

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.

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Clerk of Supreme Court
Original Action For Writ To
Eighth Judicial District Court,
Clark County, Nevada
Case No. C-20-346852-A

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.

Case No. 82249

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

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

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I. INTRODUCTION

These consolidated appeals address whether the separation of powers doctrine set forth in Article 3, Section 1 of the Nevada Constitution prohibits deputy district attorneys from both serving in the legislature and prosecuting criminal cases. The two cases that are the subject of the State’s writ were DUI convictions prosecuted by Chief Deputy District Attorney Melanie Scheibel. Chief DDA Scheibel not only serves in the Nevada Senate, she chairs the Judiciary Committee. The decision in this case may affect two other Chief Deputy District Attorneys. Jason Frierson serves as the Speaker of the Assembly. Nicole Cannizzaro not only serves as Senate Majority Leader, she chairs the Senate Legislative Commission.

II. STATEMENT OF THE CASE

The State of Nevada filed a Petition For Writ Of Mandamus Or, In The Alternative, Prohibition on December 22, 2020. The writ requests that the Supreme Court vacate the District Court’s reversal of two misdemeanor DUI convictions. The same writ was filed in the case of Jennifer Plumlee, District Court case number C-20-346852-A and the case of Matthew Haney Molen, District Court case number C-20-348754-A. On February 8, 2021, the Supreme Court granted the State of Nevada Legislature’s (hereinafter referred to as “the

Legislature”) requests to consolidate these matters and for en banc consideration.

On February 17, 2021, the Legislature (through its counsel the Legislative Counsel Bureau, Legal Division, hereinafter referred to as LCB Legal) filed a motion to exceed the 7,000-word limit of NRAP 21(d). Along with its motion, the Legislature filed a proposed Amicus Brief that is 63 pages of text (89 pages with exhibits) and contains 15,076 words. By contrast, on September 17, 2020, the State filed a Supplemental Response to Appellant’s Opening Brief Regarding Separation Of Powers Issues in Matthew Molen’s district court appeal. Attached to the State’s Supplemental Response as an exhibit was an opinion letter prepared by LCB Legal and dated August 8, 2020. That opinion letter supported the State’s position on the separation of powers issue, examined the law of other jurisdictions, the history of Nevada and concluded that public employment is not a bar to serving in the Legislature. That opinion letter was 32 pages long. A copy of the State’s Supplemental Response with the attached opinion letter is included in Petitioner’s appendix. Appendix, pp. AA000178-000216.

II. APPLICABLE LAW

The Nevada Constitution states in relevant part:

ARTICLE. 3. - Distribution of Powers.

Section 1. Three separate departments; separation of powers....

1. The powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the

Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

Nevada Rule of Appellate Procedure 32(a)(7)(D) states:

- (D) Permission to Exceed Page Limit or Type-Volume Limitation.
- (i) The court looks with disfavor on motions to exceed the applicable page limit or type-volume limitation, and therefore, permission to exceed the page limit or type-volume limitation will not be routinely granted. A motion to file a brief that exceeds the applicable page limit or type-volume limitation will be granted only upon a showing of diligence and good cause. The court will not consider the cost of preparing and revising the brief in ruling on the motion.
 - (ii) A motion seeking an enlargement of the page limit or type-volume limitation for a brief shall be filed on or before the brief's due date and shall be accompanied by a declaration stating in detail the reasons for the motion and the number of additional pages, words, or lines of text requested. A motion to exceed the type-volume limitation shall be accompanied by a certification as required by Rule 32(a)(9)(C) as to the line or word count.
 - (iii) The motion shall also be accompanied by a single copy of the brief the applicant proposes to file.

IV. ARGUMENT

A. LCB Legal's Motion Should Be Denied For Failure To Establish Due Diligence And Good Cause.

Motions to exceed the applicable page limit or type-volume limitation, and therefore, permission to exceed the page limit or type-volume limitation will not be routinely granted. A motion to file a brief that exceeds the applicable page limit or

type-volume limitation will be granted only upon a showing of diligence and good cause. NRAP 32(a)(7)(D)(i). As stated above, LCB Legal’s August 8, 2020, opinion letter was 32 pages long. *See*, Appendix pp. A000184-000216. There has been no explanation as what good cause exists to justify why its amicus brief needs twice as many pages, plus approximately 26 pages of exhibits to come to the same conclusion as its August 8 opinion letter. LCB Legal has not explained what due diligence it undertook to attempt to meet the page limit requirements of NRAP 21(d). Therefore, the Legislature’s motion to exceed page limit should be denied.

B. LCB Legal’s Motion Should Be Denied As It Seeks Leave To Expand The Word Limit Of NRAP 21(d) So That It May Raise Issues Not Raised By Petitioner In Its Writ.

In its motion to exceed LCB Legal argues that “...defendants were not entitled to reversal of their convictions and new trials under the Due Process clause because they did not make the required showing that the constitutional errors caused actual prejudice that resulted in unfair trials.” *Motion To Exceed*, p. 2. LCB Legal’s brief also contains a section raising this argument. *Amicus Brief*, Argument Section III, p. 5. This argument was not raised by Petitioner State of Nevada in its Petition.

“Absent exceptional circumstances, amicus curiae cannot expand the scope of an appeal to implicate issues not presented by the parties or seek relief beyond that sought by the parties. *See*, C.J.S. *Amicus Curiae*, Section 17 (2013). This

Court has recently denied an amicus from raising its own issues on appeal. “To the extent SPS or the American Legal and Financial Network (in its amicus brief) raise new arguments regarding NRS Chapter 104 on appeal that were not raised or explained to the district court, we decline to consider those arguments.” *Select Portfolio Servicing v. Dunmire*, No. 77251, 456 P.3d 255, n.4 (Nev., January 27, 2020) (unpublished). This is in keeping with the policy stated in the C.J.S. that amicus curiae are precluded from raising issues not raised by the parties.

Therefore, the motion to exceed the page limit should be denied.

C. LCB Legal’s Motion Should Be Denied As It Fails To Make A Threshold Showing Of Ambiguity In The Wording Of Article 1, Section 3, Of The Nevada Constitution.

When analyzing the Constitution, the Court always starts with the plain language of the Nevada Constitution and the Court considers extrinsic authority *only* if it finds an ambiguity. “The rules of statutory construction apply when interpreting a constitutional provision. This court will look to the plain language of the provision if it is unambiguous. *If, however, the provision is subject to more than one reasonable interpretation*, the provision is ambiguous and this court will look beyond the plain language and consider the provision’s history, public policy and reason in order to ascertain the intent of the drafters.” *Schwartz v. Lopez*, 132 Nev. 732, 745, 382 P.3d 886, 895 (2016) (citations omitted) (emphasis added).

“The rules of statutory construction apply when interpreting a constitutional provision. If a provision is clear and unambiguous, this court will not look beyond the language of the provision, but will instead apply its plain meaning. A constitutional provision is ambiguous if ‘it is susceptible to two or more reasonable but inconsistent interpretations.’ *If a provision is ambiguous*, this court ‘may look to the provision’s history, public policy and reason to determine what the voters intended’.” *Lorton v. Jones*, 130 Nev. Adv. Op. 8, 322 P.3d 1051, 1054 (2014) (citations omitted) (emphasis added).

It does not appear that LCB Legal argues anywhere in its motion or its brief that the plain language of Nevada Constitution Article 1, Section 1 is ambiguous. Indeed, the plain language of the provision is clear and “not susceptible to two or more reasonable but inconsistent interpretations.” *Id.* LCB Legal’s brief contains entire sections entitled Historical Evidence, Federal Government and Congress, California Legislature, Case Law From Other Jurisdictions. Not until page 49 of 62 pages of text does LCB Legal present a section devoted to interpretation of Nevada’s separation-of-powers provision. Both the *Schwartz* and *Lorton* decisions clearly state that this Court will not look past the clear, unambiguous language of a provision; only after a showing that the provision is ambiguous may the Court examine extrinsic historical, public policy, and reasoning in its interpretation. *Id.* The sections of the proposed amicus brief devoted to historical evidence, Federal government and Congress, California legislature, and caselaw from other

jurisdictions are all irrelevant unless the Legislature establishes a threshold showing that Nevada Constitution Article 3, Section 1 is ambiguous; it has not done so. Therefore, the Legislature's motion to exceed the page and word limits of NRAP 21(d) should be denied.

CONCLUSION

Based on the foregoing arguments, Real Parties In Interest Jennifer Plumlee and Matthew Haney Molen respectfully submit that the Nevada Legislature's Motion To Exceed Word Limit In NRAP 21(d) For Amicus Curiae Brief should be denied.

DATED this 23rd day of February, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of Craig A. Mueller & Associates, and that on the 23rd day of February, 2021, pursuant to NRAP 25 and NEFCR 9, I filed and served a true and correct copy of the Opposition to 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:

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