

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAOLA M. ARMENI, JONAH J. HORWITZ,
and DEBORAH A CZUBA,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
COUNTY OF CLARK, STATE OF
NEVADA, THE HONORABLE MICHAEL
P. VILLANI, DISTRICT COURT JUDGE,

Respondents,

And

TIMOTHY FILSON, Warden,
ADAM PUAL LAXALT, Attorney General
for the State of Nevada, and
THE STATE OF NEVADA,

Real Party in Interest.

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CASE NO: 73462

D.C. NO: 81C053867

**OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF**

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BRIEF**

COMES NOW, the State of Nevada, Petitioner, by STEVEN B. WOLFSON,
District Attorney, through his chief deputy, Jonathan VanBoskerck, and submits this
Opposition to Motion for Leave to File Amicus Curiae Brief pursuant to Rule 27 and
Rule 29 of the Nevada Rules of Appellate Procedure (NRAP). This opposition is
based on the following memorandum and all papers and pleadings on file herein.

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Dated this 13th day of October, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
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BY /s/ Jonathan E. VanBoskerck
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MEMORANDUM OF POINTS AND AUTHORITIES¹

This Court should deny the American Civil Liberties Union of Nevada's (ACLUN) Motion for Leave to File Brief of Amicus Curiae Brief (Amicus Motion) because it is untimely and the proposed brief (Amicus Brief) fails to address the misconduct below that justifies the \$250 sanction.

“An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the brief of the party being supported is filed.” Nevada Rules of Appellate Procedure (NRAP) Rule 29(f) (emphasis added). The Petition for Writ of Mandamus was filed on July 14, 2017. (Petition for Writ of Mandamus (Petition), filed July 14, 2017, p. 1). As such, the Amicus Motion had to be filed no later than July 25, 2017.² The Amicus Motion was not filed until October 11, 2017. Thus, the Amicus Motion is 78 days late.

The ACLUN's unreasonable failure to comply with this Court's mandatory filing deadline should be fatal:

Every system of law has within it artificial devices which are deemed to promote ... forms of public good. These devices take the shape of rules or standards to which the individual though he be careless or ignorant, must at his peril conform. If they were to be abandoned by

¹ Petitioners filed a similar motion in the appeal of the denial of habeas relief in Howard v. State, Nevada Supreme Court Case Number 73223. Since the motions are substantially similar Respondent's oppositions under both case numbers will be nearly identical.

² This accounts for the 7 days under NRAP 29(f) and excludes intervening non-judicial days as required by NRAP 26(2).

the law whenever they had been disregarded by the litigant effected, there would be no sense in making them.

Scott E. v. State, 113 Nev. 234, 239, 931 P.2d 1370, 1373 (1997) (quoting, Benjamin N. Cardozo, The Paradoxes of Legal Science 68 (1928)).

Rather than offer this Court an explanation for pursuing leave to file 78 days late, the ACLUN deflects attention from its failure to comply with basic filing rules by irrelevantly arguing that “[a]lthough the present motion ... falls outside of the time period required by Rule 29(f) ..., it is being filed before the opening brief in the related appeal[.]” (Amicus Motion, p. 3). The ACLUN offers no authority supporting the proposition that the filing date of an opening brief in a related appeal can toll NRAP 29(f). Regardless, this Court has declined to consolidate the cases so any attempt to toll NRAP 29(f) on the basis of the appeal is a dubious proposition at best. (Order, filed October 12, 2017, p. 2) (“we deny the motion to consolidate without prejudice.”).

Moreover, there is no reason to excuse the ACLUN’s decision to flaunt a mandatory filing deadline. NRAP Rule 29(c)(2) requires consideration of “the reasons why an amicus brief is desirable.” The desirability of ACLUN intervention hinges upon what it has to offer in adjudicating this case:

Chief Judge Posner, of the Seventh Circuit, writes that, “The vast majority of *amicus curiae* briefs are filed by allies of litigants and duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant’s brief. Such *amicus* briefs should not be allowed. They are an abuse. The term ‘*amicus curiae*’ means

friend of the court, not friend of a party.” Ryan v. Commodity Futures Trading Commission, 125 F.3d 1062, 1063 (7th Cir. 1997). “An *amicus* brief should normally be allowed when a party is not represented competently or is not represented at all....” Id. “We are not helped by an *amicus curiae*’s expression of a ‘strongly held view’ about the weight of the evidence.” Id. at 1064.

Long v. Coast Resorts, Inc., 49 F.Supp.2d 1177, 1178 (D. Nev. 1999).

The wisdom of Judge Posner is proven by a comparison of the Amicus Brief with the Petition. Both the Amicus Brief and Petition argue that Petitioners were zealously litigating a meritorious issue in accordance with professional norms. (Amicus Brief, p. 2-15; Petition, p. 13-34). Both pleadings argue that the sanctions will have a chilling effect on attorneys litigating on behalf of capital habeas petitioners. (Amicus Brief, p. 3, 8; Writ, 14-15, 32-34). In making this argument both of the pleadings extensively argue Public Employee Retirement System of Nevada v. Gitter, 133 Nev. ___, 393 P.3d 673 (2017), and Young v. Ninth Judicial District Court, 107 Nev. 642, 818 P.2d 844 (1991). (Amicus Brief, p. 3, 8, 10; Writ, p. 15, 24, 32-34). Indeed, both share specific arguments, such as complaining that one of the sanctioned lawyers was a pro bono attorney. (Amicus Brief, p. 9; Writ, p. 14-15). Both contend that Petitioners were complying with their ethical duties. (Amicus Brief, p. 2-15; Petition, p. 14-34). Both discuss the American Bar Association (ABA) Guidelines. (Amicus Brief, p. 4-6, 9, 11, 13; Writ, p. 26-27).

To the extent that the two pleadings differ, the distinctions offer little of value. The Amicus Brief argues the meritorious nature of the claim that Petitioners were

litigating below. (Amicus Brief, p. 6-8, 10-11). However, the Appellant's Opening Brief filed in the appeal from the denial of habeas relief offers substantially more analysis on that issue. (Howard v. State, Supreme Court Case Number 73223, Appellant's Opening Brief, filed October 11, 2017, p. 93-101). While it is true that the Amicus Brief presents arguments alleging infringement upon the right of access to the courts, chilling of First Amendment rights and retaliation, these complaints are derivative of Petitioner's chilling arguments. (Amicus Brief, p. 15-21; Petition, p. 14-15, 32-34). As such they are of marginal value and do not support intervention. Alternatively, if this Court concludes the issues are of value it should strike the other portions of the Amicus Brief and allow intervention only on these limited issues.

Ultimately, intervention by the ACLUN is unwarranted because the Amicus Brief fails to address Petitioners conduct below. This Court could accept almost every legal proposition in the Amicus Brief and still decline to grant extraordinary relief. It is undisputed that Petitioners have a professional obligation to zealously advocate for their client. It is undisputed that this may include presentation of all claims, from the mundane to the outlandish. It is undisputed that courts should permit attorneys to do their jobs without fear of *undesired* punishment. What is at issue is how Petitioners attempted to do these things and the ACLUN never once addresses the facts of what happened below.

The sanction must be placed in the context of the misbehavior below. The fifth round of state habeas litigation began with gamesmanship from Petitioners:

The FPD has engaged in a pattern of waiting until just before the one-year deadline of NRS 34.726(1) to file Hurst claims in eighteen (18) cases before the Eighth Judicial District Court and the Nevada Supreme Court. (Adams, Larry (C069704), Fifth Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), filed January 10, 2017; Byford, Robert (C108502), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Castillo, William (C133336), Petition for Writ of Habeas Corpus Post-Conviction), filed January 6, 2017; Crump, Thomas (83C064243), Petition for Writ of Habeas Corpus Post-Conviction), filed January 6, 2017; Doyle, Antonio (C120438), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Echavarria, Jose (C095399), Petition for Writ of Habeas Corpus Post-Conviction), filed January 10, 2017; Emil, Rodney (C082176), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Greene, Travers (C124806), Petition for Writ of Habeas Corpus Post-Conviction), filed January 10, 2017; Guy, Curtis (65062), Notice of Supplemental Authorities, filed January 11, 2017; Hernandez, Fernando (C162952), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Howard, Samuel (81C053867), Amended Petition for Writ of Habeas Corpus, filed December 1, 2016; McKenna, Patrick (C044366), Supplement to Petition for Writ of Habeas Corpus, filed January 11, 2017; Powell, Kitrich (90C092400), Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Rippo, Michael (C106784), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Sherman, Donald (C126969), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Smith, Joe (C100991), Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Walker, James (03C196420-1), Supplement to Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Witter, William (C117513), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017).

The above listed 18 pleadings were filed by four different branch offices of the FPD. The Nevada FPD filed fourteen of them. (Adams, Larry (C069704), Fifth Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), filed January 10, 2017; Byford, Robert

(C108502), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Castillo, William (C133336), Petition for Writ of Habeas Corpus Post-Conviction), filed January 6, 2017; Crump, Thomas (83C064243), Petition for Writ of Habeas Corpus Post-Conviction), filed January 6, 2017; Doyle, Antonio (C120438), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Echavarria, Jose (C095399), Petition for Writ of Habeas Corpus Post-Conviction), filed January 10, 2017; Greene, Travers (C124806), Petition for Writ of Habeas Corpus Post-Conviction), filed January 10, 2017; Hernandez, Fernando (C162952), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Powell, Kitrich (90C092400), Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Rippo, Michael (C106784), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Sherman, Donald (C126969), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Smith, Joe (C100991), Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Walker, James (03C196420-1), Supplement to Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Witter, William (C117513), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017). The FPD Central Division of California office filed two. (Emil, Rodney (C082176), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Guy, Curtis (65062), Notice of Supplemental Authorities, filed January 11, 2017). The Arizona branch office filed one. (McKenna, Patrick (C044366), Supplement to Petition for Writ of Habeas Corpus, filed January 11, 2017). And, the Idaho FPD filed one in this case. (Howard, Samuel (81C053867), Amended Petition for Writ of Habeas Corpus, filed December 1, 2016).

2 AA 460-62.

Petitioners' skullduggery continued after filing the fifth state habeas petition on October 5, 2016. (3 Appellant's Appendix (AA) 526).³ The State filed an

³ Petitioners have titled their appendix Appellant's Appendix even though this is a writ proceeding. The State will refer to Petitioners' appendix as Appellant's Appendix in order to avoid confusion.

opposition and motion to dismiss on November 2, 2016. Id. On December 1, 2016, Petitioners filed an amended petition. 3 AA 527. The State sought dismissal of the additional claim because Petitioners filed the amended petition without securing prior permission in violation of NRS 34.750(5) and Barnhart v. State, 122 Nev. 301, 130 P.3d 650 (2006). 1 AA 195-202. The lower court struck the amended fifth petition on that basis on March 17, 2017. 3 AA 527. Petitioners next sought reconsideration of the decision to strike the amended fifth petition without seeking leave of court to do so. Id. On May 2, 2017, the lower court issued a minute order “imposing a \$250.00 sanction upon Howard’s counsel for causing the State to respond to the Motion to Amend when the Court had already decided the issue in the context of striking the Amended Fifth Petitioner and/or failing to seek leave of court prior to requesting consideration.” Id.

Petitioners started this process through the gamesmanship of waiting until the eve of the one-year time bar of NRS 34.726 kicking in to file. Petitioners next ignored the plain text of NRS 34.750(5) by failing to seek leave of court to file an amended petition. Petitioners then ignored the plain text of both Rule 13(7) of the District Court Rules of Nevada (DCR) and Rule 7.12 of the Eighth Judicial District Court Rules (EDCR).

The judge below had the inherent authority to enforce basic rules of procedure. See, NRS 1.210(3); Jordan v. State ex rel. DMV & Public Safety, 121

Nev. 44, 58-59, 110 P.3d 30, 41-42 (Nev. 2005), overruled in part on other grounds, Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228, 181 P.3d 670, 672 (Nev. 2008). Petitioners should have been on notice to comply with the requirements of DCR 13(7) and EDCR 7.12 to seek leave prior to demanding reconsideration. This notice came in the form of having their pleading struck for failing to seek leave to file an amended habeas petition as required by NRS 34.750(5). Petitioners essentially committed the same offense again by demanding reconsideration without first seeking leave to do so. The lower court had tried to make the message clear with a lesser sanction of striking a pleading and was left with little choice but to hold Petitioners accountable when they again ignored their responsibility to seek leave of court.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court deny the Motion for Leave to File Brief of Amicus Curiae Brief.

Dated this 13th day of October, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ Jonathan E. VanBoskerck
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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 13, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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