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MICHAEL DAMON RIPPO,

Case No. 53626

Appellant,

Electronically Filed
Oct 16 2009 04:56 p.m.
Tracie K. Lindeman

vs.

E.K. McDANIEL, Warden, Ely State
Prison, CATHERINE CORTEZ
MASTO, Attorney General for Nevada,

Respondent.

**MOTION TO PERMIT APPELLANT TO FILE A BRIEF EXCEEDING
EIGHTY (80) PAGES**

Appellant Michael Damon Rippo hereby moves this Court for permission to file an opening brief that is ninety-three (93) pages in length, which exceeds the eighty page limit provided for in NRAP 32(a)(7)(B), for capital cases. This motion is made and based upon the following declaration of counsel. NRAP 32(a)(7)(C).

DATED this 16th day of October, 2009.

Respectfully submitted,

FRANNY A. FORSMAN
Federal Public Defender

DAVID ANTHONY
Assistant Federal Public Defender
Nevada Bar No. 7978
411 East Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101
(702) 388-6577

Counsel for Appellant

DECLARATION

1. I am an attorney at law admitted to practice before this Court, employed as an Assistant Federal Public Defender in the Capital Habeas Unit of the Federal Public Defender's Office. I have been appointed to represent the appellant Michael Damon Rippo in the instant appeal.

2. NRAP 32(a)(7)(B) permits the filing of an opening brief in a capital case that is eighty (80) pages in length. Pursuant to NRAP 32(a)(7)(C), Mr. Rippo hereby moves this Court for permission to file an opening brief that is ninety-three (93) pages in length. Mr. Rippo requests permission to file a brief that exceeds the page limit by thirteen pages. Mr. Rippo respectfully submits that he can demonstrate sufficient good cause and diligence to file a brief that exceeds the page limit.

3. The petition filed by Mr. Rippo in the district court was 192 pages in length. The petition contains twenty-two constitutional claims, and several of the claims contain multiple sub-claims. The instant appeal is Mr. Rippo's only opportunity to vindicate his right to the effective assistance of post-conviction counsel under Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997), and he is also required to fairly present the merits of his constitutional claims. NRAP 40(a)(3). The opposition to motion to dismiss that Mr. Rippo filed in the district court was 104 pages in length (using twelve point font). In order to shorten the instant brief, Mr. Rippo has omitted several of the procedural and substantive issues that he raised below. The statement of the case and statement of facts in the instant brief are each two pages in length.

4. In his first contention on appeal, Mr. Rippo alleged that post-conviction counsel was ineffective in failing to conduct any investigation of facts outside of the record on direct appeal. The argument section of post-conviction counsel's appeal brief was approximately twenty pages in length, it contained inadequate citations to the record, and the appendix failed to include any exhibits to support the contentions that were made in the brief. The instant appeal is therefore Mr. Rippo's only opportunity to raise and litigate constitutional claims which require investigation outside of the record on direct appeal, and

1 is the only opportunity to vindicate his right to the effective assistance of post-conviction
2 counsel.

3 5. In his first claim, Mr. Rippo alleged that the trial judge who adjudicated his
4 case was biased against him. In order to sufficiently discuss the factual allegations of this
5 claim, Mr. Rippo has included the transcripts from the two federal criminal trials against the
6 trial judge as well as the state transcripts of the government informant who was used by the
7 FBI to offer bribes to the judge. In order to fairly present his claim, Mr. Rippo has set forth
8 in detail the factual representations of the state and trial judge that were made at trial as
9 compared against the facts that were later revealed in the federal criminal trials and the state
10 files of the government informant. The facts uncovered at the federal criminal trial relate
11 both to the judge's knowledge of the state's involvement in the federal investigation as well
12 as to the judge's relationship to the victim witness in the instant case. The argument section
13 for this claim is sixteen pages in length, and it includes sections addressing the procedural
14 defenses that were raised by the state and adopted by the district court. This section of the
15 brief is lengthy because it is based substantially upon complex facts that are outside of the
16 record created on direct appeal.

17 6. In his second claim, Mr. Rippo alleged that the state committed egregious
18 prosecutorial misconduct warranting a new trial. On March 7, 1994, a motion to disqualify
19 the prosecutor's office was held and the transcript of this hearing is 162 pages in length.
20 During trial, on February 7, 1996, an evidentiary hearing was held on the issue of
21 prosecutorial misconduct, and that transcript is 182 pages in length. There were also two
22 motions for a mistrial that were raised during trial based on prosecutorial misconduct. The
23 allegations of prosecutorial misconduct include misconduct in failing to disclose the state's
24 role in the investigation of the trial judge, the intimidation of a defense witness, the failure
25 to disclose material exculpatory and impeachment information, and misconduct in argument.
26 In order to receive a cumulative consideration of his claim of prosecutorial misconduct, Mr.
27 Rippo is required to discuss the misconduct contained in the trial record as well as newly
28 discovered information that is outside of the trial record. The factual and legal allegations

1 of this claim are twenty-one page in length.

2 7. The remaining twenty constitutional claims raised in Mr. Rippo's opening brief
3 are contained in forty-three pages of the argument section, which averages approximately
4 two and a half pages of the opening brief for each claim. Within this section, Mr. Rippo has
5 attempted to distill the factual allegations of a social history which is 117 pages in length as
6 well as a neuropsychological report that is thirteen pages long, and approximately nine
7 declarations from mitigation witnesses. Mr. Rippo has also alleged that his prior conviction
8 for sexual assault, which was used a statutory aggravating circumstance, is invalid, and he
9 has included all of the necessary transcripts relating to that conviction.

10 8. I have attempted to reduce the length of the instant brief as much as possible,
11 and do not believe that I can make the brief shorter without jeopardizing Mr. Rippo's right
12 to receive an adequate review of the claims that infect his convictions and death sentences.
13 See 28 U.S.C. § 2254(b) (1, 3). I have attempted to comply with the Court's decisions
14 requiring counsel both to shorten arguments presented, and to provide "cogent" supporting
15 authority for each constitutional claim. Compare Hernandez v. State, 117 Nev. 463, 466-467,
16 24 P.3d 767 (2001), with Browning v. State, 120 Nev. 347, 91 P.3d 39, 50, 53 (2004), State
17 v. Haberstroh, 119 Nev. 173, 69 P.3d 676, 684 (2003).

18 9. I therefore request that this Court allow Mr. Rippo to file the accompanying
19 opening brief which exceeds the page limit by thirteen pages. This request is made in order
20 to provide Mr. Rippo with competent representation, NRPC 1.1, and not solely for the
21 purpose of delay or for any other improper purpose

22 I declare under penalty of perjury that the foregoing is true and correct and
23 that this declaration was executed on October 16, 2009, in Las Vegas, Nevada.

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25 David Anthony

26 Attorney for Appellant
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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that pursuant to NRCP 5(b)(2)(D) this document was filed electronically with the Nevada Supreme Court on the 16th day of October, 2009. Electronic Service of the foregoing MOTION TO PERMIT APPELLANT TO FILE A BRIEF EXCEEDINGEIGHTY (80) PAGES shall be made in accordance with the Master Service List as follows:

Steven Owens, Deputy District Attorney

Katrina Manzi,
An Employee of the Federal Public Defender