

NO. 96365-7

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent/Cross-
Petitioner,

v.

PHILLIP S. NUMRICH,

Petitioner/Cross-
Respondent.

PETITIONER'S
MOTION TO STRIKE
AMICUS CURIAE
BRIEF OF
DEPARTMENT OF
LABOR AND
INDUSTRIES

1. IDENTITY OF MOVANT

Phillip Numrich is the Petitioner and Cross-Respondent (hereafter "Petitioner").

2. STATEMENT OF RELIEF SOUGHT

Petitioner respectfully moves this Court to strike the Amicus Curiae Brief of Department of Labor and Industries

3. FACTS RELEVANT TO MOTION

On May 11, 2020, the Washington Department of Labor and Industries filed a Motion to file an Amicus Curiae Brief. On May 18, 2020, Petitioner timely filed his Objection to Motion to File Amicus Curiae Brief

of Department of Labor and Industries. On May 20, 2020, the Court informed the parties by letter that “the Chief Justice has granted the motion for leave to file an amicus curiae brief without prejudice to any motion to strike.”

4. STATEMENT OF GROUNDS FOR RELIEF SOUGHT

Petitioner filed a comprehensive 12-page objection outlining the facts and law relevant to Petitioner’s objection to the amicus brief, which Petitioner incorporates by reference and attaches hereto. In summary, Petitioner’s objection explained:

The Washington State Department of Labor and Industries (“L&I”) is the investigating agency that prepared this case for filing by the King County Prosecutor’s Office on behalf of the State of Washington. The King County Prosecutor’s Office directed L&I to investigate potential criminal charges. CP 69. Following additional investigation, L&I Officer Mark Joseph drafted a detailed Certification for Determination of Probable Cause, which constituted the sole basis for the State’s charges against Mr. Numrich. CP 5-9. Because L&I is the State’s investigating agent in this case, it is synonymous with the prosecutor. L&I – as part of the State prosecuting team – is simply not entitled to file a separate brief. *See State v. MacDonald*, 183 Wn.2d 1, 15, 346 P.3d 748 (2015)(“[p]rosecutors may not do indirectly through their investigating officers what they are prohibited from doing

directly.” *MacDonald*, 183 Wn.2d 1 at 15 (quoting *State v. Sanchez*, 146 Wash.2d 339, 359, 46 P.3d 774 (2002)).

This Court should strike the amicus brief because L&I is not a proper amicus curiae participant in these proceedings.

5. CONCLUSION

Petitioner respectfully moves this Court to strike the brief of Amicus Curiae Department of Labor and Industries.

RESPECTFULLY SUBMITTED this 8th day of June, 2020.

/s/Cooper Offenbecher
COOPER OFFENBECHER, WSBA #40690
Attorney for Petitioner/Cross-Respondent

/s/Todd Maybrow
TODD MAYBROWN, WSBA #18557
Attorney for Petitioner/Cross-Respondent

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Seattle, WA 98101
Tel.: (206) 447-9681

PROOF OF SERVICE

Sarah Conger swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 8th day of June, 2020, I filed the above Motion to Strike Amicus Curiae Brief of Department of Labor and Industries via the Appellate Court E-File Portal through which counsel listed below will be served:

Respondent's Counsel

Patrick Hinds, Senior DPA
Eileen Alexander, DPA
King County Prosecutor's Office
King County Courthouse
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Seattle, WA 98104

Amicus Curiae Counsel

Anastasia Sandstrom, AAG
Elliott Furst, AAG
WA State Attorney General's Office
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

DATED at Seattle, Washington this 8th day of June, 2020.

/s/ Sarah Conger
Sarah Conger, Legal Assistant

ATTACHMENT:

**PETITIONER'S OBJECTION TO
MOTION TO FILE AMICUS
CURIAE BRIEF OF DEPARTMENT
OF LABOR AND INDUSTRIES**

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SUPREME COURT
STATE OF WASHINGTON
5/18/2020 2:59 PM
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NO. 96365-7

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent/Cross-Petitioner.

v.

PHILLIP SCOTT NUMRICH,

Petitioner/Cross-Respondent.

PETITIONER'S OBJECTION TO MOTION TO FILE AMICUS
CURIAE BRIEF OF DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

Pursuant to RAP 10.6(d), Petitioner/Cross-Respondent Phillip Numrich objects to the Motion to File Amicus Curiae brief of the Washington State Department of Labor and Industries.

The case involves a criminal prosecution filed by the State of Washington based on an investigation completed by the Washington State Department of Labor and Industries (“WSDLI”). The State Department of Labor and Industries, as the investigating officer in this case, is an agent of the prosecutor. The State of Washington is the Respondent/Cross-Petitioner in this appeal and has filed two comprehensive briefs as allowed under the Rules of Appellate Procedure. The State should not be entitled to file yet another brief, under the guise of an amicus curiae, by its own investigating agency.

This Court should deny the Motion to File Amicus Curiae brief.

II. STATEMENT OF RELEVANT FACTS

This matter arises out of a criminal prosecution in King County Superior Court. In January 2018, the State of Washington charged Petitioner/Cross-Respondent Phillip Numrich with Second Degree Manslaughter and Violation of Labor Safety Regulation with Death Resulting, both criminal offenses. CP 1-9. The charges relate to the death of one of Mr. Numrich’s employees that occurred when a trench collapsed on a worksite in January 2016. CP 5-9. The criminal investigation was conducted by the

WSDLI. CP 3-9. The Certification for Determination of Probable Cause – which constituted the sole basis for the criminal charges filed by the State – was written by WSDLI Officer Mark Joseph. CP 5-9. The prosecutor has conceded that he directed the WSDLI to initiate the criminal investigation that led to the charges being filed. CP 69. No other investigating agencies were involved in the criminal case. Additional facts related to the relationship between the prosecutor and the WSDLI will be discussed below.

This matter consolidates four separate granted motions for direct discretionary review: Mr. Numrich’s motion for review of the trial court’s denial of his motion to dismiss manslaughter in the second degree based on the general-specific rule; Mr. Numrich’s motion for review of the trial court’s order granting the State’s motion to amend to add manslaughter in the first degree; the State’s motion for review of the trial court’s order imposing sanctions, in the form of attorney fees, against the State related to the timing of its motion to amend; and the State’s motion for review of the trial court’s order setting the amount of attorney fees awarded to Petitioner.

Oral argument is scheduled for June 25, 2020. On May 11, 2020, the State of Washington filed its Reply brief of Respondent/Cross-Petitioner. That same day, less than 30 minutes later, the WSDLI filed its “Motion to File Amicus Curiae Brief Department of Labor & Industries” accompanied by a “Brief of Amicus Curiae Department of Labor and Industries.”

III. DISCUSSION

A. RAP 10.6

RAP 10.6(a) provides that “[t]he appellate court may on motion grant permission to file an amicus curiae brief only if all parties consent, or if the filing of the brief would assist the appellate court.” “The rule seeks to minimize the abuses sometimes associated with amicus curiae briefs.” 3 Wash. Prac., Rules Practice RAP 10.6 (8th ed.). This Court has granted motions to strike amicus briefs that fail to comport with the rules. *See, e.g., U.S. v. Hoffman*, 154 Wn.2d 730, 735 n.3, 116 P.3d 999 (2005)(“much of the amicus brief fails to comply with RAP 10.3 and 10.6. The motion to strike is granted”); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 628 n.30, 90 P.3d 659 (2004)(granting motion to strike portions of amicus brief)(quoting *State v. Gonzalez*, 110 Wn.2d 738, 752 n. 2, 757 P.2d 925 (1988) (“we have many times held that arguments raised only by amici curiae need not be considered”)).

B. Amicus Curiae Briefs are Exclusively Reserved for Non-Parties

An amicus curiae brief is a unique vehicle that allows for the submission of briefs by those who are not parties to a lawsuit. Black’s Law Dictionary defines amicus curiae as:

Someone who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.

AMICUS CURIAE, Black's Law Dictionary (11th ed. 2019). Here, the State of Washington is the plaintiff in the underlying criminal case, and the Respondent/Cross-Petitioner on appeal. The State of Washington is also the party seeking permission to file an amicus brief. Moreover, in this particular case, there can be no claimed distinction drawn between “the State of Washington” and the “Washington State Department of Labor and Industries” because the WSDLI is the investigating officer in this case.

a. The Investigating Officer (“IO”) is an Agent of the Prosecutor

In *State v. MacDonald*, 183 Wn.2d 1, 346 P.3d 748 (2015), this Court addressed the agency relationship between the prosecutor and the investigating law enforcement agency. MacDonald was charged with first degree murder in 2010 for a cold case homicide occurring in 1978. *Id.* at 5. During trial, plea negotiations ensued that resulted in MacDonald pleading guilty to second degree manslaughter under an agreement in which the State would recommend a five-year suspended sentence. *Id.* at 6. At sentencing, the prosecutor informed the Court that the detective wished to speak on behalf of the victim as a “victim’s advocate.” *Id.* The detective addressed the court, over MacDonald’s objection, and immediately asked the court to impose the

maximum sentence. *Id.* The detective attacked each of the points raised by MacDonald in favor of the plea agreement and “implored the court, speaking as a cold case detective, to hold someone accountable for this crime.” *Id.* at 7. The trial court imposed the maximum sentence. *Id.* MacDonald moved to withdraw his guilty plea based on a violation of the plea agreement. *Id.*

On appeal, this Court held that “an investigation officer (IO) could not undermine the prosecution’s plea bargain.” *Id.* at 9 (*citing State v. Sanchez*, 146 Wn.2d 339, 370, 46 P.3d 774 (2002)). This Court carefully analyzed the agency relationship between the prosecutor’s office and the investigative law enforcement agency:

In outlining the relationship between the IO and the prosecutor's office, the legislature created a relationship where “ ‘[a] prosecuting attorney is dependent upon law enforcement agencies to conduct the necessary factual investigation which must precede the decision to prosecute.’ ” *Id.* at 361, 46 P.3d 774 (Madsen (Madsen, J., dissenting) (quoting former RCW 9.94A.440(2)(b)(i)). The statutory scheme enables the prosecutor's office to direct the activities of law enforcement: IOs must fully apprise the prosecution of their investigative techniques, the prosecutor may “ ‘insist upon further investigation,’ ” and the prosecutor may “ ‘specify what that investigation needs to include.’ ” *Id.* (quoting former RCW 9.94A.440(2)(b)(i)). Based on these statutory duties, we reaffirm the holding in *Sanchez* that IOs function as a substantial arm of the prosecution.

MacDonald, 183 Wn.2d at 14.¹

¹ In *MacDonald*, this Court clarified the previously-misconstrued holding of *Sanchez*: “five justices held that an IO is an investigating arm of the prosecutor and therefore may not

This Court concluded that the detective was acting as a substantial arm of the prosecution:

Applying these principles to *MacDonald*, we hold that Detective Tompkins was acting in the role of substantially assisting the prosecution. Tompkins initiated the investigation, he personally pursued the investigation, and his affidavit of probable cause resulted in charges being filed against MacDonald. The prosecutor intended to have Tompkins sit at counsel's table in order to assist her during the trial. Additionally, as noted above, Tompkins was involved in the plea negotiations and copied on correspondence related to the plea agreement. An agreement to enter a plea was reached only after Tompkins and the prosecutor discussed the issue at length. Based on these facts, we conclude that Tompkins was fulfilling his statutory responsibilities and acting as a substantial arm of the prosecution.

MacDonald, 183 Wn.2d at 14–15.

This Court rejected the State's claim that the detective could address the court under the guise of a "victim's advocate": "We now hold that RCW 9.94A.500 does not permit an IO serving as a victim's advocate in court to make a recommendation that undermines the plea agreement." *MacDonald*, 183 Wn.2d at 17. Ultimately, this Court concluded: "Washington law recognizes that '[p]rosecutors may not do indirectly through their investigating officers what they are prohibited from doing directly.'" *MacDonald*, 183 Wn.2d 1 at 15 (*quoting Sanchez*, 146 Wn.2d at 359 (Chambers, J., concurring/dissenting)).

undermine a plea agreement. This is the holding of the *Sanchez* court, and we adhere to it today." *MacDonald*, 183 Wn.2d at 14.

b. The WSDLI is the Prosecutor's Agent Because WSDLI is the Investigating Officer in this Case

The Washington Department of Labor and Industries is the Investigating Officer ("IO") in this case and is therefore the prosecutor's agent.

The State has acknowledged that, from the outset, it directed the WSDLI criminal investigation that led to the filing of charges:

the case was presented to the King County Prosecuting Attorney's Office (KCPAO) as a potential criminal matter. KCPAO concluded that Numrich had potentially committed criminal violations of the law and WSDLI reopened its investigation.

CP 69 (State's Response to Defendant's Motions to Dismiss Count 1). After the criminal investigation was concluded, the WSDLI, through Officer Joseph, authored the Certification for Determination of Probable Cause that formed the basis of the criminal charges filed by the State:

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

I, MARK JOSEPH, am a Certified Safety and Health Officer with the Washington State Department of Labor and Industries ("WSDLI") based out of Bellingham Washington. I am authorized under RCW 49.17 to conduct investigation of workplaces for safety violations, and may under section .070 of the same title and chapter require the attendance and testimony of witnesses and the production of evidence under oath. As such, I have reviewed investigation documents for WSDLI Inspection No. 317939264. I have also conducted an additional investigation in conjunction with the Washington State Office of the Attorney General.

Based upon my review and additional investigation, I declare that the following is true and correct:

CP 5. The Certification then proceeded to outline, over four and a half pages, the detailed investigatory efforts of the WSDLI. CP 5-9. Officer Joseph outlined numerous witness interviews he conducted, records he reviewed, and other analysis he completed as part of the investigation. Officer Joseph signed the Certification for Determination of Probable Cause on behalf of the State:

Based on all of the above, there is probable cause to believe that Phillip Numrich committed the crime of Manslaughter in the Second Degree within King County in the State of Washington. There is also probable cause to believe that Phillip Numrich committed the crime of Violation of Labor Safety Regulation with Death Resulting within King County in the State of Washington in violation of RCW 49.17.190.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to the best of my knowledge. Signed and dated by me this 5th day of JANUARY 2018, at BELLINGHAM, Washington.



Mark Joseph, Certified Safety Health Officer
Washington State Department of Labor & Industries

CP 9. Officer Joseph's Certification constituted the sole basis for the criminal charges filed by the State against Mr. Numrich. *See generally* CP 1-9. The prosecutor explicitly incorporated by reference Officer Joseph's Certification as its own case summary and for the purpose of the bail request:

CAUSE NO. 18-1-00255-5 SEA

PROSECUTING ATTORNEY CASE SUMMARY AND REQUEST FOR BAIL AND/OR
CONDITIONS OF RELEASE

The State incorporates by reference the Certification for Determination of Probable Cause prepared by Mark Joseph of the WA State Department of Labor and Industries for case number 317939264.

CP 3.

Personnel from the WSDLI worked closely with the prosecutor during the lower court proceedings and were present at numerous court hearings in the superior court. *See, e.g.* CP 1149 (court minutes reflecting presence of WSDLI at March 21, 2018 motion hearing); VRP 23 (prosecutor advising superior court at the beginning of the July 19, 2018 hearing on the motion to dismiss that personnel from the WSDLI were present). The State also presented numerous affidavits from WSDLI personnel. Supplemental Clerk's Papers ____ (State's Motion to Impose Conditions of Release, Appendices F-H (Declarations of WSDLI Officer Mark Joseph, and employees Erich Smith and Ryan Olsen)).

The “phrase ‘amicus curiae’ means, literally, ‘friend of the court.’” *United States v. Gotti*, 755 F.Supp. 1157, 1158 (S.D.N.Y. 1991). The *Gotti* court considered the role of amicus curiae in evaluating an amicus motion filed by a civil rights organization to clearly aid the criminal defendant:

Rather than seeking to come as a “friend of the court” and provide the court with an objective, dispassionate, neutral discussion of the issues, it is apparent that the [amicus curiae] has come as an advocate for one side, having only the facts of one side at the time. In doing so, it does the court, itself and fundamental notions of fairness a disservice. Chief Judge Aldrich cautioned in *Strasser v. Doorley* [432 F.2d 567 (1st Cir. 1970)], that it “may be thought particularly questionable” for the court to accept an *amicus* when it

appears that the parties are well represented and that their counsel do not need supplemental assistance and where the joint consent of the parties to the submission by the *amicus* is lacking. 432 F.2d at 569. That observation is precisely applicable here.

Gotti, 755 F.Supp. at 1159 (denying civil rights organization's motion to file amicus curiae brief where it was apparent that the organization came as an advocate for the criminal defendant). Similarly, in Mr. Numrich's case, the proffered amicus brief is a recapitulation of the State's arguments by a partial advocate.

The State of Washington is the plaintiff in this criminal case and the State's investigator is the Washington State Department of Labor and Industries. As in *MacDonald*, the WSDLI is clearly an agent of the prosecutor. Amicus curiae briefs are intended for persons who are not parties to the lawsuit. Here, the WSDLI is clearly a substantial arm of the State prosecuting authority. The WSDLI, as the State agency on whose behalf the criminal case was filed, is also "the State." Given the circumstances of this case, the WSDLI is not a proper participant as an amicus curiae.

C. This Case Does Not Involve the Interpretation of a WSDLI Rule

WSDLI cites *Washington Cedar & Supply Co., Inc. v. State, Dep't of Labor & Indus.*, 137 Wn.App. 592, 599, 154 P.3d 287 (2007) for the proposition that "deference to L&I interpretation of a WISHA rule is

appropriate”). Motion to File Amicus Brief at 2. But WSDLI distorts the holding of *Washington Cedar*, which addressed the interpretation of WAC 296-155-24510, an administrative regulation. *Id.* at 598. By definition, the provision in question was an “agency regulation” that had been created by the agency itself. *Id.* Accordingly, the Court of Appeals held that “deference to the Department's interpretation of its own regulation is appropriate.” *Id.* at 599.

In the instant case, however, this Court is dealing with the application of Washington’s long-standing general specific rule to the State’s concurrent prosecution of Mr. Numrich for general manslaughter and pursuant to RCW 49.17.190(3), statutes that were enacted by the legislature. This case does not involve the interpretation of any administrative regulations, and therefore the opinion of the WSDLI – which is the investigating officer in this case – is not afforded any deference.

IV. CONCLUSION

The Washington State Department of Labor and Industries is not a proper amicus curiae participant in these proceedings. Rather, the WSDLI is a proxy for the State of Washington, the plaintiff below and the Respondent/Cross-Petitioner in this appeal. The State of Washington has already filed a 57-page Brief of Respondent/Cross-Petitioner, for which it obtained permission to file an overlength brief, and a 20-page Reply brief.

The State's further effort to file another 20-page brief, styled as an amicus brief, is improper.

Accordingly, for the foregoing reasons, Petitioner Phillip Numrich respectfully objects to the State's motion to file an amicus brief.

RESPECTFULLY SUBMITTED this 18th day of May, 2020.

ALLEN, HANSEN, MAYBROWN & OFFENBECHER, P.S.
Attorneys for Petitioner/Cross-Respondent

/s/ Cooper Offenbecher
COOPER OFFENBECHER
WSBA #40690

/s/ Todd Maybrow
TODD MAYBROWN
WSBA #18557

PROOF OF SERVICE

Sarah Conger swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 18th day of May, 2020, I filed the above Objection to Brief of Amicus via the Appellate Court E-File Portal through which Respondent's counsel listed below will be served:

Patrick Hinds, Senior DPA
Eileen Alexander, DPA
King County Prosecutor's Office
King County Courthouse
516 Third Avenue, W554
Seattle, WA 98104

And e-mailed to Petitioner Phillip Numrich.

DATED at Seattle, Washington this 27th day of March, 2020.

Sarah Conger
Sarah Conger, Legal Assistant

ALLEN, HANSEN, MAYBROWN, OFFENBECHER

June 08, 2020 - 3:33 PM

Transmittal Information

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