

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

AUG 10 2007

JANETTE M. KOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

MICHAEL RIPPO,
Appellant,

v.

Case No. 44094

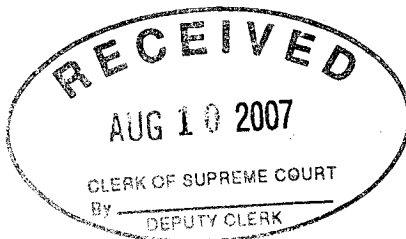
THE STATE OF NEVADA,
Respondent.

STATE'S OPPOSITION TO MOTION TO RECALL REMITTITUR

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17-17718

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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5 MICHAEL RIPPO,
6 Appellant,

7 v.

8 THE STATE OF NEVADA,
9 Respondent.

Case No. 44094

10 STATE'S RESPONSE TO MOTION TO RECALL REMITTITUR

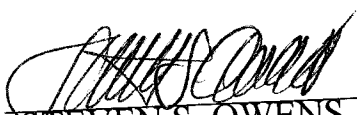
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12 COMES NOW the State of Nevada, by DAVID ROGER, Clark County District
13 Attorney, through his Chief Deputy, STEVEN S. OWENS, and submits this Response
14 to Motion to Recall Remittitur. This Response is based on the following declaration
15 of counsel and all papers and pleadings on file herein.

16 Dated 8th day of August, 2007.

17 Respectfully submitted,

18 DAVID ROGER
19 Clark County District Attorney
Nevada Bar # 002781

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21 BY


22 STEVEN S. OWENS
23 Chief Deputy District Attorney
24 Nevada Bar #004352

25 Attorney for Respondent
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8 This Court having divested itself of jurisdiction, the federal public defender was
9 appointed in federal court to represent Defendant in federal post-conviction
10 proceedings and a 100-page petition for writ of habeas corpus with exhibits was filed
11 in federal court on April 18, 2007, in case number 2:07-cv-00507-ECR-PAL. The
12 issues raised in that federal petition include a challenge to this Court's rulings on the
13 mitigation instruction and reweighing under McConnell. Three and a half months
14 after initiating federal habeas proceedings and nearly seven months after this Court
15 issued its remittitur, the federal public defender now moves this Court to recall
16 remittitur in this state appeal and again "reconsider" issues that are pending in federal
17 court.

26 _____
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28 ¹ This is not the first time federal public defender David Anthony has demonstrated an ignorance or unwillingness to
comply with procedures for substitution of counsel and thereby build error into a case. See Donald Sherman, S.Ct. No.
47012.

IN APPELLATE WPDOS\SECRETARY\MOTIONS\MISC\RIPPO, MICHAEL, STATE'S RESPONSE TO MOTION TO RECALL REMIT.DOC 2

1 that David Anthony so qualifies. Accordingly, the present motion is a nullity and
2 should be stricken.

3 In the event this Court is inclined to disregard procedural rules and consider the
4 motion on its merits, the State offers the following analysis. Ancillary to recall of
5 remittitur, Appellant appears to be requesting yet another rehearing of his appeal.
6 Pursuant to NRAP Rule 40, a petition for rehearing may be filed within eighteen (18)
7 days after the filing of the court's decision unless the time is shortened or enlarged by
8 order. NRAP Rule 40(a)(1). The instant motion to recall remittitur acknowledges
9 that the time for filing a petition for rehearing in this case has long since expired.
10 Rippo is seeking to recall a remittitur that issued seven months ago. Pursuant to
11 NRAP Rule 26(b), the Court may permit an act to be done after the expiration of time
12 prescribed by the rules only upon "good cause shown."

13 **The Motion is Untimely and Without Good Cause**

14 The "good cause" alleged by Rippo's counsel is that certain facts concerning
15 Justice Becker's subsequent employment by the district attorney's office were not
16 known previously and could not have been raised in the previous petition for
17 rehearing. Rippo's counsel points to John L. Smith's column in the Review Journal
18 on January 5, 2007, as the first indication that Justice Becker was considering
19 employment with the district attorney's office. Notably, the article was printed
20 approximately seven weeks after the filing of the Court's opinion in this case and does
21 not in any way suggest that employment discussions pre-dated Justice Becker's
22 decision in this case. Rippo fails to set forth a single fact in support of his bald
23 accusation that employment negotiations were ongoing during the pendency of this
24 appeal.

25 Although Rippo's counsel fails to allege when he became aware of the grounds
26 for recall of remittitur, he had constructive notice from the news article on January 5,
27 2007, and the official announcement made on January 16, 2007, both of which facts
28 are acknowledged in Appellant's motion. See Snyder v. Viani, 112 Nev. 568, 916

1 P.2d 170 (1996). Becker's employment with the district attorney's office was well-
2 known in the legal community at the time and attorneys in the special public
3 defender's office unsuccessfully challenged Becker's bias in March of this year.²
4 Rippo's counsel fails to establish or even allege "good cause" for the subsequent four-
5 month delay once the facts giving rise to the motion for recall of remittitur became
6 known.

7 Rippo's counsel references an amendment to the Commentary to Canon 3E(1)
8 approved by this Court on December 22, 2006, as if it somehow evidences Becker's
9 bias in anticipation of employment with the district attorney. Such an allegation
10 demonstrates the speciousness of the claims being made against Becker. The
11 amended language in the Commentary to Canon 3E(1) concerns only the situation
12 where a former law clerk of a judge subsequently appears before that same judge as a
13 litigant. It has no bearing or relevance to the facts of this case. This belies that the
14 true intent of Rippo's counsel in bringing the current motion is not to remedy the
15 failure of a biased judge to recuse themselves, but is rather to get a rehearing on a
16 closely divided issue in front of new justices now that the composition of the Court
17 has changed.

18 **The Issues Raised Are Not Cognizable in a Motion for Recall of Remittitur or**
19 **Petition for Rehearing**

20 Pursuant to NRAP Rule 40(c)(1), "no point may be raised for the first time on
21 rehearing." Disqualification of Justice Becker and the request for discovery and an
22 evidentiary hearing are new issues not previously raised in the pleadings on file
23 herein. The motion to recall remittitur does not allege that this Court overlooked or
24 misapprehended a material fact "in the record" or a material question of law "in the
25 case" or authority directly controlling a dispositive issue "in the case." NRAP Rule
26 40(c)(2). A challenge to Justice Becker's bias and impartiality is a collateral issue
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28 ² See Donte Johnson, S.Ct. No. 45456, and Marlo Thomas, S.Ct. No. 46509.

1 unrelated to the merits of this appeal. Accordingly, the issue is not properly raised for
2 the first time in a petition for rehearing. For that reason alone, the motion to recall
3 remittitur should be denied.

4 When a justice has participated in a case, NRAP Rule 35 requires that a motion
5 to disqualify must establish that it is timely filed and that the alleged disqualifying
6 interest amounts to "fraud or like illegal conduct." NRAP Rule 35. Rippo's counsel
7 fails to cite this rule or make any attempt to comply with its procedures even though it
8 directly pertains to the relief he is seeking. The mere timing of Nancy Becker's
9 employment by the district attorney two months following publication of the opinion
10 in this case on November 16, 2006, comes no where near the fraud or illegal conduct
11 needed for disqualification.

12 While the written opinion of the Court may have been filed on November 16,
13 2006, this does not mean that a vote was taken and the decision was rendered that day.
14 Briefing in the case occurred between May of 2005 and January of 2006, and the
15 Court heard oral argument on June 13, 2006. This was well before the November
16 election. Presumably, an informal decision on the case would have preceded the
17 assignment to Justice Hardesty to draft the written opinion.

18 Although the Court's opinion in this appeal was split 4-3, the spurious
19 allegation that Justice Becker's employment negotiations with the district attorney's
20 office pre-dated her signing of the opinion on November 16, 2006, and influenced her
21 vote is completely unfounded and is based on nothing more than the mere timing of
22 her employment with the district attorney two months later. Even if this Court could
23 engage in the kind of discovery and evidentiary hearing requested by Rippo's counsel,
24 his bare allegations are insufficient to warrant such relief. Especially at such a late
25 date, it is unwise to recall remittitur and reassert jurisdiction away from the federal
26 courts where this Court's ruling has been pending review for the last three and a half
27 months. The motion to recall remittitur serves no purpose other than to seek rehearing
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1 on a closely divided issue in front of new justices now that the composition of the
2 Court has changed.


3 WHEREFORE, the State respectfully requests that the Motion to Recall
4 Remittitur be denied.

5 Dated this 8th day of August, 2007.

6 Respectfully submitted,

7 DAVID ROGER
8 Clark County District Attorney
9 Nevada Bar # 002781

10 BY


11 STEVEN S. OWENS
12 Chief Deputy District Attorney
13 Nevada Bar #004352

14 Attorney for Respondent
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