

1 IN THE COURT OF APPEALS THE STATE OF NEVADA

2 Electronically Filed
3 May 05 2022 09:18 p.m.
4 Elizabeth A. Brown
Clerk of Supreme Court

5 BRETT ALAN LINDER,

CASE NO.: 83163-COA

6 Appellant,

7 vs.

8 THE STATE OF NEVADA,

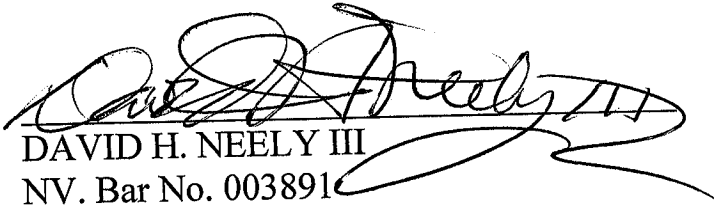
9 Respondent,

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**

15 Appellant, **BRETT ALAN LINDER**, by and through his attorney of record, **DAVID H.**
16 **NEELY III, Esq.**, hereby petitions this Honorable Court to reconsider its Order of Affirmance
17 from an appeal from his judgment convictions. This Motion is made and based upon SCR 40, the
18 following Points and Authorities, all papers, pleadings and documents on file herein, as well as
19 any oral arguments that may be entertained at the hearing of this Motion.
20

1 DATED this 5th day of May, 2022.

2
3 
4 DAVID H. NEELY III
5 NV. Bar No. 003891
6 3520 E. Tropicana Ave., Suite D-1
7 Las Vegas, Nevada 89121
8 Attorney for Appellant//

7 **POINTS AND AUTHORITIES**

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

10 a. Procedure and Limitations.

11 (1) Time. Unless the time is shortened or enlarged by order, a petition for
12 rehearing may be filed within 18 days after the filing of the court's decision under
13 Rule 36. The 3 day period set forth in Rule 26© does not apply to the time limits
14 set by this Rule.
15

16 (2) Contents. The petition shall state briefly and with particularity the points
17 of law or fact that the Petitioner believes the court has overlooked or
18 misapprehended and shall contain such argument in support of the petition as the
19 petitioner desires to present. Oral argument in support of the petition will not be
20 permitted. Any claim that the court has overlooked or misapprehended a material
21

1 fact shall be supported by a reference to the page of the transcript, appendix or
2 record where the matter is to be found; any claim that the court has overlooked,
3 misapprehended a material question of law or has overlooked, misapplied or failed
4 to consider controlling authority shall be supported by a reference to the page of
5 the brief where petitioner has raised the issue.
6

7 Here, the Court has misapprehended one (1) matter in the record.

8 The Court has misapprehended a material fact when it concluded that the
9 sentencing judge had not exhibited bias and should not have recused himself prior
10 to sentencing.

11 The Court states, "First, Linder claims the sentencing judge exhibited bias
12 and should have recused himself prior to sentencing, "[A] judge is presumed to be
13 impartial." Ybarra v. State. 127 Nev.47, 51, 247 P.3d 269, 272 (2011). "[R]emarks
14 of a judge made in the context of a court proceeding are not considered indicative
15 of improper bias or prejudice unless they show the judge has closed his or her mind
16 to the presentation of all the evidence." Cameron v. State, 114 Nev. 1281, 1283,
17 968 P.2d 1169, 1171 (1998).
18

19 Linder argues the judge exhibited bias by referring to Linder as a
20 "psychopath." The judge determined that, given Linder's past crimes and inability
21

1 to stay out of trouble after completing regimental discipline and probationary
2 terms. Linder was unable to be reformed and was thus a psychopath. Specifically,
3 the judge found Linder's past crimes were either violent in nature, involved the use
4 of a firearm, or involved the stealing of a firearm. These conclusions were based
5 on the facts and arguments made to the district court during sentencing hearing,
6 and they did not demonstrate the judge closed his mind to the presentation of all
7 evidence. Therefore, we conclude Linder has failed to demonstrate the judge was
8 biased against him and that recusal was warranted.

10 In Caperton v. A.T. Massey Coal Company, 129 S. Ct. 2252, 173 L. Ed. 2d
11 1208 (2009), the United States Supreme Court held, "In all circumstances of this
12 case, due process requires recusal.

14 (a) The Due Process Clause incorporated the common law rule requiring
15 recusal when a judge has a "direct, personal, substantial, pecuniary interest" in a
16 case. Turner v. Ohio, 273 U.S. 510, 523, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law
17 Abs. 185, 25 Ohio L. Rep. 236, but this Court has also identified additional
18 circumstances which, as an objective matter, require recusal where the "probability
19 of actual bias on the part of the judge or decision maker is too high to be
20

1 constitutionally tolerable.” Withrow v. Larkin, 412 U.S. 35, 47, 95 S. Ct. 1456, 42
2 L. Ed. 712.

3 At Sentencing, the Trial Court stated to the Appellant, “There’s a small
4 segment of society of the population that are what we call psychopaths or
5 sociopaths, criminals that repeatedly keep doing crimes and hurting other people.
6 Most of those would never dream of hurting other people - sexually assaulting a
7 woman, molesting a child, hitting somebody in the face, et cetera - we would never
8 dream of doing that, most of the normal people. There’s a small segment of our
9 society that for some reason doesn’t think normal and they don’t mind doing what
10 they need to do to hurt other people, and so forth.”
11

12 “Starting in 2014, you had Conspiracy to Commit Burglary, Burglary, Drug
13 charges, another Burglary, another Burglary, more Drug charges, FTA’s, other
14 crimes - Speeding, Paraphernalia, and so forth - Domestic Battery with an
15 Enhancement for a Deadly Weapon Against an Older Person, Harassment, Simple
16 Battery, Battery on an Older Person, Domestic Battery, Grand Larceny of a Gun,
17 Attempted Murder, Possession of a Gun by Prohibited Person, Discharging a Gun,
18 Burglary while in Possession of a Gun, Deadly Gun, Owning/Possession of Gun,
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1 Stalking/Harassment, Child Abuse, Conspiracy, Battery, Grand Larceny, Burglary,
2 Unlawful Use, Battery two Counts, et cetera.”

3 “Now, obviously what that tells any normal person is you’re a psychopath.
4 You don’t mind going out and hurting other people - older people, younger people,
5 whatever - you’re going to do whatever you think you want to do to make yourself
6 happy.”

7
8 “We’ve tried Drug Court with you. We’ve tried Boot Camp with you.
9 Nothing works. As soon as I let you out, you’re going to go out and hurt other
10 people again, because there’s something in your brain that doesn’t click right that
11 says, “Hey, that’s not normal. I shouldn’t do that.” “You’re a dangerous person.”
12 Forty-eight to 120 on each count, consecutive to each other, with credit for time
13 served calculated by Mr. Fritz of 286. We’ll recalculate that. And we’ll keep you
14 away from people as long as we can to try and keep them protected from you,”

15
16 The Trial Court exhibited bias against Appellant at the Sentencing, when he
17 described him as a psychopath who doesn’t mind going out and hurting other
18 people, older people, younger people, whatever. In addition, he told him he has
19 something in his brain that doesn’t click right that say’s , “Hey that’s not normal. I
20 shouldn’t do that. You’re a dangerous person.” This bias led the Trial Court to
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1 sentence the Appellant to 48 to 120 months on each count, consecutive to each
2 other, with 286 days credit for time served, instead of following the
3 recommendations of Trial Counsel. The Trial Court had a duty to recuse himself
4 from the Appellant's prior to Sentencing. This was an instance which, as an
5 objective matter, required recusal where the probability of actual bias on the part of
6 the Judge or decision maker is too high to be constitutionally tolerable pursuant to
7 Withrow v. Larkin, 412 U.S. 35, 47, 95 S. Ct. 1456, 42 L. Ed. 2d 712.

8 CONCLUSION

9
10 In conclusion, the Court has misapprehended one material fact in the instant
11 matter. The material facts that the Court misapprehended was when it concluded
12 that the Sentencing Judge had not exhibited bias and should not have recused
13 himself prior to Sentencing.

14 **CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 40 and 40A**

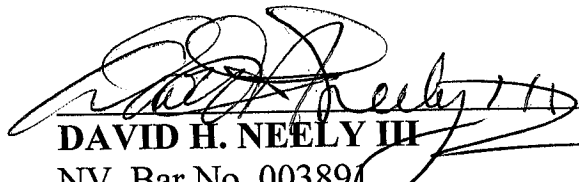
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16 1. I hereby certify that this petition for rehearing/reconsideration or answer
17 complies with the formatting requirements of NRAP 32(a)(4), the typeface
18 requirements of NRAP 32(a)(5) and the type of style requirements of NRAP
19 32(a)(6) because:
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21
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23
24

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 [X] Does not exceed 10 pages.

6
7 DATED this 5th day of May, 2022.

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15 Attorney for Appellant
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1 **CERTIFICATE OF SERVICE BY MAIL**

2 **I HEREBY CERTIFY** that I am an agent or employee of the above
3 attorney, and that on the 5th day of May, 2022, I served the above and foregoing
4 **PETITION FOR REHEARING** by depositing a copy in the United States
5 mails, postage prepaid, addressed to the following persons or parties at their last
6 known addresses as indicated below:
7

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14 Attorneys for Respondents



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17 **DAVID H. NEELY, III, ESQ.**
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