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9
10 IN THE SUPREME COURT OF THE STATE OF NEVADA

11 ASHLEY WILLIAM BENNETT,)

12 Appellant,)

13 vs.)

CASE NO. 39864

FILED

14 THE STATE OF NEVADA,)

15 Respondent.)

OCT 30 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

16 MOTION TO HOLD BRIEFING SCHEDULE IN ABEYANCE,
17 OR, ALTERNATIVELY, MOTION FOR EXTENSION OF
18 TIME TO FILE OPENING BRIEF AND APPENDIX

19 COMES NOW the appellant Ashley William Bennett, by and
20 through his counsel, Martin R. Boyers, Esq., of the law firm
21 Markoff & Boyers, and moves this court for an Order holding the
22 briefing schedule in this appeal in abeyance pending the
23 disposition of the appellant's motion for a new trial. The
24 appellant's motion for a new trial has an anticipated filing date
25 of October 29, 2002. If this court grants this motion to hold
26 the briefing schedule in abeyance, counsel recommends that this
court require monthly status reports to be filed and served
pending resolution of the appellant's motion for a new trial.

OCT 30 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

Alternatively, appellant moves for an extension of time of 120 days from October 31, 2002 until February 28, 2003 in which to file the Appellant's Opening Brief and either a joint appendix or an appellant's appendix in this appeal.

This motion is made and based upon Nevada Rules of Appellate Procedure 2, 26(b), 27(b), and 31(a)(1), the Affidavit of Martin R. Boyers, Esq. filed herewith, Points and Authorities attached hereto, and the records, documents and pleadings on file in this appeal.

DATED this 29th day of October, 2002.

Martin R. Boyers
Martin R. Boyers Esq.
Nevada Bar No. 002288
302 E. Carson Ave., Suite 610
Las Vegas, Nevada 89101
Co-Counsel for Appellant
Ashley William Bennett

POINTS AND AUTHORITIES¹

I. HOLDING THE BRIEFING SCHEDULE IN ABEYANCE PENDING
DISPOSITION OF MOTION FOR NEW TRIAL

Concurrently with the filing of the motions herein, counsel (Martin R. Boyers, Esq.) filed his Notice of Entry of Appearance as Co-counsel of Record. (See the Affidavit of Counsel annexed hereto.)

The following reasons are the basis for requesting that this court hold the briefing schedule in abeyance:

1. If the appellant's anticipated motion for a new trial is successful, this appeal will be moot and subject to dismissal. The motion for a new trial will be based on the documented perjury or recantation of a key witness (co-defendant Anthony Gantt) against appellant Bennett. Stanley A. Walton, Esq., who is appellant Bennett's current district court counsel of record, will be filing Bennett's motion for a new trial.

2. David Schieck, Esq., represented appellant Bennett's codefendant, Lailoni D. Morrison, at a severed district court trial. Mr. Schieck indicated that Bennett's motion for new trial will be credible or viable (not Schieck's actual words). The trial of Mr. Schieck's client trailed appellant Bennett's trial. Schieck ordered and utilized the transcripts from Bennett's trial to prepare his cross-examination of the same prosecution witnesses who testified against Bennett. Schieck,

¹ The factual representations discussed in the Points And Authorities are addressed in the Affidavit of Martin R. Boyers, Esq., infra.

1 therefore, is in a position to make the representations that he
2 made regarding the likely viability of Bennett's motion for a new
3 trial.

4 3. If appellant Bennett's motion for a new trial is
5 unsuccessful, a transcript of the proceedings below will have to
6 be ordered. This transcript along with related pleadings and
7 documents will likely have to be incorporated into the record of
8 appellant Bennett's pending appeal.

9 4. Counsel (Martin R. Boyers, Esq.) will need a
10 substantial amount of time to collect, review, and assimilate the
11 voluminous record in the case below. Appellant Bennett's trial
12 lasted eleven days. There are currently 34 pages of minutes and
13 277 entries in the docket sheets.

14 5. Additionally, counsel may have to additionally
15 review the transcript of codefendant Lailoni D. Morrison's trial
16 in order to competently represent appellant Bennett on appeal.
17 Schieck stated that there was an arguable insufficiency of the
18 evidence issue regarding appellant Bennett. Co-counsel Stanley
19 A. Walton, Esq. has documented the recantation or perjury of
20 codefendant Gantt who was a key state's witness. Gantt testified
21 in both the Bennett and Morrison trials. Therefore, record
22 segments from codefendant Morrison's trial may also have to be
23 incorporated into appellant Bennett's appeal.

24 Pursuant to NRAP 2, this court for "good cause shown"
25 may suspend the requirements or provisions of the Nevada Rules of
26 Appellate Procedure. This court can issue orders regarding

1 appellate proceedings consistent with the "good cause shown" or
2 reasons for a party's application under NRAP 2.

3 In Hosey Daniels vs. State, 100 Nev. 579, 581 (n. 2)
4 (citing NRAP 2), 688 P.2d 315 (1984) (ambiguous request seeking
5 remand for a post-conviction evidentiary hearing as part of the
6 direct appeal process rejected), the appellant's counsel became
7 involved in the appeal after the opening brief was filed.
8 Appellant's counsel moved to argue issues raised for the first
9 time in his reply brief. The appellant's counsel also moved to
10 supplement the record on appeal with documents attached to his
11 reply brief. Both motions were granted. In turn, the State was
12 granted leave to file a supplemental answering brief addressing
13 the new issues raised in the appellant's reply brief.

14 The Hosey Daniels decision, supra, also noted that in a
15 "few prior cases" direct appeals have been held in abeyance
16 pending the disposition of post-conviction proceedings. 100 Nev.
17 at 581. This court noted that, in those prior cases, the post-
18 conviction issues raised regarding ineffective assistance of
19 counsel claims had prima facie merit. Id. Accordingly, this
20 court may want to review appellant Bennett's motion for a new
21 trial as soon as it becomes available for transmittal. (See the
22 Affidavit of Counsel.)

23 This court also allowed an irregular briefing schedule
24 in order to accommodate an appellant's replacement counsel
25
26

1 ("supplemental and/or reply brief") in Mathews v. State, 91 Nev.
2 682, 684 (citing NRAP 2), 541 P.2d 906 (1975).²

3 Appellant Bennett respectfully requests that this court
4 hold the briefing schedule in his appeal in abeyance pending the
5 disposition of his motion for a new trial. There is "good cause
6 shown" under NRAP 2 and the decisional law to honor appellant
7 Bennett's request.

8 Appellant Bennett further requests or advises this
9 court to require the filing of periodic status reports by
10 appellant Bennett. Periodic status reports will enable this
11 court to track the proceedings before the district court and to
12 monitor the orderly disposition of Bennett's appeal.³

13 II. EXTENSION OF TIME PURSUANT TO NRAP 31(a)(1),
14 26(b), AND 27(b)

15 NRAP 31(a)(1) provides that applications for extensions
16 of time beyond that to which the parties are permitted to
17 stipulate ". . . will be considered only on motion for good cause
18 clearly shown . . ." Also see NRAP 26(b). As required by NRAP
19 31(a)(1), this first extension of time is being sought by the
20 appellant pursuant to motion rather than by stipulation since

21 ² Appellant Bennett's new co-counsel also was allowed to
22 file a supplemental opening brief after the conclusion of the
23 briefing schedule in Roberts v. State, 110 Nev. 1121, 881 P.2d 1
24 (1994). As with Bennett, counsel entered his appearance late in
25 the Roberts appeal. This court will have to check its file (case
26 no. 23217) to verify this point because it was not discussed in
the published Roberts decision itself.

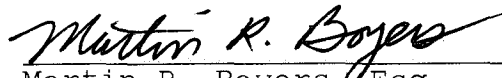
³ Appellant Bennett's new co-counsel has followed a similar
procedure in direct appeals before the United States Court of
Appeals for the Ninth Circuit.

1 NRAP 31(a)(1) only authorizes stipulations for thirty (30)
2 additional days beyond an original briefing deadline.

3 Under NRAP 27(b), motions for the enlargement of time
4 filed pursuant to NRAP 26(b) ". . . may be acted upon at any
5 time, without awaiting a response thereto."

6 The Affidavit of Martin R. Boyers, Esq., filed herewith
7 and section I of these Points And Authorities, supra, establish
8 the "good cause clearly shown" as required by NRAP 31(a)(1) for
9 an extension of time.

10 DATED this 29th day of October, 2002.

11
12 
13 Martin R. Boyers, Esq.
14 Nevada Bar No. 002288
15 302 E. Carson Ave., Suite 610
16 Las Vegas, Nevada 89101
17 Co-Counsel for Appellant
18 Ashley William Bennett
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1 AFFIDAVIT OF MARTIN R. BOYERS, ESO.

2 STATE OF NEVADA)
3) :ss
4 COUNTY OF CLARK)

5 Martin R. Boyers, being first duly sworn, deposes and
6 says:

7 1. That your affiant is duly licensed to practice law
8 in the State of Nevada and before this court. Affiant has
9 noticed his entry of appearance as co-counsel of record
10 concurrently with the filing of the motions herein.

11 2. That the appellant, Ashley William Bennett, and his
12 mother, Ms. Diane Richmond, have indicated that they want affiant
13 to replace Stanley A. Walton, Esq., as counsel on appeal.
14 Affiant has had direct personal communications with appellant
15 Bennett and his mother regarding this matter. That your affiant
16 entered his appearance by means of a notice of entry of
17 appearance as co-counsel of record instead of by means of a
18 substitution of attorneys. The opening brief and appendix,
19 according to the Clerk's Office are due to be filed on October
20 31, 2002. There was insufficient time to prepare a substitution
21 of attorneys. A substitution of counsel form requires the
22 appellant's signature. Therefore, a double mailing (back and
23 forth to the Ely State Prison) is required before the
24 substitution of counsel form can be mailed (a third mailing) to
25 this court. In the near future, a substitution of counsel form
26 will be prepared. Stanley A. Walton, Esq. will tender his
 resignation as co-counsel of record on appeal.

1 3. That your affiant made a series of representation
2 in section I of the Points And Authorities, supra. Some of these
3 representations concerned factual developments and procedural
4 occurrences which have occurred or are about to occur before the
5 district court. Other representations concerned the opinions of
6 David Schieck, Esq. who represented codefendant Lailoni D.
7 Morrison at a severed trial. These averments are necessarily
8 incorporated into this affidavit upon information and belief as
9 to their veracity or accuracy. As to the representations
10 regarding factual and procedural matters before the district
11 court, both Walton and Schieck must be considered reliable
12 sources. Walton currently is appellant Bennett's district court
13 counsel of record and Schieck has continued his representation of
14 codefendant Morrison on appeal before this court.

15 4. That as to Schieck's opinions, he has laid a
16 foundation for them. Schieck ordered and reviewed Bennett's
17 trial transcripts in preparation for his trial work on behalf of
18 codefendant Morrison. Additionally, Schieck has followed the
19 recent developments on the "Bennett side" of the case.
20 Furthermore, Schieck is one of the most experienced homicide
21 defense attorneys in the State of Nevada. His opinions and
22 viewpoints are highly respected by your affiant. Upon
23 information and belief, affiant avers that this court also holds
24 Schieck in high regard. Schieck's excellent reputation, however,
25 does not necessarily validate his opinions on any given point as
26 being accurate or correct. Nevertheless, Schieck's opinions

1 should carry some weight with this court regarding the underlying
2 insufficiency of the evidence issue on the "Bennett side" of the
3 case and how it relates to the viability of the anticipated
4 motion for a new trial.

5 5. That your affiant's secretary received a telephone
6 message from Stanley A. Walton Esq. on October 24, 2002. Walton
7 indicated that he needed to receive one copy of an unspecified
8 transcript which he expected to receive immediately. Walton
9 further indicated that the motion for new trial would be filed no
10 later than Tuesday, October 29, 2002.

11 6. That your affiant has made it very clear to
12 appellant Bennett and his mother, Ms. Diane Richmond, that his
13 representation might very well delay the final disposition of his
14 direct appeal. The appellant and Ms. Richmond are more concerned
15 about proceeding with counsel of their own choosing due to the
16 serious personal consequences stemming from this case
17 (consecutive life sentences without the possibility of parole).

18 Dated this 29th day of October, 2002.

19
20 Martin R. Boyers
21 Martin R. Boyers Esq.

22 SUBSCRIBED AND SWORN to before me
23 this 29 day of October, 2002.

24 Connie Jones
25 NOTARY PUBLIC in and for said
26 County and State



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That on October 29, 2002, she served a copy of the attached MOTION TO HOLD BRIEFING SCHEDULE IN ABEYANCE, OR ALTERNATIVELY, MOTION FOR EXTENSION OF TIME TO FILE OPENING BRIEF AND APPENDIX by placing said copy in a postpaid envelope addressed to the persons hereinafter named, at the addresses stated below, which are the last known addresses, and by depositing said envelopes and contents in the United States mail.

ADDRESSEE:

Stanley A. Walton, Esq.
550 E. Charleston, Suite A
Las Vegas, NV 89104

Connie Jones