

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA, in
and for THE COUNTY OF CLARK; and
THE HONORABLE RICHARD SCOTTI,
District Judge,
Respondents,
and
JENNIFER LYNN PLUMLEE,
Real Party in Interest.

THE STATE OF NEVADA,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA, in
and for THE COUNTY OF CLARK; and
THE HONORABLE RICHARD SCOTTI,
District Judge,
Respondents,
and
MATTHEW HANEY MOLEN,
Real Party in Interest.

Electronically Filed
Feb 17 2021 03:00 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 82236

Original Action for Writ to
Eighth Judicial District Court,
Clark County, Nevada,
Case No. C-20-346852-A

Case No. 82249

Original Action for Writ to
Eighth Judicial District Court,
Clark County, Nevada,
Case No. C-20-348754-A

**NEVADA LEGISLATURE'S MOTION TO EXCEED WORD LIMIT
IN NRAP 21(d) FOR AMICUS CURIAE BRIEF**

KEVIN C. POWERS, General Counsel
Nevada Bar No. 6781
LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
401 S. Carson St.
Carson City, NV 89701
Tel: (775) 684-6830; Fax: (775) 684-6761
Email: kpowers@lcb.state.nv.us
Attorneys for the Legislature of the State of Nevada

MOTION

The Legislature of the State of Nevada (Legislature), by and through its counsel the Legal Division of the Legislative Counsel Bureau (“LCB Legal”) under NRS 218F.720, hereby files this motion to exceed the word limit in NRAP 21(d) for its amicus curiae brief. On February 16, 2021, the Legislature submitted an amicus brief that contains 15,076 words, which exceeds the type-volume limitation of 7,000 words in NRAP 21(d). The Legislature’s motion to exceed the word limit is necessary so that the Legislature can properly address in its amicus brief several complex issues of constitutional and statutory law and matters of first impression presented by these cases.

In each of these cases, the district court decided that a deputy district attorney who prosecutes criminal cases and who also serves in the Legislature violates a criminal defendant’s rights to “procedural due process” on the basis that such dual service violates the separation-of-powers provision. (*Plumlee App. VI:249-52; Molen App. VI:233-36.*) As a result, the district court concluded that the defendants in these cases were entitled to reversal of their convictions and new trials in the justice court because they were deprived of their rights to “procedural due process” given that the deputy district attorney who prosecuted their cases served in the Legislature at the time of their trials. (*Plumlee App. VI:249-52; Molen App. VI:233-36.*)

In its amicus brief, the Legislature asks this Court to reverse and vacate the district court's decision in these cases because the decision was based on a clearly erroneous interpretation and application of constitutional and statutory law. In making its arguments, the Legislature needed to comprehensively brief several complex issues of constitutional and statutory law and matters of first impression in Nevada. This required LCB Legal to support the Legislature's arguments with historical evidence, legal treatises and other authorities on constitutional law, case law from other jurisdictions interpreting similar state constitutional provisions, common-law rules governing public officers and employees, and evidence of the intent of the Framers of the Nevada Constitution and their underlying public policies supporting the concept of the "citizen-legislator" as the cornerstone of an effective, responsive and qualified part-time legislative body.

In particular, the Legislature argues in its amicus brief that the district court's decision was based on a clearly erroneous interpretation and application of the Due Process Clause because even assuming that the defendants had proven that the prosecutor committed constitutional errors in prosecuting these cases, the defendants were not entitled to reversal of their convictions and new trials under the Due Process Clause because they did not make the required additional showing that the constitutional errors caused actual prejudice that resulted in unfair trials.

The Legislature also argues in its amicus brief that the district court’s decision was based on a clearly erroneous interpretation and application of constitutional and statutory law because deputy district attorneys serve as county employees—not as state officers or county officers—and they do not exercise sovereign functions belonging to the state executive branch when they participate in criminal prosecutions.

The Legislature also argues in its amicus brief that the district court’s decision was based on a clearly erroneous interpretation and application of the separation-of-powers provision because that provision does not prohibit legislators from holding positions of public employment with county governments as deputy district attorneys. Specifically, the Legislature argues that the separation-of-powers provision does not prohibit legislators from holding any positions of public employment with local governments because local governments and their officers and employees are not part of one of the three departments of state government. The Legislature additionally argues that even if the separation-of-powers provision is interpreted to apply to local governments, the provision still would not prohibit legislators from holding positions of public employment as deputy district attorneys with county governments because deputy district attorneys are county employees who do not exercise sovereign functions belonging to the state executive branch when they participate in criminal prosecutions.

In filing the Legislature’s motion to exceed the word limit, LCB Legal is respectful of this Court’s admonition to appellate counsel to observe reasonable limitations on arguments filed with this Court. See Hernandez v. State, 117 Nev. 463 (2001). However, LCB Legal is asking to exceed the word limit to meet this Court’s high standards of appellate practice in which this Court “expects all appeals to be pursued with high standards of diligence, professionalism, and competence.” Barry v. Lindner, 119 Nev. 661, 671 (2003); Polk v. State, 126 Nev. 180, 184 (2010). This duty requires counsel to avoid inadequate appellate practices, such as discussing issues without including “cogent argument and citation to relevant authority.” Berkson v. Lepome, 126 Nev. 492, 501-02 (2010) (“It is well established that this court need not consider issues not supported by cogent argument and citation to relevant authority.”). Therefore, the additional words in the Legislature’s amicus brief are necessary to discuss the complex issues of constitutional and statutory law and matters of first impression presented by these cases in a cogent manner that includes “adequate supporting law.” Barry, 119 Nev. at 672.

Finally, LCB Legal wants to stress that it takes no pleasure in asking this Court for permission to exceed the word limit or in preparing an amicus brief that exceeds the word limit. However, in light of the statewide importance of the issues presented by these cases, LCB Legal believes that the Legislature’s amicus brief

will facilitate a more comprehensive and thorough presentation of the controlling law and a better understanding of the issues and will ensure that the views of the Legislature are fairly and adequately represented and are not prejudiced by these cases. Therefore, the Legislature asks this Court to grant its motion to exceed the word limit in NRAP 21(d) for its amicus brief.

DATED: This 17th day of February, 2021.

By: /s/ Kevin C. Powers
KEVIN C. POWERS, General Counsel
Nevada Bar No. 6781
LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
401 S. Carson St.
Carson City, NV 89701
Tel: (775) 684-6830; Fax: (775) 684-6761
Email: kpowers@lcb.state.nv.us
Attorneys for the Legislature of the State of Nevada

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 17th day of February, 2021, pursuant to NRAP 25 and NEFCR 9, I filed and served a true and correct copy of the Legislature’s Motion to Exceed the Word Limit in NRAP 21(d) for its Amicus Curiae Brief, by means of the Nevada Supreme Court’s electronic filing system, directed to:

STEVEN B. WOLFSON
Clark County District Attorney
ALEXANDER CHEN
Chief Deputy District Attorney
OFFICE OF THE CLARK COUNTY
DISTRICT ATTORNEY
200 Lewis Ave.
Las Vegas, NV 89155
Alexander.Chen@clarkcountyda.com
Attorneys for Petitioner
State of Nevada

CRAIG A. MUELLER, ESQ.
CRAIG MUELLER & ASSOCIATES
723 S. Seventh St.
Las Vegas, NV 89101
receptionist@craigmuellerlaw.com
Attorneys for Real Party in Interest
Matthew Haney Molen and Real Party
in Interest Jennifer Lynn Plumlee

AARON D. FORD
Attorney General
OFFICE OF THE ATTORNEY GENERAL
100 N. Carson St.
Carson City, NV 89701
Attorneys for Petitioner
State of Nevada

/s/ Kevin C. Powers
An Employee of the Legislative Counsel Bureau