

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

BENNETT GRIMES,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Electronically Filed  
Supreme Court Case No. 74419  
Mar 13 2018 04:45 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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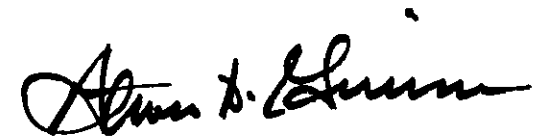
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CLERK OF THE COURT

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DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

THE STATE OF NEVADA,	)	
	)	
Plaintiff,	)	CASE NO. C276163-1
	)	DEPT NO. XII
VS.	)	
	)	
BENNETT GRIMES,	)	<b>TRANSCRIPT OF</b>
	)	<b>PROCEEDINGS</b>
Defendant.	)	

BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE

**JURY TRIAL - DAY 4**

MONDAY, OCTOBER 15, 2012

APPEARANCES:

For the State:	AGNES M. BOTELHO, ESQ. Deputy District Attorney PATRICK J. BURNS, ESQ. Deputy District Attorney
For the Defendant:	RALPH HILLMAN, ESQ. Deputy Public Defender NADIA HOJJAT, Esq. Deputy Public Defender

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1           **LAS VEGAS, NEVADA, MONDAY, OCTOBER 15, 2012, 10:41 A.M.**

2                           **\* \* \* \* \***

3                           (In the presence of the jury.)

4           THE COURT: Do the parties stipulate to the presence  
5 of the jury panel?

6           MS. BOTELHO: Yes, Your Honor.

7           MR. HILLMAN: Yes, Judge.

8           THE COURT: Does the State have any additional  
9 witnesses that they intend to call at this time?

10          MS. BOTELHO: No, Your Honor. At this point the  
11 State rests.

12          THE COURT: Okay. The State rests. The defense?

13          MS. HOJJAT: Your Honor, the defense rests.

14          THE COURT: Okay. At this time, ladies and  
15 gentlemen, you have heard all of the evidence that will be  
16 introduced at the time of the trial in this matter. You have  
17 been provided with the written jury instructions when you came  
18 in. Each of you has a copy. You'll be permitted to take  
19 those with you when you go back to deliberate upon your  
20 verdict. Before the attorneys do address you in their closing  
21 argument, I'm required by law to read the instructions to you.

22                       (Jury instructions read - not transcribed)

23          THE COURT: The State of Nevada may open and close  
24 the arguments.

25          MR. BURNS: Thank you, Your Honor.

1 CLOSING ARGUMENT

2 MR. BURNS: The evidence has shown that on July 22nd,  
3 2011 the defendant, Bennett Grimes, was experiencing two  
4 different emotions. The first is the emotion of desperation,  
5 that he was completely desperate, at a total sense of loss.  
6 The other is that he had a sense of entitlement, that he  
7 deserved something, that he owed something.

8 Now, the sense of desperation he had was because the  
9 woman he had been with for ten years, to whom he had been  
10 married for seven years, had ended their relationship  
11 permanently and forever. You heard Aneka Newman get up there  
12 and testify that she wanted "him out of my life forever." She  
13 wanted him gone, she wanted him out of her life forever.  
14 Aneka was -- had her family, she had her job, her apartment.  
15 She had just bought a new car. She was turning her gaze  
16 towards a new future and in that new future there was no place  
17 for that man, the defendant, Bennett Grimes.

18 He knew that also. He clearly knew that and he knew  
19 she didn't even want him around her. He was not to be around  
20 her. So finding that out filled him with a sense of total  
21 desperation. You've heard Stephanie's 9-1-1 call, you've  
22 heard Aneka's 9-1-1 call and you can hear the defendant's  
23 voice. It's a sense of total loss, total desperation, total  
24 anxiety.

25 But that's not the only emotion he was feeling on

1 July 22nd, 2011. He was also feeling like he was entitled to  
2 something, like he was owed something by Aneka. He was owed  
3 that she -- he deserved to be taken back by her. He had gone  
4 out, he had gotten this job. He deserved something from her.  
5 He also thought that he deserved to lurk around and hide in  
6 the shadows outside her apartment on that evening, waiting for  
7 Stephanie and Aneka to come home. He felt like he deserved  
8 when they actually got home to burst his way into that house,  
9 to batter his way through the door against the combined  
10 resistance of Aneka and Stephanie.

11           Once inside the house, he felt like he deserved to  
12 block the door, to stand there and make sure that no one left  
13 until he got what he wanted. He also felt like once -- after  
14 they had told him ten plus times that he had to leave, after  
15 you heard Stephanie telling him go outside, Bennett, he felt  
16 like he deserved to stay there. Not only that, he felt like  
17 he deserved to not have the police called. And when he found  
18 out that the police were called, what was the testimony you  
19 heard from Stephanie. He told Stephanie and Aneka that they  
20 were scandalous. They were scandalous for calling 9-1-1 and  
21 trying to have him removed from the house.

22           He also felt -- once it became clear that the police  
23 were going to come and remove him from the house, that he was  
24 probably going to go to jail that night, he felt like -- the  
25 sense of desperation was enhanced and he felt like he deserved



1 something else. He felt like he deserved to ruin things for  
2 Aneka, to pick up a knife and to try and murder her. And  
3 that's exactly what he did. But for the heroics of Officer  
4 Bobby Hoffman, that's exactly what he would have done. It's  
5 what he felt entitled to do because she wouldn't take him  
6 back. And that's the state of the evidence. Don't make any  
7 mistake that Aneka is the one who he almost murdered and is  
8 the victim in this case.

9 Now, the point of this first closing argument is to  
10 talk about the elements of the offenses. You have Count One,  
11 attempt murder; Count Two, the burglary, and then Count Three,  
12 the battery offense. I'm going to go through those offenses,  
13 talk about their specific legal elements and talk about the  
14 evidence you've heard over the last three days last week. And  
15 we'll talk about how those facts fit into the elements and how  
16 they demonstrate by proof beyond a reasonable doubt that that  
17 man attempted to murder Aneka Newman with a deadly weapon,  
18 that he committed the battery offense alleged in Count Three  
19 and that he also committed a burglary while in possession of a  
20 deadly weapon.

21 Now, in every criminal case the State has two larger,  
22 general burdens. The first is to show that a crime was  
23 committed. The second is to show that the defendant committed  
24 the crime. Now, the second element in this case, it's not  
25 difficult. It's a question of -- that's the element we

1 usually refer to as identify. There's no question who was the  
2 person stabbing Aneka 21 times. There's no alternate suspect  
3 or any kind of theory like that. It's the defendant, Bennett  
4 Grimes. Just a question of running the facts through the  
5 legal elements of the crimes the State of Nevada has charged  
6 and coming to the conclusion that that evidence has shown that  
7 he committed those crimes by proof beyond a reasonable doubt.

8 Let's talk first about Count One, attempted murder  
9 with a deadly weapon in violation of a temporary protective  
10 order. And you've heard some, throughout the trial, about TPO  
11 and you'll hear about it. It's in all the offenses, but we're  
12 not going to talk about it much because it's stipulated  
13 between the parties there was a valid temporary protective  
14 order in place and it was violated.

15 Attempted murder, there are two essential elements,  
16 performance of acts that tend, but fail to kill a human being.  
17 And in this case, stabbing someone 21 times, that's conduct  
18 that tends to kill someone, but it failed in this case because  
19 the defendant's effort to kill Aneka was interrupted by  
20 Officer Hoffman.

21 Second aspect is the mental state element. You have  
22 to find by proof beyond a reasonable doubt that the defendant  
23 intended to kill Aneka when he was stabbing her 21 times. And  
24 we'll talk about how you prove that, how you determine that  
25 from the evidence and then we'll talk about the specific

1 evidence. But you have to prove both of those elements that  
2 the defendant had the specific intent to murder Aneka.

3 Intention to kill. You have an instruction on this,  
4 I believe it's Instruction 14. It may be ascertained or  
5 deduced from all the facts and circumstances. We don't need  
6 some mind reader to go into Bennett Grimes' mind and tell us  
7 what he was thinking at the time he stabbed Aneka 21 times.  
8 You look at the facts, you look at the circumstances, you look  
9 at the testimony and you infer from that what his intention  
10 was.

11 You can also infer that intention of the use of a  
12 weapon calculated to produce death and the manner of the  
13 weapon's use. So the fact that a deadly weapon -- and I'll  
14 talk more about the definition of a deadly weapon -- was used  
15 in this case. And the manner, and we'll talk about the  
16 manner that was used.

17 The most important fact is that the defendant in  
18 ascertaining his intent, he stabbed Aneka 21 times. You've  
19 seen that evidence. Stabs her all over her body. She's  
20 literally riddled in stab wounds. In all, 21 stab wounds all  
21 over her body. And the State of Nevada submits to you that  
22 you don't stab your wife in the face, you don't stab her in  
23 the neck, you don't stab her in the head three times and you  
24 don't stab her in the back unless you intend to kill her. And  
25 that evidence is the only evidence you even need in this case

1 to convict him of attempted murder.

2           You can also look at the weapon and the use of the  
3 weapon. It's a common steak knife. Probably all have one  
4 like this in your home. Under the circumstances that it was  
5 used, you can infer that his choice of this weapon and the way  
6 that he used it, that he had the specific intent to kill  
7 Aneka. You look at the weapon, the manner of its use is  
8 another factor you can look at. You look at that blade and  
9 that blade is warped from being plunged into Aneka repeatedly.  
10 That shows his intention, it shows the amount of force he was  
11 putting into those stab wounds and it shows exactly what he  
12 wanted to do to Aneka.

13           Also, you look at the defendant's hand. Now, you can  
14 look at that cut and you can see that by repeatedly stabbing  
15 her one, two, three, four, five -- 21 times, that his hand  
16 slipped. That just shows you the amount of force he was  
17 putting into it, the amount of strength he was using.

18           Bobby Hoffman testified about how the defendant was  
19 holding that knife and he used this plastic picnic knife to  
20 show you that he was holding it like this. That lines up  
21 exactly with the defendant's index finger and that cut. You  
22 don't need an expert witness, you don't need a lawyer to tell  
23 you that what the defendant did was while he was stabbing her  
24 21 times so vigorously, so angrily, that his hand slipped and  
25 he cut his finger. That's other evidence you can show, the

1 fact that he would cut himself while stabbing her 21 times and  
2 keep trying to stab her is evidence that he intended to kill  
3 her. And the only thing that stopped him was Officer Hoffman.  
4 So the manner of the weapon's use is a critical factor showing  
5 his intent to murder Aneka.

6 Also, you can look at the types of wounds that the  
7 defendant did inflict and you can infer his intent from that.  
8 You had Dr. Kuhls come in here and testify. She was the  
9 doctor who treated him -- I'm sorry, treated Aneka. And she  
10 testified that a particular stab wound in the neck area, that  
11 it came very close and nicked a blood vessel branch of the  
12 subclavian artery. That injury was bleeding actively. And  
13 that kind of injury, she said, "Brings a risk of bleeding to  
14 death and large internal hematoma."

15 So, based on that type of injury -- and you remember,  
16 she testified that doing a surgery to close that --  
17 fortunately, the active bleeding stopped, but doing the type  
18 of surgery to repair that would have to be very deep, you'd  
19 have to go under all this muscle and that's why they would  
20 prefer to o the radiography type of treatment. That just  
21 shows you that the defendant was stabbing her as hard as he  
22 could and he was stabbing -- getting that knife as deep as he  
23 could into her.

24 Also, the chest wounds. Dr. Kuhls testified about  
25 the chest wounds, the stab that the defendant inflicted on

1 Aneka's chest, that it was of the breastbone, it was near the  
2 heart and the blood vessels that are underneath the  
3 breastbone. And she testified that that injury is  
4 "potentially very lethal injuries," those stab wounds to the  
5 chest. So that's more evidence of his intent, that he's  
6 stabbing her all over her body, but he's stabbing her in  
7 potentially vital, critical areas.

8 Now, one element that you have in all of the offenses  
9 is -- in all the Counts is deadly weapon. And the law defines  
10 deadly weapon in one or two ways. And you have a jury  
11 instruction on this. Any instrument which, if used in the  
12 ordinary manner contemplated by its design and construction,  
13 will or is likely to cause substantial bodily harm or death.  
14 And any weapon, device used under the circumstances in which  
15 it is used, attempted to be used is readily capable of causing  
16 substantial bodily harm or death. Although it's just a  
17 mundane, everyday steak knife, that is a deadly weapon the way  
18 he was using it, the injuries he was inflicting on her and the  
19 way he was stabbing her.

20 There's no question it's a deadly weapon under the  
21 circumstances he used it. That's an element you need to find,  
22 but it's an easy element to find based on the way he used the  
23 knife and the all the testimony you've heard from the  
24 witnesses. And you can see further, you know it's a deadly  
25 weapon because it was able to do this.

1           Now, temporary protective order, talked about this  
2 very briefly. It's stipulated between the parties. It's not  
3 something that you need to spend a lot of time on. The  
4 defendant should not have been near Aneka.

5           Count Three is a very long, has a very long title,  
6 but it's actually more simple than it looks. It's battery  
7 with the use of a deadly weapon constituting domestic violence  
8 resulting in substantial bodily harm in violation of temporary  
9 protective order. Now, we'll just break it down element by  
10 element. It's actually pretty simple when you break it down.  
11 It's just a mouthful.

12           First, let's look at battery and domestic violence.  
13 Those are two elements that you have to find in order to  
14 convict the defendant of Count Three. First is battery. Any  
15 willful and unlawful use of force or violence upon the person  
16 of another. There's no question, stabbing someone 21 times  
17 constitutes a battery. Domestic violence, it's defined when  
18 an act is committed upon a person -- the battery is committed  
19 upon a person, former spouse, or any other person to whom he  
20 is related by blood or marriage. You heard Aneka testify that  
21 she was married to the defendant, that she finally divorced  
22 him April of this year. So there was this spousal  
23 relationship that makes the battery inflicted on her domestic  
24 violence. Battery, domestic violence, very easy for you to  
25 find based on the evidence.

1           Substantial bodily harm. Now, this is another  
2 element you have to find. And there are four different ways  
3 you can find this. State submits that each way that you could  
4 find it has been proved beyond a reasonable doubt based on the  
5 evidence. Look at the first. Creates a substantial risk of  
6 death, that the injury had to have created a substantial risk  
7 of death. I just refer you again to Dr. Kuhls' testimony that  
8 these injuries were potentially very lethal and that they  
9 could have caused Aneka to die. He stabs her in the neck, he  
10 stabs her in the face, he stabs her in the head, he stabs her  
11 in the chest and the back. Now clearly, that created a  
12 substantial risk of death.

13           Next, serious or permanent disfigurement. You saw  
14 Aneka get off the witness stand. She came up to you and she  
15 showed you her scars. You know, she's obviously a very lovely  
16 person. She's not someone you'd describe as disfigured. But  
17 in this case, it meets the elements because you've seen the  
18 disfigurement on her arms, particularly what appear to be  
19 these defensive wounds from being stabbed repeatedly by the  
20 defendant on her arm. You've seen the scars on her neck and  
21 on her chest. She's covered in scars and those will always be  
22 with her. So that second element shows substantial bodily  
23 harm.

24           The third is protracted loss or impairment of the  
25 function of any bodily member or organ. This is pretty simple



1 also because you'll remember, Aneka telling you about her  
2 ordeal after she was stabbed. She said that she couldn't use  
3 her left arm. She had to rehabilitate it. In the aftermath  
4 of the stabbing, she could not use it. She could not move it.  
5 She was eventually able to regain movement. On top of that,  
6 she told you that she couldn't -- after the stabbing she  
7 couldn't use her thumb, that she actually had to go and  
8 undergo a surgery that repaired and gave her back the use of  
9 her thumb. That's protracted loss of a bodily member. So  
10 that's substantial bodily harm. That's proved beyond a  
11 reasonable doubt.

12 And finally, prolonged physical pain. Lasted longer  
13 than the pain immediately resulting from the wrongful act.  
14 You'll remember that Aneka testified how much pain she was in.  
15 Also, Dr. Kuhls testified to her complaining about the pain  
16 from the stab wounds. Aneka testified that she was on pain  
17 killers for some amount of time, some months after this  
18 incident. Clearly, there's protracted physical pain based on  
19 what the defendant did to Aneka.

20 So the substantial bodily harm element has been  
21 proved in so many ways. It's been proved by proof beyond a  
22 reasonable doubt. You've heard the doctor's testimony, you've  
23 heard Aneka's testimony and you've also heard Stephanie  
24 provide some testimony about it.

25 Now, let's go to Count Two, it's burglary. There are

1 three elements to burglary. First is that there's a house or  
2 structure; second is that the defendant enters it; third is  
3 that the defendant has the intent to commit an assault,  
4 battery or a felony when he enters the house or structure. He  
5 has to have that intent at the time he enters.

6 There's the structure. It's the apartment 173, West  
7 Desert Inn Road. You heard lots of testimony that the  
8 defendant entered it, that he was hiding out there, that he  
9 battered his way into the house and forced his way in. Once  
10 he was in there, he stabbed Aneka. Both Stephanie and Aneka  
11 testified that he busted his way in there.

12 Now, the specific intent element of burglary is like  
13 the specific intent element of attempted murder. It can be  
14 inferred from the circumstances. And you look at all the  
15 different circumstances showing what the defendant intended to  
16 do. First, that he's lurking outside. He's ready. He  
17 essentially lays in wait and then ambushes them and forces his  
18 way into the house. That's one circumstance you can look at.

19 He pushes his way in, he batters his way into the  
20 house against their will. Stephanie testified that she was  
21 pushed back by the amount of force he applied to get into the  
22 house. Also, once he's in there, he doesn't let anybody  
23 leave. So you know what his intent is. You can infer from  
24 the evidence that he's not leaving until he gets what he  
25 wants. And if he doesn't get what he wants, he's going to

1 perpetrate some violence against someone, specifically Aneka.  
2 And that's exactly what he did. Now, that he might have the  
3 hope that she takes him back or something like that doesn't  
4 mean he didn't commit a burglary because he had the intent to  
5 commit violence. He didn't get what he wanted when he went in  
6 there.

7 Finally, you can infer from the fact that he stabs  
8 Aneka 21 times that he went in there with that intent, to do  
9 something physical to commit violence against Aneka or anybody  
10 else.

11 Now, there's a fourth element to burglary in this  
12 case, it's that the defendant came into possession of a deadly  
13 weapon while he was -- while the burglary was going on. Now,  
14 all you need to find -- you don't need to find that he had the  
15 weapon at the time he entered, right at the time he entered.  
16 It's sufficient, if he commits a burglary and sometime  
17 thereafter he comes into possession of the deadly weapon. So  
18 he gains possession of any firearm or deadly weapon at any  
19 time during the commission of the crime, at any time before  
20 leaving the structure or upon leaving the structure. You  
21 know, he grabbed that knife in the middle of everything and  
22 long before -- you know, he only left the structure after the  
23 police took him. So he came into possession of that deadly  
24 weapon, that steak knife which we've talked about is a deadly  
25 weapon, during the commission of a burglary. The proof is

1 overwhelming of that.

2           Now, I want to talk a little bit about your verdict  
3 form, what it's going to look like and what the State submits  
4 you should be -- how you should fill it out. There's page one  
5 of the verdict form. Let's look at Count One, attempt murder  
6 with use of a deadly weapon. You have three choices. The  
7 evidence in this case is overwhelming, so I'll just submit  
8 that you're not even going to consider a not guilty verdict.  
9 And then you have two options. The difference between those  
10 two options is one of them has a deadly weapon, one does not.  
11 Now, the evidence is very clear that the defendant used a  
12 deadly weapon, that steak knife, the way he used it. You find  
13 it's a deadly weapon, so at that point really the only verdict  
14 based on the evidence, only reasonable verdict would be guilty  
15 of attempt murder with the use of a deadly weapon in violation  
16 of a temporary protective order.

17           Count Two is the burglary count. Pretty similar  
18 here. You've got two options. Obviously, it's the State's  
19 view you're not going to take -- you're not going to choose  
20 not guilty. You have one option with a deadly weapon and one  
21 option without. Clearly, he came into possession of a deadly  
22 weapon. He picked it up, he stabbed Aneka 21 times, Aneka  
23 testified to it. Officer Hoffman testified to it. Stephanie  
24 testified to it. The evidence is overwhelming.

25           Let's look at the second page of your verdict form,

1 Count Three. This one looks a little crazy. You've got a  
2 bunch of options here and we'll talk about it. It's more  
3 simple than it looks, but we'll just talk more specifically  
4 about it. There are a number of elements. There's battery,  
5 domestic violence, deadly weapon, substantial bodily harm and  
6 TPO. Don't worry about TPO. All your options except for a  
7 not guilty verdict are going to have a TPO.

8 Now, the first option has all of those. It has the  
9 battery, domestic violence, substantial bodily harm, deadly  
10 weapon. Second option drops out the deadly weapon, but keeps  
11 the substantial bodily harm. Third option does the opposite,  
12 drops substantial bodily harm, keeps in deadly weapon. Fourth  
13 option drops substantial bodily harm and drops deadly weapon.

14 Now, based on the evidence, the only reasonable  
15 verdict is going to be the number one option, that there was a  
16 battery, that they were married, it constituted domestic  
17 violence, that the knife was used so there was a deadly weapon  
18 and that all of this -- all of these substantial bodily harm  
19 was inflicted on Aneka. So really, although you have a lot of  
20 options, State submits that you're going to pick the first  
21 option because it has all of those elements. Evidence of each  
22 element is overwhelming.

23 The defendant's not the victim in this case. He's  
24 guilty of Counts One through Three. I ask you to find him as  
25 such. Thank you.

1           THE COURT: Thank you. The defense may address the  
2 jury in their closing argument.

3           MR. HILLMAN: Judge, do you mind if I grab the  
4 podium?

5           THE COURT: Not at all.

6           MR. HILLMAN: And may I turn off the monitor for this  
7 portion?

8           THE COURT: Sure.

9                           DEFENSE CLOSING ARGUMENT

10          MR. HILLMAN: Good morning, ladies and gentlemen. In  
11 this particular hearing, you folks are the people who are  
12 going to decide the facts in this case. You'll decide what  
13 happened on that day. You'll decide if the State has proven  
14 beyond a reasonable doubt each and every element of the crimes  
15 that have been alleged against Bennett Grimes.

16          Mr. Burns stood up and told you that Bennett Grimes  
17 was desperate when he went there on July 22nd. I don't know  
18 if that's exactly what it sounded like. It may sound like  
19 that. But his family was breaking up, he was concerned. And  
20 you can hear that on the 9-1-1 call. You can hear that in the  
21 testimony that was given by Aneka Grimes, Aneka Newman and  
22 Stephanie Newman as well.

23          Let's talk for a few minutes and I'm not going to put  
24 up any pictures of any jury instructions and read them to you.  
25 You have the jury instructions. You'll be able to read them

1 yourselves. Let's talk a little bit about the burglary.

2           Burglary means entry into the structure with the  
3 intent to commit one of those acts as described in the jury  
4 instruction. What evidence do we have of that intent? You  
5 can hear Bennett in the 9-1-1 tape. You can hear what he had  
6 to say. He was upset. He was sad. He was not happy with the  
7 way things were. You heard what Aneka said. Aneka said that  
8 Bennett told her that he loved her, that he wanted her back.  
9 Stephanie said the same thing. He entered that apartment with  
10 no knife, with no gun, with no weapon, with no intent to do  
11 anything other than to try and get Aneka back. He had  
12 obtained a new job and he hoped that would smooth over the  
13 problems that they had and this could be over with.

14           He was in there quite a while. You can hear it in  
15 the 9-1-1 call. Aneka walked over, opened up the sliding  
16 glass door. Stephanie went out while all this was going on  
17 and talked to the police officers. There was no indication  
18 that anything was going to bad at that point in time. He did  
19 not enter that apartment with the intent to do anything other  
20 than to try and get Aneka back.

21           Now, let's go on to the attempt murder. The State  
22 talked an awful lot about the 21 stab wounds. And there's no  
23 doubt that there were 21 stab wounds. But if he intended to  
24 kill her and stabbed her 21 times, how did that not happen?  
25 How did she not die? You see what he looks like. He's a fit

1 looking young man. Twenty-one times? State says that Officer  
2 Hoffman burst in, tackled him off of her, took the knife away.  
3 That's what Officer Hoffman said. Officer Tavaréz says that  
4 when she went in Officer Hoffman was saying where's the knife,  
5 where's the knife. He didn't know where the knife was.  
6 Stephanie Newman said that Officer Hoffman didn't tackle  
7 anybody, that he used his weapon and intimidation to stop  
8 whatever was going on on the floor by the entryway to that  
9 apartment.

10 So we've got several different facts. We've got  
11 several different stories about what was going on in there.  
12 Is that unusual? Probably not. When emotions get high, when  
13 the adrenaline starts to go, everybody sees things a little  
14 bit different. If you watch football, if you watch baseball,  
15 if you watch basketball, they have slow motion replays to show  
16 what the referees didn't see, what everybody else thinks they  
17 saw and people argue about it and argue about it.

18 Officer Hoffman, in his domestic violence report,  
19 indicated that Bennett Grimes was cut on his left hand, even  
20 though it was his right. The AMR, the medic Robison, said  
21 that it was his right ring finger. She said that she filled  
22 this out just a few minutes after it happened. But  
23 perceptions can vary, things can be different.

24 Excuse me for a minute. I wonder if I could have --  
25 approach and get those.



1 THE COURT: Sure.

2 MR. HILLMAN: Thank you very much. One thing that's  
3 pretty consistent, though, is that Bennett Grimes spent a lot  
4 of time by the entry, that Aneka spent a lot of time by the  
5 kitchen counter, minutes, several minutes that you can hear on  
6 the 9-1-1 call, that you can hear from the testimony of  
7 Stephanie Newman and Aneka Newman. You can hear the  
8 conversation going on in the background in the 9-1-1 call.  
9 Bennett's over here, Aneka is over here in front of the  
10 counter.

11 Aneka says that Bennett left the entry in five to  
12 seven feet, grabbed her, took her back five to seven feet and  
13 then commenced to stab her. Aneka did not say she was  
14 fighting back. Aneka said she was trying to get away, which  
15 makes sense. Stephanie said she went over and tried to pull  
16 Aneka off of Bennett, away from Bennett. Anybody who's seen a  
17 fight, anybody who's been in a fight knows that if you pull  
18 one combatant off the other, the person who's getting pulled  
19 away is pretty much helpless to the other combatant. If two  
20 guys are fighting and someone grabs one of the guys and pulls  
21 him off, that guy's going to get punched. The guy that's  
22 pulled off is going to get punched.

23 Officer Hoffman said that when he entered Aneka was  
24 standing here, Stephanie was standing directly behind her and  
25 Bennett was standing --

1 (Cell phone interruption)

2 MR. HILLMAN: You won't get in as much trouble for  
3 that as I would. And Bennett was standing here. At the  
4 preliminary hearing, Officer Hoffman testified that Bennett  
5 had Aneka in a headlock and was punching her in the head. At  
6 trial, Officer Hoffman said Bennett had Aneka in a headlock  
7 and was stabbing her in what appeared to be the upper left  
8 chest. While these wounds may be consistent with what the  
9 State has alleged, they may just as well be consistent with  
10 two people struggling over a weapon.

11 We talk about 21 stab wounds. There is no medical  
12 evidence to indicate that that knife was ever plunged  
13 completely into her body. None of the stab wounds are that  
14 deep. If you look at the pictures, they look like scrapes and  
15 cuts and pokes that are also consistent with two people  
16 struggling over the weapon. And Aneka said she did struggle  
17 over that weapon. She said she was trying to get away.

18 And the State talks about defensive wounds. Anybody  
19 remember when their brother was going to hit them with a  
20 wiffle ball bat? How did you block it? Did you block it like  
21 this, Bruce Lee style? Or do you put your hands up, cover  
22 your face like this? What's the natural reaction? And yet,  
23 if you look at the pictures, there are no wounds on the hands.  
24 There are no wounds on the fingers. There's no wounds to her  
25 thumb.

1           The State needs to prove beyond a reasonable doubt  
2 that Bennett Grimes entered the building with the intent to do  
3 something. There was no intent. They need to prove that he  
4 intended to kill Aneka. There's no intent to kill Aneka here.  
5 And there's some other questions that still remain.

6           There's the DNA evidence. There's DNA on that knife.  
7 The DNA belongs to Aneka and an unknown male. What kind of a  
8 palette do we have for that knife? What kind of a palette, as  
9 if we're painting a picture, do we have for the DNA to stick  
10 there? We have a freshly washed knife in the dish drainer  
11 around the corner from where Bennett was standing. Julie  
12 Marschner said well, this knife isn't rough enough to hold any  
13 DNA and yet, it had Aneka's, which may have come from the  
14 blood. I think that's what the testimony was. And another  
15 male that is not Bennett Grimes. It's not rough enough to  
16 hold Bennett Grimes' DNA and yet, the Government says Bennett  
17 Grimes held that knife long enough and hard enough to stab  
18 Aneka 21 times. If you're going to leave DNA, you're going to  
19 leave DNA then. And then there's the matter of fingerprints  
20 on the knife. We don't know who they belong to. We don't  
21 know who they belong to.

22           Ladies and gentlemen, State has not met their burden  
23 in this case. Bennett Grimes did not enter that apartment  
24 with any intent other than to try and talk his wife into  
25 letting him come back. He shouldn't have been there. He

1 shouldn't have gone back. But he didn't have any intent.  
2 Since he had no intent when he entered the apartment, doesn't  
3 matter if he picked up the knife later on because there's no  
4 burglary. He did not attempt to kill Aneka Grimes. He did  
5 not have the specific intent to kill anybody here. No DNA  
6 from Bennett Grimes on the knife, fingerprints that belonged  
7 to who knows. Who knows? Find Bennett Grimes not guilty is  
8 what we're asking. Thank you.

9 THE COURT: The State can address the jury in their  
10 rebuttal.

11 STATE'S REBUTTAL CLOSING ARGUMENT

12 MS. BOTEHO: Ladies and gentlemen of the jury, Mr.  
13 Hillman's right. The State does have the burden of proving to  
14 each of you beyond a reasonable doubt that the defendant  
15 committed each and every element of each of the charges that  
16 we have brought against him. But I'll tell you right now that  
17 it is a burden that the State, Mr. Burns and myself, it's a  
18 burden that we welcome. And I remind you that it is a burden  
19 that is met in courtrooms across America every single day.

20 You heard a lot about this reasonable doubt. State  
21 has to prove this, that, this, that beyond a reasonable doubt.  
22 What is that? I'd like you to turn to jury instruction number  
23 five because this tells you exactly what it is. "A reasonable  
24 doubt is one based on reason. It is not mere possible doubt,  
25 but is such a doubt as would govern or control a person in the

1 more weighty affairs of life. If the minds of the jurors,  
2 you, after the comparison and consideration of all the  
3 evidence are in such a condition that you feel an abiding  
4 conviction of the truth of the charge, there is not a  
5 reasonable doubt." There is not. If after looking at the  
6 exhibits, if after hearing all the testimony you have an  
7 abiding conviction of the charges we have brought forth, there  
8 is not a reasonable doubt. Reasonable doubt must be actual.  
9 It is not a possibility or speculation.

10 Now, you're charged with this very, very hard task.  
11 Look at all of the evidence, decide this case. What tools do  
12 you have to make this decision? I'd like you to turn to juror  
13 instruction number 31, towards the back. Instruction number  
14 31 says, "Although you are to consider only the evidence in  
15 this case in reaching a verdict, you must bring to the  
16 consideration of the evidence your everyday common sense and  
17 judgment as reasonable men and women. You're not limited  
18 solely to what you see and hear as the witnesses testify. You  
19 may draw reasonable inferences from the evidence which you  
20 feel are justified in the light of common experience, keeping  
21 in mind that such inferences should not be based on  
22 speculation or guess."

23 You heard a lot of eyewitness testimony in this  
24 particular case. What instruction do you have to guide you in  
25 evaluating that testimony? I ask you to turn your attention

1 to jury instruction number eight. "The credibility of  
2 believability of a witness should be determined by his or her  
3 manner upon the stand, her relationship to the parties, fears,  
4 motives, interests or feelings, opportunity to have observed  
5 the matter to which she or he is testifying, the  
6 reasonableness of the statements and the strengths or  
7 weaknesses of his recollections."

8 Yes, Officer Hoffman, Stephanie Newman and Aneka  
9 Newman all testified for you as eyewitnesses. Yes, some of  
10 their descriptions of what happened kind of varied. But as  
11 Mr. Hillman stated, adrenaline was high. Think about what  
12 Aneka was going through. What were her fears and motivations?  
13 What was it that Aneka, as she was being stabbed 21 times by  
14 her husband, what was she thinking about? Defending herself,  
15 getting out of there. What was her mother thinking about?  
16 Helping her daughter, stopping her daughter from being killed.  
17 What was Officer Hoffman thinking about at that exact moment?  
18 Did he have much time to react, to sit there and take a  
19 snapshot of what exactly he saw? No.

20 Officer Hoffman had just jumped over a balcony,  
21 walked into an apartment, saw the defendant appeared to be  
22 punching his wife. But he wasn't punching her. Officer  
23 Newman sat on the witness stand and told you he had little to  
24 no time to react. What did he do? He tackled the defendant,  
25 shoved the knife away or at least got it out of his hand, and

1 brought the defendant outside. Yes, he drew his weapon. He  
2 absolutely did. He told that the defendant, the defendant,  
3 drop your knife or I'm going to fucking shoot you. That's  
4 exactly what he said. That was his reaction. What was  
5 Officer Hoffman thinking at that time? Was he thinking oh, I  
6 need to remember whether or not the victim was laying down or  
7 standing up? I need to remember their exact positioning. I  
8 need to know exactly what was going on. No. What was he  
9 seeing? Danger, fear, get to it. Stop it. Save her life.  
10 You're going to expect variations in testimony.

11           Using your common sense, I ask you, you expect DNA or  
12 at least Aneka's DNA to be everywhere. She was stabbed 21  
13 times. You saw the bloody pictures. You expect her blood to  
14 be everywhere. Julie Marschner, the DNA analyst, told you  
15 blood DNA can consume touch DNA. What's the big deal about  
16 this anyway? DNA is not going to tell you the obvious. You  
17 cannot test for the obvious. It's called common sense. The  
18 defendant is holding the knife, stabbing her 21 times. Yes,  
19 touch DNA may be there. Well, what is going to consume that?  
20 Aneka's blood. The pictures that you saw her being treated at  
21 the hospital was after the blood or the bleeding had been  
22 stopped. You can believe that she was bleeding all over the  
23 place as her mother held her against her chest trying to stop  
24 those wounds. It wasn't that clean, clean wounds that you  
25 saw.

1           There was testimony or at least an assertion that  
2 there was another person's DNA on it. So what? So what?  
3 What's the claim? Officer Hoffman stabbed her? Some other  
4 person did it? No, that is not it. You have three eyewitness  
5 testimonies that the defendant held that knife and stabbed  
6 her. You cannot test the obvious. The DNA can't tell you  
7 anymore than what you already know.

8           Burglary. Mr. Hillman talked about this. What was  
9 his intent, what was the defendant's intent when he busted his  
10 way through the apartment door? I submit to you, we don't  
11 have the capability of having a recording of what exactly the  
12 defendant was thinking before, during and after this incident.  
13 No, we don't have the ability to then download his thoughts  
14 and then play it for you. That is why you have to use your  
15 common sense. You have to use your experience. You have to  
16 use the facts and circumstances of this case to decide what  
17 did he mean. That's the one thing you're not going to have  
18 direct evidence of. What did he mean?

19           There's a valid protection order in place. He's  
20 lurking around. He busted his way against the wishes of Mrs.  
21 Newman and Aneka. Burglary is with the intent to commit  
22 assault, battery or felony. You could find that maybe when he  
23 walked in he didn't have the intent to try to kill her. But  
24 if he so much had the intent to scare her or her mother, which  
25 is what assault is, or to batter, use unlawful force against



1 Aneka or her mother, such as shoving the door open, he's  
2 guilty of burglary. Burglary is met. It's not that he had to  
3 have intended to kill her when he walked in, it's with the  
4 intent to commit assault, battery or a felony, such as  
5 attempted murder.

6 If you find that he violated that TPO, that he busted  
7 through that door to scare Aneka into taking him back or to  
8 scare them into allowing him in or to batter them by shoving  
9 the door open, he's guilty of burglary.

10 Where was the defendant once he entered the  
11 residence? Where? What kind of movements did he make? Well,  
12 there's a big deal made about how he stood in front of the  
13 door most of the time. That could be true. But the evidence  
14 has shown and the evidence is that at some point the defendant  
15 walked over to that bar area, grabbed a knife, grabbed Aneka  
16 and dragged her back. How do we know that? Again, we don't  
17 have a videotape of this. We can't just press play and say  
18 here, jurors, this is what happened. Look with your own eyes.  
19 What do we have?

20 Remember that blue bag, the blue bag with the  
21 defendant's work schedule? The blue bag that he brought with  
22 him that day. That blue bag was found near the counter. That  
23 blue bag didn't have blood on it. Why is that important?  
24 Well, because all of the stabbing and the bloody mess happened  
25 near the entrance. That blue bag, we submit to you, the

1 defendant dropped during his struggle with Aneka and in his  
2 attempt to grab a knife and Aneka and drag her towards the  
3 front where he could stab her. That's why there's no blood.

4 Now, could it have been kicked? Yes. But the fact  
5 that there's no blood shows that it was kicked from the bar  
6 area towards the front door, if anything. If anything. It's  
7 not the other way around where you have a clean blue bag with  
8 no blood being kicked to the bar area from the front area  
9 where there's blood everywhere. Use your common sense when  
10 you're looking at the evidence. Yes, he stood there. He  
11 stood near the front door blocking their entrance or exits.  
12 But he moved from there.

13 There's an instruction and I'm not going to read it  
14 to you again that makes a difference between motive and an  
15 attempt to kill. Motive is what causes someone to act a  
16 certain way. The State doesn't have to prove motive in this  
17 case. But I submit to you that we've proven it. As Mr. Burns  
18 told you in closing argument, he wasn't getting what he  
19 wanted. He wanted Aneka back; she wanted nothing to do with  
20 him. So he responded in anger. And he stabbed her, he  
21 attacked her. What motivation does Aneka have to engage in a  
22 struggle with the defendant? Aneka got a temporary  
23 restraining order against domestic violence.

24 When the defendant walked in against her will and  
25 against her mother's will, what did Aneka do? She called

1 9-1-1. Ask them to remove the defendant. Aneka did what she  
2 needed to get help. What motivation does she have to engage  
3 in a struggle with the defendant who's bigger, who's stronger  
4 after she had already called the police for help? None.

5 This attempt to kill. Mr. Hillman talked to you  
6 about the attempt murder with a deadly weapon. There are  
7 three different charges. Attempt murder with a deadly weapon,  
8 burglary while in possession of a deadly weapon and also the  
9 battery charge, which has all the different other elements.  
10 The battery, you don't have to have a specific intent to do  
11 anything. It's just you used force against someone, you used  
12 a deadly weapon, it caused substantial bodily harm. And you  
13 saw the substantial bodily harm. Aneka stood in front of you,  
14 took off her cardigan and showed you the scars. The scars  
15 from the cuts, scrapes and pokes, as the defense would call  
16 it. She stood right here, right in front of you and showed it  
17 to you.

18 You decide whether those were just cuts, scrapes and  
19 pokes. What did the defendant intend to do when he picked up  
20 that steak knife and thrust it into her body 21 times? We may  
21 be losing the effect of this 21 times. You've heard it so  
22 many times, you saw the pokes, you saw the reenactments, but  
23 use your common sense. Each time the defendant grabbed that  
24 knife, thrust it into her body, took it out, thrust it, took  
25 it out, thrust it, took it out, what did he mean? What did he

1 mean? What did he mean to do to Aneka?

2           Use your common sense to fill in the blanks. If  
3 Officer Hoffman had not arrived to stop the defendant, if  
4 Officer Hoffman had not walked in at that exact moment in  
5 time, what would have happened to Aneka? I submit to you that  
6 if Officer Hoffman had not walked in at that exact moment in  
7 time, you would be deliberating a murder case. You would have  
8 heard not from a trauma surgeon, but from a coroner. More  
9 than 21 cuts, scrapes and pokes.

10           I told you in opening statement at the very beginning  
11 of this case the fact that Aneka Newman was alive on July  
12 22nd, 2011 at 7:04 p.m. is nothing short of a miracle. The  
13 defendant tried to kill her. He stabbed her 21 times. It  
14 caused her substantial bodily harm and he went into that  
15 apartment with the intent to do something bad to her. Find  
16 him guilty of all the charges.

17           Thank you, Your Honor.

18           THE COURT: Okay. At this time, the clerk's going to  
19 swear the officers of the Court who will take charge of the  
20 jury panel.

21           Okay. The clerk will now swear the officers of the  
22 Court who will take charge of the jury panel.

23                           (Oath to officers given)

24           THE COURT: At this time, ladies and gentlemen, you  
25 are going to be excused to deliberate upon your verdict. When

1 you go back to deliberate upon your verdict you can take your  
2 notes as well as the jury instructions.

3 Mr. Richard Evans, you've been selected to be our  
4 alternate juror, so I'm not going to -- I'm going to let you  
5 go for now. I'm not going to discharge you, but I'm not going  
6 to require you to stay at the courthouse while the jury  
7 deliberates. You haven't been discharged because if for any  
8 reason we need you to come back to help with the jury  
9 deliberations, we need you to be able to come back. So you're  
10 still under the same admonition not to discuss the case with  
11 anyone. Before you go, I'm going to ask that you see the  
12 clerk, Susan, here. She's going to take charge of all of your  
13 notes and your jury instructions. She's also going to get  
14 your phone number so in case we have to call you back. And  
15 I'd just ask that you don't leave the jurisdiction until we  
16 have discharged you. Okay?

17 Thank you very much and the jury is now discharged to  
18 deliberate upon their verdict. Ladies and gentlemen, the  
19 officer is going to take you to deliberate in the back. And  
20 as soon as you get back there we're going to bring lunch back.

21 (Jury recessed at 11:49 a.m.)

22 MR. HILLMAN: One last thing.

23 THE COURT: Sure. Go ahead, Mr. Hillman.

24 MR. HILLMAN: Ms. Hojjat and I were on our way over  
25 here. We got on the elevator downstairs, went down to a lower

1 level, came back up, picked up juror number 11 and rode up in  
2 the elevator with him, but nothing was said.

3 THE COURT: Okay. So it sounds like everyone  
4 complied with the admonition.

5 MR. HILLMAN: Yes, we did.

6 THE COURT: Number 11 didn't even try to talk to you?

7 MR. HILLMAN: No. He just looked at us and we looked  
8 down.

9 THE COURT: Very, very good. Thank you very much for  
10 letting me know. Thank you.

11 (Court recessed at 11:50 a.m. until 2:50 p.m.)

12 (In the presence of the jury.)

13 THE COURT: Do the parties stipulate to the presence  
14 of the jury panel?

15 MS. BOTELHO: Yes, we do, Your Honor.

16 MR. HILLMAN: Yes, Judge.

17 THE COURT: Okay. Has the jury selected a  
18 foreperson?

19 JUROR NO. 12: Yes, Your Honor.

20 THE COURT: Mr. Sanford, have you selected to be the  
21 foreperson?

22 JUROR NO. 12: Yes, Your Honor.

23 THE COURT: Has the jury reached a verdict?

24 JUROR NO. 12: Yes, we have, Your Honor.

25 THE COURT: Okay. Did the Court Marshal bring you in

1 here?

2 JUROR NO. 12: Yes.

3 THE COURT: Okay. Sorry, because he has to get the  
4 verdict form for me.

5 THE MARSHAL: Sorry, Judge.

6 THE COURT: That's okay. Can you just get the  
7 verdict form from Mr. Sanford? The Marshal's going to come  
8 get it. If you'll just present the verdict form to the Court  
9 Marshal, Mr. Sanford. Thank you. Okay.

10 At this time, if the defendant and his attorneys will  
11 please stand and the clerk will read the verdict form out  
12 loud.

13 THE CLERK: District Court, Clark County, Nevada.  
14 The State of Nevada, plaintiff, versus Bennett Grimes,  
15 defendant, Case Number C-11-276163-1, Department 12.

16 Verdict. We the jury in the above entitled case find  
17 the defendant Bennett Grimes as follows:

18 Count One, attempt murder with use of a deadly weapon  
19 in violation of a temporary protective order. Guilty of  
20 attempt murder with use of a deadly weapon in violation of a  
21 temporary protective order.

22 Count Two, burglary while in possession of a deadly  
23 weapon in violation of a temporary protective order. Guilty  
24 of burglary while in possession of a deadly weapon in  
25 violation of a temporary protective order.

1 Count Three, battery with use of a deadly weapon  
2 constituting domestic violence resulting in substantial bodily  
3 harm in violation of a temporary protective order. Guilty of  
4 battery with use of a deadly weapon constituting domestic  
5 violence resulting in substantial bodily harm in violation of  
6 a temporary protective order.

7 Dated this 15th day of October, 2012. Signed by  
8 juror number 12, foreperson.

9 Ladies and gentlemen of the jury, are those your  
10 verdicts as read, so say you one, so say you all?

11 JURORS: Yes.

12 THE COURT: Does either side wish to have the jury  
13 panel polled?

14 MS. BOTEHO: The State does not, Your Honor.

15 MR. HILLMAN: Defense does.

16 THE COURT: Okay. At this time the clerk will poll  
17 the ladies and gentlemen of the jury.

18 THE CLERK: Juror Number 1, are those your verdicts  
19 as read?

20 JUROR NUMBER 1: Yes.

21 THE CLERK: Juror Number 2, are those your verdicts  
22 as read?

23 JUROR NUMBER 2: Yes.

24 THE CLERK: Juror Number 3, are those your verdicts  
25 as read?



1 JUROR NUMBER 3: Yes.

2 THE CLERK: Juror Number 4, are those your verdicts  
3 as read?

4 JUROR NUMBER 4: Yes.

5 THE CLERK: Juror Number 5, are those your verdicts  
6 as read?

7 JUROR NUMBER 5: Yes.

8 THE CLERK: Juror Number 6, are those your verdicts  
9 as read?

10 JUROR NUMBER 6: Yes.

11 THE CLERK: Juror Number 7, are those your verdicts  
12 as read?

13 JUROR NUMBER 7: Yes.

14 THE CLERK: Juror Number 8, are those your verdicts  
15 as read?

16 JUROR NUMBER 8: Yes.

17 THE CLERK: Juror Number 9, are those your verdicts  
18 as read?

19 JUROR NUMBER 9: Yes.

20 THE CLERK: Juror Number 10, are those your verdicts  
21 as read?

22 JUROR NUMBER 10: Yes.

23 THE CLERK: Juror Number 11, are those your verdicts  
24 as read?

25 JUROR NUMBER 11: Yes.

1           THE CLERK: Juror Number 12, are those your verdicts  
2 as read?

3           JUROR NUMBER 12: Yes.

4           THE COURT: At this time, the Clerk will record the  
5 verdict in the official record of the Court. And at this time  
6 -- you can have a seat, thank you. At this time, ladies and  
7 gentlemen, I am going to discharge you from your duty. You  
8 are no longer under the admonition not to discuss this case  
9 with anyone. You're free to discuss this case, your  
10 deliberation and everything that went on in here with anyone,  
11 but you're under no obligation to discuss this case. I do  
12 give the attorneys the opportunity to speak to the jury panel,  
13 but only if that's what you want to do. So when you do get  
14 discharged, you're going to go back to the jury deliberation  
15 room with the Court Marshal, at which time I will give the  
16 attorneys the opportunity to speak to you. But again, you're  
17 under no obligation to speak to any of us.

18           Before I do excuse you, I do want to extend my  
19 gratitude and thanks to you for your willingness to be here,  
20 especially your willingness to come back this week. I know I  
21 speak on behalf of all of us, the attorneys and the Eighth  
22 Judicial Court in thanking you for your willingness to be  
23 here. At this time you are discharged as jurors. Thank you  
24 very much. You're excused.

25           (Jury exits courtroom at 2:56 p.m.)

1           THE COURT: The record will reflect this hearing is  
2 taking place outside the presence of the jury panel. At this  
3 time the defendant's bail will be revoked. He'll be remanded  
4 pending sentencing. The matter will be referred to parole and  
5 probation and it will be set for sentencing.

6           THE CLERK: Sentencing date, December 18th at 8:30.

7           THE COURT: The Court did receive a note from the  
8 jury panel. I did not respond to the note because my only  
9 response would have been read the jury instructions. But it  
10 will be marked as Court's Exhibit next in line. The note, the  
11 content of it was communicated to myself, but I did not  
12 respond to it. And the note was: Does criminal intent have  
13 to be established before entering a structure or can intent  
14 change during the chain of events for the charge of burglary?  
15 I didn't respond to it because my only response would have  
16 been continue to deliberate and look at the instructions.

17           MR. HILLMAN: I think that would have been a correct  
18 response.

19           THE COURT: It will be Court's Exhibit Number 13. Is  
20 there anything else?

21           MS. BOTELHO: No, Your Honor.

22           MR. HILLMAN: No, Judge.

23           THE COURT: Do you want to talk to the jury?

24           MS. BOTELHO: Yes, Your Honor.

25           MS. HOJJAT: Yes, Your Honor.

1 THE COURT: Okay. We'll let you go and you can go  
2 back and chat with the jury.

3 (Court adjourned at 2:58 p.m.)  
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ACKNOWLEDGMENT:

Pursuant to Rule 3C(d) of Nevada Rules of Appellate Procedure, this is a rough draft transcript expeditiously prepared, not proofread, corrected or certified to be an accurate transcript.

A handwritten signature in cursive script, reading "Kimberly Lawson", is written over a horizontal line.

KIMBERLY LAWSON  
TRANSCRIBER

UNCERTIFIED ROUGH DRAFT

1  
2 INST

3 ORIGINAL

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

4 OCT 15 2012

5 BY,   
6 SUSAN JOVANOVIH, DEPUTY

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

C-11-276163-1  
INST  
Instructions to the Jury  
1982980



9 THE STATE OF NEVADA,

10 Plaintiff,

11 -VS-

12 BENNETT GRIMES,

13 Defendant.

CASE NO: C-11-276163-1

DEPT NO: XII

14 INSTRUCTIONS TO THE JURY (INSTRUCTION NO. I)

15 MEMBERS OF THE JURY:

16 It is now my duty as judge to instruct you in the law that applies to  
17 this case. It is your duty as jurors to follow these instructions and to apply  
18 the rules of law to the facts as you find them from the evidence.

19 You must not be concerned with the wisdom of any rule of law  
20 stated in these instructions. Regardless of any opinion you may have as to  
21 what the law ought to be, it would be a violation of your oath to base a  
22 verdict upon any other view of the law than that given in the instructions of  
23 the Court.  
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MICHELLE LEAVITT  
DISTRICT JUDGE

DEPARTMENT TWELVE  
LAS VEGAS, NEVADA 89155

AA 0739 135

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

An Information is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.

In this case, it is charged in a Third Amended Information that on or about the 22nd day of July, 2011, the Defendant committed the offenses of ATTEMPT MURDER WITH USE OF A DEADLY WEAPON IN VIOLATION OF A TEMPORARY PROTECTIVE ORDER (Felony - NRS 200.010, 200.030, 193.330, 193.165, 193.166); BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON IN VIOLATION OF A TEMPORARY PROTECTIVE ORDER (Felony - NRS 205.060, 193.166) and BATTERY WITH USE OF A DEADLY WEAPON CONSTITUTING DOMESTIC VIOLENCE RESULTING IN SUBSTANTIAL BODILY HARM IN VIOLATION OF A TEMPORARY PROTECTIVE ORDER (Felony - NRS 200.481.2e; 193.166), to-wit:

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

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

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

did then and there willfully, unlawfully, and feloniously enter, and thereafter gain possession of a deadly weapon, to-wit: a knife, with intent to commit assault and/or battery and/or to commit substantial bodily harm and/or murder, that certain building occupied by ANEKA GRIMES, located at 9325 West Desert Inn, Apt. 173, Las Vegas, Clark County, Nevada, in violation of a Temporary Order for Protection against Domestic Violence issued by the District Court, Family Division, of the State of Nevada in Case No. T-11-134754-T.



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

4 did then and there willfully, unlawfully, and feloniously use force or violence upon  
5 the person of his spouse, former spouse, or any other person to whom he is related by blood  
6 or marriage, a person with whom he is or was actually residing, a person with whom he has  
7 had or is having a dating relationship, a person with whom he has a child in common, the  
8 minor child of any of those persons or his minor child, to-wit: ANEKA GRIMES, with use  
9 of a deadly weapon, to-wit: a knife, by stabbing at and into the body of the said ANEKA  
10 GRIMES with said knife, resulting in substantial bodily harm to the said ANEKA GRIMES,  
11 in violation of a Temporary Order for Protection against Domestic Violence issued by the  
12 District Court, Family Division, of the State of Nevada in Case No. T-11-134754-T.

13 It is the duty of the jury to apply the rules of law contained in these instructions to the  
14 facts of the case and determine whether or not the Defendant is guilty of one or more of the  
15 offenses charged.  
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To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

1  
2 The Defendant is presumed innocent until the contrary is proved. This presumption  
3 places upon the State the burden of proving beyond a reasonable doubt every material  
4 element of the crime charged and that the Defendant is the person who committed the  
5 offense.

6 A reasonable doubt is one based on reason. It is not mere possible doubt but is such a  
7 doubt as would govern or control a person in the more weighty affairs of life. If the minds of  
8 the jurors, after the entire comparison and consideration of all the evidence, are in such a  
9 condition that they can say they feel an abiding conviction of the truth of the charge, there is  
10 not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or  
11 speculation.

12 If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a  
13 verdict of not guilty.  
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INSTRUCTION NO. 6

You are here to determine whether the State of Nevada has met its burden of proof as to the Defendant from the evidence in the case. You are not called upon to return a verdict as to any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more persons are also guilty.

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence; direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the Defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his opinion as to any matter in which he is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

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The elements of an attempt to commit a crime are:

- 1) the specific intent to commit the crime;
- 2) performance of some act towards its commission; and
- 3) failure to consummate its commission.



INSTRUCTION NO. 11

Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill.

INSTRUCTION NO. 12

Express malice is that deliberate intention unlawfully to take away the life of a human, which is manifested by external circumstances capable of proof.

Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention, but denotes rather an unlawful purpose and design in contradistinction to accident and mischance.

INSTRUCTION NO. 14

The intention to kill may be ascertained or deduced from all the facts and circumstances, such as the use of a weapon calculated to produce death, the manner of its use, and the attendant circumstances characterizing the act.

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2 If you find that the State of Nevada did not prove beyond a reasonable doubt that the  
3 Defendant had the specific intent to murder Aneka Grimes, you must find him not guilty of  
4 Count I.  
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2 "Deadly Weapon" means:

3 (a) Any instrument which, if used in the ordinary manner contemplated by its design and  
4 construction, will or is likely to cause substantial bodily harm or death; or

5 (b) Any weapon, device, instrument, material or substance which, under the  
6 circumstances in which it is used, attempted to be used or threatened to be used, is readily  
7 capable of causing substantial bodily harm or death.  
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If you find beyond a reasonable doubt that the defendant committed Attempt Murder with the Use of a Deadly Weapon, then you are instructed that the verdict of Attempt Murder with the Use of a Deadly Weapon is the appropriate verdict.

If, however, you find that a deadly weapon was not used in the commission of the Attempt Murder, but you do find that an Attempt Murder was committed, then you are instructed that the verdict of Attempt Murder without the Use of a Deadly Weapon is the appropriate verdict.

You are instructed that you cannot return a verdict of both Attempt Murder with the Use of a Deadly Weapon and Attempt Murder without the Use of a Deadly Weapon.

INSTRUCTION NO. 18

Every person who enters any apartment or house, with the intent to commit assault or battery on any person and/or any felony therein is guilty of Burglary.



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“Assault” means:

- (1) Unlawfully attempting to use physical force against another person; or
- (2) Intentionally placing another person in reasonable apprehension of immediate bodily harm.

INSTRUCTION NO. 20

It is not necessary that the State prove the defendant actually committed an assault or battery and/or a felony in the apartment or home after he entered in order for you to find him guilty of burglary. The gist of the crime of burglary is the unlawful entry with criminal intent. Therefore, a burglary was committed if the defendant entered the building with the intent to commit assault or battery and/or a felony regardless of whether or not that crime occurred.

INSTRUCTION NO. 21

The intent with which entry was made is a question of fact which may be inferred from the defendant's conduct and all other circumstances disclosed by the evidence.

INSTRUCTION NO. 22

Every person who unlawfully breaks and enters or unlawfully enters any apartment or house may reasonably be inferred to have broken and entered or entered it with intent to commit grand or petit larceny, assault or battery on any person or a felony therein, unless the unlawful breaking and entering or unlawful entry is explained by evidence satisfactory to the jury to have been made without criminal intent.

INSTRUCTION NO. 23

Every person who, in the commission of a burglary, commits any other crime, may be prosecuted for each crime separately.

Every person who commits the crime of burglary, who has in his possession or gains possession of any firearm or deadly weapon at any time during the commission of the crime, at any time before leaving the structure, or upon leaving the structure, is guilty of burglary while in possession of a weapon.

If you find the defendant guilty of Burglary, you must also determine whether or not a deadly weapon was used in the commission of this crime.

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If you find that the State did not prove beyond a reasonable doubt that Bennett  
Grimes entered the apartment with the intent to commit an assault/battery or felony therein,  
you must find him not guilty of Count II.



“Battery” means any willful and unlawful use of force or violence upon the person of another.

Battery Constituting Domestic Violence occurs when an individual commits a battery upon his spouse, former spouse, any other person to whom he is related by blood or marriage, a person with whom he is or was actually residing, a person with whom he has had or is having a dating relationship, or a person with whom he has a child in common.

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“Substantial Bodily Harm” means:

1. Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or
2. Prolonged physical pain.

INSTRUCTION NO. 30

"Prolonged Physical Pain" necessarily encompasses some physical suffering or injury that lasted longer than the pain immediately resulting from the wrongful act.

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2 Although you are to consider only the evidence in the case in reaching a verdict, you  
3 must bring to the consideration of the evidence your everyday common sense and judgment  
4 as reasonable men and women. Thus, you are not limited solely to what you see and hear as  
5 the witnesses testify. You may draw reasonable inferences from the evidence which you feel  
6 are justified in the light of common experience, keeping in mind that such inferences should  
7 not be based on speculation or guess.

8 A verdict may never be influenced by sympathy, prejudice or public opinion. Your  
9 decision should be the product of sincere judgment and sound discretion in accordance with  
10 these rules of law.  
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In your deliberation you may not discuss or consider the subject of punishment, as that is a matter which lies solely with the court. Your duty is confined to the determination of whether the State of Nevada has met its burden of proof.

1  
2 When you retire to consider your verdict, you must select one of your member to act  
3 as foreperson who will preside over your deliberation and will be your spokesperson here in  
4 court.

5 During your deliberation, you will have all the exhibits which were admitted into  
6 evidence, these written instructions and forms of verdict which have been prepared for your  
7 convenience.

8 Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it  
9 signed and dated by your foreperson and then return with it to this room.

INSTRUCTION NO. 34

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

GIVEN:

  
DISTRICT JUDGE



ORIGINAL

FILED IN OPEN COURT

STEVEN D. GRIERSON  
CLERK OF THE COURT

OCT 15 2012

DISTRICT COURT  
CLARK COUNTY, NEVADA

BY:   
SUSAN JOVANOVIICH, DEPUTY

1 VER

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3 THE STATE OF NEVADA,

4 Plaintiff,

5 -VS-

6 BENNETT GRIMES,

7 Defendant.

CASE NO: C-11-276163-1

DEPT NO: XII

C-11-276163-1

VER  
Verdict  
1983651



8  
9 VERDICT

10 We, the jury in the above entitled case, find the Defendant BENNETT GRIMES, as  
11 follows:

12 COUNT 1 – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON IN  
13 VIOLATION OF A TEMPORARY PROTECTIVE ORDER

14 (please check the appropriate box, select only one)

15 ☒ Guilty of Attempt Murder with Use of a Deadly Weapon in Violation of  
16 a Temporary Protective Order

17 ☐ Guilty of Attempt Murder in Violation of a Temporary Protective Order

18 ☐ Not Guilty

19 We, the jury in the above entitled case, find the Defendant BENNETT GRIMES, as  
20 follows:

21 COUNT 2 – BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON IN  
22 VIOLATION OF A TEMPORARY PROTECTIVE ORDER

23 (please check the appropriate box, select only one)

24 ☒ Guilty of Burglary While in Possession of a Deadly Weapon in  
25 Violation of a Temporary Protective Order

26 ☐ Guilty of Burglary in Violation of a Temporary Protective Order

27 ☐ Not Guilty

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AA 0774

1 We, the jury in the above entitled case, find the Defendant BENNETT GRIMES, as  
2 follows:

3 **COUNT 3** – BATTERY WITH USE OF A DEADLY WEAPON CONSTITUTING  
4 DOMESTIC VIOLENCE RESULTING IN SUBSTANTIAL BODILY  
5 HARM IN VIOLATION OF A TEMPORARY PROTECTIVE ORDER

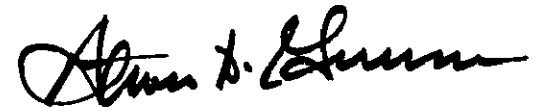
6 *(please check the appropriate box, select only one)*

- 7 ☒ Guilty of Battery with Use of a Deadly Weapon Constituting Domestic  
8 Violence Resulting in Substantial Bodily Harm in Violation of a  
9 Temporary Protective Order
- 10 ☐ Guilty of Battery Domestic Violence Resulting in Substantial Bodily Harm  
11 in Violation of a Temporary Protective Order
- 12 ☐ Guilty of Battery Domestic Violence with Use of a Deadly Weapon in  
13 Violation of a Temporary Protective Order
- 14 ☐ Guilty of Battery Domestic Violence in Violation of a Temporary  
15 Protective Order
- 16 ☐ Guilty of Battery in Violation of a Temporary Protective Order
- 17 ☐ Not Guilty

18  
19 DATED this 15<sup>th</sup> day of October, 2012

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22 FOREPERSON

23 Kirk Sanford  
24 Jury #12  
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CLERK OF THE COURT

1 **NOTC**  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 AGNES BOTELHO  
6 Deputy District Attorney  
7 Nevada Bar #011064  
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

Defendant.

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

15 NOTICE OF INTENT TO SEEK PUNISHMENT AS  
16 A HABITUAL CRIMINAL

17 TO: BENNETT GRIMES, Defendant; and

18 TO: PUBLIC DEFENDER, Counsel of Record:

19 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that pursuant to NRS  
20 207.010, the STATE OF NEVADA will seek punishment of Defendant BENNETT  
21 GRIMES, as an habitual criminal as said Defendant has been found guilty of ATTEMPT  
22 MURDER WITH USE OF A DEADLY WEAPON IN VIOLATION OF A TEMPORARY  
23 PROTECTIVE ORDER (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165,  
24 193.166); BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON IN  
25 VIOLATION OF A TEMPORARY PROTECTIVE ORDER (Category B Felony - NRS  
26 205.060, 193.166) and BATTERY WITH USE OF A DEADLY WEAPON  
27 CONSTITUTING DOMESTIC VIOLENCE RESULTING IN SUBSTANTIAL BODILY

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1 HARM IN VIOLATION OF A TEMPORARY PROTECTIVE ORDER (Category B Felony  
2 - NRS 200.481.2e, 193.166): in the above-entitled action.

3 That since the Defendant has been found guilty of ATTEMPT MURDER WITH USE  
4 OF A DEADLY WEAPON IN VIOLATION OF A TEMPORARY PROTECTIVE ORDER  
5 (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165, 193.166); BURGLARY  
6 WHILE IN POSSESSION OF A DEADLY WEAPON IN VIOLATION OF A  
7 TEMPORARY PROTECTIVE ORDER (Category B Felony - NRS 205.060, 193.166) and  
8 BATTERY WITH USE OF A DEADLY WEAPON CONSTITUTING DOMESTIC  
9 VIOLENCE RESULTING IN SUBSTANTIAL BODILY HARM IN VIOLATION OF A  
10 TEMPORARY PROTECTIVE ORDER (Category B Felony - NRS 200.481.2e,  
11 193.166),the STATE OF NEVADA will ask the court to sentence the Defendant as an  
12 Habitual Criminal based upon the following felony convictions, to-wit:

13 1. That in 2000, the Defendant was convicted in the State of California for the  
14 crime of INFLICT CORPORAL INJURY ON SPOUSE, in Case No. FSB026485.

15 2. That in 2004, the Defendant was convicted in the State of California the for  
16 the crime of INFLICT CORPORAL INJURY ON SPOUSE, in Case No. FSB044772.

17  
18 STEVEN B. WOLFSON  
19 Clark County District Attorney  
Nevada Bar #001565

20  
21 BY /s/ Agnes Botelho  
22 AGNES BOTELHO  
23 Deputy District Attorney  
Nevada Bar #011064

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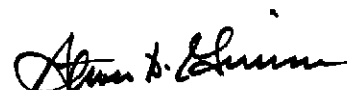
CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of State's Notice of Intent to Seek Punishment as a habitual Criminal, was made this 22<sup>nd</sup> day of October, 2012, by Electronic Filing to:

PUBLIC DEFENDER  
E-mail Address: pdclerk@ClarkCountyNV.gov

By: /s/ D. Jason  
Secretary for the District Attorney's Office

djj/L-2



CLERK OF THE COURT

1 RTRAN

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5 THE STATE OF NEVADA,

6 Plaintiff,

7 vs.

8 BENNETT GRIMES,

9 Defendant.

CASE NO. C276163

DEPT. NO. XII

10  
11 BEFORE THE HONORABLE DAVID BARKER, DISTRICT COURT JUDGE

12 TUESDAY, DECEMBER 18, 2012

13 **ROUGH DRAFT**  
14 **RECORDER'S TRANSCRIPT OF SENTENCING**

15  
16  
17  
18  
19 APPEARANCES:

20 For the State:

AGNES M. BOTELHO  
HAGAR TRIPPIEDI  
Deputies District Attorney

22 For the Defendant:

LAUREN R. DIEFENBACH  
Deputies Public Defender

24  
25 RECORDED BY: KERRY ESPARZA, COURT RECORDER

1 LAS VEGAS, NEVADA, TUESDAY, DECEMBER 18, 2012, 8:48 A.M.

2 THE COURT: This is C276163, State of Nevada versus Bennett Grimes.  
3 Record should reflect the presence of Mr. Grimes in custody with counsel,  
4 representative of the State. This is time set sentencing. My notes reflect this is  
5 sentencing as a consequence of the jury verdict from October 15, 2012, notes of the  
6 court staff reflects that defense was going to be requesting a continuance until  
7 12-20, based upon the nature of the allegation, the fact that Judge Leavitt heard this  
8 trial, frankly, my inclination would be to pass it to a time when she can address the  
9 sentencing components here because she knows the case and she has a unique  
10 insight in that effort.

11 MS. DIEFENBACH: We would agree, Your Honor. We did not -- we were not  
12 aware that Judge Leavitt was not going to be here on Thursday the 20<sup>th</sup>. That's why  
13 we were going to ask for that date. But whatever date that she's here, we may need  
14 to check -- this is Mr. Hillman's case, he's on a different team. He does the outers  
15 now.

16 THE COURT: Okay.

17 MS. DIEFENBACH: And so, and it was not my case. Also Ms. Hojjat did it  
18 with him. So, we can set it for a date in early January and hope if there's a problem  
19 we would put it back on.

20 THE COURT: I think in talking with the JEA for the Judge, that she may,  
21 we're going to head towards the first week of February, frankly.

22 MS. DIEFENBACH: Oh, really? All right. So it will be the first week of  
23 February.

24 THE COURT: Now, I note also, State has filed a witness notification of oral  
25 statement; is that witness present?

1 MS. TRIPPIEDI: Your Honor, this is actually Agnes Botelho was going to be  
2 here to argue this case because she's the one that did the trial.

3 THE COURT: Okay.

4 MS. TRIPPIEDI: I can definitely get that February date for her, but if you don't  
5 mind just trailing it 'til the end and then we can just make sure that the date that you  
6 give is --

7 THE COURT: That's fine, we'll --

8 MS. TRIPPIEDI: -- a date that is fine for her.

9 THE COURT: -- find a date that works for all parties.

10 Mr. Grimes, you understand what's happening today?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: All right. Very good, we'll trail, we can get everybody in the  
13 room that we need.

14 MS. DIEFENBACH: Very good, thank you, Your Honor.

15 [Proceeding trailed until 10:08 a.m.]

16 THE COURT: All right. This is C276163, State of Nevada versus  
17 Bennett Grimes. The record should reflect the presence of Mr. Grimes in custody;  
18 representative of the State, Botelho, Ms. Botelho; Ms. Diefenbach on behalf of  
19 Mr. Hillman. This is the time set for sentencing. Minutes should reflect parties,  
20 sidebar have indicated that the -- now Ms. Botelho's in the room, she's indicating  
21 that there are victim impact statements that the State wishes to present.

22 MS. BOTELHO: Yes.

23 THE COURT: Although we weren't really clear on that before, that because  
24 this is a jury trial and Judge Leavitt has heard the trial and the allegations are  
25 serious -- of a serious nature and the victim impact has flown in to participate, that



1 the idea is to have that victim impact in JAVS, take a video, basically JAVS capture  
2 of that, that Judge Leavitt will have the opportunity to review that as a component of  
3 the sentence effort that will happen on the first of February so they don't have to  
4 return, but that important information can be preserved. Is that where we're  
5 headed?

6 MS. BOTELHO: Yes, Your Honor.

7 THE COURT: Does everybody agree?

8 MS. DIEFENBACH: So it's going to be done and put on JAVS, what -- is that  
9 still on December 20<sup>th</sup>?

10 MS. BOTELHO: Today.

11 THE COURT: No, the December 20<sup>th</sup> date --

12 MS. DIEFENBACH: Today?

13 THE COURT: -- is not a function. I think -- are these folks the victim impact;  
14 is that correct?

15 MS. BOTELHO: Yes, Your Honor.

16 THE COURT: For the record, could you state who these individuals are?

17 MS. BOTELHO: Yes, Your Honor. I have Earl Newman, Anika Grimes --

18 [Colloquy between Ms. Botelho and members of the audience]

19 MS. BOTELHO: -- it's actually just going to be Mr. Earl Grimes, giving a  
20 victim -- oh, I'm sorry, Mr. Earl --

21 THE COURT: Mr. Newman? Earl Newman is the one that's identified by way  
22 of notification.

23 MS. BOTELHO: Yes.

24 THE COURT: So you've met that statutory notice requirement.

25 MS. BOTELHO: Yes.

1 THE COURT: So Mr. Newman is going to give that impact.

2 Officer, I'm going to need -- because I want to do a capture off the  
3 witness stand. So we'll present that information and then set a date in early  
4 February to move forward for the totality of the sentence hearing; fair enough?

5 MS. BOTELHO: Yes, Your Honor.

6 THE COURT: All right, Ms. Diefenbach?

7 MS. DIEFENBACH: Yes, that is -- that is my understanding as well,  
8 Your Honor.

9 THE COURT: All right.

10 THE DEFENDANT: What's the reason for a victim impact?

11 THE COURT: Under Nevada law, a victim or a family member as identified is  
12 permitted to address the Court and to offer what's called classic victim impact, how  
13 the offense has impacted the family and they, under law they get to go last. Okay.  
14 You'll get an opportunity, Mr. Grimes, to address the Court too, and offer information  
15 in mitigation of sentence before the judge reviews this information. I'm sure she'll  
16 follow the rules or whoever the sentencing judge is. I would hope it would be  
17 Judge Leavitt because she heard the trial. I don't know the case. I hear lots of  
18 trials. And there's a lot of insight that a judge draws as a function of listening to  
19 witnesses testify. You understand that?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: All right. Let's put the witness under oath, please.

22 **EARL LAWRENCE NEWMAN,**

23 [having been called as a victim witness and first duly sworn, testified as follows:]

24 THE CLERK: Thank you, please be seated. And could you please state your  
25 full name spelling your first and last name for the record?

1 THE WITNESS: Okay. My name is Earl Lawrence Newman, first name  
2 spelled Earl, E-A-R-L, last name Newman, N-E-W-M-A-N.

3 THE COURT: Mr. Newman, what would you like Judge Leavitt to  
4 understand?

5 THE WITNESS: Well, I just have a impact statement that I'd like to read.

6 THE COURT: How ever you wish proceed, yes.

7 THE WITNESS: Okay. Thank you. Thank you, Your Honor.

8 I speak today on behalf of my daughter, Anika, and my entire family and  
9 would like to thank you for giving us this opportunity to share the emotional impact  
10 that this horrific act of selfishness has had on all of us, in particular the emotional  
11 stress and anxiety that Bennett Grimes placed on my daughter, Anika.

12 I myself, up until this incident, have never been a victim of violent crime,  
13 and I can only hope that my family or anyone else in this courtroom will never have  
14 to experience this sort of pain in their life either. Acts such as this make us all  
15 victims either directly or indirectly. My daughter, Anika, will always have the  
16 unfortunate scars and memory of this violent act etched in her mind forever. Going  
17 forward, her life will change and she will, without a doubt, move on to better things.  
18 But the marks on her skin will never diminish and will always be a constant reminder  
19 how close she came to having her life ended. Bennett, on the other hand, only  
20 ended up with a small cut on his hand. It just does not seem fair.

21 The vicious and potentially deadly attack on Anika at the hands of  
22 Bennett Grimes did not have to happen. He could have been a true man and  
23 recognized that his relationship with Anika was over. He could have moved on,  
24 changed his life and found someone else. He knew he was not supposed to be at  
25 that apartment. He knew he was not supposed to have any contact with my

1 daughter, Anika. He knew that she had a restraining order against him, but instead  
2 he chose to ignore all of that and lurk in the shadows waiting for his chance to do  
3 harm. It is truly sad to see such irresponsible, angry, and aggressive behavior by  
4 someone who claims to be an adult.

5           Sadly, Your Honor, there is one other victim to this tragedy, and that's  
6 my wife, Stephanie. To have to witness her own flesh and blood attacked in such a  
7 horrible fashion is more than any mother should have to see or endure. And then in  
8 the moments immediately after her attack to see your daughter bleeding profusely  
9 from so many places, not knowing if any of her over 20 stabs wounds would be fatal,  
10 to have your clothing soaked with your child's blood, to be inches away from  
11 potentially being stabbed yourself is more than any mother should have to  
12 comprehend. This too did not have to happen if Bennett had been a real man, a  
13 stand-up man, a man of honor and adhere to the guidelines of the restraining order.  
14 He chose not to be any of these things and so today here we are.

15           The anguish and worry that we had to endure in the days, weeks, and  
16 months following the attack were unbearable. We wondered if Anika would regain  
17 the use of her hand and her arm. More importantly, we wondered how she would  
18 ever recover mentally. There were many days of tears, depression, followed by  
19 fear, anger, and resentment.

20           In the days and weeks leading up to these proceedings, my daughter  
21 was so fearful that Bennett would some how get out of custody and come back to  
22 harm her. She stressed about what would be the outcome of the court trial, we all  
23 did. Would he figure out a way to beat the charges against him and be found not  
24 guilty was almost as bad as the attack itself. If myself have one regret is that I did  
25 not do more to warn and protect my daughter from the unstable behavior of Bennett

1 that I had witnessed and been made aware of in the past few years.

2 In closing, Your Honor, we are not the type of people to seek  
3 vengeance or to decide what the punishment should be, we leave that up to you. I  
4 would like to say that we are forgiving but not forgetting. The jury has spoken and  
5 they made their voices heard. We now leave our trust and faith in your just and  
6 capable hands to administer the appropriate punishment. We want him to  
7 understand that not only did he hurt our family, he hurt his family as well.

8 And once again, thank you for your time and for allowing me this  
9 opportunity to present this emotional impact that this horrific crime has had on my  
10 daughter, my wife, and my entire family. Thank you.

11 THE COURT: Are there any questions, Ms. Botelho?

12 MS. BOTELHO: None, from the State, Your Honor.

13 THE COURT: Ms. Diefenbach?

14 MS. DIEFENBACH: No, Your Honor.

15 THE COURT: Thank you, Mr. Newman, please step down.

16 All right, consistent with the discussion prior to Mr. Newman's victim  
17 impact, we're going to set this for sentencing hearing the first week of February.

18 THE COURT CLERK: That'll be February 7<sup>th</sup> at 8:30.

19 MS. BOTELHO: Thank you, Your Honor.

20 THE COURT: Anything else either side?

21 MS. DIEFENBACH: No, Your Honor.

22 MS. BOTELHO: No, thank you, Your Honor.

23 ///

24 ///

25 ///

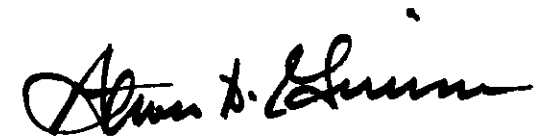
1 PROCEEDING CONCLUDED AT 10:15 A.M.

2 ATTEST: Pursuant to Rule 3C(9) of the Nevada Rules of Appellate Procedure, I  
3 acknowledge that this is a rough draft transcript, expeditiously prepared, not  
4 proofread, corrected, or certified to be an accurate transcript.

5 

6 SARA RICHARDSON

7 Court Recorder/Transcriber  
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CLERK OF THE COURT

RTRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BENNETT GRIMES,

Defendant.

CASE NO. C276163

DEPT. XII

BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE

THURSDAY, FEBRUARY 7, 2013

**TRANSCRIPT OF PROCEEDINGS  
SENTENCING**

APPEARANCES:

For the State:

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

For the Defendant:

NADIA HOJJAT, ESQ.  
Deputy Public Defender

RECORDED BY: KERRY ESPARZA, COURT RECORDER

1 THURSDAY, FEBRUARY 7, 2013 AT 9:33 A.M.

2  
3 THE COURT: State of Nevada v Bennett Grimes, C276163. He's present,  
4 he's in custody. This is the date and time set for entry of judgment, imposition of  
5 sentencing.

6 Mr. Grimes, any legal cause or reason why judgment should not be  
7 pronounced against you at this time?

8 MS. HOJJAT: Your Honor, very briefly, we're not asking for a continuance,  
9 but I did just want to note for the record that the PSI at one point is recommending  
10 large habitual treatment and Mr. Grimes is not eligible for large habitual treatment.

11 THE COURT: Is the State seeking --

12 MS. BOTELHO: No, we're not, Your Honor.

13 THE COURT: You're not seeking to habitualize him at all?

14 MS. BOTELHO: We are seeking for a habitual sentence, but under the small.

15 THE COURT: Under the small. Okay.

16 MS. HOJJAT: And so we just wanted to note for the record that the PSI was  
17 incorrect in suggesting large habitual, he's not eligible for large habitual treatment.  
18 It was my understanding the State is not seeking large habitual.

19 THE COURT: Okay. That's fine.

20 MS. BOTELHO: That's true.

21 MS. HOJJAT: And then other than that, I just wanted to inquire whether the  
22 Court had received the letters. I believe Mr. Hillman was going to send to the Court  
23 the support letters.

24 THE COURT: Uh-huh.

25 MS. HOJJAT: In that case, no legal cause or reason.



1 THE COURT: Well, let me just make sure they're the ones you think they are.  
2 Uh-huh. Yep.

3 MS. HOJJAT: We're ready to proceed, Your Honor.

4 THE DEFENDANT: Bailiff, the statement form.

5 THE COURT: I'm sorry, Mr. Grimes?

6 THE DEFENDANT: I was trying to hand you a statement.

7 THE COURT: Sure. You can hand it to the -- you can hand it to the CO or  
8 the court marshal and present it to the Court.

9 Okay. So Mr. Grimes, any legal cause or reason -- thank you, thank  
10 you very much -- why judgment should not be pronounced against you at this time?

11 THE DEFENDANT: No, I don't. But I was also aware that a Prop 36 Program  
12 was in effect now.

13 THE COURT: What?

14 THE DEFENDANT: Prop 36 Program. The judge that was here, he --

15 THE COURT: Any reason why judgment should not be --

16 THE DEFENDANT: No, ma'am.

17 THE COURT: -- pronounced against you at this time?

18 THE DEFENDANT: No, ma'am.

19 THE COURT: What do you think Prop 6 Program is?

20 THE DEFENDANT: 36. He had mentioned it that it was in effect. It's a  
21 situation where the inmate or whatever can go to a program as far as like an  
22 in-house or halfway program or something.

23 THE COURT: I reviewed his sentencing with Judge Barker. I don't recall  
24 anything even remotely close.

25 MS. BOTELHO: I don't either.

1 THE COURT: That being mentioned.

2 THE DEFENDANT: He had mentioned Prop 36 was in effect in the state,  
3 that's what he had mentioned. So.

4 THE COURT: Prop 36.

5 THE DEFENDANT: That's what he had mentioned.

6 THE COURT: Well, in Nevada we don't call it your -- I mean, in California,  
7 they call it propositions, in Nevada we don't refer to --

8 THE DEFENDANT: That's -- that's what he stated as, what his word, it was  
9 proposition.

10 THE COURT: I reviewed the sentencing and I don't recall anything even  
11 remotely close to that.

12 THE DEFENDANT: He didn't saying during my standing, he said it during  
13 someone else's standing that he had mentioned that it was in effect.

14 [Colloquy between the Court and the Court Clerk]

15 THE COURT: Okay.

16 THE DEFENDANT: By the way, I was just seeking if that was possible.

17 THE COURT: He said it during another case, had nothing to do with you.

18 THE DEFENDANT: I know. I was -- he said that it was in effect so I was  
19 just --

20 THE COURT: Any reason --

21 THE DEFENDANT: -- mentioning if it was available to me as well.

22 THE COURT: Any reason why we shouldn't proceed with your sentencing  
23 today?

24 THE DEFENDANT: No, Your Honor.

25 THE COURT: Okay. Thank you, sir.

1 Does the State wish -- by virtue of the jury verdict return in this matter, I  
2 hereby adjudicate you guilty of Count 1, attempt murder with use of a deadly  
3 weapon in violation of temporary protective order.

4 Count 2, burglary while in possession of a firearm in violation of  
5 temporary protective order.

6 Count 3, battery with use of a deadly weapon constituting in domestic  
7 violence resulting in substantial bodily harm in violation of a temporary protective  
8 order.

9 Does the State wish to address the Court?

10 MS. BOTELHO: Yes, Your Honor. The State's not going to rehash the facts  
11 and circumstances of this particular case, you presided over the trial and so very  
12 confident in your recollection of what occurred and what the testimony and evidence  
13 showed to be.

14 I will say this, though, that the Defendant's conduct constituted a vicious  
15 heinous attack against Anika in front of her mother. Anika is present here today with  
16 her family. And I can also tell the Court this, that Anika would be dead had it not  
17 been for the heroic actions of police officers who saved her life that day who  
18 responded and had to pretty much tackle this knife out of the Defendant's hand as  
19 he was going for his 22<sup>nd</sup> stab.

20 The Defendant has two prior DV convictions from California, Your  
21 Honor, from 2000 and also 2004. I will approach in just a minute and present the  
22 Court with the certified judgments of conviction. I will note there's a Post-it on the  
23 2000 conviction paperwork. I have that noted because the Defendant used a knife  
24 in that particular case. So he has this propensity for not only using violence, but  
25 also using deadly weapons.

1           He's 33 years old and in the 33 years that he has been around, he's  
2 already left two victims -- actually, three victims and just a trail of violence that's  
3 never -- that can never be undone. I read his Presentence Investigation interview  
4 and what really struck me was that given the severity of this particular crime, he  
5 minimized the severity of his offense. In fact, I'll quote him on page 7, he says: I  
6 think people are taking this case more serious than it was.

7           And despite being convicted by a jury and the state of the evidence,  
8 what's missing from this PSI is: And I'm sorry, I shouldn't have done it, I will never  
9 do it again. None of that is here. In fact, he fails to acknowledge any kind of  
10 responsibility for his conduct. And that just shows to us, Your Honor, that he  
11 constitutes an ongoing threat to women, particularly Anika. He hasn't shown any  
12 signs of change. Conviction from 2000, 2004, and now from 2012. He is going to  
13 keep victimizing women. And the next victim, if he's released, he has this  
14 opportunity, may not be as lucky as Anika was.

15           For these reasons, Your Honor, the State is recommending the  
16 following sentence: As to Count 1, the attempt murder, the State is recommending  
17 a sentence of 8 to 20 years. We would ask that for the deadly weapon  
18 enhancement, that he be sentenced to 8 to 20 years consecutive.

19           THE COURT: I think you can only choose one enhancement. I think if you're  
20 asking for the small habitual -- I mean --

21           MS. BOTELHO: We're not asking for habitual on this particular charge --

22           THE COURT: Oh, okay.

23           MS. BOTELHO: -- or on this particular count.

24           THE COURT: I'm sorry.

25           MS. BOTELHO: Yes.

1 THE COURT: So on this particular count, you're not asking him to be  
2 habitualized?

3 MS. BOTELHO: No, Your Honor. We're asking for an 8 to 20 on the attempt  
4 murder, plus a consecutive 8 to 20 on the deadly weapon enhancement. And the  
5 reason for the 8 to 20 being justified in the enhancement is that you heard the  
6 testimony, he stabbed her 21 times barely missing, you know, arteries that really  
7 could have killed her.

8 As to Count 2, we are asking for small habitual treatment. We would  
9 ask for a sentence of 8 to 20 years consecutive to the attempt murder with a deadly  
10 weapon.

11 As to Count 3, we're asking for the battery with a deadly weapon  
12 resulting in substantial domestic violence in violation of a TPO, we ask that small  
13 habitual treatment also be imposed and that an 8- to 20-year term be imposed  
14 consecutive to Counts 1 and 2.

15 THE COURT: Okay. So you're asking for habitual on Count 2 and 3 --

16 MS. BOTELHO: That's correct.

17 THE COURT: -- but not Count 1.

18 MS. BOTELHO: That's correct.

19 THE COURT: Okay.

20 MS. BOTELHO: Your Honor, we believe the Defendant should be in prison  
21 for as long as the scars and these memories live in Anika. So we feel that this is an  
22 appropriate sentence.

23 May I approach with the certified judgments of conviction?

24 THE COURT: Sure. Has the defense seen them?

25 MS. BOTELHO: They have, it was given to them prior to trial.

1 [The State shows documents to Defense Counsel]

2 MS. BOTELHO: Thank you.

3 THE COURT: Okay. Do you want to go through them? How many of them

4 are there here?

5 MS. BOTELHO: There are two, Your Honor.

6 THE COURT: Okay. There's two?

7 MS. BOTELHO: Yes.

8 THE COURT: Any objection from the defense regarding these and whether

9 they're your client?

10 MS. HOJJAT: We have no objection regarding the judgments of conviction,

11 Your Honor.

12 THE COURT: Okay. They'll be marked as Court Exhibit 1 and 2 and made

13 part of the record.

14 Okay, Mr. Grimes.

15 THE DEFENDANT: I handed you a statement. Also if you could read that.

16 THE COURT: I'm sorry?

17 THE CORRECTIONS OFFICER: Speak up, sir.

18 THE DEFENDANT: I handed you a statement to see if you could read that.

19 THE COURT: Uh-huh.

20 [Court reads statement]

21 THE COURT: So basically you want probation and you want to go on an

22 interstate compact is what I got out of that.

23 THE DEFENDANT: Well, I've been -- I've been told that it's not available, but

24 that was my asking.

25 THE COURT: Pardon?

1 THE DEFENDANT: I said I heard that -- they were told me -- they told me it  
2 wasn't available, but that was my asking in the letter, yes.

3 THE COURT: Okay.

4 MS. HOJJAT: And, Your Honor, to start off, I didn't want to interrupt anybody  
5 but we are actually objecting to adjudication of Count 3 in this case, the battery with  
6 use of a deadly weapon constituting domestic violence resulting in substantial bodily  
7 harm in violation of a temporary protective order. There was some talk of this during  
8 the trial, I'm not sure if the Court --

9 THE COURT: You're right. I mean, does the State have any objection to it  
10 being dismissed?

11 MS. BOTELHO: We actually do, Your Honor. I have copy of case law, *Adrian*  
12 *Jackson versus the State of Nevada*, it's an advisory opinion but basically it deals  
13 with the issue of redundancy and also whether or not a Defendant can be  
14 adjudicated guilty of both the Counts 1 -- Count 1, attempt murder with use, and also  
15 Count 3, battery with a deadly weapon resulting in substantial bodily harm. It is  
16 directly on point. It essentially says yes, you can adjudicate him guilty as to both.

17 THE COURT: What's an advisory opinion? Because the Nevada Supreme  
18 Court --

19 MS. BOTELHO: It's going to be published and -- it just came out, Your Honor.  
20 May I approach?

21 THE COURT: Sure.

22 MS. HOJJAT: And, Your Honor, if I may --

23 THE COURT: Why do you -- why don't we -- you be able to talk all you want,  
24 but this is a long case and so why don't we trail it? I mean, this is 14 pages. I want  
25 an opportunity to read it.

1 MS. HOJJAT: Yes, Your Honor.

2 THE COURT: Because I'm not quite sure you can be convicted of both. So

3 I'd like to see what the case says.

4 MS. HOJJAT: Right.

5 THE COURT: So we'll trail it to the end.

6 MS. HOJJAT: Very well, Your Honor.

7 THE COURT: I mean, my instincts are you can be convicted of both, but if

8 this case says -- I mean, it's a December 6, 2012 --

9 MS. HOJJAT: And, Your Honor, that was going to be my argument. This

10 case actually came out after we went to trial on this case. The defense did not raise

11 an objection, the defense did not move to consolidate.

12 THE COURT: So I don't know that it matters whether it came out afterwards

13 or before or.

14 MS. HOJJAT: Well --

15 THE COURT: I don't know that it would be a new law. But I don't know, let

16 me read it first.

17 MS. HOJJAT: Very well, Your Honor.

18 THE COURT: Okay?

19 MS. HOJJAT: Very well, Your Honor.

20 THE COURT: If I think I need more time, I'll let you know. Okay?

21 MS. HOJJAT: Thank you, Your Honor.

22 THE COURT: So I'll trail this.

23 MS. HOJJAT: Thank you, Your Honor.

24 THE COURT: You know what? I may need more time. I mean, this case is

25 like 14, 15 pages long. And I don't want to make a decision on the fly. So can we



1 continue it at least till next Tuesday? Is everyone okay with that?

2 MS. HOJJAT: I have no objections, Your Honor.

3 MS. BOTELHO: And the State is fine with that, Your Honor. Thank you.

4 THE COURT: Okay. So Tuesday.

5 And you have a copy of this case or at least the citation?

6 MS. HOJJAT: I don't, Your Honor, actually.

7 THE COURT: Okay. The citation is 128 Nevada Advanced Opinion 55. I

8 don't have a Pacific Reporter citation.

9 If you want, I can have Pam come in here and copy it for you. It might

10 be easier for you to get it.

11 MS. HOJJAT: Thank you. Thank you, Your Honor.

12 THE COURT: It might be easier.

13 MS. HOJJAT: Thank you, Your Honor, I appreciate that.

14 THE COURT: Do you guys get the advanced opinions --

15 MS. HOJJAT: I'm not sure.

16 THE COURT: -- e-mailed to you?

17 MS. HOJJAT: We don't, Your Honor, we don't have it e-mailed.

18 THE COURT: Okay. I do, but I have a feeling that it might be harder for you

19 to get it.

20 MS. HOJJAT: Yes, Your Honor.

21 THE COURT: Okay. So Pam will come in and copy this.

22 MS. HOJJAT: Thank you, Your Honor.

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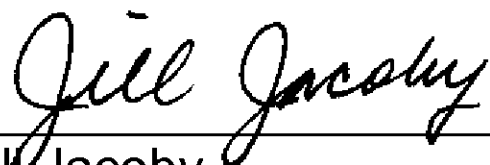
THE COURT: Okay. Tuesday.

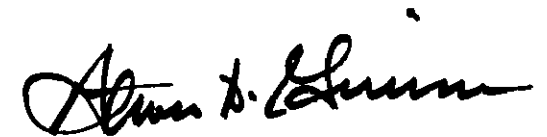
THE CLERK: February 12<sup>th</sup> at 8:30.

THE COURT: Thank you.

[Proceeding concluded at 9:50 a.m.]

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

  
\_\_\_\_\_  
Jill Jacoby  
Court Recorder



CLERK OF THE COURT

RTRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

BENNETT GRIMES,

Defendant.

CASE NO. C276163

DEPT. XII

BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE

TUESDAY, FEBRUARY 12, 2013

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

APPEARANCES:

For the State:

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

For the Defendant:

R. ROGER HILLMAN, ESQ.  
Deputy Public Defender

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.

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

Are you Anika's father?

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

THE COURT: I'm sorry?

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


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

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

THE COURT: Thank you.

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

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

  
\_\_\_\_\_  
Jill Jacoby  
Court Recorder



  
CLERK OF THE COURT

JOC

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

CASE NO C276163-1

-vs-

DEPT. NO. XII

BENNETT GRIMES  
#2762267

Defendant.

JUDGMENT OF CONVICTION  
(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of  
COUNT 1 – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON IN VIOLATION  
OF A TEMPORARY PROTECTIVE ORDER (Category B Felony) in violation of NRS  
200.010, 200.030, 193.330, 193.165, 193.166, COUNT 2 – BURGLARY WHILE IN  
POSSESSION OF A DEADLY WEAPON IN VIOLATION OF A TEMPORARY  
PROTECTIVE ORDER (Category B Felony) in violation of NRS 205.060, 193.166,  
COUNT 3 – BATTERY WITH USE OF A DEADLY WEAPON CONSTITUTING  
DOMESTIC VIOLENCE RESULTING IN SUBSTANTIAL BODILY HARM IN  
VIOLATION OF A TEMPORARY PROTECTIVE ORDER (Category B Felony) in  
violation of NRS 200.481.2e, 193.166; and the matter having been tried before a jury

//

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DEPARTMENT 0814

1 and the Defendant having been found guilty of said crimes; thereafter, on the 12<sup>th</sup> day  
2 of, February, 2013, the Defendant was present in court for sentencing with his counsel,  
3 ROGER HILLMAN, Deputy Public Defender, and good cause appearing,  
4

5 THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses. AS TO  
6 COUNTS 2 and 3 – Defendant is ADJUDGED guilty under the SMALL HABITUAL  
7 Criminal Statute and, in addition to the \$25.00 Administrative Assessment Fee, and  
8 \$150.00 DNA Analysis Fee including testing to determine genetic markers, the  
9 Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows:  
10 AS TO COUNT 1 - to a MAXIMUM of TWENTY (20) YEARS with a MINIMUM parole  
11 eligibility of EIGHT (8) YEARS PLUS a CONSECUTIVE term of a MAXIMUM of  
12 FIFTEEN (15) YEARS with a MINIMUM parole eligibility of FIVE (5) YEARS in the  
13 Nevada Department of Corrections (NDC) for use of a deadly weapon; COURT  
14 considered factors outlined in NRS 193.165 subsection 1; AS TO COUNT 2 - to a  
15 MAXIMUM of TWENTY (20) YEARS with a MINIMUM parole eligibility of EIGHT (8)  
16 YEARS, Count 2 to run CONCURRENT with COUNT 1; AND AS TO COUNT 3 - to a  
17 MAXIMUM of TWENTY (20) YEARS with a MINIMUM parole eligibility of EIGHT (8)  
18 YEARS, Count 3 to run CONSECUTIVE to Counts 1 and 2 with FIVE HUNDRED  
19 EIGHTY-ONE (581) DAYS credit for time served.  
20  
21  
22

23  
24 DATED this 19 day of February, 2013.

25  
26  
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28  
  
MICHELLE LEAVITT  
DISTRICT JUDGE

  
CLERK OF THE COURT

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

8 DISTRICT COURT

9 CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA, )  
11 )  
12 Plaintiff, ) CASE NO. C-11-276163-1  
13 )  
14 v. ) DEPT. NO. XII  
15 )  
16 BENNETT GRIMES, )  
17 )  
18 Defendant. )

19 NOTICE OF APPEAL

20 TO: THE STATE OF NEVADA

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

25 NOTICE is hereby given that Defendant, Bennett Grimes,  
26 presently incarcerated in the Nevada State Prison, appeals to the  
27 Supreme Court of the State of Nevada from the judgment entered  
28 against said Defendant on the 21st day of February, 2013 whereby  
he was convicted of Ct. 1 - Attempt Murder With Use of a Deadly  
Weapon in Violation of Temporary Protective Order; Ct. 2 -  
Burglary While in Possession of a Deadly Weapon In Violation of a  
Temporary Protective Order; Ct. 3 - Battery With Use of a Deadly  
Weapon Constituting Domestic Violence Resulting in Substantial  
Bodily Harm in Violation of a Temporary Protective Order and  
sentenced to Cts. 2 and 3 - Guilty under the Small Habitual  
Criminal Statute and in addition to the \$25 Admin. fee; \$150 DNA  
analysis fee; genetic testing; Ct. 1 - 8-20 years plus a

1 consecutive term of 5-15 years with a minimum parole eligibility  
2 of 5 years in prison for use of a deadly weapon; Court considered  
3 factors outlined in NRS 193.165 subsection 1; as to Ct. 2 - 8-20  
4 years in prison; Ct. 2 to run concurrent with Ct. 1; as to Ct. 3 -  
5 8-20 years; Ct. 3 to run consecutive to Cts. 1 and 2; 581 days  
6 CTS.

7 DATED this 18<sup>th</sup> day of March, 2013.

8 PHILIP J. KOHN  
9 CLARK COUNTY PUBLIC DEFENDER

10  
11 By: /s/ P. David Westbrook  
12 P. DAVID WESTBROOK, #9278  
13 Deputy Public Defender  
14 309 S. Third Street, Ste. 226  
15 Las Vegas, Nevada 89155  
16 (702) 455-4685  
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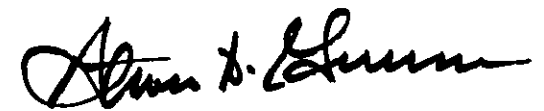
I hereby certify that service of the above and foregoing  
was made this 18<sup>th</sup> day of March, 2013, by Electronic Filing to:

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

Jennifer.Garcia@ccdancv.com

Eileen.Davis@ccdancv.com

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



CLERK OF THE COURT

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

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

v.

BENNETT GRIMES,

Defendant.

CASE NO. C-11-276163-1

DEPT. NO. XII

DATE: 9 / 26 / 13

TIME: 8 : 30 AM

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

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

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

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

PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

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

## 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.13d  
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.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:

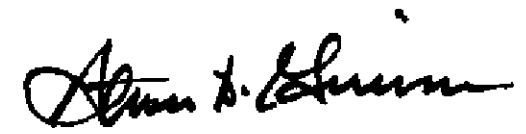
[Signature]  
Secretary for the Public Defender's Office

**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:  
PDMotions@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

7 DISTRICT COURT  
8 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  
IN VIOLATION OF TEMPORARY PROTECTIVE ORDER

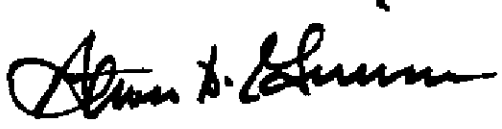
20 did then and there wilfully, unlawfully, and feloniously use force or violence upon  
21 the person of his spouse, former spouse, or any other person to whom he is related by blood  
22 or marriage, a person with whom he is or was actually residing, a person with whom he has  
23 had or is having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

26 //

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# EXHIBIT B

  
CLERK OF THE COURT

1 RTRAN  
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5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA  
7

8 STATE OF NEVADA,

9 Plaintiff,

10 vs.

11  
12 BENNETT GRIMES,

13 Defendant.

CASE NO. C276163

DEPT. XII

14 BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE

15 TUESDAY, FEBRUARY 12, 2013

16 **TRANSCRIPT OF PROCEEDINGS**  
17 **SENTENCING**

18 APPEARANCES:

19 For the State:

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

21 For the Defendant:

R. ROGER HILLMAN, ESQ.  
Deputy Public Defender

23  
24  
25 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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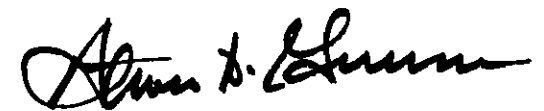
21 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual  
22 recording in the above-entitled case.

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Jill Jacoby  
Court Recorder



CLERK OF THE COURT

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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  
violation.

15 District Court Rule 13(7), governing “Rehearing of Motions,”  
provides:

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

19 “District Court Rule (DCR) 13(7) provides that a motion for reconsideration or rehearing  
20 may be made with leave of the court.” Arnold v. Kip, 123 Nev. 410, 416, 168 P.3d 1050,  
21 1054 (2007). Rehearing is warranted where the Court “has overlooked or misapprehended  
22 material facts or questions of law or when [it has] overlooked, misapplied, or failed to  
23 consider legal authority directly controlling a dispositive issue[.]”Great Basin Water  
24 Network v. State Eng’r, 126 Nev. Adv. Op. 20, 234 P.3d 912, 913-914 (2010) (discussing  
25 standard applicable to appellate analog NRAP 40(c)(2)).

26 As demonstrated from the sentencing transcript attached to his motion, Grimes’s ex  
27 post facto challenge to being sentenced on both Count 1 and 3 was considered by the Court  
28 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 ///

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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  
“[a]fter 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 Bouie, 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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**CONCLUSION**

Based upon the foregoing, the State respectfully requests that this Honorable Court  
DENY Defendant’s Motion to Correct Illegal Sentence.

DATED this 23rd day of September, 2013.

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

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

**CERTIFICATE OF FACSIMILE TRANSMISSION**

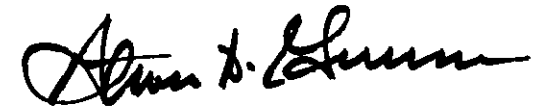
I hereby certify that service of State’s Opposition to Defendant’s Motion to Correct  
Illegal Sentence, was made this 23rd day of September, 2013, by facsimile transmission to:

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

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

ORIGINAL

Electronically Filed  
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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

5 DISTRICT COURT  
6 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: September 26, 2013

TIME: 8:30 a.m.

NOTICE OF HEARING

DATE 9-26-13 TIME 8:30

APPROVED BY 

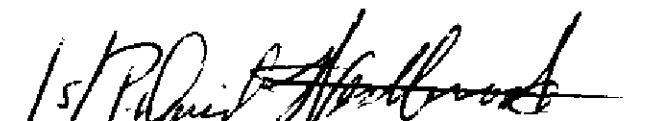
12  
13 **DEFENDANT'S MOTION TO STRIKE AS UNTIMELY THE STATE'S OPPOSITION TO**  
14 **DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE**

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

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

22 DATED this 24th day of September, 2013

23 PHILIP J. KOHN  
24 CLARK COUNTY PUBLIC DEFENDER

25 By   
26 NADIA HOJJAT, #12401  
27 Deputy Public Defender  
28

**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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

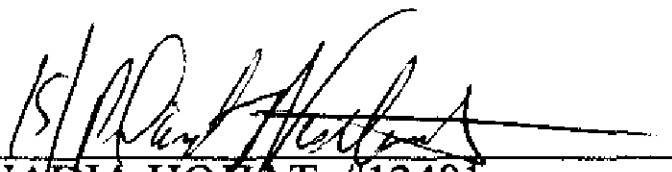
2 **I. THE STATE'S OPPOSITION IS UNTIMELY AND SHOULD BE**  
3 **STRICKEN FROM THE COURT RECORD.**

4 On September 9, 2013, Mr. Grimes filed and served Defendant's Motion to Correct Illegal  
5 Sentence. Pursuant to EDCR 3.20 (c), the State had only seven (7) days to submit a Memorandum  
6 of Points and Authorities in Opposition to Defendant's Motion. See EDCR 3.20 (c) ("Within 7  
7 days after the service of the motion, the opposing party must serve and file written opposition  
8 thereto.") (emphasis added). The State's written Opposition was due on or before September 16,  
9 2013. Nevertheless, the State did not file an Opposition on or before September 16, 2013. Instead,  
10 on September 23, 2013 – a full week after the deadline for filing and serving a written Opposition,  
11 and only 3 days before the scheduled hearing on Defendant's Motion – the State filed and served  
12 its untimely Opposition. Under the circumstances, the State's failure to timely file an Opposition  
13 to Defendant's motion "may be construed as an admission that the motion is meritorious and a  
14 consent to granting of the same." EDCR 3.20 (c).  
15

16  
17 Therefore, Defendant respectfully requests that the Court strike the State's Opposition as  
18 untimely and treat Defendant's Motion to Correct Illegal Sentence as unopposed.

19  
20 DATED this 24th day of September, 2013.

21 PHILIP J. KOHN  
22 CLARK COUNTY PUBLIC DEFENDER

23 By:   
24 NADIA HOJJAT, #12401  
25 Deputy Public Defender  
26  
27  
28


**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 

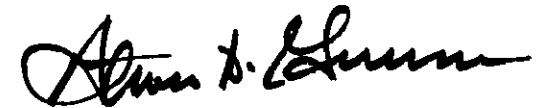


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to:

Judge Leavitt  
DEPT12LC@clarkcountycourts.us;

AA 0862



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  
it," by altering the definition of criminal conduct or increasing  
the punishment for the crime.

10 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  
11 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).  
However, the Supreme Court has held that ex post facto principles apply to the  
15 judicial branch through the Due Process Clause, which precludes the judicial  
branch "from achieving precisely the same result" through judicial  
16 construction as would application of an ex post facto law. **Bouie v. Columbia**,  
378 U.S. 347, 353-54, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964); see also United  
17 States v. Burnom, 27 F.3d 283, 284 (7th Cir.1994); Forman v. Wolff, 590 F.2d  
283, 284 (9th Cir.1978). This "judicial ex post facto" prohibition prevents  
18 judicially wrought retroactive increases in levels of punishment in precisely the  
same way that the Ex Post Facto Clause prevents such changes by legislation.  
19 See Dale v. Haeberlin, 878 F.2d 930, 934 (6th Cir.1989); see also Devine v.  
20 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").

21 **The Supreme Court has explained that "[i]f a judicial construction of a**  
22 **criminal statute is 'unexpected and indefensible by reference to the law**  
23 **which had been expressed prior to the conduct in issue,' it must not be**  
24 **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.

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

26 ///

27 ///

28 ///

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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**CONCLUSION**

Based upon the foregoing, the State respectfully requests that this Honorable Court  
DENY Defendant’s Motion to Correct Illegal Sentence.

DATED this 3rd day of October, 2013.

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

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

**CERTIFICATE OF FACSIMILE TRANSMISSION**

I hereby certify that service of STATE’S SURREPLY IN SUPPORT OF OPPOSITION TO  
DEFENDANT’S MOTION TO CORRECT ILLEGAL SENTENCE, was made this 3rd day  
of October, 2013, by facsimile transmission to:

David Westbrook, Deputy Public Defender  
Fax # 471-1527

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

ORIGINAL

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

OCT - 3 2013

BY:   
SUSAN L. IVANOVICH, DEPUTY

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 Defendant. )

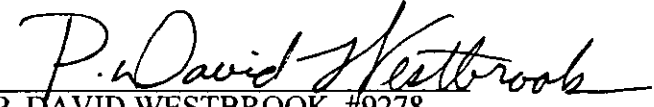
CASE NO. C-11-276163-1  
DEPT. NO. XII  
DATE: October 3, 2013  
TIME: 8:30 a.m.

16 **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO CORRECT ILLEGAL**  
17 **SENTENCE**

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

22 DATED this 3rd day of October, 2013

23 PHILIP J. KOHN  
24 CLARK COUNTY PUBLIC DEFENDER

25 By:   
26 P. DAVID WESTBROOK, #9278  
27 Deputy Public Defender  
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.

18 DCR 5 (emphasis added).

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

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  
fixed by the court or clerk.

25 2. A party filing a motion shall also serve and file with it a  
26 memorandum of points and authorities in support of each ground thereof. The  
27 absence of such memorandum may be construed as an admission that the motion is  
28 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  
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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  
3 upon the conviction and finding of the jury that Anderson should receive the  
4 maximum sentence permitted by law.

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

### 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  
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<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  
17  
18 It is well-settled that states may offer greater constitutional protections than those afforded  
19 by the federal government. See, e.g., Cooper v. California, 386 U.S. 58, 87 S.Ct. 788 (1967) (“Our  
20 holding, of course, does not affect the State’s power to impose higher standards on searches and  
21 seizures than required by the Federal Constitution if it chooses to do so.”); Oregon v. Kennedy,  
22 456 U.S. 667, 681, 102 S. Ct. 2083, 2092 (1982) (state constitutions can provide additional rights  
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 Bouie, 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  
8 Nearly two years *after* Barton, the Nevada Supreme Court decided Salazar v. State, 119  
9 Nev. 224, 70 P.3d 749 (2003). In Salazar the Nevada Supreme Court reversed an appellant’s  
10 “redundant” conviction for battery with use of a deadly weapon because the Court held – again,  
11 notwithstanding Blockburger – that it would reverse “redundant convictions that do not comport  
12 with legislative intent.” Salazar, 119 Nev. at 227, 70 P.3d at 751.

13 While the State implies that Barton somehow “overturned” Salazar, we know that cannot  
14 be true, because Barton came out two years *before* Salazar. Furthermore, while the State claims  
15 that Skiba v. State<sup>5</sup> was also “overturned” by Barton, the Skiba decision was never once *mentioned*  
16 in Barton. Notably, Nevada’s redundancy doctrine dates all the way back to 1987, in a case called  
17 Albitre v. State, 103 Nev. 281, 738 P.2d 1307 (1987), where the Nevada Supreme Court  
18 recognized that a defendant is “entitled to relief from redundant convictions that do not comport  
19 with legislative intent.”<sup>6</sup> Yet, Albitre is not mentioned a single time in Barton, either positively or  
20 negatively. Indeed, the words “redundancy” and “redundant” do not appear anywhere in the  
21  
22  
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24

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  
28

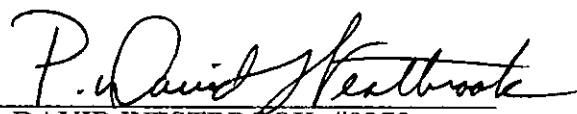
1 Nevada courts – including this one – prior to the decision in Jackson. Like the defendant in Ex  
2 Parte Scales, when this longstanding doctrine was judicially abandoned and retroactively applied,  
3 Mr. Grimes faced an additional criminal conviction and sentence that could not previously have  
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 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 ///

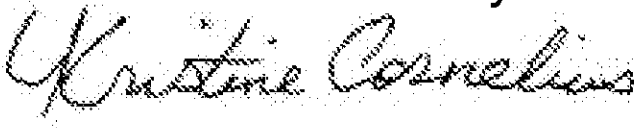
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THE COURT: It just means my notes were wrong.

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

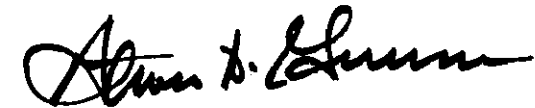
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ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.



Kristine Cornelius,  
Court Recorder

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

7 THE STATE OF NEVADA, )  
8 )  
9 Plaintiff, ) CASE NO. C-11-276163-1  
10 )  
11 v. ) DEPT. NO. XII  
12 BENNETT GRIMES, )  
13 )  
14 Defendant. )

NOTICE OF APPEAL

13 TO: THE STATE OF NEVADA

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

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

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

24 PHILIP J. KOHN  
25 CLARK COUNTY PUBLIC DEFENDER

26 By: /s/ Deborah L. Westbrook  
27 DEBORAH L. WESTBROOK, #9285  
28 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@ccdancv.com

Jennifer.Garcia@ccdancv.com

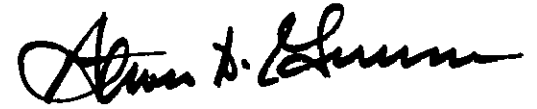
Eileen.Davis@ccdancv.com

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

1 **ORDR**

2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 LISA LUZAICH  
6 Chief Deputy District Attorney  
7 Nevada Bar #005056  
8 200 Lewis Avenue  
9 Las Vegas, NV 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

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CLERK OF THE COURT

8 DISTRICT COURT  
9 CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 BENNETT GRIMES,  
14 #2762267,

15 Defendant.

CASE NO: C-11-276163-1

DEPT NO: XII

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 ///

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DEPT. 12

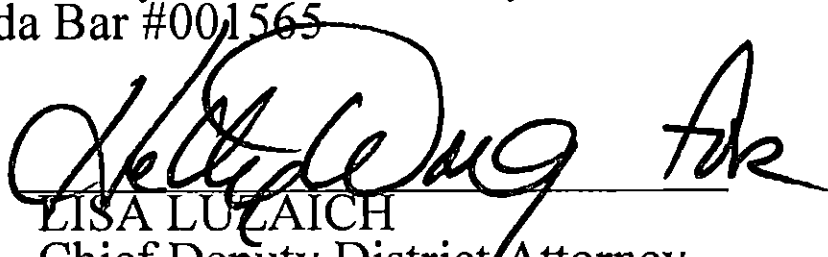
1 IT IS HEREBY ORDERED that the Defendant's Motion to Correct Illegal Sentence,  
2 shall be, and it is Denied.

3 DATED this 21 day of April, 2015.

4  
5   
6 DISTRICT JUDGE *WB*

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

10 BY

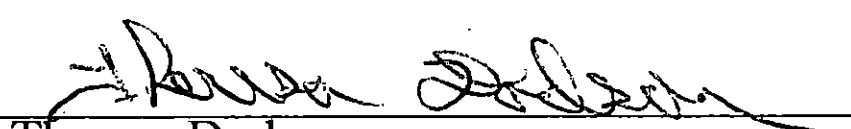
  
11 LISA LUTZACH  
12 Chief Deputy District Attorney  
13 Nevada Bar #005056

14 CERTIFICATE OF SERVICE

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

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

20 BY

  
21 Theresa Dodson  
22 Secretary for the District Attorney's Office

23  
24  
25  
26  
27  
28 td/dvu

21

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  
IPWHC  
Inmate Filed - Petition for Writ of Habeas  
4434798



BENNETT GRIMES

Petitioner,

vs.

THE STATE OF NEVADA  
ISIDOR 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.

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FEB 20 2015

CLERK OF THE COURT

114



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.

### 15 PETITION

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

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

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

21 4. Case number: C276163

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

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

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

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

27 7. Nature of offense involved in conviction being challenged: ATTEMPTED MURDER w/USE IN  
28 VIOL. OF T.P.O. BURGLARY w/USE IN VIOL. OF T.P.O. BATTERY w/USE  
CONSTRUCTIVE DOMESTIC VIOLENCE IN VIOL. OF T.P.O.

TEMPORARY 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 \_\_\_\_\_

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

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

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

5 (3) Grounds raised: THE COURT FAILED TO NOTIFY THE DEFENSE  
6 THAT THE JURY HAD A QUESTION REGARDING THE LAW IN DISCUSS  
7 INSTRUCTION. ILLEGAL SENTENCE

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

9 Yes \_\_\_ No ✓

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

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

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

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

15 (1) Name of Court: SAME

16 (2) Nature of proceeding: MOTION HEARING

17 (3) Grounds raised: ILLEGAL SENTENCE

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

19 Yes \_\_\_ No ✓

20 (5) Result: ILLEGAL SENTENCE MOTION - PENDING

21 (6) Date of result: —

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

24 (c) As to any third or subsequent additional application or motions, give the same information  
25 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 ½ 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 ½ 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 ARGUING 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: NA \_\_\_\_\_  
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. GREG WILLMAN  
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. VIOL. 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 REVERE THE DEFENSE COUNSEL'S RELIANCE ON OUT-DATED CASE AUTHORITY THE COURT PROCEEDED TO SENTENCE THE PETITIONER ON BOTH 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 THEFT/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 SENTENCED THE PETITIONER TO A TERM OF 8 TO 20 YEARS CONSECUTIVE 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 AT 751 (NEV. 2013), citing STATE OF NEVADA V.  
17 DISTRICT COURT, 116 NEV. 127, 994 P.2d 692 (2000)  
18 citing SKIBA 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. 986, 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. 688,  
27 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

## GROUND 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. STATING AT HAND INTO THE BODY OF THE SAID  
16. VICTIM ANEKA GAMES.

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 BLOCKBURGER V. UNITED STATES, 284 U.S.  
23. 299 (1931)



1 **WHEREFORE, BENNETT GRIMES**, prays that the court grant PETITIONER  
2 relief which he may be entitled in this proceeding.

3 EXECUTED at SOUTHERN DESERT CORRECTIONAL CENTER  
4 on the 10 day of FEBRUARY, 2015.

5  
6   
7 Signature of Petitioner

8 **VERIFICATION**

9 Under penalty of perjury, pursuant to N.R.S. 208.165 et seq., the undersigned declares that he is  
10 the Petitioner named in the foregoing petition and knows the contents thereof, that the pleading is  
11 true and correct of his own personal knowledge, except as to those matters based on information and  
12 belief, and to those matters, he believes them to be true.

13  
14   
15 Signature of Petitioner

16  
17 \_\_\_\_\_  
18 Attorney for Petitioner  
19  
20  
21  
22  
23  
24  
25  
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27  
28

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 J. Grimes  
Signature

2/16/2015  
Date

BENNETT GRIMES  
Print Name

WIT  
Title

**CERTIFICATE OF SERVICE BY MAILING**

I, BENNETT G. 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. WOLFSON,  
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

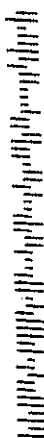
OFFICE OF ATTORNEY GENERAL  
100 NORTH CARSON STREET  
CARSON CITY, NEVADA  
89701-4717

CC:FILE

DATED: this 16 day of FEBRUARY, 2015.

Bennett G. 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 89070-0208



AA 0921

STEVEN D. GRIERSON  
DISTRICT COURT CLERK

200 LEWIS AVE. 3RD FLOOR

LAS VEGAS, NV.

89155-1100

COAST GUARD JESSE  
COMMUNICATIONS CENTER  
FEB 17 2015  
CURTIS  
NELL

BENNETT G. GRIMES # 109 8810  
HIGH DESERT STATE PRISON  
P.O. BOX 650  
INDIAN SPRINGS, NEVADA 89070

Electronically Filed  
09/23/2016 11:30:13 AM

MC  
DA  
PP

*Alvin D. Lamm*

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

AOR,  
Gamage, William H.  
Esq.

STATE OF NEVADA  
WILLIAM H. GAMAGE <sup>PLAINTIFF</sup> Esq.

V.  
BENNETT G. GRIMES  
DEFENDANT

CASE NO. C-11276163-1

DEPT NO. XII

10-18-16 @ 8:30 am

MOTION TO DISCHARGE MR. WILLIAM H. GAMAGE AS  
ATTORNEY PURSUANT TO NEVADA R.P.C. 1.16.

COMES NOW BENNETT G. GRIMES,  
DEFENDANT AND MOVES THIS HONORABLE COURT FOR AN  
ORDER GRANTING DEFENDANT'S MOTION TO DISCHARGE  
MR. WILLIAM H. GAMAGE AS ATTORNEY OF RECORD AND  
ASSIGN ANOTHER ATTORNEY.

THIS MOTION IS BASED UPON ALL THE  
PAPERS AND PLEADINGS ON FILE HEREIN, THE ATTACHED  
MEMORANDUM OF POINTS AND AUTHORITIES, AND ANY  
INFORMATION PROVIDED TO THE COURT AT THE TIME  
FOR HEARING THIS MOTION.

CLERK OF THE COURT

RECEIVED

RECEIVED

SEP 23 2016

CLERK OF THE COURT

SEP 23 2016

## MEMORANDUM AND POINTS OF AUTHORITIES

### 1. RELEVANT FACTS

BENNETT G. GRIMES, DEFENDANT, HEREBY SUBMITS THIS REQUEST TO DISCHARGE MR. WILLIAM H. GAMAGE AS ATTORNEY OF RECORD DUE TO A COMPLETE AND IRRECONCILABLE BREAKDOWN IN COMMUNICATIONS, BY VISIT, MAIL, AND PHONE AND FOR OTHER REASONS THAT CANNOT BE DISCLOSED WITHIN THIS PLEADING DUE TO ETHICAL CONSTRAINTS AND THE ATTORNEY-CLIENT PRIVILEGE.

MR. GAMAGE BECAME THE ATTORNEY OF RECORD ON OR ABOUT APRIL, 2015.

LAST DATE OF COMMUNICATION WITH ATTORNEY, BY  
1) VISIT, WAS APRIL 21, 2016. 2) LETTER SENT TO  
ATTORNEY ON OR ABOUT APRIL 25, 2016, IN WHICH  
THERE WAS NO RESPONSE RECEIVED. 3) DEFENDANT  
HAS NEVER BEEN AFFORDED THE PRIVILEGE TO  
CONTACT HIS ATTORNEY BY TELEPHONE.

### 2. LEGAL ARGUMENT

NEVADA RULES OF PROFESSIONAL CONDUCT 1.16(a) AS ADOPTED BY THE NEVADA SUPREME COURT, STATES IN PERTINENT PART: A LAWYER SHALL NOT REPRESENT A CLIENT OR SHALL WITHDRAW FROM REPRESENTATION IF: (1) THE REPRESENTATION WILL RESULT IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT OR OTHER LAW; (2) THE LAWYER'S PHYSICAL OR MENTAL CONDITION MATERIALLY IMPAIRS THE LAWYER'S ABILITY TO REPRESENT CLIENT; OR (3) THE LAWYER IS DISCHARGED

AA 0924

THE BASIS FOR THE INSTANT MOTION IS GROUNDED IN THE ABOVE QUOTED SUBSECTION WITHIN NEVADA R.P.C. 1.16. DEFENDANT IS OF THE OPINION THAT ANY GREATER SPECIFICITY REGARDING THE BASIS FOR THE INSTANT MOTION CANNOT BE DISCLOSED IN THIS PUBLICLY ACCESSIBLE PLEADING. DEFENDANT CAN PROVIDE GREATER SPECIFICITY TO THE COURT EX-PARTE AND/OR IN CAMERA AND/OR UNDER SEAL IF THE COURT FINDS IT NECESSARY TO DECIDE THIS MOTION.

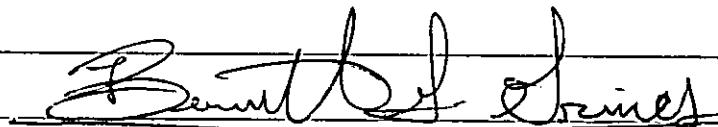
THE LAST KNOWN ADDRESS AND CONTACT INFORMATION FOR MR. GAMAGE:

WILLIAM H. GAMAGE  
ATTORNEY AT LAW

1775 VILLAGE CENTER CIRCLE, SUITE 190  
LAS VEGAS, NEVADA 89134

BASED ON THE FOREGOING, DEFENDANT RESPECTFULLY REQUESTS MR. GAMAGE BE DISCHARGED AS ATTORNEY OF RECORD FOR DEFENDANT AND A REPLACEMENT BE APPOINTED.

DATED THIS 15<sup>TH</sup> DAY OF SEPTEMBER, 2016.



— BENNETT G. GRIMES

PETITIONER  
AA 0925



## DECLARATION

BENNETT G. PRIMES MAKES THE FOLLOWING DECLARATION:

- (1) THAT THE DECLARANT IS THE DEFENDANT IN THE INSTANT MATTER, AND FAMILIAR WITH THE FACTS AND CIRCUMSTANCES OF THIS CASE.
- (2) THAT THE UNDERSIGNED MAKES THE DECLARATION IN SUPPORT OF THE INSTANT MOTION TO DISCHARGE MR. GAMAGE AS COUNSEL FOR THE DEFENDANT IN THIS CASE.
- (3) THAT IN THE CASE AT HAND, THERE HAS BEEN A COMPLETE BREAKDOWN IN COMMUNICATION BETWEEN ATTORNEY AND DEFENDANT.
- (4) THAT THE UNDERSIGNED BELIEVES HE MUST DISCHARGE ATTORNEY PURSUANT TO R.P.C. 1.16(a).
- (5) THAT THE UNDERSIGNED BELIEVES THAT HE CANNOT DIVULGE GREATER SPECIFICITY IN THIS PLEADING DUE TO ETHICAL CONSTRAINTS AND THE ATTORNEY-CLIENT PRIVILEGE.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOLLOWING IS TRUE AND CORRECT. (NRS 53.045)

EXECUTED THIS 15<sup>th</sup> DAY OF SEPTEMBER, 2016.



BENNETT G. PRIMES  
AA 002610000

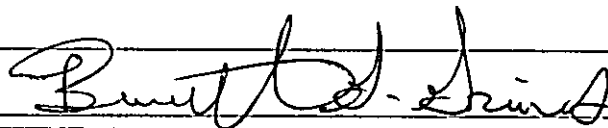
NOTICE OF MOTION

TO: WILLIAM H. GAMAGE, ATTORNEY FOR DEFENDANT

YOU WILL PLEASE TAKE NOTICE THAT THE FOREGOING  
MOTION WILL BE HEARD IN THE EIGHTH JUDICIAL  
DISTRICT COURT, DEPARTMENT NO. XII.

IN FRONT OF THE HONORABLE JUDGE,  
MICHELLE LEAVITT.

DATED THIS 15<sup>th</sup> DAY OF SEPTEMBER, 2016.



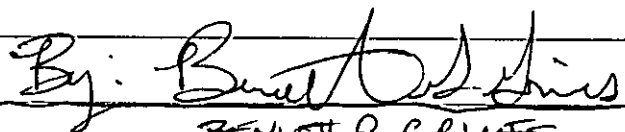
BENNETT G. GRIMES

PETITIONER

CERTIFICATE OF MAIL

I HEREBY CERTIFY THAT SERVICE OF THE  
ABOVE AND FOREGOING WAS MADE THIS 15<sup>th</sup>  
DAY OF SEPTEMBER, 2016 BY MAIL TO:

CLARK COUNTY DISTRICT ATTORNEY  
WILLIAM H. GAMAGE  
HON. MICHELLE LEAVITT  
FILE

By: 

BENNETT G. GRIMES

PETITIONER

AA 0927

BENNETT G. GRIMES #1028810  
H.D.S.P.  
P.O. BOX 650  
INDIAN SPRINGS, NEVADA 89070.

LAS VEGAS  
NV 890  
20 SEP 15  
PM 31

Hasler  
09/20/2016  
US POSTAGE \$000.465  
ZIP 8910100  
011E12650783  
AA 00

LEGAL

89101-630000

ATTN: STEVEN G. GRIFFIN  
DISTRICT COURT CLERK  
200 LEWIS AVENUE  
3RD FLOOR  
LAS VEGAS, NEVADA  
89155-1160.

SEP 15 2015

U.S. DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
U.S. ATTORNEY GENERAL'S OFFICE  
U.S. DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
U.S. ATTORNEY GENERAL'S OFFICE

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

BENNETT GRIMES,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No. 74419

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**APPELLANT'S APPENDIX**

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**CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 13th day of March, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Steven Wolfson, Clark County District Attorney's Office

Adam P. Laxalt, Nevada Attorney General

Jamie J. Resch, Resch Law, PLLC d/b/a Conviction Solutions

By: 

Employee, Resch Law, PLLC d/b/a Conviction Solutions