

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLO THOMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46509

FILED

JUN 29 2007

ORDER DENYING MOTION

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [Signature]
DEPUTY CLERK

Appellant Marlo Thomas 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 his motion.

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

¹Thomas v. State, 122 Nev. ___, 148 P.3d 767 (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.

²In support of his argument, Thomas 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

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Assuming without deciding that Thomas has presented an arguable basis for questioning former Justice Becker's participation in the decision of Thomas' appeal, we conclude that the result on appeal 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 Thomas, three justices signed a concurrence. All seven justices of this court were in agreement that Thomas' death sentence should be affirmed. Even if former Justice Becker had not participated in the decision of Thomas' appeal, the result would have remained the same.

Accordingly, we deny the motion for permission to file a late petition for rehearing.⁴ The clerk of this court shall return unfiled the

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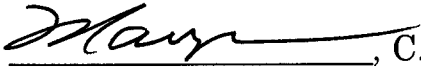
to the judge and has no bearing on the facts or law implicated in this matter.


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).

⁴Thomas has also moved 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.

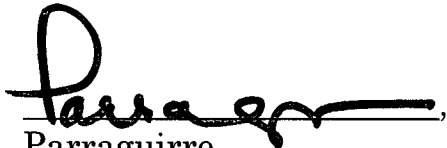
rehearing petition that Thomas submitted provisionally with his motion.⁵

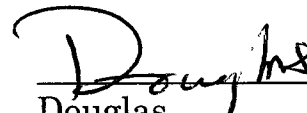
It is so ORDERED.⁶


Maupin, C.J.


Gibbons, J.


Hardesty, J.


Parraguirre, J.


Douglas, J.

cc: Hon. Sally L. Loehrer, 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

⁵Other than his allegation regarding former Justice Becker, Thomas has not asserted in his petition 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.