IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,	)	
	)	
Appellant,	)	
vs.	)	**Case No: 77002**
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent,	)	
	)	

BRIEF OF AMICUS CURIAE NEVADA ATTORNEYS FOR CRIMINAL JUSTICE, IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in Nevada Rule of Appellate Procedure 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Darin Imlay; Clark County Public Defender
2. Jonathan Kirshbaum, Nevada Attorneys for Criminal Justice
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IDENTITY OF AMICUS CURIAE & STATEMENT OF INTEREST

Nevada Attorneys for Criminal Justice (NACJ) is a state-wide, non-profit organization of criminal defense attorneys in Nevada. Our mission is to ensure accused persons receive effective, zealous representation through shared resources, legislative lobbying, and intra-organizational support. This includes the filing of Amicus Curiae Briefs pertaining to (1) state and federal constitutional issues; (2) other legal matters with broad applicability to accused persons; and (3) controversies with potential to impact our members' ability to advocate effectively for accused persons.

NACJ offers the collective experience of its members to assist this Court in deciding important issues presented by Petitioner Chappell's case, and NACJ urges this Court to grant Petitioner's petition for rehearing. In this brief NACJ asks this Court to reconsider the new rule established in this case concerning when a petitioner should raise guilt-phase Crump claims. NACJ proposes a middle-ground approach, not advanced by either party, which is more consistent with the statutory scheme and avoids several intractable problems this Court's new rule creates.

This Amicus Brief is filed in accordance with Nevada Rules of Appellate Procedure 29 and 32. NACJ's authority to file derives from our Motion of Nevada Attorneys for Criminal Justice (NACJ) to File Brief of Amici Curiae in Support of Petitioner Chappell filed concurrently with this brief.

ARGUMENT

I. Introduction

In its published opinion, this Court established the new rule that, when a petitioner gets penalty phase relief on their first postconviction petition, they are required to raise their ineffective assistance of postconviction counsel claims (otherwise known as Crump claims) in a postconviction petition within one-year of the remittitur on the first post-conviction appeal while the new penalty phase proceedings are pending, even if those Crump claims challenge the performance of the attorney who is currently representing the petitioner in the new penalty phase proceedings. Slip Op. at 9-10.

This Court should reconsider this rule. This rule is inconsistent with the statutory scheme, will unfairly trap unwary pro se litigants, creates significant conflict of interest issues, and places a tremendous burden on the system. There is a far better rule that will avoid *all* of these serious concerns. The rule should be: **in the situation where a petitioner has obtained penalty phase relief on the first postconviction petition, a petitioner must raise the guilt-phase Crump claims in the first postconviction petition filed after the new judgment has become final.** Not only is this rule easier to administer, but it is consistent with Chapter 34 and the ethical rules. Under this rule, a petition need not be filed until the judgment of conviction and sentence are final and penalty phase counsel's representation has

ended. It will avoid piecemeal litigation and will not trap unwary pro se litigants, who would have no way of knowing from looking at the statutory scheme by itself that postconviction claims should be raised before they have even been sentenced.

Because there is no indication this Court considered this more reasonable rule, amicus curiae respectfully request the Court to grant the petition for rehearing and reconsider the opinion. See NRAP 40(a)(2).

II. The most reasonable interpretation of Chapter 34 is that a postconviction petition should not be filed until both the conviction and sentence have become final

The fundamental problem with this Court's decision is that it is inconsistent with NRS Chapter 34. The plain language of NRS 34.724(1) grants leave to file a postconviction petition for writ of habeas corpus only to those "convicted of a crime *and* under a sentence of death or imprisonment." (Emphasis added). NRS 34.820(4) states that the "court shall inform the petitioner and petitioner's counsel that all claims which challenge the conviction or imposition of sentence *must be joined in a single petition* and that any matter not included in the petition will not be considered in a subsequent proceeding." (Emphasis added). And NRS 34.735 requires the petitioner to designate their sentence in the questions provided in the standard form. The only fair reading of these statutes is that a petitioner must wait until both their convictions and sentence have become final before they may file a petition challenging *either* their conviction or sentence.

In a case where the petitioner has received a new penalty hearing, the first possible opportunity to file a petition challenging both the conviction *and* sentence would be the first postconviction petition following imposition of sentence at the new penalty hearing. This would mean that first postconviction counsel appointed after the affirmance of the penalty judgment on direct appeal would be initial postconviction counsel as to the penalty phase issues and Crump counsel as to the guilt phase issues. See Crump v. Warden, 113 Nev. 293, 304-05, 934 P.2d 247, 253-54 (1997). This is the most reasonable approach and is fully consistent with the plain language of NRS Chapter 34.

Critically, this interpretation is also consistent with the definition of finality under federal law. Controlling federal law holds that a federal habeas petition cannot be filed until both the judgment of conviction *and* sentence are final. Burton v. Stewart, 549 U.S. 147, 156-57 (2007). The new judgment after a penalty retrial will be the relevant judgment challenged in a federal petition. The federal litigation cannot be undertaken until that judgment becomes final, meaning after direct review is complete after the retrial. Therefore, this Court's interpretation of Chapter 34 does little to further the interests of finality. If anything, this Court's decision threatens to prolong finality since, as discussed in more detail below, this additional round of postconviction litigation will likely introduce reversible error into the retrial

proceedings due to the conflict of interest created when a postconviction petition is filed against the same attorney currently representing the petitioner. See Slip op. at 9-10.

Second, the Court's unforeseeable interpretation is not apparent from the plain language of the statute, creating a trap for unwary pro se litigants. Because petitioners do not have the right to counsel on their guilt-phase Crump claims, these petitions will almost invariably have to be filed pro se. It simply would not be obvious to pro se petitioners from the language of the statute that they are required to file a postconviction petition before they have been sentenced. Further, in the situation where postconviction counsel has remained counsel on the penalty phase retrial, it would be hard for pro se petitioners to understand they need to challenge the performance of the same attorney who is currently representing him at the penalty phase retrial. It is unfair to interpret Chapter 34 in a way that is not readily understandable to a pro se petitioner.

Requiring a petitioner to file and litigate, pro se, a successive petition raising the guilt-phase Crump claims while simultaneously facing penalty retrial in a capital case runs contrary to the statute and creates an unreasonable burden on litigants and counsel. The more reasonable interpretation of the statute, which also reflects a more appropriate balance between the interests in finality and avoiding piecemeal

litigation, is to require claims of ineffective assistance of first postconviction counsel as to guilt phase issues to be raised in the first postconviction petition filed after the penalty retrial judgment becomes final.

III. Requiring a petitioner to file a postconviction petition raising ineffectiveness claims against his attorney while that attorney is representing him during the penalty phase retrial creates a conflict of interest that requires the attorney to withdraw from the case.

In its opinion, this Court established a rule that a petitioner is required to file a *pro se* postconviction petition raising Crump guilt phase claims while the penalty phase retrial is pending, even though those claims may allege ineffectiveness against the attorney who is representing him in those pending proceedings. Slip Op. at 9. This Court suggests it is acceptable for a postconviction attorney to continue his representation despite a concurrent petition challenging his prior performance in the same case. But this creates a clear conflict of interest that jeopardizes the entire penalty phase retrial and requires the attorney to immediately withdraw. To avoid this conflict, the rule must be that the guilt phase Crump claims should be raised in the first postconviction petition filed *after* the attorney no longer represents the client.

"Every defendant has a constitutional right to the assistance of counsel unhindered by conflicting interests." Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (citing Holloway v. Arkansas, 435 U.S. 475 (1978). "A conflict

of interest arises when counsel's 'loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests.'" Jefferson v. State, 133 Nev. 874, 876, 410 P.3d 1000, 1002 (Nev. App. 2017) (quoting People v. Horton, 11 Cal.4th 1068, 47 Cal.Rptr.2d 516, 906 P.2d 478, 501 (1995)).

An attorney's loyalty is threatened by his own interests when a client files a postconviction habeas petition accusing that attorney of ineffective assistance of counsel. See, e.g., Roberts v. State, 141 So.3d 1139 (Ala. Crim. App. 2013) (where defendant filed a postconviction-relief claim against attorney, that attorney could not serve as postconviction counsel for defendant); People v. Harlan, 54 P.3d 871 (Colo. 2002) (discussing cases "in which specific allegations of ineffective assistance of counsel, usually asserted in post-conviction pleadings, have created an actual conflict of interest"); Com. v. Delker, 306 Pa. Super. 361, 363 (1982) (holding that a "petitioner alleging ineffective assistance of counsel may not be represented by an attorney from the same office as the allegedly ineffective attorney").

As the Ninth Circuit has recognized, an "inherent conflict of interest" arises when counsel is forced to prove his own ineffectiveness in representing a defendant at trial. See United States v. Del Muro, 87 F.3d 1078, 1080 (9th Cir. 1996) (Defendant's Sixth Amendment rights were presumptively violated by a conflict of

interest when trial court forced counsel to prove his own ineffectiveness in connection with a motion for new trial); accord United States v. Morris, 259 F.3d 894 (9th Cir. 2001) (actual conflict of interest when attorney argued his own ineffectiveness in connection with motion to withdraw guilty plea). When a petitioner files a postconviction petition against the attorney representing him during the penalty phase retrial, that attorney is placed in an untenable position–he would either have had to acknowledge his own ineffectiveness or take a position adverse to his own client. In either case the conflict is clear.

For the reasons set forth above, an attorney should not be forced to prove his own incompetence at the time of the penalty phase retrial because this would create a conflict. See Del Muro, 87 F.3d at 1080; Morris, 59 F.3d at 900. Yet, an even greater conflict would arise if the attorney sought to *defend* his prior actions during the penalty phase retrial. When a petitioner files a postconviction habeas petition against the attorney representing him during the penalty phase retrial, the filing arguably waives the attorney-client privilege throughout their relationship, enabling the prosecution to inquire into all aspects of the defense during the penalty phase retrial. NRS 34.735 provides that if a petition for postconviction habeas relief "contains a claim of ineffective assistance of counsel, that claim will operate to

waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective."

Furthermore, the State Bar of Nevada's Standing Committee on Ethics and Professional Responsibility has determined that when a lawyer faces allegations of ineffective assistance of counsel from a client, that lawyer "may disclose confidential information relating to the representation of the client to the extent the lawyer reasonably believes necessary to defend against the allegations." State Bar of Nevada Standing Committee on Ethics and Professional Responsibility, Formal Op. No. 55, December 10, 2019, p.1. By holding that a petitioner is required to waive the attorney-client privilege under circumstances where an attorney has a motivation to defend her actions and protect her own reputation, this Court's Opinion places petitioners and their attorneys in an untenable situation.

A case from Colorado is directly on point. In People v. Delgadillo, 275 P.3d 772 (2012), the Colorado Court of Appeals addressed the conflict situation that necessarily arises when a prosecutor questions a defense attorney about his representation of an existing client. The court held that an actual conflict of interest was created by

> the swearing-in of defense counsel to testify about communications he had with defendant pertaining to the ongoing representation; the possibility that the prosecution could have obtained from counsel material to impeach defendant; defense counsel's disclosures of

> attorney-client privileged information and defense strategy; and the specter of an ineffective assistance claim.

275 P.2d at 778. This Court's rule in this case opens the door to the exact kind of conflict of interest that required reversal in Delgadillo. See also Nika v. State, 120 Nev. 600, 606-07, 97 P.3d 1140, 1144-45 (2004).

To avoid a conflict of interest, a petitioner should be permitted to wait to file a postconviction petition challenging an attorney's performance until that attorney's representation ends. Filing a postconviction petition against an attorney during the penalty phase retrial creates an irreconcilable conflict that requires counsel's withdrawal from the case. This is true as both a matter of law and under the ethical rules. The attorney herself has the ethical obligation to diligently watch for any potential conflicts of interest and should take the appropriate steps to avoid them should they arise.

Because postconviction counsel should seek to withdraw due to these ethical and legal concerns, this Court's Opinion will place a heavy burden on the court system. The pool of attorneys who are qualified to represent petitioners in capital postconviction cases in this State is limited. A qualified attorney who obtained penalty phase relief on postconviction is in the best position to represent the petitioner at the penalty phase retrial. That attorney has spent years becoming familiar with the case. The system should want that attorney to remain on the case

as it will facilitate a more expeditious resolution. But if that counsel is conflicted—either as a matter of law or ethics—and cannot continue, it will be difficult to find an available attorney to take on a long-pending capital case from the small pool of qualified attorneys. Moreover, even if a new qualified attorney is available, it will take a significant amount of time—potentially years—for the new attorney to become sufficiently prepared for the penalty phase retrial.

The rule announced by this Court will also force petitioners to choose between challenging their attorney's performance in litigating their guilt phase claims or maintaining a meaningful relationship with that attorney in connection with the penalty retrial. No petitioner, capital or otherwise, should be placed in such an impossible position. Further, the stress of a capital penalty hearing alone is enough to interfere with a petitioner's ability to competently and concurrently litigate a habeas petition, with all of its legal intricacies and procedural pitfalls.

There is a simple way to avoid these intractable problems—require the petitioner to raise the Crump guilt phase claims in the postconviction petition filed after the new judgment after the retrial becomes final.

IV. This Court should adopt the rule that, after penalty phase relief in the first postconviction proceeding, the guilt-phase Crump claims should be raised in the first postconviction petition filed after the judgment from the penalty phase retrial becomes final

The proposed rule from amicus curiae is reasonable and solves all of the potential problems the current rule will create. It is the most reasonable reading of the statute—the Crump claims will be raised in a postconviction petition after the petitioner has been resentenced and the retrial judgment has become final. It is a far more equitable approach as it avoids piecemeal litigation and won't trap unwary pro se litigants who, without any legal training, will not read Chapter 34 as requiring them to file a postconviction petition before being sentenced or a judgment being entered. The claims will be raised in a petition *after* counsel's representation on the retrial has ended, thereby avoiding any potential conflict of interest issues. Further, removing the potential for a conflict of interest will alleviate any burdens on the system and facilitate a more expeditious penalty phase retrial and postconviction litigation.

Because there is no indication this Court considered this more reasonable path, this Court should grant the petition for rehearing to reconsider this rule. See NRAP 40(a)(2).

CONCLUSION

The petition for rehearing should be granted.

Dated this 22nd day of February, 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that the amicus curiae brief complies with the formatting requirements of NRAP 21(d), NRAP 32(a)(4) and NRAP 32(c)(2), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

The Amicus Curiae brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that the Amicus Curiae Brief is proportionately spaced, has a typeface of 14 points or more and contains 2,744 words which is within the limitations set forth in NRAP 29(e) and NRAP 32(a)(7).

DATED this 22nd day of February, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 22nd day of February, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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