

1 IN THE COURT OF APPEALS THE STATE OF NEVADA

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4 Electronically Filed
Apr 25 2022 02:43 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

5 CRYSTAL YVONNE AUSTIN,

CASE NO.: 83345-COA

6 Appellant,

7 vs.

8 THE STATE OF NEVADA,

9 Respondent,

10
11 **ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT IN AND**
12 **FOR THE COUNTY OF NYE, THE HONORABLE ROBERT LANE,**
13 **PRESIDING**

14 **PETITION FOR REHEARING**

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16 Appellant, **CRYSTAL YVONNE AUSTIN**, by and through her attorney of
17 record, **DAVID H. NEELY III, ESQ.**, hereby petitions this Honorable Court to
18 reconsider its Order of Affirmance from an Order of the District Court denying a
19 Post-Conviction Petition for a Writ of Habeas Corpus. This Motion is made and
20 based upon SCR 40, the following Points and Authorities, all papers, pleadings and
21 documents on file herein, as well as any oral arguments that may be entertained at
22 the hearing of this Motion.
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1 **POINTS AND AUTHORITIES**

2 NRAP 40(a) allows rehearings where this Court has misapprehended a
3 material fact in a case. NRAP 40(a) states:

4 a. Procedure and Limitations.

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6 (1) Time. Unless the time is shortened or enlarged by order, a petition for
7 rehearing may be filed within 18 days after the filing of the court's decision under
8 Rule 36. The 3 day period set forth in Rule 26© does not apply to the time limits
9 set by this Rule.

10 (2) Contents. The petition shall state briefly and with particularity the points
11 of law or fact that the Petitioner believes the court has overlooked or
12 misapprehended and shall contain such argument in support of the petition as the
13 petitioner desires to present. Oral argument in support of the petition will not be
14 permitted. Any claim that the court has overlooked or misapprehended a material
15 fact shall be supported by a reference to the page of the transcript, appendix or
16 record where the matter is to be found; any claim that the court has overlooked,
17 misapprehended a material question of law or has overlooked, misapplied or failed
18 to consider controlling authority shall be supported by a reference to the page of
19 the brief where petitioner has raised the issue.
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1 Here, the Court has misapprehended one (1) matter in the record.

2 The Court has misapprehended a material fact when it concluded that Trial
3 Counsel was not ineffective for failing to impeach victim impact testimony during
4 the sentencing hearing which Appellant contends was ineffective assistance of
5 counsel.
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7 The Court states, "Third, Austin claimed that her trial counsel was
8 ineffective for failing to impeach victim impact testimony during the sentencing
9 hearing. Austin asserted that the victim's testimony concerning the facts of the
10 offense was not accurate. During the sentencing hearing, counsel cross-examined
11 the victim concerning her version of the events. Counsel also noted during the
12 sentencing hearing that many of the victim/s statements concerning the incident
13 were not supported by the factual evidence, and counsel urged the sentencing court
14 to disregard those statements when it imposed Austin's sentence. In light of
15 counsel's cross-examination of the victim and request for the sentencing court to
16 disregard the victim's unsupported statements, Austin did not demonstrate that her
17 counsel's performance fell below an objective standard of reasonableness. Austin
18 also failed to demonstrate a reasonable probability of a different outcome at
19 sentencing had counsel performed different actions concerning the victim's impact
20 testimony. Therefore, we conclude that the district court did not err by denying this
21 claim without conducting an evidentiary hearing.
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1 In Petitioner's own words, "I signed a 2 to 5 deal. However, I was double
2 sentenced due to Mc Cox's lies. If you read through the testimony she (Ms. Cox)
3 said I was out 4 years. I should be sentenced 4 years. This was all done before Mr.
4 Martinez and the DA could Ms. Cox on her over dramatization of things that did
5 not exist." (Appx. 0290-0291)
6

7 "Ms. Cox was allowed Oct. 28, 2019, to read a "story" of her unfactual
8 accounts. To which Judge Lane allowed to be submitted to PNP. Ms. Cox was
9 trying to get restitution and blame me for the death of her mother all the while not
10 involved in the wreck."
11

12 "Ms. Cox lied under oath. I was maliciously prosecuted by Ms. Cox. Ms.
13 Cox submitted receipts for 4 new tires. Her mother's medical proved no injuries,
14 her service dog- no proof no receipts nor were they listed as being involved. Ms.
15 Cox's mother wrote a statement submitted 1 year later which claimed I had open
16 container on the floorboard. A complete lie. Malicious prosecution. That's what
17 Nye County charged me with when making a police statement to the best of my
18 knowledge." (Appx. 0291)
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20 "Ms. Cox stalled my case for 4 years trying to pin the blame of her mother's
21 death, which was I'm sure natural causes 2 years after June 1, 2016."
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1 DA Vitto told Ms. Cox she was stretching the truth. But the "story" was
2 already incorporated in my report. PNP Pahrump started it, Clark County finished
3 my report." (Appx. 0291)

4 "Ms. Cox is a fraud and a liar. Ms. Cox submitted receipts for 4 new tires?
5 She claims trees, her car was a sports car type (4 door KIA Optima) is no sports
6 car. Not involved in a wreck. Merely a Golddigger." (Appx. 0291)

7 "With Ms. Cox perjuring herself, malicious prosecuting me, stalking my
8 residence all last year, manipulation of the truth, the letter of lies, her trying to
9 blame a natural COD of her mother on me. Trying to snow over the Judge
10 controlling the courtroom telling the Judge what my sentence should be.
11 Meanwhile, Mr. Martinez let her do whatever with no objection. Told me all
12 victims have a right to speak. I said she is no victim. Mr. Martinez told me to shut
13 up." (Appx. 0291)

14 "The DA is the only one who basically called Ms. Cox a liar. But damage
15 was done." Trial Counsel had a duty to defend his client at the Sentencing by
16 objecting to testimony that included falsehoods from Ms. Cox, the victim witness.
17 Thus, he was not functioning as the 'counsel' guaranteed the defendant by the
18 Sixth Amendment," Strickland, 466 U.S. at 87, 104 S. Ct. at 2064. (0292)

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1 Counsel's performance fell below an objective standard of reasonableness
2 and his errors were so severe that it caused Appellant to plead Guilty in the instant
3 case in violation of Strickland since there was a reasonable probability that she
4 would have chosen to go to trial if she knew she would be sentenced without her
5 Trial Counsel defending her by objecting to falsehoods uttered by the victim
6 witness.
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8 In conclusion, the Court has misapprehended one material fact in the instant
9 matter. The material fact that the Court misapprehended was when it concluded
10 that Trial Counsel was not ineffective for failing to impeach victim impact
11 testimony during the sentencing hearing which Appellant contends was ineffective
12 assistance of counsel.
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14 **CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 40 and 40A**

15 1. I hereby certify that this petition for rehearing/reconsideration or answer
16 complies with the formatting requirements of NRAP 32(a)(4), the typeface
17 requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6)
18 because:
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1 [X] It has been prepared in a proportionally spaced typeface using Microsoft
2 Word 2016 in Times New Roman 14.

3 2. I further certify that this brief complies with the page- or type-volume
4 limitations of NRAP 40 or 40A because it
5

6 [X] Does not exceed 10 pages.

7 **DATED** this 25 day of April, 2022.

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10 
11 **DAVID H. NEELY III**

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14 Las Vegas, Nevada 89121

15 Attorney for Appellant
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