

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,

Respondent,

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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Oct 20 2017 01:55 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 73462

D.C. NO: 81C053867

**OPPOSITION TO MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF PURSUANT TO NRAP 29
AND FOR LEAVE TO FILE LATE BRIEF**

COMES NOW, the State of Nevada, by STEVEN WOLFSON, District Attorney, through his Chief Deputy, JONATHAN E. VANBOSKERCK, and submits this Opposition to Motion for Leave to File Amicus Curiae Brief Pursuant to NRAP 29 and for Leave to File Late Brief pursuant to Rules 27 and 29 of the Nevada Rules of Appellate Procedure (NRAP). This opposition is based on the following pleading and all documents on file herein.

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Dated this 20th day of October, 2017.

Respectfully submitted,

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

By: */s/ Jonathan VanBoskerck*
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #6528
Office of the Clark County District Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

This Court should deny Petitioners’ attempt to secure a third bite at the apple through the sophistry of yet another request for leave to file an untimely amicus brief that merely reiterates the same issues presented by the Petition for Writ of Mandamus. More importantly, the proposed brief (EBaY Brief) submitted by the Ethics Bureau at Yale (EBaY) fails to address the misconduct below that justified 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.” NRAP Rule 29(f). 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,

EBaY's request for leave and the proposed brief needed to be filed by July 25, 2017.¹

EBaY's motion and brief were not filed until October 18, 2017. Thus, EBay is 85 days late.

EBaY'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 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 85 days late, EBay deflects attention from its failure to comply with basic filing rules by irrelevantly arguing that "there is nothing in the Nevada Rules of Appellate Procedure to suggest that the seven-day deadline applies to amicus briefs filed in support of writ petitions rather than in support of appellate briefs." (EBay Motion, p. 4).² Assuming the truth of this statement, if NRAP 29 does not address amicus

¹ This accounts for the 7 days under NRAP 29(f) and excludes intervening non-judicial days as required by NRAP 26(2).

² EBay's motion for leave fails to include internal pagination as required. See, NRAP 27(d)(1)(D) ("The pages shall be consecutively numbered at the bottom.");

filings in extraordinary relief cases than there is no rule upon which leave may be granted at all and as such the EBaY Motion should be summarily denied.

EBaY goes on to complain that it “believed ... that it would be filing an *amicus* brief in support of Petitioners’ opening brief, which would be consolidated with the mandamus petition.” (EBaY Motion, p. 5). EBaY 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 denied consolidation so any attempt to toll NRAP 29(f) on the basis of the appeal is a dubious proposition. (Order, filed October 12, 2017, p. 2) (“we deny the motion to consolidate without prejudice.”). Indeed, EBaY’s assumption is rebutted by this Court’s warning that a litigant who fails to comply with the rules does so at his or her peril. Scott E., 113 Nev. at 239, 931 P.2d at 1373.

EBaY further tries to ignore its failure to comply with NRAP 29 by offering a “no autopsy, no foul” interpretation of NRAP 29. Since “Respondents have not filed ... an answer to the writ of mandamus, they have not missed the opportunity to take into consideration and respond to *amicus*’ arguments.” (EBaY Motion, p. 5). While such a fast and loose approach to litigation has never been endorsed by this Court, the State will in fact be prejudiced by granting leave to file the EBaY Brief.

NRAP 29(a) (“Any other *amicus curiae* may file a brief only by leave of court granted on motion”).

Petitioners have essentially recruited two allies to offer the same arguments, albeit with variations and different nuances, that Petitioners have presented. Instead of having to respond to one unified voice, Respondent will be forced to address multiple arguments offering differing permutations and spins on the same issues. Not only does this substantially burden Respondent by exponentially increasing the difficulty of addressing each and every argument, it drastically increases the chance of inadvertent error under Polk v. State, 126 Nev. ___, ___, 233 P.3d 357, 360-61 (2010). Additionally, it is fundamentally unfair to allow Petitioners to pile on argument upon argument through the use of surrogates. Indeed, endorsement of such skullduggery by this Court would encourage Respondent, and litigants in other cases, to solicit organizations and allies to inflict second and third and fourth reiterations of arguments upon this Court.

Moreover, there is no reason to excuse EBaY'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 EBaY 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 EBaY’s brief with the Petition. Both the EBaY Brief and Petition argue that Petitioners were zealously litigating a meritorious issue in accordance with professional norms. (EBaY Brief, p. 4-11; Petition, p. 13-34). Both pleadings argue that the sanctions will have a chilling effect on attorneys litigating on behalf of capital habeas petitioners. (EBaY Brief, p. 14-16; Writ, 14-15, 32-34). In making this argument both of the pleadings extensively argue Young v. Ninth Judicial District Court, 107 Nev. 642, 818 P.2d 844 (1991). (Amicus Brief, p. 6-8, 18; Writ, p. 15, 32-34). Indeed, both share specific arguments, such as complaining that one of the sanctioned lawyers was a pro bono attorney. (EBaY Brief, p. 14-15; Writ, p. 14-15). Both contend Petitioners were complying with their ethical duties. (EBaY Brief, p. 4-11; Petition, p. 14-34). Both discuss the American Bar Association (ABA) Guidelines and other ethical standards. (EBaY Brief, p. 5, 7-11, 13-16; Writ, p. 26-27). Both argue that the manner in which the sanctions were imposed violated Petitioners’ constitutional rights. (EBaY Brief, p. 11-14; Petition, p. 40-46). Both argue that it was inappropriate to order that the sanction be paid to the District Attorney. (EBaY

Brief, p. 16-18; Petition, p. 46-49). Both argue that the case should be remanded to a different judge. (EBaY Brief, p. 18-23; Petition, p. 49-50).

Ultimately, intervention is unwarranted because the EBay Brief fails to address Petitioners conduct below. This Court could accept almost every legal proposition in the EBay 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 EBay 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 Appellant's Appendix (AA) 460-62.³

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

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.

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 were on notice to comply with DCR 13(7) and EDCR 7.12 by seeking 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 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 and was left with little choice but to hold Petitioners accountable when they again ignored their responsibility to seek leave of court.

Ultimately, the failure of EBaY to address the underlying misconduct renders the EBaY Brief unworthy of consideration. Petitioners were not sanctioned for zealous advocacy. Petitioners were punished for misbehavior that they themselves would have argued amounted to ineffective assistance of counsel if it had been committed by trial, appellate or first post-conviction counsel. The issue is not the zealousness of Petitioners or the issue they were advocating. Instead, what is at issue is whether Petitioners should be held accountable for repeated misconduct that brings into question their ability to competently represent their client. To the extent that the sanctions have a chilling effect on such incompetence of counsel, the legal profession will be better for it.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court deny the Motion for Leave to File Amicus Curiae Brief Pursuant to NRAP 29 and for Leave to File Late Brief.

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Dated this 20th day of October, 2017.

Respectfully submitted,

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

BY */s/ Jonathan VanBoskerck*

JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 89155-2212

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 20, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

JONAH J. HORWITZ
DEBORAH A. CZUBA
Assistant Federal Public Defenders
Counsels for Petitioner

WILLIAM H. BROWN, ESQ.
JOSEPH Z. GERSTEN, ESQ.
Counsels for Amicus Curiae

PAOLA M. ARMENI, ESQ.
Counsel for Petitioner

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

JUDGE MICHAEL P. VILLANI
EJDC, Dept. 17
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

LAWRENCE J. FOX
Yale Law School
127 Wall Street
New Haven, Connecticut 06511
Counsel for Amicus Curiae

BY /s/ E.Davis
Employee, District Attorney's Office

JEV//ed