

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL HOWARD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 57469

**FILED**

**OCT 30 2012**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *R. Malone*  
DEPUTY CLERK

ORDER REGARDING MOTION TO SUBSTITUTE COUNSEL

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus filed by a petitioner sentenced to death. Appellant's counsel, the Federal Public Defender for the District of Nevada (Nevada FPD), has filed a motion to substitute counsel, the Federal Defender Services of Idaho. The motion argues that the former Nevada Federal Public Defender and a supervising attorney in the Nevada FPD's Office have disqualifying personal conflicts of interest that should be imputed to the entire office and warrant the substitution of counsel. The motion was submitted ex parte and was not accompanied by an acknowledgment or proof of service. When the motion was filed, it was entered into E-Flex and electronically served on respondent, who filed an opposition to the motion. Appellant then filed a motion to strike the opposition,<sup>1</sup> which respondent has opposed.

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<sup>1</sup>Appellant's motion, filed on September 28, 2012, also asks the court to strike a motion filed by respondent on September 25, 2012, and to enter an order regarding respondent's conduct with respect to documents that appellant submitted to this court under seal. Those aspects of appellant's motion will be addressed separately.

We first address the issues regarding the motion to strike respondent's opposition to the ex parte motion to substitute counsel. Although this court may act on a motion for a procedural order without awaiting a response, NRAP 27(b), nothing in this court's rules specifically addresses when ex parte relief may be sought. Cf., e.g., NRS 7.135 (allowing ex parte application for reimbursement for expenses incurred in representing indigent defendant); NRS 34.700(3) (allowing ex parte application to extend time to file pretrial petition for writ of habeas corpus). See generally NCJC R. 2.9(A)(1), (5) (addressing a judge's consideration of ex parte communications, which is generally disfavored except when authorized by law). Regardless, this court's rules generally contemplate that motions shall be served on the opposing party, see NRAP 25(b); NRAP 27(a)(1), and Rule 25(d)(3) provides that this court "will not take any action on any . . . papers [filed without acknowledgement or proof of service], including requests for ex parte relief, until an acknowledgment or proof of service is filed." As a result, this court's rules indicate that even an ex parte motion must be served. The electronic service through E-Flex after the motion was filed cured this defect. That leaves the question whether the State acted improperly in opposing the request for ex parte relief. Given the uncertainty in this court's rules and the requirement that even requests for ex part relief must be served, we are not convinced that the State acted improperly in filing an opposition. We therefore deny the motion to strike as to the opposition filed on September 24, 2012.

We now turn to the motion to substitute counsel. Generally, substitutions of counsel are routine upon filing of the substitution with the required signatures or affidavit, but the court "may disapprove a substitution that does not have the necessary signatures or affidavit."

NRAP 46(d)(2). Thus, the detailed information in the motion about purported conflicts of interest and imputation of those conflicts was not necessary.<sup>2</sup>

We are inclined to approve the substitution, but we cannot do so at this time for two reasons. First, the substitution does not comply with NRAP 46(d)(2). It was not signed by all of the affected attorneys and the client, which is required to ensure that the attorney being substituted into the case and the client have agreed to the substitution; nor does the substitution include the affidavit in lieu of the client's signature as provided in the rule. See NRAP 46(d)(2). Second, it appears that the attorneys with the Federal Defender Services of Idaho who have been substituted in the federal proceedings are not licensed to practice law in this State; therefore they cannot be substituted as counsel for appellant until an active member of the Nevada bar who will be associated with those attorneys appears as counsel of record for appellant and files a motion to associate counsel that complies with SCR 42.<sup>3</sup> See NRAP

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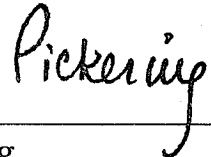
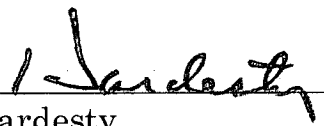
<sup>2</sup>Because we do not address the merits of the alleged conflict or imputation of that conflict, we decline the State's request to remand for an evidentiary hearing on the motion. We note, however, our initial impression that the purported conflict would not require disqualification in this matter given that briefing is complete, the case has been submitted for decision on the briefs, and this court generally will not consider issues that were not presented in the petition filed in the district court; thus, it is not apparent that the representation of appellant in this appeal would be materially limited by the purported conflict. See RPC 1.7(a).

<sup>3</sup>We note that current counsel has supplemented the substitution motion with copies of the documents required by SCR 42(3)(a)-(b) and indicated that Nevada attorney Paola Armeni will be local counsel and will file a motion to associate two attorneys employed by the Federal

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46(a)(1), (3) (requiring that persons who practice law before this court must be an active member of Nevada bar or granted permission to appear under SCR 42); SCR 42(3)(d) ("Before a motion to associate counsel is granted, the active member of the State Bar of Nevada who will be associated with the applicant must appear as attorney of record in the particular cause and consent in writing to the association"). We therefore defer ruling on the substitution. The Nevada FPD shall have 30 days from the date of this order to file a substitution of counsel that complies with NRAP 46(d)(2), and attorney Paola Armeni shall have 30 days from the date of this order to comply with SCR 42 and file a motion to associate the attorneys from the Federal Defender Services of Idaho.

It is so ORDERED.

  
Saitta \_\_\_\_\_, J.  
  
Pickering \_\_\_\_\_, J.  
  
Hardesty \_\_\_\_\_, J.

cc: Federal Public Defender/Las Vegas  
Federal Defender Services of Idaho  
Paola Armeni  
Attorney General/Carson City  
Clark County District Attorney  
Samuel Howard

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Defender Services of Idaho once this court grants the substitution motion. Current counsel must submit a substitution of counsel that complies with NRAP 46(d)(2) and to substitute foreign counsel, the substitution of counsel must be accompanied by a motion to associate that complies with SCR 42.