

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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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 ANSWER TO PETITION FOR WRIT OF
MANDAMUS OR, IN THE ALTERNATIVE, PROHIBITION**

CRAIG A. MUELLER, ESQ.

Nevada Bar No. 4703

JOSE C. PALLARES, ESQ.

Nevada Bar No. 4020

JAY MAYNARD, ESQ.

Nevada Bar No. 14738

CRAIG A. MUELLER & ASSOCIATES

808 S. Seventh Street

Las Vegas, NV 89101

Office: 702.382.1200

receptionist@craigmuellerlaw.com

chuck@craigmuellerlaw.com

Attorneys for Real Parties In Interest

MEMORANDUM OF POINTS AND AUTHORITIES

I. Issue Presented

Whether the District Court acted arbitrarily, capriciously and exceeded its jurisdiction in holding that a deputy district attorney who is also a Nevada Senator, violated the Separation of Powers Clause of the Nevada Constitution by prosecuting real-parties-in-interest herein.

II. Procedural History and Statement of the Facts

A. Jennifer Plumlee.

Jennifer Plumlee was arrested on September 19, 2018, for suspected DUI. She retained attorney Craig A. Mueller, Esq., to handle the case. A trial was held on October 7, 2019, in Henderson Justice Court. The prosecutor was Deputy District Attorney Melanie Scheibel. Following her conviction, she appealed to the District Court. The two issues raised initially were: (1) whether the Justice Court erred in granting the State's request for a continuance of the trial, and (2) whether the results of the Intoxilyzer 8000 breath test were properly admitted. Petitioner's App. Vol. 2, p. 00152

On July 16, 2020, the District Court denied the appeal. Mr. Mueller filed a Motion to Reconsider, arguing in part that Plumlee's conviction should be vacated because DDA Scheibel's prosecution of the case violated the Separation Of Powers Clause of the Nevada constitution as DDA Scheibel also serves as a Senator in the

Nevada Legislature. The State filed a written objection to the Motion To Reconsider because Ms. Plumlee was now raising issues that were not pursued earlier in the proceedings. The District Court entertained the issue, requesting additional briefing regarding whether Plumlee had waived her separation of powers argument and whether DDA Scheible's prosecution of the case violated the Separation Of Powers Clause of the Nevada Constitution.

On November 9, 2020, the District Court filed a Minute Order vacating Plumlee's convictions on the grounds that her due process rights were violated when she was prosecuted by a deputy district attorney who also serves in the Legislature. On November 17, 2020, the State sought to clarification on two issues in the minute order. The State also requested a stay of the proceedings so that it could seek a petition for a writ of prohibition and/or mandate from the Nevada Supreme Court. On November 18, 2020, the District Court filed an Order vacating the conviction and remanding the case for a new trial. Petitioner's App. Vol. 2, pp. 00248-252. A second Minute Order addressing the State's request for clarification and denying the State's request for a stay was filed on December 15, 2020. Petitioner's App. Vol. 2, p. 00271.

The State filed the instant Petition for Writ Of Mandamus Or, In The Alternative, Prohibition on December 21, 2020. This Court issued an Order on

December 31, 2020, directing Respondent to obtain a written order memorializing the December 15, 2020 ruling. The matter had been reassigned from Department II to Department XIX. Department XIX filed its Order Denying Respondent's Motion For Clarification And Stay of the Proceedings on January 14, 2021, stating in part, that Department II's decision was "legally correct and properly based on the Nevada Supreme Court and the principle of Separation of Powers." Petitioner's App. Vol. 2, pp. 00272-73.

B. Matthew Haney Molen.

Matthew Haney Molen was arrested on March 12, 2019, for suspected Child Abuse, Neglect, Or Endangerment, and one count of DUI. He retained attorney Craig A. Mueller, Esq., to handle the case. A trial was held on December 5, 2019, in Henderson Justice Court. The prosecutor was Deputy District Attorney Melanie Scheibel. DDA Scheibel also serves as a Senator in the Nevada Legislature. After supplemental briefing by the parties, the Justice Court adjudicated him guilty on March 17, 2020.

Following his conviction, Mr. Molen appealed his case to the District Court. Among the issues raised on appeal was that DDA Scheible's prosecution of the case violated the Separation Of Powers Clause of the Nevada Constitution. Petitioner's App., p. 00152. The appeal was argued on September 17, 2020. On November 9, 2020, the District Court issued a Minute Order granting the appeal

and vacating the conviction based on the Separation Of Powers issue. Petitioner's App., p. 00176

On November 17, 2020, the State filed a Motion For Clarification and requesting a stay of the Minute Order. On November 18, 2020, the District Court filed an Order vacating the conviction and remanding the case for a new trial. Petitioner's App., p. 00232-36. A second Minute Order addressing the State's request for clarification was filed on December 15, 2020. The District Court also denied the issuance of a stay of the Order. The State now seeks a petition of writ of prohibition, or alternatively a writ of mandamus, vacating the District Court's Order.

III. Summary Of The Argument

The language of Article III, Section 1 of the Nevada Constitution clearly and unequivocally states that:

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 person 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.** (emphasis added).

The authors of the Nevada Constitution did not insert any language expressly directing or permitting a deputy district attorney to exercise her/his executive authority to enforce and implement laws while also directing or permitting the

same deputy district attorney to exercise its legislative authority as a member of the legislature. Such comingling of authority is expressly prohibited by the plain language of the Nevada Constitution.

IV. Argument

A. Standard of Review.

“[M]andamus and prohibition are extraordinary remedies, and the decision of whether a petition will be entertained lies within the discretion of this court.” *Hickey v. Eighth Judicial District Court*, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989). Extraordinary relief will not issue where the petitioner has a plain, speedy and adequate remedy in the ordinary course of law. *State v. Eighth Judicial District Court*, 134 Nev. 104, 105, 412 P.3d 18, 21 (2018). The petitioner carries “the burden of demonstrating that extraordinary relief is warranted.” *Pan v. Eighth Judicial District Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004); see also NRAP 21(a). The Nevada Supreme Court has previously emphasized the “narrow circumstances” under which mandamus is available and has cautioned that extraordinary remedies are not a means for routine correction of error. *State v. District Court (Riker)*, 121 Nev. 225, 112 P.3d 1070 (2005). Mandamus may issue to correct discretionary action if it is manifestly abused or is exercised arbitrarily or capriciously. *Office Of The Washoe County DA v. Second Judicial District Court*, 116 Nev. 629, 635, 5 P.3d 562, 566 (2000).

B. Judge Scotti Did Not Abuse His Discretion In Considering The Separation Of Powers Issue.

The general rule is that failure to preserve an error is forfeited on appeal, even when the error has been deemed structural. *Jeremias v. State*, 134 Nev. Adv. Op. 8, 412 P.3d 43, 48 (2018). However, this Court may grant writ relief “where an important issue of law needs clarification and public policy is served by this court’s invocation of its original jurisdiction.” *Business Computer Rentals v. State Treasurer*, 114 Nev. 63, 67 (1998). For example, writ relief is warranted when the petition “raises pressing issues involving the Nevada Constitution and the public policy of this state.” *Id.*

To date this Court has not addressed whether a prosecutor who simultaneously serves in the Nevada Legislature violates the separation of powers doctrine of Article 3, Section 1 of the Nevada Constitution. This purely legal issue requires the Court’s urgent resolution. A significant number of prosecutions and convictions are constitutionally suspect due to the prosecutor-legislator simultaneously carrying out functions of two branches of government. This is an issue of statewide importance. Judge Scotti recognized this when he considered the Separation of Powers issue in Ms. Plumlee’s case. Judge Scotti did not abuse his discretion when he addressed Respondent Plumlee’s challenge as it “raises pressing issues involving the Nevada Constitution and the public policy of this state.” *Id.*

In addition, District Courts are reaching conflicting decisions on whether the prosecutor's dual role violates the Separation of Powers. In *State v. Caruso*, Eighth Judicial District Court case number C-19-345393-1, the District Court denied a motion to dismiss based on Deputy District Attorney Melanie Scheibel's violation of the separation of powers doctrine. In *State v. Bills*, Eighth Judicial District Court case number C-20-351790-1, the defendant also brought a Separation of Powers challenge based on the Deputy District Attorney Nicole Cannizzaro's concurrent service in the Nevada Legislature. The hearing in that matter is currently scheduled for April 26, 2021. Absent the Court promptly resolving this issue, District Courts will continue reaching different conclusions, creating further uncertainty and confusion for both prosecutors and the accused.

C. Judge Scotti Did Not Act Arbitrarily Or Capriciously, Nor Did He Exceed His Jurisdiction, In Reversing Respondents' Convictions On Separation Of Powers Grounds.

The principle of separation of powers is fundamental to our system of governance. As the framers of the United States Constitution recognized, "[t]he accumulation of all powers, legislative executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." James Madison, *The Federalist Papers* No. 47. The framers sought to minimize this threat to democracy by separating legislative, executive and judiciary authority into three,

co-equal branches of government, positioning the branches to serve as a check on the others with each branch “in their proper places.” Alexander Hamilton or James Madison, *The Federalist Papers* No. 51. The founders believed that this structural design placed vital structural barriers on the power of those governing us who, after all, are merely human: “If angels were to govern men, neither external nor internal controls on government would be necessary.” Id.

Time and again, this Court has emphasized the foundational importance of the separation of powers to our system of government. “The division of powers is probably the most important single principle of government declaring and guaranteeing the liberties of the people.” *Galloway v. Truesdell*, 83 Nev. 13, 18, 422 P.2d 237, 241 (1967).

Article III, Section 1(1) of the Nevada Constitution states:

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 person 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.** (emphasis added).

“As with the United States Constitution, the structure of our state’s constitution gives rise to the separation of powers doctrine through its ‘discrete treatment of the three branches of government’. But ‘Nevada’s Constitution goes farther; it contains an express provision prohibiting any one branch of government

from impinging on the functions of another’.” *State v. Second Judicial District Court*, 134 Nev. Adv. Op. 96, 432 P.3d 154, 158 (2018), quoting, *Comm’n On Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103 (2009). In *State v. Second Judicial District Court*, this Court considered a challenge to NRS 176A.290(2) which required the State, through its deputy district attorney in Washoe County, to stipulate to a defendant’s assignment to veteran’s court before the defendant could be eligible for that program. *Id.* at 157. This Court, like the District Court, found that such a requirement violated Article 3, Section 1(1) as it gave the executive veto power over a judicial function. Once the legislature gave the judiciary the authority to assign a defendant to veteran’s court, the decision to assign a defendant to veteran’s court became a sentencing decision. The fact that the executive, through the district attorney, could veto that decision by not stipulating to the assignment violated separation of powers. *Id.* at 159. Thus, this Court recognized in *State v. Second Judicial District Court* and *Comm’n On Ethics v. Hardy*, that Article 3, Section 1 expressly prohibits any person “charged with the exercise of powers properly belonging to one of these departments” from exercising any function appertaining to either of the other branches. The language of the Nevada Constitution is clear and unambiguous.

The framers of the Nevada Constitution did carve out an exception to what is a *prima facie* prohibition on working as a member of the legislative and executive

branches of state government simultaneously. That exception is found in the last phrase of Article 3, Section 1(1): “...*except in the cases expressly directed or permitted in this constitution.*” The plain language of Article 3, Section 1(1) authorizes an individual to work for two branches of government if the Legislature either: 1) amends the constitution, or 2) passes constitutionally valid legislation enabling an individual to work for two branches of government simultaneously. This interpretation is harmonious with the Nevada Supreme Court’s reasoning in *Heller v. Legislature of Nevada* that Article 4, Section 6 of the Nevada Constitution “...expressly reserves to the Senate and Assembly the rights to extend, with and withdraw membership status.” *Heller v. Legislature of Nevada*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004).

In *Heller* the Nevada Supreme Court ruled that the Secretary of State did not have standing to sue the Legislature to remove executive branch employees from serving on the Legislature because doing so violates the separation of powers doctrine. The Supreme Court held that Secretary Of State Dean Heller did not state an actionable “claim or controversy”. *Id.* at 463. The Supreme Court further held that since there were no executive branch employees actually seated in the Legislature, the matter was not ripe for review. *Id.*

By contrast, Respondents were actually aggrieved by the fact that they were

convicted after a bench trial that should never have happened. Deputy DA Scheible, as a member of the Legislature, may not exercise executive authority by criminally prosecuting individuals without some constitutional or statutory exception to Article 3, Section 1's clear prohibition. Currently the Legislature has not enacted such an exception pursuant to Article 3, Section 1(1). Until the Senate and Assembly authorize dual service, the practice is expressly prohibited by Article 3, Section 1(1). Because of that the trial was a nullity. If the member of one branch exercises a function that belongs to another, that action is constitutionally invalid. See, *Del Papa v. Steffen*, 112 Nev. 369, 383, 915 P.2d 245, 254 (1996) (invalidating a Supreme Court Justice's exercise of executive authority).

D. The Argued Distinction Between A "Public Officer" And A "Public Employee" Does Not Alter The Separation Of Powers Analysis.

Both Petitioner and the Legislative Counsel Bureau, Legal Division, argue that there is a distinction between a public office and a public employee for purposes of Separation of Powers analysis. Petition, pp.11-12; LCB Amicus Brief, p. 9. Petitioner argues that "NRS 252.070(1) makes it clear that a deputy district attorney only serves under the district attorney and does not hold a public office by virtue of prosecuting cases." Petition, p. 11. Put more concretely, Petitioner's argument is that District Attorney Steven Wolfson, as an elected official exercising executive functions, is prohibited by the Separation of Powers doctrine from

serving as a legislator, but Chief Deputy District Attorney Melanie Sheibel, as a mere public employee, is not.

This attempted distinction between a public officer and a public employee ignores the reality of the relationship between the public office (Clark County District Attorney Steven Wolfson) and the public employee (Chief Deputy District Attorney Melanie Sheibel). The distinction LCB makes is that a public officer (the Clark County District Attorney) makes public policy, whilst a public employee (Chief Deputy District Attorney Melanie Scheibel) merely administrates those policies and enforces the statutes as written. LCB Amicus Brief, p.9. This argument ignores the reality of the current situation. Rather than a mere academic exercise, we need only look at what is occurring right now in the Legislature for a concrete example of how the dual role of deputy district attorney and legislator violates the Separation of Powers doctrine.

AB395, which in part would eliminate the death penalty in Nevada, cleared a vote in the Assembly on April 9, 2021. It has now passed to the Senate where its continued existence lies squarely in the hands of Chief Deputy District Attorney Melanie Scheibel in her role as chairwoman of the Senate Judiciary Committee.

Speaking as they left the Senate floor Tuesday, Majority Leader Nicole Cannizaro and her fellow Las Vegas Democrat Sen. Melanie Scheibel, who chairs the Judiciary committee, would not commit that the bill would get a hearing in their chamber. Both are prosecutors in Clark County, where District Attorney Steve Wolfson has been

outspoken in his support for keeping the death penalty.

Assembly Oks bill to end death penalty, *Las Vegas Review Journal*, April 14, 2021, page 1A, 10A. In testimony presented to the Assembly Judiciary Committee, Clark County District Attorney Steven Wolfson made his, and his office's, position on abolishing the death penalty in Nevada abundantly clear.

'If we abolish the death penalty and a person who is convicted of first-degree murder can only be sentenced in two ways—life with or without the possibility of parole—that's not right,' Wolfson told the Assembly Judiciary Committee last month.

Id. Regardless of whether or not AB395 is ultimately brought to a vote in the Senate Judiciary Committee is irrelevant to the question of separation of powers. The point is that the executive branch currently is in a position to legislate.

NRS Chapter 252 conveys policymaking authority on the principal prosecutor. NRS 252.070(1) explicitly states: "The appointment of a deputy district attorney must not be construed to confer upon that deputy policymaking authority for the office of the district attorney or the county by which the deputy district attorney is employed."

In the case at bar, the deputy district attorney is not in a position to make policy for the office of the district attorney. Rather, the deputy district attorney here *is* in the position of imposing the policies of her employer, the Clark County District Attorney, not just on Clark County, *but on the entire State of Nevada*. The deputy district attorney here is in a position to set the legislative agenda for the

entire state by simply killing any bill before the Senate Judiciary Committee that is not in line with the policies or preferences of her employer, the Clark County District Attorney. This is clearly the executive branch exercising legislative authority and clearly violates Article 3, Section 1(1) of the Nevada Constitution.

The Legislative Counsel Bureau argues that under Article 4, Section 32 of the Nevada Constitution, because the office of the district attorney is a county office, Nevada's district attorneys are not state officers of the executive branch. LCB Brief, p. 6, citing *Lane v. Second Judicial District Court*, 104 Nev. 427, 437 (1988) and *In re Contested Election of Mallory*, 128 Nev. 436, 439 (2012). “[I]n Nevada, principal district attorneys ‘are final policymakers for the local government in a particular area, or on a particular issue’.” *Webb v. Sloan*, 330 F.3d 1158, 1165 (9th Cir. 2003), quoting *McMillan v. Monroe County*, 520 U.S. 781, 785, 138 L. Ed., 117 S. Ct. 1734 (1997). The Ninth Circuit held that NRS 252.070(1) confers that same authority on deputy district attorneys as well. *Id.*

Returning to the case at bar, the Clark County District Attorney is the final policymaker for enforcing the laws within Clark County. This authority extends to deputy district attorneys as well. But by her service in the Senate Chief Deputy District Attorney Melanie Scheibel, and by extension District Attorney Steven Wolfson, are extending their office's policymaking authority far beyond the

parameters authorized by NRS 252.070(1). Rather, they are now in a position to be the policymaker for *the entire state of Nevada by controlling the legislative agenda*. Any bills, not just those that deal with criminal justice, that reach the Senate Judiciary Committee that do not comport with the policies or preferences of the Clark County District Attorney can be killed by Chief Deputy District Attorney Melanie Scheibel by simply not bringing it to a vote. Not only is this a *de facto* legislative, not executive, function, but it is an impermissible extension of the authority conferred by NRS 252.070(1). Her actual role far exceeds that of a mere “public employee” with no policymaking authority.

CONCLUSION

Based on the foregoing arguments, Real Parties In Interest Jennifer Plumlee and Matthew Haney Molen respectfully submit that the State of Nevada’s Petition For Writ Of Mandamus Or, In The Alternative, Prohibition, must be DENIED.

DATED this 15th day of April, 2021.

By: Craig A. Mueller
CRAIG A. MUELLER, ESQ.
Nevada Bar No. 4703
CRAIG A. MUELLER & ASSOCIATES
808 S. Seventh Street
Las Vegas, NV 89101
Office: 702.382.1200
receptionist@craigmuellerlaw.com
chuck@craigmuellerlaw.com
Attorneys for Real Parties In Interest

DECLARATION

I certify that the information provided in this mandamus petition is true and complete to the best of my knowledge, information and belief.

DATED this 15th day of April, 2021.

By: Craig A. Mueller

CRAIG A. MUELLER, ESQ.

Nevada Bar No. 4703

CRAIG A. MUELLER & ASSOCIATES

808 S. Seventh Street

Las Vegas, NV 89101

Office: 702.382.1200

receptionist@craigmuellerlaw.com

chuck@craigmuellerlaw.com

Attorneys for Real Parties In Interest

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(9) because this brief has been prepared in a proportionally spaced typeface, double spaced, using Microsoft Word For Apple 2011 Version 14.4.7 in 14 point font of the Times New Roman style.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 21(d) because, excluding the parts of the writ answer exempted by 32(a)(7)(C), it is double spaced, has a typeface of 14 points or more and contains 4144 words.
3. Finally, I hereby certify that I have read this appellate writ answer, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 15th day of April, 2021.

By: Craig A. Mueller
CRAIG A. MUELLER, ESQ.
Nevada Bar No. 4703
CRAIG A. MUELLER & ASSOCIATES
808 S. Seventh Street
Las Vegas, NV 89101
Office: 702.382.1200
receptionist@craigmuelllaw.com
chuck@craigmuelllaw.com
Attorneys for Real Parties In Interest

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of Craig A. Mueller & Associates, and that on the 16th day of April, 2021, pursuant to NRAP 25 and NEFCR 9, I filed and served a true and correct copy of the Answer To Petition For Writ Of Mandamus Or In The Alternative, Prohibition, by means of the Nevada Supreme Court's electronic filing system, directed to:

STEVEN B. WOLFSON

Clark County District Attorney

ALEXANDER CHEN

Attorney General

Chief Deputy District Attorney

Office Of The Clark County District Attorney

200 E. Lewis Ave.

Las Vegas, NV 89155

Alexander.Chen@clarkcountyda.com

Attorneys for Petitioner State of Nevada

AARON D. FORD

Nevada Attorney General

Office of the Nevada

100 N. Carson St.

Carson City, NV 89701

Attorneys for Petitioner

State of Nevada

KEVIN C. POWERS

General Counsel

Legislative Counsel Bureau, Legal Division

401 S. Carson St.

Carson City, NV 89701

kpowers@lcb.state.nv.us

Attorneys for the Legislature of the State of Nevada

By: /s/ Rosa Ramos

Rosa Ramos, Office Manager

Craig A. Mueller & Associates