviction AFFIRMED.

Pickering, J.  
Pickering

Parraguirre, J.  
Parraguirre

Saitta, J.  
Saitta

cc: Hon. Michelle Leavitt, District Judge  
Clark County Public Defender  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk



**CERTIFIED COPY**

This document is a full, true and correct copy of  
the original on file and of record in my office.

DATE: March 24<sup>th</sup> 2014

Supreme Court Clerk, State of Nevada

By *Salvatore M. Murrain* Deputy

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

**Supreme Court No. 62835**  
District Court Case No. C276163

**REMITTITUR**

TO: Steven Grierson, District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.  
Receipt for Remittitur.

DATE: March 24, 2014

Tracie Lindeman, Clerk of Court

By: Sally Williams  
Deputy Clerk

cc (without enclosures):

Hon. Michelle Leavitt, District Judge  
Clark County Public Defender  
Clark County District Attorney  
Attorney General/Carson City

**RECEIPT FOR REMITTITUR**

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the  
REMITTITUR issued in the above-entitled cause, on MAR 27 2014

HEATHER UNGERMANN

Deputy District Court Clerk

**RECEIVED**

**MAR 27 2014**

**CLERK OF THE COURT**

27

FILED  
FEB 20 2015  
CLERK OF COURT

BENNETT GRIMES #1098810

Petitioner/In Propria Personam  
Post Office Box 650 [HDSP]  
Indian Springs, Nevada 89018

DISTRICT COURT  
CLARK COUNTY, NEVADA

C-11-276163-1  
IPW/HC  
Inmate Filed - Petition for Writ of Habeas  
4434798



BENNETT GRIMES

Petitioner,

vs.

THE STATE OF NEVADA  
TRICIA WILLIAMS SR.  
WARDEN.

Respondent(s).

Case No. C276163

Dept. No. XII

Docket

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the institution. If you are not in a specific institution of the department within its custody, name the director of the department of corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction and sentence.

RECEIVED

FEB 20 2015

CLERK OF THE COURT

14

1 Failure to raise all grounds I this petition may preclude you from filing future petitions challenging  
2 your conviction and sentence.

3 (6) You must allege specific facts supporting the claims in the petition you file seeking relief from  
4 any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your  
5 petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that  
6 claim will operate to waive the attorney-client privilege for the proceeding in which you claim your  
7 counsel was ineffective.

8 (7) If your petition challenges the validity of your conviction or sentence, the original and one  
9 copy must be filed with the clerk of the district court for the county in which the conviction occurred.  
10 Petitions raising any other claim must be filed with the clerk of the district court for the county in  
11 which you are incarcerated. One copy must be mailed to the respondent, one copy to the attorney  
12 general's office, and one copy to the district attorney of the county in which you were convicted or to  
13 the original prosecutor if you are challenging your original conviction or sentence. Copies must  
14 conform in all particulars to the original submitted for filing.

### 10 PETITION

11 1. Name of institution and county in which you are presently imprisoned or where and who you  
12 are presently restrained of your liberty: SOUTHERN DESERT CORRECTIONAL CENTER

13 2. Name the location of court which entered the judgment of conviction under attack: EL PASO  
14 JUDICIAL DISTRICT COURT

15 3. Date of judgment of conviction: FEBRUARY 21, 2013.

16 4. Case number: C276163

17 5. (a) Length of sentence: MINIMUM 21 YEARS TO MAXIMUM 75

18 (b) If sentence is death, state any date upon which execution is scheduled: NA

19 6. Are you presently serving a sentence for a conviction other than the conviction under attack in  
20 this motion:

21 Yes ☐ No ☒ If "Yes", list crime, case number and sentence being served at this time: NA

22  
23 7. Nature of offense involved in conviction being challenged: ATTEMPTED MURDER w/USE IN  
24 VID. OF T.P.O. BURGLARY w/USE IN VID. OF T.P.O. BATTERY w/USE  
25 CONSTRUCTING DOMESTIC VIOLENCE IN VID. OF T.P.O.

26 TEMPORARILY PROTECTIVE ORDER (T.P.O.)

1 8. What was your plea? (Check one)

2 (a) Not guilty ☒

3 (b) Guilty \_\_\_\_\_

4 (c) Nolo contendere \_\_\_\_\_

5 9. If you entered a guilty plea to one count of an indictment or information, and a not guilty plea  
6 to another count of an indictment or information, or if a guilty plea was negotiated, give details: \_\_\_\_\_

7 NA

8  
9 10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

10 (a) Jury ☒

11 (b) Judge without a jury \_\_\_\_\_

12 11. Did you testify at trial? Yes \_\_\_\_\_ No ☒

13 12. Did you appeal from the judgment of conviction?

14 Yes ☒ No \_\_\_\_\_

15 13. If you did appeal, answer the following:

16 (a) Name of court: IN THE SUPREME COURT OF THE STATE OF NEVADA

17 (b) Case number or citation: 62835

18 (c) Result: AFFIRMED

19 (d) Date of appeal: NOTICE OF APPEAL FILED March 18, 2013

20 (Attach copy of order or decision, if available).

21 14.) If you did not appeal, explain briefly why you did not: NA

22  
23  
24 15. Other than a direct appeal from the judgment of conviction and sentence, have you previously  
25 filed any petitions, applications or motions with respect to this judgment in any court, state or  
26 federal? Yes ☒ No \_\_\_\_\_



16. If your answer to No 15 was "Yes", give the following information:

(a) (1) Name of court: EIGHTH JUDICIAL DISTRICT COURT

(2) Nature of proceedings: MOTION FOR A NEW TRIAL; MOTION TO CORRECT ILLEGAL SENTENCE

(3) Grounds raised: THE COURT FAILED TO NOTIFY THE DEFENSE THAT THE JURY HAD A QUESTION REGARDING THE (AND IN) INSTRUCTION. ILLEGAL SENTENCE

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes \_\_\_ No ✓

(5) Result: (MOTION FOR NEW TRIAL (DENIED))

(6) Date of result: \_\_\_\_\_

(7) If known, citations of any written opinion or date of orders entered pursuant to each result: \_\_\_\_\_

(b) As to any second petition, application or motion, give the same information:

(1) Name of Court: SAME

(2) Nature of proceeding: MOTION HEARING

(3) Grounds raised: ILLEGAL SENTENCE

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes \_\_\_ No ✓

(5) Result: ILLEGAL SENTENCE MOTION - PENDING

(6) Date of result: \_\_\_\_\_

(7) If known, citations or any written opinion or date of orders entered pursuant to each result: cf. MOTION

(c) As to any third or subsequent additional application or motions, give the same information as above, list them on a separate sheet and attach.

1 (d) Did you appeal to the highest state or federal court having jurisdiction, the result or action  
2 taken on any petition, application or motion?

3 (1) First petition, application or motion?

4 Yes \_\_\_ No ☒

5 Citation or date of decision: NA

6 (2) Second petition, application or motion? NA

7 Yes \_\_\_ No \_\_\_

8 Citation or date of decision: \_\_\_\_\_

9 (e) If you did not appeal from the adverse action on any petition, application or motion, explain  
10 briefly why you did not. (You may relate specific facts in response to this question. Your response  
11 may be included on paper which is 8 1/2 x 11 inches attached to the petition. Your response may not  
12 exceed five handwritten or typewritten pages in length). PENDING

13  
14 17. Has any ground being raised in this petition been previously presented to this or any other  
15 court by way of petition for habeas corpus, motion or application or any other post-conviction  
16 proceeding? If so, identify:

17 (a) Which of the grounds is the same: PETITIONER'S SENTENCE IS

18 ILLEGAL

19 (b) The proceedings in which these grounds were raised: MOTION

20  
21 (c) Briefly explain why you are again raising these grounds. (You must relate specific facts in  
22 response to this question. Your response may be included on paper which is 8 1/2 x 11 inches attached  
23 to the petition. Your response may not exceed five handwritten or typewritten pages in length). \_\_\_\_\_

24 FOR THE RECORD THIS PETITIONER IS REQUESTING THAT  
25 HIS TRIAL COURT COUNSEL WAS INEFFECTIVE DURING  
26 TRIAL COURT PROCEEDINGS AND DURING SENTENCING.

1 18. If any of the grounds listed in Nos. 23(a), (b), (c), and (d), or listed on any additional pages  
2 you have attached, were not previously presented in any other court, state or federal, list briefly what  
3 grounds were not so presented, and give your reasons for not presenting them. (You must relate  
4 specific facts in response to this question. Your response may be included on paper which is 8 1/2 x  
5 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten  
6 pages in length). \_\_\_\_\_  
7

8 19. Are you filing this petition more than one (1) year following the filing of the judgment of  
9 conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay.  
10 (You must relate specific facts in response to this question. Your response may be included on paper  
11 which is 8 1/2 x 11 inches attached to the petition. Your response may not exceed five handwritten or  
12 typewritten pages in length). N/A. \_\_\_\_\_  
13  
14

15 20. Do you have any petition or appeal now pending in any court, either state or federal, as to the  
16 judgment under attack?

17 Yes \_\_\_\_\_ No ☒

18 If "Yes", state what court and the case number: N/A \_\_\_\_\_  
19

20 21. Give the name of each attorney who represented you in the proceeding resulting in your  
21 conviction and on direct appeal: Appellate Attorney DEBORAH L. WESTBROOK;  
22 Trial Court Attorney R. BAKER WILLIAMS  
23

24 22. Do you have any future sentences to serve after you complete the sentence imposed by the  
25 judgment under attack?

26 Yes \_\_\_\_\_ No ☒ If "Yes", specify where and when it is to be served, if you know: \_\_\_\_\_  
27 NA \_\_\_\_\_  
28

Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

23. (a) GROUND ONE: 6th AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE  
OF COUNSEL. 5th AMENDMENT RIGHT UNDER THE DOUBLE  
JEOPARDY CLAUSE. U.S. CONST. VIOL. ET SEQ. VIOL. 1 § 8 OF  
NEVADA CONST. VIA ALSO 5th AMEND. DUE PROCESS VIOL. U.S. CONST.

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law): TRIAL  
COURT COUNSEL FAILED TO PREPARE ADEQUATELY FOR PETITIONER'S  
SENTENCING ON FEBRUARY 12, 2013.

TRIAL COURT COUNSEL RELIED ON OUT DATED  
CASE LAW AND AUTHORITIES IN PREPARATION FOR THE  
PETITIONER'S TRIAL WHICH CAUSED HIM TO BE SENTENCED  
TO AN ADDITIONAL 8 TO 20 YEARS.

SPECIFICALLY WHERE THE DEFENSE COUNSEL'S RELIANCE ON  
OUT-DATED CASE AUTHORITY THE COURT PROCEEDED TO SENTENCE  
THE PETITIONER ON COUNTS 1 AND 3.

AS TO COUNT 1 (ATTEMPT MURDER), THE COURT SENTENCED  
THE PETITIONER TO A TERM OF 8 TO 20 YEARS PLUS A  
CONSECUTIVE TERM OF 5 TO 15 YEARS FOR THE WEAPONS  
ENHANCEMENT.

AS TO COUNTS 2 AND 3, THE COURT SENTENCED THE  
PETITIONER PURSUANT TO THE SMALL STATISTICAL CRIMINAL  
STATUTE. I.E., FOR COUNT 2, THE COURT SENTENCED  
THE PETITIONER TO A TERM OF 8 TO 20 YEARS CONCURRENT  
TO COUNT 1. HOWEVER FOR COUNT 3, THE COURT SENTEN-  
CED THE PETITIONER TO A TERM OF 8 TO 20 YEARS CONSE-  
CUTIVE TO COUNTS 1, AND 2.

GROUND ONE CONTINUED

1 FOR THE RECORD DEFENSE COUNSEL ADVISED THE PETITIONER  
2 DURING TRIAL AND PRIOR TO TRIAL THAT HE COULD  
3 NOT AND WOULD NOT BE CONVICTED AND SENTENCED ON  
4 BOTH COUNTS 1 AND 3 BASED ON THE EXISTING AND  
5 CONTROLLING LAW.

6 FURTHERMORE DURING TRIAL DEFENSE COUNSEL WAS IN-  
7 EFFECTIVE FOR NOT OBJECTING TO THE VERDICT FORM  
8 AND THEREBY REQUESTING THAT COUNT 3 BE LISTED  
9 AS A LESSER INCLUDED OFFENSE OF COUNT 1.

10 HAD DEFENSE COUNSEL OBJECTED FOR THE RECORD TO  
11 THE VERDICT FORM THE COURT WOULD HAVE BEEN  
12 BOUND TO GRANTING SUCH A REQUEST WHICH WOULD  
13 HAVE PREVENTED THE PETITIONER FROM BEING CONVICTED  
14 AND SENTENCED ON BOTH COUNTS 1 AND 3 BASED  
15 ON THEN EXISTING LAW, I.E., SALAZAR V. STATE, 70  
16 P.3d 749 AND 751 (Nov. 2013), citing STATE OF NEVADA V.  
17 DISTRICT COURT, 112 Nev. 127, 994 P.2d 692 (2000)  
18 citing SKIDNA V. STATE, 114 Nev. 612, 616, footnote 4,  
19 959 P.2d 959, 961, n. 4 (1998)

20 A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL PRESENTS  
21 A MIXED QUESTION OF LAW AND FACT, SUBJECT TO INDEPENDENT  
22 REVIEW. KICKSEY V. STATE, 112 Nev. 988, 987, 923 P.2d 1102,  
23 1107 (1996). TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL,  
24 A CLAIMANT MUST SHOW BOTH THAT COUNSEL'S PERFORMANCE  
25 WAS DEFICIENT AND THAT THE DEFICIENT PERFORMANCE PRE-  
26 JUDICED THE DEFENSE. STICKLAND V. WASHINGTON, 466 U.S. 668,  
27 687, 184 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

CROWN ONE CONTINUED

1. TO SHOW PREJUDICE, THE CLAIMANT MUST SHOW A REASON-  
2. ABLE PROBABILITY THAT BUT FOR COUNSEL'S ERRORS THE  
3. RESULT OF THE TRIAL WOULD HAVE BEEN DIFFERENT. ID, AT  
4. 988, 923 P.2D AT 1187.

5. THE RECORD REFLECTS THAT THE PETITIONER WAS CHARGED  
6. UNDER COUNT 1 WITH ATTEMPTED MURDER WITH USE OF  
7. A DEADLY WEAPON IN VIOLATION OF A TEMPORARY PROTECTIVE  
8. ORDER; AND COUNT 3 WITH BATTERY WITH USE OF  
9. A DEADLY WEAPON CONSTITUTING DOMESTIC VIOLENCE RE-  
10. SULTING IN SUBSTANTIAL BODILY HARM IN VIOLATION OF A  
11. TEMPORARY PROTECTIVE ORDER.

12. THE PETITIONER ARGUES AND SAYS THAT BOTH COUNTS  
13. 1 AND 3 ARE REDUNDANT BECAUSE THEY PUNISHED  
14. THE EXACT SAME CRIMINAL ACT. I.E., THE ACT OF  
15. STRIKING AT AND INTO THE BODY OF THE SAID  
16. VICTIM ANEKA GEMES.

17. THE APPLICABLE RULE IS THAT WHERE THE SAME ACT OR TRANS-  
18. ACTION CONSTITUTES A VIOLATION OF TWO DISTINCT STATUTORY  
19. PROVISIONS. THE TEST TO BE APPLIED TO DETERMINE WHETHER  
20. THERE ARE TWO OFFENSES OR ONLY ONE IS WHETHER EACH  
21. PROVISION REQUIRES PROOF OF A FACT WHICH THE OTHER  
22. DOES NOT... SEE BLACKBURGER V. UNITED STATES, 384 U.S.  
23. 299 (1966)



AFFIRMATION  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Petition

FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

(Title of Document)

filed in District Court Case number 0276163

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application  
for a federal or state grant.

Bennett L. Grimes  
Signature

2/16/2015  
Date

BENNETT GRIMES  
Print Name

WIT  
Title



**CERTIFICATE OF SERVICE BY MAILING**

I, BENNETT GRIMES, hereby certify, pursuant to NRCP 5(b), that on this 16  
day of FEBRUARY, 2015, I mailed a true and correct copy of the foregoing, "PETITION FOR  
WRIT OF HABEAS CORPUS (POST-CONVICTION)"  
by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid,  
addressed as follows:

STEVEN B. WILSON,  
DISTRICT ATTORNEY  
200 LEWIS AVE.  
PO BOX 552212  
LAS VEGAS, NEVADA 89155

CLERK OF THE COURT  
200 LEWIS AVE. 3rd Floor  
LAS VEGAS, NEVADA  
89155-1168

OFFICE OF ATTORNEY GENERAL  
100 NORTH CARSON STREET  
CARSON CITY, NEVADA  
89701-4717

CC:FILE

DATED: this 16 day of FEBRUARY, 2015.

Bennett Grimes  
BENNETT G. GRIMES #1898810  
/In Propria Personam  
Post Office box 650 [HDSP]  
Indian Springs, Nevada 89018  
**IN FORMA PAUPERIS:**

BENNETT G. GRIMES #1098810  
Southern Desert Correctional Center  
P.O. Box 2008  
INDIAN SPRINGS, NV 89070-0008

1098810



STEVEN D. GRIFFINSON  
DISTRICT COURT CLERK

200 LEWIS AVE. 2ND FLOOR  
LAS VEGAS, NV.  
89155-1100

2014-2015  
DESERT  
EDUCATIONAL CENTER  
FEB 17 2015  
CURSORS  
1002

FILED  
FEB 20 2015  
CLERK OF COURT

1 BENNETT G. GRIMES #1098810  
2 Defendant / In Propria Personam  
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200, Post Office Box-208  
Indian Springs, Nevada 89070-0208.

DISTRICT COURT  
CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA, )  
8 Plaintiff, )  
9 BENNETT G. GRIMES, )  
10 Defendant. )

Case No. # C-276163  
Dept. No. # XII  
Docket No. # \_\_\_\_\_

MOTION TO APPOINT COUNSEL

Date of Hearing: \_\_\_\_\_  
Time of Hearing: \_\_\_\_\_

C-11-276163-1  
MAPA  
Motion for Appointment of Attorney  
4434799



17 COMES NOW the Defendant BENNETT G. GRIMES in proper person and  
18 hereby moves this Honorable Court for an ORDER granting him Counsel in the herein  
19 proceeding action.

20 This Motion is made and based upon all papers and pleadings on File herein  
21 and attached Points and Authorities.

22  
23 Dated: This 10 Day OF FEBRUARY, 2015.

Respectfully Submitted,  
BY: Bennett G. Grimes  
BENNETT G. GRIMES #1098810  
Defendant, In Forma Pauperis:

RECEIVED  
FEB 20 2015

CLERK OF THE COURT

POINTS AND AUTHORITIES

NRS.34.750 Appointment of Counsel for indigents;pleading supplemental to petition;response to dismiss:

"If the Court is satisfied that the allegation of indigency is True and the petition is Not dismissed summarily,the Court may appoint counsel to represent the-petitioner/defendant."

NRS.171.188 Procedure for appointment of attorney for indigent defendant:

"Any defendat charged with a public offense who is an indigent may, by oral statement to the District Judge,justice of the peace,municipal judge or master, request the appointment of an attorney to represent him."

NRS 178.397 Assignment of counsel;

"Every defendant accused of a gross misdemeanor or felony who is financially unable to obtain counsel is entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before a magistrate or the court through appeal,unless he waives such appointment."

WHEREFORE ,petitioner/defendant,prays this Honorable Court will grant his motion for the appointment of counsel to allow him the assistance that is needed to insure that justice is served.

Dated:This 16 Day OF February 2015.

Respectfully Submitted,

BY: Bennett G. Grimes  
BENNETT G. GRIMES # 1098810  
Defendant, In Forma Pauperis:

//A

//A

//A

ADDITIONAL FACTS OF THE CASE:

PETITIONER'S 5<sup>TH</sup>, 6<sup>TH</sup> AND 14<sup>TH</sup>  
UNITED STATES CONSTITUTIONAL RIGHTS  
TO DUE PROCESS, THE EFFECTIVE ASSISTANCE  
OF COUNSEL AND DUE PROCESS AND EQUAL  
PROTECTION OF LAW WERE VIOLATED.

I DO NOT UNDERSTAND THE PROCESS TO DEVELOP  
INEFFECTIVE ASSISTANCE OF COUNSEL GROUNDS.  
MY CASE IS COMPLEX. DESPITE EFFORTS TO DO SO.  
THERE ISN'T ENOUGH TIME FOR ME TO LEARN  
THIS PROCESS, PROCEDURE BEFORE THE ONE (1) YEAR  
TIME LIMITATION TO FILE A WRIT EXPIRES.

I RESPECTFULLY REQUEST THE ASSISTANCE OF  
COUNSEL.

AS TO ANY AND ALL GROUNDS.

I AM REQUESTING THE ASSISTANCE OF COUNSEL  
TO AID ME IN DISCOVERING POST-CONVICTION  
INEFFECTIVE ASSISTANCE OF COUNSEL'S ISSUES.

\* SHOULD THIS COURT NOT APPOINT COUNSEL,  
PETITIONER REQUESTS TIME AND RESERVE THE  
RIGHT TO SUPPLEMENT THE PETITION WITH  
SUPPORTING FACTS OF INEFFECTIVE ASSISTANCE  
OF COUNSEL.

AFFIDAVIT OF: BENNETT G. GRIMES

STATE OF NEVADA

ss:

COUNTY OF CLARK

TO WHOM IT MAY CONCERN:

I, BENNETT G. GRIMES the undersigned, do hereby swear that all statements, facts and events within my foregoing Affidavit are true and correct to my own knowledge, information and belief, and as to those, I believe them to be True and Correct. Signed under the penalty of perjury, pursuant to, NRS. 29.010; 53.045; 208.165, and state the following:

THAT I AM UNFAMILIAR WITH THE KNOWLEDGE OF  
LAW AND NEED THE ASSISTANCE OF COUNSEL

FURTHER YOUR AFFIANT SWEETH NAUGHT.

EXECUTED At: Indian Springs, Nevada, this 16 day of February

BY:

Bennett G. Grimes  
BENNETT G. GRIMES

Post Office Box-208 (ADCS)  
Indian Springs, Nevada 89309  
Affiant, In Propria Personam:

**CERTIFICATE OF SERVICE BY MAILING**

I, BENNETT G. GRIMES, hereby certify pursuant to NRCP 5(b), that on this 12<sup>th</sup>  
day of FEBRUARY, 2015, I mailed true and correct copy of the foregoing, "MOTION  
TO APPOINT COUNSEL"

by placing document in a sealed pre-postage paid envelope and deposited said envelope in the  
United State Mail addressed to the following:

STEVE WILSON  
200 LEWIS AVE.  
PO BOX 550010  
LAS VEGAS, NEVADA  
89155-0010

OFFICE OF ATTORNEY GENERAL  
100 NORTH CARSON STREET  
CARSON CITY, NEVADA  
89701-4717

CLERK OF THE COURT  
200 LEWIS AVE. 3RD FLOOR  
LAS VEGAS, NEVADA  
89155-1100

CC:LE

DATED: this 10 day of FEBRUARY, 2015.

Bennett G. Grimes  
BENNETT G. GRIMES # 1098810  
/In Propria Personam  
Post Office Box 208, S.D.C.C.  
Indian Springs, Nevada 89018  
IN FORMA PAUPERIS:



**AFFIRMATION**  
**Pursuant to NRS 239B.030**

The undersigned does hereby affirm that the preceding \_\_\_\_\_

"MOTION TO APPOINT COUNSEL"  
(Title of Document)

filed in District Court Case number C 27.02163

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

\_\_\_\_\_  
(State specific law)

-or-

B. For the administration of a public program or for an application  
for a federal or state grant.

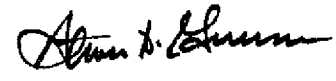
Bennett A. Grimes  
Signature

2/16/15  
Date

BENNETT A. GRIMES  
Print Name

DEFENDANT  
Title

1 PHILIP J. KOHN, PUBLIC DEFENDER  
2 NEVADA BAR NO. 0556  
3 309 South Third Street, Suite 226  
4 Las Vegas, Nevada 89155  
5 (702) 455-4685  
6 Attorney for Defendant

  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA, )

8 Plaintiff, )

9 v. )

10 BENNETT GRIMES, )

11 Defendant. )

CASE NO. C-11-276163-1

DEPT. NO. XII

DATE: 3-19-15  
TIME: 8:30 A.M.

12  
13 **DEFENDANT'S MOTION TO WITHDRAW DUE TO CONFLICT AND MOTION TO  
14 APPOINT NEW COUNSEL**

15 COMES NOW Defendant BENNETT GRIMES and respectfully requests that this  
16 Honorable Court allow the Clark County Public Defender to withdraw and to appoint  
17 independent counsel for both appellate and Post-Conviction Relief purposes due to a conflict of  
18 interest.

19 This Motion is made and based upon all the papers and pleadings on file herein, the  
20 attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

21 DATED this 27<sup>th</sup> day of February, 2015

22 PHILIP J. KOHN  
23 CLARK COUNTY PUBLIC DEFENDER

24 By: /s/ Deborah L. Westbrook  
25 DEBORAH L. WESTBROOK, #9285  
26 Deputy Public Defender  
27  
28



1 appropriate to appoint one attorney to handle both the appeal and Mr. Grimes' pending Petition  
2 for Post-Conviction relief.

3 I declare under penalty of perjury that the foregoing is true and correct to the best of my  
4 information and belief. (NRS 53.045)

5 EXECUTED this 27th day of February, 2015.

6 /s/ Deborah L. Westbrook  
7 DEBORAH L. WESTBROOK  
8  
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YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion on for hearing before the Court on March 19, 2015, at 8:30 a.m.

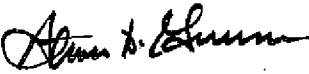
PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

CERTIFICATE OF ELECTRONIC FILING

District Attorneys Office  
E-Mail Address:  
PDMotions@clarkcountynyda.com  
patrick.burns@clarkcountynyda.com

/s/ Carrie M. Connolly  
Secretary for the Public Defender's Office

1 NOAS  
2 PHILIP J. KOHN, PUBLIC DEFENDER  
3 NEVADA BAR No. 0556  
4 309 South Third Street, Suite 226  
5 Las Vegas, Nevada 89155  
6 (702) 455-4685  
7 Attorney for Defendant

  
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

BENNETT GRIMES,

Defendant.

CASE NO. C-11-276163-1

DEPT. NO. XII

NOTICE OF APPEAL

TO: THE STATE OF NEVADA

STEVEN B. WOLFSON, DISTRICT ATTORNEY, CLARK COUNTY,  
NEVADA and DEPARTMENT NO. XII OF THE EIGHTH JUDICIAL  
DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE  
COUNTY OF CLARK.

NOTICE is hereby given that Defendant, Bennett Grimes,  
presently incarcerated in the Nevada State Prison, appeals to the  
Supreme Court of the State of Nevada from the judgment entered  
against said Defendant on the 26th day of February, 2015 whereby  
the Motion to Correct Illegal Sentence was denied.

DATED this 16<sup>th</sup> day of March, 2015.

PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

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

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the above and foregoing  
was made this 16<sup>th</sup> day of March, 2015, by Electronic Filing to:

District Attorneys Office  
E-Mail Address:  
PDMotions@ccdany.com

Jennifer.Garcia@ccdany.com

Eileen.Davis@ccdany.com

/s/ Carrie M. Connolly  
Secretary for the  
Public Defender's Office



BENNETT GRIMES #2098818  
SNCC  
PO BOX 208  
Indian Springs, Nevada 89070

*Ann L. Blum*  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

BENNETT GRIMES  
Petitioner

C-11-276163-1

CASE NO. C-276163

DEPT. NO. XII

vs.  
THE STATE OF NEVADA

Respondent

NOTICE  
OF  
APPEAL

COMES NOW BENNETT GRIMES, HEREINAFTER  
APPELLANT MOVES THE COURT PURSUANT TO N.R.A.P. 4(b),  
SPECIFICALLY THE APPELLANT APPEALS THE DENIAL OF  
HIS MOTION TO CORRECT AN ILLEGAL SENTENCE.

RESPECTFULLY  
SUBMITTED

DATED THIS 12<sup>th</sup> Day of March, 2015.

*Bennett Grimes*  
APPELLANT

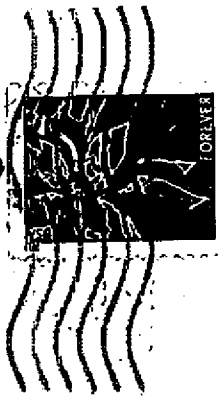
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CLERK OF THE COURT

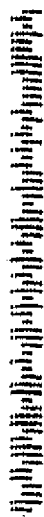
BENNETT B. GRIMES #1098810  
S.D.C.C.  
P.O. BOX 208  
INDIAN SPRINGS, NEVADA  
89070.

LAS VEGAS NV 890

18 MAR 2015 PM 2 L



CLERK OF THE COURT  
200 LEWIS AVENUE 3RD FLOOR  
LAS VEGAS, NEVADA  
89155-1160.

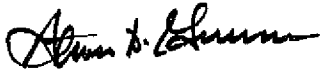


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Outgoing Mail

MAR 18 2015

Southern Desert  
Corporation Center

  
CLERK OF THE COURT

OPI  
STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
LISA LUZAICH  
Chief Deputy District Attorney  
Nevada Bar #005056  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,

-VS-

BENNETT GRIMES,  
#2762257,

Defendant.

CASE NO: C-11-276163-1

DEPT NO: XII

ORDER FOR PRODUCTION OF INMATE  
BENNETT GRIMES, BAC #1098810

DATE OF HEARING: April 2, 2015  
TIME OF HEARING: 8:30 A.M.

TO: BRIAN E. WILLIAMS, Warden of the Southern Desert Correctional Center;

TO: JOE LOMBARDO, Sheriff of Clark County, Nevada

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by STEVEN B. WOLFSON, Clark County District Attorney, through LISA LUZAICH, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that BRIAN E. WILLIAMS, Warden of the Southern Desert Correctional Center shall be, and is, hereby directed to produce BENNETT GRIMES, in Case Number C-11-276163-1, wherein THE STATE OF NEVADA is the Plaintiff, inasmuch as the said BENNETT GRIMES is currently incarcerated in the Southern Desert Correctional Center located in Indian Springs, Nevada and his presence will be required in Las

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MAR 25 2015

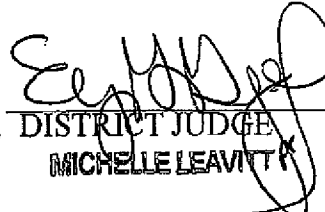
DEPT 12

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1 Vegas, Nevada commencing on April 2, 2015, at the hour of 8:30 o'clock A.M. and continuing  
2 until completion of the prosecution's case against the said Defendant.

3 IT IS FURTHER ORDERED that JOE LOMBARDO, Sheriff of Clark County,  
4 Nevada, shall accept and retain custody of the said BENNETT GRIMES in the Clark County  
5 Detention Center, Las Vegas, Nevada, pending completion of said matter in Clark County, or  
6 until the further Order of this Court; or in the alternative shall make all arrangements for the  
7 transportation of the said BENNETT GRIMES to and from the Nevada State Prison facility  
8 which are necessary to insure the BENNETT GRIMES's appearance in Clark County pending  
9 completion of said matter, or until further Order of this Court.

10 DATED this 25th day of March, 2015.

11  
12  
13 for:   
DISTRICT JUDGE  
MICHELLE LEAVITT

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

16  
17 BY   
18 LISA LUZATCH  
19 Chief Deputy District Attorney  
20 Nevada Bar #005056  
21  
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28 td/dvu

*Allen B. Linn*  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

BENNETT GRIMES  
APPELLANT

CASE NO. C-11-276163-1  
DEPT NO. XII

v.  
THE STATE OF NEVADA  
RESPONDENT

NOTICE  
OF  
APPEAL

COMES BENNETT GRIMES, PETITIONER  
HEREINAFTER APPELLANT RESPECTFULLY MOVE THE COURT PURSUANT  
TO NBAP 4(b) NOTICE OF APPEAL.

SPECIFICALLY THE APPELLANT APPEALS FROM THE DISTRICT  
COURT'S GRANTING OF THE "DEFENDANT'S MOTION TO WITHDRAW  
DUE TO CONFLICT AND MOTION TO APPOINT NEW COUNSEL"  
FOR THE RECORD THE ABOVE MOTION WAS FILED MARCH 2, 2015.

RESPECTFULLY  
SUBMITTED

DATED THIS 18 DAY OF MARCH 2015.

*Bennett Grimes*  
APPELLANT

RECEIVED

APR 01 2015

CLERK OF THE COURT

BENNETT GAMES #1898818  
SOUTHERN DESERT CREATION CENTER  
PO BOX 208  
INDIAN SPRINGS, NEVADA 89075

LAS VEGAS NV 890

30 MAR 2015 PM 2 L

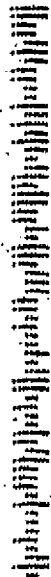


CLERK OF THE COURT

200 LEGIS. AVE. 3RD FLOOR

LAS VEGAS, NEVADA 89155-1166

6600666666



Southern District  
Correctional Center

MAR 30 2015

Outgoing Mail

  
CLERK OF THE COURT

OPI  
STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
LISA LUZAICH  
Chief Deputy District Attorney  
Nevada Bar #005056  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,

-vs-

BENNETT GRIMES,  
#2762257,  
Defendant.

CASE NO: C-11-276163-1

DEPT NO: XII

ORDER FOR PRODUCTION OF INMATE  
BENNETT GRIMES, BAC #1098810

DATE OF HEARING: April 14, 2015  
TIME OF HEARING: 8:30 A.M.

TO: BRIAN E. WILLIAMS, Warden of the Southern Desert Correctional Center;

TO: JOE LOMBARDO, Sheriff of Clark County, Nevada

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by STEVEN B. WOLFSON, Clark County District Attorney, through LISA LUZAICH, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that BRIAN E. WILLIAMS, Warden of the Southern Desert Correctional Center shall be, and is, hereby directed to produce BENNETT GRIMES, in Case Number C-11-276163-1, wherein THE STATE OF NEVADA is the Plaintiff, inasmuch as the said BENNETT GRIMES is currently incarcerated in the Southern Desert Correctional Center located in Indian Springs, Nevada and his presence will be required in Las

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1 Vegas, Nevada commencing on April 14, 2015, at the hour of 8:30 o'clock A.M. and  
2 continuing until completion of the prosecution's case against the said Defendant.

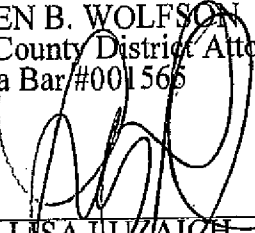
3 IT IS FURTHER ORDERED that JOE LOMBARDO, Sheriff of Clark County,  
4 Nevada, shall accept and retain custody of the said BENNETT GRIMES in the Clark County  
5 Detention Center, Las Vegas, Nevada, pending completion of said matter in Clark County, or  
6 until the further Order of this Court; or in the alternative shall make all arrangements for the  
7 transportation of the said BENNETT GRIMES to and from the Nevada State Prison facility  
8 which are necessary to insure the BENNETT GRIMES' appearance in Clark County pending  
9 completion of said matter, or until further Order of this Court.

10 DATED this 8 day of April, 2015.

11   
12 DISTRICT JUDGE 

13  
14 STEVEN B. WOLFSON  
15 Clark County District Attorney  
16 Nevada Bar #001565

17 BY

  
18 LISA LUZAICH  
19 Chief Deputy District Attorney  
20 Nevada Bar #005056

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28 td/dvu

  
CLERK OF THE COURT

OPI  
STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
LISA LUZAICH  
Chief Deputy District Attorney  
Nevada Bar #005056  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,

-vs-

BENNETT GRIMES,  
#2762257,

Defendant.

CASE NO: C-11-276163-1

DEPT NO: XII

ORDER FOR PRODUCTION OF INMATE  
BENNETT GRIMES, BAC #1098810

DATE OF HEARING: May 19, 2015  
TIME OF HEARING: 8:30 A.M.

TO: BRIAN E. WILLIAMS, Warden of the Southern Desert Correctional Center;

TO: JOE LOMBARDO, Sheriff of Clark County, Nevada

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by STEVEN B. WOLFSON, Clark County District Attorney, through LISA LUZAICH, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that BRIAN E. WILLIAMS, Warden of the Southern Desert Correctional Center shall be, and is, hereby directed to produce BENNETT GRIMES, in Case Number C-11-276163-1, wherein THE STATE OF NEVADA is the Plaintiff, inasmuch as the said BENNETT GRIMES is currently incarcerated in the Southern Desert Correctional Center located in Indian Springs, Nevada and his presence will be required in Las

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APR 30 2015

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DEPT. 12

1 Vegas, Nevada commencing on May 19, 2015, at the hour of 8:30 o'clock A.M. and continuing  
2 until completion of the prosecution's case against the said Defendant.

3 IT IS FURTHER ORDERED that JOE LOMBARDO, Sheriff of Clark County,  
4 Nevada, shall accept and retain custody of the said BENNETT GRIMES in the Clark County  
5 Detention Center, Las Vegas, Nevada, pending completion of said matter in Clark County, or  
6 until the further Order of this Court; or in the alternative shall make all arrangements for the  
7 transportation of the said BENNETT GRIMES to and from the Nevada State Prison facility  
8 which are necessary to insure the BENNETT GRIMES' appearance in Clark County pending  
9 completion of said matter, or until further Order of this Court.

10 DATED this 8 day of <sup>May</sup>~~April~~, 2015.

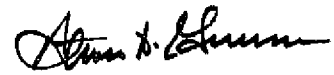
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13 DISTRICT JUDGE <sub>as</sub>

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

16  
17 BY 

18 LISA LUZAICH  
19 Chief Deputy District Attorney  
Nevada Bar #005056

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28 td/dvu



CLERK OF THE COURT

OPI  
STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
LISA LUZAICH  
Chief Deputy District Attorney  
Nevada Bar #005056  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
  
Plaintiff,

-VS-

BENNETT GRIMES,  
#2762257,

Defendant.

CASE NO: C-11-276163-1

DEPT NO: XII

ORDER FOR PRODUCTION OF INMATE  
BENNETT GRIMES, BAC #1098810

DATE OF HEARING: June 18, 2015  
TIME OF HEARING: 8:30 A.M.

TO: BRIAN E. WILLIAMS, Warden of the Southern Desert Correctional Center;

TO: JOE LOMBARDO, Sheriff of Clark County, Nevada

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by STEVEN B. WOLFSON, Clark County District Attorney, through LISA LUZAICH, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that BRIAN E. WILLIAMS, Warden of the Southern Desert Correctional Center shall be, and is, hereby directed to produce BENNETT GRIMES, in Case Number C-11-276163-1, wherein THE STATE OF NEVADA is the Plaintiff, inasmuch as the said BENNETT GRIMES is currently incarcerated in the Southern Desert Correctional Center located in Indian Springs, Nevada and his presence will be required in Las

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MAY 27 2015


DEPT. 12

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1 Vegas, Nevada commencing on June 18, 2015, at the hour of 8:30 o'clock A.M. and continuing  
2 until completion of the prosecution's case against the said Defendant.


3 IT IS FURTHER ORDERED that JOE LOMBARDO, Sheriff of Clark County,  
4 Nevada, shall accept and retain custody of the said BENNETT GRIMES in the Clark County  
5 Detention Center, Las Vegas, Nevada, pending completion of said matter in Clark County, or  
6 until the further Order of this Court; or in the alternative shall make all arrangements for the  
7 transportation of the said BENNETT GRIMES to and from the Nevada State Prison facility  
8 which are necessary to insure the BENNETT GRIMES' appearance in Clark County pending  
9 completion of said matter, or until further Order of this Court.

10 DATED this 28<sup>th</sup> day of May, 2015.

11  
12   
13 For: DISTRICT JUDGE  
MICHELLE LEAVITT

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

16  
17 BY

  
18 LISA LUZAICH  
19 Chief Deputy District Attorney  
Nevada Bar #005056

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 67741  
District Court Case No. C276163

**FILED**

**JUN 18 2015**

*Tracie Lindeman*  
CLERK OF COURT

**CLERK'S CERTIFICATE**

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

**JUDGMENT**

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER this appeal DISMISSED."

Judgment, as quoted above, entered this 18<sup>th</sup> day of May, 2015.

C-11-276163-1  
CCJD  
NV Supreme Court Clerks Certificate/Judgr  
4465850



IN WITNESS WHEREOF, I have subscribed  
my name and affixed the seal of the Supreme  
Court at my Office in Carson City, Nevada this  
June 12, 2015.

Tracie Lindeman, Supreme Court Clerk

By: Joan Hendricks  
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 67741

**FILED**

MAY 18 2015

ORDER DISMISSING APPEAL

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

This is a pro se appeal from a district court order granting a motion to withdraw as counsel. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Because no statute or court rule permits an appeal from an order granting a motion to withdraw as counsel, we lack jurisdiction. *Castillo v. State*, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990). Accordingly, we

ORDER this appeal DISMISSED.

Parraguirre J.  
Parraguirre

Douglas J.  
Douglas

Cherry J.  
Cherry

cc: Hon. Michelle Leavitt, District Judge  
Bennett Grimes  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

SUPREME COURT  
OF  
NEVADA

(O) 1947A

15-15098

**CERTIFIED COPY**

This document is a full, true and correct copy of the original on file and of record in my office.

DATE: June 12th, 2015

Supreme Court Clerk, State of Nevada

By Jan Hendrich Deputy



**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

**Supreme Court No. 67741**  
District Court Case No. C276163

**REMITTITUR**

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.  
Receipt for Remittitur.

DATE: June 12, 2015

Tracie Lindeman, Clerk of Court

By: Joan Hendricks  
Deputy Clerk

cc (without enclosures):  
Hon. Michelle Leavitt, District Judge  
Bennett Grimes  
Attorney General/Carson City  
Clark County District Attorney

**RECEIPT FOR REMITTITUR**

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the  
REMITTITUR issued in the above-entitled cause, on JUN 18 2015

HEATHER UNGERMANN  
Deputy District Court Clerk

**RECEIVED**

**JUN 16 2015**

CLERK OF THE COURT

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No. 67598

vi.

Respondent.

## 10

STEVE WOLFSON  
Clark County District Attorney  
200 Lewis Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89155

ADAM LAXALT  
Attorney General  
100 North Carson Street  
Carson City, Nevada 89701-4717  
(702) 687-3538

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Employee, Clark County Public Defender's Office