

JASON J. BOLDEN, A/K/A,
JASON JEROME BOLEN,

Appellant,

VS.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Nov 08 2021 04:05 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 79715

**REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF
OF AMICI CURIAE IN SUPPORT OF APPELLANT’S
PETITION FOR EN BANC RECONSIDERATION**

COME NOW the Clark County Public Defender (CCPD), Clark County Special Public Defender (SPD), and Nevada Attorneys for Criminal Justice (NACJ), by and through their undersigned counsel of record for amici, and hereby file this Reply supporting amici's request to submit an amici curiae brief in the instant matter.

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This motion is based upon the following Memorandum of Points and Authorities and all papers and pleadings on file herein.

DATED this 8th day of November, 2021.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Deborah L. Westbrook
DEBORAH L. WESTBROOK*
Chief Deputy Public Defender
Nevada Bar No. 9285
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MEMORANDUM OF POINTS AND AUTHORITIES

The State objects to the brief proposed for submission by Amici Curiae on the basis that, under *its* reading of NRAP 29, “an amici brief in support of a petition for en banc reconsideration . . . may be no more than five pages, or 2,334 words (rounding up).” But Amici Curiae read the plain language of NRAP 29 differently. NRAP 29(e) states, “Except by the court’s permission, an amicus brief may be no more than one-half the maximum length authorized by these Rules for a party’s brief.” NRAP 29(e) (emphasis added).

NRAP 32(a)(7) governs the length of the parties’ appellate briefs. Pursuant to NRAP 32(a)(7), opening briefs and answering briefs in non-capital cases have a 14,000 word limit. So, when read in conjunction with

NRAP 29(e), an amicus brief can be no more than 7,000 words (or “one-half the maximum length authorized by these Rules for a party’s brief.”).

Amici Curiae read the plain language of NRAP 29(e) as creating a uniform 7,000 word limit for *all* amicus briefs, notwithstanding the word limit of the underlying document that amici are seeking to support. Importantly, NRAP 29(e) does not say, “an amicus brief may be no more than one-half the maximum length authorized by these Rules *for the pleading to which it is being submitted in support.*” The rule speaks, instead, of “a party’s brief.”

NACJ has utilized this very same interpretation of NRAP 29(e) in numerous appellate cases involving the State of Nevada where it has appeared as Amicus Curiae. And the State has not previously objected on this basis, nor has this Court previously denied a motion by NACJ for leave to file an amicus brief on the basis that its brief improperly exceeded one-half the word limit of the underlying document.

For instance, in Gonzalez v. State (Case No. 78152), NACJ submitted an amicus brief containing 4,198 words in support of the appellant’s petition for review under NRAP 40(B), notwithstanding the 4,667 word limit for the underlying petition. See Dkt. No. 20-43020 (filed 11/25/20). Likewise, in Dean v. Eighth Judicial Dist. Court (Case No. 82416), NACJ submitted an

amicus brief containing 6,088 words in support of a petition for writ of mandamus, notwithstanding the 7,000 word limit for the underlying petition. See Dkt. No. 21-05763 (filed 2/26/21). And in Gathrite v. Eighth Judicial Dist. Court (Case No. 77529), NACJ submitted an amicus brief containing 4,366 words in support of a petition for writ of mandamus.¹ In light of the foregoing, Amici Curiae reasonably interpreted NRAP 29(e) as authorizing an amicus brief of 7,000 words or less, and provided a certificate of compliance indicating that their brief “contains a total of 4,313 words which does not exceed the 7,000 word limit.”

Amici Curiae believe that NRAP 29(e) is clear in providing a uniform 7,000 word limit for all amicus briefs. Nevertheless, to the extent the Court disagrees, or finds NRAP 29(e) ambiguous as to the proper length of an amicus brief supporting a petition of this nature, that ambiguity should not result in an outright denial of Amici Curiae’s request for leave to submit an amicus brief. Again, NRAP 29(e) provides that the Court may grant “permission” to file an amicus brief that exceeds the type-volume limitations

¹ In State v. Seka (Case No. 80925), NACJ submitted a 4,300-word amicus brief in support of a petition for en banc reconsideration, notwithstanding the 4,667-word limit for Seka’s underlying petition. Although a majority of the en banc Court denied NACJ’s request to submit an amicus brief in that case, the denial did not reference the length of the proposed amicus brief, and three justices would have granted NACJ’s motion for leave to file its amicus brief. See Dkt. No. 21-28753 (filed 10/7/21).

for amicus briefs. Under these circumstances, the Court can *certainly* grant permission to Amici Curiae to file an amicus brief in this case, just as it did in Gonzalez, Dean and Gaithrite without a specific request to exceed the word-limit.

The State's additional arguments in opposition to Amici's proposed brief only underscore the urgent need for amicus briefing in this case. In Bolden, a panel of this Court drastically changed the law in the State of Nevada, in contravention of more than fifty years of legal precedent and in violation of the plain language of Nevada's statutes governing preliminary hearings. The panel did so in a case where Bolden filed an 8-page Opening Brief and did not submit a Reply. The panel's finding of "egregious error" was based *entirely* on the State's unopposed arguments in its Answering Brief. En banc reconsideration is necessary so that the full Court can consider *both* the State and defense perspectives on a critical issue that affects all criminal defense practitioners statewide—whether justice courts have inherent and statutory authority to dismiss charges after considering credibility and weighing evidence following a preliminary hearing. Indeed, to properly address this issue, given the paucity of legal analysis below, an amicus brief of 4,313 words was essential.

The “classic role of amicus curiae” is to assist in a case of “general public interest, supplementing the effort of counsel, *and drawing attention to law that escaped consideration.*” Miller-Wohl Co. v. Com’n of Labor and Industry, 694 F.2d 203, 204 (9th Cir. 1992) (emphasis added). An amicus brief should be allowed “when the amicus has an interest in some other case that may be affected by the decision in the present case . . . or when the amicus has unique information or perspective that can help the court *beyond the role that the lawyers for the parties are able to provide.*” Ryan v. Commodity Futures Trading Com’n, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J., in chambers) (citations omitted) (emphasis added).

Contrary to the State’s claim, an amicus brief *may* raise issues not addressed in the parties’ briefs, even where those issues were not raised in the trial court. See, e.g., Nevada Power Co. v. Haggerty, 115 Nev. 353, 356, 989 P.2d 870, 872 (1999) (addressing an issue raised for the first time on appeal by an amicus curiae). Indeed, an amicus brief that simply parrots back the same arguments made in a party’s briefing is of little use to the Court and will generally be disregarded. See Dow Chemical Co. v. Mahlum, 115 Nev. 13, 15 n.1, 973 P.2d 842, 843 n.1 (1999). Given the significant impact of the panel’s decision in this case on preliminary hearings statewide, the Court should allow Amici Curiae to weigh in on the important legal

issues that were created by the panel’s drastic ruling in this case. See, e.g., Grace v. Eighth Judicial Dist. Court, 132 Nev. 511, 515 (2016) (en banc) (“preliminary hearings are commonly utilized in Nevada, and a clarification on the issue raised here would have a broad and significant impact; thus, the petition raises significant public policy concerns”).²

To the extent the State’s Opposition could be read to suggest that Amici Curiae are somehow limited by NRAP 40A(c) which states, “Matters presented in the briefs and oral arguments may not be reargued in the petition, and no point may be raised for the first time,” this language does not operate as a limitation on amicus briefs. Amici have filed an amicus brief that is subject to the “contents and form” requirement of NRAP 29(d), not a petition for en banc reconsideration that is subject to the “content” limitation set forth in NRAP 40A(c). Furthermore, this language is contradictory, as it is unclear how *any* party could *ever* simultaneously meet the requirement of not “rearguing” any matters previously raised, while not raising any points “for the first time.” The analogous federal rule, FRAP 35,

² Pursuant to NRAP 40A(f), the Court “may place this matter on the en banc calendar for reargument or resubmission or make such other orders as are deemed appropriate under the circumstances of the particular case.” This means the Court can permit full briefing on the issues raised in Bolden’s petition and the amicus brief, thereby giving the State an opportunity to fully respond to the serious issues that have come to light as a result of the panel’s published decision.

does not contain any similar language respecting petitions for en banc reconsideration. See FRAP 35(b). Finally, regardless of whether the contents of Bolden’s petition can satisfy the impossible-to-meet standard set forth in NRAP 40A(c), this Court always retains the *power* to grant a petition for en banc reconsideration for any of the reasons set forth in NRAP 40A(a). As long as the proceeding involves “a substantial precedential, constitutional or public policy issue” or reconsideration is necessary “to secure or maintain uniformity of decisions,” the en banc Court has the power to reconsider a panel decision. See NRAP 40A(a).

CONCLUSION

For all the foregoing reasons, the Court should grant Amici Curiae leave to file their proposed amicus brief of 4,313 words.

DATED this 8th day of November, 2021.

DARIN F. IMLAY
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 8th day of November, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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