

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Case No. 45456

FILED

APR 03 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

OPPOSITION TO MOTION TO ALLOW LATE
FILING OF PETITION FOR REHEARING

The present appeal was decided against Donte Johnson in a published opinion filed on December 28, 2006. Johnson v. State, 122 Nev. Adv. Op. 113 (Dec. 28, 2006). Pursuant to NRAP Rule 40, a petition for rehearing may be filed within eighteen (18) days after the filing of the court's decision unless the time is shortened or enlarged by order. NRAP Rule 40(a)(1). The instant motion to allow late filing acknowledges that the deadline for filing a petition for rehearing in this case was January 15, 2007. Johnson now seeks permission to file a petition for rehearing nearly three months, or 88 days, after the Court's decision was filed. Pursuant to NRAP Rule 26(b), the Court may permit an act to be done after the expiration of time prescribed by the rules only upon "good cause shown."

The Motion is Untimely and Without Good Cause

The "good cause" alleged by Johnson's counsel is that certain facts concerning Justice Becker's subsequent employment by the district attorney's office were not known previously and have only recently come to his attention. Johnson's counsel

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1 points to John L. Smith's column in the Review Journal on January 5, 2007, as the
2 first indication that Justice Becker was considering employment with the district
3 attorney's office. Notably, the article was printed a full week after the filing of the
4 Court's opinion in this case and does not in any way suggest that employment
5 discussions pre-dated Justice Becker's decision in this case.

6 Although Johnson's counsel claims to not have had actual notice of the Review
7 Journal article until sometime later, he was on constructive notice at that time
8 nonetheless. See Snyder v. Viani, 112 Nev. 568, 916 P.2d 170 (1996). At a
9 minimum, Johnson's counsel admits actual knowledge of Becker's employment with
10 the district attorney from an official announcement made on January 16, 2007.

11 Johnson fails to establish "good cause" for the subsequent two-month delay
12 once the facts giving rise to the petition for rehearing became known to him. Neither
13 the motion nor the petition itself purport to give any explanation at all as to why
14 counsel waited an additional 69 days to bring the issue to the Court's attention. A
15 motion for disqualification must be filed with the Court "as soon as possible" after
16 receiving either actual or constructive notice of the grounds for disqualification,
17 otherwise it is waived. Id. Even assuming the knowledge gained on January 16,
18 2007, constituted good cause for the late filing of a petition for rehearing at that time,
19 there is no showing of good cause to explain the subsequent two-month delay in
20 bringing the current motion.

21 22 **The Issues Raised Are Not Cognizable in a Petition for Rehearing**

23 Pursuant to NRAP Rule 40(c)(1), "no point may be raised for the first time on
24 rehearing." Disqualification of Justice Becker and the request for a "confidential
25 investigation" are new issues not previously raised in the pleadings on file herein.
26 The petition for rehearing does not allege that this Court overlooked or
27 misapprehended a material fact "in the record" or a material question of law "in the
28 case" or authority directly controlling a dispositive issue "in the case." NRAP Rule

1 40(c)(2). A challenge to Justice Becker's bias and impartiality is a collateral issue
2 unrelated to the merits of this appeal. Accordingly, the issue is not properly raised for
3 the first time in a petition for rehearing. For that reason alone, the motion to allow
4 late filing of the petition should be denied.

5 When a justice has participated in a case, NRAP Rule 35 requires that a motion
6 to disqualify must establish that it is timely filed and that the alleged disqualifying
7 interest amounts to "fraud or like illegal conduct." NRAP Rule 35. Johnson's
8 counsel fails to cite this rule or make any attempt to comply with its procedures even
9 though it directly pertains to the relief he is seeking. The mere timing of Nancy
10 Becker's employment by the district attorney following publication of the Court's last
11 opinions for the year on December 28th comes no where near the fraud or illegal
12 conduct needed for disqualification.


13 While the written opinion of the Court may have been filed on December 28,
14 2006, this does not mean that a vote was taken and the decision was rendered that day.
15 Briefing in the case occurred between January and May of 2006, and the Court heard
16 oral argument on June 14, 2006. This was well before the November election.
17 Presumably, an informal decision on the case would have preceded the assignment to
18 Justice Hardesty to draft the written opinion. All seven members of the Court,
19 including Justice Becker, *unanimously* affirmed Johnson's death sentence, belying
20 any suggestion that Justice Becker was impartial. The three justices who filed a short
21 concurring opinion agreed that Johnson's death sentence should be affirmed and
22 differed from the majority only on a narrow point of law that had no application to
23 Johnson's case.¹ The notion that any one justice's vote would have changed the
24 outcome of Johnson's case is inaccurate.

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26
27 ¹ Justices Rose, Maupin and Douglas concurred in the majority's conclusion that it was not error under the
28 Confrontation Clause and Crawford v. Washington to admit inmate disciplinary reports during the selection
phase of Donte Johnson's penalty hearing.

1 WHEREFORE, the State respectfully requests that the Motion to Allow Late
2 Filing of Petition for Rehearing be denied.

3 Dated March 30, 2007.

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5 By


6 STEVEN S. OWENS
7 Chief Deputy District Attorney
8 Nevada Bar #004352
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