

No. 83864

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IN THE NEVADA SUPREME COURT

Electronically Filed  
Jul 13 2022 03:38 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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**Jermiah Dewight Thornburg,**

Appellant,

v.

**State of Nevada,**

Respondent.

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Direct Appeal from a Judgment of Conviction  
Eighth Judicial District Court  
The Honorable Jerry A. Wiese, District Court Judge  
District Court Case No. C-20-348507-1

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**Appellant's Reply Brief**

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## I. ARGUMENT

### **A. Thornburg did not waive the issues raised in this appeal.**

Although a waiver of the right to appeal can apply to issues that arise after the plea is signed, the denial of the right to appeal must not work a miscarriage of justice. *Burns v. State*, 137 Nev. Adv. Op. 50, 495 P.3d 1091, 1100 (2021). While this Court has not decided what constitutes a “miscarriage of justice” within the context of a waiver of a defendant’s appellate rights, the Ninth Circuit has held that an appeal waiver will not apply if: (1) the plea does not comport with the applicable court rules for guilty pleas; (2) the sentencing judge informs a defendant that they retain the right to appeal; (3) the sentence is not consistent with the terms of the plea agreement; or (4) the sentence is illegal. *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007). A sentence is illegal if it exceeds the statutory penalty for the charged offense or if it violates the Constitution. *Id.*

Thornburg submits that an order to pay several thousand dollars in light of the significant child support arrears he already carries constitutes a miscarriage of justice in that it violates the federal and state constitutional prohibitions against excessive fines and fees. *See* U.S.

Const. amend. VIII; Nev. Const. Art. 1 § 6. NRS 179.225(2) provides that a district court shall conduct an investigation of the financial status of the defendant to determine their ability to make restitution payments. This statutory provision renders the district court responsible for ascertaining what fines and fees, if any, are “excessive.” Failure to do so implicates defendants’ substantial rights, as happened in this case.

Because the fines and fees imposed in this case were excessive, they do not pass constitutional muster. The issues raised in this appeal are therefore not waived, and should be entertained on their merits.

**B. Thornburg is not able to pay the imposed extradition costs.**

The district court’s ruling defies the plain language of the governing statute. NRS 179.225(2) requires the court to make an investigation into the defendant’s financial status, while subsection 3 prohibits the court from ordering restitution—or in this case, extradition fees—when doing so would preclude payment of any existing obligations, including child support. The statute does not permit the judge to look at whether repayment is “fair” to the State, *see* 1 App. 40, nor does it provide that indicia of family support can be relied upon in making such an order as the State seems to imply, RAB 10–11.

The provisions of NRS 179.225 are plain, and the district court disregarding its obligations under the same. For that reason, Thornburg's sentence should be vacated and he should be re-sentenced without the imposition of extradition costs.

**C. The district court abused its discretion in ordering an indigent defense civil assessment of \$250.00.**

Failure to object and preserve an issue renders that issue subject to plain error review. NRS 178.602; *see also Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). In conducting plain error review, this Court looks to whether there was "error" that was "plain" or clear, and whether such error affected the defendant's substantial rights. *Green*, 119 Nev. at 545, 80 P.3d at 95.

Thornburg was found indigent and counsel was appointed for him, according to the United States Supreme Court's holding in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). One is hard-pressed to think of a right more fundamental, more substantial, than the right to counsel. *Cf. id.* at 343. The indigent defense civil assessment is nothing but a de facto tax upon those too poor to seek the assistance of retained counsel. To the extent that this Court has held differently, *see Taylor v. State*, 111 Nev.

1253, 1259, 903 P.2d 805, 809 (1995), Thornburg urges this Court to reconsider that position.

The district court erred in assessing attorney's fees to Thornburg as part of his sentence, implicating a substantial right—namely, the right to counsel. As a result, Thornburg's sentence should be reversed and this case remanded for re-sentencing.

## II. CONCLUSION

Thornburg respectfully submits that the district court abused its discretion when it ordered him to pay extradition costs and plainly erred in imposing an indigent defense civil assessment. For those reasons, Thornburg would ask this Court to vacate his sentence and remand this matter for re-sentencing.

DATED this 13th of July, 2022.

Respectfully submitted,

JoNell Thomas  
Clark County Special Public Defender

/s/ Julian Gregory

Julian Gregory  
Deputy Special Public Defender

## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook, 14 point font.

2. I further certify that this brief does comply with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it contains 736 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

...



sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 13th of July, 2022.

Respectfully submitted,

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/s/ Julian Gregory

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#### **CERTIFICATE OF SERVICE**

I hereby certify that on July 13, 2022, a copy of the Appellant's Reply Brief was served as follows:

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