

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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Elizabeth A. Brown
Clerk of Supreme Court

Case No: 82236

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

**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN
EXCESS OF TYPE-VOLUME LIMITATIONS**

COMES NOW the Clark County Public Defender (CCPD), Clark County Special Public Defender (SPD), and Nevada Attorneys for Criminal Justice (NACJ), by and through the undersigned counsel of record for amici

and hereby files this motion for leave to file an amicus curiae brief in excess of this Court's type-volume limitations in support of Real Parties In Interest's Answer to Petition for Writ of Mandamus, or in the Alternative, Prohibition.

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

DATED this 22nd day of April, 2021.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By /s/ Deborah L. Westbrook
DEBORAH L. WESTBROOK, #9285
Chief Deputy Public Defender
*Counsel of Record for Amici

MEMORANDUM OF POINTS AND AUTHORITIES

The Clark County Public Defender (CCPD), Clark County Special Public Defender (SPD), and Nevada Attorneys for Criminal Justice (NACJ) hereby request leave to appear as amici curiae and submit an amicus brief in this matter that exceeds the type-volume limits set forth in NRAP 21(d), supporting Real Parties in Interest Jennifer Plumlee and Matthew Molen.

A. Procedural Background.

On appeal, the district court reversed Plumlee’s and Molen’s misdemeanor convictions after finding that they had both been unlawfully prosecuted by State Senator Melanie Scheible in violation of Nevada’s separation-of-powers clause. (Molen Appendix at 232-237; Plumlee Appendix at 248-253). In December of 2020, the State of Nevada petitioned this Court for writs of mandamus and/or prohibition, seeking to vacate the district court’s decisions in the Plumlee and Molen cases, identifying the issue before this Court as follows: “Whether the District Court erred in holding that a deputy district attorney who handled a misdemeanor prosecution violated the Separation of Powers Clause of the Nevada Constitution.” See Plumlee Petition at 3, Molen Petition at 3.

On February 17, 2021, the Legislative Counsel Bureau (LCB) filed a motion to exceed the word limit in NRAP 21(d) along with a proposed

amicus brief in support of the State of Nevada’s petitions which contained 15,076 words—more than twice the type-volume limit for an amicus brief of this nature. LCB explained that it “needed to comprehensively brief several complex issues of constitutional and statutory law and matters of first impression.” LCB Motion at p. 2. LCB further explained that the lengthy brief was necessary,

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.

LCB Motion at p. 2. LCB stressed the “statewide importance” of the issues presented by the Plumlee and Molen cases and its belief 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.”

On March 15, 2021, the Court granted LCB’s motion in part. On March 19, 2021, LCB filed an amicus brief containing 13,836 words.

On April 16, 2021, Real Parties in Interest submitted a 4,144-word Answer, responding to *both* of the State’s Petitions, but failing to directly address the lengthy and detailed legal arguments raised by LCB in its amicus

brief. Therefore, CCPD, SPD, and NACJ have prepared the attached amicus brief which responds directly to each of the arguments raised by LCB to help facilitate this Court’s ruling on the merits of the State’s Petitions.

B. Requirements for Amicus Curiae Briefs.

Pursuant to NRAP 29, an amicus curiae may file a brief “by leave of court granted on motion”, which “shall be accompanied by the proposed brief and state: (1) the movant’s interest and (2) the reasons why an amicus brief is desirable.” NRAP 29 (a) & (c). Where, as here, the proposed amicus brief relates to an extraordinary writ petition, the brief shall not contain more than 7,000 words (or 650 lines of text in a monospaced typeface), unless the court directs otherwise after receiving a motion to exceed the type-volume limit. See NRAP 21(d) and NRAP 32(a)(7)(D). As set forth herein, Amici have an interest in the separation-of-powers issue raised by the State’s Petitions and their proposed brief, although in excess of the type-volume limitations, will be useful to this Court because it directly responds to each of the points raised in LCB’s lengthy amicus brief.

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C. The Court should permit CCPD, SPD, and NACJ to file an amicus brief containing 9,604 words.

1. Movants' Interest.

CCPD is the largest provider of indigent defense services in Nevada. The office endeavors to provide high-quality, zealous representation to accused persons in Las Vegas, Henderson, and surrounding areas.

SPD is appointed to represent indigent clients in criminal cases, which have a potential sentence of life in prison or the death penalty, for which the CCPD cannot represent the client because of a conflict. SPD employs approximately 20 highly-trained and experienced attorneys.

NACJ is a state-wide, non-profit organization of criminal defense attorneys in Nevada. NACJ's mission is to ensure that accused persons receive effective, zealous representation through shared resources, legislative lobbying, and intra-organizational support.

As criminal defense organizations, CCPD, SPD and NACJ all have an interest in the issue pending before this Court, namely, whether a sitting member of the legislative branch of state government can prosecute criminal defendants for violations of state law under Nevada's separation-of-powers clause. Resolution of this issue will affect the rights of criminal defendants throughout Clark County who have been prosecuted by State Senators

Melanie Scheible and Nicole Cannizzaro, both prosecutors in the Clark County District Attorney's Office.

CCPD is currently litigating this same issue in the Eighth Judicial District Court in Case No. C-20-351504-1 (State v. Benjamin Ames). In Ames, CCPD filed a pretrial motion to dismiss an indictment obtained by Senator Scheible while serving as a State Senator. That motion is scheduled to be heard on April 22, 2021.

SPD has litigated a similar separation-of-powers issue via extraordinary writ in two capital cases before this Court: Raymond Padilla v. Eighth Judicial District Court (Case No. 79528), and Alonzo Perez v. Eighth Judicial District Court (Case No. 79106). The Court denied both writ petitions on the basis that an appellate remedy would be available following their convictions, leaving the issue open. And SPD intends to reassert the issue in these and additional cases following the 2021 legislative session.

NACJ members Dayvid Figler and Kristina Wildeveld are also currently litigating this issue in the Eighth Judicial District Court in Case No. C-20-351790 (State v. Kirk Bills). Bills requested pretrial relief based on a similar separation of powers violation by Senator Nicole Cannizzaro. That motion is scheduled to be heard on April 26, 2021.

Finally, the Federal Public Defender has raised a related issue in connection with a petition for writ of habeas corpus filed on behalf of Zane Floyd in Case No. A-21-832952-W, which will not be heard until June 25, 2021. A number of attorneys in the Federal Public Defender's Office are also members of NACJ.

2. Desirability of an Amicus Brief in Excess of Type/Volume Limitations.

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). 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).

The proposed brief meets both purposes. Clients of CCPD, SPD and NACJ members will be affected by a decision in the instant case, particularly those clients whose cases were identified in Section C (1), supra. Because this Court may rule on the State's Petitions in Plumlee and Molen

before any of those cases make their way up to the Supreme Court, Amici desire an opportunity to weigh in on the important constitutional issue currently pending before this Court. And where LCB has been allowed to submit an amicus brief containing 13,836 words supporting the State's Petitions, fairness dictates that criminal defense organizations have an opportunity to respond to each of LCB's arguments in support of Real Parties in Interest.

In addition, the proposed amicus brief offers a unique perspective that has not yet been presented to this Court by either party or LCB. Because Real Parties in Interest did not directly respond to the specific arguments raised in LCB's amicus brief, Amici prepared a response to each of LCB's arguments. In the proposed brief, Amici explain how LCB has improperly framed the issue before the Court by straying from the plain language of Article III, Section 1. Then, after analyzing the plain language of Article III, Section 1, the proposed amicus brief addresses each of LCB's arguments, point-by-point, and explains why they are inapplicable to the separation-of-powers issue pending before this Court.

To adequately respond to LCB's 13,836-word brief which referenced "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” (see LCB Motion at 2), it was necessary to exceed the 7,000-word type-volume limitation set forth in NRAP 21(d). However, the instant brief is significantly shorter than LCB’s amicus brief, containing just 9,604 words.

Amici agree with LCB in one respect—that the issue before this Court involves a matter of first impression and of statewide importance that warrants amicus involvement. Although Amici do not believe the issue to be as complex as presented by LCB, Amici could not adequately respond to each of LCB’s points without exceeding the type-volume limitations.

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CONCLUSION

Based upon the foregoing, CCPD, SPD, and NACJ respectfully request that this Court grant leave and accept their amicus brief in excess of type-volume limitations in support of Real Parties in Interest.

DATED this 22nd day of April, 2021.

DARIN IMLAY
CLARK COUNTY PUBLIC DEFENDER

By /s/ Deborah L. Westbrook
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 22nd day of April, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
ALEXANDER CHEN

DEBORAH L. WESTBROOK

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

RICHARD SCOTTI, ESQ.
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KEVIN C. POWERS
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BY /s/ Carrie M. Connolly
Employee, Clark County Public
Defender's Office