IN THE SUPREME COURT OF THE STATE OF NEVADA

BENNETT GRIMES, Appellant, vs. THE STATE OF NEVADA, Respondent.	Supreme Court Case No. 74419

APPELLANT'S APPENDIX VOLUME 5 PAGES 929-1137

ATTORNEY FOR APPELLANT

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Bennett Grimes, Case No. 74419

SUPP

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DISTRICT COURT

CLARK COUNTY, NEVADA

BENNETT GRIMES, Petitioner, vs. THE STATE OF NEVADA, Respondent.	Case No.: C-11-276163-1 Dept. No: XII **SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** Date of Hearing: August 24, 2017 Time of Hearing: 8:30 a.m.

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: **High Desert State Prison, Clark County, Nevada**.

2. Name and location of court which entered the judgment of conviction under attack: **Eighth Judicial District Court, Dept. XII, 200 Lewis Avenue, Las Vegas, NV 89101.**

3. Date of judgment of conviction: **February 21, 2013.**

4. Case number: **C276163-1.**

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5(a). Length of sentence: **Count 1: 8 to 20 years NDOC with consecutive 5 to 15 for use of a deadly weapon; Count 2: 8 to 20 years NDOC concurrent to Count 1; Count 3: 8 to 20 years NDOC consecutive to Counts 1 and 2.**

5(b). If sentence is death, state any date upon which execution is scheduled: **N/A.**

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? **No.**

If "yes," list crime, case number and sentence being served at this time: **N/A.**

7. Nature of offense involved in conviction being challenged: **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, Count 3: Battery with use of a Deadly Weapon Constituting Domestic Violence Resulting in Substantial Bodily Harm in Violation of a Temporary Protective Order.**

8. What was your plea? (check one)

(a) Not guilty __X_

(b) Guilty ___

(c) Guilty but mentally ill __

(d) Nolo contendere ___ (Alford)

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: **N/A.**

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10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury _X_.

(b) Judge without a jury __.

11. Did you testify at the trial? Yes____**No _X_**

12. Did you appeal from the judgment of conviction? **Yes _X_** No __

13. If you did appeal, answer the following:

(a) Name of court: **Nevada Supreme Court**

(b) Case number or citation: **62835**

(c) Result: **Denial of relief was affirmed.**

(d) Date of result: **February 27, 2014.**

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

14. If you did not appeal, explain briefly why you did not: **N/A**

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? **Yes_X__** No __

16. If your answer to No. 15 was "yes," give the following information: **Proper person Petition for Writ of Habeas Corpus filed February 20, 2015. Motion to Correct Illegal Sentence filed September 9, 2013 – denial affirmed by Nevada Supreme Court February 26, 2016 (NSC#67598).**

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17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? **No** If so, identify:

(a) Which of the grounds is the same:

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

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

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

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? **No.**

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes___ **No _X_** If yes, state what court and the case number: **N/A.**

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: **Trial: Ralph Hillman, Nadia Hojjat, Clark County**

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Public Defender. Direct appeal: Deborah Westbrook, Clark County Public Defender. Motion to Correct Illegal Sentence: William Gamage.

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes___ **No _X_**

If yes, specify where and when it is to be served, if you know: **N/A.**

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground One: **Petitioner received ineffective assistance of trial and appellate counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution due to the failure to present a viable "Ex Post Facto" issue on direct appeal instead of deficiently presenting the issue in a motion to correct an illegal sentence and related failure to seek dismissal of a redundant count prior to verdict or sentencing.**

Supporting Facts (Tell your story briefly without citing cases or law):

Ground One as set forth in Petitioner's Proper Person Petition for Writ of Habeas Corpus (Post-Conviction), filed February 20, 2015, is fully incorporated herein.

In addition, Ground One is supplemented here to explain there are two theories presented for consideration. Both arise from the fact that between the time of the verdict and sentencing, the Nevada Supreme Court issued a published opinion in Jackson v. State, 128 Nev. Adv. Op. 55, 291 P.3d 1274 (2012). Prior to the issuance of Jackson, Nevada had a robust "redundancy" doctrine which supplemented Double Jeopardy Clause caselaw and allowed for a

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more generous ability to dismiss duplicative charges. Trial counsel advised Grimes that, among other things, counsel did not object to the verdict form and specifically Count 3 as being redundant to Count 1 because 1) Salazar v. State, 119 Nev. 224, 70 P.3d 749 (2003) was well settled, and 2) the trial court had already indicated and "all parties" had agreed Count 1 and Count 3 were redundant and Grimes could not be adjudicated guilty of both counts. See Motion to Correct Illegal Sentence filed 9-9-2013, p. 3.

However, the verdict in this case was filed October 15, 2012. Jackson was decided on December 6, 2012. Sentencing was held February 12, 2013. At that time, trial counsel argued that application of Jackson would constitute an ex post facto violation. That challenge was rejected, and Grimes was not only sentenced on Count 3, but the Court ran Count 3 consecutive to Count 1. See Transcript, Sentencing dated 5-7-13, p. 13.

The notice of appeal pertaining to the direct appeal was filed March 18, 2013. Notwithstanding the multiple alerts in the record regarding the ex post facto issue, appellate counsel inexplicably failed to raise a redundancy issue concerning Count 3 on direct appeal in any capacity. The first time the issue was squarely presented for consideration was via the motion to correct illegal sentence filed September 9, 2013. The constitutionality of applying Jackson retroactively was plainly outside the narrow scope of claims permissible in a motion to correct illegal sentence and competent appellate counsel would have readily realized as much. Indeed, the motion to correct illegal sentence was denied, appealed, and ultimately denied by the Nevada Supreme Court which found the motion fell "outside the narrow scope of claims permissible in a motion to correct an illegal sentence." Order of Affirmance dated February 26, 2016.

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As a result of trial and appellate counsel's ineffectiveness, Grimes was denied all meaningful review of a claim that applying Jackson to his case was unconstitutional. Grimes was prejudiced as a result because had such a claim been considered on its merits, the trial or appellate courts would have been compelled to find in Grimes' favor. Grimes is therefore entitled to relief in the form of a dismissal of Ground 3 and/or new trial.

(b) Ground Two: **Petitioner received ineffective assistance of trial counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution when trial counsel failed to properly object to or present any argument against the fact that the State had alleged a steak knife was a deadly weapon.**

Supporting Facts (Tell your story briefly without citing cases or law):

On October 12, 2011, trial counsel filed a pre-trial petition for writ of habeas corpus. The same appeared to argue that the information on file was defective because it did not list a knife as a deadly weapon. See Petition filed 10-12-2011, p. 4. In response, the State filed a corrected information on October 25, 2011. The trial court denied the pre-trial petition as moot, and described the issue as a "clerical error." Transcript of hearing 11-3-2011, p. 2.

The defense never challenged the Petitioner's use of a deadly weapon again in the case. The weapon, a steak knife, was extensively argued to be a "deadly weapon" during the State's closing argument. TT, Day 4, pp. 9-11. The defense raised no argument whatsoever during its closing that steak knife is not a deadly weapon.

Trial counsel was ineffective in failing to challenge the allegation that the steak knife was a deadly weapon. Had such an argument or challenge been raised, Grimes would have enjoyed

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a reasonable probability of a more favorable outcome and Grimes therefore requests his convictions be vacated due to this error.

(c) Ground Three: **Petitioner received ineffective assistance of appellate counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution when appellate counsel failed to argue on appeal that the trial court erroneously denied "Defendant's Motion to Dismiss for Failure to Gather Evidence" filed June 5, 2012.**

Supporting Facts (Tell your story briefly without citing cases or law):

On June 5, 2012, trial counsel filed a motion to dismiss premised on the State's failure to test the knife impounded in this case for fingerprints despite the obvious presence of at least one fingerprint. The State also failed to test obvious blood found on the knife for DNA. After several hearings on the matter, the trial court ultimately denied the motion. Transcript dated September 13, 2012, p. 8.

The issue was not presented on direct appeal. Had such an argument been raised, Grimes would have enjoyed a reasonable probability of a more favorable outcome and Grimes therefore requests his convictions be vacated due to this error.

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(d) Ground Four: **Petitioner's conviction and sentence violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, section 8 of the Nevada Constitution because the cumulative effect of the errors alleged in this petition deprived him of his federal constitutional rights, including, but not limited to, his rights to due process of law, equal protection, confrontation, the effective assistance of counsel.**

Supporting Facts (Tell your story briefly without citing cases or law):

Petitioner has set forth separate post-conviction claims and arguments regarding numerous errors, and each one of these errors independently compels reversal of the judgment or alternative post-conviction relief. However, even in cases in which no single error compels reversal, a defendant may be deprived of due process if the cumulative effect of all errors in the case denied him fundamental fairness. Taylor v. Kentucky, 436 U.S. 478, n. 15; Harris v. Wood, 64 F.3d 1432, 1438-1439 (9th Cir. 1995); United States v. McLister, 608 F.2d 785, 791 (9th Cir. 1979).

Petitioner submits that the errors alleged in this petition and those found on direct appeal by the Nevada Supreme Court require reversal both individually and because of their cumulative impact. As explained in detail in the separate claims and arguments on these issues, the errors in this case individually and collectively violated federal constitutional guarantees under the Fifth, Sixth, Eighth, and Fourteenth Amendments, as they individually and collectively had a substantial and injurious effect or influence on the verdict, judgment and sentence and are moreover prejudicial under any standard of review.

See Supplemental Points and Authorities provided herewith for additional argument in support of all claims.

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WHEREFORE, Petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

DATED this 16th day of May, 2017.

Submitted By:

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
JAMIE J. RESCH
Attorney for Petitioner

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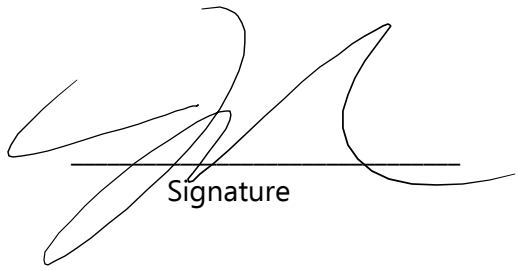
VERIFICATION

I, JAMIE J. RESCH, ESQ., declare under penalty of perjury as follows:

That I am the attorney of record for Petitioner / Defendant Bennett Grimes; that I have read the foregoing supplement and know the contents thereof; that the same are true and correct to the best of my knowledge, information and belief, except for those matters stated therein on information and belief, and as to those matters, I believe them to be true; that Petitioner/Defendant personally authorized me to commence this Supplemental Petition for Writ of Habeas Corpus.

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

5-16-17
Executed on


Signature

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CERTIFICATE OF SERVICE

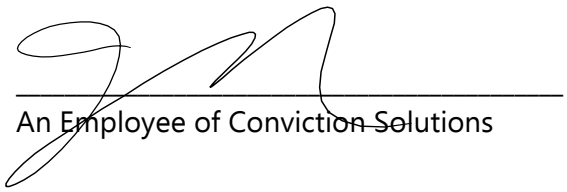
I hereby certify that I am an employee of Resch Law, PLLC d/b/a Conviction Solutions and that, pursuant to N.R.C.P. 5(b), on May 16, 2017, I served a true and correct copy of the foregoing Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) via first class mail in envelopes addressed to:

Clark County District Attorney
200 Lewis Ave.
Las Vegas, NV 89155

Mr. Bennett Grimes #1098810
High Desert State Prison
PO BOX 650
Indian Springs, NV 89070

and via Wiznet's electronic filing system, as permitted by local practice to the following person(s):

Steven B. Wolfson
Clark County District Attorney
PDMotions@ClarkCountyDA.com



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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Bennett Grimes ("Grimes") was convicted of several crimes all involving his ex-wife Aneka Newman. The charges all stem from a short episode in which Grimes traveled to an apartment he shared with Newman. Grimes contended he went there to talk and that Newman eventually grabbed a steak knife from the kitchen. The State contended Grimes attempted to murder Newman by stabbing her repeatedly with a steak knife.

Grimes was represented by the Clark County Public Defender. While certain aspects of his defense were quite vigorous, several errors were made which worked to Grimes' extreme prejudice. Those errors were serious enough that Grimes should be granted relief either in the form of a dismissal of the charges in Count 3, or, a new trial.

II.

PROCEDURAL BACKGROUND

On September 14, 2011, an Information was filed that charged Petitioner with Count One, attempt murder with use of a deadly weapon in violation of a temporary protective order, Count Two, burglary while in possession of a firearm (later amended to "deadly weapon") in violation of a temporary protective order, and Count Three, battery with use of a deadly weapon constituting domestic violence resulting in substantial bodily harm in violation of a temporary protective order. See Information filed 9-14-2011, Second Amended Information filed October 25, 2011.

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Trial commenced on October 10, 2012. After a four day trial, Grimes was convicted of all counts by way of a verdict reached October 15, 2012. On October 23, 2012, the State filed a notice of intent to seek punishment as a habitual criminal, citing two California convictions from 2000 and 2004. As noted earlier herein, Grimes was sentenced on February 12, 2013, at which time the Court sentenced Grimes to prison including running Count Three consecutive to Count One.

Grimes undertook several challenges to his conviction. A motion for new trial was filed on October 22, 2012, which raised an issue concerning a jury question. A notice of appeal was filed on March 18, 2013. Finally, a motion to correct illegal sentence was filed on September 9, 2013.

The opening brief on appeal was filed on August 19, 2013. SUPP 1. The brief raised four issues: 1) the trial court erred by refusing to instruct on self-defense, 2) the trial court erred by failing to notify the parties of a jury question (i.e. the issue from the motion for new trial), 3) there was insufficient evidence to sustain the burglary conviction and 4) cumulative error. SUPP 1. The Nevada Supreme Court issued an order of affirmance on February 27, 2014. SUPP 64.

Meanwhile, the motion to correct illegal sentence was argued October 3, 2013. At that time, the Clark County Public Defender was confronted with the fact that an issue with Count Three had not been raised in the opening brief on appeal. The attorney responded that there was "good reason" for not doing so, specifically mentioning page limitations and the fact in counsel's opinion the trial court "needed a written motion on this." Transcript, 10-3-2013, p. 7. The Court stated it would take the matter under advisement. Transcript, 10-3-2013, p. 21. However, a minute order denying the motion did not issue until February 26, 2015. A written

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order denying the motion to correct illegal sentence was filed on May 1, 2015. Neither the minute order nor the written order contain any rationale for the denial of the motion.

A notice of appeal from the denial of the motion to correct illegal sentence was filed on March 23, 2015 by Grimes in proper person. The Clark County Public Defender filed an opening brief on Grimes' behalf on July 2, 2015. SUPP 75. Grimes was appointed new counsel to assist with the remainder of the appeal. The State filed its response on September 4, 2015. SUPP 95. Counsel filed a reply on September 29, 2015. SUPP 117. Despite the extensive briefing, the Nevada Supreme Court declined to consider the merit of the appeal and instead issued an Order of Affirmance on February 26, 2016 based solely on the fact the motion raised issues which were outside the permissible grounds of a motion to correct illegal sentence. SUPP 132.

III.

GROUNDS FOR RELIEF

Due to the ineffective assistance of trial and appellate counsel, Grimes has never had his concerns about Count Three squarely considered on the merits by any court. The State contends Grimes "cannot with a straight face say that Jackson was 'unforeseeable, unexpected and indefensible.'" SUPP 110. Actually, Grimes can easily say so because subsequent to Jackson, the Nevada Supreme Court made it clear that Jackson had in fact overruled Nevada's redundancy framework. Grimes can therefore easily show that Jackson was an unforeseeable new rule, and its retroactive application to increase the punishment upon Grimes for what is effectively one criminal act is an unconstitutional violation of the Ex Post Facto Clause.

The failure of trial counsel to move for dismissal of Count Three prior to sentencing, or appellate counsel to raise the issue on direct appeal is patently indefensible. There is a

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component to the claim that cannot be presented in a straight-faced manner, which was the Public Defender's *post hoc* attempt to justify the failure to raise the issue on direct appeal. Under no circumstance was it an effective strategy to eschew the issue on direct appeal in favor of a motion to correct illegal sentence, and the alleged justifications for doing so are merely an attempt to cover up this blatant error. Grimes is entitled to relief on his Ex Post Facto claim and the Court should grant relief and dismiss Ground Three.

Grimes is also entitled to relief on claims concerning the failure to raise on appeal the issue of untested evidence, and the failure of trial counsel to challenge the definition of deadly weapon. Alone or cumulatively, these errors justify relief in the form of a dismissal of Count Three, a new sentencing hearing, or a new trial.

GROUND ONE

Petitioner received ineffective assistance of trial and appellate counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution due to the failure to present a viable "Ex Post Facto" issue on direct appeal instead of deficiently presenting the issue in a motion to correct an illegal sentence and related failure to seek dismissal of a redundant count prior to verdict or sentencing.

An ineffective assistance of counsel claim has two components. First, the petitioner must show counsel's performance was deficient, and second, must show the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). This requires the petitioner to show the result of the proceeding probably would have been different. A

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reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694. The Nevada Supreme Court has further recognized the sum total of counsel's failures may justify post-conviction relief if the result of the trial is rendered unreliable. Buffalo v. State, 111 Nev. 1139, 1149, 901 P.2d 647 (1995) (Holding that, "Defense counsel's failure to investigate the facts, failure to call witnesses, failure to make an opening statement, failure to consider the legal defenses of self-defense and defense of others, failure to spend any time in legal research and general failure to present a cognizable defense rather clearly resulted in rendering the trial result 'unreliable'"). Thus, relief can be granted when even one error by counsel constitutes constitutionally ineffective assistance of counsel, or, where the cumulative effect of errors violates due process. Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007).

To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.3d 1102 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). Still, ineffectiveness may be found where counsel presents arguments on appeal while ignoring arguments that were clearly stronger. Suggs v. United States, 513 F.3d 675, 678 (7th Cir. 2008).

With these basics in mind, Petitioner alleges his trial and appellate counsel were ineffective as it related to a claim Count Three was redundant. The motion to correct illegal sentence, ill-placed as it was, contains a declaration that illuminates the underlying issue. It makes clear that trial counsel advised Grimes that "he could not be adjudicated and sentenced

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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." Motion, 9-9-2013, p. 2.

The next paragraph of the declaration is extremely important and is therefore reproduced here in its entirety:

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

Motion, 9-9-2013, pp. 2-3.

The declaration went on further to explain that at the initial sentencing hearing, the Court agreed that Count 3 was to be dismissed. The record supports this. On February 7, 2013, the following exchange occurred:

> Ms. Hojjat: And, Your Honor, to start off, I didn't want to interrupt anybody but we are actually objecting to the adjudication of Count 3 in this case, the

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> battery with use of a deadly weapon constituting domestic violence resulting in substantial bodily harm in violation of a temporary protective order. There was some talk of this during the trial, I'm not sure if the Court-
>
> The Court: You're right. I mean, does the State have any objection to it being dismissed?
>
> Ms. Botelho: We actually do, Your Honor. I have a copy of case law, Adrian Jackson versus the State of Nevada, it's an advisory opinion but basically it deals with the issue of redundancy and also whether or not a Defendant can be adjudicated guilty of both Counts 1 – Count 1, attempt murder with use, and also Count 3, battery with a deadly weapon resulting in substantial bodily harm. It is directly on point. It essentially says yes, you can adjudicate him guilty as to both.

Transcript, 2-7-2013, p. 9.

While much of what is described in the declaration apparently took place in-chambers or off the record, the above exchange confirms that the Court and defense counsel were under the belief the State had agreed to dismiss Count 3. Nonetheless, the sentencing was continued for the Court to review the Jackson decision.

At the continued sentencing, at no time did defense counsel move to dismiss Count 3. Transcript, 2-12-2013. The sentencing was attended by a different deputy public defender, who again noted discussion during the trial regarding Count 3 merging with Count 1. Transcript, pp. 2-3. The Court appeared to agree with that recollection. Transcript, p. 2. Counsel did argue that applying Jackson would be an ex post facto violation, but did not move to dismiss Count 3, delay the sentencing, or take any other action. In fact, trial counsel agreed the Court should sentence Grimes, and deal with the issue later. Transcript, p. 4. As mentioned before, the Court would go on not just to sentence Grimes on Count 3, but to run Count 3 consecutive to Count 1.

Remarkably, despite the ready state of the record, the issue was not raised on direct appeal. As noted, the Clark County Public Defender instead presented the issue in a motion to

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correct illegal sentence. The explanation for not raising the issue on appeal was "because the limitations of fast track and, number two, because it needed to be preserved in a more proper fashion." Transcript, 10-3-2013, p. 7. Interestingly, the State's response at argument focused on that Jackson was "not unforeseeable, not unexpected." Transcript, p. 19. Defense counsel maintained that "Nobody, including the State, thought that we were going to reverse 25 solid years of precedence and go the opposite direction and bust the State of Nevada from this redundancy standard, this fairness standard, back down to a straight mechanical application of Blockburger." Transcript, p. 20.

The motion to correct illegal sentence was eventually denied and the denial appealed. While the briefing in support of the appeal seems relatively complete, the ultimate denial of the appeal by the Nevada Supreme Court rested purely on jurisdictional grounds and did not reach the merit of the claims. Order of Affirmance dated February 26, 2016. SUPP 132.

While the concerns raised in this petition have several moving parts, Grimes would suggest this Court is called upon to decide 1) what counsel could have done differently, 2) whether the State was estopped from abandoning its agreement that Count 3 was redundant, and 3) whether Jackson can in fact be applied retroactively.

Trial and appellate counsel were ineffective:

Challenges to the actions of trial or appellate counsel are viewed in light of the law existing "at the time" of the challenged conduct. Smith v. Murray, 477 U.S. 527, 536 (1986). Failure to raise a "dead-bang winner" exceeds the level of showing required under Strickland. See Neill v. Gibson, 278 F.3d 1044, 1057 at n. 5 (10th Cir. 2002) (noting that "dead-bang winner" test does not replace Strickland's "reasonable probability" analysis).

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At the trial level, moving to dismiss Count 3 or listing Count 3 as a lesser included offense of Count 1 were dead bang winners. Existing law established that a charge of battery was redundant to a charge of attempt murder where both charges arose from the same criminal act. Salazar, 119 Nev. at 224. There was no tactical reason for failing to move to dismiss Count 3 prior to verdict, or for failing to have Count 3 listed as a lesser included offense of Count 1. At best, the record discloses that trial counsel failed to do these things based on assurances from the Court and prosecution that Count 3 would be dismissed at the time of sentencing. Motion filed 9-9-2013, pp. 2-3. The Benjamin Franklin quote "Don't put off until tomorrow what you can do today" illuminates the problem: in the absence of any good reason for failing to act, trial counsel should have protected Petitioner's rights at the earliest opportunity.

The situation on appeal was perhaps even more egregious. Appellate counsel's reasons for not raising the issue on direct appeal are nonsensical. First, counsel noted the page limitations of the fast track briefing rules. Transcript, 10-3-2013, p. 7. However, appellate counsel's prime duty is to present the strongest arguments on appeal, and the dismissal of Count 3 was a certainty under the law in effect at the time of Grimes' trial. Relatedly, appellate counsel could easily have filed a motion for full briefing if page limitations presented a logistical problem to presenting this important issue. See NRAP 3(e)(k)(2). Such a motion would have had a strong chance of success where even the State admitted to the Nevada Supreme Court that the retroactivity of Jackson was an important statewide issue that the Supreme Court should decide. SUPP 95.

Second, the argument that the issue needed further preservation is also incorrect. Transcript, 10-3-2013, p. 7. The issue was already preserved for review when the Court

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effectively overruled a defense objection and granted the State's request to consider Jackson and impose a consecutive sentence. Transcript, 2-7-2013, p. 9. Here, where the objection was made, the matter continued for the Court to review Jackson, and the objection overruled by the Court's refusal to dismiss Count 3 and imposition of a consecutive sentence, the matter was properly preserved for review. Richmond v. State, 118 Nev. 924, 59 P.3d 1249, 1254 (2002) (adopting "flexible" approach to determination if issue properly preserved for review). Even if that were not so, the issue could have been presented for plain error review. Martinorellan v. State, 131 Nev. Adv. Op. 6, 343 P.3d 590 (2015). If the issue were in fact not preserved for review, that fact alone would constitute ineffective assistance of trial counsel.

Moreover, the strategy of presenting the issue via a motion to correct illegal sentence was inherently flawed. Such a motion is very narrow in scope and may only be used to challenge facial illegality of a sentence. Edwards v. State, 112 Nev. 704, 918 P.2d 321, 324 (1996). That is, the motion might have been appropriate if the issue before the Court was purely one of whether Count 3 was an illegal sentence under Salazar. However, the question here was deeper: Whether applying the new decision in Jackson constituted an unconstitutional Ex Post Facto violation. The sentence imposed was plainly not illegal under Jackson; thus the concept of addressing the challenge to Count 3 via a facial illegality argument was a non-starter. Rather, as a complicated Due Process claim, it was well outside the narrow bounds of an illegal sentence motion and should have been raised on direct appeal. Order of Affirmance, 2-26-2016.

The State remains bound by its promise that Count Three merged with Count One:

Inconsistency of position by the government which impedes the Defendant's defense at trial results constitutes a miscarriage of justice. Siddiqi v. United States, 98 F.3d 1427, 1428 (2nd

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Cir. 1996). The State is bound by the promises it makes during trial proceedings. Santobello v. New York, 404 U.S. 257 (1971); see also People v. Quartermain, 16 Cal. 4th 600, 619 (1998) (error for State to use Defendant's statement during trial having previously promised not to). Courts have acknowledged that the principles of Santobello apply whenever a defendant acts to his detriment in reliance upon governmental promises. United States v. Carrillo, 709 F.2d 35, 36 (9th Cir. 1983), United States v. Rodman, 519 F.2d 1058 (1st Cir. 1975).

In the present case, it appears the State managed to avoid expressly stating its agreement "on the record" during the trial proceedings. However, defense counsel has explained that they advised their client and made tactical decisions during trial (such as to not object to the verdict form) based on promises by the State. The record supports this contention because when defense counsel first objected at the sentencing hearing, this Court responded "You're right. I mean, does the State have any objection to it being dismissed?" Transcript, 2-7-2013 , p. 9.

Based on the foregoing, defense counsel's actions make a lot more sense. The State had agreed that Count 3 would merge with Count 1 in the event of a conviction. As a result, defense counsel was given a promise it could count on, and this would explain why no objection to the verdict form was made. The State is bound by that promise, and as a matter of fundamental fairness could not change positions *after trial*. Where, as here, the State's promise affected the defense's preparation and presentation of its case, the Due Process Clause requires the promise be enforced.

Appellate counsel was ineffective for not presenting this argument on direct appeal and Petitioner would have enjoyed a reasonable probability of a more favorable outcome had

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appellate counsel argued that the State was bound by its prior agreement to dismiss Ground Three.

Application of Jackson to the instant case is an Ex Post Facto violation:

Although there has never been a definitive ruling on the issue, the record contains extensive briefing on the underlying merit of the Ex Post Facto claim. To briefly review the same, the Ex Post Facto and Due Process clauses of the federal and state constitutions prohibit infliction of "after the fact" laws or judicial decisions in certain circumstances. See U.S. Const. art. I, § 9, cl. 3 (Ex Post Facto Clause); U.S. Const. amend. XIV (Due Process Clause); Nev. Const. art. I, § 15 (Ex Post Facto Clause); Nev. Const. art. 1 § 8, cl. 5 (Due Process Clause).

There are four types of Ex Post Facto laws that are constitutionally prohibited: (1) "Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action"; (2) "Every law that aggravates a crime, or makes it greater than it was, when committed"; (3) "Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed"; and (4) "Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender." Calder v. Bull, 3 Dall. 386, 390 (1798). Because the Ex Post Facto Clause expressly limits legislative powers, it "does not of its own force apply to the Judicial Branch of government." Marks v. United States, 430 U.S. 188, 191 (1977). Nevertheless, both the United States Supreme Court and the Nevada Supreme Court have held that Ex Post Facto principles also apply to the judiciary through the Due Process Clause. Bouie v. Columbia, 378 U.S. 437 (1964); Stevens v. Warden, 114 Nev. 1217, 969 P.2d 945 (1998).

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In Stevens, the Nevada Supreme Court set forth a three-part test for determining when a judicial decision violates Ex Post Facto principles: (1) the decision must have been "unforeseeable"; (2) the decision must have been applied "retroactively"; and (3) the decision must "disadvantage the offender affected by it." Stevens, 114 Nev. at 1221-22.

Turning back to the appeal from the denial of the motion for illegal sentence, the record plainly shows the State's agreement with the above, well-settled authorities. SUPP 107-110. Of course, this is not to say the State agreed with the application of them to this matter. Rather, the State quite clearly staked out a position that (1) application of Jackson "did nothing to change the amount of punishment attaching to the crimes Grimes committed" and (2) Jackson was not unforeseeable. SUPP 108. The State's briefing on appeal fails to mention Stevens at all. However, Stevens itself was largely premised on the Supreme Court's holding in Bouie, thus creating a large overlap between those decisions. Stevens, 114 Nev. at 1121.

While this Court will be the first to address the merits of the Ex Post Facto claim, Petitioner would suggest the actual application of Stevens renders the decision easy to make. The "retroactivity" question is not disputed by the State: Jackson came out after Grimes was found guilty but before sentencing and in any event, undisputedly did not exist at the time of the offense. There is no question Jackson is being applied retroactively in this matter.

That just leaves the questions of disadvantage and of unforeseeability. As to disadvantage, the State's position on appeal made little sense. It is plain that this Court's decision to run Count 3 consecutive to Count 1 works to "disadvantage" Grimes when compared to the possible complete dismissal of Count 3. The holding in Stevens specifically concluded that additional time in prison constitutes a "disadvantage" for purposes of this analysis. Stevens,

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113 Nev. at 1222-23. By being made to serve an extra 8 to 20 years on Count 3, instead of Count 3 being dismissed, Grimes has been disadvantaged.

Finally, there is no question at this point in time that Jackson was unforeseeable. To be sure, the State hotly (and glibly) disputed that fact during the original appellate briefing. SUPP 110. However, the Nevada Supreme Court has now spoken on the issue and it is beyond dispute that Jackson constituted an unforeseeable repudiation of Salazar and other redundancy-based cases. Byars v. State, 130 Nev. Adv. Op. 85, 336 P.3d 939, 949 (2014). There, the Supreme Court held:

> This court has disapproved of the "same conduct" theory, however, specifically mentioning the three cases cited by Byars in support of his argument. Jackson v. State, 128 Nev. ___, 291 P.3d 1274, 1282 (2012) (naming Salazar v. State, 119 Nev. 224, 228, 70 P.3d 749, 751-52 (2003), Skiba v. State, 114 Nev. 612, 616, 959 P.2d 959, 961 (1998), and Albitre v. State, 103 Nev. 281, 283-84, 738 P.2d 1307, 1309 (1987), **and overruling these cases and their progeny**). In light of our prior disapproval, we conclude that Byars' argument in this regard lacks merit.

Id. at 949 (emphasis added).

Therefore, any prior debate on the topic is over. The Nevada Supreme Court expressly proclaimed in Byars that Jackson overruled Salazar and the other redundancy-based cases. Again, the holding of Stevens provides a plain answer: if a line of cases is overruled, that overruling constitutes an unforeseeable decision for purposes of the Ex Post Facto analysis. Stevens, 114 Nev. at 1121.

Grimes meets all of the Stevens criteria. As a result, his underlying claim of error has merit and the application of Jackson to his crime constitutes a violation of the state and federal Ex Post Facto Clauses. Put another way, Grimes had the right to know how much punishment he

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could receive at the time the offenses herein were committed, and the law at that time required the Court to collapse Count 3 into Count 1.

The Ex Post Facto issue was meritorious. Viewed as either a failure of trial or appellate counsel, the botched presentation of this issue deprived Grimes of even the opportunity to receive a ruling on the merits of the claim. Because the claim has a reasonable probability of success, Grimes suffered ineffective assistance of counsel and is entitled to relief in the form of a new trial and/or complete dismissal of Count Three.

GROUND TWO

Petitioner received ineffective assistance of trial counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution when trial counsel failed to properly object to or present any argument against the fact that the State had alleged a steak knife was a deadly weapon.

Trial counsel was ineffective by failing to present any challenge to the steak knife as a deadly weapon. As noted herein, the State's closing argument contained a lengthy segment on how the steak knife was a deadly weapon, and the defense presented no argument on the topic.

As previously explained by the Nevada Supreme Court, "a steak knife is not primarily designed or fitted for use as a weapon." Knight v. State, 116 Nev. 140, 993 P.2d 67, 72 (2000). Therefore, the question of "whether a common steak knife is a dangerous or deadly weapon is a question of fact for the jury." Id.

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During opening statement, the defense suggested that the evidence would show the injuries supposedly inflicted via the steak knife "were so superficial that she was discharged from the hospital a day and a half later." TT, Day 2, p. 16. Aneka's testimony confirmed she was in fact in the hospital for only two days. TT, Day 2, p. 128. Any wounds were treated via "stiches and staples." TT, Day 2, p. 102.

Defense counsel failed to argue during the closing that a steak knife is not a deadly weapon. The trial evidence, any particularly the fact any knife wounds were treated with stiches and staples, could have been used to support an argument that the deadly weapon enhancement should have been rejected by the jury. Had this argument been advanced during the closing argument, there is a reasonable probability of a more favorable outcome, and Petitioner is therefore entitled to relief on this claim.

GROUND THREE

Petitioner received ineffective assistance of appellate counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution when appellate counsel failed to argue on appeal that the trial court erroneously denied "Defendant's Motion to Dismiss for Failure to Gather Evidence" filed June 5, 2012.

The basic requirements of an ineffective assistance of counsel claim are set forth in Ground One, which is fully incorporated herein. Here, it is alleged appellate counsel should have raised on appeal the denial of a motion to dismiss for failure to gather evidence.

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Trial counsel filed a motion to dismiss based on the State's failure to test the knife in this case for either a bloody fingerprint found on the knife, or to test blood on the knife for DNA. Motion filed 6-5-12. The motion was subsequently denied. Transcript, 9-13-12, p. 8.

Appellate counsel should have raised the denial of the motion as an issue on appeal because it had a reasonable probability of success. The State defended the motion on grounds that the defense was free to test the knife itself. Opposition filed 7-18-12, p. 5. However, as the defense explained, it believed the passage of time would have diminished the accuracy of any later testing. Transcript, 9-13-12, p. 8.

The State also contended that the defense failed to show the fingerprint or DNA results were material evidence. Opposition, 7-18-12, p. 3. But materiality as it pertains to a duty to preserve evidence means the "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479, 490 (1984). Even if the exculpatory value is not apparent, evidence which might be useful to the defense can also be protected from loss or destruction. Illinois v. Fisher, 540 U.S. 544, 548 (2004). Nevada appears to take a slightly more relaxed approach in first considering whether there was a "reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different." Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111 (1998).

Testimony at trial confirmed that fingerprints and blood were visible on the knife, even as of the time of trial. TT, Day 3, p. 23. The fingerprint was there when the knife was impounded. TT, Day 3, p. 25. Likewise, the knife was preserved for DNA testing. TT, Day 3, p.

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29. Therefore, it is clear the fingerprint and DNA evidence were apparent before the passage of time diminished the ability to conduct appropriate testing. Trial counsel contended that the failure to test this evidence at the time of collection, the only time it could in fact be accurately tested for fingerprints, constituted bad faith. Motion, 6-5-12, p. 4.

There is a reasonable probability that had appellate counsel presented this ground on appeal, Petitioner would have enjoyed a more favorable outcome. Petitioner therefore requests relief on this claim.

GROUND FOUR

Petitioner's conviction and sentence violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, section 8 of the Nevada Constitution because the cumulative effect of the errors alleged in this petition deprived him of his federal constitutional rights, including, but not limited to, his rights to due process of law, equal protection, confrontation, the effective assistance of counsel.

The cumulative effect of any of the errors identified herein, and those found on direct appeal, if any one were not sufficient in severity to justify a grant of post-conviction relief, justify relief in their combined magnitude. The cumulative effect of those errors rendered the trial fundamentally unfair and supports relief based on a claim of cumulative error. This is particularly so in light of the Nevada Supreme Court's finding of multiple errors on appeal, including that the defense was incorrectly prevented from arguing and instructing the jury as to

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self-defense, and that the State was impermissibly allowed to present expert testimony on knife wounds. When those errors are considered in combination with the errors contained in the trial record, particularly those relating to the State's promise that Count Three would be dismissed as redundant, trial counsel's failure to secure that dismissal, and appellate counsel's failure to raise the issue, it is clear Petitioner's trial proceedings were fundamentally unfair. Petitioner is entitled to relief on a claim of cumulative error.

IV.

CONCLUSION

For each of the reasons set forth herein, Petitioner submits that he is entitled to an evidentiary hearing and/or relief on his claims herein.

Wherefore, petitioner prays this Court (1) grant a new trial on all charges, (2) grant an evidentiary hearing, (3) vacate the conviction on Count Three, and/or (3) grant any other relief to which petitioner may be entitled.

DATED this 16th day of May, 2017.

Submitted By:

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
JAMIE J. RESCH
Attorney for Petitioner

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EXHS

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Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

BENNETT GRIMES, Petitioner, vs. THE STATE OF NEVADA, Respondent.	Case No.: C-11-276163-1 Dept. No: XII **PETITIONER'S EXHIBITS IN SUPPORT OF SUPPLEMENT TO POST-CONVICTION WRIT OF HABEAS CORPUS** Date of Hearing: Aug. 24, 2017 Time of Hearing: 8:30 a.m.

COMES NOW Petitioner, Bennett Grimes, by and through appointed counsel, Jamie J. Resch, Esq., and hereby submits his Exhibits in Support of Supplement to Post-Conviction Writ of Habeas Corpus.

Dated this 16th day of May, 2017.

Submitted By:

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
JAMIE J. RESCH
Attorney for Petitioner

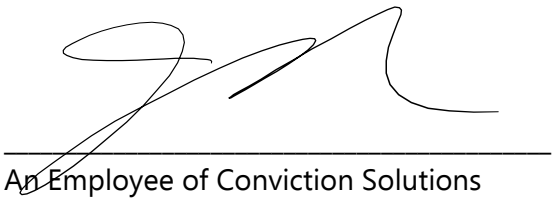
CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Resch Law, PLLC d/b/a Conviction Solutions and that, pursuant to N.R.C.P. 5(b), on May 16, 2017, I served a true and correct copy of the foregoing Exhibits in Support of Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) via first class mail in envelopes addressed to:

Clark County District Attorney
200 Lewis Ave.
Las Vegas, NV 89155

and via Wiznet's electronic filing system, as permitted by local practice to the following person(s):

Steven B. Wolfson
Clark County District Attorney
PDMotions@ClarkCountyDA.com



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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 62835

E-File

FAST TRACK STATEMENT

1. **Name of party:** Bennett Grimes ("Bennett").

2. **Name of attorney submitting this fast track statement:**

DEBORAH L. WESTBROOK, #9285
Clark County Public Defender's Office
309 S. Third St., Ste. 226
Las Vegas, Nevada 89155
(702) 455-4685

3. **Name of appellate counsel if different from trial counsel:** Same.

4. **Judicial district, county, and district court docket number of lower court proceedings:** Eighth Judicial District, County of Clark, District Court Case No. C276163.

5. **Name of judge issuing order appealed from:** Michelle Leavitt.

6. **Length of trial.** Four days.

7. **Conviction(s) appealed from:** 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.

8. **Sentence for each count:** $25 Admin. fee; $150 DNA analysis fee; genetic testing; Ct. 1 – 8-20 years plus a consecutive term of 5-15 years for use of a deadly weapon; as to Cts. 2 and 3, habitual criminal treatment; Ct. 2 – 8-20 years in prison; Ct. 2 concurrent with Ct. 1; Ct. 3 – 8-20 years; Ct. 3 consecutive to Cts. 1 and 2; 581 days CTS.

9. **Date district court announced decision:** 02/12/13.

10. **Date of entry of written judgment:** 02/21/13.

11. **Habeas corpus:** N/A.

12. **Post-judgment motions:** N/A.

13. **Notice of appeal filed:** 03/18/13.

14. **Rule governing the time limit for filing the notice of appeal:** NRAP4(b).

15. **Statute which grants jurisdiction to review the judgment:** NRS 177.015.

16. **Disposition below:** Judgment upon verdict of guilt.

17. **Pending and prior proceedings in this court:** N/A.

18. **Pending and prior proceedings in other courts:** N/A.

19. **Proceedings raising same issues.** Appellate counsel is unaware of any pending proceedings before this Court which raise the same issues as the instant appeal.

20. **Procedural history.** The State filed a Criminal Complaint on July 26, 2011, charging Bennett with three felony counts: attempt murder with use of a deadly weapon,[1] burglary, and battery with use of a deadly weapon constituting domestic violence. (Appellant's Appendix, Vol. I: 1-3).[2] These counts stemmed from a July 22, 2011 incident involving Bennett and his former wife Aneka Grimes at an apartment located at 4325 West Desert Inn, Las Vegas, NV. *Id.*

At the preliminary hearing on August 25, 2011, the state filed an Amended Criminal Complaint in open court charging Bennett with: (1) attempt murder with use of a deadly weapon in violation of a temporary protective order, (2) burglary while in possession of a deadly weapon in violation of a temporary protective order; and (3) battery with use of a deadly weapon constituting domestic violence resulting in substantial bodily harm in violation of a temporary protective order. (I: 8). After the preliminary hearing, Bennett was bound over to District Court as charged. (I: 8, 52).

Bennett was charged by way of Information filed September 14, 2011. (I: 9-11). At his arraignment on September 20, 2011, he pled not guilty. (I: 230; II: 266). The

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[1] The deadly weapon identified in the Criminal Complaint was a "knife". (I: 1-3).

[2] Hereinafter, citations to the Appellant's Appendix will start with the volume number, followed by the specific page number. For example, (AA Vol.I: 1-3) will be shortened to (I: 1-3).

State filed an Amended Information on September 21, 2011 and a Second Amended Information on October 25, 2011. (I: 14-16, 65-67). The Second Amended Information charged Bennett with the following: (1) attempt murder with use of a deadly weapon in violation of a temporary protective order, (2) burglary while in possession of a deadly weapon in violation of a temporary protective order, and (3) battery with use of a deadly weapon constituting domestic violence resulting in substantial bodily harm in violation of a temporary protective order. (I: 65-67).[3]

Trial commenced on October 10, 2012. (I: 250-51). On October 15, 2012, a jury convicted Bennett of all three charges against him. (I: 211-12). On October 22, 2012, Bennett filed a Motion for New Trial based on the Court's failure to notify the parties that the jury had a question about the law during deliberations. (I: 213-16). After the Court denied that motion, Bennett was sentenced on February 13, 2012 and a Judgment of Conviction was filed on February 21, 2013. (I: 224-25; II: 258, 263-64). On March 8, 2013, Bennett timely filed his Notice of Appeal.

21. **Statement of facts.** Bennett and his former wife Aneka were married for seven years before they divorced in April of 2012. (III: 654-55). By July of 2011, the two were estranged and living apart. (III: 656-57) Aneka, who then lived in an apartment at 9325 West Desert Inn Road in Las Vegas, had obtained a TPO against Bennett which required him to stay away from her. (III. 655-57). On the evening of

[3] On October 10, 2012, the State filed a Third Amended Information, designating Steven B. Wolfson as the District Attorney instead of David Roger. (I: 173-75).

July 22, 2011, between 6:30 and 6:45 p.m., Aneka and her mother Stephanie Newman returned to Aneka's apartment. (III: 657; 709). When Aneka walked into the apartment, her mother yelled for her to come to the door because Bennett was trying to get inside. (III: 659). Although Aneka and Stephanie tried to hold the door closed, Bennett eventually pushed his way into the apartment. (III: 660). Once inside, Bennett told Aneka he was sorry, that he loved her and that he wanted to be with her. (III: 660). Bennett pleaded with Aneka's mother Stephanie, telling her he was sorry and that he loved her daughter. (III: 660, 741). Stephanie recalled Bennett asking Aneka to "let him come back, please let him come back". (III: 715). Bennett also told her "he got a job, he can take care of the kids now." (III: 715). When he came into the apartment, Bennett did not threaten Aneka or her mother, and neither of them felt threatened. (III: 683-84, 741-42). He simply stood in the entry way for about five minutes, pleading with Aneka to take him back. (III: 682-88). Aneka testified that Bennett's demeanor was "sad", not angry, and that he was trying to "resolve things" between the two of them. (III: 683, 685). At one point, Bennett broke down and cried. (III: 741). Bennett did not have a knife, gun or any other weapon when he came into the apartment. (III: 683). He did, however, bring a copy of his Walmart schedule with him, showing he had a job. (IV: 794-95 & V: 1077).

When Bennett pleaded for his wife to come back, Aneka told him she "didn't really care". (III: 661). Aneka and her mother asked Bennett to leave and to "just get

out" but he did not do so. (III: 661, 715). At some point, Aneka walked over to the counter bar and called the police while Stephanie called Aneka's father. (III: 661-62, 668). During the 911 call, Aneka was calm because she was "just at the point where I just wanted him to be gone." (III: 665, 675). When the 911 dispatcher asked Aneka if anyone had access to weapons, she said, "no". (III: 699).

When Stephanie went outside to the balcony to wait for the police, Aneka either called or texted a friend. (III: 666). Bennett was still standing by the front door. (III: 689). Then, Aneka claims that Bennett walked five-to-seven feet to where she was standing at the counter bar, reached across the counter, grabbed a knife from out of her dish rack (which was sitting below the counter next to the sink) and pulled her five-to-seven feet back to the front door, where he stabbed her in the head, arms and chest more than 20 times. (III: 669-70, 689). Stephanie admitted that she did not see how the encounter began; she only saw Aneka and Bennett when they were already on the floor near the front door. (III: 735-38).

It is undisputed that the knife had recently been cleaned and was sitting in a drying rack below the counter. (III: 692). In that location, the knife would not have been readily apparent to someone who did not already know it was there. (*See* III: 692; V: 1068-69, 1081-85). In Stephanie's statement to the police, she told officers that she did not think there was any way that Bennett could have gotten the knife from the kitchen. (III: 744-45). Aneka was admittedly standing next to the knife when the

encounter began and she knew the knife was there because she had just washed those dishes. (*See* III: 692, 747). Although Aneka denied ever holding the knife during the incident (III: 692-93), her skin cells – but not Bennett's – were found on the knife handle. (IV: 991-92, 904). While Stephanie testified that Aneka was neither aggressive nor threatening to Bennett before the incident (III: 720), Officers heard arguing and yelling right as they arrived on the scene. (III: 571; 606-07). On the 911 tapes, Aneka and her mother can be heard yelling at Bennett, while he sobs and pleads for her to take him back. (V: 1087-88). Aneka admitted that she "wanted him to just be gone . . . out of my life forever, gone". (III: 674).

Following the incident, Aneka did not have any stab wounds on her hands; rather, her injuries were localized to her upper chest, neck, face and scalp. (*See* III: 630-31). Bennett had a cut on his right hand which had bled profusely. (III: 582). Both Aneka and Bennett received medical treatment following the incident. (III: 618; 628, 634). Having seen both Aneka and Bennett in court, jurors could clearly see the difference in their respective sizes. (V: 936). Jurors also knew from photographs presented that Aneka wore a size "small". (V: 1078).

22. **Issues on appeal.**

I. The court violated the Fifth, Sixth and Fourteenth Amendments and the Nevada constitution by forcing Bennett to choose between his right to remain silent and his right to present a self defense theory to the jury despite evidence of self defense; the court penalized Bennett for not testifying by denying proposed jury instructions on self defense; the court prohibited Bennett from arguing self defense

after allowing the State to rebut self defense in its case in chief with an unnoticed expert.

II. The court committed reversable constitutional error by refusing to notify the parties that the jury had a question during deliberations about when the intent to commit a burglary needed to be formed (before or after entry).

III. The State failed to present sufficient evidence to sustain a conviction for burglary beyond a reasonable doubt.

IV. Bennett's federal and state constitutional right to a fair trial was violated by the cumulative error in this case.

23. **Legal argument, including authorities:**

I. THE COURT VIOLATED THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND THE NEVADA CONSTITUTION BY FORCING BENNETT TO CHOOSE BETWEEN HIS RIGHT TO REMAIN SILENT AND HIS RIGHT TO PRESENT A SELF DEFENSE THEORY TO THE JURY DESPITE EVIDENCE OF SELF DEFENSE; THE COURT PENALIZED BENNETT FOR NOT TESTIFYING BY DENYING PROPOSED JURY INSTRUCTIONS ON SELF DEFENSE; THE COURT PROHIBITED BENNETT FROM ARGUING SELF DEFENSE AFTER ALLOWING THE STATE TO REBUT SELF DEFENSE IN ITS CASE IN CHIEF WITH AN UNNOTICED EXPERT.

At trial, Bennett's theory of the case was self defense. The defense theory – as outlined in the defense's opening statement – was that after Bennett came into the house and pleaded with Aneka to take him back, Aneka took the knife from the dish rack by the counter bar (where she was standing), approached Bennett at the door with the knife, and the two struggled over the knife; however, because Bennett was bigger than Aneka, Aneka received the majority of injuries during the struggle. (III: 564-67).

After the close of evidence, the defense requested seven jury instructions explaining self defense. (V: 957-59 & 1055-61). The Court agreed that the proposed

instructions were legally correct; however, the Court declined to instruct the jury on self defense. (V: 958-59). The Court stated repeatedly that it was denying the instructions because, **without Defendant's testimony**, there was insufficient evidence to support an inference of self-defense:

- There's "no evidence from anybody that's testified that she went towards him . . . . Somebody has to testify that she was the initial aggressor and everything that makes that up." (V: 943 (emphasis added)).

- If defense counsel is allowed to argue self defense, they can "basically tell the jury what the defendant would have said had he taken the stand." (V: 946).

- "[I]n all fairness, it is extraordinarily difficult to assert a self-defense theory if there isn't something from your client, either a statement made to the police. I mean, I've had cases where statements made to the police, but then – well, that's a whole other story about how that gets in or doesn't get in. Or the defendant has to take the stand. (V: 947 (emphasis added)).

- "I don't know how in the world you get those jury instructions if – it's very, very difficult. There has to be something from the defendant, something. We don't have anything." (V: 947-48 (emphasis added))

After ruling that Bennett would not get any self defense instructions unless he testified, the Court told Bennett that it was "up to [him]" whether or not to testify. (V: 949-951). When Bennett stated that he was not going to take the stand, the Court advised him, "All right. And you understand I'm not going to instruct the jury on self-defense?" (V: 951). The Court's ruling that Bennett could not present his theory of the case unless he testified violated the Fifth, Sixth and Fourteenth Amendments and the Nevada Constitution and warrants reversal. The defense preserved these arguments by making a detailed record before the court. (V: 931-52).

A. There was sufficient evidence -- even without Bennett's testimony -- to warrant a self defense instruction.

A criminal defendant has the "right to have the jury instructed on his theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." **McCraney v. State**, 110 Nev. 250, 254, 871 P.2d 922, 925 (1994) (citing **Margetts v. State**, 107 Nev. 616, 818 P.2d 392 (1991)) (emphasis added). It is reversible error for a court to fail to instruct the jury on a theory of the case supported by the evidence. **McCraney**, 110 Nev. at 255, 871 P.2d at 925; accord **Rosas v. State**, 122 Nev. 1258, 147 P.3d 1101 (2007) (where some evidence supported a theory of self defense, defendant was entitled to have jury instructed on that theory).

In this case, even without Defendant's testimony, there was sufficient circumstantial evidence from which a jury could infer that Aneka was the initial aggressor, thereby warranting a self-defense instruction:

- Aneka admitted that she "wanted [Bennett] to just be gone . . . out of my life forever, gone". (III: 674).
- While Stephanie testified that Aneka was neither aggressive nor threatening to Grimes before the incident (III: 720), Officers heard arguing and yelling right as they arrived on the scene. (III: 571; 606-07).
- On the 911 tapes, Aneka and her mother can be heard screaming and yelling at Bennett to leave, over and over, while Bennett sobs and pleads for her to take him back. (V: 1087-88).
- The knife used in the encounter was taken from a drying rack behind the counter in an area not immediately accessible or apparent to someone who did not already know it was there. (*See* III: 692; V: 1068-69, 1081-85).

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

- Aneka's DNA was found on the newly-cleaned knife handle but Bennett's was not. (IV: 991-9, 904; V: 934).

- Testimony and evidence placed Bennett almost exclusively by the front door. (*See* III: 685, 735-36, 750; V: 933, 1069, 1081-85).

- Stephanie did not see how the encounter began and only saw Aneka and Bennett when after they were lying near the front door. (III: 735-38).

- It does not make sense that Bennett would have dragged Aneka five-to-seven feet only to stab her at the front door. (III: 669-70, 689; V: 934)

- Bennett received an injury to his hand during the encounter which bled profusely. (III: 582).

- Aneka did not have any wounds on her hands. (III: 630-31).

- Jurors could see that Bennett was larger than Aneka, and that she wore a size small, and the size differential supports that Aneka would have been injured in a struggle over the knife. (V: 936, 1078).

Under existing law in Nevada, regardless of how "weak or incredible" the evidence may have been, Bennett had a right to receive a jury instruction on his theory of self defense. **McCraney**, 110 Nev. at 254, 871 P.2d at 925. Based on the evidence presented, Bennett should have been permitted to argue that after five minutes of Aneka and her mother screaming and yelling at him to leave, Aneka picked up the knife and came at him where he was standing at the door, resulting in the struggle that led to her injuries. Because there was sufficient circumstantial evidence to suggest that Aneka was the initial aggressor, the court committed reversible error by failing to

instruct the jury on self-defense. **Id.**; accord **Williams v. State**, 915 P.2d 371 (Ok. Cr. 1996) ("a defendant may raise self defense sufficiently to justify an instruction through circumstantial evidence alone").

B. A defendant need not testify to obtain a self defense instruction.

The trial court's ruling was based, in part, on an erroneous belief that a defendant cannot obtain a self defense instruction unless he either testifies or introduces evidence of a prior statement that he made to the police. That ruling is error as a matter of law. In Nevada, a defendant does not have to testify or even present any evidence in order to obtain a specific jury instruction. See, e.g., **McCraney**, 110 Nev. at 255, 871 P.2d at 925. Likewise, other states have recognized that it is error for a court to require a defendant to testify to obtain a jury instruction on self defense. **State v. Walker**, 164 Wash.App. 724, 729 n.5, 265 P.3d 191 (2011) (internal citations omitted) (evidence warranting a self defense jury instruction may come "from 'whatever source' and . . . the evidence does not need to be the defendant's own testimony"); **State v. Heiskell**, 666 P.2d 207, 213 (Kan. App. 1983) (citing, inter alia, **1 Wharton's Criminal Evidence § 27** (13th Ed. 1972) ("there is no requirement a defendant must rely upon his own testimony to merit a self defense instruction"); **Cordray v. State**, 268 P.2d 316 (Ok. Cr. 1954) (reversible error to refuse requested self defense instruction although defendant did not testify). Because the law does not require a defendant to testify or even present evidence obtain a jury instruction on self

defense, the trial court erred in refusing to instruct the jury on self defense on the basis that defendant did not testify.

C. The Court impermissibly required Bennett to choose between two constitutional rights.

This Court has previously stated that requiring a criminal defendant "to introduce evidence in order to be entitled to a specific jury instruction on a defense theory would violate the defendant's constitutional right to remain silent by requiring that he forfeit that right in order to obtain instructions." **McCraney**, 110 Nev. at 255, 871 P.2d at 925. Moreover, a "trial court cannot explicitly or effectively force a defendant to choose between his Sixth Amendment right to present a defense and his Fifth Amendment right not to testify." **Williams**, 915 P.2d at 377. Unfortunately, that is exactly what the trial court asked Bennett to do in this case when it said that he could not receive any instructions on self defense unless he first testified.

Bennett's "choice" to forfeit his entire defense theory was not a voluntary one. As the Supreme Court recognized in **Brooks v. Tennessee,** 406 U.S. 605 (1972), a criminal defendant cannot "voluntarily" choose between asserting two constitutional rights. Here, Bennett had an illusory choice – either waive his Fifth Amendment right to remain silent, or waive his Sixth Amendment right to present a defense. See **U.S. Const. amend. V, VI, XIV;** see also **Nev. Const. Art. 1 § 8.** By forcing Bennett to choose between two constitutional rights, the trial court committed reversible error.

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D. The Court deprived Bennett of his right to counsel and violated Bennett's due process and fundamental fairness rights by preventing his attorneys from arguing his theory of the case in closing.

The defense's closing argument "is a basic element of the adversary fact finding process in a criminal trial." **Herring v. New York,** 422 U.S. 853, 858 (1975). As a result, even though a court may limit closing arguments, "denying an accused the right to make final arguments on his theory of the defense denies him the right to assistance of counsel." **Conde v. Henry**, 198 F.3d 734, 739 (9th Cir. 2000) (citation omitted) ("trial court violated defendant's right to counsel by precluding his attorney from arguing his theory of the defense in closing arguments"). In this case, the Court told defense counsel in no uncertain terms, "you cannot get up and argue to the jury what [Bennett] may have said had he taken the stand". (V: 947) The Court later informed Bennett, "I'm just not going to let the attorneys basically make up a story. And if it's the truth, I'm not going to let them tell it because it wasn't testified to up there." (V: 950). By preventing Bennett from arguing that he acted in self defense – a theory presented by the defense in its opening statement and supported by the evidence – the trial court violated Bennett's due process rights, his fundamental right to assistance of counsel and his right to present a defense, relieving the State of its burden to prove its case beyond a reasonable doubt. **Conde,** 198 F.3d at 739; see also **U.S. Const. amend. V, VI, XIV; Nev. Const. Art. 1 § 8.**

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E. The Court improperly allowed the State to refute Bennett's self-defense theory in its case in chief with an unnoticed expert, compounding the constitutional error in this case.

Prior to trial, the State identified Crime Scene Analyst ("CSA") Louise Renhard as an expert "in the area of crime scene investigation and the identification, documentation, collection and preservation of evidence". (I: 103-104). Despite the limited scope of Renhard's expertise as a CSA, and over defense objection, the State elicited testimony from Renhard on direct examination on the subject of self-inflicted knife wounds. (IV: 797-98). Specifically, the trial court allowed Renhard to testify that she was familiar with "self-inflicted knife wounds to the knife wielder's hand" and that, based on her review of State's Exhibit 73, the wound on Bennett's hand was "consistent" with what would "happen when a knife slips in a person's hand" (as opposed to a wound obtained during a struggle, which was the defense contention). (IV: 797-99). When the State later tried to elicit testimony from Renhard about so-called "defensive" wounds on Aneka, defense counsel again objected and argued that allowing Renhard to testify about the cause of various knife wounds improperly bolstered other testimony in the record, allowed her to testify as to an ultimate issue, and prejudiced the defense because it had received no CV/notice to prepare for cross examination on the subject. (IV: 799-801, 803-08). The trial court sustained the objection, finding that the State's expert witness notice was defective. (IV: 814, 816). Although defense counsel requested a curative instruction that the jury disregard all

testimony by Renhard about the cause of injuries in this case, the court denied the request and told the jury only to disregard the "last question and response." (IV: 818, 820-21). As a result, the court improperly allowed the testimony about Bennett's so-called "self-inflicted" knife wound to stand.

The court's ruling violated Bennett's due process and confrontation clause rights to confront the witnesses against him by allowing an expert witness to testify outside of her area of expertise without prior notice to the defense and depriving counsel of a meaningful opportunity for cross-examination of the unexpected testimony.[4] See **U.S. Const. amend. V, VI, XIV Nev. Const. Art. 1 § 8**; see also **Grey v. State**, 124 Nev. 110, 178 P.3d 154 (2008) (due process clause violated by improper notice of expert witness). The ruling was particularly prejudicial in this case because Bennett was subsequently prevented from even arguing self-defense in closing and via jury instructions while the State was free to present "evidence" that this was not a case of self-defense in its case-in-chief.

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[4] Although the court was of the opinion that the testimony was not "expert" in nature (IV: 813), even if that were true, by allowing the testimony to stand as "expert" testimony, it was given heightened importance in the eyes of the jury and undermined the defense argument that Bennett's injury was obtained during a struggle over the knife and was a defensive wound.

II. THE COURT COMMITTED REVERSABLE CONSTITUTIONAL ERROR BY REFUSING TO NOTIFY THE PARTIES THAT THE JURY HAD A QUESTION DURING DELIBERATIONS ABOUT WHEN THE INTENT TO COMMIT A BURGLARY NEEDED TO BE FORMED (BEFORE OR AFTER ENTRY).

After the jury returned its verdict of guilty on all counts, the Court advised the parties that it had received a note from the jury during deliberations which asked the following question: "Does criminal intent have to be established before entering the structure, or can intent change during the chain of events for the charge of burglary?" (V: 1008, 1067). The Court stated that it "didn't respond to it because my only response would have been to continue to deliberate and look at the instructions." (V: 1008). Bennett subsequently filed a Motion for New Trial based on the Court's failure to inform the parties of this question, arguing that "more clarification would have aided the jury in coming to an accurate verdict" and that the Court's failure to notify the parties of the question deprived Bennett of his constitutional rights to a fair trial and due process under state and federal law. (I: 213-16). The Court denied that motion. (V: 1011-12). In this case, by refusing to even notify the parties that the jury had a question of law, the Court deprived Bennett of counsel at a critical stage of the proceedings and violated his state and federal constitutional rights to a fair trial and due process of law. **See U.S. Const. amend. V, VI, XIV; see also Nev. Const. Art. 1 § 8.**

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Although the Nevada Supreme Court has not yet ruled on this issue,[5] the Ninth Circuit has held that it is constitutional error for a trial court to fail to notify defense counsel of messages from the jury and provide an opportunity to be heard before responding. **U.S. v. Barragan-Devis**, 133 F.3d 1287, 1289 (9th Cir. 1998). As the Ninth Circuit explained in **Barragan-Devis**, "counsel for Appellant could have used such a conference to try and persuade the judge *to* respond. The trial judge's failure to provide that opportunity was error. . . . [which] implicates defendant's constitutional rights." **Id.** at 1289.

Although the court applied harmless error analysis in **Barragan-Devis**, a subsequent Ninth Circuit decision found that automatic reversal would be necessary if a trial court failed to notify the defense that the jury had a question of law during deliberations. See **Musladin v. Lamarque,** 555 F.3d 830, 843 (9th Cir. 2009) (relying on **United States v. Cronic**, 466 U.S. 648 (1984) (automatic reversal required where defendant is denied counsel at a "critical stage")). In **Musladin**, the Ninth Circuit explained that a "missed opportunity to influence the trial court's response to a jury

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[5] To date, the Nevada Supreme Court has not addressed the constitutional aspect of a court's failure to advise counsel about the existence of a jury note, confining its discussion of the law regarding jury communications to an analysis of NRS 175.451, which codifies Nevada state law regarding responses to jury questions. See, e.g., **Daniel v. State,** 119 Nev. 498, 78 P.3d 890 (Nev. 2003); **Cavanaugh v. State,** 102 Nev. 478, 729 P.2d 481 (1986); **Varner v. State,** 97 Nev. 486, 634 P.2d 1205 (1981); **Tellis v. State**, 84 Nev. 587, 445 P.2d 938 (Nev. 1968). To the extent the Court is inclined to make a ruling on this substantive matter, Bennett would request full briefing on this issue.

question" is a "critical stage" of proceedings and, as a result, the failure to notify counsel of a jury question would trigger automatic reversal under **Cronic** on direct review.[6] The Ninth Circuit observed that "counsel is most acutely needed before a decision about how to respond to the jury is made – because it is the substance of the response – or the decision whether to respond substantively or not – that is crucial." 555 F.3d at 842 (emphasis added).

Here, Bennett's attorneys were completely unaware that the jury had a question about the intent necessary for the burglary charge until the court notified the parties after the verdict was delivered. (See I: 213-16; V: 1008). Had the court advised the parties of the note during deliberations, defense counsel would have had an opportunity to try to convince the judge to respond to the question. However, counsel never even had that opportunity, which deprived Bennett of counsel at a critical stage of proceedings warranting automatic reversal in this case. **Musladin**, 555 F.3d at 842.

Nevertheless, even if this Court applied a harmless-error analysis, it cannot be sure "beyond a reasonable doubt that the error did not contribute to the verdict obtained." **Barragin-Devis**, 133 F.3d at 1289 (quoting **U.S. v. Frazin**, 780 F.2d 1461, 1469 (9th Cir. 1986)). In assessing harmless error, the court considers: (1) the probable effect of any message actually sent; (2) the likelihood that the court would

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[6] Because the Ninth Circuit was reviewing the case in a habeas proceeding under AEDPA (rather than on direct review), the Court was unable to grant the defendant's request for relief, notwithstanding its conclusion that defendant was denied counsel at a "critical stage" of trial. **Musladin**, 555 F.3d at 842.

have sent a different message had it consulted with the defense beforehand; and (3) whether any changes in the message to the jury would have affected the verdict. **Id.** (quoting **Frazin**, 780 F.2d at 1470-71).

During deliberations in this case, the jury asked the court, "Does criminal intent have to be established before entering the structure, or can intent change during the chain of events for the charge of burglary?" (V: 1008, 1067). By asking this question, the jury demonstrated that it did not understand instructions 18, 20 and 22 which described burglary as entering "with the intent" to commit an assault, battery or other felony. (I: 194, 196, 198) (emphasis added). Although the jury was clearly confused about that issue, the court did not respond. Because the evidence presented at trial demonstrated that Bennett lacked the requisite criminal intent at the time he entered Aneka's apartment (see Section 23 (III), infra.), the probable effect of the court's failure to respond to this jury question is that the jury improperly relied on criminal intent that formed after Bennett entered Aneka's apartment.

There is a strong likelihood that the court would have responded to the jury question had defense counsel been given an opportunity to weigh in on the issue. No one disputes that for a burglary to occur, the necessary criminal intent must be present "at the very moment of entering". See, e.g., **People v. Hamilton**, 251 Cal.App.2d 506, 508, 59 Cal.Rptr. 459, 460-61 (Cal. App. 1967) ("it is a necessary element of burglary to prove that at the very moment of entering the building in question there

was an intent to commit theft or some felony"); **People v. Gaines**, 74 N.Y.2d 358, 363, 546 N.E.2d 913, 915-16, 547 N.Y.S.2d 620, 622-23 (N.Y. 1989)) ("defendant was entitled to a charge clearly stating that the jury must find that he intended to commit a crime at the time he entered the premises unlawfully.") However, rather than clearly spelling this out, Nevada's burglary statute uses legalese to describe the point in time when the requisite criminal intent must be present:

> A person who, by day or night, enters any . . . apartment . . . with the intent to commit . . . assault or battery on any person or any felony . . . is guilty of burglary"

NRS 205.060 (1) (emphasis added). Here, the jury instructions used similar legalese since they were based on the statute. (I: 194, 196, 198). This Court knows all too well that jurors "should neither be expected to be legal experts nor make legal inferences with respect to the meaning of the law". **Crawford v. State**, 121 Nev. 744, 754, 121 P.3d 582, 488 (2005). In this case, had the court discussed the jury's note with defense counsel, it would have determined that an additional instruction was necessary to explain what entry "with intent" meant – namely, that criminal intent must have been present "at the very moment of entry" for Bennett to be found guilty of the crime of burglary. See, e.g., **Hamilton**, 251 Cal.App.2d at 508, 59 Cal. Rptr. at 460-61; **Gaines**, 74 N.Y.2d at 363, 546 N.E.2d at 915-16, 547 N.Y.S.2d at 622-23.

Finally, as set forth in Section 23 (III), infra, had the jury been instructed in this manner, the verdict would have been "not guilty" on the burglary count, because the

evidence presented at trial demonstrated that Bennett lacked the requisite criminal intent at the time he entered Aneka's apartment in light of the jury's note.

III. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR BURGLARY BEYOND A REASONABLE DOUBT.

"The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." **Carl v. State**, 100 Nev. 164, 165, 678 P.2d 669 (1984). The Nevada Supreme Court will reverse a conviction when the state fails to present evidence to prove an element of the offense beyond a reasonable doubt. **In re Winship**, 397 U.S. 358 (1970); **Martinez v. State**, 114 Nev. 746, 961 P.2d 752 (1998). The standard of review for a challenge to the sufficiency of the evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.'" **McNair v. State**, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.C6. 2781 (1979)). Here, even viewing the evidence in the light most favorable to the prosecution, no rational juror could have found, beyond a reasonable doubt, that Bennett possessed the necessary criminal intent when he entered Aneka's apartment. See **NRS 205.060(1)**.

Even assuming the truth of Aneka's testimony that five minutes after Bennett arrived in her apartment, he walked over to where she was standing, grabbed a knife from her dish rack and pulled her back to the front door where he began stabbing her,

no reasonable juror could have found beyond a reasonable doubt that Bennett intended to commit an assault, battery or felony when he entered her apartment. Bennett and Aneka were still married at the time of the incident. (III: 654-57). Although there was a TPO in place and Bennett was not supposed to be at Aneka's apartment, the only reasonable inference that can be drawn from the evidence is that Bennett intended to try to win his wife back when he barged into her apartment on July 22nd.

Bennett brought no weapons with him, only a backpack with proof that he had just gotten a new job. (III: 683; IV: 794-95; V: 1075-77). Both Aneka and Stephanie confirmed that Bennett spent five minutes begging and pleading with Aneka -- telling her he loved her, telling her he was sorry, telling her he wanted to be with her. (III: 660, 741). Aneka knew that Bennett was trying to resolve things with her. (III: 683, 685). Bennett simply wanted Aneka to take him back into his life, and he tried desperately to prove to her that he was worthy -- an effort that proved futile when Aneka and Stephanie repeatedly shut him down and yelled at him to leave. (V: 1087-88). If Bennett had intended to attack Aneka when he entered the apartment, there would have been no reason for him to try to reconcile with Aneka, let alone spend five minutes crying, begging and pleading with her to take him back. Because there was insufficient evidence that Bennett possessed the requisite criminal intent when he

entered Aneka's apartment, the Court must reverse Bennett's conviction of burglary in this case.[7]

IV. BENNETT' FEDERAL AND STATE CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY CUMULATIVE ERROR IN THIS CASE.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." **Valdez v. State**, 124 Nev. 1172, 1195-96, 196 P.3d 465, 480-81 (2008) (quoting **Hernandez v. State**, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). When evaluating a claim of cumulative error, this Court will consider: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Id. (quoting **Mulder v. State**, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)).

Viewed as a whole, the combination of errors in this case warrants reversal of Bennett's conviction because the quantity and character of errors are so serious that they deprived Bennett of a fair trial. See **Walker v. Fogliani**, 83 Nev. 154, 157, 425 P.2d 794 (1967) ("no matter how guilty a defendant might be or how outrageous his crime, he must not be deprived of a fair trial"). Here, the trial court forced Bennett to

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[7] Despite the presumption set forth in Jury Instruction No. 22 that a person who "unlawfully enters any apartment or house may reasonably be inferred to have broken and entered or entered it with [the necessary criminal intent]", the presumption should have been rebutted in this case because the "unlawful entry [was] explained by evidence satisfactory to the jury to have been made without criminal intent". (I: 198) As set forth in Section II, *supra*, the jury was confused about when the criminal intent to commit a burglary had to exist for the crime to occur. Had the jury been properly advised that the necessary criminal intent had to exist at the moment of entry, the jury would have concluded that the necessary criminal intent was lacking in this case.

choose between his constitutional right to remain silent and his right to present a defense (which was fundamentally unfair and a denial of due process), then penalized him for choosing to remain silent by eviscerating his entire defense. In addition, the Court improperly allowed the State to refute Bennett's self-defense theory in its case-in-chief with an unnoticed expert, in violation of Bennett's due process and confrontation clause rights. Finally, the trial court denied Bennett his right to counsel at a critical stage of proceedings and violated his rights to due process and a fundamentally fair trial by failing to notify the defense that the jury was confused about the burglary jury instructions during deliberations when the confusion could have been cured. In combination, these errors violated Bennett's right to a fair trial and warrant reversal of all counts.

24. **Preservation of issues:** As set forth in Section 23, *supra*, counsel preserved each of the issues raised on appeal with timely objections and, in some cases, written motions. In addition, issues involving constitutional violations may be raised at any time, even on appeal. See, e.g., **Grey**, 124 Nev. at 120, 178 P.3d at 161 (the Nevada Supreme Court "may address plain error and constitutional error *sua sponte*").

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25. **Issues of first impression or of public interest:** The constitutional implications of a trial court's failure to advise counsel about the existence of a jury note is an issue of first impression for this Court.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

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VERIFICATION

1. I hereby certify that this fast track statement complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This fast track statement has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

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

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 6783 words and 581 lines of text.

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

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

DATED this 19th day of August, 2013.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 19th day of August, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
STEVEN S. OWENS

DEBORAH L. WESTBROOK
HOWARD S. BROOKS

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

BENNETT GRIMES
NDOC No. 1098810
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

CASE NO: 62835

FAST TRACK RESPONSE

1. Name of party filing this fast track response: The State of Nevada

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

Steven S. Owens
Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2750

3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal: None

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5. Procedural history.

On October 15, 2012, a jury found Appellant guilty of: Count 1-Attempt Murder with Use of Deadly Weapon in Violation of Temporary Protective Order ("TPO"); Count 2-Burglary while in Possession of Deadly Weapon in Violation of TPO; and Count 3-Battery with Use of Deadly Weapon Constituting Domestic Violence Resulting in Substantial Bodily Harm in Violation of TPO. 1 AA 173-175,211-212.

February 12, 2013, Appellant was sentenced to the Nevada Department of Corrections as follows-Count 1: 8-20 years, plus a consecutive term of 5-15 years, for use of deadly weapon; Counts 2 & 3: for each count, Appellant was sentenced under the small habitual criminal statute to 8-20 years, Count 2 to run concurrent to Count 1, and Count 3 to run consecutive to Counts 1 and 2. The Judgment of Conviction was filed on February 21, 2013. 1 AA 224-225.

On March 18, 2013, Appellant filed a Notice of Appeal. 1 AA 226-229. Appellant's Fast Track Statement ("FTS") was filed on August 19, 2013. On September 9, 2013, Respondent filed a Motion to Extend Time, which was granted by this Honorable Court, extending Respondent's time to file its Fast Track Response to October 9, 2013.

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6. Statement of Facts.

On July 22, 2011, Aneka Grimes ("Aneka") and her mother Stephanie Newman ("Stephanie") returned to Aneka's apartment at 9325 West Desert Inn Road. 3 AA 655-57. After they entered the apartment, Appellant appeared from nowhere and pushed his way through the front door, while Aneka and Stephanie attempted to keep him out. 3 AA 660,713. Although Aneka and Appellant were married at the time, Aneka had a TPO in place prohibiting Appellant from being near her or her apartment. 3 AA 654,657. After forcing his way in, Aneka and Stephanie told Appellant to leave, but he did not listen. 3 AA 660-63,695. Neither Aneka nor Stephanie could leave because Appellant was blocking the doorway. 3 AA 697,718. Aneka then dialed 911. 3 AA 663,716.

Officer Tavarez ("Tavarez") of the Las Vegas Metropolitan Police Department ("LVMPD") was the first officer to arrive. 5 AA 602-607. Shortly thereafter, Tavarez was joined by Officer Hoffman ("Hoffman") and Officer Gallup ("Gallup"). 3 AA 569,607-08. The officers made contact with Stephanie who was standing Aneka's balcony. 3 AA 572-73,610-11. Then they heard a "bloody murder" scream. Id.

Inside the apartment, Appellant had approached Aneka near the kitchen counter, reached over the bar and grabbed a knife that was placed near the sink; pulled her toward the front door and began stabbing her. 3 AA 669,689,692.

Aneka attempted to defend herself by using her left arm to block the remainder of her body. 3 AA 670,676,698. Hoffman made entry into the apartment through the patio door. 3 AA 573. Upon entry, Hoffman observed Appellant hunched over Aneka; it appeared to him that Appellant was punching Aneka over and over but as he approached, Hoffman realized that Appellant was holding a knife in his hand, which he had just extracted from Aneka's body. 3 AA 575-6. As Appellant's hand was in an upward motion to stab Aneka again, Hoffman rushed toward him, grabbed his wrist, instructed him to "drop the knife," and simultaneously knocked Appellant to the ground. 3 AA 576,578,672. Hoffman's command was heard by Tavarez from the other side of the front door. 3 AA 612.

Shortly after Hoffman's entry, Gallup entered the apartment, followed by Tavarez. 3 AA 578,612. Upon entry, Tavarez observed Hoffman and Gallup attempting to subdue Appellant so she assisted in securing him. 3 AA 615-16. After Appellant was secure, Tavarez retrieved a towel and instructed Stephanie to maintain pressure on Aneka's wounds until paramedics arrived. 3 AA 617-18,728. During the interaction between Aneka and Appellant, Aneka was not behaving in an aggressive manner; rather, she was merely trying to defend herself and to get away from Appellant's violent wrath. 3 AA 580,731.

After taking Appellant into custody, Hoffman noticed that Appellant had a cut on his right index finger; the same hand he used to stab Aneka. 3 AA 582.

Hoffman then called for an ambulance. 3 AA 595-96. Aneka was ultimately treated for 21 stab wounds to her upper extremities, upper chest, neck and scalp. 3 AA 630,635.

7. Issue(s) on appeal.

I. The court did not err in failing to issue a self-defense instruction.

II. The court did not err by failing to notify the parties of a jury question during deliberation regarding the formation of burglarious intent.

III. The State presented sufficient evidence to sustain a burglary conviction.

IV. The district court proceeding is not subject to reversal for cumulative error.

8. Legal Argument, including authorities:

I. THE COURT DID NOT ERR IN FAILING TO ISSUE A SELF-DEFENSE INSTRUCTION

Appellant contends that his Constitutional rights were violated because he was prevented from presenting his theory of the case. The State will address each of Appellant's arguments in turn.

A. Self-Defense Instruction

In the instant case, Appellant requested that the jury be instructed on self-defense. 5 AA 932,957-958. The court ruled such an instruction was improper because there was no evidence that Aneka was the initial aggressor or that she used

deadly force against Appellant. 5 AA 932-950. Appellant contends that the court's decision was erroneous.

This Court reviews the district court's decision regarding jury instructions for judicial error or abuse of discretion. Funderburk v. State, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009). Here, the district court did not abuse its discretion in failing to instruct the jury on self-defense.

If a defendant presents evidence to support a theory, "no matter how weak or incredible that evidence may be," the district court may not refuse to give an instruction on that theory. McCraney v. State, 110 Nev. 250, 254, 871 P.2d 922, 925 (1994). However, a self-defense "instruction should not be given if there is no supportive evidence" tending to prove defendant's actions occurred in circumstances amounting to self-defense. Williams v. State, 91 Nev. 533, 535, 539 P.2d 461, 462 (1975) (citation omitted), see Mirin v. State, 93 Nev. 57, 59, 560 P.2d 145, 146 (1977). One element of self-defense is that the person relying on the claim had a reasonable apprehension of great bodily harm. See Riddle v. State, 96 Nev. 589, 613 P.2d 1031 (1980).

As recognized in Defendant's proposed Jury Instruction, "[i]f a person attempts to kill another in self-defense, it must appear that: (1) The danger was so urgent and pressing that, ***in order to save the person's own life, or to prevent the person from receiving great bodily harm, the attempt killing of the other was***

absolutely necessary; and (2) ***The person attempted to be killed was the assailant***, or that the non-assailant…endeavored to decline any further struggle before the mortal blow was given. 5 AA 1057, NRS 200.200, see also Runion v. State, 116 Nev. 1041, 1051-52, 13 P.3d 52, 59 (2000). Thus, in order to warrant a jury instruction on self-defense, there must have been some evidence that Aneka was the initial aggressor and that Appellant acted under the actual and reasonable belief that the use of force was necessary to avoid death or great bodily injury.

Here, the record establishes that Appellant, not Aneka, was the aggressor. 3 AA 580,669,689. Additionally, there is absolutely no evidence of any threats made by Aneka, nor any evidence that she made a violent advancement toward Appellant. Appellant alleges that Aneka's threatening behavior can be inferred because she was yelling at him to leave and because she admitted she wanted him to be gone. FTS at 11-12. Such words do not warrant an instruction on self-defense, especially when Appellant was violating a TPO by his presence in Aneka's apartment.

Appellant had the opportunity to cross-examine the State's witnesses and was unable to elicit any evidence that Aneka was the initial aggressor or that Appellant was ever in fear of suffering death or great bodily harm. Furthermore, not only does Appellant fail to point to any evidence that he acted out of fear of death or great bodily injury, Appellant never even alleges that this was the case.

Accordingly, the district court properly refused to instruct on self-defense. See Mirin, 93 Nev. at 59, Williams v. State, 91 Nev. at 535. However, even if the district court erred in failing to instruct on self-defense, the error was harmless as the jury would have found Appellant guilty on all counts even with this instruction.

B. Presentation of Evidence

Appellant alleges that the trial court's ruling was based on an erroneous belief that a defendant cannot obtain a self-defense instruction unless he testifies or introduces evidence of a prior statement made to police. Appellant misconstrues the record. All statements made by the trial court and cited in Appellant's FTS were made after the State closed its case-in-chief. A full review of the record reveals that the court's decision was not based on Appellant's failure to testify. 5 AA 932-951. Rather, the court simply informed Appellant that there was insufficient evidence following the State's case-in-chief, to warrant a self-defense instruction. 5 AA 932,934-35,938,949-950. As such, the trial court instructed Appellant that he needed to assert *some* evidence in support of his theory. See 5 AA 949-951. As Appellant had no other evidence, the trial court informed him that he would not be entitled to a self-defense instruction unless he testified. Id.

Accordingly, the trial court's statements should not be construed as an assertion that a self-defense instruction cannot be warranted absent a defendant's testimony. The court simply acknowledged the obvious difficulty of otherwise

establishing sufficient evidence of self-defense. This acknowledgement does not amount to error. See State v. Walker, 164 Wash. App. 724, n.5, 265 P.3d 191 (2011) (A defendant's request for a self-defense instruction may be denied if there is insufficient evidence to support it, and sometimes defendant's testimony is the only source for such evidence). As Appellant falsely alleges that the trial court refused to instruct on self-defense due to Appellant's failure to testify, the trial court did not err on this basis.

C. Fifth and Sixth Amendment Rights

Appellant alleges that the trial court forced him to choose between his Sixth Amendment right to present a defense and his Fifth Amendment right not to testify. Appellant cites to Williams v. State, 1996 OK CR 16, 915 P.2d 371, in support of his argument. FTS at 15. In Williams, the defendant's constitutional right not to testify was violated when the trial court ruled that ***no*** evidence could be presented on self-defense unless the defendant testified; the defendant was not even allowed to elicit testimony on cross-examination regarding the theory. 915 P.2d at 375-377.

Williams is unlike the present case. As noted above, in this case, the court never indicated that Appellant needed to testify in order to warrant a self-defense instruction. The court merely recognized that there was insufficient evidence to warrant a self-defense instruction unless Appellant ultimately decided to take the

stand. And that was only because the State's case-in-chief had closed and there would be no more cross-examination through which he could elicit positive evidence that Aneka was the aggressor. Unlike the trial court in Williams, the trial court in this case did not prevent Appellant from presenting evidence in support of self-defense. Accordingly, Appellant was not forced to choose between two constitutional rights and Appellant's conviction cannot be reversed on this ground.

D. Appellant's Theory of the Case

For the first time on appeal, Appellant argues that he was precluded from arguing self-defense at trial. However, Appellant does cite to anywhere in the record where such a ruling was rendered. In fact, a review of the record reveals that appellant was not precluded from arguing self-defense. Specifically, during closing, Appellant argued many of the points addressed in his FTS statement which he contends support the theory of self-defense. 5 AA 987-993. Also, Appellant explicitly stated that although Aneka's "wounds may be consistent with what the State has alleged, they may just as well be consistent with two people struggling over a weapon." Id. Although, the court informed Appellant's counsel that they could not "argue to the jury what [Appellant] may have said had he taken the stand," 5 AA 947, the court was simply prohibiting Appellant from arguing facts not in evidence. This cannot be equated to prohibiting Appellant from presenting a self-defense argument.

Furthermore, even if Appellant was precluded from arguing self-defense in closing, such a ruling would have been justified. While "[c]ounsel is allowed to argue any reasonable inferences from the evidence," Jain v. McFarland, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993), it is fundamental that neither the prosecution nor the defense "'premise arguments on evidence which has not been admitted.'" Glover v. Dist. Ct., 125 Nev. 691, 705, 220 P.3d 684, 694 (2009) (citation omitted). As noted above, there was insufficient evidence to warrant a self-defense instruction. Therefore, it would have been improper to allow counsel to present a theory of self-defense because doing so would have amounted to allowing argument not supported by the evidence.

Accordingly, the trial court did not violate Appellant's due process rights, his fundamental right to assistance of counsel or his right to present a defense.

E. Expert Testimony

Appellant contends that the court erred in allowing State's witness, Louise Renhard (Crime Scene Analyst for LVMPD) to testify regarding the injury Appellant received to his right hand. In reference to photographs taken by Renhard of Appellant's hand, the following testimony was elicited by the State:

> Q. Now, Ms. Renhard…in your experience of photographing, seeing self-inflicted wounds, how would you describe that wound to the right index finger on that hand?
>
> A. I would describe it as [an] incise wound.

> Q. Okay. And do those types of wounds sometimes happen when a knife slips in a person's hand?
>
> A. Yes.
>
> Q. And [is] that photograph consistent with that happening?
>
> A. Yes, it is.

4 AA 799.

In anticipation of the above-testimony, Appellant's counsel objected on the basis that Renhard was not qualified to make such a determination; the objection was overruled. 4 AA 798. Subsequent to the above testimony, the State attempted to elicit testimony from Renhard regarding defensive wounds.[1] 5 AA 799. Prior to any answer being given, Appellant's counsel objected as to lack proper notice, i.e., defense counsel was not informed that Renhard would be testifying as to the nature of wounds; and because Renhard's CV was not provided in advance. 5 AA 801-813. The trial court sustained counsel's objection for lack of notice. 5 AA 816.

Trial counsel then asked for "an instruction to disregard any testimony [Renhard] gave as to her opinion of how [the] particular wounds were caused." 4 AA 818. The court did not render this instruction and instead instructed the jury to "disregard the last question and any testimony given in response...." 5 AA 821.

[1] Referencing a photograph of Aneka's injuries, the State asked "[d]o you notice anything in particular based on the placement…of this cut that indicate[s] something to you?" 5 AA 801

Here, Appellant contends that the above testimony violated Appellant's due process and confrontation clause rights. This argument is not properly before the Court because Appellant did not object at the trial level on either basis. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (A defendant's failure to object to an issue at trial generally precludes appellate review of that issue unless there is plain error).

However, in the event this Court does determine that the constitutional arguments were properly preserved, the testimony does not warrant reversal as any error was harmless. First, Renhard never gave an opinion as to how Appellant's wound was caused; she merely indicated that Appellant's wound was consistent with a knife slipping in his hand. Second, during closing, the State told the jury they did not need anyone else's opinion, not an "expert witness" nor "a lawyer" to conclude that Appellant's injury was inflicted when he stabbed Aneka 21 times. 5 AA 977-78. Thus, there is no evidence that the jury relied on Renhard's testimony or that any potential reliance affected the jury's verdict.

II. THE COURT DID NOT ERR BY FAILING TO NOTIFY THE PARTIES OF A JURY QUESTION DURING DELIBERATION REGARDING THE FORMATION OF BURGLARIOUS INTENT

A "trial judge has wide discretion in the manner and extent he answers jury's questions during deliberation…[i]f he is of the opinion instructions already given are adequate, correctly state the law, and fully advise jury on procedures they are

to follow in their deliberation, his refusal to answer a question already answered in the instructions is not error." Scott v. State, 92 Nev. 552, 554, P.2d 735 (1976) (quoting Tellis v. State, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968)).

This court reviews a district court's actions in responding to questions from the jury for an abuse of discretion. See Scott, 92 Nev. at 555. Additionally, errors pertaining to communications between the judge and jury are reviewed for harmlessness. See Daniel v. State, 119 Nev. 498, 511, 78 P.3d 890, 899 (2003).

In Scott, this Court held that it was not abuse of discretion for the trial court to fail to give further instruction on the issue of premeditation following a request by the jury. In Scott, a defendant was convicted of first-degree murder and attempted murder. 92 Nev. at 554. During deliberation, the jury foreman suggested to the judge it would be helpful to have another instruction regarding premeditation. Id. The judge informed the jury that he would render an additional instruction if he felt it was necessary to do so. Id. The judge did not render an additional instruction and there was no further communication between the judge and the jury on this matter. Id. In reaching its decision that the trial court did not err in failing to reinstruct the jury regarding premeditation, this Court recognized that the jury had already been properly and fully instructed. Id.

In this case, following the reading of the verdict, the judge informed the parties that she received a note from the jury during deliberation. Specifically, the trial judge stated as follows:

> The Court did receive a note from the jury panel. I did not respond to the note because my only response would have been read the jury instructions…And the note was: Does criminal intent have to be established before entering structure or can intent change during the chain of events for the charge of burglary? I didn't respond to it because my only response would have been continue to deliberate and look at the instructions.

5 AA 1008. Trial counsel for Appellant then stated: "I think that would have been a correct response." Id. At the time the jury question was brought to the attention of the parties, there were no objections to the judge's failure to respond to the question, or for failing to notify the parties when the question was raised. Id.

Appellant now asserts that his Constitutional rights were violated as he was not notified of the jury note prior to the judge's determination not to respond. Specifically, Appellant contends he was denied counsel at a critical stage in the proceedings. FTS at 21. Appellant relies primarily on U.S. v. Barragan-Devis, 133 F.3d 1287 (9th Cir. 1998) (holding that the court's failure to notify defense counsel of a jury note was harmless error where the court did not respond), and Musladin v. Lamarque, 555 F.3d 830 (9th Cir. 2009).

Contrary to Barragan, wherein the harmless error standard was applied, Appellant contends that Musladin requires automatic reversal in the instant case.

FTS at 20-21. In Musladin, the appellant argued that the trial court's failure to consult with defense counsel before responding to a jury note, deprived him of his Sixth Amendment right to counsel. 555 F.3d 835. In upholding the state court's decision that the defendant was ***not denied counsel at a critical stage*** of the proceedings, the Ninth Circuit noted that U.S. Supreme Court case law, does not require automatic reversal based on the trial judge's decision to refer the jurors back to the jury instructions. Id. at 842-43. The Ninth Circuit recognized that when "the judge simply directs the jury to his previous instructions, the potential impact of defense counsel's inability to participate is significantly lessened, because defense counsel played a role in the formulation of those instructions." Id. at 843.

As afforded in Scott, the trial judge in this case used her discretion in deciding not to respond to the jury's question. As she noted on the record, a response simply would have referred the jurors back to the instructions already provided. 5 AA 1008.

Here, Appellant's trial counsel was involved in the formation of the jury instructions and at no time did he object to the instructions that were admitted, nor did he proffer any additional instructions regarding intent. 5 AA 953. Furthermore, Appellant's argument that he was denied counsel at a critical stage is circular. Here, the trial judge decided not to respond to the jury question. 5 AA

1008. Accordingly, there was no proceeding at which Appellant's trial counsel could have appeared. For these reasons, Appellant was not denied counsel at a critical stage of the proceedings. See United States v. Widgery, 778 F.2d 325, 329 (7th Cir. 1985) ("A judge's failure to show jurors' notes to counsel and allow them to comment before responding [does not violate] the Constitution"). Accordingly, the trial court did not err in failing to notify the parties of the jury's note.

However, if this Court does determine that the trial court erred, reversal is not warranted because the error, if any, was harmless. As noted above, the jury in this case was fully and properly instructed on the issue of intent. 1 AA 194,196-198. Furthermore, when the judge brought the jury question to the attention of the parties, Appellant's trial counsel did not object to the lack of notification and affirmatively indicated that the trial judge would have been correct in referring the jurors to the jury instructions. 5 AA 1008. This response makes clear the harmlessness of the court's actions. Although Appellant contends that defense counsel could have convinced the judge to respond to the jury's question if given the opportunity, it is extremely unlikely, based on counsel's response that he would have done so. Further, even if he had convinced the judge to send a response, the response would have referred the jurors to the instructions already provided, resulting in the same outcome as no response. Accordingly, any error was clearly harmless and this court should not find reversible error.

III. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN A BURGLARY CONVICTION

In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). "Where there is substantial evidence to support a jury verdict, it will not be disturbed on appeal." Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 21 (1981).

Here, there was sufficient evidence to convict Appellant of burglary. When reading the evidence in the light most favorable to the prosecution, a reasonable trier of fact could have found beyond a reasonable doubt that Appellant entered Aneka's home with the intent to commit an assault or battery or another felony therein. See NRS 205.060(1). With respect to the intent required for burglary, the jury was instructed, pursuant to NRS 205.065 that: "[e]very person who unlawfully [enters any structure] may reasonably be inferred to have [entered it] with intent to commit…assault or battery on any person or a felony therein, unless the [unlawful entry] is explained by evidence satisfactory to the jury to have been made without criminal intent." 1 AA 197.

Appellant claims "the only reasonable inference that can be drawn from the evidence is that [Appellant] intended to try to win his wife back when he barged into her apartment..." FTS at 25-26. Whether an alternate explanation for unlawful entry is sufficient to overcome the inference of burglarious intent is a decision of fact for the jury to make. Fritz v. State, 86 Nev. 655, 474 P.2d 377 (1970) (In burglary prosecution, jury had right to reject explanation that defendant was inside building looking for a job, and to conclude that his entry was with intent to commit a felony), Boyle v. State, 86 Nev. 30, 32 464 P.2d 493, 494 (1970) (The jury is not compelled to accept a defendant's denial of intent but can perform its duty to evaluate the facts surrounding the incident.).

Here, the jury was presented with the following evidence regarding Appellant's intent. Appellant forced his way into Aneka's apartment without permission. 3 AA 660,713-14. Appellant was waiting outside Aneka's apartment for her to return home but did not announce his presence or try to discuss matters with her until she was already inside, ensuring that any interaction between them would be in private. See 3 AA 695,713. Aneka had a TPO in place but despite the TPO and despite Aneka's pleading, Appellant would not leave. 3 AA 657,660-63,695. Furthermore, Appellant placed his body in front of the front door, so neither Aneka nor her mother could exit the apartment. 3 AA 697,718.

The fact that Appellant unlawfully entered Aneka's apartment is sufficient evidence for the jury to infer that he did so with felonious intent. Appellant contends he could not have maintained the requisite intent to commit burglary when he entered the apartment because he did not have a weapon with him when he entered and because he spent "five minutes begging and pleading with Aneka" to take him back. FTS at 26. Notably, the jury heard all of this evidence, including the 911 tapes with Appellant's voice in the background. Despite this evidence, the jury rejected Appellant's theory that he did not have burglarious intent upon entry into Aneka's apartment. This determination was fully within the jury's province. See Fritz and Boyle, supra. Also, as the State argued in closing, a conditional intent to batter or commit a felony formed prior to entry is sufficient, i.e., Appellant's hope "that [Aneka] might [take] him back…doesn't mean he didn't commit a burglary because he had the intent to commit violence" if Aneka did not take him back. 5 AA 983-84, see People v. Fond, 71 Cal.App.4th 127, 83 Cal.Rptr.2d 660 (Cal. Ct. App. 1999).

Simply because Appellant proffered an alternate explanation does not mean that Appellant's explanation was satisfactory to the jury; nor does the jury's rejection of Appellant's explanation require reversal. After reviewing the evidence in the light most favorable to the prosecution, it is clear that *any* rational trier of

fact could have found the essential elements of burglary beyond a reasonable doubt. Therefore, this conviction should not be overturned.

IV. THE DISTRICT COURT PROCEEDING IS NOT SUBJECT TO REVERSAL FOR CUMULATIVE ERROR

Under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citations omitted). Evidence against the defendant must therefore be "substantial enough to convict him in an otherwise fair trial" and it must be said "that the verdict would have been the same in the absence of the error." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988).

Insofar as Appellant failed to establish any error that would entitle him to relief, there is no cumulative error worthy of reversal. However, assuming arguendo that this Court determines any errors did occur, such errors were harmless as the evidence in Appellant's case was substantial enough to convict him absent any errors.

9. Preservation of the Issue.

The above issues were properly preserved for appeal.

VERIFICATION

1. I hereby certify that this fast track response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track response has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point and Times New Roman style.
2. I further certify that this fast track response complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points or more and contains 4,630 words.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 9th day of October, 2013.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Steven S. Owens*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 9, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

DEBORAH L. WESTBROOK
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Chief Deputy District Attorney

BY */s/ j. garcia*
Employee,
Clark County District Attorney's Office

SSO/Rachel O'Halloran/jg

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 62385

E-File

REPLY TO FAST TRACK RESPONSE

I. BENNETT WAS PREVENTED FROM ARGUING SELF-DEFENSE.

A. Circumstantial Evidence Justified Instructions.

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

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

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

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

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

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

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

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

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

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

///

C. Prevented from Arguing Theory of Case.

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

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

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

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

II. FAILURE TO NOTIFY PARTIES OF JURY QUESTION.

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

---

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

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

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

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

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

---

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

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

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

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

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

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

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

III. INSUFFICIENT EVIDENCE OF BURGLARY.

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

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

IV. CUMULATIVE ERROR.

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

CONCLUSION

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

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

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

VERIFICATION

1. I hereby certify that this fast track reply complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This fast track statement has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

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

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

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

DATED this 23rd day of October, 2013.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

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

CERTIFICATE OF SERVICE

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

CATHERINE CORTEZ MASTO
STEVEN S. OWENS

DEBORAH L. WESTBROOK
HOWARD S. BROOKS

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

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

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 62835
District Court Case No. C276163

FILED
MAR 27 2014
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

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

JUDGMENT

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

"ORDER the judgment of conviction AFFIRMED."

Judgment, as quoted above, entered this 27th day of February, 2013.

C-11-276163-1
CCJA
NV Supreme Court Clerks Certificate/Judgn
3622206

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

Tracie Lindeman, Supreme Court Clerk

By: Sally Williams
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 62835

FILED

FEB 27 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

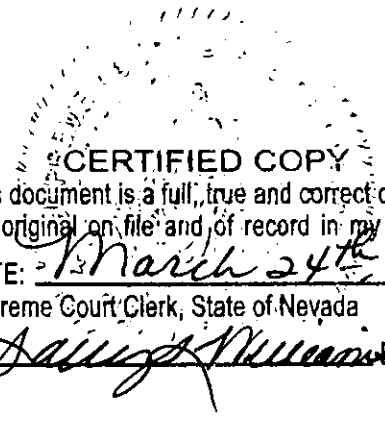
ORDER the judgment of conviction AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

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


CERTIFIED COPY
This document is a full, true and correct copy of
the original on file and of record in my office.
DATE: March 24th 2014
Supreme Court Clerk, State of Nevada
By Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 62835
District Court Case No. C276163

REMITTITUR

TO: Steven Grierson, District Court Clerk

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

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

DATE: March 24, 2014

Tracie Lindeman, Clerk of Court

By: Sally Williams
Deputy Clerk

cc (without enclosures):
Hon. Michelle Leavitt, District Judge
Clark County Public Defender
Clark County District Attorney
Attorney General/Carson City

RECEIPT FOR REMITTITUR

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

HEATHER UNGERMANN

Deputy District Court Clerk

RECEIVED
MAR 27 2014
CLERK OF THE COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 67598

E-File

FAST TRACK STATEMENT

1. **Name of party:** Bennett Grimes ("Bennett").

2. **Name of attorney submitting this fast track statement:**

DEBORAH L. WESTBROOK, #9285
Clark County Public Defender's Office
309 S. Third St., Ste. 226
Las Vegas, Nevada 89155
(702) 455-4685

3. **Name of appellate counsel if different from trial counsel:** Same.

4. **Judicial district, county, and district court docket number of lower court proceedings:** Eighth Judicial District, County of Clark, District Court Case No. C276163.

5. **Name of judge issuing order appealed from:** Michelle Leavitt.

6. **Length of trial.** Four days.

7. **Conviction(s) appealed from:** Order Denying Defendant's Motion to Correct Illegal Sentence", filed May 1, 2015, challenging redundant

convictions on Ct. 1 (Attempt Murder With Use of a Deadly Weapon in Violation of Temporary Protective Order) and Ct. 3 (Battery With Use of a Deadly Weapon Constituting Domestic Violence Resulting in Substantial Bodily Harm in Violation of a Temporary Protective Order).

8. **Sentence for each count:** $25 Admin. fee; $150 DNA analysis fee; genetic testing; Ct. 1 – 8-20 years plus a consecutive term of 5-15 years for use of a deadly weapon; as to Cts. 2 and 3, habitual criminal treatment; Ct. 2 – 8-20 years in prison; Ct. 2 concurrent with Ct. 1; Ct. 3 – 8-20 years; Ct. 3 consecutive to Cts. 1 and 2; 581 days CTS.

9. **Date district court announced decision:** February 26, 2015.

10. **Date of entry of written judgment:** May 1, 2015

11. **Habeas corpus:** N/A.

12. **Tolling by Post-judgment motions:** N/A

13. **Notice of appeal filed:** A notice of appeal was prematurely filed in District Court on March 16, 2015, prior to the entry of a written judgment or order. Pursuant to NRAP 4(b)(2), "[a] notice of appeal filed after the announcement of a decision, sentence or order – but before entry of the judgment or order – shall be treated as filed after such entry and on the day thereof." As a result, the notice of appeal was deemed "filed" in this case on

May 1, 2015, the day the District Court entered its written Order Denying Defendant's Motion to Correct Illegal Sentence.

14. **Rule governing the time limit for filing the notice of appeal:** NRAP 4(b).

15. **Statute which grants jurisdiction to review the judgment:** NRS 177.015(1)(b); see also Haney v. State, 124 Nev. 408, 185 P.3d 350 (2008) (granting appeal from denial of motion to correct an illegal sentence).

16. **Disposition below:** Order Denying Defendant's Motion to Correct Illegal Sentence, filed May 1, 2015.

17. **Pending and prior proceedings in this court:** Bennett Grimes v. State, Case No. 62835 (filed 03/20/2013); Bennett Grimes v. State, Case No. 67741 (filed 04/07/2015).

18. **Pending and prior proceedings in other courts:** Bennett Grimes v. State, PCR Petition, Eighth Judicial District Court, Department XII, Case No. C-11-276163-1, currently pending.

19. **Proceedings raising same issues.** Appellate counsel is unaware of any proceedings raising the same issues raised herein.

20. **Pursuant to NRAP 17, is this matter presumptively assigned to the Court of Appeals? Identify issues or circumstances that override any presumptive assignment to the Court of Appeals or require retention**

by the Supreme Court. Issues should be identified and explained with specific reference to arguments in the Fast Track Statement. This matter appears to be presumptively assigned to the Court of Appeals because it is a "direct appeal from a judgment of conviction that challenges only the sentence imposed" pursuant to NRAP 17(b)(1). However, to the extent the Nevada Supreme Court deems this case to raise "as a principal issue a question of first impression involving the United States or Nevada constitution" (see Sections 23 and 26, infra), the Nevada Supreme Court should retain jurisdiction pursuant to NRAP 17(a)(13).

21. **Procedural history.**

On September 9, 2011, the State filed a three-count Information charging Bennett with: (1) attempt murder with use of a deadly weapon in violation of temporary protective order, (2) burglary while in violation of a temporary protective order, and (3) battery with use of a deadly weapon constituting domestic violence resulting in substantial bodily harm in violation of a temporary protective order. (Appellant's Appendix, Vol. I: 9-11).[1] Bennett pled not guilty to all charges. (I: 230; II: 266). After amending the Information several times, Bennett eventually went to trial on the charges set

[1] Hereinafter, citations to the Appellant's Appendix will start with the volume number, followed by the specific page number. For example, (Appellant's Appendix, Vol. I: 9-11) will be shortened to (I: 9-11).

forth in a Third Amended Information on October 10, 2012. (I: 14-16, 65-67, 173-75, II: 250-51). The Third Amended Information charged Bennett with: (1) attempt murder with use of a deadly weapon in violation of a temporary protective order, (2) burglary while in possession of a deadly weapon in violation of a temporary protective order, and (3) battery with use of a deadly weapon constituting domestic violence resulting in substantial bodily harm in violation of a temporary protective order. (I:173-75).

On October 15, 2012, a jury convicted Bennett of all three charges. (I: 211-12). On October 22, 2012, Bennett filed a Motion for New Trial. (I: 213-16). After denying that motion, the District Court sentenced Bennett on February 13, 2013 and filed the Judgment of Conviction on February 21, 2013. (I: 224-25; II: 258, 263-64). On March 8, 2013, Bennett timely filed a Notice of Appeal. (I: 226).

While Bennett's first direct appeal was pending, he filed a Motion to Correct an Illegal Sentence in District Court on September 9, 2013. (VI: 1103-30). The District Court heard oral argument on that Motion on October 3, 2013 and took the matter under advisement. (VI: 1169-90). Before the District Court ruled on Bennett's Motion to Correct an Illegal Sentence, this Court issued an Order of Affirmance, affirming Bennett's convictions on February 27, 2014. (IV: 1196-1204).

Almost exactly one year later, on February 26, 2015, the District Court denied Bennett's Motion to Correct an Illegal Sentence. (IV: 1094). The District Court entered a Written Order denying the Motion on May 1, 2015. (IV: 1167). Bennett timely appealed from that Order. (IV:1231-33). See also NRAP 4(b)(2).

22. **Statement of facts.**

The State charged Bennett with two counts that were based on the same underlying act: the act of "stabbing at and into the body of the said ANEKA GRIMES" with a knife on July 22, 2011. (I: 173-75, 178-79; VI: 1104, 1114-15). Count 1 charged Bennett with attempt murder with use of a deadly weapon in violation of a temporary protective order and Count 3 charged Bennett with battery with use of a deadly weapon constituting domestic violence resulting in substantial bodily harm in violation of a temporary protective order. (I: 173-75, 178-79; VI: 1104, 1114-15).

After reviewing the Information and the crimes charged, Defense Counsel advised Bennett that he could not be adjudicated and sentenced on both Counts 1 and 3 because they were "redundant" under then-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". (VI: 1104).

Additionally, during trial the District Court repeatedly stated that Bennett could not be adjudicated guilty of both Counts 1 and 3. (IV: 1104).

Defense Counsel 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. (IV: 1104). Indeed, during trial, Defense Counsel 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). (IV: 1104). The District Court indicated that it would have granted this request had Defense Counsel made it. (IV: 1104). However, Defense Counsel 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, Bennett could not have been convicted and sentenced for both crimes. (IV: 1104).

A jury found Bennett guilty Counts 1 and 3 on October 15, 2012. (I: 211-12). Two months later, this Court issued its decision in Jackson v. State, 128 Nev. ——, 291 P.3d 1274 (2012), overruling Nevada's redundancy doctrine. Although the redundancy doctrine was still in effect at the time of Bennett's underlying crimes, the District Court nevertheless applied Jackson and sentenced Bennett to consecutive time on Counts 1 and 3 in February of 2013. (I: 224-25). As to Count 1 (attempt murder), the District Court

sentenced Bennett to a term of 8 to 20 years plus a consecutive term of 5 to 15 years for the weapons enhancement. (I: 224-25). For Count 3, the District Court sentenced Bennett to a term of 8 to 20 years consecutive to Counts 1 and 2. (I:224-25). In his Motion to Correct an Illegal Sentence, Bennett argued that his redundant sentence on Count 3 was illegal under the law in effect at the time the crimes were committed. (IV:1188). The District Court denied Bennett's motion. (IV: 1167).

23. **Issue on appeal:** Whether Jackson v. State, 128 Nev. ——, 291 P.3d 1274 (2012), could be applied retroactively in a case where the defendant and his attorneys relied on the redundancy doctrine to make legal decisions during trial and where the application of Jackson increased the defendant's sentence by an additional 8 to 20 years that would have been impermissible at the time his crimes were committed?

24. **Legal argument, including authorities:**

A. Standard of Review/Issue on Appeal

This Court will review a District Court decision denying a motion to correct an illegal sentence for an abuse of discretion. Haney, 124 Nev. at 411, 185 P.3d at 352. As set forth herein, the District Court abused its discretion by denying Bennett's motion to correct an illegal sentence, where his sentence

on Count 3 was imposed in violation of the judicial *ex post facto* doctrine and his constitutional right to due process.

B. The Redundancy Doctrine of Salazar v. State Governs Bennett's Sentence in this Case.

In Salazar v. State, 119 Nev. 224, 228, 70 P.3d 749, 751 (2003), the Nevada Supreme Court ruled that "where a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant" and a defendant cannot be punished for both offenses without violating the Double Jeopardy Clause of the United States Constitution. Described as the "redundancy doctrine", the rule in Salazar required the courts to apply a fact-based "same conduct" test (in addition to a traditional Blockburger analysis) when determining the permissibility of cumulative punishment under different statutes. See Jackson v. State, 291 P.3d 1274, 1282, 128 Nev. Adv. Op. 55, -- (2012). Under Salazar, "multiple convictions factually based on the same act or course of conduct cannot stand, even if each crime contains an element the other does not." Jackson, 291 P.3d at 1280, 128 Nev. Adv. Op. at -- (emphasis in original). When Salazar was in effect, Nevada courts were required to determine "whether the material or significant part of each charge is the same even if the offenses are not the same" under Blockburger. Salazar, 119 Nev. at 227-28, 70 P.3d at 751.

Where the factual "gravamen" of two different offenses was the same, a defendant could not be punished for both offenses under Salazar -- even if the statutes in question passed the Blockburger test. Id. at 228, 70 P.3d at 752 (defendant could not be punished for both battery and mayhem because the "gravamen" of both offenses – cutting the victim which resulted in nerve damage – was the same for both offenses).

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

> If the Legislature has authorized – or interdicted – cumulative punishment, that legislative directive controls. Absent express legislative direction, the Blockburger 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.

Jackson, 291 P.3d at 1282-83, 128 Nev. Adv. Op. at --. Under Blockburger, the court must determine "whether each offense contains an element not

contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." Jackson, 291 P.3d at 1978, 128 Nev. Adv. Op. at -- (citing United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2849 (1993)).

C. The Court Erroneously Applied Jackson v. State to Bennett's Sentence in Violation of the Judicial Ex Post Facto Doctrine.

It is undisputed that Salazar v. State was still good law on July 22, 2011, the date Bennett committed the offense at issue in this case. (VI: 1104). The District Court's refusal to apply the redundancy doctrine set forth in Salazar v. State violated Bennett's constitutional rights under the Ex Post Facto and Due Process clauses of the federal and state constitutions. See U.S. Const. art I, § 9, cl. 3 (Ex Post Facto Clause); U.S. Const. amend. XIV (Due Process Clause); Nev. Const. art 1, § 15 (Ex Post Facto Clause); Nev. Const. art. 1 § 8, cl. 5 (Due Process Clause).

There are four types of *ex post facto* laws that are constitutionally prohibited: (1) "Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action"; (2) "Every law that aggravates a crime, or makes it greater than it was, when committed"; (3) "Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed"; and (4) "Every law that alters the legal rules of evidence, and

receives less, or different, testimony than the law required at the time of the commission of the offence, in order to convict the offender." Calder v. Bull, 3 Dall. 386, 390 (1798). Because the Ex Post Facto Clause expressly limits legislative powers, it "does not of its own force apply to the Judicial Branch of government." Marks v. United States, 430 U.S. 188, 191, 97 S. Ct. 990 (1977). Nevertheless, both the United States Supreme Court and the Nevada Supreme Court have held that *ex post facto* principles also apply to the judiciary through the Due Process Clause. Bouie v. Columbia, 378 U.S. 437, 353-54, 84 S. Ct. 1697 (1964) (observing that the Due Process Clause precludes courts "from achieving precisely the same result" through judicial construction as would application of an *ex post facto* law); accord Stevens v. Warden, 114 Nev. 1217, 969 P.2d 945 (1998).

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

violated the judicial *ex post facto* doctrine and resulted in the imposition of an illegal sentence on Count 3.

First, the Nevada Supreme Court's wholesale abandonment of the "redundancy doctrine" -- which was good law in Nevada for nearly 10 years -- was not foreseeable. Defendants had relied on Salazar and related cases to obtain the dismissal of redundant charges for nearly a decade and would have continued to do so had the Supreme Court not ruled as it did in Jackson. The decision in Jackson was by no means a foregone conclusion. Indeed, even the Jackson court recognized that other jurisdictions currently employ redundancy-type tests in evaluating the propriety of multiple punishments for a single act. See Jackson, 291 P.3d at 1283 n. 10, 128 Nev. Adv. Opp. at -- (citing State v. Swick, 279 P.3d 747, 755 (N.M. 2012) and State v. Lanier, 192 Ohio App.3d 762, 950 N.E.2d 600, 603 (2011)). In this very case, the District Court was prepared to dismiss Count 3 based on redundancy principals, right up until the point where the State raised the Jackson decision as a basis for rejecting redundancy. (VI: 1104-05).

Second, there can be no doubt that Jackson was applied retroactively in Bennett's case. When determining whether a decision is being applied "retroactively", Nevada courts look to "'what [the defendant] could have anticipated at the time he committed the crime." Stevens, 114 Nev. at 1221,

969 P.2d at 948 ("the relevant date of inquiry is the date that [defendant] committed the offense"). In this case, Bennett committed the offense on July 22, 2011, almost a year-and-a-half before the Nevada Supreme Court's decision in Jackson, at a time when Salazar was still good law. Therefore, Jackson was applied retroactively in this case. See Stevens, 114 Nev. at 1222, 969 P.2d at 948-49.

Finally, Bennett was disadvantaged by the District Court's application of Jackson instead of Salazar at sentencing in this case. Up until the State raised the Jackson decision at sentencing on February 7, 2013, the District Court was prepared to dismiss Count 3 because it was redundant to Count 1. (VI: 1104-05). Throughout trial, the District Court acknowledged to the parties that Bennett could not be adjudicated on both Counts 1 and 3. (VI: 1104-05). Under Salazar, the "gravamen" of Counts 1 and 3 as charged in the Second Amended Information is the exact same act -- "stabbing at and into the body of the said ANEKA GRIMES" with a knife on July 22, 2011. See Salazar, 119 Nev. at 228, 70 P.3d at 752 (defendant could not be punished for both battery and mayhem because the "gravamen" of both offenses – cutting the victim which resulted in nerve damage – was the same for both offenses). Since Bennett would not have been convicted of both Counts 1 and 3 under Salazar, he was disadvantaged by the Court's application of Jackson at

sentencing to impose a consecutive 8 to 20 year sentence on Count 3. See Stevens 114 Nev. at 1222-23, 969 P.2d at 949 ("assuming applying Bowen to Stevens would increase his sentence, we conclude that to do so would violate the Due Process Clause"). Accordingly, Bennett's conviction and sentence on Count 3 violates the judicial *ex post facto* doctrine and must be vacated because it is illegal.

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

> In this very case, applicant is now liable to conviction for two offenses, or more. Under the carving doctrine, if he engaged in

> only one criminal transaction, he would be liable to only one criminal conviction because, under the carving doctrine, the transaction was the offense. Likewise, where he might once have been exposed only to the punishment prescribed for unlawfully carrying a weapon, he must now expect to face the punishment prescribed for aggravated assault as well, even though he may have committed but a single criminal transaction. And finally, where the law once entitled him to prevent prosecution for aggravated assault after a conviction for the same criminal transaction, he is now denied the benefit of this substantive defensive theory. Therefore our decision to make the abandonment of 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, Bennett 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, this Court should vacate Bennett's illegal redundant conviction and sentence for battery pursuant to the Ex Post Facto and Due Process clauses of the federal and state constitutions. See U.S. Const. art I, § 9, cl. 3 (Ex Post Facto Clause); U.S. Const. amend. XIV (Due Process Clause); Nev. Const. art 1, § 15 (Ex Post Facto Clause); Nev. Const. art. 1 § 8, cl. 5 (Due Process Clause).

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D. The Court's Application of Jackson was Fundamentally Unfair to Bennett under the Fifth Amendment.

The Fifth Amendment Due Process Clause "guarantees that a criminal defendant will be treated with the fundamental fairness essential to the very concept of justice." U.S. v. Valenzuela-Bernal, 458 U.S. 858, 872, 102 S.Ct. 3440 (1982) (internal quotations and citation omitted); see also U.S. Const. amend. XIV (Due Process Clause); Nev. Const. art. 1 § 8, cl. 5 (Due Process Clause). In the instant case, it was fundamentally unfair for the District Court to convict and sentence Bennett on Count 3 (battery). Both prior to and during trial, Defense Counsel advised Bennett that he could not be convicted and sentenced on both Counts 1 and 3 based on then existing law. (VI:1104-05). During trial, Defense Counsel could have objected to the verdict form and requested that Count 3 be listed as a lesser included offense of Count 1. (VI:1104-05). Had Defense Counsel done so, the District Court would have granted such request which would have prevented Bennett from being convicted and sentenced on both counts. (VI:1104-05). However, Defense Counsel chose not to do so with the understanding that the District Court would later dismiss Count 3 at time of sentencing, in the event of a conviction on both Counts 1 and 3. (VI:1104-05). Given Bennett's reliance on existing law, and his reasonable expectation that the Court would later dismiss Count 3

as promised, it is fundamentally unfair for him to be convicted and sentenced on that count.

25. **Preservation of issues:** Bennett filed a Motion to Correct Illegal Sentence in the District Court, thereby preserving a direct appeal from the District Court's denial of that Motion. See Haney v. State, 124 Nev. 408, 185 P.3d 350 (2008) (granting appeal from denial of motion to correct an illegal sentence).

26. **Issues of first impression or of public interest:** This Court has not yet addressed whether the retroactive application of Jackson v. State may violate the judicial *ex post facto* doctrine or a defendant's constitutional right to due process.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By *_/s/ Deborah L. Westbrook_*
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VERIFICATION

1. I hereby certify that this fast track statement complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This fast track statement has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

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

[XX] Proportionately spaced, has a typeface of 14 points or more, and contains 3, 936 words.

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

DATED this 2nd day of July, 2015.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By *_/s/ Deborah L. Westbrook_*
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2nd day of July, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
STEVEN S. OWENS

DEBORAH L. WESTBROOK
HOWARD S. BROOKS

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

BENNETT GRIMES
NDOC NO: 1098810
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

BENNETT GRIMES, Appellant, v. THE STATE OF NEVADA, Respondent.	CASE NO: 67598

FAST TRACK RESPONSE

ROUTING STATEMENT: This is a direct appeal from a judgment of conviction that challenges only the sentence imposed or the sufficiency of the evidence. However, as this appeal raises an issue of statewide importance and first impression, the State submits this appeal is appropriately retained by the Nevada Supreme Court. See NRAP 17(a)(13), (14).

1. Name of party filing this fast track response: The State of Nevada

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

Chris Burton
Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2750

3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal:

The State is not aware of any pending proceedings which raise the same issues raised in this appeal.

5. Procedural history.

On September 14, 2011, Grimes was charged by way of Information with Count 1: Attempt Murder with Use of a Deadly Weapon in Violation of Temporary Protective Order (Category B Felony – NRS 200.010; 200.030; 193.330; 193.165; 193.166); Count 2: Burglary while in Possession of Deadly Weapon in Violation of Temporary Protective Order (Category B Felony – NRS 205.060; 193.166); and Count 3: Battery with Use of a Deadly Weapon Constituting Domestic Violence Resulting in Substantial Bodily Harm in Violation of Temporary Protective Order (Category B Felony – NRS 200.481; 200.485; 33.018; 193.166). I AA 9-11. The State filed a Third Amended Information just prior to trial charging the same offenses.. I AA 173-175.

Trial commenced on October 10, 2012, and concluded on October 15, 2012, with the jury returning a guilty verdict on all three counts. I AA 211-212. On October 22, 2012, Grimes filed a Motion for New Trial. On November 5, 2012, the State filed its Opposition. I AA 217-220. On November 6, 2012, the Court denied the Motion. II AA 258.

On February 12, 2013, the Court sentenced Grimes. V AA 1045-46. In addition to the $25.00 Administrative Assessment fee, and $150.00 DNA Analysis Fee, Grimes was adjudged guilty under the small habitual criminal statute years for Counts 2 and 3, and sentenced as follows: Count 1 – to a minimum of 8 years and a maximum of 20 years in the Nevada Department of Corrections (NDC), plus a consecutive term of a minimum of 5 years and a maximum of 15 years in the NDC for use of a deadly weapon; Count 2 – a minimum of 8 years and a maximum of 20 years in the NDC, to run concurrent with Count 1; and Count 3 – a minimum of 8 years and a maximum of 20 years in the NDC, to run consecutive to Counts 1 and 2, with 581 days credit for time served. I AA 224-25; V AA 1045-46. On February 21, 2013, the Judgment of Conviction was filed. I AA 224-25. Grimes filed a Notice of Appeal on March 8, 2013. I AA 226-29. On February 27, 2014, the Nevada Supreme Court issued an Order of Affirmance, affirming Grimes' convictions and sentences. VI AA 1196-1206. Remittitur issued March 24, 2014. Id.

On September 9, 2013, while his direct appeal was pending, Grimes filed a Motion to Correct Illegal Sentence. VI AA 1103-30. On September 23, 2013, the State filed its Opposition. VI AA 1131-40. On October 3, 2013, Grimes filed a Reply in Support of Motion to Correct Illegal Sentence. VI AA 1152-64. The State also filed a Surreply in Support of Opposition to Defendant's Motion to Correct Illegal Sentence on October 3, 2013. VI AA 1146-51. On the same day, the Court heard

arguments on the Motion. VI AA 1169-90. On February 26, 2015, the Court denied the Motion. VI AA 1167-68. On May 1, 2015, the Order Denying the Motion was filed. VI AA 1167. On March 16, 2015, Grimes filed a Notice of Appeal. VI AA 1231-33. On July 2, 2015, Grimes filed his Fast Track Statement.

6. Statement of Facts.

Grimes' first sentencing hearing was set for February 7, 2013. V AA 1022. During this sentencing hearing, Grimes objected to the adjudication of Count 3. V AA 1030. The State argued that under Jackson v. Nevada, Grimes could be adjudicated guilty of both Counts 1 and 3. V AA 1030. The Court requested time to review the case and continued the sentencing hearing to February 12, 2013. V AA 1031-33. On February 12, 2013, after argument by both parties, the Court found that under Jackson, Grimes could be adjudicated guilty of both Counts 1 and 3. V AA 1034-37. The Court adjudicated Grimes guilty on all counts and sentenced him to an aggregate sentence of twenty-one (21) to fifty-five (55) years in NDC. V AA 1037-47; V1 AA 1132.

On September 9, 2013, Grimes filed a Motion to Correct Illegal Sentence, in which he claimed Jackson was applied ex post facto to his case. VI AA 1103-30. On September 23, 2013, the State filed its Opposition, arguing Jackson was retroactive and that Grimes' case did not violate ex post facto. VI AA 1131-40. On October 3, 2013, the Court heard arguments on the Motion. VI AA 1169-90. During that

hearing, the Court stated that it believed this issue was already discussed and resolved at the Sentencing Hearing but passed the matter for final judgment. VI AA 1171. The Court denied the Motion on February 26, 2015. VI AA 1167-68. On May 1, 2015, the Order Denying the Motion was filed. VI AA 1167. On March 16, 2015, Grimes filed a Notice of Appeal. VI AA 1231-33. On July 2, 2015, Grimes filed his Fast Track Statement.

7. Issue(s) on appeal.

Whether the district court properly denied Grimes' Motion to Correct Illegal Sentence.

8. Legal Argument, including authorities:

I. THE DISTRICT COURT PROPERLY DENIED GRIMES' MOTION TO CORRECT ILLEGAL SENTENCE.

Grimes appeals the district court's denial of his Motion to Correct Illegal Sentence. NRS 176.555 states that "[t]he court may correct an illegal sentence at any time." See also Passanisi v. State, 108 Nev. 318, 321, 831 P.2d 1371, 1372 (1992). However, the grounds to correct an illegal sentence are interpreted narrowly under a limited scope. See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996); see also Haney v. State, 124 Nev. Adv. Op. 40, 185 P.3d 350, 352 (2008). "A motion to correct an illegal sentence is an appropriate vehicle for raising the claim that a sentence is facially illegal at any time; such a motion cannot be used as a vehicle for

challenging the validity of a judgment of conviction or sentence based on alleged errors occurring at trial or sentencing." Edwards, 112 Nev. at 708, 918 P.2d at 324.

This Court reviews a district court's decision denying a motion to correct illegal sentence for an abuse of discretion. Haney v. State, 124 Nev. 408, 411, 185 P.3d 350, 352 (2008). A sentencing judge is permitted broad discretion in imposing a sentence and absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993) (citing Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)).

The district court did not abuse its discretion by denying Grimes' Motion to correct an illegal sentence because Grimes' Motion was not properly before the district court as it requested the court to reconsider a legal issue already fully litigated and determined at Grimes' sentencing. Additionally, Grimes' Motion was properly denied because the court lacked the jurisdiction to grant the Motion while Grimes' appeal was pending. Further, Grimes' Motion was properly denied because Grimes presented claims not cognizable in a Motion to Correct Illegal Sentence. Finally, Grimes' Motion was properly denied because Grimes' rights under the Ex Post Facto and Due Process Clauses were not violated by the court imposing sentences on both Counts 1 and 3 under Jackson.

A. Grimes' Motion was Not Properly Before the District Court Because It Essentially Requested the Court to Reconsider a Legal Issue Already Fully Litigated and Determined at Grimes' Sentencing

Hearing, and He Failed to Establish Even a Prima Facie Basis for Reconsideration

Grimes' Motion was a thinly veiled attempt to have the Court reconsider a legal issue already fully litigated and determined at his sentencing hearing. His Motion failed to even make a request for consideration, much less attempt to justify why leave to reconsider should have be granted under the substantive requirements of the rule governing such requests. There was no basis for the district court to grant leave for reconsideration because the district court already considered at the sentencing hearing whether applying Jackson, 128 Nev. Adv. Op. 55, 291 P.3d 1274 (2012), and adjudicating Grimes guilty of both Counts 1 and 3 would constitute an ex post facto violation.

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

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

"District Court Rule (DCR) 12(7) provides that a motion for reconsideration or rehearing may be made with leave for the court." Arnold v. Kip, 123 Nev. 410, 416, 168 P.3d 1050, 1054 (2007). Rehearing is warranted where the Court "has overlooked or misapprehended material facts or questions of law or when [it has] overlooked, misapplied, or failed to consider legal authority directly controlling a dispositive issue[.]" Great Basin Water Network v. State Eng'r, 126 Nev. Adv. Op.

20, 234 P.3d 912, 913-914 (2010) (discussing standard applicable to appellate analog NRAP 40(c)(2)).

Grimes' ex post facto challenge to being adjudicated guilty as to both Counts 1 and 3 was considered by the Court and rejected on the merits at sentencing. Restyling his claims as a motion to correct illegal sentence did nothing to entitle him to a reconsideration of that prior determination. The presentation of Grimes' single persuasive authority from another jurisdiction did not warrant reconsideration. See Fast Track Statement at 15 (arguing the persuasive impact of Ex parte Scales, 853 S.W.2d 586 (Tex. Crim. App. 1993)). That case was published in 1993 and it was untimely brought to the Court's attention. Moreover, that merely persuasive authority – which has never been cited by another jurisdiction – is not a "legal authority directly controlling a dispositive issue," which would warrant reconsideration, Great Basin Water Network, supra. Thus, Grimes' Motion was properly denied due to his failure to seek and inability to justify reconsideration of the Court's legal determination at his sentencing.

B. Grimes' Motion was Properly Denied Because the District Court Did Not Have the Jurisdiction to Grant the Motion while Grimes' Appeal was Pending

"Jurisdiction in an appeal is vested *solely* in the supreme court until the remittitur issues to the district court." (emphasis added) Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994). While an appeal is pending, district courts

do not have jurisdiction over the case until remittitur has issued. Id. Generally, once a defendant files a notice of appeal with the Nevada Supreme Court, that divests the district court of jurisdiction to hear the matter until remittitur issues. See Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994). The general divesting of jurisdiction applies to all proceedings not "collateral to or independent from the appealed order." Foster v. Dingwall, 126 Nev. __, 228 P.3d 453, 455 (2010).

Here, Grimes had a direct appeal pending while his Motion to Correct Illegal Sentence was before the district court. Further, Grimes' Motion was not collateral but a direct attack on his Judgment of Conviction and his sentencing proceedings.[1] Accordingly, the district court had no jurisdiction to consider Grimes' Motion to Correct Illegal Sentence.

C. Grimes' Motion Was Properly Denied Because It Presented Claims Not Cognizable in a Motion to Correct Illegal Sentence

NRS 176.555, governing "Correction of illegal sentence," provides that "[t]he court may correct an illegal sentence at any time." A motion to correct an illegal sentence looks only to see if the sentence is illegal upon its face. Edwards, 112 Nev. at 708, 918 P.2d at 324. The Court in Edwards further explained:

> A motion to correct an illegal sentence is an appropriate vehicle for raising the claim that a sentence is facially illegal at any time; such a motion cannot be used as a vehicle for challenging the

[1] Grimes' improper use of a Motion to Correct Illegal Sentence to challenge his Judgment of Conviction and sentence will be addressed infra.

> validity of a judgment of conviction or sentence based on alleged 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. An "illegal sentence' is one which is at variance with the controlling sentencing statute, or "illegal" in a sense that the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided. Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985); Robinson v. United States, 454 A.2d 810, 813 (D.C. 1982)).

Grimes' ex post facto/due process challenge to the procedure followed at his sentencing hearing is not substantively within the scope of a motion to correct illegal sentence as recognized in Edwards. He did not attempt to demonstrate any facial invalidity in his Judgment of Conviction. The Edwards Court expressly held that the type of claims Grimes made in his Motion are not cognizable in a motion to correct illegal sentence. The Court has noted that "such a motion cannot be used as a vehicle for challenging the validity of a judgement of conviction or sentence *based on alleged errors occurring at trial or sentencing*." Edwards, 112 Nev. at 707, 918 P.2d at 324 (emphasis added). Having already filed a 27-page Fast Track Statement in his direct appeal, Grimes was instead improperly using the Motion as a vehicle for obtaining additional appellate review of issues omitted from his direct appeal. Regardless of his motives, Grimes could not pursue the issue through a motion to

correct illegal sentence. Cf. id. at 704 n.2-709, 918 P.2d at 325 n.2.[2] Thus, Grimes' Motion was properly denied because it raised a claim not cognizable in the "very narrow scope" of a motion to correct illegal sentence.

D. Even Assuming The Motion was Substantively and Procedurally Proper, Grimes' Motion was Properly Denied Because Grimes' Rights Under the Ex Post Facto and Due Process Clauses Were Not Violated by the Court Adjudicating Grimes Guilty of and Imposing Sentences on Both Counts 1 and 3

1. Standard for Determining the Existence of an Ex Post Facto/Due Process Violation under Calder/Bouie

Laws that retroactively alter the definition of crimes or increase the punishment for crimes constitute violations of the prohibition on ex post facto punishments. Miller v Ignacio, 112 Nev. 930, 921 P.2d 882 (1996). An ex post facto law is defined exclusively as a law falling into one of the four categories delineated in Calder v. Bull, 3 U.S. 385, 390 (1798). See Carmell v. Texas, 529 U.S 513, 537-39, 120 S. Ct. 1620, 1635 (2000); Collins v. Youngblood, 497 U.S. 37, 41-42, 110

[2] We have observed that defendants are increasingly filing in district court documents entitle "motion to correct illegal sentence" or "motion to modify sentence" to challenge the validity of their convictions and sentences in violation of the exclusive remedy provision detailed in NRS 34.724(2)(b), in an attempt to circumvent the procedural bars governing post-conviction petitions for habeas relief under NRS chapter 34. We have also observed that the district courts are often addressing the merits of issues regarding the validity of convictions of 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…

S. Ct. 2715, 2718-19 (1990). As Calder explained, ex post facto laws include the following:

> (1) Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action;
> (2) Every law that aggravates a crime, or makes it greater than it was, when committed;
> (3) Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crimes, when committed;
> (4) Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

The Calder categories provide "an exclusive definition of ex post facto laws," Collins, 497 U.S. at 42, 110 S. Ct. at 2719, and the United States Supreme Court has admonished that it is "a mistake to stray beyond Calder's four categories." Carnell, 529 U.S. at 539, 120 S. Ct. at 1620. There is no clear formula for determining whether a statute increases the 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 Dep't of Corr. 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 508-09, 115 S. Ct. at 1603-04. Likewise, statutes that disadvantage

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

The constitutional protection against ex post facto laws applies as a matter of due process under the Fifth Amendment, equally to judicial pronouncements and doctrines. Marks v. United States, 430 U.S. 188, 191-92, 97 S. Ct. 990, 993 (1977); Bouie v. City of Columbia, 378 U.S. 347, 352054, 84 S. Ct. 1697, 1703 (1964) ("'(A)n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids…If a state legislature is barred by the Ex Post Facto Clause from achieving precisely the same result by judicial construction.'"). Ex post facto analysis under the due process clause hinges upon whether the judicial pronouncement or doctrinal change constitutes an "unforeseeable judicial construction" of the law. Marks, 430 U.S. at 192-193, 97 S. Ct. at 993. To constitute a due process violation, the new judicial pronouncement or doctrinal change must be "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue[.]" Bouie, 378 U.S. at 354, 84 S. Ct. 1697 (citation omitted).

/ / /

/ / /

2. Application of Jackson's Disapproval of the Salazar-Skiba Redundancy Analysis Does Not Constitute an Ex Post Facto Law/Due Process Violation

As already determined by the district court at sentencing, Grimes cannot locate his alleged ex post facto violation in any of the four Calder categories. Further, he cannot demonstrate that Jackson's change in the law was so unforeseeable that its application to him constitutes a due process violation under Bouie. Application of Jackson did nothing to change the amount of punishment attaching to the crimes Grimes committed. Grimes's sole legal justification for invalidating his Count 3 conviction is a reference to the Texas case, Ex parte Scales, 853 S.W.2d 586 (Tex. Crim. App. 1993). Putting aside that Ex parte Scales has 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 post facto due process test, Grimes cannot establish a similar claim that disapproval of the Salazar-Skiba redundancy analysis 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[.]"Marks, 430 U.S. at 192-193, 97 S. Ct. at 993; Bouie, 378 U.S. at 354, 84 S. Ct. 1697.

Unlike the redundancy analysis developed in Nevada, Texas's carving doctrine at issue in Ex parte Scales was almost a century old at the time it was doctrinally abandoned in 1982. See Ex parte McWilliams, 634 S.W.2d 815 (Tex.

Crim. App. 1980) (citing cases dating 1896 and 1905 as the origin of the so-called carving doctrine and noting "[t]here is no definitive statement of the carving doctrine; it is a nebulous rule applied only in this jurisdiction."). Conversely, the Salazar-Skiba redundancy analysis (if it even constitutes a doctrine per se) was a jurisprudential outlier consisting of two "conclusory," opinions, which arose beginning in 1998. Jackson v. State, 291 P.3d at 1282 (noting Skiba "exhibits the same conclusory analysis as Salazar."). Further, this Court noted that the redundancy doctrine it was overturning is "unique" in the sense that only Nevada follows it. Id. at 1280.

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

> Like Nevada, the United States Supreme Court has vacillated on whether to pursue, in addition to Blockburger's "same elements" test, a "same conduct" analysis in assessing cumulative punishment…a mere three years after Grady, the Court overruled it outright, reasoning that Grady was "not only wrong in principle, it has already proved unstable in application."
> In Barton, this court retraced the Supreme Court's path in Grady and Dixon and endorsed Dixon's "same elements" approach, to the exclusion of Grady's "same conduct" approach. Although Barton arose in the context of lesser-included-offense

> instructions, its stated holding applies to other contexts as well, including specifically, to questions of whether the conviction of a defendant for two offenses violates double jeopardy, whether a jury finding of guilt on two offenses was proper, and whether two offenses merged. Id. at 689-90, 30 P.3d at 1105. Indeed, the principal "same conduct" case Barton overrules, is a double jeopardy/cumulative punishment case. And Barton states its holding categorically: To the extent that our prior case law conflicts with the adoption of the elements test, we overrule Owens v. State and expressly reject the same conduct approach *that has been used in various contexts*; [j]ust as the United States Supreme Court found [Grady's] same conduct test to be unworkable…, we to conclude that *eliminating the use of this test* will promote mutual fairness.

Jackson, 291 P.3d at 1280-81 (emphasis original) (internal quotations and citations omitted). Essentially then, the Court in Jackson was saying that Barton had already overturned the "same conduct" mode of analysis relied on in Salazar-Skiba. It is quizzical then that Grimes 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." Instead, Jackson merely followed the path already staked out in Barton. 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 Nevada Supreme Court precedent. 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' Motion was properly denied because he utterly fails to demonstrate application of Jackson to him constitutes an ex post facto/due process violation.[3]

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court affirm the district court's decision. To the extent this Court finds the District Court came to the appropriate conclusion for the wrong reason, it is of no consequence and the District Court's decision should be affirmed. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) ("If a judgment or order of a trial court reaches the right

[3] Further, to find Jackson is not retroactive would expressly undermine the sentencing Court's intent. After rejecting Grimes' Jackson argument at sentencing, the Court sentenced Grimes to a consecutive term for Count 3 due to his two prior felony convictions for Battery Constituting Domestic Violence and the facts of this case wherein he stabbed his estranged wife 21 times in front of her mother, in violation of a lawful Temporary Protective Order, and was only stopped when a police officer burst into the house, leapt and grabbed his wrist, thus stopping a murder in the making. Based on the sentencing structure, it was obviously important to the judge that Grimes guy spend *decades* away from any woman. However, if this Court reverses and remands for resentencing, Wilson v. State, 123 Nev. 587, 170 P.3d 975 (2007), bars the sentencing judge from redistributing its sentence among the remaining two counts and Grimes will ultimately receive a 40% discount on his sentence in direct contradiction with the intent of the sentencing judge. See Pitmon v. State, 131 Nev. Adv. Rep. 16, 352 P.3d 655 (App. 2015) ("[T]he nature of criminal sentencing in Nevada is such that judges must be able to exercise discretion in order to match the sentence imposed in each case to the nature of a particular crime, the background of a particular defendant, the potential effect of the crime on any victim, and any other relevant factor.").

result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal.").

9. Preservation of the Issue.

The issue was litigated below.

VERIFICATION

1. I hereby certify that this Fast Track Response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Fast Track Response has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point and Times New Roman style.
2. I further certify that this Fast Track Response complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points or more, contains 4,232 words.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 4th day of September, 2015.

Respectfully submitted,

STEVEN B. WOLFSON
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BY */s/ Christopher Burton*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 4th day of September, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Clerk of Supreme Court

NEVADA SUPREME COURT

BENNETT GRIMES	)	
	)	Case No.: 67598
Appellant,	)	
v.	)	**NOTICE OF INTENT TO NOT**
	)	**FILE SUPPLEMENTAL FAST**
THE STATE OF NEVADA	)	**TRACK STATEMENT**
	)	
Respondent.	)	
	)	

COMES NOW Bennett Grimes by and through appointed counsel William H. Gamage, Esq., of GAMAGE & GAMAGE, and hereby provides NOTICE that Appellant Counsel will not be filing a Supplemental Fast Track Statement. Counsel has reviewed the filed Fast Track Statement and determined that no additional issues need be briefed related to this appeal. NRAP 3C(g)(1)(a).

DATED this 10th day of July, 2015.

GAMAGE & GAMAGE

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CERTIFICATE OF SERVICE

I hereby certify that on 10th day of July, 2015, I served a copy of the foregoing ***Notice*** to each of the parties via the court's electronic service system, and addressed to:

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NEVADA SUPREME COURT

BENNETT GRIMES	)	
	)	Case No.: 67598
Appellant,	)	
v.	)	
	)	**REPLY TO FAST TRACK**
THE STATE OF NEVADA	)	**RESPONSE**
	)	
Respondent.	)	
	)	

ARGUMENT

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

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

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

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

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

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

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

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

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

This court has repeatedly held that the timely filing of a notice of appeal "divests the district court of jurisdiction to act and vests jurisdiction in this court." *Foster v. Dingwall*, 228 P.3d 453, 454-55 (Nev., 2010) (citing to *Mack-Manley v. Manley*, 122 Nev. 849, 855 (2006) (*quoting Rust v. Clark Cty. School District*, 103 Nev. 686, 688 (1987))). This jurisdictional transfer is not absolute in that:

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

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

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

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

1. The trial court violated Grimes rights by forcing him to choose between his right to remain silent and his right to present a self defense theory to the jury.

2. The court erred by failing to notify the parties that the jury had a question during deliberations.

3. The State failed to present sufficient evidence to sustain a conviction for burglary beyond a reasonable doubt.

4. Cumulative error denied Grimes a fair trial.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Grimes was disadvantaged by application of *Jackson*:

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

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

***Jackson* retroactively applied to Grimes**:

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

***Jackson* was not foreseeable**:

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

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

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

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

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

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

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

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

VERIFICATION

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

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

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

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

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

Dated this 28th day of September, 2015.

Respectfully submitted

/s/ William H. Gamage

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

CERTIFICATE OF SERVICE

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

Steven B. Wolfson, Esq.
Clark County District Attorney

Adam P. Laxalt
Nevada Attorney General

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

/s/ William H. Gamage, Esq.
_____
An employee of GAMAGE & GAMAGE

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 67598
District Court Case No. C276163

FILED
MAR 2 5 2016
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

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

JUDGMENT

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

"ORDER the judgment AFFIRMED."

Judgment, as quoted above, entered this 26th day of February, 2016.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this March 22, 2016.

Tracie Lindeman, Supreme Court Clerk

By: Sally Williams
Deputy Clerk

C-11-276163-1
CCJA
NV Supreme Court Clerks Certificate/Judgn
4534434

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 67598

FILED

FEB 2 6 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a motion to correct an illegal sentence. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Bennett Grimes argues that the district court abused its discretion in denying his motion to correct an illegal sentence, pursuant to NRS 176.555, because ex post facto and due process violations rendered his sentence illegal. Without considering the merits of any claims raised in the motion, we conclude that the district court did not abuse its discretion because Grimes's claims fall outside the narrow scope of claims permissible in a motion to correct an illegal sentence. *See Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996); *see also Haney v. State*, 124 Nev. 408, 411, 185 P.3d 350, 352 (2008) (reviewing a district court's decision denying a motion to correct an illegal sentence for an abuse of discretion). Specifically, Grimes does not allege facial

invalidity of the sentence and has not demonstrated that the court was without jurisdiction. Therefore, we

ORDER the judgment AFFIRMED.

_____, J.
Hardesty

_____, J.
Saitta

_____, J.
Pickering

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

CERTIFIED COPY
This document is a full, true and correct copy of the original on file and of record in my office.
DATE: March 22nd, 2016
Supreme Court Clerk, State of Nevada
By: Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 67598
District Court Case No. C276163

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

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

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

DATE: March 22, 2016

Tracie Lindeman, Clerk of Court

By: Sally Williams
Deputy Clerk

cc (without enclosures):
Hon. Michelle Leavitt, District Judge
Clark County Public Defender
Clark County District Attorney
Attorney General/Carson City
Law Offices of Gamage & Gamage, Las Vegas

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on MAR 2 5 2016.

HEATHER UNGERMANN
Deputy District Court Clerk

RECEIVED
MAR 2 5 2016
CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
CHARLES THOMAN
Deputy District Attorney
Nevada Bar #012649
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BENNETT GRIMES,
#2762267,

Defendant.

CASE NO: C-11-276163-1

DEPT NO: XII

STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

DATE OF HEARING: AUGUST 24, 2017
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through CHARLES THOMAN, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Supplemental Petition For Writ Of Habeas Corpus.

This Response 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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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On September 14, 2011, the State of Nevada charged Bennett Grimes ("Defendant") by way of Information as follows: Count 1 – Attempt Murder With Use of a Deadly Weapon In Violation of Temporary Protective Order (Felony – NRS 200.010, 200.030, 193.330, 193.165, 193.166), Count 2 – Burglary In Violation of Temporary Protective Order (Felony – NRS 205.060, 193.166), and Count 3 – Battery With Use of a Deadly Weapon Constituting Domestic Violence Resulting In Substantial Bodily Harm In Violation of Temporary Protective Order (Felony – NRS 200.481.2e, 193.166). On September 21, 2011, the State filed an Amended Information amending Count 2 to Burglary While In Possession of a Firearm In Violation of a Temporary Protective Order.

A jury trial commenced on October 10, 2012, and on October 15, 2012, a Clark County jury returned a verdict of guilty on each of the three charges.

On February 12, 2013, Defendant was sentenced as follows: on Count 1 to a maximum of 20 years with a minimum parole eligibility of 8 years in the Nevada Department of Corrections (NDOC), plus a consecutive term of a maximum of 15 years with a minimum parole eligibility of 5 years in the NDOC for use of a deadly weapon; on Count 2 to a maximum of 20 years with a minimum parole eligibility of 8 years in the NDOC, to run concurrent to Count 1; and on Count 3 to a maximum of 20 years with a minimum parole eligibility of 8 years in NDOC, to run consecutive to Counts 1 and 2. Defendant received 581 days credit for time served. The District Court entered the Judgment of Conviction on February 21, 2013.

On March 18, 2013, Defendant filed a Notice of Appeal. On February 27, 2014, the Nevada Supreme Court issued an Order of Affirmance in Defendant's appeal. The date of remittitur was March 24, 2014.

On September 9, 2013, Defendant filed a Motion to Correct Illegal Sentence. On September 23, 2013, the State opposed that Motion. This Court heard the Motion on September 26, 2013, but continued the hearing so that the parties could file replies. On October 3, 2013, Defendant filed a Reply, the State filed a Sur-reply, and the Court heard additional argument.

This Court indicated that a decision would issue via minute order. On February 26, 2015, this Court denied Defendant's Motion to Correct Illegal Sentence via minute order. On May 1, 2015, a written order denying the same was filed.

On February 20, 2015, Defendant filed a pro se Petition for Writ of Habeas Corpus claiming his trial counsel was ineffective. On April 21, 2015, Defendant was appointed counsel. On July 21, 2016, at Defendant's request, the District Court set a briefing schedule ordering Defendant's Supplemental Petition for Writ of Habeas Corpus due on August 18, 2016, the State's Response due on October 29, 2016, and Defendant's Reply due on November 9, 2016. The matter was set for hearing on November 15, 2016.

On August 25, 2016, Defendant filed three pro se motions to add additional grounds to and request an evidentiary hearing on his February 20, 2015, Petition for Writ of Habeas Corpus. The State opposed those three motions on September 8, 2016. On September 15, 2016, this Court struck those motions as fugitive documents.

On September 23, 2016, Defendant filed a motion to discharge his attorney. That motion was denied on October 18, 2016.

On November 15, 2016, this Court ordered Defendant's attorney withdrawn from the case and appointed instant counsel. On January 17, 2017, this Court set a briefing schedule for the Petition for Writ of Habeas Corpus. Defendant's Petition was due by May 16, 2017, the State's Response is due July 18, 2017, and Defendant may reply by August 17, 2017.

On May 16, 2017, Defendant filed a Supplemental Petition for Writ of Habeas Corpus. ("Petition") The State responds as follows:

ARGUMENT

I. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686,

104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711

(1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked"

allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

a. Trial Counsel Was Not Deficient For Not Moving To Dismiss Count 3 At Trial

Petitioner argues that trial counsel was deficient for failing to move the court to dismiss Count 3. Petition 21. Petitioner fails to demonstrate that counsel was deficient.

First, Petitioner's position is illogical and fails to demonstrate that counsel was deficient. Petitioner begins his argument by citation to authority that states that counsel's deficiency is to be judged in light of the law existing "at the time" of the challenged conduct. Petition at 20 (quoting Smith v. Murray, 477 U.S. 527, 536 (1986)). According to Petitioner, the law existing during trial suggested that Petitioner could not be adjudicated guilty of both Count 1 and Count 3 because they were redundant.[1] Petition 15; see generally also Defendant's Motion To Correct Illegal Sentence, filed September 9, 2013, Defendant's Reply In Support Of Motion To Correct Illegal Sentence, filed October 3, 2013, Transcript of Proceedings: Sentencing, Thursday, February 7, 2013. If that is the case, then counsel was not deficient for failing to move to vacate Count 3 during trial because (1) Petitioner had not yet been convicted and such a motion may have been redundant anyway, and (2) counsel was under the reasonable belief that Petitioner could not be adjudicated of it anyway. At the time of trial, waiting to challenge Count 3 until it became a live issue was a reasonable strategic decision that is now "almost unchallengeable." Dawson, 108 Nev. at 117, 825 P.2d at 596.

Indeed, if Petitioner's argument is correct, "counsel's failure to anticipate a change in the law does not constitute ineffective assistance of counsel even where 'the theory upon which the court's later decision is based is available, although the court had not yet decided the issue.'" Nika v. State, 124 Nev. 1272, 1289, 198 P.3d 839, 851 (2008). Put differently, if Petitioner is right that the law at the time prevented Petitioner from being adjudicated guilty

[1] The State does not concede that this was actually the state of the law existing at the time, and has previously argued that Jackson v. State, 128 Nev. Adv. Op. 55, 291 P.3d 1274 (2012), merely clarified existing law. State's Opposition to Defendant's Motion to Correct Illegal Sentence, filed September 23, 2013, State's Surreply in Support of Opposition to Defendant's Motion to Correct Illegal Sentence, filed October 3, 2013..

of both Count 1 and 3, then counsel had no reason to raise the issue during trial and cannot be ineffective for failing to do so. Alternatively, if Petitioner is wrong and Jackson merely clarified, but did not change, the law, then counsel cannot have been ineffective for failing to argue incorrect law.

Second, even if Petitioner could show that counsel was deficient, Petitioner cannot demonstrate prejudice sufficient to warrant relief. Absolutely nothing in the record demonstrates that this Court would have entertained a motion to dismiss Count 3 at that time, despite counsel's affidavit that this Court "repeatedly stated that Mr. Grimes could not be adjudicated guilty of both Counts 1 and 3." Petition at 18. Indeed, reviewing the trial transcripts indicates that *absolutely nowhere on the record* did this Court indicate as much. Nowhere in the trial transcripts is there even a passing comment to a discussion that was had off the record. Further, even if this Court *had* entertained such a motion, there is nothing to indicate that the motion would have been granted *prior to the jury ever finding Petitioner guilty on any count* other than counsel's statements after the fact. Further still, even if such a motion had been entertained, and even if this Court had granted it, the result would have been error under Jackson.

Either way, based on the law Petitioner claims was in effect during trial, Petitioner cannot demonstrate that counsel was deficient for failing to move to dismiss Count 3 because the decision to wait until it was a live issue was "[w]ithin the range of competence demanded of attorneys in criminal cases." Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

b. Appellate Counsel Was Not Deficient For Challenging The Sentence Via A Motion To Correct Illegal Sentence

Petitioner argues that counsel was deficient for raising a challenge to the sentence in a Motion To Correct Illegal Sentence rather than on appeal. Petition 21-22.[2]

There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v.

[2] Petitioner appears to argue that arguments during sentencing and within the Motion To Correct Illegal Sentence were the actions of post-conviction counsel. Petition 21-22. The State will respond as if that is the case, but the arguments apply equally if these actions should more properly be attributed to trial counsel.

Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314.

While counsel certainly *could have* raised the issue on appeal, counsel gave two persuasive reasons to think that it was a better strategic decision to raise the issue first in this Court.

First, Counsel was engaged in the "winnowing out" of weaker arguments in favor of those that could have provided more relief. Jones, 463 U.S. at 751-52, 103 S. Ct. at 3313. Each of the grounds raised on appeal could have resulted in a new trial or reversal of Petitioner's conviction, while the Jackson issue could have, at most, overturned a portion of Petitioner's sentence by vacating Count 3. Given both the professional diligence and competence required on appeal, counsel was justified in presenting the arguments with the potential to vacate Petitioner's entire conviction rather than diluting those arguments, or cutting them entirely, in favor of a complex issue that would have required the vast portion of a fast track brief; After all, even here counsel has spent 27 pages briefing the issue.

Second, Counsel's reasoning that the issue required additional briefing, and the belief that this Court would be best equipped to decide the issue on the first instance in light of arguments already presented during sentencing, was reasonable. Having already heard the

arguments of counsel (and, if Petitioner's unsupported arguments are believed, having discussed the issue off the record with counsel) this Court was readily familiar with the issue and, if the sentence were illegal, could more easily correct it. Further, if counsel was unsuccessful, the denial of the Motion to Correct Illegal Sentence could be, and in fact was, appealed. Therefore, counsel was not deficient in deciding not to include the issue within the limited confines of a fast track brief.

Petitioner also argues that counsel was deficient for actually raising the issue within a Motion to Correct Illegal Sentence. Petition at 22. As Petitioner states, a motion to correct illegal sentence is appropriate when challenging the facial illegality of a sentence. Id. (quoting Edwards v. State, 112 Nev. 704, 918 P.2d 321, 324 (1996)). Indeed, Petitioner *extensively* argued that adjudicating him guilty of both Count 1 and Count 3 was facially illegal. see generally also Defendant's Motion To Correct Illegal Sentence, filed September 9, 2013, Defendant's Reply In Support Of Motion To Correct Illegal Sentence, filed October 3, 2013, Transcript of Proceedings: Sentencing, Thursday, February 7, 2013, Fast Track Statement, Appeal 67598, filed July 2, 2015, *and especially* Reply To Fast Track Statement, Appeal 67598, filed September 29, 2015. Counsel was correct that the Motion to Correct Illegal Sentence spawned extensive briefing, far outside that permitted even by a non-fast-track appeal, and numerous hearings by this Court. That this Court denied Petitioner's claims, on the merits, does not make counsel ineffective for choosing to present the argument through that vehicle. And, while the Nevada Supreme Court eventually found that "Grimes does not allege the facial invalidity of the sentence," that finding was clearly at odds with the Reply To Fast Track Response that extensively and clearly *did* argue the facial invalidity of the sentence. Cf Order of Affirmance Appeal 67598, filed February 26, 2016; Reply To Fast Track Statement, Appeal 67598, p. 5-8, filed September 29, 2015.

Once again, just because this Court denied Petitioner's argument on the merits, and the Nevada Supreme Court held that this Court did not abuse its discretion in doing so, a bad outcome does not demonstrate either deficiency or prejudice. Indeed, given the extensive record created by the Motion to Correct Illegal Sentence, in addition to that created during

Appeal 67598, had the Nevada Supreme Court found Petitioner's arguments had merit it could easily have decided so by recognizing Petitioner's argument in the Reply To Fast Track Statement and agreeing that facial invalidity was argued in order to reach the substantive merits. Instead, the Nevada Supreme Court decided to let this Court's decision stand with little to no additional comment.

Because appellate counsel was not deficient, and because even if appellate counsel were deficient the record indicates that the Nevada Supreme Court was unlikely to grant Petitioner relief and Petitioner therefore cannot demonstrate prejudice, Petitioner's claims should be denied.[3]

c. Counsel Was Not Deficient For Not Arguing That A Steak Knife Was Not A Deadly Weapon When Petitioner Stabbed The Victim 21 Times With One

A "deadly weapon" is "[a]ny instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; or [a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death." NRS 193.165(6)(a)-(b).

Petitioner cites to Knight v. State, 116 Nev. 140, 993 P.2d 67, 72 (2000), for the proposition that Petitioner could reasonably argue that a steak knife is not a deadly weapon. Petition at 27. This argument is preposterous. While a steak knife, without more, might not necessarily be a deadly weapon, here Petitioner stabbed the victim 21 times with the weapon

[3] The State notes that Petitioner also argues that the State should be "bound by its promise" to merge counts three and one (a "promise" wholly unsupported by the record), and that the application of Jackson is, in fact, an ex post facto violation. Petition 22-27. These issues are squarely outside a Petition For Writ of Habeas Corpus and cannot be considered here in the first instance. The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). Further, this Court has already decided, initially at Sentencing and later in the Motion to Correct Illegal Sentence, that Petitioner's claims are meritless. Transcript of Proceedings Sentencing, February 12, 2013; Minute Order, February 26, 2015, Order Denying Defendant's Motion to Correct Illegal Sentence, May 1, 2015. This Petition is not a valid vehicle for relitigating those decided issues.

and left scars so severe that this Court, at sentencing, stated that the scars remained visible years later:

> I sat up here and watched that woman testify and looked over at her and saw that – just looking at her, not even trying, and I saw the horrible horrendous scars left on her, like, area that you can see just in normal clothing. Horrific scars that she has to live with the rest of her life. I think the girl's lucky that she's alive, if you want my opinion. How many times was she stabbed? ... I mean, 21 times. 21 times.

Transcript of Proceedings Sentencing, February 12, 2013 p. 7. Further, the jury convicted Petitioner of attempted murder. Judgment of Conviction, February 21, 2013. By definition, the jury must have believed that Petitioner was attempting to kill the victim in order to convict him of attempted murder. In that context, anything at all, from a pencil to a pillow, could be considered a deadly weapon. Petitioner's counsel was already placed in the exceedingly difficult position of arguing that Petitioner did not intend to kill the victim because he somehow failed to kill her after stabbing her 21 times. Transcript of Proceedings Jury Trial - Day 4, p. 20 ln. 21-25, October 15, 2012. Further arguing that the method in which the knife was used was not likely to lead to death or substantial bodily harm risked the jury believing that no arguments counsel made could be credible.

Trial counsel was not deficient for failing to make a futile argument. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Further, even if counsel were somehow deficient, Petitioner cannot demonstrate prejudice because no reasonable juror could have believed both that Petitioner attempted to murder the victim with a steak knife and that the steak knife was not, as used, a deadly weapon. Therefore, Petitioner's claim should be dismissed.

d. Appellate Counsel Was Not Deficient For Deciding Not To Argue That This Court Erroneously Denied Appellant's Motion To Dismiss For Failure To Gather Evidence

Petitioner argues that appellate counsel should have argued, during the first appeal, that this Court erred in denying his Motion To Dismiss For Failure To Gather Evidence. Petition at 28-30. The law cited in Section b, supra, ln. 1-15 applies once again.

Appealing this issue would have been frivolous, and was appropriately "winnow[ed] out." Jones, 463 U.S. at 751-52, 103 S. Ct. at 3313. Petitioner concedes that any DNA or fingerprint evidence was properly preserved, even until trial. Petition at 29. Further, Petitioner has not demonstrated that the State had any obligation whatsoever to test the knife for DNA or fingerprints. Petitioner does not contend that the State prevented him from testing the knife at any time. Instead, Petitioner simply chose not to. Given that Petitioner did not test the knife, despite its availability, Appellate counsel could not reasonably argue that the State was under any obligation to perform Petitioner's discovery for him.

If, however, Petitioner is arguing that Appellate counsel should have claimed ineffective assistance of counsel in the first appeal, based on Petitioner's failure to test the knife, such a claim still fails because an ineffective assistance of counsel claim is not appropriately raised on appeal. Franklin, 110 Nev. at 752, 877 P.2d at 1059. Therefore, such a claim would have been summarily denied, if it were even considered at all, by the Nevada Supreme Court.

Finally, this Court did not err in denying the motion in the first instance. A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Were the knife tested, only two outcomes were possible. First, Petitioner's DNA and/or fingerprints could have been found on the knife – an outcome not beneficial for the Petitioner and one that would not have led to a more favorable outcome at trial. Second, the DNA and/or fingerprint test could have been inconclusive and/or could have failed to identify the DNA and/or fingerprint on the knife as Petitioner's. In fact, given that Petitioner merely received a scratch on his finger, while he stabbed the victim 21 times with the knife, in all probability at least the apparent blood on the knife was the victim's, not the Petitioner's. As such, Petitioner fails to demonstrate how testing the knife would have led to a better outcome at trial. Petitioner makes a bare assertion that, had Appellate counsel raised the issue, Petitioner would have somehow "enjoyed a more favorable outcome" on appeal, but utterly fails to indicate how the Nevada Supreme Court

could have found as much given that (1) the knife was available for Petitioner to test, (2) the State was under no obligation to test the knife, and (3) the knife was not actually tested. Petition at 29-30. Such a bare assertion is insufficient to warrant relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Therefore, Petitioner's claim should be denied.

II. CUMULATIVE ERROR DOES NOT APPLY BECAUSE THERE WERE NO ERRORS

Petitioner asserts a claim of cumulative error in the context of ineffective assistance of counsel.[4] The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; and it is the State's position that they cannot. However, even if they could be, it would be of no moment as there was no single instance of ineffective assistance in Petitioner's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, Petitioner's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Furthermore, any errors that occurred at trial were minimal in quantity and character, and a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

Here, the issue of guilt was not close because Petitioner stabbed the victim 21 times in front of numerous people, including a police officer. Transcript of Proceedings Jury Trial - Day 2, p. 25-26, October 11, 2012. Additionally, there was no error, so there is nothing to cumulate. While the crimes of which Petitioner was convicted are serious, serious crimes of which a defendant is convicted absent error are not sufficient, by themselves, to warrant relief. While Petitioner addresses the fact that the Nevada Supreme Court found some errors on

[4] Once again, any alleged cumulative error outside of the context of an ineffective assistance of counsel claim is not properly brought in a Petition for Writ of Habeas Corpus and should be denied. " Franklin, 110 Nev. at 752, 877 P.2d at 1059. "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans, 117 Nev. at 646-47, 29 P.3d at 523.

appeal, all errors which the Nevada Supreme Court found were harmless beyond a reasonable doubt and did not affect the integrity of Petitioner's conviction. Therefore, Petitioner's claim should be denied.

CONCLUSION

For the forgoing reasons the State respectfully requests that Petitioner's Writ of Habeas Corpus be DENIED.

DATED this 17th day of July, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #1565

BY _____ for CT
CHARLES THOMAN
Deputy District Attorney
Nevada Bar #012649

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Response to Defendant's Supplemental Petition For Writ Of Habeas Corpus, was made this 17th day of July, 2017, by facsimile transmission to:

JAMIE RESCH, ESQ.
FAX #702-481-7113

BY: _____
Theresa Dodson
Secretary for the District Attorney's Office

jn/CT/td/dvu

RPLY

RESCH LAW, PLLC d/b/a Conviction Solutions
By: Jamie J. Resch
Nevada Bar Number 7154
2620 Regatta Dr., Suite 102
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Telephone (702) 483-7360
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Jresch@convictionsolutions.com
Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

BENNETT GRIMES, Petitioner, vs. THE STATE OF NEVADA, Respondent.	Case No.: C-11-276163-1 Dept. No: XII **REPLY TO STATE'S RESPONSE TO SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** Date of Hearing: Aug. 24, 2016 Time of Hearing: 8:30 a.m.

COMES NOW, Defendant/Petitioner, Bennett Grimes, by and through his attorney, Jamie J. Resch, Esq., and hereby files his reply to the State's Response to Supplement to Petition for Writ of Habeas Corpus (Post-Conviction). This reply is based on the pleadings and papers herein, any attached exhibits, and any argument as may be presented to the Court at the time of hearing.

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the foregoing Reply to Response to Supplement to Petition for Writ of Habeas Corpus (Post-Conviction) was made this 7th day of August, 2017, by Electronic Filing Service to:

Clark County District Attorney's Office
Motions@clarkcountyda.com
PDmotions@clarkcountyda.com

An Employee of Conviction Solutions

Conviction Solutions
2620 Regatta Dr., Suite 102
Las Vegas, Nevada 89128

I.

POINTS AND AUTHORITIES

The State's response to the pending petition, particularly with respect to the redundancy claim in Ground One, seems entirely designed to blur the issues before this Court. However, a careful review of the issues reveals that Grimes is entitled to relief on his ineffectiveness claims concerning this issue.

The State first contends that trial counsel's declaration is not supported by the transcripts in this case. The supplement acknowledged as much. See Supplement, p. 19. However, that is hardly the end of the issue. If the State promised, off the record or in-chambers, that Counts 1 and 3 would merge and/or that Grimes could not be sentenced on Count 3 if convicted of Count 1, then those promises are binding. Perhaps this Court will

personally recall whether those conversations occurred, although the trial itself was October 2012 – nearly five years ago. The better approach may be that proposed in the supplement, in that an evidentiary hearing could be held to test trial counsel's recollection of those promises and the reasons for not seeking dismissal of Count 3 at a sooner time on redundancy grounds. The fact this claim relies on outside-the-record evidence for support is proof, in and of itself, that it could not have been asserted at a sooner time, i.e. such as on direct appeal.

Second, the State "does not concede" that redundancy existed as an issue at the time of Petitioner's trial, and goes on to suggest Jackson v. State, 128 Nev.Adv.Op. 55, 291 P.3d 1274 (2012) "merely clarified existing law." Response, p. 6 at n. 1. This position is mistaken. The supplement explained that the Nevada Supreme Court already held that Jackson overruled existing redundancy caselaw and therefore was not a clarification of existing law. Byars v. State, 130 Nev. Adv. Op. 85, 336 P.3d 939, 949 (2014). That particular sub-issue is settled: Jackson was a new and unforeseeable decision and not a clarification of existing law.

Third, the State appears to suggest that the Motion to Correct Illegal Sentence was in fact a correct and viable manner of raising Petitioner's Ex Post Facto claim. This argument is also extremely suspect in light of the Nevada Supreme Court's holding to the contrary in the order dismissing the appeal therefrom based on a lack of jurisdiction. SUPP 132-133. Again, the Nevada Supreme Court's decision is the final word on any topics it may have previously addressed, and here it concluded the motion to correct illegal sentence rubric was the improper method of raising an Ex Post Facto Claim. Implicit in that ruling is a finding, as conceded by the State, that such a claim was viable to be raised on direct appeal. The claim should have been by appellate counsel in this matter on direct appeal.

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Finally, there remains the simple fact that **no court** has, to date, heard Petitioner's Ex Post Facto claim on the merits. This Court's prior order on the motion to correct illegal sentence did not address the merits of the claim, and the Nevada Supreme Court affirmed the denial of the same on procedural grounds. As already extensively explained in the supplement, Jackson was new, unforeseeable, and applied retroactively to Grimes' detriment. No more is needed to establish an Ex Post Facto violation. Tellingly, the State does not even attempt to assail Grimes' retroactivity analysis, and instead focuses exclusively on the alleged reasonableness of counsels' actions. But again, the Nevada Supreme Court has already held it was a mistake to pursue this issue via a motion to correct illegal sentence instead of on direct appeal. This court may readily decide the prejudice issue by concluding Grimes is in fact entitled to relief on his Ex Post Facto claim.

II.

CONCLUSION

Count Three should be dismissed as it is redundant to Count One and failing to so hold violates the Ex Post Facto Clause. Grimes is also entitled to relief on all claims stated in the supplemental petition.

DATED this 7th day of August, 2017.

Submitted By:

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
JAMIE J. RESCH
Attorney for Petitioner

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Las Vegas, Nevada 89128

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. BENNETT GRIMES, Defendant.	CASE NO. C276163 DEPT. XII

BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE

THURSDAY, AUGUST 24, 2017

RECORDER'S TRANSCRIPT RE:
PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

APPEARANCES:

For the Plaintiff: BRYAN S. SCHWARTZ, ESQ.
Deputy District Attorney

For the Defendant: JAMIE J. RESCH, ESQ.

RECORDED BY: KRISTINE SANTI, COURT RECORDER

THURSDAY, AUGUST 24, 2017, 8:35 A.M.

* * * * *

THE COURT: State versus Bennett Grimes, C276163. He's not present. He's in the Nevada Department of Corrections.

MR. RESCH: Jamie Resch on his behalf.

THE COURT: Go ahead.

MR. RESCH: Well, this is our post-conviction petition. We've got four claims and I would simply suggest any one of them is sufficient to grant the relief, but, obviously, the major issue involves the –

THE COURT: Right.

MR. RESCH: – ex post facto claim. It's tough. On one hand we have the affidavit from counsel that kind of explains some of what happened, but this is five years ago and none of it appears in the record, so, unfortunately – if the Court recalls any of these discussions that's great. I, obviously, wouldn't expect such a thing. But it there's any question about what happened or why they didn't move to dismiss this so-called redundant count, then perhaps an evidentiary hearing is the right way to explore it.

THE COURT: Okay. But everyone agrees he was convicted. He was – the verdict came back. Okay. He committed the offense. The verdict came back and *Salazar* is what everybody was relying upon, and then after the verdict came back the Supreme Court decided *Jackson.*

MR. RESCH: That's right and –

THE COURT: Okay. I think the issue is – I mean I know – the State is, I think, arguing that it was a clarification of the law. And I'm not sure –

MR. RESCH: Well, yeah.

THE COURT: – because it appears to me as though the Supreme Court overruled *Salazar.*

MR. RESCH: Well, that is what they said. So I would hope –

THE COURT: That's what they said.

MR. RESCH: Even though in the pleadings we're debating that, I would hope that the Court would see we're sort of past that point. The Nevada Supreme Court said, yeah, we overruled those redundancy cases. Well, then they're overruled and that's the end of it. And if that's the case, then certainly the blame could be put perhaps on appellate counsel as well, because ultimately we see this issue was attempted to be raised in that Motion to Correct Illegal Sentence. And the Nevada Supreme Court spoke there too when they said this isn't the right way to do it, we aren't even going to consider the merits of it.

THE COURT: Right. See, they dismissed it based on –

MR. RESCH: So no court has considered the merits of this.

THE COURT: – procedural grounds.

MR. RESCH: Right. So there is ample room here, I would suggest, to – for the Court right now to find on this record that there was a legal error; that this should have been a redundant count and based on the laws that existed at the time of Mr. Grimes's trial that there's a basis to say that's right, Count 3 is redundant and it should've been dismissed. The record makes it sound like that was everybody's plan until this new case came out, but, nonetheless, that's where the ex post facto part of it comes in. If you're going to punish someone, they need to know what was the buy-in at the time the crime was committed, not later down the road where you can't change the rules.

THE COURT: Do you think the Court could – I mean what relief would

you be asking for, because I know it appears as though you asked for: run it concurrent – or it seems like you asked for both – or dismiss Count 3.

MR. RESCH: Well –

THE COURT: Or does it need to be set for an evidentiary hearing, because was appellate counsel deficient in not raising that on appeal?

MR. RESCH: Okay. Now that's several questions. I would suggest that it either be dismissed or perhaps he be resentenced with the dismissal, that count in mind. There is some concept of making sure that we have a clean record; although, even the State has conceded that you really can't increase the sentence to account for this.

THE COURT: No, you can't.

MR. RESCH: So he, basically, is going to get what he already got minus Count 3, so one way would be to dismiss Count 3.

As far as an evidentiary hearing, certainly I'm asking for that, but, again, the Supreme Court has said if the facts are clear and there's nothing to discover in an evidentiary hearing, then a decision could be made on the merits of the petition. If it's so clear at this point –

THE COURT: That's what I'm wondering. You think it's clear based on this record, or do you think it needs to be expanded, because the trial record doesn't speak to what – I know you put that one part in about what I said. Whew, I'm not –

MR. RESCH: Oh, no, I know.

THE COURT: – sure that gets you to where you want to go. I'm just wondering, because I don't think the trial record supports it, do we have to expand the record?

MR. RESCH: Well, if we're talking about the actions of trial counsel, perhaps an evidentiary hearing is needed. They're the ones making the allegations that these promises were made. I don't have anything other than that, but then again, those should be sufficient if the Court found that those were credible.

If we're talking about appellate counsel, I think the record is more clear. It was wrong to raise it as a Motion to Correct Illegal Sentence. It should've been raised on direct appeal and it wasn't. And the flimsy reasons given already for not raising it on direct appeal don't hold any weight. You know the page limits of a fast-track statement, give me a break. There's plenty of ways around that or could've [indiscernible] us in one of the less good issues and put this issue in, which obviously has merit.

THE COURT: And you think the Court could decide that based on this record without an evidentiary hearing?

MR. RESCH: At least as to appellate counsel. If we're going to encompass the question trial counsel, I would suggest an evidentiary hearing would be the better way to go.

THE COURT: Does the State wish to be heard?

MR. SCHWARTZ: No, Your Honor. I'll submit it on our pleadings.

THE COURT: Okay. At this time I'm going to grant the evidentiary hearing as to the issue regarding Count 3.

MR. RESCH: All right. I appreciate it.

THE COURT: I think we need to expand the record, but I think it's an important issue –

MR. RESCH: Well, it was –

THE COURT: – that needs to be adjudicated on the merits and not based on procedural grounds.

MR. RESCH: The Public Defender's Office did the trial and the appeal, so it's relatively easy to get them here.

THE COURT: I think so too.

MR. RESCH: Okay.

THE COURT: Okay. How much time do you want?

MR. RESCH: Half day or less.

THE COURT: No. I mean how much time do you want from now, because you're going to have to get –

MR. RESCH: Oh.

THE COURT: You're going to have to subpoena witnesses.

MR. RESCH: Yes. Unfortunately, my September is a little jammed up, so if we could talk about October or November that would be very helpful.

THE COURT: All right. And then the State can do an order to transport the Defendant.

MR. SCHWARTZ: Yes, Your Honor.

THE CLERK: October 5, 10:30.

MR. RESCH: Just one moment please.

THE CLERK: Oh, I'm sorry.

MR. RESCH: All right, so is that a Thursday during –

THE COURT: It is.

MR. RESCH: – say regular calendar?

THE COURT: No. It's at 10:30.

MR. RESCH: 10:30. All right, October 5th, 10:30.

THE COURT: Thank you.

MR. RESCH: Thank you.

[Proceedings concluded at 8:41 a.m.]

* * * * *

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

Kristine Santi

KRISTINE SANTI
Court Recorder

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. BENNETT GRIMES, Defendant.	CASE NO. C276163 DEPT. XII Transcript of Proceedings

ERRATA

The transcript of hearing in the matter of The State of Nevada vs. Bennett Grimes, heard on February 7, 2013, before the Honorable Michelle Leavitt, District Court Judge, was filed on April 19, 2013. An error in the transcript was made in that the case had been recalled on that day and the recalled portion was not transcribed. Attached is the correct version of said transcript.

Dated this 6th day of September, 2017

Kristine Santi

Kristine Santi, Court Recorder/Transcriber

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE 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

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

APPEARANCES:

For the State: AGNES M. BOTELHO, ESQ.
J. PATRICK BURNS, ESQ.
HAGAR TRIPPIEDI, ESQ.
Deputy District Attorneys

For the Defendant: NADIA HOJJAT, ESQ.
LAUREN R. DIEFENBACH, ESQ.
Deputy Public Defenders

RECORDED BY: KERRY ESPARZA, COURT RECORDER

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

* * * * *

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

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

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

THE COURT: Is the State seeking –

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

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

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

THE COURT: Under the small, okay.

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

THE COURT: Okay. That's fine.

MS. BOTELHO: That's true.

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

THE COURT: Uh-huh.

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

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

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

THE DEFENDANT: Bailiff, the statement form.

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

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

THE COURT: Sure. You can hand it to the – you can hand it to the CO or the court marshal and they'll present it to the Court.

Okay. So, Mr. Grimes, any legal cause or reason –

Thank you. Thank you very much.

– why judgment should not be pronounced against you at this time?

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

THE COURT: What?

THE DEFENDANT: A Prop 36 Program. The judge that was here, he –

THE COURT: Any reason why judgment should not be –

THE DEFENDANT: No, ma'am.

THE COURT: – pronounced against you at this time?

THE DEFENDANT: No, ma'am.

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

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

house or a halfway program or something.

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

MS. BOTELHO: I don't either.

THE COURT: – like that being mentioned.

THE DEFENDANT: He had mentioned Prop 36 was in effect in the state. That's what he had mentioned, so.

THE COURT: Prop 36?

THE DEFENDANT: That's what he had mentioned.

THE COURT: Well, in Nevada we don't call it – you're – I mean in California they call it propositions. In Nevada we don't refer to –

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

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

THE DEFENDANT: He didn't say it during my standing. He said it during someone else's standing; that he had mentioned that it was in effect.

[Colloquy between the Court and the Court Clerk]

THE COURT: Okay.

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

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

THE DEFENDANT: I know. I was – he said that it was in effect, so I was just –

THE COURT: Any reason –

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

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

THE DEFENDANT: No, Your Honor.

THE COURT: Okay. Thank you, sir.

Does the State wish – by virtue of the jury verdict returned in this matter, I hereby adjudicate you guilty of 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 Firearm in Violation of a Temporary Protective Order; Count 3, Battery with Use of a Deadly Weapon Constituting Domestic Violence Resulting in Substantial Bodily Harm in Violation of a Temporary Protective Order.

Does the State wish to address the Court?

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

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

The Defendant has two prior DV convictions from California, Your Honor, from 2000 and also 2004. I will approach in just a minute and present the Court with the certified judgments of conviction. I will note there's a Post-it

on the 2000 conviction paperwork. I have that noted because the Defendant used a knife in that particular case. So he has this propensity for not only using violence but also using deadly weapons.

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

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

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

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

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

THE COURT: Oh, okay.

MS. BOTELHO: – or on this particular count.

THE COURT: I'm sorry.

MS. BOTELHO: Yes.

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

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

As to Count 2, we are asking for small habitual treatment. We would ask for a sentence of 8 to 20 years consecutive to the Attempt Murder with a Deadly Weapon.

As to Count 3, we're asking for the Battery with a Deadly Weapon Resulting in Substantial Domestic Violence in Violation of a TPO, we ask that small habitual treatment also be imposed and that an 8- to 20-year term be imposed consecutive to Counts 1 and 2.

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

MS. BOTELHO: That's correct.

THE COURT: – but not Count 1.

MS. BOTELHO: That's correct.

THE COURT: Okay.

MS. BOTELHO: Your Honor, we believe the Defendant should be in prison for as long as the scars and these memories live in Anika. So we feel

that this is an appropriate sentence.

May I approach with the certified judgments of conviction?

THE COURT: Sure. Has the Defense seen them?

MS. BOTELHO: They have. It was given to them prior to trial.

[The State shows documents to Defense Counsel]

MS. BOTELHO: Thank you.

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

MS. BOTELHO: There are two, Your Honor.

THE COURT: Okay. There's two?

MS. BOTELHO: Yes.

THE COURT: And any objection from the Defense regarding these and whether they're your client?

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

THE COURT: Okay. They'll be marked as Court's Exhibit 1 and 2 and made part of the record.

Okay, Mr. Grimes.

THE DEFENDANT: I handed you a statement also, if you could read that.

THE COURT: I'm sorry?

THE CORRECTIONS OFFICER: Speak up, sir.

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

THE COURT: Uh-huh.

[Court reads statement]

THE COURT: So, basically, you want probation and you want to go on an interstate compact is what I got out of that.

THE DEFENDANT: Well, I've been – I've been told that it's not available, but that was my asking.

THE COURT: Pardon?

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

THE COURT: Okay.

MS. HOJJAT: And, Your Honor, to start off, I didn't want to interrupt anybody, but we are actually objecting to adjudication of Count 3 in this case, the Battery with Use of a Deadly Weapon Constituting Domestic Violence Resulting in Substantial Bodily Harm in Violation of a Temporary Protective Order. There was some talk of this during the trial. I'm not sure if the Court –

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

MS. BOTELHO: We actually do, Your Honor. I have copy of case law, *Adrian Jackson vs. The State of Nevada*. It's an advisory opinion, but, basically, it deals with the issue of redundancy and also whether or not a defendant can be adjudicated guilty of both the Counts 1 – Count 1, Attempt Murder with Use, and also Count 3, Battery with a Deadly Weapon Resulting in Substantial Bodily Harm. It is directly on point. It essentially says, yes, you can adjudicate him guilty as to both.

THE COURT: What's an advisory opinion, because the Nevada Supreme Court –

MS. BOTELHO: It's going to be published and it – it just came out, Your

Honor. May I approach?

THE COURT: Sure.

MS. HOJJAT: And, Your Honor, if I may –

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

MS. HOJJAT: Yes, Your Honor.

THE COURT: Because I'm not quite sure you can be convicted of both. So I'd like to see what the case says.

MS. HOJJAT: Right.

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

MS. HOJJAT: Very well, Your Honor.

THE COURT: I mean my instincts are you can't be convicted of both, but if this case says – I mean it's a December 6, 2012 –

MS. HOJJAT: And, Your Honor, that was going to be my argument. This case actually came out after we went to trial on this case. The Defense did not raise an objection; the Defense did not move to consolidate.

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

MS. HOJJAT: Well –

THE COURT: I don't know that it would be a new law, but I don't know. Let me read it first.

MS. HOJJAT: Very well, Your Honor.

THE COURT: Okay?

MS. HOJJAT: Very well, Your Honor.

THE COURT: And if I think I need more time, I'll let you know, okay?

MS. HOJJAT: Thank you, Your Honor.

THE COURT: So we'll trail this.

MS. HOJJAT: Thank you, Your Honor.

THE COURT: You know what? I may need more time. I mean this case is like 14, 15 pages long and I don't want to make a decision on the fly. So can we continue it at least till next Tuesday?

MS. HOJJAT: Yes, Your Honor.

THE COURT: Is everyone okay with that?

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

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

THE COURT: Okay, so Tuesday.

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

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

THE COURT: Okay. The citation is: 128 Nev., Advance Opinion 55. I don't have a Pacific Reporter citation. If you want, I can have Pam come in here and copy it for you. It might be easier for you to get it.

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

THE COURT: It might be easier.

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

THE COURT: Do you guys get the advance opinions –

MS. HOJJAT: I'm not sure.

THE COURT: – emailed to you?

MS. HOJJAT: We don't, Your Honor.

MS. DIEFENBACH: No.

MS. HOJJAT: We don't have them emailed.

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

MS. HOJJAT: Yes, Your Honor.

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

MS. HOJJAT: Thank you, Your Honor.

THE COURT: Okay, Tuesday –

THE CLERK: – February 12th at 8:30.

THE COURT: Thank you.

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

[Proceedings recalled at 10:02 a.m.]

MS. HOJJAT: And, Your Honor, I apologize. Would it be possible for us to briefly recall Bennett Grimes? There was just one issue with the – that I wanted to request transcripts from the case. I'd spoke with Ms. Botelho.

THE COURT: We lost the DAs.

MS. HOJJAT: She said that she had to go somewhere else, but she said that the master calendar deputy could just take down the date and –

THE COURT: What do you need?

MS. HOJJAT: Your Honor, I believe that this issue of the – whether he could be adjudicated of Count 3 or not was discussed on the record during the case, and so I wanted to order the transcripts of the case and perhaps request it –

THE COURT: Oh, I'm sure it was, and I'm sure I said that it would be dismissed, okay?

MS. HOJJAT: I believe so, and so I wanted to order the transcripts for –

THE COURT: But you can't hold me to that if there's case law that says differently. I agree with you. I absolutely am sure I said it.

MS. HOJJAT: Okay.

THE COURT: So I don't think you need a transcript to prove that I said it.

MS. HOJJAT: Very well, Your Honor.

THE COURT: Because I'm pretty sure I said it.

MS. HOJJAT: Thank you, Your Honor.

THE COURT: Okay.

MS. HOJJAT: And would – I'm not sure that the State would agree, but as –

THE COURT: No. I said it.

MS. TRIPPIEDI: I wasn't at the trial, so I'm not going to –

MS. DIEFENBACH: But did the –

THE COURT: I said it.

MS. DIEFENBACH: Okay.

MS. HOJJAT: All right. Thank you, Your Honor.

THE COURT: Okay.

MS. DIEFENBACH: I didn't know if they had agreed that that was what was going to happen or not.

MS. HOJJAT: Oh, oh, that might be the issue, Your Honor. I believe the State might have agreed with Your Honor at that time.

THE COURT: Oh, they might have agreed to dismiss it –

MS. DIEFENBACH: Yes.

THE COURT: – if he was convicted of that.

MS. HOJJAT: I believe so.

THE COURT: Oh, okay. Do you remember what day it was?

MS. HOJJAT: I don't, Your Honor. I apologize.

THE COURT: Okay.

MS. HOJJAT: I'm assuming it was either Friday or Monday.

THE COURT: Whatever it is, just request the transcript from Kerry.

MS. HOJJAT: Thank you.

THE COURT: And she'll prepare it.

MS. DIEFENBACH: And we'll get a new date.

THE COURT: Or you can just request the disc and listen to it.

MS. HOJJAT: Okay. And would it be possible for me to – I'm just concerned about whether it will be ready by next Tuesday. I think if there's a disc I could just listen to it.

THE COURT: Okay, just listen to the disc.

MS. HOJJAT: Perfect.

THE COURT: Because that's really probably all you want –

MS. HOJJAT: Yes, Your Honor.

THE COURT: – is to know whether there was an agreement.

MS. HOJJAT: Yes, Your Honor.

THE COURT: Okay. Because I don't recall that.

MS. HOJJAT: I don't – yeah.

THE COURT: Okay.

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MS. HOJJAT: Thank you, Your Honor.

[Proceedings concluded at 10:04 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 Santi

KRISTINE SANTI
Court Recorder

IN THE SUPREME COURT OF THE STATE OF NEVADA

BENNETT GRIMES, Appellant, v. THE STATE OF NEVADA, Respondent.	Supreme Court Case No. 74419

APPELLANT'S APPENDIX

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