

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

Respondent,
and
JENNIFER LYNN PLUMLEE,
Real Party In Interest.

Electronically Filed
May 19 2021 04:08 p.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

Respondent,
and
MATTHEW HANEY MOLEN,
Real Party In Interest.

CASE NO: 82249

REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF MANDAMUS

COMES NOW, the State of Nevada, Petitioner, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, ALEXANDER CHEN, on behalf of the above-named Petitioner and submits this Reply to Oppositions to Petition for Writ of Mandamus and in obedience to this Court's order filed May 6, 2021, in the above-captioned case. This Reply is based on the following memorandum and all papers and pleadings on file herein.

Dated this 19th day of May, 2021.

Respectfully submitted,

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

BY */s/ Alexander Chen*

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney

MEMORANDUM AND POINTS OF AUTHORITIES

I. NONE OF THE BRIEFS IN SUPPORT OF THE REAL PARTIES IN INTEREST ADDRESS THE PROCEDURAL DEFECT

Neither of the Responses from the Real Parties In Interest, nor the Amicus Brief written in support of the Real Parties In Interest, address the issue that the district court vacated both convictions on direct appeal without the parties having ever first preserved the issue.

The Real Parties In Interest recognize that the standard is that failure to preserve an error is forfeited on appeal, even when such error is structural. Jeremias v. State, 134 Nev. 46 (2018). The Real Parties In Interest then proceed to indicate that the Nevada Supreme Court may grant writ relief “where an important issue of law needs clarification and public policy is served by this court’s invocation of its

original jurisdiction.” Answer, p. 7, *citing* Business Computer Rentals v. State Treasurer, 114 Nev. 63, 67 (1998).

Real Parties in Interest brief seems to validate this Court’s entertaining of the petition on public policy grounds, but it does not address the procedural defects. The writ sought arises from the district court’s granting of two direct appeals for an issue that was never previously raised. Therefore, the procedural issue that the district court should not have even entertained the issue on direct appeal, is uncontested. This Court has repeatedly held that failure to respond to an issue raised should be construed as a confession of error. Bates v. Chronister, 100 Nev. 675, 681-82 (1984), *see also* Polk v. State, 126 Nev. 180 (2010).

II. DEPUTY DISTRICT ATTORNEYS DO NOT EXERCISE EXECUTIVE FUNCTIONS THAT IMPLICATE THE SEPARATION OF POWERS CLAUSE

The Real Parties In Interest argue that the plain language of Article 1, Section 3 supports their position that a person who has executive power may not also serve in the Legislature. When interpreting a constitutional provision, the court must “first look to the language itself and will give effect to its plain meaning, unless the provision is ambiguous.” Secretary of State v. Burk, 124 Nev. 579, 590, (2008). “A constitutional provision is considered ambiguous when it is capable of at least two reasonable yet inconsistent interpretations.” Id. at 590. When courts engage in constitutional interpretation, the document should be reviewed as a whole in order

to ascertain the meaning of any particular provision. Killgrove v. Morriss, 39 Nev. 224, 226–27 (1916).

All of the briefs submitted acknowledge that district attorneys perform some executive functions. Literally any position that seeks to enforce a law, statute, or even administrative code serves an executive function. However, the functions that a deputy district attorney performs do not rise to the level of implicating the separation of powers clause of the Nevada Constitution. For example, Article 4, Section 32 of the Nevada Constitution allows for the Legislature (aka the legislative branch) to abolish a county district attorney's office. If the district attorney's office, is in fact the type of state executive branch that the Constitution contemplated, then why does the Constitution empower the legislative branch to completely eliminate district attorney offices? Clearly district attorney offices were not executive agencies that were contemplated by Nevada's separation of powers clause.

When the Nevada Supreme Court was confronted with the question of whether district attorneys were subject to term limits proscribed by Article 15, Section 3 of the Nevada Constitution, this Court referenced Article 4, Section 32 to illustrate that the district attorney offices were not the type of "state office" that Article 15, Section 3 contemplated. In re Contested Election of Mallory, 128 Nev. 436 (2012). This Court held that because a district attorney's office is a legislatively created office, the term limits proscribed by the Constitution did not apply. Through

the same logic as used in Mallory, this Court should not expand the separation of powers clause to district attorney offices.

It is also worth noting that Deputy District Attorney Scheible does not simultaneously exercise her functions. Nevada's legislative bodies meet for session once every other year. During the session, she does not serve any executive function. Instead, she collaborates with her fellow legislators, which come from all different professions and backgrounds, to collectively propose, debate, and pass various laws.

Conversely, neither the Real Parties In Interest nor the Amicus Brief in support of the Real Parties In Interest, address whether the Legislature was properly in session after Deputy District Attorney Scheible was elected to the Senate. Deputy District Attorney Scheible was a deputy district attorney prior to her legislative service. In her role as a Senator, Senator Scheible for instance was part of and voted in favor of A.B. 236 at the 2019 legislative session. A.B. 236 was a bill that substantially reduced the penalties for various crimes. However, the Real Parties In Interest, as well as the Clark County Public Defender's Office and NACJ in amicus, have argued that her participation negates any of the benefits their clients have received from the passage of A.B. 236 or any of the other bills that were passed during the legislative session. Real Parties in Interest and the Amicus Brief only attack her role as a deputy district attorney because it benefits them to do so. However if their separation of powers claim has merits, why should she be able to

exercise her legislative powers while serving at the Legislature while being unable to use any of her executive powers in her role as a deputy district attorney? This certainly cannot and should not be the outcome.

The fact that Deputy District Attorney Scheible serves as an employee of an executive agency nothing to violate the separation of powers clause. The Legislature, as a body, creates the laws which go into effect for all people of Nevada. When she prosecutes a case, she is merely acting as a person enforcing the laws. When she prosecutes a case, it carries no legislative function. She does not rewrite the laws as she simultaneously prosecutes a case. Moreover, a defense attorney either appointed or hired, and a court, review her prosecutorial decisions. The court in its judicial capacity provides a check on her executive functions. This is the separation of powers at work despite the separate role that she has when serving at the Legislature. Thus, there is no blend of executive and legislative functions that would violate the separation of powers clause.

To the extent that the Real Parties In Interest argue her involvement is violative of the separation of powers because she had a hand in enacting or preventing laws, this again is not the requirement. Individuals from all branches of government can be involved with the laws passed (or proposed but not passed). Nevada Supreme Court Justices, the 8th Judicial District Court, representatives of multiple executive agencies such as the Governor and Attorney General's Office

routinely partake in the legislative process. The separation of powers clause does not simply expand to any person who was involved with the creation of legislation. People with knowledge of an area of legislation routinely provide input. To argue that individuals because they were involved would then in turn be prevented from enforcing the law would affect every area of government. That outcome was certainly not what the founders of the Nevada Constitution intended.

CONCLUSION

Petitioner urges this Court to issue a writ of mandamus reinstating the judgments against each Real Party In Interest. The Real Parties In Interest have not addressed the fact that this issue was first raised on direct appeal. This fact should enable Petitioner to prevail on procedural grounds. However, the substantive issues discussed also support the issuance of a writ. The separation of powers clause should not be implicated when a deputy district attorney prosecutes a case.

Dated this 19th day of May, 2021.

Respectfully submitted,

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

BY */s/ Alexander Chen*

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney

AFFIDAVIT

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

Dated this 19th day of May, 2021.

BY */s/ Alexander Chen*

ALEXANDER CHEN

Chief Deputy District Attorney

Nevada Bar #010539

Office of the Clark County District Attorney

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this Answer to Mandamus Writ complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 1,287 words and 109 lines of text.
3. **Finally, I hereby certify** that I have read this Answer to Mandamus Writ, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19th day of May, 2021.

Respectfully submitted,

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

BY */s/ Alexander Chen*

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

