

GAMAGE & GAMAGE  
William H. Gamage, Esq.  
Nevada Bar No.: 009024  
1775 Village Center Cir., Ste 190  
Las Vegas, NV 89134  
Telephone: (702) 386-9529  
Facsimile: (702) 382-9529  
wgamage@gamagelaw.com  
***Attorney for Appellant***

Electronically Filed  
Sep 29 2015 08:55 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

## NEVADA SUPREME COURT

BENNETT GRIMES	)	
	)	Case No.: 67598
Appellant,	)	
v.	)	
	)	<b>REPLY TO FAST TRACK</b>
THE STATE OF NEVADA	)	<b>RESPONSE</b>
	)	
Respondent.	)	
_____	)	

### ARGUMENT

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

The States argument relying on Nevada District Court Rule ("DCR") 13 (7), does not apply. Just because the *ex post facto* application of *Jackson v. State*, 291 P.3d 1274 (2012) was discussed at Grimes' sentencing, it does not require him to first file a motion for

reconsideration before filing a Motion to Correct Illegal Sentence. DCR 13 is inapplicable here as it sets forth procedures for filing and responding to written motions in Nevada's district courts without local district court rules. The purpose of Nevada's District Court Rules is to:

cover the practice and procedure in all actions in the district courts of all districts where no local rule covering the same subject has been approved by the supreme court.

DCR 5 (emphasis added) and *see Arnold v. Kip*, 123 Nev. 410, 416 (2007) (Washoe District Court Rule 12(8) incorporates DCR 13(7) and sets forth deadlines for seeking reconsideration). Moreover, DCR 13 deals with the filing and service of written motions and related documents. *See* DCR 13(1)-(7)

In the Eighth Judicial District Court, there is already an express rule governing the filing of written motions in criminal cases: EDCR 3.2. Because there is already a local rule governing the filing of motions in this jurisdiction, DCR 13 is not applicable in the Eighth Judicial District Court. *See* DCR 5 (stating that where a local court rule covers the same subject matter as a DCR, the local rule applies). *Arnold*, 123 Nev. at 416.

Notwithstanding this fact, Grimes filed no written motion at sentencing that this Court could "reconsider" or "rehear" pursuant to DCR 13 (7). Accordingly, Mr. Grimes was not required to file a "motion for reconsideration" in lieu of the Motion to Correct an Illegal Sentence.

## **II. THE TRIAL COURT WAS NOT DIVESTED OF JURISDICTION DUE TO A PENDING APPEAL**

As Grimes' direct appeal made no sentencing arguments, the trial court was free to hear and rule on his motion to correct illegal sentence. Nevada courts which err in rendering judgments to the detriment of defendants cannot let those errors stand. *Warden v. Peters*, 83 Nev. 298, 301 (1967). To this end, courts are duty bound to fix their mistakes to offer a just and equitable remedy to aggrieved defendants. *Id.*

This court has repeatedly held that the timely filing of a notice of appeal "divests the district court of jurisdiction to act and vests jurisdiction in this court." *Foster v. Dingwall*, 228 P.3d 453, 454-55 (Nev., 2010) (citing to *Mack-Manley v. Manley*, 122 Nev. 849, 855 (2006) (quoting *Rust v. Clark Cty. School District*, 103 Nev. 686, 688 (1987))).

This jurisdictional transfer is not absolute in that:

when an appeal is perfected, the district court is divested of jurisdiction to revisit issues that are pending before this court,

[but] the district court retains jurisdiction to enter orders on matters that are collateral to and independent from the appealed order, i.e., matters that in no way affect the appeal's merits.

*Foster*, 228 P.3d at 455 (citing to *Mack-Manley*, 122 Nev. at 855) (emphasis added).

Here, Grimes' issues on direct appeal dealt with errors at trial that lead to his improper conviction rather than the imposition of a facially illegal sentence as follows:

1. The trial court violated Grimes rights by forcing him to choose between his right to remain silent and his right to present a self defense theory to the jury.
2. The court erred by failing to notify the parties that the jury had a question during deliberations.
3. The State failed to present sufficient evidence to sustain a conviction for burglary beyond a reasonable doubt.
4. Cumulative error denied Grimes a fair trial.

See Grimes' Fast Track Statement, page 7-8, Nevada Supreme Court Case No. 62835, filed August 19, 2013 (Appellant requests judicial notice be taken of the records of this Court because the court clerk's record is a source whose accuracy cannot reasonably be questioned. NRS 47.130 (2014); NRS 47.150(2) and, *In re Amerco Derivative Litig. Glenbrook Capital Ltd. P'ship*, 252 P.3d 681, 699 (Nev., 2011)).

Accordingly, as Grimes made no direct appeal regarding the nature of his sentence, the trial court was free to correct its error in granting his motion to correct illegal sentence.

### **III. GRIMES' MOTION TO CORRECT ILLEGAL SENTENCE REQUESTED RELIEF PERMITTED BY STATUTE.**

The plain language of NRS 176.555 allows courts to "correct an illegal sentence at any time." NRS 176.555. This inherent and express authority requires correction of sentences that, although within the statutory limits, were entered in violation of the defendant's right to due process." *Passanisi v. State*, 108 Nev. 318, 321, 831 P.2d 1371, 1372 (1992). Contrary to the State's assertions, the Nevada Supreme Court has long recognized that a district court may correct a sentence which is illegal as a result of controlling *judicial* precedent. *See, e.g. Anderson v. State*, 90 Nev 385 (1974).

In *Anderson v. State*, 528 P.2d 1023 (Nev. 1974), this Court affirmed the correction of a facially illegal sentence by the trial court in voiding the defendant's death sentence. *Id.* at 1025. The *Anderson* trial court commuted a death sentence for 1st degree murder to a life without parole sentence after the United States Supreme Court found the death

penalty unconstitutional. *Id.* This Court reasoned that the sentencing judge was authorized to resentence the appellant at any time under the circumstances pursuant to NRS 176.555. *Id.*

In *Wicker v. State*, 888 P.2d 918 (Nev. 1995), this Court affirmed the finding of facial illegality of a sentence because the trial court's sentencing structure violated both the letter and spirit of this state's statutory provisions regarding sentencing, probation and parole. *Id.* at 920 (*citing to see Hollis v. State*, 96 Nev. 207, 210 (1980) and *Spears v. Spears*, 95 Nev. 416, 418 (1979)).

In *Fullerton v. State*, 997 P.2d 807 (Nev. 2000), this Court found a sentence to be facially illegal because the sentencing judge erred in sentencing the defendant to more than five years of probation. *Id.* at 811 (*citing to see* NRS 176A.500 (formerly NRS 176.215); NRS 176.555 (providing that "[t]he court may correct an illegal sentence at any time"); and, *Wicker v. State*, 111 Nev. 43 (1995)).

In *Grey v. State*, 178 P.3d 154 (Nev. 2008), this Court impliedly found that a sentence was facially illegal when the defendant was sentenced as a habitual criminal even though the state failed to file any

notice of their intent to seek habitual criminal status under the state law. *Id.* at 163.

In *Davidson v. State*, 192 P.3d 1185 (Nev. 2008), this Court found a sentence facially illegal when the sentencing judge amended the verdict by increasing a misdemeanor conviction to a felony conviction in violation of habitual criminal statutes. *Id.* at 1191.

In *Pavon v. State*, 281 P.3d 1208 (Nev. 2009), this court upheld the trial court's amendment of a facially illegal sentence when it illegally awarded Pavon credit for time served and concurrent time with the sentence imposed in another district court case. The court reasoned that the original sentence was "per se illegal" and cited to NRS 176.555 in reasoning that an illegal sentence can be corrected at any time. *Id.* at 1209.

Here, like in *Anderson*, *Wicker*, *Fullerton*, *Grey*, *Davidson*, and *Pavon*, Grimes can argue facial illegality of his sentence because he was double punished contrary to *Salazar v. State*, 119 Nev. 224 (2003). See NRS 176.555. Likewise Grimes can argue correction of his illegal sentence is permissible because his due process rights were violated when the trial court sentenced him on Counts I and 3 after assurances

from both the court *and State* during trial that he would not be adjudicated and sentenced on both counts. *See Passanisi*, 108 Nev. at 321. Accordingly, Grimes' Motion was permitted under NRS 176.555.

#### **IV. APPLICATION OF JACKSON VIOLATES JUDICIAL EX POST FACTO DOCTRINE AND THE USE OF CALDER IN THAT ANALYSIS IS MISPLACED**

The State's reliance on *Calder* is misplaced because this Court analyses *ex post facto* application of judicial decisions using the three-part test in *Stevens v. Warden*, 114 Nev. 1217, 961 P.2d 945 (1998); *see Calder v. Bull*, 3 U.S. 385, 390 (1798); and *see e.g., Marks v. U.S.*, 430 U.S. 188 (1977)

In *Stevens*, the Nevada Supreme Court held that a judicial decision violates *ex post facto* principles if:

- (1) it was unforeseeable;
- (2) it was being applied "retroactively; and,
- (3) it disadvantaged the offender affected by it.

*Stevens*, 112 Nev. at 1221-22. In line with *Stevens* and contrary to the State's position, Grimes' rights were violated:

#### **Grimes was disadvantaged by application of Jackson:**

Contrary to the State's arguments otherwise, Grimes was disadvantaged by *Jackson* because he is now serving an additional and



consecutive 8 – 20 year sentence. *See Stevens*, 112 Nev. at 1223, 969 P.2d at 949 (holding that "if the computation pursuant to *Bowen* is less favorable to Stevens (i.e., Stevens must spend more time in prison), then application of *Bowen* violates due process").

**Jackson retroactively applied to Grimes:**

Likewise, the State does not dispute that Jackson was applied retroactively Grimes committed the offense in question on July 22, 2011; which predates *Jackson* by almost one and a half years. When the crime was committed, *Salazar's* redundancy doctrine was still good law. Therefore, *Jackson* was applied retroactively to Grimes. *See Stevens*, 114 Nev. at 1222.

**Jackson was not foreseeable:**

The States argument that *Jackson* was somehow foreseeable misstates the law and should be rejected by this Court. The State improperly cites to the *Barton v. State*, 117 Nev. 686, 694 (2001) in averring that *Jackson* was foreseeable because *Barton* had already overturned the 'same conduct' mode of analysis relied on in *Salazar-Skiba*. (Fast Track Response, pg. 16-17).

*Servin* illustrates the fallacy of the State's position, when this Court (one month after *Barton* and sitting *en bane*) held that a strict *Blockburger* analysis was inappropriate when determining whether multiple aggravating circumstances in support of a death sentence were impermissibly redundant. *Servin v. State*, 117 Nev. 775 (2001) (*en bane*). Based on *Servin*, it is clear that *Barton* did nothing to delegitimize Nevada's unique redundancy doctrine, which remained firmly in place until *Jackson* was issued in 2012.

Moreover, two years *after Barton*, this Court decided *Salazar*, 119 Nev. 224 (2003) in reversing an appellant's "redundant" conviction for battery with use of a deadly weapon because the Court held - again, notwithstanding *Blockburger* - that it would reverse "redundant convictions that do not comport with legislative intent." *Salazar*, 119 Nev. at 227. While the State implies that *Barton* somehow "overturned" *Salazar*, this cannot be true because *Barton* came out two years before *Salazar*.

Likewise, while the State claims *Skiba v. State* was also "overturned" by *Barton*, the *Skiba* decision is never once *mentioned* in *Barton*. *Skiba v. State*, 114 Nev. 612, 959 P.2d 959 (1998) (applying

redundancy analysis and reversing one of "the two convictions arising from Skiba's single act of hitting McKenzie with a broken beer bottle causing substantial harm").

Accordingly under a *Stevens* analysis, Grimes' due process rights were violated by a retroactive application of *Jackson* at sentencing.

**V. IN FAILING TO OPPOSE GRIMES' FUNDAMENTAL UNFAIRNESS ARGUMENTS, THE STATE CONCEDES THAT APPLICATION OF *JACKSON* WAS CONSTITUTIONAL ERROR.**

The State failed to oppose Grimes' final argument that the Court's application of *Jackson* was fundamentally unfair under the United States and Nevada Constitutions. This State's failure to address this argument should be construed as an admission to its merits. Accordingly, Grimes' case should be remanded with instruction for the Court to impose a legal sentence in line with *Salazar*.

**VERIFICATION**

I hereby certify that this Reply to Fast Track Response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track statement has been prepared in a

proportionally spaced typeface (Century Schoolbook) produced by Microsoft Word in size 14 font.

I further certify that this fast track statement complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points or more, and contains 2,315 words.

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

///

///

///

///

///

///

provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

Dated this 28th day of September, 2015.

Respectfully submitted

/s/ William H. Gamage

---

William H. Gamage, Esq.  
Nevada Bar No. 009024  
1775 Village Center Cir.  
Ste 190  
Las Vegas, NV 89134  
Attorney for Appellant

## **CERTIFICATE OF SERVICE**

I hereby certify that on 28th day of September, 2015, I served a copy of the foregoing ***Reply to Fast Track Response*** to each of the parties via the court's electronic service system, and addressed to:

Steven B. Wolfson, Esq.  
Clark County District Attorney

Adam P. Laxalt  
Nevada Attorney General

BENNETT GRIMES (via first class mail)  
Offender No. 1098810  
Southern Desert State Prison  
22010 Cold Creek Road  
Indian Springs, NV 89018

/s/ William H. Gamage, Esq.

---

An employee of GAMAGE & GAMAGE