

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

3 Electronically Filed
4 Jul 06 2022 05:24 p.m.
Elizabeth A. Brown
5 Clerk of Supreme Court

6 BRETT ALAN LINDER,

CASE NO.: 83162

7 Appellant,

8 vs.

9 THE STATE OF NEVADA,

10 Respondent,

11 ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT IN AND
12 FOR THE COUNTY OF NYE, THE HONORABLE ROBERT LANE,
13 PRESIDING
14

15 PETITION FOR REVIEW

16 Appellant, BRETT ALAN LINDER, by and through his attorney of record,
17 DAVID H. NEELY III, ESQ., hereby petitions this Honorable Court to Review
18 the COURT OF APPEALS ORDER DENYING REHEARING from an appeal
19 of an order of the district court that denies a Post-Conviction Petition for Writ of
20 Habeas Corpus.
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23 //

1 This Motion is made and based upon SCR 40B, the following Points and
2 Authorities, all papers, pleadings and documents on file herein, as well as any oral
3 arguments that may be entertained at the hearing of this Motion.
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5 **POINTS AND AUTHORITIES**

6 NRAP 40B(a) allows review of a decision of the Court of Appeals on petition
7 for review. NRAP 40B(a) states:

8 (a) Decisions of Court of Appeals Reviewable by Petition for Review. A
9 decision of the Court of Appeals is a final decision that is not reviewable by the
10 Supreme Court except on petition for review. A party aggrieved by a decision of the
11 Court of Appeals may file a petition for review with the clerk of the Supreme Court.
12 The petition must state the question(s) presented for review and the reason(s) review
13 is warranted. Supreme Court review is not a matter of right but of judicial discretion.
14 The following, while neither controlling nor fully measuring the Supreme Court's
15 discretion, are factors that will be considered in the exercise of that discretion:
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17 (1) Whether the question presented is one of first impression of general
18 statewide significance;
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20 (2) Whether the decision of the Court of Appeals conflicts with a prior
21 decision of the Court of Appeals, the Supreme Court, or the United States Supreme
22 Court;
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1 (3) Whether the case involves fundamental issues of statewide public
2 importance. Here, the Court has misapprehended one (1) matter in the record.

3 The Court has misapprehended a material fact when it concluded that the
4 sentencing judge had not exhibited bias and should not have recused himself prior
5 to sentencing.
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7 The Court states, "First, Linder claims the sentencing judge exhibited bias
8 and should have recused himself prior to sentencing, "[A] judge is presumed to be
9 impartial." Ybarra v. State, 127 Nev.47, 51, 247 P.3d 269, 272 (2011). "[R]emarks
10 of a judge made in the context of a court proceeding are not considered indicative
11 of improper bias or prejudice unless they show the judge has closed his or her mind
12 to the presentation of all the evidence." Cameron v. State, 114 Nev. 1281, 1283,
13 968 P.2d 1169, 1171 (1998).
14

15 Linder argues the judge exhibited bias by referring to Linder as a
16 "psychopath." The judge determined that, given Linder's past crimes and inability
17 to stay out of trouble after completing regimental discipline and probationary
18 terms. Linder was unable to be reformed and was thus a psychopath. Specifically,
19 the judge found Linder's past crimes were either violent in nature, involved the use
20 of a firearm, or involved the stealing of a firearm. These conclusions were based
21 on the facts and arguments made to the district court during sentencing hearing,
22 and they did not demonstrate the judge closed his mind to the presentation of all
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1 evidence. Therefore, we conclude Linder has failed to demonstrate the judge was
2 biased against him and that recusal was warranted.

3 In Caperton v. A.T. Massey Coal Company, 129 S. Ct. 2252, 173 L. Ed. 2d
4 1208 (2009), the United States Supreme Court held, “In all circumstances of this
5 case, due process requires recusal.
6

7 (a) The Due Process Clause incorporated the common law rule requiring
8 recusal when a judge has a “direct, personal, substantial, pecuniary interest” in a
9 case. Turner v. Ohio, 273 U.S. 510, 523, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law
10 Abs. 185, 25 Ohio L. Rep. 236, but this Court has also identified additional
11 circumstances which, as an objective matter, require recusal where the “probability
12 of actual bias on the part of the judge or decision maker is too high to be
13 constitutionally tolerable.” Withrow v. Larkin, 412 U.S. 35, 47, 95 S. Ct. 1456, 42
14 L. Ed. 712.
15

16 At Sentencing, the Trial Court stated to the Appellant, “There’s a small
17 segment of society of the population that are what we call psychopaths or
18 sociopaths, criminals that repeatedly keep doing crimes and hurting other people.
19 Most of those would never dream of hurting other people - sexually assaulting a
20 woman, molesting a child, hitting somebody in the face, et cetera - we would never
21 dream of doing that, most of the normal people. There’s a small segment of our
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1 society that for some reason doesn't think normal and they don't mind doing what
2 they need to do to hurt other people, and so forth."

3 "Starting in 2014, you had Conspiracy to Commit Burglary, Burglary, Drug
4 charges, another Burglary, another Burglary, more Drug charges, FTA's, other
5 crimes - Speeding, Paraphernalia, and so forth - Domestic Battery with an
6 Enhancement for a Deadly Weapon Against an Older Person, Harassment, Simple
7 Battery, Battery on an Older Person, Domestic Battery, Grand Larceny of a Gun,
8 Attempted Murder, Possession of a Gun by Prohibited Person, Discharging a Gun,
9 Burglary while in Possession of a Gun, Deadly Gun, Owning/Possession of Gun,
10 Stalking/Harassment, Child Abuse, Conspiracy, Battery, Grand Larceny, Burglary,
11 Unlawful Use, Battery two Counts, et cetera."

12 "Now, obviously what that tells any normal person is you're a psychopath.
13 You don't mind going out and hurting other people - older people, younger people,
14 whatever - you're going to do whatever you think you want to do to make yourself
15 happy."

16 "We've tried Drug Court with you. We've tried Boot Camp with you.
17 Nothing works. As soon as I let you out, you're going to go out and hurt other
18 people again, because there's something in your brain that doesn't click right that
19 says, "Hey, that's not normal. I shouldn't do that." "You're a dangerous person."
20 Forty-eight to 120 on each count, consecutive to each other, with credit for time
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1 served calculated by Mr. Fritz of 286. We'll recalculate that. And we'll keep you
2 away from people as long as we can to try and keep them protected from you,"

3 The Trial Court exhibited bias against Appellant at the Sentencing, when he
4 described him as a psychopath who doesn't mind going out and hurting other
5 people, older people, younger people, whatever. In addition, he told him he has
6 something in his brain that doesn't click right that say's , "Hey that's not normal. I
7 shouldn't do that. You're a dangerous person." This bias led the Trial Court to
8 sentence the Appellant to 48 to 120 months on each count, consecutive to each
9 other, with 286 days credit for time served, instead of following the
10 recommendations of Trial Counsel. The Trial Court had a duty to recuse himself
11 from the Appellant's prior to Sentencing. This was an instance which, as an
12 objective matter, required recusal where the probability of actual bias on the part of
13 the Judge or decision maker is too high to be constitutionally tolerable pursuant to
14 Withrow v. Larkin, 412 U.S. 35, 47, 95 S. Ct. 1456, 42 L. Ed. 2d 712.

17 CONCLUSION

18 In conclusion, the Court has misapprehended one material fact in the instant
19 matter. The material facts that the Court misapprehended was when it concluded
20 that the Sentencing Judge had not exhibited bias and should not have recused
21 himself prior to Sentencing.
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1 Review is warranted because this was a miscarriage of justice which is a
2 fundamental issue of state wide importance when the Court of Appeals
3 misapprehends one (1) material fact that resulted in the Appellant having lost his
4 liberty as a result.
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7 **CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 40 and 40A**

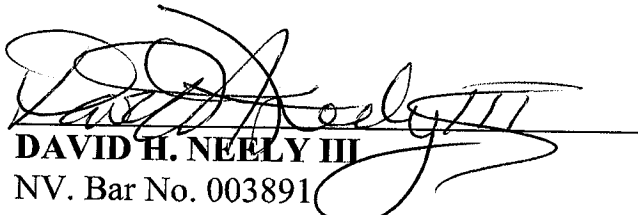
8 1. I hereby certify that this petition for review complies with the formatting
9 requirements of Rule 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the
10 type style requirements of NRAP 32(a)(6) because:
11

12 [a] It has been prepared in a proportionally spaced typeface using Microsoft Word
13 in Times Roman 14.

14 2. I further certify that this brief complies with the page limitations of Rule
15 40B(d) because it:

16 [X] Does not exceed 10 pages.

17 DATED this 6th day of July, 2022.
18

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agent or employee of
DAVID H. NEELY, III, ESQ.