ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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MICHAEL RIPPO,

Appellant,

-vs-

E.K. McDANIEL, et al.,

Respondent.

No. 44094

FILED

AUG 17 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY A. Alvarado
DEPUTY CLERK

MOTION FOR LEAVE TO FILE REPLY AND REPLY TO STATE'S OPPOSITION TO MOTION TO RECALL REMITTITUR

1. On the merits, the State's opposition does not dispute Mr. Rippo's position that his death sentence is invalid because a penalty phase jury instruction improperly informed the jury that they had to be unanimous to impose a life sentence, and that this Court's narrow four-three decision denying relief failed to apprehend this problem with the jury instruction thereby rendering it an unreasonable application of clearly established federal law. See, e.g., Davis v. Mitchell, 314 F.3d 682, 689 (6th Cir. 2003); Spisak v. Mitchell, 465 F.3d 684, 708-10 (6th Cir. 2006).

2. The State's opposition also does not dispute the factual allegations in Mr. Rippo's motion or his contention that Justice Nancy Becker should not have participated in the decision in his case while seeking employment with the Clark County District Attorney's Office - the litigation opponent in the present appeal. The State speculates that perhaps Justice Becker did not personally participate in any decision on the case on or after November 7, 2006, or specifically, at the exact same time that she began employment negotiations, see Opposition at 3, 5; however, neither the State nor Mr. Rippo has any way of knowing whether this is true or not without obtaining discovery. As explained in Mr. Rippo's motion, there is certainly a "reasonable inference of bias or impropriety", see Snyder

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v. Viani, 112 Nev. 568, 576, 916 P.2d 170, 175 (1996), from the facts as alleged in Mr. Rippo's motion that Justice Becker was seeking and/or negotiating employment with the Clark County District Attorney's Office at a time when she was participating in the decision on his appeal. The State also does not dispute that Mr. Rippo suffered actual prejudice given the fact that Justice Becker was the critical swing vote on the narrow four person majority that affirmed the denial of relief as to Mr. Rippo's death sentence. Mr. Rippo's motion to recall the remittitur should therefore be granted on the merits.[1]

3. Contrary to the State's assertion, see Opposition at 2-3, Mr. Rippo's motion is not a "nullity" just because it was filed by undersigned counsel from the Federal Public Defender's Office, who presently represents him. It is beyond rational dispute that an attorney is able to file pleadings on behalf of a client that he presently represents even in the absence of a formal substitution of attorneys.[2] The Federal Public Defender's Office is Mr. Rippo's

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[1] The State's assertion that the "special public defender's office unsuccessfully challenged Becker's bias in March of this year", see Opposition at 4, is misleading given that this Court did not reach the merits of the appellants' claims. Unlike those cases, in the present case the conflicted justice was the crucial swing vote on the narrow four-justice majority.

[2] See, e.g., Baker v. Boxx, 226 Cal. App.3d 1303, 1310, 277 Cal. Rptr. 409, 413 (1991) (court precedents do "not stand for the proposition that a new attorney's failure to file a substitution of attorneys will irrevocably disempower- -in respondents' term, render 'a nullity'- -the pleadings he files"); In re Goldstein, 43 F.3d 698, 699-700 (2d Cir. 1930) (service of process by attorney in fact not invalid when effected without formal substitution of attorney); Barry v. Ashley Anderson, P.C., 718 F. Supp. 1492, 1494 (D. Colo. 1989) ("where the old attorney's authority has been terminated and the new attorney's authority has been recognized by the parties involved, the necessity for formal substitution may be unnecessary."); Crocker National Bank v. O'Donnell, 115 Cal. App.3d 264, 268, 171 Cal. Rptr. 225, 228 (1981) (court order not invalid when counsel in fact had "not yet filed the many necessary substitution of attorneys"); Gilette v. Burbank Comm. Hosp., 56 Cal. App.3d 430, 434, 128 Cal. Rptr. 636, 638 (1976) (amended complaint properly filed "even though it bore a different title and named a different attorney as counsel for plaintiff"); Warner v. Warner, 38 Cal.App.3d 714, 720, 113 Cal.Rptr. 556, 560 (1974) (rejecting argument that defective substitution of attorney "deprived the trial court of jurisdiction"; recognizing that

present attorney in fact, not prior state counsel, Christopher Oram, and it is entirely proper for Mr. Rippo's present counsel to take all necessary steps to protect his rights in this capital habeas corpus matter, including the filing of the instant motion. The primary purpose served by a formal substitution of attorneys is to notify opposing counsel of the attorney who is authorized to represent the client, and the State's opposition demonstrates that it has actual knowledge that the Federal Public Defender's Office is presently representing Mr. Rippo given its acknowledgment that he is represented by undersigned counsel in federal court. See Opposition at 1. There was nothing unethical in filing of the present motion by undersigned counsel, and counsel has not repeatedly "demonstrated an ignorance or unwillingness to comply with procedures for substitution of counsel . . . ." Opposition at 2 n.1.[3] Equally untenable is the State's assertion that undersigned counsel is not qualified under Nev. Sup.

"it does not follow that the court was without power to act in the matter here in question"); Ross v. Ross, 120 Cal.App.2d 70, 74, 260 P.2d 652, 654 (1953) (rejecting argument that motion "was not properly before the court since notice thereof was not signed by the attorney of record"); Carrara v. Carrara, 121 Cal.App.2d 59, 262 P.2d 591 (1953) ("None of [court's precedents] holds that an irregularity in the substitution of attorneys deprives the court of jurisdiction."); Vitale v. City Const. Management, Co., 172 A.D.2d 326, 326-27 (N.Y. App. Div. 1991) (motion not improper when filed by attorney in fact who was not counsel of record); Gilbert v. Bennett, 665 N.Y.S.2d 837, 838 (N.Y. Sup. Ct. 1997) (nothing "would prevent the prior attorney or the attorney-in-fact who has not yet been formally substituted from arranging for the filing" of pleading); Deuville Corp. v. Garden Suburbs Golf and Country Club, 60 F. Supp. 72, 74 (S.D. Fla. 1943); State ex rel. Breuner v. Superior Court for Pierce County, 166 Wash. 502, 505, 7 P.2d 604 (1932) (defect in substitution of attorneys does not affect final decree of divorce); Golden Gate Hydraulic Mining Co. v. Superior Court of Yuba, 65 Cal. 187, 193, 3 P. 628, 632 (1884) (service of process on attorney not ineffective despite lack of formal substitution of attorneys).

[3] In the case cited by the State, Sherman v. State, Nev. Sup. Ct. No. 47012, Order of Reversal and Remand (filed January 9, 2007), this Court held that undersigned counsel did not need to file a formal substitution of attorneys before filing a successive state habeas petition, and that the district court erred in dismissing the petition on this ground. See Ex. 1, at 2. This Court did not state or imply that undersigned counsel had done anything unethical regarding the substitution of attorneys in its order reversing the district court.

Ct. R. 250(2)(d) to represent Mr. Rippo for the purposes of the instant motion, which is a fact of which the representative for the State is personally aware.[4] The State's argument that Mr. Rippo's motion is a nullity just because it was filed by present counsel is therefore meritless.

4. Mr. Rippo has been sufficiently diligent in raising the instant motion to receive consideration by this Court. The State's opposition concedes, as it must, that Mr. Rippo did not know and could not have known of former Justice Becker's negotiations with the Clark County District Attorney's Office at the time that the period for seeking rehearing expired. See Opposition at 3; e.g., Snyder v. Viani, 112 Nev. 568, 576, 916 P.2d 170, 175 (1996) (citing Ainsworth v. Combined Ins. Co., 105 Nev. 237, 774 P.2d 1003 (1989)). The facts giving rise to Mr. Rippo's motion therefore could not have been raised earlier, and the usual presumption that Justice Becker was impartial in his case was subsequently weakened by the presence of recent evidence from this Court's opinion in the Bickom case on June 29, 2007, that Ms. Becker did not understand that she was disqualified from representing the Clark County District Attorney on a case in which she participated on direct appeal as a justice. See Bickom v. State, No. 48564, Order Granting Motion in Part (filed June 29, 2007), Ex. 2 to Motion.[5] Mr. Rippo's instant motion was therefore filed within a reasonable time after

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[4] Undersigned counsel has acted as appellate counsel in two previous appeals in capital cases before this Court in which Mr. Owens was opposing counsel for the State, including the very case cited in footnote one of the State's opposition. See also Bejarano v. State, 122 Nev. __, 146 P.3d 265, 276 (2006), consolidated for oral argument with Rippo v. State, 122 Nev. __, 146 P.3d 279, 284 (2006). Undersigned counsel has represented capital clients exclusively in state and federal court for approximately five years as an attorney with the Capital Unit of the Federal Public Defender's Office. Counsel has also done direct appeals from felony convictions in the Ninth Circuit Court of Appeals.

Therefore, if necessary, this Court could appoint undersigned counsel nunc pro tunc for the purposes of litigating the instant motion.

[5] This Court's order in Bickom was unpublished and was only brought to counsel's attention by word of mouth.

learning of all of the facts contained in his motion. Technically, NRAP 26(b) does not apply to the instant motion as the State asserts, see Opp. at 3, because there is no prescribed time limitation for motions to recall the remittitur. However, the facts as set forth in Mr. Rippo's motion still demonstrate that he was reasonably diligent in raising the instant motion.

5. Contrary to the State's assertion, see Opposition at 5, Mr. Rippo's instant motion is not governed by NRAP 35 because he is not presently attempting to recuse or disqualify a justice of this Court. Instead, Mr. Rippo's contention is that his state and federal due process rights were violated when a former justice subject to a conflict of interest participated in a decision in which she was the crucial swing vote, which was prejudicial in Mr. Rippo's case because his death sentence would otherwise have been invalidated. As the State points out in its opposition, Mr. Rippo is not presently alleging that former Justice Becker engaged in any "fraud or illegal conduct." See NRAP 35, Opposition at 5, which is relevant to a motion for disqualification, but is separate and distinct from Mr. Rippo's argument that his state and federal due process rights were violated.[6] And even if NRAP 35 were directly applicable, the "interests of justice" dictate that Mr. Rippo should not be precluded by the rule because "there was no way [he] could have known of the interest or association of the judge prior to the decision." Snyder, 112 Nev. at 575, 916 P.2d at 174. Mr. Rippo therefore need not demonstrate fraud or illegal conduct by Justice Becker in order to prevail on his instant motion.

6. The State's argument that Mr. Rippo cannot raise the grounds for the instant motion at all after the Court's decision, see Opposition at 4-5, need not detain this Court long because Mr. Rippo's motion cited cases wherein this Court did recall its remittitur long after

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[6] Practically, this Court's required showing of fraud or illegal conduct with a motion under NRAP 35 is understandable given that the presence of the disqualified justice may have had no effect on the outcome of the appeal. But see PETA v. Bobby Berosini, Ltd., 111 Nev. 431, 438, 894 P.2d 337, 342-43 (1995) (reconsidering earlier opinion even when disqualified judge "could be considered mere surplusage").

the period for seeking rehearing expired. See Motion at 1. The State's opposition does not address or discuss those authorities, which should operate as a concession that its contrary argument is meritless.

7. Finally, the State's unsupported assertion that consideration of Mr. Rippo's motion would "reassert jurisdiction away from the federal courts", Opposition at 5, is contrary to the facts and the law. On the contrary, principles of comity and federalism are advanced by giving the state courts an opportunity to remedy this situation in the first instance, see Rose v. Lundy, 455 U.S. 509, 515-17 (1982), which can be done much more efficiently by reconsideration by the current Court, which now lacks the taint of any conflict of interest, than by a federal court. The State's argument that Mr. Rippo should wait for a stay of the federal proceedings (as if this Court would be more hospitable to the claim when raised in a successive state petition), is also flatly inconsistent with its assertion that the issue should be raised as soon as possible. Put simply, this Court's consideration of Mr. Rippo's motion has absolutely no effect on the jurisdiction of the federal court. The pendency of the federal proceedings therefore should militate in favor of this Court's consideration of Mr. Rippo's motion instead of against it as the State asserts.

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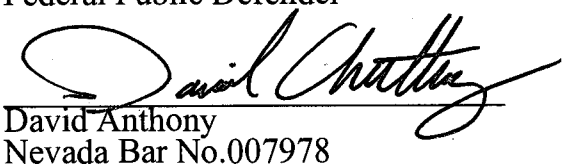
Therefore, Mr. Rippo respectfully requests that this Court recall its remittitur, reconsider its decision affirming the denial of post-conviction relief by the present Court which lacks any taint of conflict of interest, and reverse appellant's death sentence. In the alternative, appellant requests that this Court permit him the opportunity to conduct discovery and receive an evidentiary hearing to show that former Justice Becker was subject to a conflict of interest that disqualified her from participating in the decision in appellant's case, and that appellant's death sentence is therefore invalid.

Dated this 15th day of August, 2007.

Respectfully submitted,

FRANNY A. FORSMAN
Federal Public Defender



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Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of August, 2007, he deposited in the United States mail, postage prepaid, a true and correct copy of the foregoing MOTION FOR LEAVE TO FILE REPLY AND REPLY TO STATE'S OPPOSITION TO MOTION TO RECALL REMITTITUR addressed to counsel as follows:

Clark County District Attorney's Office
Steve Owens
200 South Third Street
Las Vegas, Nevada 89101

An Employee of the Federal Public Defender

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD WILLIAM SHERMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47012

FILED

JAN 09 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Appellant Donald William Sherman was convicted, pursuant to a jury verdict, of burglary, robbery, and first-degree murder and sentenced to death. This court affirmed the judgment of conviction and sentence on direct appeal.[1] This court also affirmed the district court's denial of Sherman's first post-conviction petition for a writ of habeas corpus.[2] Christopher Oram represented Sherman in that appeal and remained as counsel of record in that matter.

Sherman, represented by the Federal Public Defender, filed a second post-conviction petition for a writ of habeas corpus on December

[1]Sherman v. State, 114 Nev. 998, 965 P.2d 903 (1998).

[2]Sherman v. State, Docket No. 37191 (Order of Affirmance, July 9, 2002).

12, 2005. The district court denied the petition without prejudice, ruling that Mr. Oram was counsel of record and the Federal Public Defender needed to obtain a substitution of counsel and refile the petition. This appeal followed.

We conclude that the district court erred in denying the petition on these grounds. Mr. Oram's representation of Sherman was specific to the previous matter. The instant petition was a new and different matter, and Mr. Oram was not counsel of record for the petition. Further, had a substitution of counsel been necessary, it would have been a technical defect in the petition that did not deprive the district court of jurisdiction to hear the matter after a substitution had been filed. A district court should allow a petitioner to cure a technical defect rather than dismissing or denying the petition.[3]

The States also argues that we should consider this appeal moot because Sherman has been permitted to refile his petition. We are not persuaded by this argument given the possibility that dismissal of the instant petition could independently give rise to issues of procedural default.

Having reviewed Sherman's contentions and concluded he is entitled to relief, we

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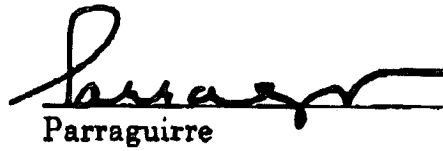
[3]Miles v. State, 120 Nev. 383, 91 P.3d 588 (2004) (holding that an inadequate verification of a petition for a writ of habeas corpus is an amendable rather than jurisdictional defect that the district court should allow the petitioner to cure).

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.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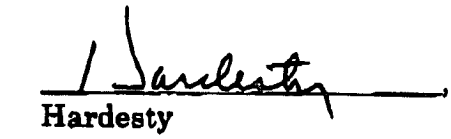
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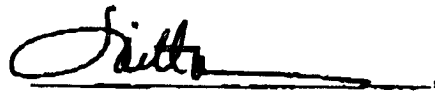
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cc: Hon. Valorie Vega, District Judge
Federal Public Defender/Las Vegas
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk