

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.)

Electronically Filed
Apr 22 2021 10:58 a.m.
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

**BRIEF OF AMICI CURIAE CLARK COUNTY PUBLIC DEFENDER,
CLARK COUNTY SPECIAL PUBLIC DEFENDER AND NEVADA
ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF REAL
PARTIES IN INTEREST**

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii-vi

IDENTITY OF AMICI CURIAE & STATEMENT OF INTEREST.. 2

ARGUMENT..... 5

I. The Court should affirm the district court’s rulings because Senator Schieble violated Article III, Section 1 of the Nevada Constitution when she exercised a function appertaining to the state’s executive department by prosecuting criminal cases on behalf of the State of Nevada..... 6

A. Article III, Section 1 applied to Senator Schieble as she was charged with the exercise of the legislative department’s powers as a sitting state senator.....8

B. Prosecuting crimes on behalf of the State of Nevada is a function appertaining to the state’s executive department..... 9

C. Because Senator Schieble was barred from performing any functions appertaining to the state’s executive department, the prosecutions were a nullity pursuant to Article III, Section 1 of the Nevada Constitution.....15

II. Whether Nevada’s Constitution prohibits state legislators from holding positions of “public employment” with local governments is not an issue for this Court to decide; rather, this Court must decide whether a criminal prosecution is a function appertaining to the executive branch of state government.....16

A. Deputy district attorneys’ status as “county employees” is irrelevant to the issue of whether criminal prosecution is a state executive function.....17

B. Whether separation-of-powers doctrine protects “political subdivisions” is irrelevant to the question of whether criminal prosecution is a state executive function.....21

<i>C. Historical evidence of dual employment in “Federal Government and Congress” is irrelevant to whether criminal prosecution is a state executive function.....</i>	<i>26</i>
<i>D. Historical evidence of dual employment in California after 1864 is irrelevant to whether criminal prosecution is a state executive function.....</i>	<i>30</i>
<i>E. Historical evidence of dual employment in Nevada does not affect this Court’s analysis either.....</i>	<i>34</i>
<i>F. Case law from other jurisdictions demonstrates why the officer/employee distinction is irrelevant and the meaning of the word “functions” is key.....</i>	<i>37</i>
<i>G. The word “functions” is not limited to actions that are, in fact, taken by an officer of a branch of government, but applies to all actions that could be taken by an officer or deputy.....</i>	<i>41</i>
CONCLUSION.....	45
CERTIFICATE OF COMPLIANCE.....	46
CERTIFICATE OF SERVICE.....	47

TABLE OF AUTHORITIES

Cases

<u>Buckley v. Valeo</u> , 424 U.S. 1 (1976).....	30
<u>Burgoyne v. Board of Supervisors of the County of San Francisco</u> , 5 Cal. 9, (1855).	31
<u>Chenoweth v. Chambers</u> , 164 P.428 (Cal. Dist. Ct. App. 1917).	31
<u>City of Fernley v. State Dep’t of Tax’n</u> , 132 Nev. 32 (2016).....	21
<u>City of Reno v. Washoe Co.</u> , 94 Nev. 327 (1978).....	22
<u>City of Sparks v. Sparks Mun. Ct.</u> , 129 Nev. 348 (2013).....	6, 23
<u>Commission on Ethics v. Hardy</u> , 125 Nev. 285 (2009).....	30
<u>Compare Powers v. United Servs. Auto. Ass’n</u> , 115 Nev. 38 (1999)	4
<u>Del Papa v. Steffen</u> , 112 Nev. 369 (1996)	8, 15
<u>Dow Chem Co. v. Mahlum</u> , 115 Nev. 13 (1999).....	4
<u>Halverson v. Miller</u> , 124 Nev 484 (2008).....	34
<u>Heckler v. Chaney</u> , 470 U.S. 821 (1985).....	10
<u>Humphrey’s Executor v. United States</u> , 295 U.S. 602 (1935).....	26
<u>Hunter v. Pittsburgh</u> , 207 U.S. 161 (1907)	23
<u>In re Contested Election of Mallory</u> , 128 Nev. 436 (2012).....	17
<u>Lane v. Second Judicial Dist. Ct.</u> , 104 Nev. 427 (1988)	17, 18

<u>McGirt v. Oklahoma</u> , 140 S. Ct. 2452 (2020).....	36
<u>Mistretta v. United States</u> , 488 U.S. 361 (1989).....	26, 28
<u>Monaghan v. School Dist. No. 1</u> , 315 P.2d 797 (Or. 1957).	40
<u>Morrison v. Olson</u> , 487 U.S. 654 (1988)	10
<u>Nevada Mining Ass’n v. Erdoes</u> , 117 Nev. 531 (2001).....	35
<u>Nunez v. City of N. Las Vegas</u> , 116 Nev. 535 (2000).....	25
<u>People ex rel. Att’y Gen. v. Provines</u> , 34 Cal. 520 (1868)	31
<u>People v. Provines</u> , 34 Cal. 520 (1968)	25
<u>People v. Salomon</u> , 212 N.Y. 446 (1914).....	39
<u>Righetti v. Eighth Judicial Dist. Ct.</u> , 133 Nev. 42 (2017).....	11, 21
<u>Saint v. Allen</u> , 126 So. 548 (La. 1930)	39
<u>Schoels v. State</u> , 114 Nev. 981 (1998).....	11, 21
<u>Secretary of State v. Burk</u> , 124 Nev. 579 (2008).....	6
<u>State ex rel. Black v. Burch</u> , 226 Ind. 445 (1948)	38
<u>State ex rel. Coffin v. Howell</u> , 26 Nev. 93 (1901).....	35
<u>State ex rel. Harvey v. Second Judicial Dist. Court</u> , 117 Nev. 754 (2001) .	11,
21, 30	
<u>State ex rel. Kendall v. Cole</u> , 38 Nev. 215 (1915).....	42
<u>State ex rel. Mason v. Bd. of Cnty. Comm’rs</u> , 7 Nev. 392 (1872)	24

<u>State ex rel. Mathews v. Murray</u> , 70 Nev. 116 (1953)	42
<u>State ex rel. Spire v. Conway</u> , 472 N.W.2d 403 (Neb. 1991).....	40
<u>State v. Second Judicial District Court (Hearn)</u> , 134 Nev. 783 (2018)	20
<u>Strickland v. Waymire</u> , 126 Nev. 230 (2010).....	6
<u>U.S. v. Khanu</u> , 664 F.Supp.2d 28 (D.C. 2009).....	10
<u>United States v. Nixon</u> , 418 U.S. 683 (1974)	10
<u>Univ. & Cmty. Coll. Sys. v. DR Partners</u> , 117 Nev. 195 (2001).....	25
<u>Waller v. Florida</u> , 397 U.S. 387 (1970)	25
<u>We the People Nev. v. Miller</u> , 124 Nev. 874 (2008)	6
<u>Webb v. Sloan</u> , 330 F.3d 1158 (9th Cir. 2003).....	17, 18, 19

Misc. Citations

18 U.S.C. § 431	29
42 U.S.C. § 1983	19, 25, 44
La. Const. Ann. art. II, § 1	39
La. Const. Ann. art. II, § 2	39
Nev. Const. art. III, § 1	5, 6, 7, 9, 18
Nev. Const. art. V, § 14.....	12, 13, 14
Nev. Const. art. V, § 22.....	12, 13

NRAP 29	5
NRAP 32.	5
<u>The Federalist</u> No. 47.....	26, 30
<u>The Federalist</u> No. 76.....	29
U.S. Const. art. I § 6, cl. 2.....	29

Statutes

NRS 169.055	14
NRS 176A.290	20
NRS 228.080	13, 14, 43
NRS 228.125	14, 43
NRS 228.140	13, 15
NRS 252.070	43
NRS 252.080	43
NRS 252.090	43
NRS 281.005	25

IDENTITY OF AMICI CURIAE & STATEMENT OF INTEREST

The Clark County Public Defender's Office (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.

The Clark County Special Public Defender's Office (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.

Nevada Attorneys for Criminal Justice (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. This includes the filing of Amicus Curiae Briefs pertaining to (1) state and federal constitutional issues; (2) other legal matters with broad applicability to accused persons; and (3) controversies with potential to impact our members' ability to advocate effectively for accused persons.

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 engage in the state executive function of prosecuting criminal defendants for violations of state law pursuant to Article III, Section 1 of Nevada's Constitution. 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.

CCPD is currently litigating the same separation-of-powers issue in the Eighth Judicial District Court in Case No. C-20-351504-1 (State v. Benjamin Ames). See Exhibit A (Ames Motion to Dismiss). 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). See Exhibit B (Bills Motion). 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. See Exhibit C (Floyd Motion).

Because this Court may decide Plumlee and Molen before any of the above cases make their way up to the Supreme Court, Amici request an opportunity to weigh in on the important constitutional issue currently pending before this Court. The Court will find this Amicus Brief useful because it directly responds to the detailed and extensive arguments presented by the Legislative Counsel Bureau (LCB) in its Amicus Brief, which have not yet been addressed by either party. Compare Powers v. United Servs. Auto. Ass'n, 115 Nev. 38, 41 n.2 (1999) (permitting amicus briefing where “briefs of the amici were of some assistance in reviewing this matter”), with Dow Chem Co. v. Mahlum, 115 Nev. 13, 15 n.1 (1999) (denying motions for leave to file amicus curiae briefs that “substantially mirror[ed]” the parties briefing).

As set forth herein, CCPD, SPD and NACJ urge this Court to deny the State's Petitions and affirm the district court's rulings in the Plumlee and Molen cases. This Amicus Brief is filed in accordance with Nevada Rules of Appellate Procedure 29 and 32.

ARGUMENT

The district court vacated the misdemeanor convictions of Jennifer Plumlee and Matthew Molen after finding that deputy district attorney Melanie Scheible violated the separation-of-powers provision set forth in Article III, Section 1 of Nevada's Constitution by prosecuting both defendants while simultaneously serving as a state legislator. (Molen Appendix at 232-237; Plumlee Appendix at 248-253). This Court should affirm the district court's rulings based on the plain language of Nevada's Constitution which prohibits a member of one branch of state government from exercising functions appertaining to another branch of state government. Nev. Const. art. III, § 1. Prosecuting criminal defendants for violating state law is a quintessential state executive function that cannot be performed by a sitting state senator. The LCB Amicus Brief ignores the plain language of Nevada's Constitution and, instead, asks the Court to decide whether a state senator may be "employed" in the executive branch of a state or local government. However, that issue is not properly before the

Court and the legal authority relied on by LCB is inapplicable. Regardless of who employs county prosecutors, when they prosecute state crimes in the courtroom on behalf of the State of Nevada, they are exercising a function appertaining to the state's executive department. Nev. Const. art. III, § 1.

I. The Court should affirm the district court's rulings because Senator Schieble violated Article III, Section 1 of the Nevada Constitution when she exercised a function appertaining to the state's executive department by prosecuting criminal cases on behalf of the State of Nevada.

The rules of statutory construction apply to the interpretation of a constitutional provision. We the People Nev. v. Miller, 124 Nev. 874, 881 (2008). This Court must look first to the plain language of the provision, and, if the meaning of that language is unambiguous, not look beyond it, unless it is clear that the ordinary meaning was not intended by the drafters. City of Sparks v. Sparks Mun. Ct., 129 Nev. 348, 359 (2013). Only when a constitutional provision is ambiguous will this Court consider "the provision's history, public policy, and reason to determine what the voters intended." Strickland v. Waymire, 126 Nev. 230, 234 (2010) (quoting Secretary of State v. Burk, 124 Nev. 579, 590 (2008)).

In its Amicus Brief, LCB ignores this primary rule of statutory interpretation. LCB does not identify *any* ambiguity in Nevada's separation-of-powers clause that would allow this Court to look beyond its plain

language. Yet, LCB’s brief relies almost exclusively on interpretive aids designed to clarify ambiguities, including “historical evidence” from the federal government, California, and other jurisdictions. LCB Amicus at 19-44. LCB does not even begin to interpret Nevada’s separation-of-powers provision until page 44 of its brief. This was error.

The issues raised in these consolidated cases must be resolved by looking at the plain language of Nevada’s separation-of-powers clause. According to Article III, Section 1 of Nevada’s Constitution, “[t]he 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 persons 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.*” Nev. Const. art. III, § 1 (emphasis added).

Based on the plain language of Article III, Section 1, this Court must conduct a two-step analysis to determine whether a particular action violates that provision: First, the Court must determine whether the actor is a person “charged with the exercise of powers properly belonging to” the state’s legislative, executive, or judicial departments. Second, the Court must determine whether the actor exercised a function “appertaining to” either of

the other two departments. See Del Papa v. Steffen, 112 Nev. 369, 383 (1996) (invalidating an action by a member of the Judicial Department that was properly a function of the Executive Department). Finally, if this Court determines that an action violates Article III, Section 1, that action is constitutionally invalid and considered a nullity. Id.

A. Article III, Section 1 applied to Senator Schieble as she was charged with the exercise of the legislative department's powers as a sitting state senator.

Here, the Court must first determine whether, at the time of Senator Scheible's actions in these cases, she was a person "charged with the exercise of powers belonging to one of [the] departments" who was prohibited from exercising functions "appertaining to" the others. LCB would concede that, as a legislator, Senator Scheible was just such a person. See LCB Amicus at 23 (because legislators hold elective offices that are expressly created by Article 4 of the Nevada Constitution governing the Legislative department, legislators are 'charged with the exercise of **powers** properly belonging to one of these departments,' which is the Legislative Department.") (emphasis added by LCB).

The Nevada Constitution invests the power of the legislative department into the members of the Nevada State Senate,¹ and during the Plumlee and Molen prosecutions, Schieble was a sitting state senator. (Molen Appendix at 233; Plumlee Appendix at 249). Because Senator Scheible was charged with the exercise of powers belonging to the legislative branch, the limitations of Article III, Section 1 applied to her at the time of both prosecutions. Accord LCB Amicus at 23 (“legislators are not allowed by the separation-of-powers provision to ‘exercise any **functions**, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.”) (emphasis added by LCB).

B. Prosecuting crimes on behalf of the State of Nevada is a function appertaining to the state’s executive department.

Because Senator Scheible was barred from engaging in any functions appertaining to the state’s executive or judicial departments, this Court must determine whether prosecuting crimes on behalf of the State of Nevada is such a function. Without question, criminal prosecution to enforce state laws is a function appertaining to the state executive department within the meaning of Article III, Section 1.

¹ Nev. Const. art. IV, § 1 (“The Legislative authority of this State shall be vested in a Senate and Assembly which shall be designated ‘The Legislature of the State of Nevada and the sessions of such Legislature shall be held at the seat of government of the State.’”).

This Court has previously described the function of the state executive department in the context of Article III, Section 1 by explaining that “executive power extends to the carrying out and enforcing the laws enacted by the legislature.” Del Papa, 112 Nev. at 377.

As a matter of federal law, criminal prosecution is uniformly recognized as a “core” function of the executive branch of government. See U.S. v. Khanu, 664 F.Supp.2d 28 (D.C. 2009) (“the enforcement of criminal laws” by a prosecutor is a “core Executive function”); Heckler v. Chaney, 470 U.S. 821, 832 (1985) (“the decision of a prosecutor in the Executive Branch not to indict ... [is] a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to take Care that the Laws be faithfully executed.”) (internal quotations omitted); Morrison v. Olson, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) (“Governmental investigation and prosecution of crimes is a quintessentially executive function.”); United States v. Nixon, 418 U.S. 683, 693 (1974) (“the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case”).

Likewise, this Court has always treated prosecution as a function of the state’s executive department, even when the prosecutor in question was a

county district attorney. See Righetti v. Eighth Judicial Dist. Ct., 133 Nev. 42, 46 (2017) (district court lacked authority to accept a nonconforming guilty plea over county district attorney’s objection, because to hold otherwise “would allow the judiciary to invade a realm where the executive branch maintains almost exclusive control, in violation of separation-of-powers principles”); State ex rel. Harvey v. Second Judicial Dist. Court, 117 Nev. 754, 770 (2001) (recognizing criminal prosecutions by county prosecutors to be an “executive function”); Schoels v. State, 114 Nev. 981, 991 (1998) (Shearing, J. concurring) (recognizing that Article III, Section 1, provides for separation of powers such that the judiciary generally may not invade a county prosecutor’s decision to seek the death penalty).

In its brief, LCB correctly acknowledges that district attorneys perform *some* state executive functions as part of their duties.² Nevertheless, LCB maintains that district attorneys are not performing state executive functions when they prosecute criminal defendants for violations of state law. LCB Amicus at 2. But LCB’s claim is belied by the following fundamental facts: (1) a district attorney’s authority to prosecute criminal cases is subordinate *at every stage* to state executive department officials

² “Because district attorneys perform a variety of *official functions for the state* and local governments, they can exercise policymaking authority for the state for some official functions and policymaking authority for the county for other official functions.” LCB Amicus at 12 (emphasis added).

identified in Nevada's Constitution; (2) a district attorney performs no functions during a criminal prosecution that cannot also be performed by a state executive department officer, specifically the Attorney General; and (3) district attorneys represent *the State of Nevada* (not municipalities or other local governments) when they prosecute criminal cases.

For all prosecutions involving violations of state law, there is no distinction between county and state executive functions. Such prosecutions are all subject to the ultimate authority of the State Attorney General, an explicitly "executive" office of the state created by Article V of the Nevada Constitution. See Nev. Const. art. V, § 22 (creating the position of Attorney General as a state executive officer). In the event of a conviction, such prosecutions are subject to the ultimate authority of the State Board of Pardons, another "executive" office of state government. See Nev. Const. art. V, § 14 (creating the State Board of Pardons).

State executive officials maintain ultimate control at *every* stage of *every* prosecution initiated by a county district attorney. The Attorney General has "supervisory powers over all district attorneys of the State in all matters pertaining to the duties of their offices." NRS 228.120(2). The Attorney General has the authority to "[a]ppear in, take exclusive charge of and conduct any prosecution in any court of this State for a violation of any

law of this State, when in his or her opinion it is necessary, or requested to do so by the Governor.” NRS 228.120(3). And once a county prosecutor obtains a conviction, the Attorney General must “prosecute or defend” in front of the Nevada Supreme Court, “[a]ll causes to which the State may be a party.” NRS 228.140(1)(a).

After every successful criminal conviction, final authority is transferred to another state executive department entity—the State Board of Pardons—which may “commute punishments” and “grant pardons, after convictions, in all cases, except treason and impeachments,” regardless of whether a district attorney or the Attorney General prosecuted the underlying case. Nev. Const. art. V, § 14 (2). In sum, every criminal prosecution under Nevada law, whether it is performed by the Attorney General, a district attorney, a special prosecutor, or other entity, is subordinate to, and a function of, the state executive department.

Even if the district attorney’s authority were not completely subordinate to the state’s executive department in criminal matters, a criminal prosecution by a district attorney would necessarily be considered a function of the state executive because it is indistinguishable from a prosecution conducted by the Attorney General, who is undeniably an officer of the state executive department. See Nev. Const. art. V, § 22. The

district attorney has no rights or duties within the criminal context that the Attorney General does not have. From filing criminal charges to presenting evidence at trial, a prosecution conducted by the district attorney is identical to that performed by the Attorney General. See NRS 228.125.

Most telling, however, is that *all prosecutors* (whether they be county district attorneys or the Attorney General) represent the same plaintiff in every criminal prosecution: The State of Nevada. See NRS 169.055 (“A criminal action is prosecuted in the name of the State of Nevada, as plaintiff.”). If the state, not a political subdivision, is the plaintiff, then the action is clearly a state action, rather than a local action.

Without question, Melanie Schieble’s actions prosecuting Plumlee and Molen were functions appertaining to the executive branch of state government. At every point before their cases were dismissed, the Attorney General had ultimate authority over both prosecutions pursuant to NRS 228.120(2) & (3). If Plumlee’s and Molen’s convictions had not been reversed by the district court, the State Board of Pardons would have had the ultimate authority to pardon their convictions. See Nev. Const. art. V, § 14. At no point during these prosecutions did Senator Schieble exercise a power that was not identical to the powers conferred upon the Attorney General under NRS 228.125. Perhaps most telling, Senator Schieble’s exercise of

authority was done on behalf of the *State of Nevada*,³ not Clark County or some other political subdivision, undermining any claim that the executive function belonged to an entity other than the state.⁴ Accordingly, the prosecutions of Plumlee’s and Molen’s cases were functions of the state executive department under Article III, Section 1.

C. Because Senator Schieble was barred from performing any functions appertaining to the state’s executive department, the prosecutions were a nullity pursuant to Article III, Section 1 of the Nevada Constitution.

Any action that violates Article III, Section 1 is invalid. Del Papa, 112 Nev. at 383, 915 P.2d at 254 (finding actions taken in violation of Article III, Section 1 to be “invalid”). As a sitting State Senator, Melanie Schieble is a member of the legislative branch and barred from exercising a function appertaining to the state executive department. (Molen Appendix at 232-237; Plumlee Appendix at 248-253). However, by prosecuting these cases on behalf of the State of Nevada, Senator Schieble performed a state executive function. Id. Because her actions violated Article III, Section 1 of

³ See Molen Appendix at 232 (where caption identified the parties as “MATTHEW HANEY MOLEN, Appellant(s), vs. *STATE OF NEVADA*, Respondent(s)”); See Plumlee Appendix at 248 (where caption identified the parties as “JENNIFER LYNN PLUMLEE, Appellant(s), vs. *STATE OF NEVADA*, Respondent(s)”).

⁴ The Attorney General is currently representing the State right alongside the office of the Clark County District Attorney in these consolidated writ petitions. NRS 228.140(1)(a).

Nevada's Constitution, the prosecutions were invalid, and this Court must affirm the rulings of the district court. See Del Papa, 112 Nev. at 383.

II. Whether Nevada's Constitution prohibits state legislators from holding positions of "public employment" with local governments is not an issue for this Court to decide; rather, this Court must decide whether a criminal prosecution is a function appertaining to the executive branch of state government.

The majority of LCB's Amicus Brief is devoted to a "dual roles" theory, and an argument that Nevada's Constitution does not prohibit a member of the state legislature from simultaneously *serv*ing in the role of employee or officer within a local government entity.⁵ But this Court need not decide whether Nevada's Constitution allows a member of the state legislature to be a local government employee or officer. Nevada's separation-of-powers provision does not address "public employment" and it does not contain the word "office." Rather, based on the plain language of Nevada's Constitution, the *only* question this Court needs to answer is

⁵ Amici Curiae are not asking this Court to construe Article III, Section 1 to prohibit members of Nevada's legislature from occupying positions of public employment in the executive branch of government. Rather, Amici simply ask this Court to find that state legislators may not *prosecute* criminal defendants because the act of *criminal prosecution* is a function appertaining to the executive branch of state government. Such a finding would comport with Nevada's concept of the "citizen-legislator", as it would allow legislators to work for the executive branch of government so long as they do not perform the core function of the executive branch of government—the enforcement of laws.

whether a member of the state legislature can perform a “function” appertaining to the executive branch of state government. More specifically, the Court must decide whether the *act of prosecuting a criminal defendant* for a violation of state law is a state executive function. As set forth herein, the authority provided by LCB fails to answer these key questions and does not warrant reversal of the district court’s rulings.

A. Deputy district attorneys’ status as “county employees” is irrelevant to the issue of whether criminal prosecution is a state executive function.

Relying on Lane v. Second Judicial Dist. Ct., 104 Nev. 427, 437 (1988), In re Contested Election of Mallory, 128 Nev. 436, 439 (2012), and Webb v. Sloan, 330 F.3d 1158, 1164-65 (9th Cir. 2003), LCB argues that Article III, Section 1 does not apply to district attorneys because they “serve as county employees – not as state officers or county officers.” LCB Amicus at 5-10. Yet, a district attorney’s *status* as a county employee (as opposed to a State officer) is not determinative of the issue before this Court: whether a criminal prosecution is a state executive function.

LCB’s argument is based on the faulty premise that, to violate Article III, Section 1, an individual must be an officer of *two or more* branches of state government. But, in fact, Article III, Section 1 applies whenever “persons charged with the exercise of powers properly belonging to one of

*these departments . . . exercise any functions, appertaining to either of the others.” Nev. Const. art. III, § 1 (emphasis added). To violate Nevada’s separation-of-powers provision, a person need only belong to *one* branch of state government and exercise functions appertaining to another branch. Because Senator Scheible is a state officer of the *legislative branch*, it does not matter whether she is also an officer of the executive branch. The separation-of-powers provision applies to *her*. So, the only question this Court must answer is whether a criminal prosecution is a *state executive function* that *she* is barred from performing. And Lane, Mallory and Webb all fail to answer that question.*

In Lane, this Court rejected an argument by former Washoe County DA Mills Lane that “only he, as the representative of the executive branch of the government, may conduct prosecutions on behalf of the people.” Lane, 104 Nev. at 437. Lane contended that he was “vested with the sole right to control the processes of the grand jury, to the exclusion of [the district court judge] who empaneled the grand jury.” Id. at 428. *In that context*, the Court concluded that the doctrine of separation-of-powers was “inapplicable,” and noted that control over the grand jury’s functions was *not* vested in the district attorney or his office. Id. at 437. The Court pointed out that the grand jury was “an adjunct to the judicial branch of the government” and was not a

part of the executive branch. Id. at 437. At its core, Lane is about a district attorney trying to improperly claim plenary power over grand jury proceedings under the guise of Nevada’s separation-of-powers clause.

Mallory and Webb are irrelevant because neither case involved Nevada’s separation-of-powers clause. Mallory addressed the “narrow question of whether the office of the district attorney is a state office *for the purpose of determining whether district attorneys are subject to term limits under the ‘state office’ portion of Article 15, Section 3(2) of the Nevada Constitution.*” 128 Nev. at 437 (emphasis added). The fact that district attorneys are “county officers” under Article 4, Section 32 (and therefore not subject to term limits under Article 15), does not resolve the question of whether the essential *function* that they perform (*i.e.*, state criminal prosecutions) appertains to the state’s executive branch. Again, the word “office” does not appear anywhere in Article III, Section 1.

Likewise, Webb is inapplicable to the issue raised by the Petition because Webb involved the question of whether a deputy district attorney could subject a municipality to liability under 42 U.S.C. § 1983—a federal statute that permits municipal liability “when the person causing the violation has final policymaking authority.” Whether a district attorney has “final policymaking authority” for purposes of a federal statute (42 U.S.C. §

1983) is irrelevant to the question of whether a criminal prosecution is an executive “function” for purposes of Nevada’s separation-of-powers clause. And article III, Section 1 does not speak of “policymaking authority”; it speaks of the “functions” appertaining to a branch of state government.

Importantly, State v. Second Judicial District Court (Hearn), 134 Nev. 783 (2018), shows that a district attorney’s status as a county actor does not insulate his or her prosecutorial actions from the reach of Nevada’s separation of powers clause. In Hearn, this Court concluded that Nevada’s separation-of-powers clause precluded a Washoe County deputy district attorney from having “veto power” over a district court’s ability to assign a defendant to veteran’s court. See Hearn, 134 Nev. at 787 (“In requiring that a prosecutor stipulate to the district court’s decision, the effect of NRS 176A.290(2) is to afford an executive veto over a judicial function. . . . any prosecutorial power over the district court’s disposition at this stage of the proceedings is offensive to the separation of powers.”). If a statute that gives a *county prosecutor* veto power over the district court at sentencing violates Nevada’s separation-of-powers clause, it necessarily follows that county prosecutors are capable of acting in excess of the separation-of-powers clause, even if they are not “officers” of the state executive branch with “policymaking authority.” Hearn demonstrates that a county prosecutor’s

actions are not beyond the reach of Nevada’s separation-of-powers clause. See also Righetti, 133 Nev. at 46, 388 P.3d at 647; Harvey, 117 Nev. at 770, 32 P.3d at 1274; Schoels, 114 Nev. at 991, 966 P.3d at 741-42, all discussed supra at pp. 7-8.

B. Whether separation-of-powers doctrine protects “political subdivisions” is irrelevant to the question of whether criminal prosecution is a state executive function.

LCB contends that Nevada’s separation-of-powers provision does not bar a person who serves in Nevada’s legislative branch of government from prosecuting criminal defendants for violations of state law, as long as that prosecution occurs in the service of a *local government employer* (as opposed to a state government employer). LCB Amicus at pp. 11-17. Essentially, LCB contends that employees or agents of a local government employer are unable to violate Nevada’s separation-of-powers provision because they are not, themselves, part of the three branches of government.

To make this argument, LCB relies on a footnote from a recent decision where this Court observed that “the language of the separation-of-powers provision in the Constitution does not extend any protection to political subdivisions.” LCB Amicus at 11 (citing City of Fernley v. State Dep’t of Tax’n, 132 Nev. 32, 43 n.6 (2016)). LCB’s argument is based on a logical fallacy. While separation-of-powers may not *protect* a political

subdivision from actions taken by the state, it does not follow that political subdivisions cannot, themselves, *violate* separation-of-powers through their own actions.

In Fernley, this Court declined to address a separation-of-powers argument raised by a political subdivision, finding that the political subdivision did not have *standing* to sue the state under a separation-of-powers provision that was not created to *protect* political subdivisions. To reach this conclusion, Fernley relied on City of Reno v. Washoe Co., 94 Nev. 327 (1978), where this Court observed that Nevada’s political subdivisions are entirely dependent on the State of Nevada for their powers, which may be given or taken away. Quoting extensively from the United States Supreme Court decision, Hunter v. Pittsburgh, the Court observed:

“Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take, without compensation such property, hold it itself, or vest it in

other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

Reno, 94 Nev. 327, 329–30 (1978) (quoting Hunter v. Pittsburgh, 207 U.S. 161, 178-79 (1907)) (emphasis added). From this, the Court concluded that a city, as a political subdivision of the state, could not sue the state for violating Nevada’s constitutional provisions against takings or interfering with contracts “as against the State, its creator.” Id.

Although a political subdivision may not have *standing* to challenge a state law for a violation of certain constitutional provisions (including separation of powers), it does not follow that a political subdivision is incapable of engaging in a state function within the meaning of Article III, Section 1. To the contrary, this Court recognized in Reno that political subdivisions serve as *agents* of the State “exercising such of the governmental powers of the state as may be entrusted to them.” Id. (quoting Hunter, 207 U.S. at 179).

Although LCB relies on City of Sparks v. Sparks Mun. Ct., 129 Nev. 348 (2013), that case explicitly recognized that political subdivisions may violate separation of powers even though they are not, themselves, a part of

the three branches of state government. In Sparks, this Court affirmed a district court order prohibiting the City of Sparks from “interfering with the Municipal Court’s management of its employees.” In doing so, this Court recognized that “any statutory scheme that would allow the executive or legislative branches *of a municipal government* to control or exercise the inherent powers of the municipal court would violate the separation of powers doctrine.” Sparks, 129 Nev. at 363. It follows that if a municipal government can violate Nevada’s separation-of-powers provision, so may a deputy district attorney who is employed by a county.

Importantly, none of the Nevada cases relied on by LCB support the proposition that local governments and their officers are unable to violate the state’s separation-of-powers provision. C.f. LCB Amicus at 11-17. In State ex rel. Mason v. Bd. of Cnty. Comm’rs, 7 Nev. 392, 396-97 (1872), this Court merely addressed the *powers* afforded to a local board of commissioners by Article 4, Section 26 of the State Constitution. The Court did not hold that local boards of commissioners were incapable of violating Article III, Section 1 in the event they undertook actions that violated separation of powers. And the other Nevada cases cited in this section of LCB’s Amicus brief are irrelevant because they do not involve Nevada’s separation-of-powers provision. See, e.g., Univ. & Cmty. Coll. Sys. v. DR

Partners, 117 Nev. 195 (2001) (office of community college president was not a “public officer” as that term is defined by NRS 281.005(1)); Nunez v. City of N. Las Vegas, 116 Nev. 535, 539 (2000) (municipal court was not a “state entity” within the meaning of 42 U.S.C. § 1983, but recognizing that “municipal courts . . . are entitled to manage internal affairs without interference from separate governmental branches”).

LCB’s reliance upon Eleventh Amendment sovereign immunity case law is similarly misplaced. C.f. LCB Amicus at 15-16. Whether a local political subdivision is entitled to sovereign immunity under federal law is irrelevant to whether a local political subdivision may violate Article III, Section 1 of Nevada’s Constitution.⁶ And because this Court has already recognized that local governments *can* violate separation of powers, LCB’s contrary argument fails. See, e.g., Hearn, 134 Nev. at 787; Sparks, 129 Nev. at 363.⁷

⁶ C.f. Waller v. Florida, 397 U.S. 387, 392–95 (1970) (state and municipality are the same sovereign in regards to criminal prosecutions, barring prosecution by one entity after conviction in another under the Fifth Amendment’s Double Jeopardy Clause, because municipalities are “subordinate government instrumentalities created by the State to assist in carrying out state government functions.”).

⁷ We address People v. Provines, 34 Cal. 520 (1968), in section II(D), infra.

C. Historical evidence of dual employment in “Federal Government and Congress” is irrelevant to whether criminal prosecution is a state executive function.

Selectively citing from Mistretta v. United States, 488 U.S. 361, 380-82 (1989), LCB argues that the Framers of the United States Constitution never believed “that the doctrine of separation of powers absolutely prohibited an officer of one department from performing functions in another department.” See LCB Amicus at 20-24. While it is true that the Framers did not believe that the three branches of government had to be “entirely separate and distinct,” the Framers *did* expect each branch to remain “entirely free from the control or coercive influence, direct or indirect, of either of the others[.]” Mistretta, 488 U.S. at 380 (quoting Humphrey’s Executor v. United States, 295 U.S. 602, 629 (1935)).

The Framers understood that one individual (or branch of government) should not be permitted to both *enact* the laws and *enforce* the laws. As James Madison explained, “The accumulation of all powers, legislative, executive, and judiciary, *in the same hands*, whether of one, a few, or many, and whether hereditary, selfappointed [sic], or elective, may justly be pronounced the very definition of tyranny.” The Federalist No. 47 (emphasis added).

Describing Montesquieu as the “oracle” and expert on separation of powers, Madison used Montesquieu’s writings to explain the meaning of the doctrine:

“When the legislative and executive powers are united in the same person or body” says he “there can be no liberty, because apprehensions may arise lest THE SAME monarch or senate should ENACT tyrannical laws, to EXECUTE them in a tyrannical manner.” Again: “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for THE JUDGE would then be THE LEGISLATOR. Were it joined to the executive power, THE JUDGE might behave with all the violence of AN OPPRESSOR.”

The Federalist No. 47 (quoting Montesquieu) (capitalization in original, italics emphasis added). So, even though separation-of-powers doctrine might not “*absolutely* prohibit an officer of one department from performing functions in another department,” c.f. LCB Amicus at 25, it *would* prevent a legislator from performing *the essential function* of the Executive Branch: namely the function of prosecuting, or enforcing the laws.

The Supreme Court’s ruling in Mistretta does not suggest otherwise. In Mistretta, the issue before the Supreme Court was whether the Sentencing Guidelines promulgated by the United States Sentencing Commission violated the separation-of-powers doctrine, where the Sentencing Commission was created by Congress and placed within the Judicial Branch of government. The Court recognized that “the sentencing function long has

been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch.” Mistretta, 488 U.S. at 390. Since federal judges were already responsible for pronouncing sentences within the statutory range set by Congress, the Supreme Court saw no problem with allowing a subset of the Judicial Branch to create rules relating to that judicial function. Yet, that is not the same thing as allowing members of the Judicial Branch to write or enforce criminal laws, both of which are clearly functions of the other two Branches of Government.

Again, citing Mistretta, LCB claims that “it was a common and accepted practice for judicial officers of the United States to serve simultaneously as executive officers of the United States.” LCB Amicus at 21. Yet, LCB did not identify *a single example* of a federal judge who simultaneously served as a federal prosecutor. That’s because there is no “long-accepted historical practice” whereby judges were permitted to prosecute defendants. And Mistretta certainly does not stand for the proposition that a federal judge could simultaneously prosecute a criminal defendant.

Next, LCB argues that the “history surrounding the Incompatibility Clause”⁸ means that the separation-of-powers doctrine would not bar a lawmaker from enforcing the law. LCB Amicus at 22. But the Incompatibility Clause was inserted to prevent the Executive Branch from “purchas[ing] the integrity” of the Legislative Branch with the bribe of an executive *appointment*. See The Federalist No. 76 (Alexander Hamilton). As such, it protects a different interest than does the federal separation-of-powers doctrine. To the extent LCB relies on a subsequently-passed law that prohibits an executive officer from entering into a contract of *employment* with a member of Congress, see 18 U.S.C. § 431, that law does not speak to the issue of whether a member of Congress could properly wield prosecutorial power and engage in prosecutorial functions. And regardless of whether members of the House of Representatives believed that the Constitution allowed them to serve as Executive Branch mail carriers in the 1800’s (c.f. LCB Amicus at 22-24), there is no evidence that anyone believed congressional representatives could lawfully prosecute criminal defendants while serving in Congress.

⁸ The Incompatibility Clause prevents national legislators from being “appointed to any civil Office” created while serving as a legislator. U.S. Const. art. I § 6, cl. 2.

In any event, Nevada’s Constitution differs from the U.S. Constitution in its treatment of the separation-of-powers doctrine: “In the United States Constitution, separation of powers is expressed by the discrete treatment of the three branches of government in Articles I (legislative), II (executive) and III (judicial).” Commission on Ethics v. Hardy, 125 Nev. 285, 292, 212 P.3d 1098, 1103 (2009) (citing Buckley v. Valeo, 424 U.S. 1, 124 (1976)). However, the Nevada Constitution “goes one step farther,” by expressly prohibiting “persons” charged with the exercise of powers belonging to one branch from “exercising any functions” appertaining to another branch. Hardy, 125 Nev. at 292, 212 P.3d at 1103; Nev. Const. art. III, § 1(1). In this way, Nevada’s separation-of-powers clause better encapsulates the Framers’ understanding that “there can be no liberty” when “legislative and executive powers are united in the same person.” See The Federalist No. 47. And where Nevada’s separation-of-powers clause is *stronger* than the analogous federal doctrine, the “federal judicial precedent and long-accepted historical practices” relied on by the LCB are of limited utility to this Court.

D. Historical evidence of dual employment in California after 1864 is irrelevant to whether criminal prosecution is a state executive function.

Citing State ex rel. Harvey v. Second Jud. Dist. Ct., 117 Nev. 754, 761-63 (2001), LCB asks this Court to consider “historical evidence and

case law from California” because Nevada relied on California’s 1849 Constitution as a basis for developing the Nevada Constitution. LCB Amicus at 13, 24. In this regard, LCB leans heavily on two California Supreme Court Decisions: People ex rel. Att’y Gen. v. Provines, 34 Cal. 520 (1868) and Chenoweth v. Chambers, 164 P.428 (Cal. Dist. Ct. App. 1917). Yet, the Framers of Nevada’s Constitution, which was approved and ratified in 1864, would not have known about these subsequent interpretations of California’s Constitution, nor would they have known how California would amend its Constitution decades later. California’s subsequent legal opinions cannot tell us what *our Framers* meant when they adopted Article III, Section 1.

In 1864, when Nevada’s Framers adopted Article III, Section 1, the highest court of California had already deemed its separation-of-powers provision to apply at the local level. See Burgoyne v. Board of Supervisors of the County of San Francisco, 5 Cal. 9, 18-19 (1855). In Burgoyne, the California Supreme Court held that the state’s separation-of-powers clause prohibited a *county* Court of Sessions from issuing warrants to pay for a lot of land, which exceeded the scope of the court’s judicial power. As a result of the separation of powers violation, the court deemed the warrants null and void. Burgoyne, 5 Cal. at 18-19.

Four years after Nevada’s Constitution was ratified, the California Supreme Court overruled Burgoyne and decided that separation of powers did not apply at the local level. See Provines, 34 Cal. at 539-40. Specifically, the court ruled that California’s separation-of-powers clause would not prohibit a *local* Police Judge from also serving as a *local* Police Commissioner in the City and County of San Francisco. The court explained,

the Third Article of the Constitution means that the powers of the *State* Government, not the local governments thereafter to be created by the Legislature, shall be divided into three departments, and that the members of one department shall have no part or lot in the management of the affairs of either of the other departments, ‘except in the cases hereinafter expressly directed or permitted.’

34 Cal. at 534 (emphasis in original). Because a local Police Judge was not a member of one of the three branches of *state* government, and a local Police Commissioner was not a member of one of the three branches of *state* government, it necessarily followed that serving in those dual roles would not violate California’s Constitution.

But the issue in Provines was completely different from the issue facing *this* Court. California’s separation-of-powers clause was never triggered in Provines because the individual in question was not a “member” of the *state’s* legislative, executive or judicial departments. In this case, by

contrast, Nevada's separation-of-powers provision *does* come into play because Senator Scheible *is* a member of the state's legislative department. And Provines does not answer the question currently pending before this Court: whether the act of prosecuting a criminal defendant on behalf of the State of Nevada for violating a state law is a *function* appertaining to the executive branch of Nevada's state government.⁹

Next, LCB argues that because it was "common practice" for California legislators to work in the executive branch of state government prior to 1916, our Founders must have intended the same result here. But even if LCB is correct that "California Legislators routinely held positions as state executive branch employees" prior to 1916, this does not mean that the same California Legislators who wrote the laws were also allowed to prosecute citizens for violation those same laws. LCB has not shown that any of those state executive branch employees engaged in the quintessentially *executive* function of criminal prosecution.

⁹ It is unclear from Provines what "functions" the Police Commissioner was responsible for performing for the City and County of San Francisco. However, the function of Police Judge was to "examine into the qualifications of candidates and determine their fitness for the duties required, and as the result of the determination, appoint or reject." Id. at 543 (Sawyer, C.J. concurring). No one could reasonably argue that evaluating a candidate for employment in local government was a state executive function.

Rather, LCB concedes that the known examples of dual employment involved “the State Lunacy Commission, State Motor Vehicles Department, State Labor Commissioner, State Pharmacy Board, State Railroad Commission, Folsom State Prison and State Inheritance Tax Commission.” LCB Amicus at 25-26. And LCB has not identified what “functions” these individuals performed that could be deemed state executive functions.

E. Historical evidence of dual employment in Nevada does not affect this Court’s analysis either.

LCB contends that a Nevada legislator may properly prosecute a criminal defendant for violation of state law because Nevada legislators have historically been employed in the executive branch of government. LCB Amicus at 27-32. But as with the other “historical evidence” offered by LCB, there is no indication that any Nevada legislators (other than Senators Melanie Scheible and Nicole Cannizzaro) ever prosecuted criminal defendants for violations of state law. LCB concedes that there are “no official records specifically detailing the occupations of the legislators who served in the 1800s and early 1900s.” LCB Amicus at 28. And again, LCB identifies no state executive functions that these legislators performed.

Citing Halverson v. Miller, 124 Nev 484, 488-89 (2008), LCB contends that this Court must defer to its evidence of historical “practices” by Nevada legislators because those practices constitute an “interpretation”

by the legislature as to what conduct is permissible under Nevada's Constitution. LCB Amicus at 29. In turn, LCB also appears to argue that because it is the legal arm of the state's legislature, this Court must defer to the interpretation of Nevada's Constitution set forth in its Amicus Brief. But the principal espoused in Halverson is not that broad. To warrant "deference," the legislature must have *enacted a law* "close in time to when the constitutional provision was enacted." Halverson, 124 Nev. at 489 & n. 18 (giving deference to a contemporaneous "legislative enactment creating a judicial position for an initial two-year term"). And because our legislature has *never* passed any law allowing a state legislator to prosecute a criminal defendant, this Court has no "construction" to "defer" to under Halverson.

In addition, deference is unwarranted because the question raised in this Petition does not relate to a "matter of procedure" for the legislative branch of government, but instead relates to a legislator's improper exercise of an *executive function* on behalf of the state *executive* branch of government. C.f., State ex rel. Coffin v. Howell, 26 Nev. 93, 104 (1901) ("[a] long continued and contemporaneous construction placed by the coordinate branch of government *upon a matter of procedure in such coordinate branch of government* should be given great weight") (emphasis added); Nevada Mining Ass'n v. Erdoes, 117 Nev. 531, 539-542 (2001)

(deferring to Legislative Counsel’s interpretation of a “constitutional amendment [that] was proposed and passed by the 1995 Legislature” regarding the length of the legislative session, where that “interpretation” consisted of Legislative Counsel’s refusal to enroll two bills and deliver them to the Governor after the deadline).

Importantly, prior to the Plumlee and Molen cases, no one appears to have *challenged* a state executive function performed by a state legislator, seeking to invalidate an executive action on the basis of Article III, Section 1. LCB’s action of filing a brief and stating a legal position is not the kind of “interpretation” that is entitled to deference by this Court, particularly where that interpretation does not relate to a legislative procedure or an action taken by the legislature itself. To find otherwise would mean that *any* position taken by LCB in litigation would be entitled to deference.

Finally, *even if there were* evidence of such historical practices in Nevada, this alone would not justify the unconstitutionality of the practice here. When a state recently asked the United States Supreme Court “to defer to its usual practices instead of federal law,” the Court responded that this is “something we will not and may never do.” McGirt v. Oklahoma, 140 S. Ct. 2452, 2478 (2020). As the Court explained, “[u]nlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To

hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.”

Id. at 2482.

F. Case law from other jurisdictions demonstrates why the officer/employee distinction is irrelevant and the meaning of the word “functions” is key.

Next, LCB points to cases from “other jurisdictions” that address “the legal issue of whether a state constitutional separation-of-powers provision prohibits legislators from being state or local government employees.” LCB Amicus at 32-44. LCB recognizes that there is a “conflict” among the courts, and that three jurisdictions (Montana, New Mexico and Colorado) ruled that state legislators *can* be employed in the executive branch of government as long as they are not “officers,” while four jurisdictions (Indiana, Oregon, Nebraska and Louisiana) determined that legislators *could not* be employed in the executive branch of government where those employees were exercising functions or duties of the executive branch. See LCB Amicus at 32-44.

These cases are largely irrelevant as this Court need not decide whether “dual employment” is permissible under Nevada’s separation-of-powers clause. Yet, the analysis undertaken by the courts in Indiana, Oregon, Nebraska and Louisiana sheds light on the meaning of the word

“functions” in Nevada’s separation of powers clause, and why one need not be an “officer” to exercise a function of a branch of State government. As LCB concedes, the “court decisions from Indiana and Oregon are especially notable because the language in the separation-of-powers provisions of those states more closely resembles the language in Nevada’s separation-of-powers provision.” LCB Amicus at 36.

Like in Nevada, Indiana’s separation-of-powers provision expressly prohibits persons “charged with official duties under one of these departments” from “exercis[ing] *any of the functions of another*, except as in this Constitution expressly provided.” State ex rel. Black v. Burch, 226 Ind. 445, 457 (1948) (emphasis in original). In Burch, the Indiana Supreme Court recognized that “the meaning of the phrase ‘any of the functions of another’” was key to understanding the scope of the state’s separation-of-powers provision. Id. The court recognized that “functions” was a broad term and that *both* officers and employees could be said to perform the “functions” of a public office. Id. at 460-464. Looking to a New York case, the court observed that a “district attorney is authorized to appoint and employ subordinates to aid him in the discharge of the obligations of said office” such that both “the appointee or employee performing such duty is thereupon executing the functions of that public office.” Id. at 462-63 (citing

People v. Salomon, 212 N.Y. 446 (1914)). And the court looked to the Louisiana case of Saint v. Allen, 126 So. 548 (La. 1930), which also contained similar language to Nevada’s constitution.

In Saint, the Louisiana Supreme Court was asked whether employing members of the legislature to perform services for pay in the executive department of state government was forbidden by Article II of the Louisiana Constitution. Like Nevada’s constitution, Louisiana’s separation-of-powers provision provided that the “powers of the government of the state of Louisiana” were “divided into three distinct departments – legislative, executive, and judicial.” La. Const. Ann. art. II, § 1. Additionally, “No one of these departments, nor any person or collection of persons holding office in one of them, *shall exercise power properly belonging to either of the others*, except in the instances hereinafter expressly directed or permitted.” La. Const. Ann. art. II, § 2 (emphasis added). Based on the choice of words—which forbade the *exercise of power* and made no reference to office holding—the court had “no doubt that it is not a law against dual office holding. It is not necessary, to constitute a violation of that article, that a person should hold office in two departments of government. *It is sufficient if he is an officer in one department and at the same time is employed to*

perform duties, or exercise power, belonging to another department.” Saint, 126 So. at 1067 (emphasis added).

The Oregon Supreme Court reached a similar conclusion. See Monaghan v. School Dist. No. 1, 315 P.2d 797 (Or. 1957). Like Nevada’s separation-of-powers provision, Oregon’s Constitution provided that “no person charged with official duties under one of these departments, shall exercise any of the functions of another[.]” Id. at 800. The court properly recognized that the word “functions” has a broader sweep than “official duties” and that both officers and employees could perform functions of a department of government. “Our conclusion is that the word ‘functions’ embodies a definite meaning with no contradiction of the phrase ‘official duties,’ that is, he who exercised the functions of another department of government may be either an official or an employee.” Id. at 802-804.

Nebraska’s separation-of-powers provision is slightly different. Unlike Nevada’s Constitution, which prohibits members of one branch of government from exercising the “functions” of another, Nebraska’s separation-of-powers language speaks in terms of the “exercise” of power, stating that “no person or collection of persons being one of these departments, *shall exercise any power* properly belonging to either of the others.” State ex rel. Spire v. Conway, 472 N.W.2d 403, 404 (Neb. 1991)

(emphasis added). But, here again, the court appropriately recognized that the officer/employee distinction was irrelevant because its separation-of-powers clause (like Nevada’s own clause) “does not speak in terms of officers or employees.” Id. at 409.

Looking to the plain language of Article III, Section 1 which does not mention officers or employees but instead speaks of “functions,” this Court should reject LCB’s illogical argument that only dual office-holding is prohibited by Nevada’s Constitution.

G. The word “functions” is not limited to actions that are, in fact, taken by an officer of a branch of government, but applies to all actions that could be taken by an officer or deputy.

In the final section of its Amicus Brief, LCB contends that the word “functions” is limited to actions taken by an officer of one of the three branches of government because “the Framers intended to prohibit a constitutional officer in one department from holding constitutional offices or nonconstitutional offices in another department, *because persons holding constitutional or nonconstitutional offices in another department exercise the sovereign functions of state government.*” LCB Amicus at 48 (emphasis added). From this, LCB posits that only a dual office holder may violate Nevada’s separation-of-powers provision. Id.

LCB bases this argument on what it contends to be a “well-established body of case law” that the sovereign functions of government can “only” be exercised by public officers. LCB Amicus at 48. Yet, the cases relied on by LCB do not stand for the proposition that *only* public officers can exercise sovereign functions of government within the meaning of Article III, Section 1. The reason this Court spoke of public officers in State ex rel. Kendall v. Cole, 38 Nev. 215 (1915), was because the Court was interpreting Article IV, Section 8 of Nevada’s Constitution, which (like the Incompatibility Clause of the United States Constitution) prohibits State legislators from being “appointed to any civil *office* of profit” during their legislative term. The reason this Court spoke of public officers in State ex rel. Mathews v. Murray, 70 Nev. 116 (1953), was because the plaintiff filed a quo warranto action to remove the defendant from his position as Director of the Drivers License Division of the Public Service Commission of Nevada. Because a quo warranto action could only be brought as a remedy for “usurping a public office,” the distinction between “officer” and “employee” was important. And, the reason this Court spoke of public officers in DR Partners, 117 Nev. 195, was because the Court had to decide whether a community college president was subject to Nevada’s open

meeting law, and the answer to this question turned on whether the president was a “public officer” as defined by NRS 281.005(1).

Where Article III, Section 1 speaks of “functions,” as opposed to officers, the authority relied on by LCB is irrelevant. Nothing in these cases indicates that an executive function can *only* be exercised by an officer of the executive branch. To the contrary, one need not be an officer to exercise a sovereign function appertaining to state government; rather, one can be *deputized* to perform a sovereign function.

Pursuant to NRS 228.080(1), the Attorney General “may appoint as many deputies as he or she may deem necessary to perform fully the duties of his or her office” and all such deputies “may perform all duties now required of the Attorney General.” And pursuant to NRS 228.125, one of those duties is criminal “prosecution.” Surely, LCB cannot contend that a deputy attorney general lacks the power to exercise the sovereign prosecutorial function of the state executive branch.

Furthermore, just like deputy attorneys general, deputy district attorneys are “authorized to transact all official business relating to those duties of the office [of the District Attorney] set forth in NRS 252.080 and 252.090 to the same extent as their principals. . . .” NRS 252.070(1). This includes the district attorney’s prosecutorial function. See 252.080 (“The

district attorney in each county shall be public prosecutor therein”).¹⁰ And as set forth in Section I, supra, the act of criminal prosecution is a function appertaining to the state executive branch of government, regardless of whether the deputy who performs that function is employed by the State (as a deputy attorney general) or a by a local government employer (as a deputy district attorney).

///

///

///

///

///

///

///

///

///

///

///

¹⁰ Although the statute was amended in 2005 to limit municipal liability under 42 U.S.C. § 1983 by adding language stating that deputy district attorneys do not have “policymaking authority,” that amendment did not preclude deputy district attorneys from performing the sovereign function of criminal prosecution.

CONCLUSION

Based upon the foregoing, CCPD, SPD and NACJ respectfully request that this Court affirm the district court's rulings in the Plumlee and Molen cases because Article III, Section 1 of Nevada's Constitution barred Senator Scheible, a member of the legislative branch of state government, from prosecuting criminal defendants for violations of state law.

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
309 So. Third Street, Suite #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

CERTIFICATE OF COMPLIANCE

1. I hereby certify that the amicus curiae brief complies with the formatting requirements of NRAP 21(d), NRAP 32(a)(4) and NRAP 32(c)(2), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

The Amicus Curiae brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that the Amicus Curiae Brief is proportionately spaced, has a typeface of 14 points or more and contains 9,604 words and 927 lines of text which exceeds the limitations set forth in NRAP 21(d) and NRAP 32(a)(7). The appropriate motion for leave to file brief in excess has been filed.

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

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.
630 S. 3rd Street
Las Vegas, NV 89101

KEVIN C. POWERS
General Counsel
Legislative Counsel Bureau, Legal Division
401 S. Carson Street,
Carson City, NV 89701

BY /s/ Carrie M. Connolly
Employee, Clark County Public
Defender's Office

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.)

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

**BRIEF OF AMICI CURIAE CLARK COUNTY PUBLIC DEFENDER,
CLARK COUNTY SPECIAL PUBLIC DEFENDER AND NEVADA
ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF REAL
PARTIES IN INTEREST**

DARIN F. IMLAY
Clark County Public Defender
Nevada Bar No: 5674
*DEBORAH L. WESTBROOK
Chief Deputy Public Defender
Nevada Bar No: 9285
309 S. Third Street, Suite #226
Las Vegas, NV 89155-2601
Telephone: (702) 455-4685
*Counsel for Amici

JONELL THOMAS
Clark County Special Public Defender
Nevada State Bar No. 4771
333 S. Third Street, 8th Floor
Las Vegas, Nevada 89101
(702) 455-6265

JONATHAN M. KIRSHBAUM
Amicus Chairperson
Nevada Attorneys For Criminal Justice
Nevada State Bar No. 12908C
411 E. Bonneville, Suite 250
Las Vegas, Nevada 89101
(702) 388-6577

NRAP 26.1 DISCLOSURE

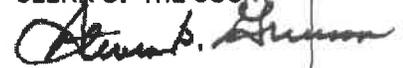
The undersigned counsel of record certifies that the following are persons and entities as described in Nevada Rule of Appellate Procedure 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Clark County Public Defender
2. Clark County Special Public Defender
3. Nevada Attorneys for Criminal Justice

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

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

EXHIBIT A



1 DARIN F. IMLAY, PUBLIC DEFENDER
NEVADA BAR NO. 5674
2 KARA M. SIMMONS, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 14621
3 **PUBLIC DEFENDERS OFFICE**
309 South Third Street, Suite 226
4 Las Vegas, Nevada 89155
Telephone: (702) 455-4685
5 Facsimile: (702) 455-5112
Kara.simmons@clarkcountynv.gov
6 *Attorneys for Defendant*

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA,
10 Plaintiff,
11 v.
12 BENJAMIN AMES,
13 Defendant,

CASE NO. C-20-351504-1
DEPT. NO. XVIII
DATE: February ____, 2021
TIME: 12:30 p.m.

14
15 **MOTION TO DISMISS DUE TO VIOLATION OF ARTICLE III, SECTION 1 OF THE**
16 **NEVADA CONSTITUTION**

17 COMES NOW, the Defendant, BENJAMIN AMES, by and through KARA M.
18 SIMMONS, Deputy Public Defender and hereby requests that this Court dismiss the State's
19 Indictment as it was filed in violation of Article III, Section 1 of the Nevada Constitution.

20 This Motion is made and based upon all the papers and pleadings on file herein, the
21 attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

22 DATED this 17th day of February, 2021.

23 DARIN F. IMLAY
24 CLARK COUNTY PUBLIC DEFENDER

25
26 By: /s/Kara M. Simmons
KARA M. SIMMONS, #14621
27 Deputy Public Defender
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DECLARATION

KARA M. SIMMONS makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am a Deputy Public Defender for the Clark County Public Defender's Office appointed to represent Defendant BENJAMIN AMES in the present matter;
2. I am more than 18 years of age and am competent to testify as to the matters stated herein. I am familiar with the procedural history of the case and the substantive allegations made by The State of Nevada. I also have personal knowledge of the facts stated herein or I have been informed of these facts and believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 17th day of February, 2021.

/s/Kara M. Simmons
KARA M. SIMMONS

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Mr. Ames requests that this Court dismiss the State’s Indictment as the Indictment was
3 filed in violation of Article III, Section 1 of the Nevada Constitution.

4 **STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY**

5 Senator Melanie Schieble was elected to the Nevada State Senate in November of 2018
6 and is currently serving a four-year term as state senator.¹ She also prosecutes cases as a Deputy
7 District Attorney with the Clark County District Attorney’s Office.

8 On October 7, 2020, during her term as State Senator, Melanie Schieble opened this case
9 before the grand jury under case number 19BGJ211X, filing a proposed indictment accusing Mr.
10 Ames of: (1) Driving Under the Influence Resulting in Death or Substantial Bodily Harm, and (2)
11 Reckless Driving. Senator Schieble began her prosecution of Mr. Ames that same day, handling
12 a majority of the presentation of evidence before the grand jury.

13 When the grand jury returned a true bill, the formal Indictment was filed on October 15,
14 2020 under Melanie Schieble’s authorization. Exhibit A, Indictment signed by Deputy District
15 Attorney Colleen Baharav for Melanie Schieble. On November 5, 2020, Mr. Ames was arraigned
16 on the October 15th Indictment where he pled not guilty to the charges. He is now set for trial on
17 March 15, 2021.

18 Historically Senator Schieble has allowed her prosecutorial power to shape her legislative
19 agenda and has used her position as a legislator to advocate and vote for laws that remove limits
20 on prosecutorial power. She campaigns on criminalizing unregistered firearm possession and
21 increasing penalties for accused domestic abusers, using her prosecutorial function to enhance her
22 legislative agenda.² In 2019 she voted for Senate Bill 97, which banned criminal defense attorneys
23 from raising certain defenses at trial. In advocating for the bill, she directly referenced her role as
24 a prosecutor, stating:

25
26 ¹ Legislator Information, Senator Melanie Scheible,
<https://www.leg.state.nv.us/App/Legislator/A/Senate/Current/9> (last visited February 9, 2021).

27 ² Public Safety, <https://www.melanieformvssenate.com/public-safety> (last visited February 9,
28 2021)

1 "I take great pride in being the first prosecutor, to my knowledge, to take a hate
2 crime to trial. I have asked around, and I have not found another one in Nevada. **It**
3 **is important to note that I lost because hate crimes are incredibly difficult to**
4 **prove.** I think something we sometimes forget is, when you are prosecuting a case
5 or going through a criminal trial, the facts develop. We might not have all the facts
6 when we charge somebody. They might just be charged with battery with
7 substantial bodily harm, and if I, as a prosecutor, have not charged the hate crime
8 upfront, there is nothing in the law to prevent the defendant from bringing up the
9 exact same facts that would have made it a hate crime—had I known when I first
10 authored the charging document about the circumstances—to argue "That is why I
11 was scared," or "That is why I pushed, hit, or shot her." **I think it is important that**
12 **we identify facts we think are aggravating—things that make a crime worse**
13 **rather than better—and put into law that they can be used as a sword, but not**
14 **as a shield.**"³

15 She now chairs the Nevada State Senate's Judiciary Committee,⁴ which has jurisdiction over
16 legislation related to criminal procedure and crimes and punishments.

17 ARGUMENT

18 Mr. Ames requests that the Court dismiss the Indictment because it was obtained and filed
19 by Senator Scheible in violation of Article III, Section 1 of the Nevada Constitution, which
20 explicitly bars members of the legislative branch such as Senator Scheible from exercising power
21 properly belonging to the executive.

22 As the framers of federal constitution recognized, "[t]he accumulation of all powers,
23 legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and
24 whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of
25 tyranny." James Madison, *The Federalist Papers* No. 47. The framers tamed this threat by
26 separating legislative, executive, and judiciary power into three, co-equal branches government,
27 positioning the branches to serve as a check on the others which, in turn, each branch "in their
28 proper places." Alexander Hamilton or James Madison, *The Federalist Papers* No. 51. The

³ Nevada Assembly Committee on Judiciary, 80th Session, April 24, 2019 (emphasis added),
available at
<https://www.leg.state.nv.us/Session/80th2019/Minutes/Assembly/JUD/Final/1011.pdf>.

⁴ Senate Judiciary,
<https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Committee/329/Overview> (last visited
February 9, 2021).

1 founders believed that this structural design placed vital structural barriers on the power of those
2 governing us who, after all, are merely human: "If angels were to govern men, neither external nor
3 internal controls on government would be necessary." Id.

4 Under the Nevada Constitution, "[t]he powers of the Government of the State of Nevada
5 shall be divided into three separate departments,--the Legislative,--the Executive and the Judicial;
6 **and no persons charged with the exercise of powers properly belonging to one of these**
7 **departments shall exercise any functions, appertaining to either of the others,** except in the
8 cases expressly directed or permitted in this constitution." Nev. Const. art. III, § 1 (emphasis
9 added). Similar to the United States Constitution, Nevada's Constitution "gives rise to the
10 separation of powers doctrine through its 'discrete treatment of the three branches of
11 government.'" Comm'n on Ethics v. Hardy, 125 Nev. 285, 292, 212 P.3d 1098, 1103 (2009). "But
12 the Nevada Constitution goes one step further [than the United States Constitution]; it contains an
13 express provision prohibiting any one branch of government from impinging on the functions of
14 another." State v. Second Jud. Dist. Ct. in & for Cty. of Washoe (Hearn), 134 Nev. 783, 786, 432
15 P.3d 154, 158 (2018). If the member of one branch exercises a function that belongs to another,
16 that action is constitutionally invalid. See Del Papa v. Steffen, 112 Nev. 369, 383, 915 P.2d 245,
17 254 (1996) (invalidating a Supreme Court Justice's exercise of executive authority).

18 The Nevada Constitution clearly invests the power of the Legislative Department into the
19 members of the Nevada State Senate. Nev. Const. art. IV, § 1 ("The Legislative authority of this
20 State shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the
21 State of Nevada and the sessions of such Legislature shall be held at the seat of government of the
22 State.>"). This means that Ms. Scheible is a person "charged with the exercise of powers belonging
23 to one of [the] departments" described in Article III, Section 1, and so bound by the limitations
24 described in that provision. Because Ms. Scheible is charged with the exercise of powers
25 belonging to the Legislative branch, she is necessarily barred from wielding executive or judicial
26 power. Under Nevada law, "executive power extends to the carrying out and enforcing the laws
27 enacted by the legislature." Del Papa, 112 Nev. at 377, 915 P.2d at 250. The prosecution of a
28

1 criminal case is a power reserved for the executive. See Second Jud. Dist. Ct. in & for Cty. of
2 Washoe (Hearn), 134 Nev. 783, 787, 432 P.3d 154, 159 (2018) (“In requiring that a prosecutor
3 stipulate to the district court’s decision, the effect of NRS 176A.290(2) is to afford an executive
4 veto over a judicial function.”); State ex rel. Harvey v. Second Judicial Dist. Court, 117 Nev. 754,
5 770, 32 P.3d 1263, 1274 (2001) (recognizing criminal prosecutions by county prosecutors as an
6 “executive function.”). Furthermore, the specific act of seeking an indictment is an executive
7 function: after finding that three Supreme Court Justices “improperly exercised the functions of
8 the executive branch” by initiating an investigation to expose the sources of news leaks, the Court
9 in Del Papa noted that the investigation properly should have been undertaken by either the State
10 Bar or “a district attorney’s office” . . . and “[i]n any of these situations, **Respondent Justices**
11 **could also have asked a district attorney to seek an indictment from a grand jury.**” 112 Nev.
12 at 378, 915 P.2d at 251 (emphasis added). In prosecuting Mr. Ames and specifically by seeking an
13 indictment against him, Senator Schieble exercised executive power and performed an executive
14 function during her current term as a Nevada State Senator.

15 Because Senator Schieble is a current member of the legislative branch, any exercise of
16 executive power by Senator Schieble, including seeking an indictment and prosecuting Mr. Ames,
17 violates the prohibition clearly laid out in Article III, Section 1, making any exercise of such power
18 invalid unless “expressly directed or permitted in this constitution.”. In turn, this means that the
19 Indictment filed by Senator Schieble in this case must be dismissed as it is constitutionally invalid
20 pursuant to Article III, Section 1, of the Nevada Constitution.

21 ///

22 ///

23 ///

1 **CONCLUSION**

2 Mr. Ames requests that this Court dismiss the State's Indictment as it was based upon
3 Senator Schieble's presentation of evidence to the grand jury and filed under her authority, both
4 executive functions that Schieble could not perform as a sitting State Senator without violating
5 Article III, Section 1 of the Nevada Constitution.

6 DATED this 17th day of February, 2021.

7 DARIN F. IMLAY
8 CLARK COUNTY PUBLIC DEFENDER

9 By: /s/Kara M. Simmons
10 KARA M. SIMMONS, #14621
11 Deputy Public Defender
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing MOTION on for hearing before the Court on the ___ day of February, 2021 at 12:30 p.m.

DATED this 17th day of February, 2021.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

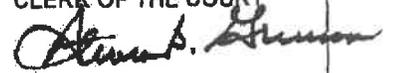
By: /s/Kara Simmons
KARA M. SIMMONS, #14621
Deputy Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and forgoing MOTION was served via electronic e-filing to the Clark County District Attorney's Office at motions@clarkcountyda.com on this 17th day of February, 2021.

By: /s/Melissa Boudreault
An employee of the
Clark County Public Defender's Office

EXHIBIT A



1 IND
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 MELANIE SCHEIBLE
6 Deputy District Attorney
7 Nevada Bar #14266
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,
11 -vs-
12 BENJAMIN JOSEPH AMES,
13 #6032705
14 Defendant.

CASE NO: C-20-351504-1
DEPT NO: XII

INDICTMENT

15 STATE OF NEVADA }
16 COUNTY OF CLARK } ss.

17 The Defendant above named, BENJAMIN JOSEPH AMES, accused by the Clark
18 County Grand Jury of the crime(s) of DRIVING UNDER THE INFLUENCE RESULTING
19 IN DEATH OR SUBSTANTIAL BODILY HARM (Category B Felony - NRS 484C.110,
20 484C.430, 484C.105 - NOC 53908/53906) and RECKLESS DRIVING (Category B Felony -
21 NRS 484B.653 - NOC 53896), committed at and within the County of Clark, State of Nevada,
22 on or about the 11th day of September, 2020, as follows:

23 COUNT 1 - DRIVING UNDER THE INFLUENCE RESULTING IN DEATH OR
24 SUBSTANTIAL BODILY HARM

25 did then and there willfully and unlawfully drive and/or be in actual physical control of
26 a motor vehicle on or off a highway, to-wit: at or near U.S. Highway 95 and Russell Road, Las
27 Vegas, Clark County, Nevada, Defendant being responsible in one or more of the following
28 ways and/or under one or more of the following theories, to wit: 1) while under the influence

1 of intoxicating liquor, to any degree, which rendered him incapable of safely driving and/or
2 exercising actual physical control of a vehicle, and/or 2) while he had a concentration of
3 alcohol of .08 or more in his blood, and/or 3) when he was found by measurement within two
4 (2) hours after driving and/or being in actual physical control of a vehicle to have a
5 concentration of alcohol of .08 or more in his blood, and/or 4) while under the influence of
6 one or more of the following controlled substances, to any degree, which rendered him
7 incapable of safely driving or exercising actual physical control of a vehicle, to wit:
8 Amphetamine and/or Methamphetamine, and/or 5) when he was found to have one or more of
9 the following prohibited substance in his blood, in an amount that is equal to or greater than
10 the prohibited amount listed in NRS 484C.110(3), incorporated by reference as though fully
11 contained herein, to wit: Amphetamine and/or Methamphetamine, and/or 6) while under the
12 combined influence of intoxicating liquor and the controlled substance(s), to any degree,
13 which rendered him incapable of safely driving and/or exercising actual physical control of a
14 vehicle, Defendant, while driving and/or in actual physical control of a vehicle, failing to pay
15 full time and attention to his driving, failing to exercise due care, and/or failing to drive in a
16 careful and prudent manner, which acts, or neglect of duties, proximately caused the vehicle
17 Defendant was driving and/or in actual physical control of, to strike and collide with a vehicle
18 being driven or occupied by SUSAN TEVES, said collision proximately causing death to
19 SUSAN TEVES and/or substantial bodily harm to SUSAN TEVES, to-wit: by Defendant
20 driving the wrong way on the U.S. 95 highway and striking the vehicle being driven or
21 occupied by SUSAN TEVES.

22 COUNT 2 - RECKLESS DRIVING

23 did then and there willfully, unlawfully, and feloniously drive a motor vehicle on or
24 off a highway or premises to which the public has access, to-wit: at or near U.S. Highway 95
25 and Russell Road, Las Vegas, Clark County, Nevada, with willful or wanton disregard for the
26 safety of persons or property, by driving said vehicle without paying full time and attention to
27 his driving, and/or failing to exercise due care, and/or failing to drive in a careful and prudent
28 manner, and/or driving the wrong way on street at approximately 100 miles per hour, which

1 acts, or neglect of duties, proximately causing the death of or substantial bodily harm to
2 SUSAN TEVES, to-wit: by Defendant driving the wrong way on the U.S. 95 highway and
3 striking the vehicle being driven or occupied by SUSAN TEVES.

4
5 DATED this _____ day of October, 2020.

6 STEVEN B. WOLFSON
7 Clark County District Attorney
8 Nevada Bar #001565

9 BY


10 MELANIE SCHEIBLE
11 Deputy District Attorney
12 Nevada Bar #14266

13 ENDORSEMENT: A True Bill

14 
15 Foreperson, Clark County Grand Jury

1 Names of Witnesses and testifying before the Grand Jury:

2 ACOSTA, SAM – NHP

3 CAMPOS, JOSE – NHP

4 DARCEY, CHRISTOPHER – NHP

5 MEJIA, JUAN – c/o CCDA, 200 Lewis Avenue, LV, NV 89101

6 MILLER, ROSS – NHP

7 ROSA JR., RONALD – c/o CCDA, 200 Lewis Avenue, LV, NV 89101

8

9 Additional Witnesses known to the District Attorney at time of filing the Indictment:

10 CUSTODIAN OF RECORDS - CCDC

11 CUSTODIAN OF RECORDS - LVMPD COMMUNICATIONS

12 CUSTODIAN OF RECORDS - LVMPD RECORDS

13

14

15

16

17

18

19

20

21

22

23

24

25

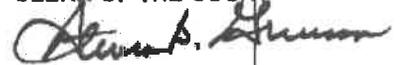
26

27 19BGJ211X/20CRH001237/mcb-GJ

NHP EV# 200900657

28 (TK)

EXHIBIT B



MOT

DAYVID J. FIGLER, ESQ.
Nevada Bar No. 004264
KRISTINA WILDEVELD, ESQ.
Nevada Bar No. 005825
THE LAW OFFICES OF KRISTINA WILDEVELD & ASSOCIATES
550 E. Charleston Blvd., Suite A
Las Vegas, NV 89104
Phone (702) 222-0007
Fax (702) 222-0001
Attorneys for Defendant, KIRK BILLS

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,)	
)	CASE NO. C-20-351790
Plaintiff,)	DEPT. NO. XXI
)	
vs.)	
)	Hearing Date:
KIRK BILLS,)	Hearing Time:
)	
Defendant.)	

**MOTION TO REMOVE THE CLARK COUNTY DISTRICT ATTORNEYS OFFICE
FROM PROSECUTION BASED ON THE SEPARATION OF POWERS DOCTRINE,
OR IN THE ALTERNATIVE MOTION TO DISMISS PROSECUTION**

COMES NOW, Defendant, KIRK BILLS, by and through his attorneys of record, KRISTINA WILDEVELD, ESQ., and DAYVID FIGLER, ESQ., of The Law Offices of Kristina Wildeveld, respectfully requests that the Clark County District Attorney's Office be disqualified from continuing prosecution in the instant matter, or in the alternative, to dismiss the instant prosecution based on the Separation of Powers clause of the Nevada and United States Constitutions. (Nev. Const. Art. 3 Sec. 1(1))

This motion is made and based upon all of the papers and pleadings on file herein, the attached Points and Authorities in support hereof, as well as oral argument at the time of hearing

DATED this 17th day of December, 2020.

Respectfully Submitted by:

/s/: David Figler
DAYVID FIGLER, ESQ.
Nevada Bar No. 004264

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff;
TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff; and
TO: NICOLE CANNIZZARO, Chief Deputy District Attorney, Attorney for Plaintiff;

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the Defendant will bring the foregoing **MOTION TO REMOVE THE CLARK COUNTY DISTRICT ATTORNEYS OFFICE FROM PROSECUTION BASED ON THE SEPARATION OF POWERS DOCTRINE, OR IN THE ALTERNATIVE MOTION TO DISMISS PROSECUTION** on for hearing on the _____ day of ____, 2021, at the hour of ____: _____ A.M., in Department ____ of the Eighth Judicial District Court, or as soon thereafter as the matter can be heard before the Court.

DATED this 17th day of December, 2020.

Respectfully Submitted by:

/s/: David Figler
DAYVID FIGLER, ESQ.
Nevada Bar No. 004264
550 E. Charleston Blvd., Suite A
Las Vegas, NV 89104
(702) 222-0007
Attorney for Defendant, KIRK BILLS

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

The original complaint in this matter was filed in Henderson Justice Court on or about April 30, 2020, alleging four total counts, to wit: Attempt Murder with a Deadly Weapon (Robert Ortiz), Attempt Murder with a Deadly Weapon (Davion Fletcher), Discharging a Firearm at or into an Occupied Structure, and Ownership of a Firearm by a Prohibited Person involving an incident that occurred in Henderson. **Four counts total.**

That Complaint was amended on or about May 26, 2020, to include matters from a different jurisdiction (described in greater detail below), and charges related to a different incident on a different date in Henderson, as well as expanded charges to include a separate discharge of a firearm count for what appears to be every cartridge and/or bullet found at all event scenes. **This expanded charges to 59 counts total.**

On August 25, 2020, KIRK BILLS (hereinafter “Mr. Bills”) charges were further expanded by way of a Second Amended Criminal Complaint with two (2) counts of CONSPIRACY TO COMMIT MURDER, six (6) counts of ATTEMPT MURDER WITH USE OF A DEADLY WEAPON, one (1) count of BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM, two (2) counts of ASSAULT WITH A DEADLY WEAPON, twenty-eight (28) counts of DISCHARGING FIREARM FROM STRUCTURE/VEHICLE, two (2) counts of DISCHARGING FIREARM INTO OCCUPIED STRUCTURE, eighteen (18) counts of DISCHARGING WEAPON WHERE PERSON MIGHT BE ENDANGERED, and three (3) counts of OWNERSHIP OR POSSESSION OF A FIREARM BY A PROHIBITED PERSON, a total of sixty-two (62) counts. The charged offenses are based on three (3) separate incidents occurring from March 30, 2020 to April 4, 2020. **A total of 62 Counts.**

Nevada State Senate Majority Leader and Chair of the Senate Judiciary Committee Nicole Cannizzaro is the Deputy District Attorney assigned to this prosecution and ostensibly the individual exercising prosecutorial discretion to expand the charges from 4 to 59 to 62.

There were multiple continuations of proceedings in the Henderson Justice Court until the final Preliminary Hearing was set for October 28, 2020. One of the primary reasons for the delay of proceedings was waiting upon a ballistics report that purportedly linked the ammunition found at the Woodlawn Cemetery and the Henderson shooting. Attorney Cannizzaro made that representation on the record. To date, that report has not been produced.

Bail had been set in the Henderson Justice Court at 300,000 dollars on the Second Amended Complaint without hearing. Mr. Bills filed a bail motion for a reduced bail and/or O.R. release on or about October 15, 2020. The State opposed the Motion. A hearing was conducted on October 19, 2020, where the State was again represented by Attorney Nicole Cannizzaro. Attorney Cannizzaro made representations about Mr. Bills having a gang affiliation and engagement in witness tampering (over objection) in support of maintaining the bail at 300,000 dollars. The Defense requested that any documentation of such allegations either be provided to the Court or stricken. The Court continued the hearing to October 22, 2020.

Mr. Bills was handed a *Marcum* notice announcing the intention to seek an Indictment. The Defense then prepared and delivered correspondence of October 20, 2020, to Attorney Cannizzaro outlining exculpatory evidence that should be presented to the Grand Jury and contained the following language:

You are hereby on notice that the defense *demand*s that in the event a new True Bill is issued by the Grand Jury, the District Attorney notifies this office of the return so that Mr. Bills's counsel may be present to address the issue of bail or anything other matter in the District Court prior to any argument by the State in the spirit of the recent Nevada Supreme Court's decision in *Valdez-Jimenez*.

Any effort to argue bail or other issues at any time without counsel first being notified and given an opportunity to be present is also a violation of my client's state and federal constitutional rights. It will be assumed if you proceed without notice that you are intentionally violating my client's rights.

At the October 22, 2020, hearing, the Court reduced the bail to 100,000 dollars. The Defendant was able to secure bond for the 100,000 dollars and was released without other

condition shortly thereafter. (The records referred to by Attorney Cannizzaro regarding gang affiliation and witness tampering never having materialized).

A preliminary hearing was set for October 28, 2020 at 10 AM.

On October 28, 2020 at 10 AM, Mr. Bills appeared out-of-custody in Henderson Justice Court with counsel. The State was again represented by Attorney Cannizzaro who notified the Court that the State was dismissing the charges as it was proceeding by Indictment. The State did not disclose that the Grand Jury proceedings had already been completed. Counsel for Mr. Bills requested pursuant to NRS 178.502 that the bond be transferred to the District Court. The Justice Court confirmed that such a transfer would be made as it had confirmed the same in the Court computer system. Attorney Cannizzaro was present at this exchange and neither objected nor offered any other information to the Justice Court.

On October 28, 2020 at 11 AM, Attorney Cannizzaro appeared in the District Court with a return of the True Bill and the filing of Indictment and engaged in an ex parte hearing regarding bail. Attorney Cannizzaro request a 300,000 bail plus house arrest. The bond that had been transferred to District Court was exonerated in potential violation of NRS 178.502 without cause. It is believed that Attorney Canizzaro represented that materially “new” and “different” charges were contained in the now 58 count Indictment justifying a higher bail. A careful review of the charging documents, however, reveals, that the third incident (out of Henderson) was actually dropped, one attempt murder charge was dropped, and the only “new” charge was filed, to wit, a single Count of “Mayhem” for the same named victim, Robert Ortiz, who had previously been named as the victim of Attempt Murder and Battery with Substantial Bodily Harm. Indeed, the “Mayhem” charge was merely parsed from the prior pleading where it was a part of the Battery charge. There was nothing new and actual far less.

At that ex parte hearing, Attorney Cannizzaro did not represent that Counsel had explicitly requested being present. Further, Attorney Cannizzaro exercised executive discretion to seek an arrest warrant for Mr. Bills, instead of issuing a summons, despite not only knowing his exact whereabouts a mere 1 hour earlier, but knowing he was already under bond at the time and represented by Counsel who was actively engaged in the proceedings.

Counsel for Mr. Bills regularly monitors the Court's Odyssey system and quickly learned that an arrest warrant had been issued and the bond exonerated and at approximately 2 PM on October 28, 2020, send correspondence to the District Court (naturally cc'ed to Attorney Cannizzaro) that there was a grave concern bail had been raised and warrant issued ex parte and requested that the warrant be recalled immediately. The District Court did not grant that request, however, a "bail hearing" was set for November 3, 2020. Mr. Bills was taken into custody shortly thereafter by the police on the arrest warrant and was detained in the Clark County Detention Center.

Mr. Bills filed a Motion (still pending as of the filing of this Motion) requesting alternate relief from what is averred either prosecutorial misconduct or abuse of process. In a nutshell, Mr. Bills requested either the original bond be reinstated, that the State be required to file a written motion to increase bail and/or that Mr. Bills be released from custody or that the charges be dismissed. The District Court entertained consideration of bail, despite this not specifically what Mr. Bills had requested but it was the only available relief at that time from incarceration. After hearing representations from Attorney Cannizzaro and the defense, the Court lowered the bail to 225,000 dollars and required a condition of house arrest. That hearing occurred on November 3, 2020.

Sometime thereafter, Mr. Bills' mother was able to cobble together the premium necessary for the 225,000 dollar bond and it was posted on November 24, 2020, however, Attorney Cannizzaro requested a so-called "source hearing" despite there being no statutory provision concerning such a request. The Court granted the request and on December 1, 2020, the "source" hearing was held where Mr. Bills' mother testified under oath as to the source and provided documentation corroborating her representations. She also noted the grave financial burden of having to provide this additional funding to the extent that it has impacted her son's ability to continue to retain his current counsel.

It should be noted that the State provided no evidence at this hearing disputing the representations of the witness. In fact, Attorney Cannizzaro did not appear at the source hearing and a different Deputy District Attorney did. Nonetheless, the State requested an additional

hearing before Mr. Bills could be released to “satisfy” the State’s concerns regarding the source of the bond premium and answering questions about the individuals who jointly contributed to the fee as well as the exact amount of the premium and why it appeared to be discounted by the Bail Bond company and so Attorney Cannizzaro could be present. The “source” hearing was thereby continued to December 3, 2020.

After a lengthy second round of “source” hearing, the Court was satisfied that there was no evidence of criminality in funding (and again the State never provided a single document or witness at the hearing to the contrary) and the bond moved forward giving Mr. Bills’ the opportunity to be bailed pending trial. That was December 3, 2020. For reasons still not clear, but potentially part of an evidentiary hearing in the instant matter if necessary – Mr. Bills’ was not released on House Arrest until December 11, 2020 – 8 days after the State’s concerns regarding “source” were discounted.

On December 14, 2020, Mr. Bills filed a Petition for Writ of Habeas Corpus alleging amongst other issues that there was objectively insufficient evidence to charge Mr. Bills with most, if not all, of the 59 counts – and that the Indictment was a product of gross overcharging and stacking of charges by Attorney Cannizzaro in the role as the executive vested with discretion to file the pleading.

It is of note, and Mr. Bills asks the Court to take judicial notice that there were great efforts from a non-partisan task force¹ engaged by the State of Nevada under a grant to propose “criminal justice reform” to the Nevada legislature. At an evidentiary hearing, Mr. Bills would be able to provide the Court with ample evidence regarding these efforts to curb the model of mass incarceration currently exploited by the Clark County District Attorneys Office. Part of those non-partisan proposals in other jurisdiction included discussion of significant limitations on the prosecutions ability to “stack” charges from a single incident against a Defendant. Governor Steve Sisolak publically indicated the need for reform against prosecutorial “stacking” of charges. Yet, no measures were ever included in any Nevada legislation in the

¹ The Justice Reinvestment Initiative (JRI), a public private collaboration between the Department of Justice and the Pew Charitable Trust with assistance from the Crime and Justice Institute (CJI).

2019 legislative session to curb prosecutorial abuses, or stacking. Attorney Cannizzaro was actively involved in this legislation as the chair of the Judiciary Committee and as Senate Majority leader. Had any of these measures been discussed, let alone passed, Mr. Bills would likely be facing no more than a four or five charges instead of the 58 charges currently in the Indictment.

The Instant Motion follows.

II. STATEMENT OF FACTS

A. THE WOODLAWN DISCHARGE OF WEAPONS

On March 30, 2020, there were gunshots fired at the Woodlawn cemetery located at 1500 North Las Vegas Boulevard. The State avers the incident occurred between 1:12 and 1:16 PM (GJT, Vol. 2, p. 64-68). Witness and named “victim” Ebony Jones testified that she and her family were visiting the gravesite of T’Wayne Allen, Jr. as they do every week. (GJT, Vol. 2, p. 29). She did not testify as to a time, however, she did testified that she *heard* gunshots and took cover. (GJT, Vol. 2, p. 32). Ms. Jones testified she did not seeing anyone shooting. (GJT, Vol. 2, p. 35). She testified she did not see bullets hitting any surface or even the ground. (GJT, Vol. 2, p. 35). Neither she nor her family were injured by any bullet. No testimony was adduced that Ms. Jones knew or had any connection whatsoever to Kirk Bills.

Ms. Jones is named as the victim of conspiracy to commit murder in Count 4, and Attempt Murder in Count 6 of the filed Indictment.

Daryl Galtney testified that he was at the Woodlawn Cemetery on March 30, 2020, at an unplanned visit to see a deceased friend named “Blue Angel” and witnessed the discharge of a firearm depicted by others. Mr. Galtney testified that he noticed “fragments” hitting nearby grass, but that he was not injured by any bullet. (GJT, Vol. 2, p. 197-198). He testified he “ducked for cover” after three or four shots. (GJT. Vol. 2, p. 197). He also testified that he thought he heard between 20 and 30 shots based on his prior experience of being shot at. (GJT, Vol. 2, p. 198). Mr. Galtney could not see who was shooting and never saw anyone shooting from a vehicle. (GJT, Vol. 2, p. 199). Mr. Galtney also testified that he has felony convictions

for ex-felon in possession of a firearm and firearms theft. (GJT, Vol. 2, p. 201). No testimony was adduced that Mr. Galtney knew or had any connection whatsoever to Kirk Bills.

Mr. Galtney is named as the victim of conspiracy to commit murder in Count 4, and Attempt Murder in Count 7 of the filed Indictment.

Anthony Cisneros testified that he was a worker who was employed near the Woodlawn Cemetery on March 30, 2020, and while he did not see the shooting, saw a dark, gray Jeep speeding away after the bullets stopped. (GJT, Vol. 2, p. 41). By way of a leading question, the State got Mr. Cisneros to answer that it was a dark, silver vehicle, although a clear reading of the record reveals Mr. Cisneros never independently responded the vehicle was silver. (GJT, Vol. 2, p. 44). Mr. Cisneros offered that there were at least 2 people in the dark gray Jeep, that he saw the passenger's hand shooting for some of the event as the vehicle was moving and that the windows were tinted. (GJT, Vol. 2, p. 46-47). Mr. Cisneros testified he saw three shots coming from the vehicle. (GJT, Vol. 2, p. 48). His brother, Isaac Cisneros, testified in a consistent matter and offered he heard at least 5 shots and did not see the shooting or the vehicle, only heard shots like Ms. Jones. Isaac Cisneros said he saw a gray Camaro speed away after the shooting stopped and that he saw a stop sign with apparent bullet impacts, but "he couldn't tell if they were old or new." (GJT, Vol. 2, p. 57).

Mr. David Preston testified that his neighboring business had video surveillance that depicted a gray SUV around the Woodlawn Cemetery at the averred time of the shooting. It is uncertain if the video played for the Grand Jury depicted shooting from that vehicle, or merely that a silver SUV was seen in the area during this relevant time (i.e. 1:16 PM) (GJT, Vol. 2, pp. 60-68). Mr. Preston indicated that he had no other relevant video. (GJT, Vol. 2, p. 68).

Metropolitan Police Department Crime Scene Analyst April Peterson was dispatched to the Woodlawn Cemetery on March 30, 2020. She testified that she discovered 28 bullet cartridges in different areas near the Woodlawn Cemetery upon her investigation. (GJT, Vol. 2, p. 92-93). Further that 21 cartridges were marked from a Sig 9 MM Luger, 6 cartridges were from a .380 caliber weapon, and 1 from a FC 9MM Luger. (GJT, Vol. 2, pp. 94-5). CSA

Peterson also testified she found bullets or fragments in different areas, including near a headstone of Donald Ray Williams and Rosa Chavez. (GJT, Vol. 2. pp. 96-97).

CSA Peterson did not testify as to the age of the cartridges or bullets or bullet fragments, nor was there any testimony regarding other shootings that may have occurred at the Cemetery. There was no testimony whether or not that there were cartridges or casings in the area prior to 1 PM on March 30, 2020.

Las Vegas Metropolitan Detective Julian Tappas testified that he was (1) with the gang unit (GJT, Vol. 2, p. 131) and (2) that he could not determine whether some or any of the bullets fired were from a vehicle, but only that the shooter was moving. (GJT, Vol. 2, p. 139). Detective Tappas confirmed that there was no video of the actual shooting, or what vehicle was involved in the shooting, but through a series of leading questions, Detective Tappas testified (based on hearsay) that a “silver SUV” was involved just because it was seen on video in the relevant time frame. There was no license plate or other identifying information on this “silver” SUV². (GJT, Vol. 2. p. 141-144). There was no admonishment given around Detective Tappas announcement that he was with the “gang unit.” Detective Tappas also testified that .380 casings found at a site where there is a shooting is “uncommon” and later testified that a picture of a .380 weapon was seen on a Facebook page allegedly associated with Kirk Bills. (GJT, Vol. 2, pp. 151-52). Mr. Bills was not in that photo³. (GJT. Vol. 2, p. 163).

Regarding the Indictment, the following Counts are related to the Woodlawn Cemetery incident:

COUNT 4: Conspiracy to Commit Murder of Ebony Jones and Daryl Galtney

COUNT 5: Attempt Murder of Daryl Gatney

COUNT 6: Attempt Murder of Ebony Jones

COUNTS 10-37: Discharge of a Weapon Within or From a Silver SUV

B. THE 800 NORTH MAJOR STREET SHOOTING IN HENDERSON

² It should be noted that there was video footage of a similar vein that a silver SUV was seen near the Henderson event, but Detective Tappas noted he “couldn’t say for sure that’s the same vehicle as the one in the Henderson event.”

The State allegations regarding a shooting incident in Henderson, Nevada that occurred on March 30, 2020, come primarily from the testimony of Robert Ortiz and his girlfriend Lacie Gomez. There were independent witnesses whose testimony directly contradicts that of Mr. Ortiz and Ms. Gomez and a named “victim” named Davion Fletcher who did not even testify.

According to Mr. Ortiz, he was walking back and forth to a car on the street to his apartment located at 800 North Major Street which is also known as the Landsman Garden Apartments when he was confronted on the sidewalk by a man he knew as Knowledge, identified by picture as being Kirk Bills. When allegedly confronted and ultimately shot by Mr. Bills, Mr. Fletcher was two-and-a-half feet in front of him. (GJT, Vol. 1, p. 19). Mr. Ortiz admitted he did not get along with Mr. Bills. (GJT, Vol. 1, p. 16). Mr. Ortiz then testified that Mr. Bills shot him repeatedly causing numerous injuries including the loss of an eye. (GJT, Vol. 1, pp. 19-24). Mr. Ortiz believes that a tree outside his apartment was hit by gunfire. (GJT, Vol. 1, p. 21). Mr. Ortiz did not testify as to seeing any other person present.

Lacie Gomez testified that she saw Knowledge emerge from bushes, and ultimately two other individuals emerge from the same area with him. (GJT, Vol. 2, p. 9). She testified that Knowledge shot 14 or 15 times at Robert (Ortiz) with a black handgun. (GJT, Vol. 2, p. 11). She did not testify that any shots were fired at any other person, or in any other direction. Ms. Gomez also claimed that Knowledge approached her vehicle and pointed a weapon at her, but did not say any threatening words or attempt to fire the firearm. (GJT, Vol. 2, p. 13-14). No other witness was offered supporting Ms. Gomez’s claim. Ms. Gomez admitted that she did not give this information to the police upon their initial investigation because she claimed both mistrust of the police and fear of retaliation. (GJT, Vol. 2, pp. 16-18). Ms. Gomez claimed there were no other witnesses around. (GJT, Vol. 2, pp. 21).

Brandon Gillan lives at 354 Golden Glow in Henderson Nevada and was outside on March 30, 2020 which are the Landsman Garden Apartments. He testified that he saw three black man walking down the street together before and after he heard some gunshots. (GJT,

³ It should be noted that a Grand Juror member had to ask this question, as it was implied he was in the picture from the State’s leading questions.

Vol. 2, p. 74-76). One of the individuals had braids or small dreads as a hairstyle. (GJT, Vol. 2, p. 75). After the gunshots, he saw the same three individuals running past him. (GJT, Vol. 2, p. 79). He did not see a firearm in anyone's hand. (GJT, Vol. 2, p. 79). Mr. Gillan indicated he saw other young black people on the street who then went back into their homes. (GJT, Vol. 2, p. 80). Mr. Gillan did not identify Mr. Bills, nor was he asked to identify Mr. Bills. Mr. Gillan did not indicate that he ever saw any of the individuals stop and point a gun at a person in a car.

Valerie Ruiz is the property manager of the Landsman Garden Apartments. She testified about the existence of video surveillance around the area on the day in question (GJT, Vol. 2, p. 125). She did not testify that a single bullet was shot into or at any structure at the Landsman Garden Apartments at 800 N. Major. The State through leading testimony was able to adduce from a law enforcement officer that he observed "multiple impacts to that apartment building at 800 North Major" (GJT, Vol. 2, p. 222) though it is not readily apparent that a single photograph of said impact was introduced, how many "multiple" meant, if there was any info regarding the age of the alleged "multiple" impacts (though per a Grand Juror's question, the Detective claimed without any foundation that they were "fresh") or if the "impacts" meant bullets or any other admissible evidence suggesting that a single bullet was fired at or into this structure on March 30, 2020.

There was not clear testimony on the record as to when the shooting on 800 N. Major occurred, but there was testimony that a Silver SUV that the State alleges is the same car that was seen at the Woodlawn Cemetery is observed near 800 N. Major at 1:39 PM (GJT, Vol. 2, p. 224), that a data reporting event (possibly the shooting) occurred at 1:54 PM (GJT, Vol. 2 p. 186) and was seen leaving the area "after" the shooting at 1:55 PM (GJT, Vol. 2, p. 210).

Thus, by the State's theory the "Silver" SUV was at 1500 North Las Vegas Boulevard as late as 1:16 PM (but possibly later) and near 800 N. Major as early as 1:39 PM (but possibly earlier) and that Mr. Ortiz was located and shot shortly thereafter.

The Grand Jury was also presented with undisputed information that Kirk Bills wife, Ashley had a Silver KIA Sorento rented in her name during the time when the shootings occurred. There was also testimony that a phone allegedly "associated" with a Facebook page

“connected” to Kirk Bills was allegedly pinging cell phone towers near both scenes, near the time around both events.

Through a series of leading questions, the State was also able to adduce that near the Henderson shooting, police recovered 19 total cartridges, comprised of 17 9-MM, and 2 40-MM. (GJT, Vol. 2, p. 221). There were no .380 cartridges recovered at the Henderson shooting. There was no testimony regarding any bullets, or bullet fragments located in any structure. No information was presented to the Grand Jury regarding normal travel time between those two destinations. No information other than that which was outlined provided the Grand Jury with any connection between the people at the Woodlawn Cemetery and Robert Ortiz or Lacie Gomez. There was no admissible evidence linking the evidence at Woodlawn Cemetery to any evidence found in Henderson.

No information was presented to the Grand Jury regarding any shots ever being fired at Darion Fletcher even though he is listed as a victim regarding an Assault Count, an Attempt Murder Count and a Conspiracy to Murder Count.

Regarding the Indictment, the following Counts are related to the Henderson incident:

- COUNT I: Conspiracy to Murder Robert Ortiz and Darion Fletcher
- COUNT 2: Attempt Murder with Use of a Deadly Weapon of Robert Ortiz
- COUNT 3: Attempt Murder with Use of a Deadly Weapon of Davion Fletcher
- COUNT 7: Assault with a Deadly Weapon of Lacie Gomez
- COUNT 8: Battery with Use and Substantial Bodily Harm of Robert Ortiz
- COUNT 9: Assault with a Deadly Weapon of Davion Fletcher
- COUNT 38: Discharge of a Firearm into 800 N. Major
- COUNTS 39-56: Discharge of a Weapon Where a Person Might be Endangered
- COUNT 57: Possession of a Firearm by a Prohibited Person
- COUNT 58: Mayhem with Use of A Deadly Weapon on Robert Ortiz (injury to eye)

The instant Petition follows.

IV. ARGUMENT

The Nevada Constitution states in relevant part:

ARTICLE. 3. - Distribution of Powers.

Section 1. Three separate departments; separation of powers; legislative review of administrative regulations. 1. 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 persons 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.

Deputy District Attorney Cannizzaro serves as the gatekeeper to all criminal justice matters as the Chair of the Senate Judiciary Committee and as the gatekeeper for all measures as the Senate Majority Leader in the Nevada State Legislature. She is also employed as a prosecutor by the Clark County District Attorney's Office.

The Majority Leader of the Senate position holds great authority. The Secretary of the Senate, who administers the daily business of the Senate, is responsible to the Majority Leader. (Senate Standing Rule 3). The Majority Leader has a term which extends to the interim between regular legislative sessions (Rule 6), and refers pre-filed bills to committees, appoints committees during the interim, and determines the start time of the organizational session (Rule 6). During the regular session, the Majority Leader appoints members to the Committee on Ethics and appoints the chair of the committee (Rule 23); determines the majority-minority composition of all standing and select committees, makes appointments to the committee for majority party members, and designates Chair and Vice Chair for each of these committees (Rule 40); refers bills to committees (Rule 40); allows committees to incur expenses (Rule 42). In addition, as Chair of the Judicial Committee, Majority Leader/Prosecutor Cannizzaro sets the agenda for each meeting of the committee, and thereby determines which bills will be heard and voted upon. (Rule 53).

Senate Majority Leader/Clark County Chief Deputy District Attorney Cannizzaro serves a dual role under the sole discretion of the elected Clark County District Attorney. The Collective Bargaining Agreement between Clark County and the Clark County Prosecutors Association, which governs the terms of employment for Cannizzaro, provides that the District

Attorney has sole discretion to grant a leave of absence without pay for a period not to exceed 90 calendar days, without prejudice to the employee's status. (Article 20, Section 3). The District Attorney also retains the right to hire, direct, assign or transfer these employees. NRS 288.150(3).

In addition to the direct authority over the legislative leadership, the Clark County District Attorney also has indirect authority over his subordinates. There is no quid-pro-quo requirement, as a psychological contract exists. This contract "is a set of unwritten expectations that exist between individual employees and their employers." It involves the "perceptions of both parties to the employment relationship, organization and individual, or the reciprocal promises and obligations implied in that relationship." Id. (quoting Guest, D. HRM: Towards A New Psychological Contract (eds P Boxall, J Purcell and P Wright, Oxford Handbook of Human Resource Management, Oxford University Press, Oxford (2007)). Even without express direction from supervisors, an evidentiary hearing would reveal that Attorney Cannizzaro is aware of the expectations that she is fully committed to the values of the elected District Attorney, be compliant and loyal, and enhance the image of the organization by limiting scrutiny and criticism. In exchange, she can expect job security, favored assignments, appreciation, and a sense of influence and importance.

The influence of the prosecutors' office extends beyond the elected district attorney, and the supervising assistant district attorneys, to the other deputy district attorneys and chief deputy district attorneys with whom the prosecutor legislators work daily. The prosecutors' office has a great esprit de corps, in which the group is united in pursuing prosecutions under the direction of the district attorney and senior members of the office. See generally *Anzaldua v. Northeast Ambulance & fire Prot. Dist.*, 793 F.3d 822, 834 (8th Cir. 2015). This unity and enthusiasm for the mission of the office would be harmed should the prosecutor legislators allow hearings and votes on any bills which would limit or hamper efforts like those in the instant case, or other members of the prosecutor's office who actively do the same.

As such, either directly, or as proxy for the elected District Attorney, Cannizzaro's involved in this case and in a leadership position of the Nevada legislature, would appear to clearly violate the express terms of Nev. Const. Art. 3 Sec. 1(1): "...no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others...."

Prosecuting attorneys, including deputy district attorneys, perform core executive functions on behalf of the State. See *Schoels v. State*, 114 Nev. 981, 991, 966 P.2d 735, 741-42 (1998) (concurring opinion of Shearing, J.) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 164 (1978); *United States v. Miller*, 722 F.2d 562, 565 (9th Cir. 1983) (prosecutors are representatives of the executive branch of government)). The position of district attorney is provided for by statute. NRS 252.010. Deputy district attorneys are "authorized to transact all official business relating to the duties of the office set forth in NRS 252.080 and 252.090 to the same extent as their principals and perform such other duties as the district attorney may from time to time direct." NRS 252.070(1). Deputy district attorneys are appointed, their appointments must be in writing, and along with their oath of office, must be recorded with the county recorder. NRS 252.070(3). NRS 252.080 provides that the district attorney in each county shall be the public prosecutor therein. NRS 252.090 provides that the district attorney shall attend the justice courts and district courts of the county and shall conduct all prosecutions on behalf of the people for public offenses.

United States Supreme Court Justice Robert H. Jackson, who also served as a United States Solicitor General, United States Attorney General, and as a prosecutor for the Nuremberg trials, famously stated that "The prosecutor has more control over life, liberty, and reputation, than any other person in America." *The Federal Prosecutor*, 24 J. Am. Judicature Soc'y 18 (1940). See also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 506 (2001) ("The definition of crimes and defenses plays a . . . much smaller role in the allocation of criminal punishment than we usually suppose. In general, the role it plays is to empower prosecutors, who are the criminal justice system's real lawmakers."). Prosecutors traditionally have wide discretion, as to whom to prosecute and what charge to file, and in

Nevada, how an accused person's liberty interests are handled. See *Wayte v. United States*, 470 U.S. 598, 607 (1985); *McCleskey v. Kemp*, 481 U.S. 279, 296 & n.16 (1987).

“As with the United States Constitution, the structure of our state constitution gives rise to the separation of powers doctrine through its ‘discrete treatment of the three branches of government.’” *State v. Second Judicial Dist. Court*, 432 P.3d 154, 158 (Nev. 2018) (quoting *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 212 P.3d 1098, 1103 (2009)). “Nevada's Constitution goes one step further; it contains an express provision prohibiting any one branch of government from impinging on the functions of another.” *Id.* (quoting *Hardy*, 125 Nev. at 292, 212 P.3d at 1103-04, and citing Nev. Const. art. 3, § 1).

In *State v. Second Judicial Dist. Court*, this Court considered an argument that the State, through its deputy district attorney in Washoe County, had 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 such a requirement would violate Article 3, Section 1 of the Nevada Constitution as a violation of the separation of powers doctrine. *Id.* at 158-59. The state constitution prohibits “one branch of government” from “exercise[ing] any functions, appertaining to either of the others.” *Id.* at 159 (quoting Nev. Const. art. 3 §1)

Article 3, Section 1 establishes the concept of tripartite government. *Galloway v. Truesdell*, 83 Nev. 13, 19, 422 P.2d 237, 242 (1967). It is fundamental to the system of government that the separate powers granted the executive, legislative and judicial departments be exercised without intrusion. *City of No. Las Vegas v. Daines*, 92 Nev. 292, 294, 550 P.3d 399, 400 (1976). Prosecutorial responsibilities are within the executive branch of government. *State v. Second Judicial Dist. Court*, 432 P.3d at 159; *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (recognizing that prosecutors are part of the executive branch). Allowing prosecutors to serve both legislative and executive roles violates these fundamental principles.

Understanding, that in *Heller v. Legislature of Nevada*, 120 Nev. 456, 93 P.3d 746 (2004), the Nevada Supreme Court ruled that the Secretary of State does 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 seated in the Legislature, the matter was not ripe for review. *Id.*

By contrast, Mr. Bills is explicitly aggrieved by the fact that he was and continues to suffer prejudice from the active participation by Attorney Cannizzaro regarding cost of money for increased bonds, deprivation of liberty and being required to face unfettered discretionary pleadings fashioned by Attorney Cannizzaro despite the relative weakness of the charges. Attorney Cannizzaro does this without any fear of limitation or even analysis by Senator Cannizzaro despite such actions being at the core of the dysfunctional criminal justice system leading to unwarranted mass incarceration in our community.

DA Cannizzaro may not prosecute individuals for violating statutes she may have had input in writing or amending as that would clearly cross the separation-of-powers line. Because of the ongoing prosecution of Mr. Bills, he is not requesting a sweeping ruling altering the way the Legislature polices its members. *Id.* Indeed, Mr. Bills singles out a specific prosecutor who also serves in the most vital, leadership role in the Nevada Senate, who continues to violate the separation of powers doctrine every moment that this prosecution continues.

The language of the Nevada Constitution is clear and unambiguous: “...no persons 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.”

At hearing, a Legislative Counsel Bureau’s opinion letter dated August 8, 2020 provides “...that the separation-of-powers provision of the Nevada Constitution only prohibits a legislator from holding a public office in another department of state government, because a person who holds a public office exercises sovereign functions appertaining to another department of state government.” The LCB opines “...that the separation-of-powers provision of the Nevada Constitution does not prohibit a legislator from occupying a position of public employment in another department of state government, because a person who occupies a position of public

employment does not exercise any sovereign functions appertaining to another department of state government.” *Id.*

Put concretely, District Attorney Steve Wolfson is prohibited from serving as a legislator but District Attorney Nicole Canizzaro is arguable not. This opinion, and its distinction between public office and public employment, may or may not eventually prove to be correct. As the LCB points out: “Since the *Heller* case in 2004, neither the Nevada Supreme Court nor the Nevada Court of Appeals has addressed or decided the merits of such a separation-of-powers challenge in a reported case.”

What is fact today is that the plain language of Nevada Constitution, Article 3, Section 1(1) does not make any distinction between public office and public employment. It does, however, prohibit an individual from working in the legislative and executive branches of government simultaneously. Given, the absolute exercise of discretion of executive function, however, in the instant case, that not only potentially takes advantage of gaps, and/or loopholes in any statutory scheme, but which will be immune to any discussion of reform so long as Senator Cannizzaro is helming that aspect of the legislative function – there is a distinct and unique conflict that the Constitution suggests requires intervention by a Court and relief to an individual aggrieved by this failure to adequately separate powers in a system based upon checks and balances of power, and the exercise thereof.

The framers of the Nevada Constitution carved 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) states that the legislature may permit an individual to work for two branches of government if it either: 1) amends the constitution, or 2) passes 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* 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.” *Id.* at 466, 93 P.3d at 753. Until the Senate and Assembly authorize dual service, the practice is expressly prohibited by Article 3, Section 1(1).

Here, there would be no evidence adduced at hearing that Senator Cannizzaro has ever recused concerning the consideration of matters that impact DA Cannizzaro’s ability to (generally) take advantage of any gaps or loopholes in legislative enactment concerning the rights of a person accused, or measures in committee, study or otherwise, impacting any effort to curb obvious abuses such as ex parte proceedings, discretionary arrest warrants, overcharging and/or stacking of charges, and presentations to grand juries.

There is a significant conflict in the Clark County District Attorney and specifically attorney Nicole Cannizzaro continue to prosecute the instant matter.

CONCLUSION

WHEREFORE, in as much as Mr. Bills has already and continues to irreparably suffer because of the actions of the Clark County District Attorney’s office and District Attorney Nicole Cannizzaro not only in violation of his Due Process rights (as raised under separate motion) but that the executive functioning in the instant case through District Attorney Cannizzaro violates the separation of powers – Mr. Bills requests that the case be dismissed or in the alternative, that the District Attorney’s Office be removed from the prosecution, or in the alternative that District Attorney Cannizzaro be removed from any further participation in the case.

DATED this 17th day of December, 2020.

Respectfully Submitted by:

/s/: David Figler
DAYVID FIGLER, ESQ.
Nevada Bar No. 004264
550 E. Charleston Blvd., Suite A
Las Vegas, NV 89104
(702) 222-0007
Attorney for Defendant, KIRK BILLS

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on December 17, 2020, a true copy of **MOTION TO REMOVE THE CLARK COUNTY DISTRICT ATTORNEYS OFFICE FROM PROSECUTION BASED ON THE SEPARATION OF POWERS DOCTRINE, OR IN THE ALTERNATIVE MOTION TO DISMISS PROSECUTION** was served upon interested parties via electronic mail (e-mail) through the Court's electronic filing system, Odyssey File & Serve, to counsel's corresponding e-mail address as follows:

Chief Deputy District Attorney

E-mail: *Nicole.Cannizzaro@clarkcountyda.com*

Clark County District Attorney Motions Secretary

E-mail: *Motions@clarkcountyda.com*

/s/ Dayvid Figler _____

EXHIBIT C



1 **MDQA**
RENE L. VALLADARES
2 Federal Public Defender
Nevada Bar No. 11479
3 **DAVID ANTHONY**
Assistant Federal Public Defender
4 Nevada Bar No. 7978
David_Anthony@fd.org
5 **BRAD D. LEVENSON**
Assistant Federal Public Defender
6 Nevada Bar No. 13804C
Brad_Levenson@fd.org
7 411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
8 (702) 388-6577
(702) 388-5819 (Fax)
9 Attorneys for Zane Michael Floyd

10
11 **DISTRICT COURT**
CLARK COUNTY, NEVADA

12 **ZANE MICHAEL FLOYD,**
13 **Petitioner,**
14 **v.**
15 **WILLIAM GITTERE, Warden, Ely State**
Prison; AARON FORD; Attorney General,
State of Nevada,
16 **Respondents.**

Case No. A-21-832952-W
Dept. No. VIII

**MOTION TO DISQUALIFY CLARK
COUNTY DISTRICT ATTORNEY'S
OFFICE**

Date of Hearing:
Time of Hearing:

(DEATH PENALTY CASE)

**(Execution Warrant Sought for the
Week of June 7, 2021)**

1 DATED this 15th day of April, 2021.

2 Respectfully submitted
3 RENE L. VALLADARES
4 Federal Public Defender

5 /s/ David Anthony
6 DAVID ANTHONY
7 Assistant Federal Public Defender

8 /s/ Brad D. Levenson
9 BRAD D. LEVENSON
10 Assistant Federal Public Defender
11
12
13
14
15
16
17
18
19
20
21
22
23

1 **I. INTRODUCTION**

2 Whereas the federal constitution merely implies separation of powers by
3 delineating each branch’s responsibilities, the Nevada Constitution is explicit on
4 this constitutional protection:

5 The powers of the Government of the State of Nevada
6 shall be divided into three separate departments, — the
7 Legislative, — the Executive and the Judicial; and no
8 persons charged with the exercise of powers properly
9 belonging to one of these departments shall exercise any
10 functions appertaining to either of others, except in the
11 cases expressly directed or permitted in this constitution.

12 Nev. Const. Art. 3, § 1, ¶1; *see also State v. Second Jud. Dist. Ct. (Hearn)*, 134 Nev.
13 783, 786, 432 P.3d 154, 158 (2018) (“Nevada’s Constitution goes one step further . . .
14 .”). The Clark County District Attorney’s Office is in violation of this proscription
15 because two deputy district attorneys currently serve in the Nevada Senate.
16 Because this concentration of executive department and legislative department
17 functions is unconstitutional, Floyd asks this Court to disqualify the Clark County
18 District Attorney’s Office from representing the State.

19 **II. ARGUMENT**

20 This Court is not only endowed with “broad discretion in determining
21 whether disqualification is required” but is affirmatively “responsible for controlling
22 the conduct of attorneys practicing before” it. *See Brown v. Eighth Jud. Dist. Ct.*
23 (*Thalgott*), 116 Nev. 1200, 1205, 14 P.3d 1266, 1269 (2000). In the context of a
public lawyer—like a district attorney—an appearance of impropriety requires
disqualification if it “is so extreme as to undermine public trust and confidence in
the judicial system.” *Liapis v. Second Judicial Dist. Ct. (Liapis)*, 128 Nev. 414, 419,

1 282 P.3d 733, 737 (2012). As the Nevada Supreme Court has noted, these issues
2 present “delicate and sometimes difficult” “balancing and competing interests.”
3 *Brown*, 116 Nev. at 1205, 14 P.3d at 1269. Namely, motions to disqualify implicate
4 “each party’s right to be free from the risk of even inadvertent disclosure of
5 confidential information, and the public’s interest in the scrupulous administration
6 of justice.” *Id.* at 1205, 14 P.3d at 1270 (citing *Hull v. Celanese Corp.*, 513 F.2d 568,
7 570 (2d Cir. 1975)).

8 This Court will grant a motion to disqualify if there is “at least a reasonable
9 possibility that some specifically identifiable impropriety did in fact occur” and “the
10 likelihood of public suspicion or obloquy outweighs the social interest which will be
11 served by a lawyer’s continued participation in a particular case.” *Brown*, 116 Nev.
12 at 1205, 14 P.3d at 1270.⁶ Because the Clark County District Attorney’s Office is in
13 violation of Article 3 of the Nevada Constitution, a specific and identifiable
14 impropriety has occurred. This constitutional violation creates not just the
15 likelihood but the reality of public suspicion and obloquy, and no social interest is
16 served by allowing the Clark County District Attorney to continue to represent the
17 State.

18
19 ⁶ This is not, as in *State v. Eighth Jud. Dist. Ct. (Zogheib)*, 130 Nev. 158, 321
20 P.3d 882 (2014), a traditional conflict of interest. In *Zogheib*, the issue was whether
21 the Clark County District Attorney’s conflict of interest from his previous
22 employment required disqualifying the entire District Attorney’s Office. *Id.* at 159,
23 321 P.3d at 883. The Nevada Supreme Court noted that the appropriate standard for
such a conflict is “whether the individual lawyer’s conflict would render it unlikely
that the defendant would receive a fair trial unless the conflict is imputed to the
prosecutor’s office.” *Id.* at 160, 321 P.3d at 883. Here, however, the issue is not Mr.
Wolfson’s prior employment, but the constitutional violation of mixing executive and
legislative functions.

1 **A. Violating Article 3 of the Nevada Constitution is a specific and**
2 **identifiable impropriety.**

3 The basic facts are not subject to dispute. Two deputy district attorneys of the
4 Clark County District Attorney’s office are currently serving in the Nevada Senate.⁷
5 There is no question that these two senators are “charged with the exercise of
6 powers properly belonging to one of these departments.” Nev. Const. Art. 3, § 1, ¶1.
7 As senators, they are charged with the exercise of powers properly belonging to the
8 Legislative Department. Nev. Const. Art. 4 § 1.

9 Nor can there be a question that the prosecution of offenses under Nevada
10 law is a “function” “appertaining” to the Executive Department. Time and time
11 again, the Nevada Supreme Court has treated prosecution as a quintessential
12 executive branch function. *See, e.g., State v. Second Jud. Dist. Ct.*, 134 Nev. at 786,
13 432 P.3d at 158 (Nevada Supreme Court precedent “indicates that charging
14 decisions are within the executive realm and sentencing decisions are inherently
15 judicial functions”); *Schoels v. State*, 114 Nev. 981, 991, 966 P.3d 735, 741–42 (1998)
16 (Shearing, J., concurring) (“Charging decision are primarily a matter of discretion
17 for the prosecution, which represents the executive branch of government.”); *Sandy*
18 *v. Fifth Jud. Dist. Ct.*, 113 Nev. 435, 440, 935 P.2d 1148, 1150–51 (1997) (noting
19 judicial power to reject plea bargains a necessary check on “the abuse of
20 prosecutorial (executive) prerogatives”); *Righetti v. Eighth Jud. Dist. Ct.*, 133 Nev.

21
22 ⁷ *See* About Nicole, Nicole Cannizzaro for Senate District 6, available at
23 <https://www.nicolecannizzaro.com/about-nicole>; *see also* About Melanie, Melanie
 Scheible for Senate District 9, available at
 <https://www.melaniefornvsenate.com/about>.

1 42, 46, 388 P.3d 643, 647 (2017) (“And permitting a district court to accept such a
2 guilty plea would allow the judiciary to invade a realm where the executive branch
3 maintains *almost exclusive control*, in violation of separation-of-powers principles.”
4 (emphasis added)).

5 It follows that the Clark County District Attorney’s Office is “charged with
6 the exercise of powers properly belonging to one of these departments,” namely, the
7 Executive Department. *See* Nev. Const. Art. 3, § 1, ¶1. As described above,
8 prosecution is a core Executive Department power, and Nevada law is explicit: “The
9 district attorney in each county shall be public prosecutor therein.” Nev. Rev. Stat. §
10 252.080. And the district attorney “may appoint deputies, who are authorized to
11 transact all official business related to those duties of the office” Nev. Rev.
12 Stat. § 252.070(1). Moreover, the Attorney General, a constitutionally listed
13 executive officer, has supervisory responsibility over all district attorneys. *See* Nev.
14 Const. art. 5, § 19 ¶1; *see also* Nev. Rev. Stat. § 228.120(2) (Attorney General may
15 “[e]xercise supervisory powers over all district attorneys of the State in *all* matters
16 pertaining to the duties of their offices”).⁸ The Attorney General must
17 “prosecute or defend” in front of the Nevada Supreme Court “[a]ll causes to which
18 the State may be a party.” Nev. Rev. Stat. § 228.140(1)(a).

19 Thus, whether construed as “powers properly belonging to one of these
20 departments” or as “any functions, appertaining to either of the others” the Clark

21
22 ⁸ Notably, the Attorney General’s office has unilateral authority to “[a]pppear
23 in, take exclusive charge of and conduct any prosecution in any court of this State
for a violation of any law of this State, when in his or her opinion it is necessary, or
when requested by the Governor.” Nev. Rev. Stat. § 228.120(3).

1 County District Attorney’s Office is in violation of Article 3 of the Nevada
2 Constitution. The two senate-prosecutors have powers properly belonging to the
3 Legislative Department and exercise functions appertaining to the executive
4 department. But also, the Clark County District Attorney’s office has powers
5 properly belonging to the Executive Department, and exercises—through its two
6 deputies who are senators—functions appertaining to the Legislative Department.

7 The Nevada Constitution is explicit: this mixing of powers and functions is
8 prohibited. Art. 3, § 1, ¶1. And there are good reasons for this prohibition. With
9 reference to the federal constitution, “The Founders recognized that the
10 combination of legislative and prosecutorial power is a much more explosive
11 mixture than the combination of judicial and prosecutorial power because the
12 *former would likely lead to the abuse of power due to the highly political nature of*
13 *the legislature.”* Todd David Peterson, *Federal Prosecutorial Independence*, 15
14 *Duke J. Const. L. & Pub. Pol’y* 217, 237 (2020) (emphasis added). Separating the
15 powers of prosecution from the power of legislation is “designed to protect [the
16 process of prosecution] from political influence and unfairness to those who are
17 subject to criminal investigation and prosecution.” *Id.* at 261.

18 This violation of the separation of powers principle, standing alone, is a
19 “specific and identifiable impropriety.” *Brown*, 116 Nev. at 1205, 14 P.3d at 1270.
20 However, this Court should not ignore the politically helpful timing of the Clark
21 County District Attorney revealing to local press his intention to seek a warrant of
22 execution—a mere two days after a bill to abolish the death penalty was read and
23

1 then referred to the Assembly Judiciary Committee. Nor should this Court ignore
2 the politically helpful timing of the Clark County District Attorney filing its motion
3 the day after the Assembly voted on its bill. The separation of legislative and
4 prosecutorial power is specifically intended to prevent this kind of political
5 manipulation of criminal processes.

6 **B. The Clark County District Attorney’s violation of Article 3 of the**
7 **Nevada Constitution creates a likelihood of public suspicion and**
8 **no social interest is served by allowing the Clark County District**
9 **Attorney’s Office to continue to represent the State.**

8 The political implications of the Clark County District Attorney’s statements
9 to the *Las Vegas Review-Journal* were immediately apparent. The article itself
10 drew the connection, referencing the Assembly Bill and noting that “Floyd’s
11 execution could take place as lawmakers wrap up their 2021 session, barring any
12 further legal hurdles.”⁹ Indeed, the Clark County District Attorney seemed, himself,
13 to appreciate the political implications by instructing “legislative leaders” to
14 “recognize that there are some people who commit such heinous acts”¹⁰ Other
15 quoted individuals remarked on the politics of the Clark County District Attorney’s
16

17 ⁹ Ferrara, *supra* n.3.

18 ¹⁰ *Id.* Notably, both the senator-prosecutors have important leadership roles
19 in the Nevada Senate: one is the Majority Leader and Vice-Chair of the Senate
20 Judiciary Committee, the other is the Chair of the Senate Judiciary Committee. The
21 Majority Leader has discretion over many matters related to all bills, including
22 Assembly Bill 395. *See, e.g.*, Nev. S. Standing R. 40(1) (81st Session 2021)
23 (authority to appoint all standing and select committees). The chair of any Senate
committee has unilateral authority to “determine the agenda of each meeting of the
committee,” subject only to the qualification that other committee members may
request an item or that a majority of the committee may add an item. *See* Nev. S.
Standing R. 53(10) (81st Session 2021). Thus, the Chair of Senate Judiciary
Committee—one of the employees of the Clark County District Attorney’s Office—
has great discretion in determining whether Assembly Bill 395 will receive a
hearing or a vote.

1 decision.¹¹ Social media reactions expressed suspicion and concern about the Clark
2 County District Attorney's motivations.¹² Subsequent reporting also noted the
3 connection.¹³

4 These political implications raise serious questions regarding the Clark
5 County District Attorney's separation of powers violation. How closely is the Clark
6 County District Attorney working with his senate-prosecutors? Are they exchanging
7 information related to the execution warrant of Zane Floyd and the abolition bill? Is
8 the timing of the execution warrant of Zane Floyd to politically aid the senate-
9 prosecutors? The answers to these questions, or others, matter less than that

11 ¹¹ *Id.* (quoting Scott Coffee: "These things are always politicized to some
12 extent," and Franny Forsman: "Moving forward on it now just seems like this is the
13 wrong time . . . Let people think about this. Let the legislators think about this.
14 (Prosecutors) are trying to put this case front and center with the Legislature.
15 Doing that with someone's life is inappropriate.").

16 ¹² *See, e.g.*, Michelle Rindels (@MichelleRindels), Twitter, (Mar. 26, 2021)
17 (retweeting *Review-Journal* article, and paraphrasing Wolfson claiming
18 coincidence); Dayvid Figler (@OyVegas), Twitter (Mar. 26, 2021),
19 <https://twitter.com/OyVegas/status/1375659979567362048> (noting "coincidence");
20 Jarde Busker (@JaredBusker), Twitter (Mar. 27, 2021),
21 <https://twitter.com/JaredBusker/status/1375807358434037764> ("Doesn't seem like a
22 coincidence with the attached statement."); Michael Kagan, (@MichaelGKagan),
23 Twitter (Mar. 26, 2021),
<https://twitter.com/MichaelGKagan/status/1375673238500470790> ("And abolish
political stunts involving killing people while we are at it."); Bob Fulkerson
(@bobfulkerson), Twitter (Mar. 26, 2021),
<https://twitter.com/bobfulkerson/status/1375655513661136896> ("Wolfson has pulled
some cynical moves before, but using a human life to whip up base instincts for
blood revenge to prevent the death penalty abolition bill from moving forward takes
the cake."); Rae Lathrop (@raelathrop), Twitter (Mar. 26, 2021),
<https://twitter.com/raelathrop/status/1375653197356756994> ("Actively using a
human life to fight a political battle....there are no words for this stunt."); Jon
Ralston (@RalstonReports), Twitter (Mar. 26, 2021),
<https://twitter.com/RalstonReports/status/1375644083494940676> ("Coincidence").

13 ¹³ Colton Lochhead, *Assembly votes to ban death penalty*, Las Vegas Rev. J.
14 (Apr. 13, 2021), available at [https://www.reviewjournal.com/news/politics-and-
15 government/2021-legislature/assembly-votes-to-ban-death-penalty-2328340/](https://www.reviewjournal.com/news/politics-and-government/2021-legislature/assembly-votes-to-ban-death-penalty-2328340/) ("Soon
16 after the bill was introduced last month, Wolfson's office announced that it is seeking
17 an imminent order of execution . . .").

1 reasonable members of the public might ask them. The disqualification standard
2 asks not whether public suspicion is confirmed, but whether there is a reasonable
3 likelihood of it.

4 And there can be no question that such a reasonable likelihood exists. Media
5 coverage of the abolition bills in Nevada have consistently noted that the Senate
6 Majority Leader and the Chair of the Senate Judiciary Committee are prosecutors
7 for the Clark County District Attorney's office.¹⁴ This reasonable likelihood would
8 exist, though, notwithstanding media coverage. The Clark County District Attorney
9 has a supervisory role over the two senate-prosecutors; he has made his policy
10 preference known, and used the powers of his office to highlight a case and tell
11 "legislative leaders" to consider that case in their vote on pending legislation. This

13 ¹⁴ Michelle Rindels & Tabitha Mueller, *Nevada Assembly votes to abolish the*
14 *death penalty in historic move; bill's future uncertain in Senate*, The Nev.
15 Independent (Apr. 13, 2021), available at
16 [https://thenevadaindependent.com/article/nevada-assembly-votes-to-abolish-death-
17 penalty-in-historic-move-bills-future-uncertain-in-senate](https://thenevadaindependent.com/article/nevada-assembly-votes-to-abolish-death-penalty-in-historic-move-bills-future-uncertain-in-senate) ("The bill faces a more
18 uncertain climate in the Senate where Senate Majority Leader Nicole Cannizzaro
19 (D-Las Vegas), who is a prosecutor, would not commit on Tuesday to giving the bill
20 a hearing. Both Cannizzaro and Melanie Scheible (D-Las Vegas), who chairs the
21 Senate Judiciary Committee, have day jobs at the Clark County District Attorney's
22 Office; District Attorney Steve Wolfson testified in opposition to the bill.");
23 Lochhead, *supra* n.13 ("Speaking as they left the Senate floor Tuesday, Majority
Leader Nicole Cannizzaro and her fellow Las Vegas Democrat Sen. Melanie
Scheible, 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."); Michelle Rindels, *Nevada lawmakers discuss abolishing the death
penalty for the first time since ill-fated 2017 effort*, The Nev. Independent (Mar. 31,
2021), available at [https://thenevadaindependent.com/article/nevada-lawmakers-
discuss-abolishing-death-penalty-for-first-time-since-ill-fated-2017-effort](https://thenevadaindependent.com/article/nevada-lawmakers-discuss-abolishing-death-penalty-for-first-time-since-ill-fated-2017-effort) ("Two
major variables for the bill's future are whether a death penalty ban can survive the
Senate, where two prosecutors hold key leadership positions at the head of the
entire Senate and the Senate Judiciary Committee and have the power to kill the
bill . . ."); *see also id.* (referring to Wolfson comments to *Review-Journal*); *see also*
Ferrara, *supra* n.3 ("Two prosecutors, including Senate Majority Leader Nicole
Cannizzaro, serve in the Nevada Legislature.").

1 use of power creates a conflict of interest for the senate-prosecutors: they may vote
2 in line with their boss or vote against him and risk their stature within the office.
3 Placing the senate-prosecutors in this position violates the public trust.

4 There is no social interest in allowing the Clark County District Attorney to
5 continue the prosecution in this case. First, the constitutional violation, and the
6 corresponding public suspicion, cannot be outweighed by any social interest in
7 allowing the Clark County District Attorney to continue to represent the State. But,
8 in the specific instance of Mr. Floyd's case, no social interest outweighs the
9 constitutional violation. Mr. Floyd's case has not been litigated in state court for the
10 last ten years. The last deputy district attorney listed on this case has since
11 retired.¹⁵ The trial attorneys on this case have also retired.¹⁶ Thus, it is likely that
12 attorneys working on this case will need to become familiar with the facts and
13 procedural history of the case: whether it is deputies within the Clark County
14 District Attorney or prosecutors outside of the office makes little practical
15 difference.

16 Additionally, there is a strong social interest in disqualifying the Clark
17 County District Attorney's office. End-stage litigation in a death penalty case is
18 always of high media and political interest. The citizens of the State of Nevada
19 deserve the assurance that the lawyers representing the State and seeking Mr.

21
22 ¹⁵ See *Floyd v. State*, Respondent's Ans. Br., at 45, No. 51409 (Nev. Oct. 8,
2009) (Steven Owens, Chief Deputy District Attorney).

23 ¹⁶ See, e.g., Tr. (July 18, 2000) (William T. Koot, Deputy District Attorney,
Stewart L. Bell, District Attorney).

1 Floyd's execution are doing so to "see that the laws are faithfully executed" and not
2 to further agendas or manipulate the other branches of government. *See Nev.*

3 Const. Art. 5, § 7.

4 ///

5 ///

6 ///

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

1 **III. CONCLUSION**

2 Based on the foregoing, Mr. Floyd respectfully requests that this Court
3 disqualify the Clark County District Attorney’s office from representing the State of
4 Nevada in this matter, and “appoint some other person to perform the duties of the
5 district attorney.” Nev. Rev. Stat. § 252.100.

6 DATED this 15th day of April, 2021.

7 Respectfully submitted
8 RENE L. VALLADARES
9 Federal Public Defender

10 /s/ David Anthony
11 DAVID ANTHONY
12 Assistant Federal Public Defender

13 /s/ Brad D. Levenson
14 BRAD D. LEVENSON
15 Assistant Federal Public Defender
16
17
18
19
20
21
22
23

1 **CERTIFICATE OF SERVICE**

2 In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned
3 hereby certifies that on this 15th day of April, 2021, a true and correct copy of the
4 foregoing MOTION TO DISQUALIFY, was filed electronically with the Eighth
5 Judicial District Court and served by Odyssey EFileNV, addressed as follows:

6 Alexander Chen
7 Chief Deputy District Attorney
8 motions@clarkcountyda.com
9 Eileen.davis@clarkcountyda.com

10 /s/ Sara Jelinek
11 An Employee of the Federal Public Defenders
12 Office, District of Nevada
13
14
15
16
17
18
19
20
21
22
23