

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Ex Rel. AMY HARVEY,  
the duly elected County Clerk of Washoe County and  
*ex officio* Court Clerk of the Second Judicial District  
Court, Plaintiff and AMY HARVEY in her official  
capacity as Clerk of the Second Judicial District Court,  
Applicant for a Writ of Prohibition,

Plaintiff/Applicant,

vs.

THE SECOND JUDICIAL DISTRICT COURT FOR  
WASHOE COUNTY and THE HONORABLE  
CHARLES McGEE, Chief Judge, Second Judicial  
District Court; THE HONORABLE BRENT T.  
ADAMS, District Judge, Second Judicial District Court;  
THE HONORABLE JANET J. BERRY, District Judge,  
Second Judicial District Court, THE HONORABLE  
PETER I. BREEN, District Judge, Second Judicial  
District Court; THE HONORABLE STEVEN P.  
ELLIOT, District Judge, Second Judicial District  
Court; THE HONORABLE JAMES W. HARDESTY,  
District Judge, Second Judicial District Court; THE  
HONORABLE SCOTT T. JORDAN, District  
Judge, Second Judicial District Court; THE  
HONORABLE STEVEN R. KOSACH, District Judge,  
Second Judicial District Court; THE HONORABLE  
JERRY POLAHA, District Judge, Second Judicial  
District Court; THE HONORABLE DEBORAH  
SCHUMACHER, District Judge, Second Judicial  
District Court; THE HONORABLE CONNIE J.  
STEINHEIMER, District Judge, Second  
Judicial District Court,

Defendants/Respondents

No. 35144

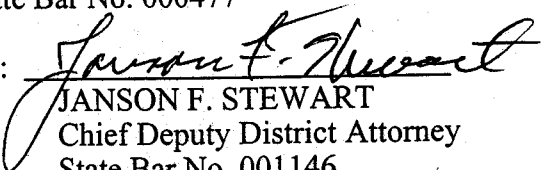
Original Proceeding Quo  
Warranto or for Writ of  
Prohibition

**BRIEF OF AMICUS CURIAE  
SHIRLEY B. PARRAGUIRRE  
(CLARK COUNTY CLERK)**

Submitted by:

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I.

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND  
STATEMENT OF THE CASE

Amicus, Parraguirre, joins in the statement of issues presented, statement of the case, and statement of facts presented in the amicus brief filed by the Nevada Association of County Clerks and County Elected Officials.

II.

ARGUMENT

A. ARTICLE 4, SECTION 32 OF THE NEVADA CONSTITUTION REQUIRES THE DISTRICT COURT CLERK TO BE THE COUNTY CLERK.

The Nevada Constitution provides:

The Legislature shall have power to increase, diminish, consolidate or abolish the following county officers: County Clerks, County Recorders, Auditors, Sheriffs, District Attorneys and Public Administrators. The Legislature shall provide for their election by the people, and fix by law their duties and compensation. County Clerks shall be *ex-officio* Clerks of the Courts of Record and of the Boards of County Commissioners in and for their respective counties.

Nev. Const. Art. 4, § 32. The constitutional provision is clear on its face, that is, the elected county clerk shall be the court clerk in her county. She assumes this office not just in its name but in its entire function. This interpretation is supported by the Constitutional Debates, the opinions of the Attorney General's Office, the decisions of the Nevada Supreme Court, the Judicial Assessment Commission, and the previous failed Constitutional Amendments.

1. Constitutional Debates.

Article 4, Section 32 of the Nevada Constitution was originally proposed with the provision that county clerks would serve as clerks of court; however, the identical provision that the county clerks would also serve as clerks of the Board of County Commissioners was added by amendment, and the attendant debate as to the purpose of that amendment casts light on the purpose of the original identical language regarding the clerk's function as clerk

1 of court. The President *pro tem* of the Constitutional Convention stated that Article 4,  
2 Section 32 should be amended "to make the county clerks *ex officio* clerks of [the] county  
3 Boards." Debates and Proceedings in the Constitutional Convention of the State of Nevada,  
4 p. 791 (1866). Delegate McClinton then stated: "Unless we do that I think any Board of  
5 County Commissioners would have power to appoint whomsoever they pleased as clerk." *Id.*  
6 His point was that the Constitution was going to prohibit the county commissioners from  
7 appointing their own clerk. The elected county clerk would also be the clerk for the county  
8 commission. Speaking of that prohibition, the President later stated: "I know very well that  
9 they have had to provide for it by statute in California, in order to prevent the Boards of  
10 Supervisors from electing their own clerks." *Id.*

11 Delegate Banks expressed opposition: "I think it would be better to leave it as it is . . .  
12 A clerk might appoint a deputy who would be very objectionable to the Board of  
13 Supervisors, or Commissioners." *Id.* However, Delegate Banks' argument lost, because  
14 those who fashioned our Constitution wanted the clerk to have independence, even if it was  
15 objectionable to the Board.

16 After a recess the convention took up the proposed amendment again with Delegate  
17 Collins saying:

18 It is important that all the duties of this nature should be brought,  
19 as far as possible, within the range of the duties and  
20 responsibilities of the county officers regularly elected, and if we  
21 adopt a general provision that the County Clerk shall be made *ex officio* Clerk of the Board of Supervisors, there is no escape from  
the requirement, and we thus save a good deal of legislation, and  
probably much bickering in the future. (Emphasis added.)

22 *Id.* at 795. The language that establishes the county clerk as the clerk of the county  
23 commission is the same language that establishes the county clerk as the clerk of the court.  
24 Its meaning must be the same. The delegates clearly intended to prevent anyone other than  
25 the elected county clerk from performing all of the duties of clerk of the county commission  
26 and all of the duties of the courts of record. There is no escape.

27 This conclusion is reinforced by the debates surrounding another proposed  
28 amendment to Article 4, Section 32, to add the duties of Auditor to the *ex officio* duties of the

1 County Clerk. In opposition to the proposed amendment Delegate Johnson said:

2 The County Clerk is, under existing laws, the Clerk of the  
3 County, or Probate Court, but under the [judicial] system  
4 proposed, he will be *ex officio* Clerk of all the Courts which are  
5 created, except the Supreme Court . . . [W]e make the County  
6 Clerk *ex officio* clerk of a court embracing the jurisdiction of that  
7 which is now the District and the Probate Courts, thus  
8 multiplying his duties very considerably . . . In the County which  
I in part represent, we have now a County Clerk, and a Clerk of  
the District Court, separate and distinct from each other, each  
performing the legitimate duties of his own office. . . Now, we  
propose in this judicial system, to devolve upon the County  
Clerks these increased duties.

9 *Id.* at 278-279. There can be no doubt that the delegates understood and intended that the  
10 county clerk would perform all the considerable duties of the office of Clerk of Court.

11 2. Opinions of the Attorney General's Office.

12 When the Justice Courts were made courts of record, the Attorney General's Office  
13 was asked to give its opinion as to whether the clerks of the Justice Courts could be  
14 appointed by the Board of County Commissioners. The answer was "no." The Attorney  
15 General's Opinion was based on Article 4, Section 32, of the Nevada Constitution. After  
16 quoting the Constitution, the Attorney General stated: "The constitutional provision just  
17 quoted requires the county clerks of this state, by virtue of their office, to be the clerks of the  
18 courts of record for the respective courts." A.G.O. 84-19 (December 26, 1984). The  
19 Attorney General further reasoned:

20 The constitution recognizes two classes of officers, one which is  
21 created by the constitution itself, and the other which is created  
22 by statute. Where an office is created by statute, it is wholly  
23 within the control of the legislature creating it. But when an  
24 office is created by the constitution, it cannot be enlarged or  
25 lessened in scope by any statute, or filled in any other manner  
than the manner directed by the constitution. See State ex rel.  
Josephs v. Douglass, 33 Nev. 82, 93, 110 P. 177 (1910). Nev.  
Const. Art. 4, § 32 imposes a mandatory duty on the county  
clerks of this state to be *ex officio* clerks of the courts of record.  
(Emphasis added.)

26 *Id.* The Attorney General's current position as advocate is not in harmony with its previous  
27 position as impartial interpreter of the law. By our Constitution, the county clerk is the clerk  
28 ....

1 of the court and her duties as such may not be enlarged or lessened by county ordinance or  
2 court rule or opinion.

3 3. Nevada Cases.

4 The Nevada Supreme Court has had no problem with the interpretation of Article 4,  
5 Section 32, in its previous cases. "The . . . county clerk is also ex officio clerk of the district  
6 court of his county, that being a court of record. Nevada Constitution, Sec. 32, Art. IV."  
7 Mulford v. Davey, 64 Nev. 506, 512, 186 P.2d 360 (1947). The Court reached a similar  
8 conclusion in construing a statute making the secretary of state ex officio clerk of the  
9 supreme court: "[T]he secretary of state is ex officio such clerk, or is the clerk of the  
10 supreme court by virtue of his office of secretary of state." Howell v. LaGrave, 23 Nev. 373,  
11 386, 48 P.674, 675 (1897). The constitutional language is plain and its meaning evident.  
12 Only the elected county clerk may serve as district court clerk.

13 4. Judicial Assessment Commission.

14 Even this court's own Judicial Assessment Commission recognized that:

15 Under the Nevada Constitution, the County Clerk has two distinct  
16 functions, that of County Clerk and that of Clerk of the Court . . .  
17 Under our current system, the Clerk of the Court, as an elected  
official serving under the title of county clerk, is not answerable  
to the Court, yet he/she has control of the court's support staff.

18 Report of the Judicial Assessment Commission, p. 52 (1994), see Respondent's Appendix,  
19 Exhibit B. The Commission went on to recommend separation of the County Clerk and  
20 Court Clerk duties with the Court Clerk function "assigned to the court administration." Id.  
21 The Commission was careful to note, however, that the proposed division and reassignment  
22 of Court Clerk duties would require a constitutional amendment. Id. p. 52-53.

23 5. Failed Constitutional Amendments.

24 In 1977, Assembly Joint Resolution 1 was introduced, at the behest of Judge Guinan  
25 of the Second Judicial District, proposing to amend the Nevada Constitution by removing the  
26 designation of county clerks as ex officio clerks of the courts of record. See, Minutes of  
27 Assembly Committee on Government Affairs, p.2 (April 24, 1979). After considerable  
28 discussion and debate, with the judges and court administrators favoring the proposal and the

1 county clerks opposed, the resolution passed. It was then referred to the 1979 Legislature  
2 wherein it failed to gain approval. The proposed constitutional amendment that was said to  
3 be necessary in order to remove the county clerk from performing the functions of the court  
4 clerk FAILED. The implications are clear, that the county clerks and court clerks are  
5 required to be the same persons as a matter of constitutional law.

6 B. THE COURT CLERK'S DUTIES ARE INHERENT IN THE OFFICE AND  
7 CANNOT BE ALTERED UNLESS SPECIFICALLY AUTHORIZED BY THE  
8 CONSTITUTION.

9 In Josephs v. Douglass, 33 Nev. 82, 110 P. 177 (1910), the Court was confronted with  
10 the constitutional validity of an attempt by the Legislature to mandate that the Secretary of  
11 State should serve ex officio as Clerk of the Supreme Court. The Court reasoned: "It is well  
12 settled by the courts that the Legislature, in the absence of special authorization in the  
13 Constitution, is without power to abolish a constitutional office or to change, alter, or modify  
14 its constitutional powers and functions." 110 P. at 180. Furthermore, "when an office is  
15 created by the Constitution, it cannot be enlarged or lessened in scope by any statute, or be  
16 filled in any other manner than the manner directed by the Constitution." Id. quoting People  
17 v. Bollam, 182 Ill. 528, 54 N.E. 1032. In support of its conclusion, the court cited the  
18 amendment to Article 4, § 32, allowing the named county offices to be increased, diminished,  
19 consolidated or abolished by the legislature. The court reasoned that, if the Legislature  
20 already had these powers, it was unnecessary to provide them by amendment. Rather the  
21 amendment "was a clear recognition of the established legal principle, that in the absence of  
22 such constitutional authority, the Legislature was without power to deal with such offices in  
23 the manner provided in the amendment." 110 P. at 181.

24 The judges argue that Article 4, § 32, "does not purport to give the legislature power  
25 over the county clerk in her capacity as *ex officio* clerk of the court." Respondents' Answer  
26 to Application and Complaint and Motion to Dismiss, p. 2, lines 27-28. Yet, the judges rely  
27 heavily on a California case based on the opposite conclusion, that is, "that the powers and  
28 duties of the county clerk . . . in his role as ex officio clerk of the superior court, have always  
....



1 been a matter entrusted to the Legislature by our Constitution." Zumwalt v. Superior Court,  
2 49 Cal. 3d 167, 171, 260 Cal. Rptr. 545, 547, 776 P.2d 247, 249 (Cal. 1989).

3 The judges also extensively quote from Rutledge v. Workman, 175 W. Va. 375,  
4 332 S.E.2d 831 (W.Va. 1985), a case concerning the separately elected office of circuit court  
5 clerk which "[u]nlike all other county officials [was] created under . . . the judicial article."  
6 332 S.E.2d at 835. The court in Rutledge held "that by inclusion of the office of circuit clerk  
7 in our Constitution's judicial article, the framers . . . intended to place the circuit clerk within  
8 the administrative hierarchy of the judicial system." 332 S.E.2d at 836. The Nevada  
9 Constitution does not support the same conclusion, but rather the opposite conclusion, as the  
10 court clerk's office was placed in the legislative Article, not in the judicial article. Nothing in  
11 Article 6 of the Nevada Constitution makes mention of the District Court Clerk's Office.  
12 Any separation of powers argument by the district court judges is misplaced. The concept of  
13 "separation of powers" arises only out of the Constitution. It is an American constitutional  
14 device and the founders of Nevada's Constitution made it very clear that the separation of  
15 powers they had in mind was directly opposite to what the district court judges had in mind.  
16 The court clerk would be an elected county official as a check and balance on courts of  
17 record.

18 Nor may the county clerk be effectively removed from her office as court clerk by  
19 usurping its most important functions. In the context of holding unconstitutional an attempt  
20 to create an advisory board to the Board of Regents, the Court in King v. Board of Regents  
21 of University of Nevada, 65 Nev. 533, 200 P.2d 221 (1948) quoted extensively from several  
22 cases on the prohibition against altering the duties of officers created in the Constitution:

23 [T]he functions of [a constitutional] officer cannot, in whole or in  
24 part, be transferred to, or be exercised concurrently, or otherwise,  
25 by any person or officer . . . A Constitution being the paramount  
26 law of a state, . . . when the people have declared by it that  
27 certain powers shall be possessed and duties performed by a  
28 particular officer or department, their exercise and discharge by  
any other officer or department are forbidden by necessary and  
unavoidable implication. Every positive delegation of power to  
one officer or department implies a negation of its exercise by  
any other officer, department, or person. If it did not, the whole  
constitutional fabric might be undermined and destroyed. This

1 result could be as effectually accomplished by the creation of  
2 new officers and departments exercising the same powers and  
3 jurisdiction as by the direct and formal abrogation of those now  
4 existing, and, although the exercise of this power by the  
5 legislature is nowhere expressly prohibited, nevertheless they  
6 cannot do so. The people having in their sovereign capacity  
7 exerted the power and determined who shall be their [officer],  
8 there is nothing left for the Legislature to act upon.

9 65 Nev. at 556, 200 P.2d at 232, quoting Crawford v. Hastings, 10 Wis. 525. The court went  
10 on to say that "encroachment on constitutional functions cannot be justified in the guise of  
11 defining duties." 65 Nev. at 558, 200 P.2d at 233. Indeed, even in a case where the  
12 Legislature has repeatedly acted to define the duties of a constitutional officer whose duties it  
13 has no power to define, "when the inescapable meaning of the constitution is apparent from  
14 the instrument itself 'it is not then permissible to adopt any different practical construction of  
15 a constitution, however long, continued or well established, or however distinguished its  
16 authorship.' (The authorship of the Legislature.)" 65 Nev. at 567, 200 P.2d at 237, quoting  
17 University of Minnesota v. Chase, 175 Minn. 259, 220 N.W. 951, 957. The office of clerk of  
18 court is of constitutional origin, and neither the Washoe County Commission nor the Second  
19 Judicial District Judges have the power to take over the duties of the court clerk.

20 In the absence of clear constitutional authority over the district court clerks, the  
21 district judges "should cooperate with other . . . officials in the administration of court  
22 business." Nevada Judicial Code, Canon 3, C. The constitutional system of cooperation  
23 between the constitutional officers of clerk and judge has worked well in Clark County. It is  
24 not apparent why Washoe County's situation is so different as to require the judges there to  
25 co-opt rather than cooperate with the county clerk in her role as court clerk. The Constitution  
26 does not support their action, however laudable its purposes may be. Case law from other  
27 jurisdictions with different constitutional systems cannot support the absolute power the  
28 judges claim they have. The judiciary and judges are bound and limited by the Constitution  
to the same degree as any other branch or officer created by the Constitution. Their power to  
interpret that document must not be abused to extend their powers beyond those expressly  
vested in them by the people. As this court has previously stated:

1 It is our duty to maintain the supremacy of the Constitution. The  
2 courts must be wary not to tread upon the prerogatives of other  
3 departments of government or to assume or utilize any undue  
4 powers. If this is not done, the balance of powers will be  
5 disturbed and that cannot be tolerated for the strength of our  
6 system of government and the judiciary itself is based upon that  
7 theory.

8 Galloway v. Truesdell, 83 Nev. 13, 31, 422 P.2d 237, 249 (1967).

### 9 III.

### 10 CONCLUSION

11 The attempt by the County Commission of Washoe County and District Court Judges  
12 of the Second Judicial District to usurp the constitutional office of the clerk of courts by  
13 substituting persons not authorized or deputized by the elected county clerk to perform court  
14 clerk duties is constitutionally prohibited and void. The court had no more power to divest  
15 the county clerk of her constitutional function than did the county commission. The change  
16 they sought to impose without authority can only be accomplished by constitutional  
17 amendment.

18 DATED this 10<sup>th</sup> day of April 2000.

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### 29 CERTIFICATE OF COMPLIANCE

30 I hereby certify that I have read this amicus curiae brief, and to the best of my  
31 knowledge, information, and belief, it is not frivolous or interposed for any improper  
32 purpose. I further certify that this brief complies with all applicable Nevada Rules of

1 Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief  
2 regarding matters in the record to be supported by a reference to the page of the transcript or  
3 appendix where the matter relied on is to be found. I understand that I may be subject to  
4 sanctions in the event that the accompanying brief is not in conformity with the requirements  
5 of the Nevada Rules of Appellate Procedure.

6 DATED this 10<sup>th</sup> day of April 2000.

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20 **CERTIFICATE OF MAILING**

21 I hereby certify that on the 10 day of April 2000, I deposited in the United States  
22 Mail, postage prepaid, at Las Vegas, Nevada, enclosed in a sealed envelope, a copy of the  
23 above and foregoing **Brief of Amicus Curiae Shirley B. Parraguirre (Clark County**  
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