



WASHOE COUNTY

PUBLIC DEFENDER

350 S. CENTER ST.
RENO, NV 89501-2103
(775) 337-4800
(800) 762-8031
FAX (775) 337-4856
www.washoecounty.us/defender

June 6, 2019

James W. Hardesty, Supreme Court Justice
Supreme Court of Nevada
201 South Carson Street, Suite 201
Carson City, NV 89701-4702

Re: Commission on Statewide Rules of Criminal Procedure

Dear Justice James W. Hardesty:

During the April 22, 2019 meeting of the Commission on Statewide Rules of Criminal Procedure, a suggestion was made that Article 4, Sections 20 and 21 of the Nevada Constitution might limit or have control over the Court's inherent authority to promulgate criminal rules of procedure. We do not believe that these constitution provisions have that effect and we conclude that the Court possesses the authority to promulgate criminal rules of procedure even in the absence of a legislative grant.

Article 4, Section 20 of the Nevada Constitution—which provides as relevant here: “The legislature shall not pass local or special laws in any of the following enumerated cases – that is to say: Regulating the practice of courts of justice[.]”—and Article 4, Section 21 of the Nevada Constitution—which provides in full: “In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State.—are constitutional limitations on *legislative power*, not judicial power. See *Clean Water Coalition v. The M Resort*, 127 Nev. 301, 305, 255 P.3d 247, 250 (2011) (recognizing that “the Legislature is endowed with considerable lawmaking authority under Article 4, Section 1 of the Nevada Constitution,” but that authority “is not without some restraints” including the restraints of Article 4 Sections 20 and 21).¹

¹ A history behind the enactment of Sections 20 and 21 is found in *Clean Water Coalition* at 127 Nev. 311-12, 255 P.3d 255. Notably, the Court notes that the “purpose in adopting mandates proscribing local and special legislation was to remedy an evil into which it was supposed the territorial *legislature* had fallen in the practice of passing local and special laws for the benefit of individuals instead of enacting laws of a general nature for the benefit of the public welfare.” 127 Nev. at 311, 255 P.3d at 254 (internal quotation marks and citation omitted, italics added).

Here, read together, Article 4, Sections 20 and 21 mean that the legislature *may* pass laws regulating the practice of courts of justice, but just not in the form of “local or special laws.” Moreover, there is nothing in this constitutional language granting the Legislature *exclusive* power to regulate the practice of courts of justice.

In *State v. Second Judicial Dist. Court (Marshall)*, 116 Nev. 953, 11 P.3d 1209 (2000), the Nevada Supreme Court provided cogent reasons in support of inherent judicial power to regulate practice in courts of justice. In *Marshall* the Court addressed two challenges to Supreme Court Rule (SCR) 250; first, whether SCR 250 was in conflict with NRS 175.552(3); and second, whether only the Legislature can enact rules of criminal procedure such that the Court’s issuance of SCR 250 violated the separation of powers set forth in the Nevada Constitution.

The Court found no conflict existing between SCR 250 and the cited statute. 116 Nev. at 958-59, 11 P.3d at 1212. On the second question, which is applicable here, the Court made the following observations:

- “[C]ourts of this state have the power to make their own procedural rules. “The judiciary, of course, has the inherent power to govern its own procedures; and that power includes the right to adopt and promulgate rules of procedure. *Whitlock v. Salmon*, 104 Nev. 24, 26, 752 P.2d 210, 211 (1988).”
- “[T]his court’s procedural rules supersede any conflicting statutes.” (Citing *State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983); and SCR 249(2)).
- “Under the Nevada Constitution two departments can in some cases exercise the same power.”
- “This court has held that the Legislature has the power [under Nev. Const. art 4, §§ 20 and 21] to regulate procedure in criminal cases.” (Citing *Colwell v. State*, 112 Nev. 807, 813, 919 P.2d 403, 407 (1996)).
 - But, “the regulation of criminal procedure is a power inherently appertaining to the judicial department [and] the Legislature may exercise this function too *only* because Sections 20 and 21 of Article 4 permit it to do so.”
 - “And, to reiterate, to the extent that any legislative regulation in this area contradicts the judiciary’s exercise of its inherent power, the latter prevails.” (Italics added) (Citing *Connery*, 99 Nev. at 345, 661 P.2d at 1300).

116 Nev. at 959-61, 11 P.3d at 1212-14.

The Court rejected the State's challenge to its rule-making authority, 116 Nev. at 963, 11 P.3d at 1215, and similarly rejected the argument that NRS 2.120 somehow constrained the Court's ability to promulgate criminal procedural rules: "[T]o the extent that NRS 2.120 countenances and codifies this court's independent power to regulate judicial procedures, it is valid. To the extent that it seeks to curtail that power, it fails." 116 Nev. at 961, 11 P.3d at 1214. *Marshall's* analysis has been referenced in subsequent cases. See e.g., *Berkson v. LePome*, 126 Nev. 492, 499-501, 245 P.3d 560, 565 (2010).

Thus, because the premise that Article 4, Sections 20 and 21 delimits the power of the Court to regulate the procedural practice of the courts of this state is not supported by the constitutional text, and because there is a substantial body of case law (in addition to *Marshall*) on the inherent judicial power of the Court to regulate the procedural practice of the courts, the Court has the inherent power to promulgate a body of uniform procedural rules of practice for the district courts of this State through a rules committee, if desired.

Sincerely,



JOHN L. ARRASCADA
Washoe County Public Defender

JA:mb