

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45456

FILED

JUN 29 2007

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

ORDER DENYING MOTION

Appellant Donte Johnson has moved this court for an extension of time within which to file a petition for rehearing of an en banc opinion issued by this court on December 28, 2006.¹ The State has opposed the motion. For the reasons stated below, we deny Johnson's motion.

Johnson alleges that former Justice Nancy Becker was negotiating for employment with the Clark County District Attorney's Office while his appeal was pending before this court. He maintains that, under NRS 1.225, NCJC Canon 3E(1), and the Commentary

¹Johnson v. State, 122 Nev. ___, 148 P.3d 727 (2006). Because a petition for a writ of certiorari was filed and docketed in the United States Supreme Court, issuance of the remittitur has been stayed.

addressing that Canon, former Justice Becker should have either disclosed the negotiations or been disqualified from participating in his appeal.²

Assuming without deciding that Johnson has presented an arguable basis for questioning former Justice Becker's participation in the decision of Johnson's appeal, we conclude that the result would have remained the same regardless of her participation.

The mere presence of, and participation by, a member of a judicial body disqualified to act in a particular case does not necessarily invalidate the proceedings and judgment of that body. Particularly is this true if his presence is not necessary to constitute a quorum, or his vote does not determine the result.³

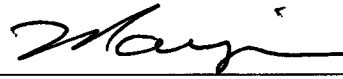
Here, although former Justice Becker was among only four justices to sign the majority opinion in Johnson, three justices signed a concurrence. All seven justices of this court were in agreement that Johnson's death sentence should be affirmed. Even if former Justice Becker had not participated in the decision of Johnson's appeal, the result would have remained the same.


²In support of his argument, Johnson references an amendment to the Commentary to Canon 3E(1) approved by this court on December 22, 2006. That amendment, however, concerned a judge's duty to disclose that an attorney appearing before the judge served as a former law clerk to the judge and has no bearing on the facts or law implicated in this matter.

³State v. Kositzky, 166 N.W. 534, 535 (N.D. 1918); cf. Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 827-28 (1986).

Accordingly, we deny Johnson's motion for an extension of time within which to file a petition for rehearing.⁴ The clerk of this court shall return unfiled the rehearing petition provisionally submitted to this court with his motion.⁵

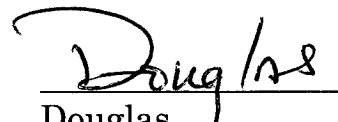
It is so ORDERED.⁶


Maupin, C.J.


Gibbons, J.


Hardesty, J.


Parraguirre, J.


Douglas, J.

⁴Johnson has also moved this court to prohibit the Clark County District Attorney's Office from having any further involvement with his case. We are not persuaded that this relief is warranted.

⁵Other than his allegation regarding former Justice Becker, Johnson has not asserted that this court overlooked or misapprehended any material fact or question of law or any authority in deciding his appeal that would warrant granting rehearing. See NRAP 40(c).

⁶The Honorable Michael Cherry, Justice, and the Honorable Nancy M. Saitta, Justice, did not participate in the decision of this matter.

cc: Hon. Lee A. Gates, District Judge
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk