IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL JOSIAH CARUSO,

Petitioner,

vs,

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE MARY KAY HOLTHUS, DISTRICT JUDGE,

Respondents,

and

THE STATE OF NEVADA,

Real Party In Interest.

CASE NO: 82362

D.C. NO: C-19-345393-1

RESPONDENT'S APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 16, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I, further certify that on March 16, 2021, a copy was sent via email to District Court, Department 18's JEA for Judge Holthus:

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BY */s/ J. Garcia*
Employee, District Attorney's Office

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TRAN

CASE NO. C345393-1

IN THE JUSTICE'S COURT OF HENDERSON TOWNSHIP

COUNTY OF CLARK, STATE OF NEVADA

STATE OF NEVADA, Plaintiff, vs. SAMUEL JOSIAH CARUSO, Defendant.	CASE NO. 19FH2101X

REPORTER'S TRANSCRIPT

OF

PRELIMINARY HEARING

BEFORE THE HONORABLE DAVID S. GIBSON, SR.

JUSTICE OF THE PEACE

MONDAY, DECEMBER 9, 2019

APPEARANCES:

For the State: EKATERINA DERJAVINA
Deputy District Attorney
MELANIE SCHEIBLE
Deputy District Attorney

For the Defendant: RYAN HAMILTON, ESQ.

Reported by: Lisa Brenske, CCR #186

W I T N E S S E S

2:00PM

INDEX OF EXHIBITS

Exhibit	Description	Admitted
STATE'S 1	LYFT SCREENSHOT	48

HENDERSON, NEVADA, DECEMBER 9, 2019

* * * * * * * * * * * *

THE COURT: Samuel Caruso, 19FH2101X.

Do you wish to invoke the exclusionary rule?

MR. HAMILTON: We do, your Honor.

THE COURT: The exclusionary rule has been invoked. Anybody who has been subpoenaed to testify in this case or expects to testify in this case is instructed to wait outside the courtroom until you're called in to testify. You are not to discuss this case with anyone until this matter is concluded.

Go ahead and call your first witness.

MS. SCHEIBLE: Your Honor, before I do that I do have an Amended Criminal Complaint to file, if you will allow me.

THE COURT: I don't have it.

Counsel, did you get a copy of that?

MR. HAMILTON: I did not.

(At the bench discussion.)

THE COURT: At this point for the first witness we are going to clear the courtroom except for the witness. We instruct everyone to wait outside

until this witness is done testifying and we'll bring you back in. Thank you.

Go ahead and call your first witness.

MS. SCHEIBLE: State calls Raquelle Rouw.

THE CLERK: Raise your right hand.

Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: Yes.

THE CLERK: Please be seated.

Please state your first and last name and spell each for the record.

THE WITNESS: Raquelle, R-A-Q-U-E-L-L-E Rouw, R-O-U-W.

THE COURT: Thank you. You may be seated and speak into the microphone.

Go ahead, counsel.

RAQUELLE ROUW,
having been first duly sworn, did testify as follows:

DIRECT EXAMINATION

BY MS. SCHEIBLE:

Q. Miss Rouw, how old are you?

A. I'm 17.

Q. And when did you turn 17?

A. August 18th -- August 17th this year.
Q. And where do you live, like what city?
A. Las Vegas.
Q. Is that here in Clark County, Nevada?
A. Yes.
Q. Have you lived in Las Vegas your whole life?
A. Yes.
Q. So all 17 years?
A. Yes.
Q. I want to draw your attention to June 22nd of this year. Were you in Las Vegas on that date?
A. Yes.
Q. Here in Clark County, Nevada?
A. Uh-huh.
Q. And on the 22nd what were you doing that day? Just briefly.
A. I was hanging out with my boyfriend and his little sister and we went to the movies.
Q. What's your boyfriend's name?
A. Daniel.
Q. And you guys went to the movies. Did you go anywhere else that day?
A. Yeah. After we dropped her off back at

her house, my boyfriend's house, we went out and we hung out with AJ and Justice.

Q. And where did you meet up with AJ and Justice?

A. At the M.

Q. The M Casino and Resort?

A. Uh-huh.

Q. Did you go anywhere else after the M?

A. We went back to AJ's house.

Q. When you went to AJ's house did you see anybody there who you see in the courtroom today?

A. Yes.

Q. Can you point out that person and describe an article of clothing he or she is wearing?

A. He is wearing a black shirt.

MS. SCHEIBLE: May the record reflect the identification of the defendant?

THE COURT: It shall.

BY MS. SCHEIBLE:

Q. About what time did you get to AJ's house?

A. Midnight.

Q. So was that midnight on the 21st turning into the 22nd?

A. Yes.

Q. So you went to the movies on the 21st?

A. Yes.
Q. And then by the time you got to AJ's house it had become the 22nd of June?
A. Uh-huh.
Q. More or less?
A. Yeah.
Q. So you got there around midnight and did you consume any alcohol at AJ's house?
A. Yes.
Q. Approximately how much?
A. From four shots and then I poured two into my drink. So probably about six to seven shots.
Q. And do you remember what you were drinking?
A. Hennessy.
Q. Were you drinking it all as shots?
A. No.
Q. How else were you drinking it?
A. Mixed in with pineapple juice.
Q. And were you able to feel the affects of the alcohol?
A. Yes.
Q. You were saying yes pretty emphatically. Does that mean that there were some serious affects or strong affects of the alcohol?

A. Yes.
Q. And can you describe that a little bit for the Court.
A. I got so intoxicated I ended up throwing up and then after that we still kept drinking.
Q. And eventually did you decide to go to sleep?
A. Yes.
Q. Where did you go to sleep that night?
A. Downstairs on the couch with my boyfriend.
Q. And when you say downstairs on the couch, that's in AJ's house?
A. Yes.
Q. Do you happen to know AJ's address?
A. Not by memory but I know he lives on Sitting Bull Drive.
Q. Would 938 Sitting Bull Drive sound right?
A. Yes.
Q. About what time did you go to bed?
A. Around four in the morning.
Q. And how do you know that that was the time?
A. I checked the time before I went to bed. I had my phone.
Q. And when you got into bed can you describe

where you were sleeping?

A. I was sleeping on -- my boyfriend took most of the couch up so I slept pretty much on the ottoman cuddled next to him halfway on the couch.

Q. And so can you describe the shape of the couch and the ottoman.

A. The couch is kind of a sectional. It comes forward and goes like this way. Like kind of like curved and the ottoman is right in front where the curve starts on the edge.

Q. So the ottoman fits into the couch?

A. Yes.

Q. And you were sleeping mostly on the ottoman?

A. Yes.

Q. And at some point in the night were you awakened?

A. Yes.

Q. By what?

A. Someone touching me.

Q. Someone touching you where?

A. On my breasts.

Q. Was that over your clothes or under your clothes?

A. Over my clothes.

Q. And did you know who that person was?
A. Not at first.
Q. At first who did you think it was?
A. I thought it was my boyfriend.
Q. But it sounds like it wasn't your boyfriend?
A. No.
Q. How did you ultimately realize that it wasn't your boyfriend?
A. Because I could hear him breathing next to me in my ear.
Q. Can you speak up just a little bit.
A. I'm sorry.
Q. It's okay. Our wonderful Court Reporter has to write down everything you say.
And when you say you could hear him breathing, do you mean your boyfriend?
A. Yes.
Q. And the person who was touching you at that point, did you know who it was?
A. No.
Q. Could you tell if it was a man or a woman?
A. No. Honestly no.
Q. And was that all that happened?
A. No.

Q. What happened next? Take your time.

A. The person who was touching me kind of rolled me over and started touching my butt. And then from there they started touching my breasts underneath my clothes and they moved down. And I was wearing a halter top and baggie shorts and they moved my shorts out of the way and they started touching me underneath my clothes.

Q. And so when they moved the shorts out of the way and started touching you underneath your clothes, was that over or under your panties?

A. Over at first.

Q. Approximately where on your body was this person touching you on?

A. On my vagina.

Q. But over your panties?

A. Yes.

Q. And at this point had you figured out who it was yet?

A. No.

Q. But that person kept touching you underneath your shorts?

A. Yes.

Q. And then what?

A. And then they kept groping my breasts and

eventually I figured out who it was because I opened up my eyes.

Q. When you opened your eyes who did you see?

A. I saw Sam.

Q. Is that the defendant?

A. Yes.

Q. And what was he doing at that point?

A. Just touching me and pretty close up into my face. Like maybe like a foot away. Bent over.

Q. And you were still lying on the ottoman at this point?

A. Yes.

Q. And what did he do next?

A. He came down -- like he moved down on my body and he started touching my vagina underneath my underwear. And then he started to penetrate me with his fingers.

Q. When you say he penetrated you, do you mean your vagina?

A. Yes.

Q. So he put his fingers inside your vagina?

A. Yes.

Q. And about how long did that last if you know?

A. Maybe like two minutes. Not like super

long.

Q. And did he ever put his mouth down there?

A. Yes.

Q. Where did he put his mouth?

A. On my vagina.

Q. Did he use his tongue?

A. Yes.

Q. How do you know that?

A. Because I could feel it.

Q. And what could you feel the tongue doing?

A. Moving up and down.

Q. Moving up and down on what part of your body?

A. Close to like the clitoris.

Q. Close to the clitoris around your vagina?

A. Yes.

Q. Did his tongue ever go inside your vagina?

A. No.

Q. Did it go in between the lips of your vagina?

A. Yes.

Q. And where were his hands at that point?

A. One hand was pulling my shorts out of the way like holding them to the side and I'm assuming the other one was on the ottoman.

Q. So you could feel one hand pulling your shorts out of the way?

A. Yes.

Q. And after that happened did he stay in the same place or did he move someplace else?

A. Around like -- there is no halfway point but eventually like I think it was after he stopped penetrating me with his fingers that he left, and I don't know how long he was gone, I didn't fall back asleep, I didn't move. I just kind of stayed there frozen. But eventually I heard I think -- I'm not going to say anything I think.

Q. Okay.

A. Eventually he did come back. I'm not sure if he left or not, but he came back and he put his penis in my hand and he had a condom on.

Q. And which hand, your left or your right?

A. My left.

Q. And did you touch his penis, did you grab his penis?

A. He tried to wrap my hand around it.

Q. And you did not want --

A. I had no grip. I was limp.

Q. What did he do from there?

A. He went back to the position he was in

prior and he moved my shorts and he tried to perform oral sex on me again and then he tried to put his penis inside of me.

Q. And when he tried to put his penis inside of you, was the condom still on?

A. Yes.

Q. And where was he trying to put it?

A. In my vagina.

Q. And could you feel him trying to do that?

A. Yes.

Q. And you keep saying the word try. Did his penis go inside your vagina?

A. No because I wasn't like wet.

Q. How could you tell he was trying?

A. The pressure. Like the force that was going into it.

Q. So you could feel pressure. Was that pressure pushing inwards?

A. Yes.

Q. And was he using anything other than his penis?

A. No.

Q. And about how long did he try to do that?

A. Thirty seconds.

Q. And how did that feel? Just pressure?

A. (No oral response.)
Q. You're nodding your head?
A. Yes.
Q. And at any point did he move his penis around your genitals?
A. I don't know.
Q. And is it fair to say that he stopped at some point pushing his penis into your vagina?
A. Yes.
Q. And what did he do then?
A. Let go of my shorts and he walked around to like the front of me where my head was and he tried to put his penis in my mouth.
Q. And how did he do that?
A. He came like pretty close and he tried to -- he was probably squatting down and he tried to like jiggle my mouth open to put it in.
Q. Did you open your mouth?
A. Yes.
Q. And did he put his penis inside your mouth?
A. Yes.
Q. And how long did he leave it there?
A. No more than like 20 seconds.
Q. And at that point was he still wearing the

condom or not?

A. I believe so.

Q. Could you taste it?

A. Yes.

Q. Or feel it?

A. Uh-huh.

MS. SCHEIBLE: Brief indulgence, your Honor?

THE COURT: Yes.

BY MS. SCHEIBLE:

Q. Was that the first time that you met the defendant?

A. Yes.

Q. And was he there when you were consuming the alcohol?

A. Uh-huh.

THE COURT: Was that a yes?

THE WITNESS: Yes.

BY MS. SCHEIBLE:

Q. At any point did you want to have sex with him?

A. No.

Q. When he first started touching you downstairs were you still under the influence of the alcohol?

A. Yes.
Q. And what was your response? Like emotionally if you will.
A. I was like terrified.
Q. Did you say you were terrified?
A. Yes.
Q. Do you have a normal fight or flight or freeze response?
A. Yes.
Q. And which one did you do on this day?
A. Freeze.
Q. And was there anything going through your head?
A. Nothing really. I was just numb.
Q. And did you become numb immediately when this started?
A. I think once I realized like what was going on, yeah.
Q. And how long did you stay numb?
A. Until I got up in the morning and I saw people were coming downstairs.
MS. SCHEIBLE: Court's indulgence.
I have nothing further for this witness.
THE COURT: Counsel.

CROSS-EXAMINATION

BY MR. HAMILTON:

Q. Miss Rouw, my name is Ryan Hamilton. I represent the defendant Samuel Caruso. How do you prefer that I address you, Raquelle or Miss Rouw?

A. Miss Rouw.

Q. Miss Rouw, when this incident occurred -- and when I say incident I'm referring to when you were being touched -- it was dark in the room?

A. Yes.

Q. And you said that you had gone to sleep around four. Do I have that right?

A. (No oral response.)

Q. Is that a yes?

A. Yes.

Q. I'm just trying to be helpful to our Court Reporter. Thank you.

And you had given an interview to Detectives Ashcroft and Viscaino. Do you recall giving that interview?

A. Yes.

Q. Do you recall telling the detectives that the person who touched you had really light colored eyes?

A. Uh-huh.

Q. Is that a yes?
A. Yes.
Q. And you had told them that you barely opened your eyes throughout the incident; is that correct?
A. Yes.
Q. And in fact you told them that you couldn't really see the texture or color of the person's hair; is that correct?
MS. DERJAVINA: At this point the State would object. Hearsay statements. At this point I'm not sure what he's doing with the statement, whether he's impeaching her testimony because at this point she hasn't testified contrary to her statement. So if he wants to ask her questions was it dark, could you see, that's fine, but at this point going through her statement would be inappropriate. It's not impeaching anything she said at this point.
MR. HAMILTON: Judge, may be I be heard on that?
THE COURT: Yes.
MR. HAMILTON: Judge, I believe it is within the scope of direct because she had identified my client as the perpetrator and this all goes to whether or not --

11:47AM THE COURT: I believe it's permissible at this point based on the direct examination.

MS. DERJAVINA: Based on is he trying to impeach her at this point because she hasn't testified to the contrary? The appropriate thing would be --

THE COURT: He hasn't tried to impeach her yet.

MS. DERJAVINA: But he's doing that with her statement. That's the whole issue.

11:47AM THE COURT: Well, she hasn't said that she can't remember and I don't see a point in -- do you want him to show her the document?

MS. DERJAVINA: I'm saying that --

THE COURT: I will allow the questions. What is it that you think there's not enough foundation?

MS. DERJAVINA: I think the way that he is questioning he is going through her statement right now. The proper way to do it is to ask her was it dark, could you see him, you barely opened your eyes and if she testifies contrary, he can go through her statement.

THE COURT: Well, she hasn't said anything contrary. No, I will allow it.

11:47AM MS. DERJAVINA: Well, my objection stands,

your Honor.

THE COURT: Okay. It's overruled.

Go ahead.

MR. HAMILTON: Thank you, Judge.

Q. Going back, Miss Rouw, you indicated to detectives that because you had barely opened your eyes you didn't notice any tattoos?

THE COURT: I think the correct form would be did you, not you did.

BY MR. HAMILTON:

Q. Did you, Miss Rouw, during the incident notice any tattoos on or around the defendant's face?

A. No. And no piercings.

Q. Was it completely dark in the room or was there any light?

A. There was a light. I remember in my statement specifically I stated there was a red I think I said or green light that was coming from the gaming console. So no, the room was not pitch black.

Q. Miss Rouw, is that the only source of light?

A. Yes.

Q. Did you have any conversation with the person who was touching you during the incident?

A. No.

Q. Did you believe the person who had touched you to have been Hispanic?
A. No.
Q. You never made a statement to any police officer that you believe the person who touched you was Hispanic?
A. No.
Q. Did you see the person's entire face during the incident?
A. Not specifics, no.
Q. Did you see the person's neck during the incident?
A. No.
Q. During the incident were there any defining features of the person who was touching you?
A. No.
Q. Any distinctive smell coming from the person?
A. Alcohol.
Q. When the incident began were you physically touching your boyfriend who was on the couch?
A. His arm was under my neck but I wasn't touching him. But he was touching me.
Q. At some point during the incident does

your boyfriend's arm get moved out from under your neck?

A. Yes.

Q. How did that happen?

A. I think there was less of his arm getting moved than me getting pulled.

Q. At any point during the incident did you try to awaken your boyfriend?

A. Telepathically. But no, I didn't physically try to move him or wake him up.

Q. Did you ever become aware of him being awake during the incident?

A. No.

Q. And I wrote down that you testified that you went to sleep around 4:00 a.m. Do I have that correct?

A. Uh-huh.

Q. And that's a yes?

A. Yes.

Q. Do you know what time the touching began?

A. No.

Q. Is there anything that could refresh your recollection as to when you believe the touching began?

A. AJ's little brother that day, I doubt he remembers, but he came downstairs after taking a shower

and he was the first one downstairs and that was probably around the time I woke up.

Q. With that information does that give you any reference point as to when the touching began and ended?

A. Before the sun was up.

Q. Just to clarify is it your testimony that the entire incident from beginning to end occurred before the sun was up?

A. Beginning -- it started when the sun was up -- I mean before the sun came up. I'm not sure when it ended.

Q. You heard a shower running during the incident?

A. Towards the end, yeah.

THE COURT: I'm sorry. I couldn't hear that. What?

THE WITNESS: Towards the end.

BY MR. HAMILTON:

Q. And just a minute ago you indicated that you believed was it Alex that had taken a shower?

A. AJ's little brother. I'm assuming it was him.

Q. You think he's the one that took the shower during the incident?

A. Yes.

Q. So if he were to give an estimate for the time of that shower --

MS. SCHEIBLE: Objection, your Honor. Speculation.

THE COURT: Sustained.

BY MR. HAMILTON:

Q. I want to make sure I understand your testimony on this point. Is it your testimony that the defendant had unbuttoned your belt?

MS. SCHEIBLE: Objection, your Honor. I don't think -- she didn't testify on that point either way.

THE COURT: I'm sorry. What was the question again?

MR. HAMILTON: Whether or not she is saying that the defendant had unbuttoned her belt.

THE COURT: I will sustain that objection. That was not asked. You can ask it a different way.

MR. HAMILTON: Sure.

Q. You testified that the defendant had moved your shorts down your body?

A. No. I never said that he moved them down. He moved them to the side.

Q. He just moved them to the side?

11:55AM
A. That's what I said in my statement.
Q. Thank you for the clarification.
A. You're welcome.
Q. You said that you threw up?
11:56AM
A. Yes.
Q. Was that at the beginning of the night, was that toward the end of the night when you fell asleep?
A. That was towards the beginning of the
11:56AM
night.
Q. Are you able to estimate how drunk you were at the time you went to sleep? Ten being so drunk unconscious, one being I've just had a sip of alcohol?
MS. SCHEIBLE: Objection, your Honor.
11:56AM
She's not an expert on intoxication levels and it sounds like he's asking her to make an expert level assessment using a numerical scale.
THE COURT: I will sustain that objection. You need to be more specific, counsel.
11:56AM
BY MR. HAMILTON:
Q. Let me just ask it this way: How intoxicated were you just before going to sleep?
A. I was -- my body was physically drunk and I mentally wasn't cognizant.
11:57AM
Q. Were you able to complete tasks such as

cleaning up?

A. No.

Q. Okay. You testified that the defendant left during the touching incident. Do you recall that?

A. Yes.

Q. How long did the defendant leave?

A. Anywhere from like five to 10 minutes. Maybe 15.

Q. And during that time did you remain awake?

A. Yes.

Q. During that time you did not try to awaken your boyfriend?

A. No.

Q. You woke up the next day and stayed around it's AJ's house, correct?

A. Uh-huh. Yes.

Q. And in fact you had lunch with the defendant present; is that correct?

A. When we were eating he wasn't there but he was at the house, yes.

Q. Did you stay longer at the house to watch a UFC game?

A. That was prior to us eating lunch.

Q. And approximately at what time during the day did you leave?

11:59AM
MS. SCHEIBLE: Objection, your Honor. Relevance.
THE COURT: I will allow it.
THE WITNESS: 3:00 p.m.
11:59AM
BY MR. HAMILTON:
Q. 3:00 p.m.?
A. Yes. Around there.
MR. HAMILTON: Court's indulgence.
THE COURT: Okay.
12:00PM
BY MR. HAMILTON:
Q. This couch and ottoman where you say the touching occurred, it's near the front door of the home?
A. It's in the front room of the home.
12:00PM
Q. Let me ask you this. How did you communicate that you did not consent to any of the touching that occurred?
A. I didn't say yes.
MR. HAMILTON: I'll pass the witness.
12:01PM
Thank you, your Honor.
THE COURT: Thank you.
12:01PM

REDIRECT EXAMINATION

BY MS. SCHEIBLE:

Q. Miss Rouw, when you went over to AJ's house was this the first time you'd been there?

A. No.

Q. How many times have you been there?

A. Once, maybe twice just stopping by. But I'd only gone over there once before.

Q. Do you know who lives at AJ's house?

A. I know his parents live there. I knew AJ lives there. I knew he had a little brother but that was pretty much it. I also met his sister once before I went there.

Q. And when you got there early on in the morning on the 22nd, who was in the house?

A. Who was awake or who was in the house?

Q. Who was in the house?

A. I didn't know at the time when I got there. I just saw who was awake.

Q. Who did you see who was awake at the house?

A. Sam, Alexis, obviously me, AJ, Daniel and Justice and then their daughters, Alexis and Sam's children.

Q. And how old are the daughters

approximately?

A. Three.

Q. So little kids?

A. They're very little, yes.

Q. And how old if you know are AJ and Daniel?

A. AJ and Daniel are both 18 and Justice recently turn 19.

Q. When you ultimately got up the next morning were you initially planning on telling your boyfriend what happened?

A. No.

MS. SCHEIBLE: I have nothing further.

THE COURT: Anything else?

MR. HAMILTON: Nothing further, your Honor.

THE COURT: Thank you, ma'am. You're excused.

THE WITNESS: Thank you.

THE CLERK: Raise your right hand.

Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: Yes.

THE CLERK: Please be seated.

Please state your first and last name and

spell each for the record.

THE WITNESS: L-I-A-N A, Liana R-I-V-E-R-A, Rivera.

LIANA RIVERA,
having been first duly sworn, did testify as follows:

DIRECT EXAMINATION

BY MS. SCHEIBLE:

Q. Ms. Rivera, what city do you live in?

A. Youngstown, Ohio.

Q. And how long have you been living there?

A. About a year.

Q. I want to direct your attention to August 14th of 2019. Were you here in Clark County, Nevada on that date?

A. Yes.

Q. Do you remember where you were staying?

A. At the Hard Rock Casino.

Q. And when you got to the Hard Rock Casino were you there by yourself or with other people?

A. I was with other people.

Q. How many other people?

A. Three others.

Q. And are these friends of yours?

A. Co-workers.

Q. And what were you guys doing on August 14th?

A. We were relaxing in the hotel room just enjoying our day off. Later that evening we decided to go get a bottle from the liquor store across the street and then we came back and we were drinking at the hotel.

Q. And so you were consuming alcohol in the hotel room?

A. Correct.

Q. About how much did you have to drink if you remember?

A. From what I remember three shots.

Q. And were you able to feel the effects of the alcohol?

A. Yes.

Q. Did you become inebriated?

A. Yeah. I was incoherent like before I left the room. I don't remember leaving the room. I don't remember leaving the hotel.

Q. But it sounds like you've since learned you did leave the hotel that night?

A. Yes.

Q. So the last thing you do remember is what?

A. Taking shots and getting ready.

Q. And that was in your room at the Hard Rock?

A. Yes.

Q. While you guys were there were you talking about what your plan was for the evening?

A. Yeah. They said they wanted to go to a club. I don't remember what club they wanted to go to but they wanted to go to the club.

Q. And do you have memories from that night that are hazy or clear or a combination of both?

A. The only thing that I really remember after taking shots was being in an elevator and falling over and then being in my hotel room. I don't remember anything in between.

Q. So do you remember what time you were drinking in the hotel room?

A. No.

Q. And I think you already testified that you don't remember leaving the hotel room?

A. No.

Q. Do you remember getting into a Lyft?

A. No.

Q. Do you remember becoming sick?

A. No.

Q. Do you remember going with your friends to

another location, another casino?

A. No.

Q. Do you remember getting a Lyft back to the hotel?

A. No.

Q. Do you remember getting back up to your room?

A. No.

Q. Do you remember going into your room?

A. I remember being in my room, not going into the room.

Q. Do you remember getting into your bed?

A. No.

Q. You said that you remember being in an elevator?

A. Yes.

Q. What do you remember about being in the elevator?

A. I just literally remember falling over. I remember seeing a man next to me and falling over but I don't remember what the man looked like and it pretty much goes black after that.

Q. You had previously testified that you did remember being back in your room at some point?

A. Yes.

12:10PM
Q. When you got into your room do you remember being pushed down?
A. Correct.
Q. And what else do you remember?
12:10PM
A. I remember being pushed down and my pants being pulled off. I was on my period. I had a tampon in. I remember my tampon being pulled out. I remember turning over. I remember being in pain. I don't remember what specifically happened. I just remember
12:10PM
saying stop, I don't want to and I don't remember anything after that.
Q. You said you remember being in pain. Do you remember where that pain was?
A. Yeah. Anal.
12:11PM
Q. And did it come on suddenly?
A. Yes.
Q. Did it feel like somebody was penetrating you anally?
A. Correct. Or trying, yeah.
12:11PM
Q. And did that pain persist?
A. No. I don't really remember it to be honest. It was so fast and I just remember being in pain and saying no and stop and I don't remember anything after that.
12:11PM
Q. Do you remember eventually falling asleep?

A. No.
Q. Do you remember eventually being asleep?
A. No.
Q. Do you remember being awakened?
A. Yes.
Q. How were you awakened?
A. The girls were knocking at the door at six o'clock in the morning and I woke up naked.
Q. And how were you feeling when you woke up?
A. Sick. Nauseous.
Q. Were you still in pain?
A. I didn't recognize the pain when I woke up. I didn't recognize it until I used the bathroom.
Q. What happened when you went to the bathroom?
A. I went to use the restroom, just went to go pee and it just -- I felt discomfort. It was like unusual for me to feel discomfort there. So I don't know, something felt off. I just kind of started shaking and I came out of the bathroom not understanding why I was in pain, why I was hurting.
Q. When you say you were in pain, are we still talking about your anus?
A. Yes.
Q. And when you say that something felt off,

can you be a little bit more specific?

A. No because it was just an intuitive feeling.

Q. Okay.

A. Outside of the discomfort that I felt.

Q. So there was both the physical pain or discomfort and then the intuitive feeling that something was off?

A. Yeah. I just felt sick to my stomach and it just felt off, something didn't feel right. I was naked, I didn't have a tampon. When I used the bathroom I was in discomfort.

Q. So I want to take a few steps back to when you said that you remembered being pushed down in your room and you remember being turned over and feeling pain. Do you remember seeing anybody else there?

A. Yes. I saw him. It was a quick glimpse of his face and his hair, his chest, his penis.

Q. So you saw a man there in your room?

A. Yes.

Q. And was it somebody who you knew?

A. No.

Q. Was it somebody that you had agreed to have sex with?

A. No. And his face, that's the first

recognition of memory that I have of seeing his face. I have no memory of seeing his face prior to that.

Q. And have you seen his face since then?

A. Besides right now, no.

Q. Do you see him right now?

A. Yes. He doesn't have hair anymore.

Q. Can you point to him and identify an article of clothing he's wearing.

A. Yes. He's wearing I think that's like a navy blue shirt, tattoos.

MS. SCHEIBLE: May the record reflect identification of the defendant?

THE COURT: Yes.

BY MS. SCHEIBLE:

Q. So this is the person that you saw in your room that night?

A. Yes. His face. The only thing that's different is the hair.

Q. And when you saw his face where was his face in relation to yours?

A. I was down low, he was standing up tall. So it was like I was looking up at him. It was quick. That's all I remember.

Q. So the next day or hours later when you actually woke up did you think what had happened was a

dream?

A. Yes.

Q. And thinking that it was a dream what did you do?

A. I went downstairs to talk to security. I asked them to check the footage to see if they saw someone come into my room after me. They advised that they were going to call the police to notify the police but I advised them not to, I didn't want to like affect someone's career or life if I wasn't sure. I just wanted to know if someone came into my room after me.

And then I went back up to my room and security and management came up to the room, at that point advised it was a crime scene and showed him clocked in my room for 25 minutes.

Q. And did you leave at that point?

A. No. Well, after I spoke with the EMTs then yes, I did leave right at that point. They took me to the hospital and I did a rape kit.

MS. SCHEIBLE: I have nothing further, your Honor.

THE COURT: Counsel.

CROSS-EXAMINATION

BY MR. HAMILTON:

Q. Ms. Rivera, I represent the defendant Samuel Caruso. Miss Rivera, did you invite Mr. Caruso up to your room?

A. No.

Q. Were you able to recall your room number?

A. No.

Q. How were you able to get to your room?

A. I don't remember.

Q. Once inside your room, Ms. Rivera, do you actually recall engaging or any sexual activity between you and the defendant?

A. No. Just besides what I remember of what I advised to the plaintiff.

Q. But no actual sexual activity?

A. No.

Q. And you testified that your anus hurt in the morning; is that fair?

A. Correct.

Q. But you don't know one way or the other whether your anus hurt because of some sexual activity, correct?

A. Correct.

Q. Ms. Rivera, are you able to recall one way

or another whether Mr. Caruso was actually able to get an erection that night?

A. I don't recall.

Q. Would it surprise you if he were unable to get an erection that night?

MS. SCHEIBLE: Objection, your Honor. Calls for speculation.

THE COURT: Well, I'll allow the question. Would it surprise her? It doesn't sound like she even knows if he did.

MS. SCHEIBLE: I'm not sure of the relevance either.

THE COURT: I'll sustain the objection.

BY MR. HAMILTON:

Q. Did you tell Mr. Caruso that it was okay he could not get an erection because you normally date females?

MS. SCHEIBLE: Objection, your Honor. She's already indicated that she doesn't remember.

THE COURT: I think you have to ask if she remembers, not if she told. I agree with the State as to the question. I will sustain it.

BY MR. HAMILTON:

Q. Do you remember telling Mr. Caruso at any point that you normally date females?

12:21PM

A. No.

MR. HAMILTON: Nothing further, your Honor.

THE COURT: Thank you.

12:21PM

Anything else, counsel?

MS. SCHEIBLE: I just have a couple things I wanted to clarify.

REDIRECT EXAMINATION

12:21PM

BY MS. SCHEIBLE:

Q. So when you went up to your room that night -- let's go back before that. Before you went up into your room and remember being pushed on the bed and turned over did you have any pain in your anus?

12:22PM

A. No.

Q. So it started then?

A. Yes.

Q. And persisted into the morning?

A. Correct.

12:22PM

Q. And you didn't put anything in your own anus?

A. No.

MS. SCHEIBLE: Nothing further.

THE COURT: Thank you.

12:22PM

Anything else, counsel?

MR. HAMILTON: No, Judge.

THE COURT: Thank you, ma'am. You are excused.

MS. DERJAVINA: The State calls Detective Nogle.

THE CLERK: Raise your right hand.

Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: Yes.

THE CLERK: Please be seated.

Please state your first and last name and spell each for the record.

THE WITNESS: My first name is Erica. It's spelled E-R-I-C-A. Last name is Nogle, N-O-G-L-E.

THE COURT: Go ahead, counsel.

MS. DERJAVINA: Thank you, Your Honor.

ERICA NOGLE,
having been first duly sworn, did testify as follows:

DIRECT EXAMINATION

BY MS. DERJAVINA:

Q. Ma'am, how are you employed?

A. I'm employed with Las Vegas Metropolitan Police Department sex crimes unit.

Q. And how long have you worked in that capacity?

A. There in sex crimes for one year.

Q. And how long with Metro in general?

A. Thirteen years.

Q. I want to direct your attention specifically to August 14th, 2019. Were you assigned to investigate a potential sexual assault that had occurred at 4455 Paradise Road?

A. Yes, that's correct.

Q. And was that in your capacity as a detective in the sex crimes unit?

A. Yes, that's right.

Q. Now, is the 4455 address the Hard Rock Hotel?

A. Yes, that's right.

Q. Is that here in Clark County?

A. Yes, it is.

Q. As part of your investigation were you given information about a potential suspect in the sexual assault?

A. Yes, I was.

Q. And was one of the things you were given is that he's potentially a Lyft driver?

A. Yes.

Q. Were you told that the victim in the case her name is Liana?

A. That's correct.

Q. And that she was put in a Lyft vehicle by her friends?

A. Yes. To some degree. She was in the vehicle with her friends at one point in time.

Q. Let's back up a little bit. I don't want to jump. Were you told that it was Liana who ordered the Lyft or her friends?

A. No. It was one of her friends.

Q. And then as part of your investigation did her friends actually show you a screen shot of the Lyft account that had ordered that car and the driver of that car?

A. Yes, that's right.

MS. DERJAVINA: Your Honor, may I approach?

THE COURT: You may.

MS. DERJAVINA: For the record I'm showing defense counsel State's Proposed Exhibit 1.

THE COURT: Okay.

BY MS. DERJAVINA:

Q. Detective, I'm going to show you State's Proposed Exhibit 1. If you could take a second. Do

you recognize that?

A. Yes, I do.

Q. And how do you recognize that?

A. This was -- it was on the Lyft app that was on Miss Liana's friend's phone. The friend that ordered it I believe was Daja Smith. So Miss Daja Smith during the interview provided her phone with the proof as far as what Lyft they had taken from where and final destination.

Q. And is it a fair and accurate photograph of that screen shot?

A. Yes, it is.

MS. DERJAVINA: Your Honor, at this time the State would move to admit State's Proposed Exhibit 1.

MR. HAMILTON: No objection.

THE COURT: It will be admitted.

(State's Exhibit 1 was admitted.)

MS. DERJAVINA: May I approach, your Honor, to show it to you?

THE COURT: Yes.

BY MS. DERJAVINA:

Q. Now, detective, were you informed as part of your investigation that the friend had actually put the victim in that Lyft to take her back to the hotel

because she was intoxicated?

A. Can you repeat the question.

Q. As part of your investigation were you informed by the friends that they had actually put the victim Liana into that Lyft to be taken back to the hotel because she was intoxicated?

A. Yes, that's right.

Q. Once you got that information and you got that screen shot, and in it for the record we can see it says, "Thanks for riding with Samuel," did you obtain information about who that Lyft driver was, his identity?

A. Yes, I did.

Q. And what was his identity? What was his name?

A. Samuel Josiah Caruso and I don't recall date of birth.

Q. If I show you your police report would that refresh your recollection?

A. Yes.

MS. DERJAVINA: May I approach, your Honor?

THE COURT: You may.

BY MS. DERJAVINA:

Q. Detective, if you can just take a second

to look at this yourself and let me know when you're done looking at it.

A. Yes.

Q. Looking at that did that refresh your recollection?

A. Yes.

Q. And what was his date of birth?

A. It is October 5th of 1986.

Q. Now, as part of your investigation did you pull surveillance video from the Hard Rock?

A. Yes, I did.

Q. Were you able to see Mr. Caruso and the victim?

A. Yes, I was.

Q. Were you also able to see the vehicle as it arrived?

A. Yes.

Q. Were you able to pull the license plate?

A. Yes.

Q. And who did the license plate come back to?

A. When I ran the plate the sole registered owner was a Samuel Caruso.

Q. As part of your investigation did you try to make contact with Mr. Caruso?

A. Yes, I did.
Q. And did you have a potential phone number?
A. I first had an address and then later acquired a phone number for him.
Q. And did you go to that address?
A. I did.
Q. Did you make contact with the family members?
A. Yes, I did, that's correct.
Q. Was he there at that point?
A. He was not.
Q. And you said as part of your investigation you were able to obtain a phone number for Mr. Caruso. Did you call that number?
A. Yes, I did.
Q. Did you leave a voice mail?
A. I did.
Q. And at some point did Mr. Caruso call back?
A. Yes, he did.
Q. Did he identify who he was?
A. Yes, he did.
Q. Initially when you talked to him what did he think that you were calling in regards to?
A. I introduced myself and he initially

thought that I was calling about the Henderson case is what he said.

Q. So he thought you were calling regarding something that happened in Henderson?

A. Correct.

Q. Did you inform him that you were calling regarding a passenger in his Lyft?

A. Yes, that's correct.

Q. Now, at this point did you read him his Miranda Rights?

A. No, I did not. I informed him of the allegation that was made by the occupant of the Lyft during the course of his duties as a driver.

Q. And what was the purpose initially of this telephone conversation?

A. It was just to get an interview with him.

Q. So you were going to ask him to come in to ask him questions?

A. That's correct. Or we'd go to him. Whichever.

Q. Basically set up a meeting?

A. Correct.

Q. But you did inform him kind of what the allegations were?

A. Yes.

Q. And when you informed him of what the allegations were what was his response?

A. So Mr. Caruso made some utterances. He initially said something to the effect of oh, man, Liana -- so he identified her by her first name -- I should have had security take her to her room is what he uttered.

Q. And then did he mention about having any kind of sexual contact with Liana?

A. Yes. Mutual oral sex was the way he described it.

Q. So by mutual basically he had oral sex on her and then she had oral sex on him?

A. Consenting, yes.

Q. But he said that that was consensual?

A. Mutual oral sex so I imagine they gave each other oral sex and would be consenting.

Q. That's what you assumed. Okay.

A. Correct.

Q. Detective, obviously being that you're a detective in the sex crimes you're familiar with different sexual acts?

A. Yes.

Q. When somebody says oral sex, so a male giving oral sex to a female, what does that mean?

12:32PM A. Well, it would be cunnilingus.

Q. And then what does cunnilingus mean? Usually what body part of a male touches what body part of a female?

12:33PM A. It's penetration nonetheless, however slight, with the male inserting his tongue into the female's vagina.

Q. So it would be the male which is in this case the defendant placing his mouth or tongue on the

12:33PM genital opening of the female?

A. That's correct.

Q. What about if it's a female on a male giving oral sex?

A. The male inserting penis into the mouth of

12:33PM the female and her sucking the penis of the male.

Q. So basically what it is is a male which in this case would be the defendant, if you're saying it was mutual oral sex it would be placing his penis in the victim's mouth?

12:33PM A. Correct.

MS. DERJAVINA: Nothing further, your Honor.

THE COURT: Thank you.

Counsel.

CROSS-EXAMINATION

BY MR. HAMILTON:

Q. Detective Nogle?

A. Yes.

12:33PM Q. When you spoke to Mr. Caruso he indicated to you that Liana had in fact --

MS. DERJAVINA: Objection. Hearsay. The defendant's statement not being admitted by a party opponent.

12:34PM THE COURT: I think you already asked that.

MS. DERJAVINA: Well, I think he's going into more than I had asked.

THE COURT: Let's hear the question.

12:34PM MS. DERJAVINA: And I apologize if I jumped. I just knew where he was going to go.

MR. HAMILTON: Kudos on your reflexes.

THE COURT: I can't remember what the question was.

12:34PM BY MR. HAMILTON:

Q. Mr. Caruso had indicated to you in your conversation that any touching between the two parties was consensual; is that fair?

A. He said they had mutual oral sex. So

12:34PM outside of that. So he did utter that check the

camera.

MS. DERJAVINA: And objection at this point. That's not his question. His question is whether he said it was consensual.

THE COURT: Ask another question. The question was whether there was consensual touching.

BY MR. HAMILTON:

Q. Did he at any point ask you to check the camera?

A. Yes.

Q. Can you tell us more about that exchange about him asking you to check the cameras?

MS. DERJAVINA: And I don't mean to interrupt. At this point I would object. Any kind of conversation with the defendant at this point would be hearsay. I didn't elicit anything about their conversation.

THE COURT: I will overrule that.

BY MR. HAMILTON:

Q. Go ahead.

A. He specified the location in this case, the registration area.

Q. Did you take that to mean the defendant wanted you to observe his conduct?

A. Yes.

12:35PM Q. And in your experience as a detective did that strike you as someone trying to get by with something or someone hoping that you will see that it was consensual?

12:36PM MS. DERJAVINA: Objection. Speculation, relevance of others cases.

THE COURT: He's asking her experience. I will allow the question.

THE WITNESS: So I'm a neutral fact finder.

BY MR. HAMILTON:

Q. Right.

A. Open to both. I've got to conduct a full interview and look at all evidence available to include all video from start to finish.

Q. And how long have you been doing this, detective?

A. Sex crimes detective?

Q. Yes.

12:36PM A. One year.

Q. And in your one year of doing this is it your experience that guilty people normally ask you to look at tapes of them?

MS. DERJAVINA: Again I think objection.

12:36PM THE COURT: I will sustain the nature of

12:36PM 1 the question. Guilty. You can ask her if people do,
2 but not whether she knows they're guilty or not.
3 BY MR. HAMILTON:
4 Q. In your professional opinion as a
12:36PM 5 detective does that cut one way or the other about
6 whether or not --
7 A. No.
8 Q. That doesn't cut one way or the other?
9 A. No.
12:37PM 10 Q. You reviewed all the tapes?
11 A. Yes.
12 Q. Is it correct that the alleged victim can
13 be seen kissing Mr. Caruso?
14 MS. DERJAVINA: Objection. Best evidence.
12:37PM 15 She can't testify to what she saw in the video. She
16 wasn't watching it live. It would be like --
17 THE COURT: Well, I will allow the
18 question, counsel. You guys ask that all the time. I
19 don't see a problem with asking if she saw the video
12:37PM 20 that you asked her about and did she see them kissing
21 in the video. Overruled.
22 MS. DERJAVINA: Just for the record if we
23 had done it, defense objects all the time. The only
24 time it's appropriate is when she was watching it live,
12:38PM 25 that's one thing. But if she goes back -- every single

12:38PM 1 case I've done I have never --
2 THE COURT: Watching what live? The video
3 live?
4 MS. DERJAVINA: Yes. For example, loss
12:38PM 5 prevention officer watches the video as it's happening.
6 He watched the defendant do that. They're allowed to
7 testify. They're watching it live. But I have never
8 had it where a detective can testify to what they saw
9 on the video without putting the video in. That's the
12:38PM 10 reason I didn't ask what could be seen in the video
11 because without putting the video in it's the best
12 evidence. Without putting the video in I can't have
13 somebody describe what they saw.
14 THE COURT: I don't have the video in
12:38PM 15 front of me.
16 MS. DERJAVINA: Exactly.
17 THE COURT: So I will sustain that
18 objection.
19 MR. HAMILTON: Judge, if I may be heard?
12:38PM 20 THE COURT: Yes.
21 MR. HAMILTON: The prosecution asked
22 several questions about the contents of the video. For
23 example, you saw the car, you saw -- we didn't object
24 even though she's saying we would have objected.
12:38PM 25 MS. DERJAVINA: If your Honor wants me to,

I didn't ask her what she saw in the video. I just said if she saw the license plate and whether she ran the license plate. I didn't have her describe exactly what she saw happening in the video which would be admitting the content of the video through her testimony. That's not what the State did.

MR. HAMILTON: We're running into a situation --

THE COURT: Honestly I don't see the difference. I don't see the difference between asking a witness if they saw a license plate and who it came back to and did you look at a video and did you see whether they kissed. I don't see the difference.

MS. DERJAVINA: Well, the difference is if you saw a license plate and then you ran it, it doesn't describe the actions that you can see in the video which is them driving into the parking lot, them going wherever and all of that.

THE COURT: I agree with that, but you're saying did you run the license plate but you are letting them say yeah, I ran the license plate, that's the one I saw and that's what it came back to. I don't see the difference.

MS. DERJAVINA: I didn't elicit the license plate number.

12:39PM 1 THE COURT: No. But you did ask who it
2 came back to.
3 MS. DERJAVINA: And that's fine. But he's
4 having her describe the actions of the defendant and
12:39PM 5 the victim in the video that --
6 THE COURT: He's not asking her what kind
7 of kiss it was. He's saying did you see them kiss.
8 I'm going to allow that question, if you saw them kiss.
9 MS. DERJAVINA: That's fine. We obviously
12:40PM 10 put our objection on the record. Thank you.
11 THE COURT: It's on the record.
12 MR. HAMILTON: Judge, if I may note it's
13 getting to the point where we're being dictated how we
14 can present our case and I just think it's
12:40PM 15 inappropriate.
16 THE COURT: Well, it's not inappropriate.
17 They can object all they want and if I feel that the
18 objection is warranted, I'll sustain it. I feel like
19 there have been questions asked about the video and I
12:40PM 20 don't see the difference and for the record I don't see
21 the difference between asking did you see the car, did
22 you see the license plate, who did it come back to and
23 who was it registered to. They're representing what
24 they saw on the video was the truth and you didn't
12:40PM 25 object but nevertheless the information came in. And

so he can cross-examine her about that information. And it was a video. Was it a different video than this one?

MS. DERJAVINA: No, Your Honor. We have some case law on the difference, but if your Honor has already made your ruling we'll take --

THE COURT: No. I'm interested in knowing what the case law says. But I need to read the case.

MS. DERJAVINA: 103 Nevada 436. It talks about the evidence rule requires production of the original document where the actual content of the document are at issue and sought to be proved.

The reason he's admitting this video and the actions is he's trying to say oh, they kissed. The reason I had elicited did you run the license plate and find out who it belonged to is to explain how she ultimately got to the defendant, contacted him and spoke to him.

THE COURT: Does 103 Nevada 436 express a difference between what you're saying and what he's saying or does it just say that you can look at a video and it's got to be admitted?

MS. DERJAVINA: That's what it's saying. If you're actually trying to admit the content of a video or a writing --

12:41PM THE COURT: But what were you doing? What did you do? You know how these work. You've been to moot court and you've been in a lot of courts.

MS. DERJAVINA: Your Honor, I was admitting it but not for the actual -- the writing -- the content of it. It doesn't matter what the license plate number said. It's to explain her running that license plate that she saw on the video and ultimately getting to his name and getting to him. It's irrelevant. It could have been like 002478.

THE COURT: It wouldn't have come back to him.

MS. DERJAVINA: Exactly. But to explain how she ultimately gets to him. They are trying to admit what's happening in the video for the actual content of the video and that you can see that they are kissing in the video. That's the difference. That goes to the core of the case and to the core of what the video would show.

THE COURT: So would it be admissible for him to say does it appear that they were kissing in the video?

MS. DERJAVINA: No.

THE COURT: But you're saying it appears there was a license plate and you can't tell me that

what you're saying about the license plate was not offered for the truth of the matter asserted because you took that license plate and you did something with it and now you've come up with a conclusion it was his license plate. I don't see the difference.

MS. DERJAVINA: The difference is even if, for example, we say it wasn't -- she got an eight. She called the number and it wasn't his license plate but ultimately he called back and identified himself. It's basically to explain to your Honor how she got to the defendant. The relevance of the license plate at this point really doesn't matter, but they're wanting what's happening on the video for specifically that they are kissing in the video. When you think about it the license plate in this case is really irrelevant other than to explain how they get to the defendant and that they call his number and that he called back. But it doesn't really matter what the license plate is.

THE COURT: I need to read your case. Let me see your case.

MS. DERJAVINA: May I approach?

THE COURT: Yes.

MS. SCHEIBLE: I think I just have the summary.

MR. HAMILTON: If it's no trouble can I

have a copy?

THE COURT: You bet.

MR. HAMILTON: I want to make sure I'm up to date on the best evidence rule.

THE COURT: It's 119 Chevrolet Motor Vehicle versus the County of Nye. Is that a forfeiture in a civil action or is it a criminal action?

MS. DERJAVINA: I believe based on the title it's a civil case but it cites to NRS 52.235 which is the best evidence rule that's also used in criminal cases. And I'm looking, your Honor, at Westlaw under that statute and that's where the cases are cited. Like I said that's the statute we use in criminal cases.

MR. HAMILTON: Your Honor, to the extent it makes any difference I'm through asking about the video.

THE COURT: We didn't get an answer but I'll keep it. But one of the things that I learned early was not to bring a civil case into a criminal matter. I got kind of dusted on that one.

MS. DERJAVINA: I can understand that, your Honor, and we appreciate you taking the time to read that.

THE COURT: Not a problem.

Are you finished?

MR. HAMILTON: Just briefly.

THE COURT: Go ahead.

BY MR. HAMILTON:

Q. Detective, is your only source of information about what occurred in the hotel room between Mr. Caruso and Miss Rivera the statements Mr. Caruso made to you?

A. No.

Q. What other information?

A. What other evidence?

Q. What other sources of evidence have you considered about what happened in that hotel room?

A. The victim's statements, the victim's friends' statements, the actual video, the timeline, the Lyft receipt and the alteration of the destination.

Q. Before we go off on a tangent about the video again, there is no video of the two of them actually in the hotel room, correct?

A. That's correct.

MR. HAMILTON: Nothing further.

THE COURT: Thank you. Anything else, counsel?

MS. DERJAVINA: No, Your Honor. Thank you.

12:49PM THE COURT: Thank you. You're excused.
THE WITNESS: Thank you, sir. Thank you, Judge.
THE COURT: Does that conclude your case 12:49PM in chief?
MS. DERJAVINA: Before we rest we have amendments to make to the complaint. So, your Honor, on Page 2 for Count 6, line 22 the State is amending where it says by rubbing and/or touching the genital 12:50PM area of RR over and/or under her clothing.
THE COURT: Okay.
MS. DERJAVINA: At this point those are the only amendments the State had, your Honor.
THE COURT: All right. With that do you 12:50PM rest?
MS. DERJAVINA: Yes, your Honor.
THE COURT: Now, if we can just get through that the other case real quick we can finish this one after.
12:50PM MS. SCHEIBLE: I think we can, your Honor.
(Recess.)
THE COURT: Back in session on 19FH2101, State versus Caruso.
Defense.
2:01PM MR. HAMILTON: Your Honor, we do have four

witnesses. We are going to try and be as economical with the time as possible.

THE COURT: Okay.

THE CLERK: Raise your right hand.

Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: Yes.

THE CLERK: Please be seated.

Please state your first and last name and spell each for the record.

THE WITNESS: Daniel Madrigal.

THE COURT: Spell your last name, please.

THE WITNESS: M-A-D-R-I-G-A-L.

THE COURT: Have a seat.

Go ahead, counsel.

DANIEL MADRIGAL,
having been first duly sworn, did testify as follows:

DIRECT EXAMINATION

BY MR. HAMILTON:

Q. Good afternoon, Mr. Madrigal. I'm Ryan Hamilton, counsel for Mr. Caruso. We met in the hall briefly. Mr. Madrigal, am I correct your girlfriend is Raquelle Rouw?

A. Yes.
Q. And was she your girlfriend on the late night of June 21, early morning June 22?
A. Yes.
Q. Do you recall late night June 21, early morning June 22?
A. Yes.
Q. Where were you at that time?
A. I was at my friend AJ's house.
Q. And does AJ go by any other names?
A. Andres Daniel Jaramillo.
Q. Did you have any alcohol to drink that night?
A. Yes.
Q. Did you become intoxicated?
A. Yes.
Q. Approximately what time did you go to sleep?
A. I'd say two.
Q. About 2:00 a.m.?
A. Somewhere around there.
Q. And are you able to tell me how drunk you were in your own words when you went to sleep?
A. I was stumbling.
Q. I'm sorry?

A. I was stumbling. Numb.
Q. Where did you sleep?
A. On the couch downstairs.
Q. And when you say downstairs, is that in the living room?
A. Yes.
Q. And anyone sleeping on or near you?
A. Yes.
Q. Who was that?
A. Raquelle.
Q. And can you describe how the two of you were positioned?
A. So I was laying down -- the couch is like an L. I was laying down on the longer side and she was laying next to me on like a foot rest thing and so she was right next to me.
Q. At any point if you recall did you have your arm around her?
A. Yes.
Q. Where was your arm and where was it around her?
A. Usually like this. I sleep -- whenever I sleep with her it's always around her.
Q. And around by her neck or her arm?
A. Like mid section.

Q. To the best of your recollection is that how you fell asleep that night?

A. I don't really remember.

Q. Did you ever wake up in the middle of the night, the early morning June 22nd?

A. No, I did not.

Q. Did you ever notice anyone coming to bother you or Raquelle?

A. No. I was sleeping.

Q. Around the time that you went to sleep did you notice anyone leaving the house?

A. No, I did not.

Q. At some point did you learn that there had been an allegation that Mr. Caruso had touched Raquelle during the night?

A. Yes.

Q. Were you surprised by that allegation?

A. Yes.

Q. Can you explain why you were surprised?

A. I couldn't believe it. It's like that really happened? She was sleeping right next to me. I thought everything was safe. But I guess not.

Q. How much had you had to drink that evening?

A. I'd say six shots.

Q. Can you tell the Court over what span of time?
A. Over like an hour or two.
Q. You're a big fellow. How much do you weigh?
A. Back then?
Q. Yes. If it's different.
A. Yeah. I weighed 209.
Q. And how tall?
A. 6'2".
Q. What time did you wake up the next morning?
A. I'd say like nine o'clock.
Q. Was anyone up in the house at that time?
A. Yes.
Q. Who was up?
A. OJ.
Q. Who is OJ?
A. AJ's dad. His name is Orlando Jaramillo.
Q. Am I right that at some point in the day you had lunch with a number of people in the house?
A. Yes.
Q. Who all was at that lunch?
A. It was OJ, AJ, Justice, me, Raquelle and I think AJ's brothers.

Q. And I apologize if I asked this already. What time was that lunch?

A. I think it was like around 12.

Q. Did you guys watch some UFC fights?

A. In the morning?

Q. At any point during the day of the 22nd.

A. I think we did, yes.

Q. And who all participated in watching UFC fights?

A. Me, Raquelle, OJ, I think AJ and Justice were there.

Q. Do you remember one way or the other whether or not Mr. Caruso was involved in that?

A. He was not there yet. I don't think so.

Q. What is your best recollection of when the viewing of the UFC fights occurred?

A. What do you mean?

Q. What time did that happen when you watched the UFC fights?

A. It was while we were eating so around 12.

Q. And what time did you leave the Jaramillo house?

A. I think it was one. I think it was one.

Q. Around one o'clock?

A. Yes. One or two.

2:09PM

MR. HAMILTON: Pass the witness, your Honor.

MS. DERJAVINA: Just brief cross.

CROSS-EXAMINATION

BY MS. DERJAVINA:

Q. Do you mind if I call you Daniel? I can't pronounce your last name.

A. Yes.

2:09PM Q. Defense counsel asked you a couple questions about the morning and into the day of June 22nd, okay?

A. Uh-huh.

Q. He asked you about whether you guys had 2:09PM lunch and you watched the UFC fight?

A. Yes.

Q. Can you describe did anything catch your attention regarding Raquelle's demeanor that morning and that afternoon?

2:09PM A. Yes. She was acting very awkward and really wanted to leave and go home.

Q. Now, at some point did Raquelle tell you what happened?

A. Yes.

2:09PM Q. Without going into what she told you,

first of all where was this?

A. It was in her car.

Q. As you guys were about to leave?

A. Uh-huh.

Q. Without telling us what she told you what was her demeanor like when she told you what happened?

A. I was very angry.

Q. What was her demeanor like?

A. She was crying.

MS. DERJAVINA: Nothing further, your Honor.

THE COURT: Anything else, counsel?

REDIRECT EXAMINATION

BY MR. HAMILTON:

Q. Mr. Madrigal, did you also stay for dinner that evening at the Jaramillo house?

A. No, I didn't.

MR. HAMILTON: I will pass the witness.

THE COURT: Anything further?

MS. DERJAVINA: No, Your Honor.

THE COURT: Thank you, sir. You're excused.

THE CLERK: Raise your right hand.

Do you solemnly swear that the testimony

that you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: Yes.

THE CLERK: Please be seated.

Please state your first and last name and spell each for the record.

THE WITNESS: Andres Jaramillo. A-N-D-R-E-S. Last name J-A-R-A-M-I-L-L-O.

THE COURT: Thank you.

Go ahead, counsel.

ANDRES JARAMILLO,
having been first duly sworn, did testify as follows:

DIRECT EXAMINATION

BY MR. HAMILTON:

Q. Mr. Jaramillo, we met in the hall. I'm Ryan Hamilton, counsel for the defendant. Is it okay if I call you Andres only because we have another Mr. Jaramillo in the case?

A. Yes.

Q. Andres, I'd like to direct your attention to late night June 21st and early morning June 22nd. Do you recall those dates?

A. Yes.

Q. And were you present in the house on

Sitting Bull when Raquelle arrived?

A. Yes.

Q. Who else was present?

A. Downstairs it was me, my girlfriend Justice, Sam and my sister Alexis.

Q. What's the relationship between your sister Alexis and the defendant?

A. Like talking about Sam, right?

Q. Yes, sir. Sam.

A. They were boyfriend and girlfriend.

Q. And it's my understanding that people in the house were drinking alcohol; is that correct?

A. Yes.

Q. Were you able to observe Raquelle's demeanor throughout the night?

A. Yes.

Q. And what was her demeanor like through the night?

A. She was fine. She wasn't acting like -- not like she was super drunk or something like out of the ordinary. She seemed normal.

Q. Were you able to observe how much she had had to drink over the course of the evening?

A. Sort of I think later in the night she ended up getting pretty sick from it, yeah.

Q. Is that something you observed or just heard about?
A. That's something I observed.
Q. And when you say she got sick you mean she was vomiting?
A. Yeah. I believe she vomited.
Q. What time did that occur?
A. I'm not sure.
Q. Am I correct that your girlfriend Justice also became sick?
A. Yes.
Q. Did you observe Raquelle assisting Justice?
A. At one point we were all kind of assisting her. She went upstairs. I believe Sam was the first one up there with her and then we went upstairs and we caught up to them in the bathroom and Sam was like oh, she's sick, she says she wants you in there. So then it was me, Raquelle and Daniel. But then they ended up leaving and it was just me and her.
Q. It was just you and Justice?
A. Yeah.
Q. What time did you go to bed that evening?
A. I'm not sure. It was shortly after my girlfriend had gotten sick. She got sick and she just

wanted to lay down. So we ended up going to bed.

Q. I assume you had your own room at the house?

A. Yes.

Q. Is that where you slept that night?

A. Yeah.

Q. Do you know one way or the other where Alexis slept?

A. In her room which is directly next to mine.

Q. Did you ever observe Sam in the room with Alexis?

A. No. I ended up going into the room. I just closed the door.

Q. Do you know one way or the other what time Raquelle went to sleep?

A. No.

Q. Did you ever observe Sam leave the house?

A. No.

Q. Am I correct that you have a brother by the name of Angelo?

A. Yes.

Q. And where does Angelo live?

A. Across the street.

Q. Do you know one way or the other if Sam

went to go visit Angelo that night?

A. I believe he did because we have a Ring. It's a doorbell system and it videotapes any time there's movement in front of the door and they have like the movement of him leaving and coming back and leaving.

Q. Were you able to observe what time Sam left and came back?

A. Just through the Ring.

Q. And what time?

A. I'm not sure. I can't really recall, but I think he had to have come back around four or five.

MS. DERJAVINA: If I may, your Honor, the same objection that we had regarding the video.

THE COURT: I will sustain that objection.

BY MR. HAMILTON:

Q. Did you ever have any discussion with Sam about going to see your brother Angelo that night?

A. Yes. I think he did bring it up that he wanted to go over there.

Q. And did you go over there with him?

A. No, I didn't go.

Q. What time did you wake up the next day?

A. I'm not sure. I want to say around 10, 11.

Q. You have a brother named AJ?
A. I'm AJ.
Q. I'm sorry. How many brothers have you got?
A. I have three brothers and all of our initials are AJ but I'm the only one that goes by it.
Q. So I hope you can understand my confusion.
A. Were you going to say Alex?
Q. Yes. That's the source of my confusion. AJ, Andres, thank you for your time.
I'll pass the witness.
MS. DERJAVINA: The State has no questions, your Honor.
THE COURT: Thank you, sir. You may step down.
THE CLERK: Raise your right hand.
Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?
THE WITNESS: Yes, I do.
THE CLERK: Please be seated.
Please state your first and last name and spell each for the record.
THE WITNESS: Orlando Jaramillo. O-R-L-A-N-D-O J-A-R-A-M-I-L-L-O.

THE COURT: Thank you, sir. You may be seated.

Go ahead, counsel.

ORLANDO JARAMILLO,
having been first duly sworn, did testify as follows:

DIRECT EXAMINATION

BY MR. HAMILTON:

Q. Mr. Jaramillo, Ryan Hamilton, we met out in the hall briefly. May I call you Orlando just for ease of the record?

A. Sure.

Q. Orlando, do you recall the late night, early morning of June 21 and 22?

A. Yes, sir.

Q. And is it correct you reside at a house on Sitting Bull?

A. Yes, sir. 938.

Q. Orlando, my questions are do you know one way or the other whether Sam left your house early morning of June 22?

A. He went across the street to my son's place. But I mean, I didn't see him and of course I was in bed.

MS. DERJAVINA: At this point I would

object to his knowledge.

THE COURT: Sustained. Lay a foundation.

BY MR. HAMILTON:

Q. How do you know that?

A. We have a Ring app. The doorbell ring.

Q. And so do you have knowledge of when Sam left the home, left your home?

MS. DERJAVINA: And then I would object. The best evidence would be based on the video.

THE COURT: If you have the video let's watch it. You should be able to get it. I got mine.

MR. HAMILTON: We'll get the video and then I'm going to really read up on this best evidence.

THE COURT: Sustained.

BY MR. HAMILTON:

Q. Orlando, I understand that a number of people were drinking in the early morning June 22nd in your home. Is that your understanding?

A. It's my understanding, but when I went to bed there was none of those people at my house.

Q. And that was going to be my followup. It's my understanding you didn't know --

A. The only people when I went to bed that were up and at my house at that time were Sam, my daughter Alexis and AJ who had just gotten home and he

was eating. That's about it. Nobody else was there.

Q. Just a couple more brief questions. Did you cook and serve lunch for a number of people on June 22nd?

A. Yes, sir. The following day. I left about eight o'clock in the morning, went to the store about 8:30ish and then got food, brought it home and prepared food for everybody.

Q. Approximately what time was it that lunch was served?

A. Oh, geez. I want to say probably around 11, 11:30, somewhere in there.

Q. Do you recall one way or another if people were watching the UFC program during lunch?

A. Everybody was just hanging out, yeah. There must have been UFC, yeah.

Q. And do you have any knowledge as to when Raquelle Rouw left your home on the 22nd?

A. No. I would say it was in the afternoon, though, for sure. I want to say, I don't know, probably around 2:30 or 3:00. I'm not sure.

Q. Did you observe her demeanor during lunch, her being Raquelle?

A. No, not really. There's so many people in my house on a regular basis. Just we have a big family

so it just kind of blends in I guess so I didn't really pay attention to anybody. I'm always busy cooking, cleaning up. Just doing what we do.

MR. HAMILTON: Fair enough. I'll pass the witness. Thank you.

THE COURT: Any questions?

MS. DERJAVINA: No questions, your Honor.

THE COURT: Thank you. Sir, you're excused.

MR. HAMILTON: Judge, there is one more witness but we are going to elect not to call her at this time and we'll rest.

THE COURT: Thank you.

Argument?

MS. SCHEIBLE: I would waive and reserve for rebuttal.

THE COURT: Counsel.

MR. HAMILTON: Judge, we do have brief argument. There are essentially two cases here. Our argument will be directed toward the incident at the Hard Rock Hotel and Casino with Miss Rivera. Miss Rivera's testimony was clear that she did not recall any sexual activity with the defendant in this case. The only testimony there was was to the effect from Detective Nogle and there was no indication that any of

the sexual activity that she spoke about was anything but consensual.

MS. DERJAVINA: I would just object, and I apologize for having to interrupt defense counsel, but again that kind of misstates the testimony of the detective.

THE COURT: It's argument.

MR. HAMILTON: Your Honor, what is clear is they were the only people who were in there in the hotel room and my client vehemently denies he did anything improper. The alleged victim simply has no memory of whatever had occurred and we respectfully submit that the State has not met its burden with respect to any sexual misconduct claims with respect to Ms. Rivera.

They have made a burglary count suggesting that my client went to the premises with the intent to commit a felony, the felony being sexual assault. I would also submit there is no evidence of the requisite intent on the part of my client showing that he intended to have a sexual assault or anything of that.

With that, your Honor, we would rest.

THE COURT: State.

MS. SCHEIBLE: So I just want to clarify it sounds like defense counsel is not making arguments

regarding Counts 1 through 6 which relate to the first victim Raquelle Rouw. I will summarize for you, your Honor, that I think we presented more than slight or marginal evidence that she in fact was assaulted by the defendant early in the morning of June 22nd at the house of Sitting Bull Drive.

And I will also turn now to the seventh through tenth counts. Your Honor, I think that this is a pretty clearcut case of, you know, adding one plus one to get two. If you have an individual who is so drunk that she can't remember anything that happened that night and then you have another individual having sex with her, she clearly didn't have the capacity to consent. And so that right there is evidence of a sexual assault having occurred in the Hard Rock Hotel. Moreover, the one thing that she does remember is saying no that she didn't want this to happen, that she didn't want to do this. I think that there was plenty of evidence adduced at the preliminary hearing today that the defendant was the person who committed this crime and that there was a crime committed against Ms. Liana Rivera. She testified that she did not have pain in her vaginal regions in the beginning of the evening, that she remembers experiencing pain and that pain lasted into the morning. She remembers somebody

else taking off her pants and somebody else taking out her tampon. Those kind of memories I think speak to the violence of the act that occurred and I don't think that there's any reasonable question as to whether or not the State's met its burden of proof at this juncture of showing probable cause by all 10 of the charges over.

Speaking briefly to the burglary charge I will go back again to noting that this victim was so inebriated that she could not consent and she could not remember anything that happened. So there's simply no way that the defendant could have been going to the room for any purpose other than to commit this crime or to commit a crime. He wasn't allowed in that hotel room, he wasn't supposed to be in that hotel room, and if he went up there and had sex with her, which is what he told detectives he did, then he did that knowingly and willingly. And all of those factors point towards binding over all 10 charges in this case. And we would respectfully ask that you do that.

THE COURT: I am in agreement. For purposes of this preliminary hearing I find that there's probable cause that the charges did occur and that the defendant committed them. I will bind it over to District Court, set it for initial arraignment on --

THE CLERK: December 18, 10:00 a.m., lower level.

(The proceedings concluded.)

* * * * *

ATTEST: Full, true and accurate transcript of proceedings.

/S/Lisa Brenske
_____
LISA BRENSKE, CSR No. 186

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 Feb 16 2021 11:58 p.m. Elizabeth A. Brown Clerk of Supreme Court **Case No. 82236** Original Action for Writ to Eighth Judicial District Court, Clark County, Nevada, Case No. C-20-346852-A
THE STATE OF NEVADA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE RICHARD SCOTTI, District Judge, Respondents, and MATTHEW HANEY MOLEN, Real Party in Interest.	**Case No. 82249** Original Action for Writ to Eighth Judicial District Court, Clark County, Nevada, Case No. C-20-348754-A

NEVADA LEGISLATURE'S AMICUS CURIAE BRIEF SUPPORTING REVERSAL OF THE DISTRICT COURT'S INTERPRETATION AND APPLICATION OF THE SEPARATION-OF-POWERS PROVISION IN ARTICLE 3, SECTION 1 OF THE NEVADA CONSTITUTION

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INTRODUCTION

The Legislature of the State of Nevada (Legislature), by and through its counsel the Legal Division of the Legislative Counsel Bureau ("LCB Legal") under NRS 218F.720, hereby files this amicus curiae brief supporting reversal of the district court's interpretation and application of the separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution.[1]

In its orders, the district court decided that a deputy district attorney who prosecutes criminal cases and who also serves in the Legislature violates a criminal defendant's rights to "procedural due process" on the basis that such dual service violates the separation-of-powers provision. (*Plumlee App. V1:249-52; Molen App. V1:233-36.*) The Legislature asks this Court to reverse and vacate the district court's decision in these cases because the decision was based on a clearly erroneous interpretation and application of constitutional and statutory law.

First, the district court's decision was based on a clearly erroneous interpretation and application of the Due Process Clause because even assuming that the defendants had proven that the prosecutor committed constitutional errors

[1] The Legislature's amicus brief is limited solely to legal issues supporting reversal of the district court's interpretation and application of the separation-of-powers provision. This brief does not address any other legal issues arising from the particular facts of these cases, and this brief does not support or oppose any of the parties with regard to any other legal issues.

in prosecuting these cases, the defendants were not entitled to reversal of their convictions and new trials under the Due Process Clause because they did not make the required additional showing that the constitutional errors caused actual prejudice that resulted in unfair trials.

Second, the district court's decision was based on a clearly erroneous interpretation and application of constitutional and statutory law because deputy district attorneys serve as county employees—not as state officers or county officers—and they do not exercise sovereign functions belonging to the state executive branch when they participate in criminal prosecutions.

Third, the district court's decision was based on a clearly erroneous interpretation and application of the separation-of-powers provision because that provision does not prohibit legislators from holding positions of public employment with county governments as deputy district attorneys. In particular, the separation-of-powers provision does not prohibit legislators from holding any positions of public employment with local governments because local governments and their officers and employees are not part of one of the three departments of state government. Furthermore, even if the separation-of-powers provision is interpreted to apply to local governments, the provision still would not prohibit legislators from holding positions of public employment as deputy district attorneys with county governments because deputy district attorneys are county

employees who do not exercise sovereign functions belonging to the state executive branch when they participate in criminal prosecutions.

Therefore, the Legislature asks this Court to issue a writ to Respondents, the Eighth Judicial District Court and the Honorable Richard Scotti, District Judge, reversing and vacating the district court's decision in these cases because the decision was based on a clearly erroneous interpretation and application of constitutional and statutory law.

ARGUMENT

I. Standards of review for writ relief.

Because writ relief is an extraordinary remedy that invokes this Court's original jurisdiction, the decision whether to grant such relief lies within this Court's sole discretion. State v. Dist. Ct. (Schneider), 132 Nev. 600, 603 (2016). This Court may grant writ relief when the petitioner does not have a plain, speedy and adequate remedy in the ordinary course of the law to challenge the district court's decision. Id. Additionally, this Court may grant writ relief "where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction." Bus. Computer Rentals v. State Treasurer, 114 Nev. 63, 67 (1998). For example, writ relief is warranted when the petition "raises pressing issues involving the Nevada Constitution and the public policy of this state." Id.

Under the Nevada Constitution, state district courts "have final appellate jurisdiction in cases arising in Justices Courts and such other inferior tribunals as may be established by law." Nev. Const. art. 6, § 6(1). As a result, when the district court exercises its final appellate jurisdiction and reverses a criminal conviction in the justice court or municipal court, the district court's decision is not subject to further appellate review in the ordinary course of the law by an appeal to this Court. Stilwell v. City of N. Las Vegas, 129 Nev. 720, 722 (2013). Under such circumstances, the State does not have a plain, speedy and adequate remedy in the ordinary course of law to challenge the district court's decision, and the State's only remedy is to petition this Court for extraordinary writ relief. Schneider, 132 Nev. at 603.

As a general rule, this Court has "declined to entertain writs that request review of a decision of the district court acting in its appellate capacity unless the district court has improperly refused to exercise its jurisdiction, has exceeded its jurisdiction, or has exercised its discretion in an arbitrary or capricious manner." State v. Dist. Ct. (Hedland), 116 Nev. 127, 134 (2000). Under these standards, this Court will grant writ relief to correct an arbitrary or capricious exercise of discretion when the district court's decision is based on "[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." State

v. Dist. Ct. (Armstrong), 127 Nev. 927, 932 (2011) (quoting Steward v. McDonald, 958 S.W.2d 297, 300 (Ark. 1997)).

In these cases, this Court should exercise its discretion to entertain the State's writ petition because: (1) the State does not have a plain, speedy and adequate remedy in the ordinary course of the law to challenge the district court's decision; (2) the district court's decision raises important issues of state constitutional and statutory law and adversely affects the public policy of this State which protects the concept of the "citizen-legislator" as the cornerstone of an effective, responsive and qualified part-time legislative body; and (3) the district court's decision was based on a clearly erroneous interpretation and application of constitutional and statutory law.

II. Standards of review for constitutional challenges.

This Court "applies a de novo standard of review to constitutional challenges." Callie v. Bowling, 123 Nev. 181, 183 (2007). Under that standard, this Court reviews the district court's interpretation and application of constitutional provisions de novo "without deference to the district court's decision." Sparks Nugget v. State Dep't of Tax'n, 124 Nev. 159, 163 (2008).

III. The district court's decision was based on a clearly erroneous interpretation and application of the Due Process Clause because even if the defendants had proven that the prosecutor committed constitutional errors in prosecuting these cases, the defendants were not entitled to reversal of their convictions and new trials under the Due Process Clause because they did not

make the required additional showing that the constitutional errors caused actual prejudice that resulted in unfair trials.

In its orders, the district court determined that a deputy district attorney who prosecutes criminal cases and who also serves in the Legislature violates a criminal defendant's rights to "procedural due process" on the basis that such dual service violates the separation-of-powers doctrine. (*Plumlee App. V1:249-52; Molen App. V1:233-36.*) As a result, the district court concluded that the defendants in these cases were entitled to reversal of their convictions and new trials in the justice court because they were deprived of their rights to "procedural due process" given that the deputy district attorney who prosecuted their cases served in the Legislature at the time of their trials. (*Plumlee App. V1:249-52; Molen App. V1:233-36.*) In particular, the district court reasoned that because the deputy district attorney's dual service as a prosecutor and legislator violated the separation-of-powers doctrine, the deputy district attorney "did not have the legal authority to prosecute" these cases, so each "trial was a nullity." (*Plumlee App. V1:250; Molen App. V1:233.*)

Thus, the district court's decision to reverse the convictions and grant new trials was based solely on its conclusion that the defendants were deprived of their rights to procedural due process by the prosecutor's alleged separation-of-powers violation in prosecuting the cases. However, the district court's decision to reverse the convictions and grant new trials based solely on the alleged violation of

procedural due process contradicts well-established principles of constitutional law because even if a defendant proves that the prosecutor has committed constitutional errors in prosecuting the case, the defendant is not entitled to reversal of the conviction and a new trial under the Due Process Clause unless the defendant makes the required additional showing that the constitutional errors caused actual prejudice that resulted in an unfair trial. Smith v. Phillips, 455 U.S. 209, 218-21 (1982).

The U.S. Supreme Court has stressed that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). Therefore, the Supreme Court has "rejected the argument that all federal constitutional errors, regardless of their nature or the circumstances of the case, require reversal of a judgment of conviction." Id.

In the context of constitutional errors committed by the prosecutor, the Supreme Court has stated that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith, 455 U.S. at 219. Thus, even if a defendant proves that the prosecutor has committed constitutional errors in prosecuting the case, the defendant is not entitled to reversal of the conviction and a new trial unless the defendant makes the required additional showing that the constitutional errors caused actual prejudice that resulted in an unfair trial. Id. at 219-21. The reason

for this rule is that "the aim of due process is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused." Id. at 219 (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)). Consequently, even if the district court finds that the prosecutor has committed constitutional errors in prosecuting the case, the district court commits its own constitutional error "when it conclude[s] that prosecutorial misconduct alone requires a new trial." Id. at 220.

For example, several courts have rejected claims by defendants that they were automatically entitled to reversal of their convictions and new trials because, at the time of trial, the prosecutors were not licensed to practice law in the prosecuting jurisdiction or their law licenses had been suspended or restricted. People v. Carter, 566 N.E.2d 119, 123-24 (N.Y. 1990); Munoz v. Keane, 777 F. Supp. 282, 284-87 (S.D.N.Y. 1991); Hamilton v. Roehrich, 628 F. Supp. 2d 1033, 1050-54 (D. Minn. 2009). The courts rejected the defendants' arguments that their trials were inherently unfair because the prosecutors were not legally authorized to practice law at the time of the trials. Id. The courts concluded that the defendants were not entitled to reversal of their convictions and new trials because they did not show that the prosecutors' lack of legal authority to practice law caused actual prejudice that resulted in an unfair trial. As stated by the New York court, "in the absence of prejudice, the fact that [the prosecutor] was not a lawyer did not result

in a deprivation of defendants' constitutional due process rights." Carter, 566 N.E.2d at 124.

In these cases, the defendants argued that the deputy district attorney's dual service as a prosecutor and legislator violated the separation-of-powers doctrine. (*Plumlee App. V1:179, 231-33; Molen App. V1:154-55; 173-74.*) The defendants also argued that each "trial was a nullity" based solely on the alleged separation-of-powers violation. (*Plumlee App. V1:179, 231-33; Molen App. V1:154-55; 173-74.*) However, the defendants did not include any arguments attempting to make the required additional showing that the alleged separation-of-powers violation caused actual prejudice that resulted in an unfair trial. (*Plumlee App. V1:179, 231-33; Molen App. V1:154-55; 173-74.*)

Similarly, the district court determined that the deputy district attorney's dual service as a prosecutor and legislator violated the separation-of-powers doctrine. (*Plumlee App. V1:249-52; Molen App. V1:233-36.*) As a result, the district court concluded that the defendants in these cases were entitled to reversal of their convictions and new trials in the justice court because they were deprived of their rights to "procedural due process" given that the deputy district attorney who prosecuted their cases served in the Legislature at the time of their trials. (*Plumlee App. V1:249-52; Molen App. V1:233-36.*) In reaching its conclusion, the district court stated that it found "a violation of procedural due process of nearly the

highest order." (*Plumlee App. V1:250; Molen App. V1:234.*) However, the district court did not make any findings that the violation caused actual prejudice that resulted in an unfair trial. (*Plumlee App. V1:249-52; Molen App. V1:233-36.*)

Under such circumstances, the district court's decision to reverse the convictions and grant new trials based solely on its finding that the prosecutor had committed constitutional errors in prosecuting these cases contradicts well-established principles of constitutional law because the district court "concluded that prosecutorial misconduct alone requires a new trial." Smith, 455 U.S. at 220. Therefore, the district court's decision was based on a clearly erroneous interpretation and application of the Due Process Clause because even if the defendants had proven that the prosecutor committed constitutional errors in prosecuting these cases, the defendants were not entitled to reversal of their convictions and new trials under the Due Process Clause because they did not make the required additional showing that the constitutional errors caused actual prejudice that resulted in unfair trials.

IV. The district court's decision was based on a clearly erroneous interpretation and application of constitutional and statutory law because deputy district attorneys serve as county employees—not as state officers or county officers—and they do not exercise sovereign functions belonging to the state executive branch when they participate in criminal prosecutions.

In its orders, the district court determined that a deputy district attorney "enforcing the laws of the State of Nevada, and representing the State of Nevada,

is actually exercising powers belonging to the [s]tate executive branch." (*Plumlee App. V1:250-51; Molen App. V1:234.*) However, the district court's determination contradicts well-established constitutional and statutory law which classifies deputy district attorneys as county employees and which does not authorize deputy district attorneys to exercise sovereign functions belonging to the state executive branch when they participate in criminal prosecutions.

Under Article 4, Section 32 of the Nevada Constitution, because the office of the district attorney is a county office, Nevada's district attorneys are not state officers of the executive branch. Lane v. Second Jud Dist. Ct., 104 Nev. 427, 437 (1988); In re Contested Election of Mallory, 128 Nev. 436, 439 (2012). As explained by this Court:

> The plain language of Article 4, Section 32 clearly declares that district attorneys are county officers. And because the Nevada Constitution plainly identifies district attorneys as county officers, it necessarily follows that the office of district attorney cannot be considered a "state office[.]"

Mallory, 128 Nev. at 439. Thus, this Court has determined that Nevada's district attorneys are not acting as state officers of the executive branch when they conduct criminal prosecutions. Lane, 104 Nev. at 437.

Based on Nevada law, the Ninth Circuit has also determined that Nevada's district attorneys are not acting as state officers of the executive branch when they are sued for federal civil rights violations stemming from their exercise of

policymaking authority in conducting criminal prosecutions. Webb v. Sloan, 330 F.3d 1158, 1164-65 (9th Cir. 2003); Botello v. Gammick, 413 F.3d 971, 979 (9th Cir. 2005). Under the federal civil rights statute in 42 U.S.C. § 1983, a county can be sued for damages for certain constitutional violations committed by county officers who exercise "policymaking authority." McMillian v. Monroe Cnty., 520 U.S. 781, 785 (1997). By contrast, "[s]tates and state officials acting in their official capacities cannot be sued for damages under Section 1983." Goldstein v. City of Long Beach, 715 F.3d 750, 753 (9th Cir. 2013).

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. Weiner v. San Diego Cnty., 210 F.3d 1025, 1028-31 (9th Cir. 2000); Goldstein, 715 F.3d at 753-59. Therefore, to determine whether the county can be sued for constitutional violations stemming from the district attorney's exercise of policymaking authority in conducting criminal prosecutions, federal courts must decide "whether the district attorney acted as a county official or as a state official when he decided to proceed with [the defendant's] criminal prosecution." Weiner, 210 F.3d at 1028. When federal courts make this determination, their "answer to that question is dependent on state law." Id.

In Webb, the Ninth Circuit reviewed Nevada law, including this Court's decision in Lane, and determined that Nevada's district attorneys are acting as county officers, not as state officers of the executive branch, when they conduct criminal prosecutions. Webb, 330 F.3d at 1164-65. Therefore, the Ninth Circuit concluded that Nevada's district attorneys exercise policymaking authority for the county—instead of the state executive branch—when they conduct criminal prosecutions. Id.

In Webb, the Ninth Circuit also reviewed Nevada law to determine whether Nevada's deputy district attorneys exercise policymaking authority for the county in a manner similar to the district attorneys who employ them. Id. at 1164-66. At the time, Nevada law provided in NRS 252.070(1) that:

> All district attorneys are authorized to appoint deputies, who may transact all official business relating to the offices to the same extent as their principals.

NRS 252.070(1) (2001). The Ninth Circuit determined that "[b]y its plain text, that statute confers authority on deputy district attorneys that is coextensive with the authority enjoyed by principal district attorneys. Thus, if principal district attorneys are final policymakers, then so are their deputies." Webb, 330 F.3d at 1164. In making this determination, the Ninth Circuit noted that its decision was based on the Nevada statutes that were in effect at the time of the decision and that

"it is within the Nevada [L]egislature's power to constrain the authority of deputies if it should see fit." Id. at 1166 n.5.

Following the Ninth Circuit's interpretation of Nevada law with regard to deputy district attorneys, the Legislature amended NRS 252.070(1) in 2005 to provide explicitly that deputy district attorneys do not exercise "policymaking authority for the office of the district attorney or the county by which the deputy district attorney is employed." Assembly Bill No. 477 (AB 477), 2005 Nev. Stat., ch. 209, § 6, at 682. After the 2005 amendment, NRS 252.070(1) now states:

> All district attorneys may appoint deputies, who are authorized to transact all official business relating to those 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. **The appointment of a deputy district attorney must not be construed to confer upon that deputy policymaking authority for the office of the district attorney or the county by which the deputy district attorney is employed**.

NRS 252.070(1) (2019) (emphasis added).

Thus, under Nevada law, deputy district attorneys are not state officers because they do not exercise sovereign functions of the executive branch when they conduct criminal prosecutions. See Lane, 104 Nev. at 437; Webb, 330 F.3d at 1164-65. Furthermore, deputy district attorneys are not county officers because they do not exercise "policymaking authority for the office of the district attorney or the county by which the deputy district attorney is employed." NRS 252.070(1). Consequently, under Nevada law, deputy district attorneys are county employees

who do not exercise sovereign functions belonging to the state executive branch when they participate in criminal prosecutions. Accordingly, the district court's decision was based on a clearly erroneous interpretation and application of constitutional and statutory law because deputy district attorneys serve as county employees—not as state officers or county officers—and they do not exercise sovereign functions belonging to the state executive branch when they participate in criminal prosecutions.

V. The district court's decision was based on a clearly erroneous interpretation and application of the separation-of-powers provision because that provision does not prohibit legislators from holding positions of public employment with county governments as deputy district attorneys.

In its orders, the district court rejected the State's and LCB Legal's arguments that the separation-of-powers provision does not prohibit legislators from holding positions of public employment with local governments because local governments and their officers and employees are not part of one of the three departments of state government. (*Plumlee App. V1:249-52; Molen App. V1:233-36.*) The district court also rejected the State's and LCB Legal's arguments that the separation-of-powers provision does not prohibit legislators from holding positions of public employment with the state executive branch because persons who hold such positions of public employment do not exercise any sovereign functions appertaining to the state executive branch. (*Plumlee App. V1:249-52; Molen App. V1:233-36.*) The district court's rejection of these arguments was based on a

clearly erroneous interpretation and application of the separation-of-powers provision because the district court's reasoning conflicts with historical evidence, legal treatises and other authorities on constitutional law, case law from other jurisdictions interpreting similar state constitutional provisions, common-law rules governing public officers and employees and, most importantly, the intent of the Framers and their underlying public policies supporting the concept of the "citizen-legislator" as the cornerstone of an effective, responsive and qualified part-time legislative body.

A. The separation-of-powers provision does not prohibit legislators from holding positions of public employment with local governments because local governments and their officers and employees are not part of one of the three departments of state government.

The separation-of-powers provision provides that "[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." Nev. Const. art. 3, § 1 (emphasis added). By using the term "State" in the separation-of-powers provision, the Framers of the Nevada Constitution expressed a clear intent to have the provision apply only to the three departments of state government. As explained by the Ohio Supreme Court:

> [I]n general at least, when the constitution speaks of the "State," the whole State, in her political capacity, **and not her subdivisions**, is intended. That such is the natural import of the language used, no one denies. That such must be its construction, to make the constitution consistent with itself, and sensible, is very apparent.

Cass v. Dillon, 2 Ohio St. 607, 616 (1853) (emphasis added).

This Court recently stated that "the language of the separation-of-powers provision in the Constitution does not extend any protection to political subdivisions." City of Fernley v. State Dep't of Tax'n, 132 Nev. 32, 43 n.6 (2016). This determination is consistent with prior cases in which this Court has recognized that political subdivisions are not part of one of the three departments of state government. See Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195, 203-04 (2001) ("Neither state-owned institutions, nor state departments, nor public corporations are synonymous with political subdivisions of the state."); Nunez v. City of N. Las Vegas, 116 Nev. 535, 540 (2000) ("Although municipal courts are created by the legislature pursuant to authority vested in that body by the Nevada Constitution, these courts are separate branches of their respective city governments. . . . .[T]hey are not state governmental entities."); City of Sparks v. Sparks Mun. Ct., 129 Nev. 348, 362 n.5 (2013) ("While municipal courts are included within the state constitutional judicial system, they are nonetheless primarily city entities, rather than an extension of the state.").

Because political subdivisions are not part of one of the three departments of state government, their local officers generally are not considered to be state officers who are subject to the separation-of-powers provision. See State ex rel. Mason v. Bd. of Cnty. Comm'rs, 7 Nev. 392, 396-97 (1872) (noting that the

exercise of certain powers by a board of county commissioners was not limited by the doctrine of separation of powers); Lane, 104 Nev. at 437 (noting that the doctrine of separation of powers was not applicable to the exercise of certain powers by the district attorney because he was not a state constitutional officer).

Furthermore, the Nevada Constitution was modeled on the California Constitution of 1849. State ex rel. Harvey v. Second Jud. Dist. Ct., 117 Nev. 754, 761 (2001). Because Nevada's constitutional provisions were taken from California's 1849 constitutional provisions, Nevada's provisions "may be lawfully presumed to have been taken with the judicial interpretation attached." Mason, 7 Nev. at 397.

In construing the separation-of-powers provision in the California Constitution of 1849, the California Supreme Court held that the separation-of-powers provision did not apply to local governments and their officers and employees. People ex rel. Att'y Gen. v. Provines, 34 Cal. 520, 523-40 (1868). In Provines, the court stated that "[w]e understand the Constitution to have been formed for the purpose of establishing a *State* Government; and we here use the term 'State Government' in contradistinction to local, or to county or municipal governments." Id. at 532. After examining the history and purpose of the separation-of-powers provision, the court concluded that "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." Id. at 534. Thus, the court held that the separation-of-powers provision had no application to the functions performed by a person at the local governmental level. Id. at 523-40.

In later cases, the California Supreme Court reaffirmed that under California law, "it is settled that the separation of powers provision of the constitution, art. 3, § 1, does not apply to local governments as distinguished from departments of the state government." Mariposa County v. Merced Irrig. Dist., 196 P.2d 920, 926 (Cal. 1948). This interpretation of the separation-of-powers doctrine is followed by a majority of other jurisdictions. See, e.g., Poynter v. Walling, 177 A.2d 641, 645 (Del. Super. Ct. 1962); La Guardia v. Smith, 41 N.E.2d 153, 156 (N.Y. 1942); 16 C.J.S. Constitutional Law § 112, at 377 (1984).

Consequently, it is well settled that "a local government unit, though established under state law, funded by the state, and ultimately under state control, with jurisdiction over only a limited area, is not a 'State.'" United States ex rel. Norton Sound Health Corp. v. Bering Strait Sch. Dist., 138 F.3d 1281, 1284 (9th Cir. 1998). Furthermore, "a local government with authority over a limited area, is a different type of government unit than a state-wide agency that is part of the organized government of the state itself." Wash. State Dep't of Transp. v. Wash. Natural Gas Co., 59 F.3d 793, 800 n.5 (9th Cir. 1995). Thus, "[w]hile local

subdivisions and boards created by the state may have some connection with one of the departments of the state government as defined by the Constitution, they are not 'departments of state government' within the intent and meaning of the [law]." State v. Coulon, 3 So. 2d 241, 243 (La. 1941). In the face of these basic rules of law, courts have consistently found that cities, counties, school districts and other local governmental entities are not included within one of the three departments of state government. See, e.g., Dermott Special Sch. Dist. v. Johnson, 32 S.W.3d 477, 480-81 (Ark. 2000); Dunbar Elec. Supply, Inc. v. Sch. Bd., 690 So. 2d 1339, 1340 (Fla. Dist. Ct. App. 1997); Stokes v. Harrison, 115 So. 2d 373, 377-79 (La. 1959); Coulon, 3 So. 2d at 243.

Likewise, in the context of the Eleventh Amendment, federal courts interpreting Nevada law have consistently found that cities, counties, school districts and other local governmental entities in this state are not included within one of the three departments of state government and that these local political subdivisions are not entitled to Nevada's sovereign immunity in federal court. See, e.g., Lincoln County v. Luning, 133 U.S. 529, 530 (1890); Eason v. Clark Cnty. Sch. Dist., 303 F.3d 1137, 1144 (9th Cir. 2002); Herrera v. Russo, 106 F. Supp. 2d 1057, 1062 (D. Nev. 2000). These federal cases are important because when a federal court determines whether a political subdivision is part of state government for the purposes of the Eleventh Amendment, the federal court makes its

determination based on **state law**. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81 (1977); Austin v. State Indus. Ins. Sys., 939 F.2d 676, 678-79 (9th Cir. 1991).

After examining state law in Nevada, federal courts have found that the Nevada Gaming Control Board, the Nevada Gaming Commission, the Nevada State Industrial Insurance System, the Nevada Supreme Court and the Nevada Commission on Judicial Discipline are state agencies included within one of the three departments of state government and that these state agencies are entitled to Nevada's sovereign immunity under the Eleventh Amendment. See Carey v. Nev. Gaming Control Bd., 279 F.3d 873, 877-78 (9th Cir. 2002); Romano v. Bible, 169 F.3d 1182, 1185 (9th Cir. 1999); Austin, 939 F.2d at 678-79; O'Connor v. State, 686 F.2d 749, 750 (9th Cir. 1982); Salman v. Nev. Comm'n on Jud. Discipline, 104 F. Supp. 2d 1262, 1267 (D. Nev. 2000). By contrast, after examining state law in Nevada, federal courts have found that cities, counties and school districts in Nevada are not included within one of the three departments of state government and that these local political subdivisions are not entitled to Nevada's sovereign immunity under the Eleventh Amendment. See Lincoln County, 133 U.S. at 530; Eason, 303 F.3d at 1144; Herrera, 106 F. Supp. 2d at 1062. Thus, as viewed by federal courts that have interpreted Nevada law, local political subdivisions in this state are not included within one of the three departments of state government.

Accordingly, because local political subdivisions in Nevada are not included within one of the three departments of state government, their officers and employees also are not part of one of the three departments of state government, and legislators who hold such positions with local governments are not serving in positions within one of the three departments of state government. Consequently, given that the separation-of-powers provision applies only to the three departments of state government, the separation-of-powers provision does not prohibit legislators from holding positions of public employment with local governments because local governments and their officers and employees are not part of one of the three departments of state government. Therefore, the district court's decision was based on a clearly erroneous interpretation and application of the separation-of-powers provision because that provision does not prohibit legislators from holding positions of public employment with county governments as deputy district attorneys.

B. Even if the separation-of-powers provision is interpreted to apply to local governments, the provision still would not prohibit legislators from holding positions of public employment as deputy district attorneys with county governments because deputy district attorneys are county employees who do not exercise sovereign functions belonging to the state executive branch when they participate in criminal prosecutions.

As discussed previously, under Nevada law, deputy district attorneys are not state officers because they do not exercise sovereign functions of the executive branch when they conduct criminal prosecutions. See Lane, 104 Nev. at 437;

Webb, 330 F.3d at 1164-65. Furthermore, deputy district attorneys are not county officers because they do not exercise "policymaking authority for the office of the district attorney or the county by which the deputy district attorney is employed." NRS 252.070(1). Consequently, under Nevada law, deputy district attorneys are county employees. As such, even if the separation-of-powers provision is interpreted to apply to local governments, the provision still would not prohibit legislators from holding positions of public employment as deputy district attorneys with county governments because deputy district attorneys are county employees who do not exercise sovereign functions belonging to the state executive branch when they participate in criminal prosecutions.

Under Nevada's separation-of-powers provision, 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. Nev. Const. art. 3, § 1 (emphasis added). As a result, 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." Id. (emphasis added).

Thus, the critical issue under the separation-of-powers provision is whether legislators who hold positions of public employment with the state executive

branch or with local governments exercise any "functions" appertaining to the state executive branch which cause their public employment to be constitutionally incompatible with their service as legislators in the state legislative branch. This Court has never directly addressed this issue of constitutional law in a reported opinion. See Heller v. Legislature, 120 Nev. 456 (2004); State ex rel. Mathews v. Murray, 70 Nev. 116 (1953).

Because there is no controlling Nevada case law directly on point to resolve this issue of constitutional law, it is appropriate to consider: (1) historical evidence of the practices in the Federal Government and Congress immediately following the ratification of the Federal Constitution; (2) historical evidence of the practices in the California Legislature under similar state constitutional provisions which served as the model for the Nevada Constitution; (3) historical evidence of the practices in the Nevada Legislature since statehood; (4) legal treatises and other authorities on constitutional law; (5) case law from other jurisdictions interpreting similar state constitutional provisions; (6) common-law rules governing public officers and employees; and (7) the intent of the Framers and their underlying public policies supporting the concept of the "citizen-legislator" as the cornerstone of an effective, responsive and qualified part-time legislative body. Taking all these compelling historical factors, legal authorities and public policies into consideration, this Court should conclude that the separation-of-powers provision

does not prohibit legislators from holding positions of public employment with the state executive branch or with local governments.

(1) Historical evidence.

(a) Federal Government and Congress.

Based on the Federalist Papers, federal judicial precedent and long-accepted historical practices under the United States Constitution, the Founders did not believe that the doctrine of separation of powers absolutely prohibited an officer of one department from performing functions in another department.

On many occasions, the U.S. Supreme Court has discussed how the Founders adopted a pragmatic, flexible view of the separation of powers in the Federalist Papers. See, e.g., Mistretta v. United States, 488 U.S. 361, 380-82 (1989); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 441-43 (1977). Relying on the Federalist Papers, the Supreme Court has consistently adhered to "Madison's flexible approach to separation of powers." Mistretta, 488 U.S. at 380. In particular, Madison stated in the Federalist Papers that the separation of powers "'d[oes] not mean that these [three] departments ought to have no *partial agency* in, or no *controul* over the acts of each other.'" Id. at 380-81 (quoting The Federalist No. 47, pp. 325-326 (J. Cooke ed. 1961)).

In light of Madison's statements and other writings in the Federalist Papers, the Supreme Court has found that "the Framers did not require—and indeed

rejected—the notion that the three Branches must be entirely separate and distinct." Mistretta, 488 U.S. at 380. Thus, as understood by the Framers in the Federalist Papers, the doctrine of separation of powers did not impose a hermetic, airtight seal around each department of government. See Loving v. United States, 517 U.S. 748, 756-57 (1996). Rather, the doctrine created a pragmatic, flexible template of overlapping functions and responsibilities so that three coordinate departments could be fused into a workable government. See Mistretta, 488 U.S. at 380-81. Therefore, the Founders believed in a "pragmatic, flexible view of differentiated governmental power." Id. at 381.

Moreover, in the years immediately following the adoption of the United States Constitution, it was a common and accepted practice for judicial officers of the United States to serve simultaneously as executive officers of the United States. See Mistretta, 488 U.S. at 397-99. For example, the first Chief Justice, John Jay, served simultaneously as Chief Justice and Ambassador to England. Similarly, Oliver Ellsworth served simultaneously as Chief Justice and Minister to France. While he was Chief Justice, John Marshall served briefly as Secretary of State and was a member of the Sinking Fund Commission with responsibility for refunding the Revolutionary War debt. Id. at 398-99. Such long-accepted historical practices support the conclusion that the doctrine of separation of powers does not

absolutely prohibit an officer of one department from performing functions in another department.

Finally, the Founders did not believe that, on its own, the doctrine of separation of powers would prohibit an executive officer from serving as a member of Congress. See 2 The Founders' Constitution 346-57 (Philip B. Kurland & Ralph Lerner eds., 1987). Therefore, the Founders added the Incompatibility Clause to the United States Constitution. Id. The Incompatibility Clause provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const. art. I, § 6, cl. 2. The history surrounding the Incompatibility Clause supports the conclusion that the doctrine of separation of powers does not prohibit a legislator from holding a position of public employment in the executive branch.

In 1806, Congressman J. Randolph introduced a resolution into the House of Representatives which provided that "a contractor under the Government of the United States is an officer within the purview and meaning of the [Incompatibility Clause of the] Constitution, and, as such, is incapable of holding a seat in this House." 2 The Founders' Constitution 357. Congressman Randolph introduced the resolution because the Postmaster General had entered into a contract of employment with a person to be a mail carrier and, at the time, the person was also a member of the Senate. Id. at 357-62.

In debating the resolution, many Congressmen indicated that the Incompatibility Clause was the only provision in the Constitution which prohibited dual officeholding and that, based on the long-accepted meaning of the term "office," a person who held a contract of employment with the executive branch was not an officer of the United States and was not prohibited from serving simultaneously as a member of Congress. Id. After the debate, the House soundly rejected the resolution because many members believed the resolution banning members of Congress from employment with the executive branch contained an interpretation of the Incompatibility Clause which expanded the meaning of the provision well beyond its plain terms. Id.

Shortly thereafter, in 1808, Congress passed a federal law which prohibited an executive officer of the United States from entering into a contract of employment with a member of Congress. Id. at 371. A version of that federal law remains in effect. 18 U.S.C. § 431; 2 Op. U.S. Att'y Gen. 38 (1826) (explaining that the federal law prohibited all contracts of employment between officers of the executive branch and members of Congress).

Based on this historical evidence, it is quite instructive that, a mere 19 years after the United States Constitution was drafted, many members of the House of Representatives expressed the opinion that the Federal Constitution did not prohibit a person who held a contract of employment with the executive branch

from serving simultaneously as a member of Congress. This historical evidence supports the legal conclusion that the doctrine of separation of powers does not prohibit an officer of one department from being employed in another department.

(b) California Legislature.

As discussed previously, because the Framers of the Nevada Constitution modeled its provisions on the California Constitution of 1849, it is appropriate to consider historical evidence and case law from California when interpreting analogous provisions of the Nevada Constitution. Harvey, 117 Nev. at 763. No California court has ever held that the separation-of-powers provision in the California Constitution prohibits a legislator from being a state executive branch employee. Furthermore, the historical evidence from California establishes that during California's first 67 years of statehood, it was a common and accepted practice for California Legislators to hold positions as state executive branch employees until 1916, when the California Constitution was amended to expressly prohibit legislators from being state executive branch employees. See Chenoweth v. Chambers, 164 P. 428, 430 (Cal. Dist. Ct. App. 1917) (explaining that the constitutional amendment "was intended to reach a practice in state administration of many years' standing.").

At the general election held in California on November 7, 1916, one of the ballot questions was Amendment No. 6, which was an initiative measure to amend Cal. Const. art. 4, § 19, to read as follows:

> No senator or member of the assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this state; *provided*, that this provision shall not apply to any office filled by election by the people.

1916 Cal. Stat. 54.[2]

In the weeks leading up to the 1916 general election, the proposed constitutional amendment was described in several California newspapers. In an article dated October 28, 1916, the San Francisco Chronicle reported that:

> Some thirty-five or forty legislators in the employ of the State in various capacities are anxiously awaiting the result of the November election, for if the electorate should adopt amendment six on the ballot, known as the ineligibility to office measure, State Controller John S. Chambers probably will refuse to draw warrants in favor of legislators then in the employ of the State.

Measure Alarms Legislators on 'Side' Payroll, S.F. Chron., Oct. 28, 1916, at 5 (*Leg.'s Amicus Br. Exs.* at 9).

[2] As a result of subsequent constitutional amendments, the substance of the 1916 constitutional amendment is now found in Cal. Const. art. 4, § 13, which provides: "A member of the Legislature may not, during the term for which the member is elected, hold any office or employment under the State other than an elective office."

In another article dated October 28, 1916, the Sacramento Bee reported that many California Legislators were employed at that time by executive branch agencies, including the State Lunacy Commission, State Motor Vehicles Department, State Labor Commissioner, State Pharmacy Commission, State Pharmacy Board, State Railroad Commission, Folsom State Prison and State Inheritance Tax Commission. Chambers Studies Amendment No. 6: Proposal to Make Legislature Members Ineligible to State Jobs is Perplexing, Sacramento Bee, Oct. 28, 1916, at 9 (*Leg.'s Amicus Br. Exs.* at 11).

On the ballot at the 1916 general election, the ballot arguments relating to the proposed constitutional amendment stated that "some of our most efficient officials have been men holding appointments under the state, [while] at the same time being members of the legislature." Amendments to Constitution and Proposed Statutes with Arguments Respecting the Same to be Submitted to the Electors of the State of California at the General Election on Tuesday, November 7, 1916 (Cal. State Archives 1916) (*Leg.'s Amicus Br. Exs.* at 13). Those arguments also stated that:

> Here and there the state, by reason of such a law, will actually suffer, as it frequently happens that the most highly specialized man for work in connection with a certain department of state is a member of the legislature. There are instances of that sort today, where, by the enactment of such a law, the state will lose the services of especially qualified and conscientious officials.
>
> * * *

> Another argument advanced by the proponents of this measure is that members of the legislature who are appointed to state offices receive two salaries, but the records will show that leaves of absence are invariably obtained by such appointees during sessions of the legislature and the actual time of the legislative session is generally about eighty days every two years.

Id.

Shortly after the constitutional amendment was adopted, the California Court of Appeal was called upon to interpret whether the amendment applied to legislators whose terms began before the effective date of the amendment. Chenoweth v. Chambers, 164 P. 428 (Cal. Dist. Ct. App. 1917). The court held that the amendment was intended to apply to those legislators. Id. at 434. In reaching its holding, the court noted that the constitutional amendment "was intended to reach a practice in state administration of many years' standing and which the people believed should be presently eradicated." Id. at 430.

Taken together, these historical accounts establish that before the California Constitution was amended in 1916, California Legislators routinely held positions as state executive branch employees. This is notable because, at that time, the separation-of-powers provision in the California Constitution was nearly identical to the separation-of-powers provision in the Nevada Constitution. Thus, the historical evidence in California supports the legal conclusion that, in the absence of a specific constitutional amendment expressly banning legislators from public

employment, the separation-of-powers provision does not prohibit a legislator from holding a position as a state executive branch employee.

(c) Nevada Legislature.

For many decades, state and local government employees have served simultaneously as members of the Nevada Legislature. Affidavit of Guy L. Rocha, Former Assistant Administrator for Archives and Records of the Division of State Library and Archives of the Department of Cultural Affairs of the State of Nevada (Apr. 29, 2004) (*Leg.'s Amicus Br. Exs.* at 1-3). Although there are no official records specifically detailing the occupations of legislators who served in the Legislature during the 1800s and early 1900s, the records that are available indicate that state and local government employees have been serving in the Legislature since at least 1903. Id. The earliest known examples of local government employees who served as members of the Legislature are Mark Richards Averill, who was a member of the Assembly in 1903, and Ruth Averill, who was a member of the Assembly in 1921. Id. The earliest known examples of state executive branch employees who served as members of the Legislature are August C. Frohlich, who was a member of the Assembly in 1931, and Harry E. Hazard, who was a member of the Assembly in 1939. Id.

Based on research conducted by the Legislative Counsel Bureau covering the period from 1967 to 2019, state and local government employees have served as

members of the Legislature during each regular session convened over the past 50-plus years. See Nevada Legislative Manual (LCB 1967-2019); Affidavit of Donald O. Williams, Former Research Director of the Research Division of the Legislative Counsel Bureau of the State of Nevada (Apr. 28, 2004) (*Leg.'s Amicus Br. Exs.* at 4-5).

Thus, the historical evidence from the Nevada Legislature supports the legal conclusion that the separation-of-powers provision does not prohibit a legislator from holding a position as a state executive branch employee or a local government employee. Under well-established rules of constitutional construction, this historical evidence represents a long-standing interpretation of the separation-of-powers provision by the Legislature which must be given great weight.

When interpreting a constitutional provision, this Court "looks to the Legislature's contemporaneous actions in interpreting constitutional language to carry out the intent of the framers of Nevada's Constitution." Halverson v. Miller, 124 Nev. 484, 488-89 (2008). Because the Legislature's interpretation of a constitutional provision is "likely reflective of the mindset of the framers," such a construction "is a safe guide to its proper interpretation and creates a strong presumption that the interpretation was proper." Id. (internal quotation marks omitted); Hendel v. Weaver, 77 Nev. 16, 20 (1961); State ex rel. Herr v. Laxalt, 84 Nev. 382, 387 (1968); Tam v. Colton, 94 Nev. 452, 458 (1978).

Furthermore, when the Legislature's construction is consistently followed over a considerable period of time, that construction is treated as a long-standing interpretation of the constitutional provision, and such an interpretation is given great weight and deference by this Court, especially when the constitutional provision involves legislative operations or procedures. State ex rel. Coffin v. Howell, 26 Nev. 93, 104-05 (1901); State ex rel. Torreyson v. Grey, 21 Nev. 378, 387-90 (1893) (Bigelow, J., concurring); State ex rel. Cardwell v. Glenn, 18 Nev. 34, 43-46 (1883). As a result, "[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." Howell, 26 Nev. at 104.

The weight given to the Legislature's construction of a constitutional provision involving legislative operations or procedures is of particular force when the meaning of the constitutional provision is subject to any uncertainty, ambiguity or doubt. See, e.g., Nev. Mining Ass'n v. Erdoes, 117 Nev. 531, 539-40 (2001). Under such circumstances, this Court has stated that "although the [interpretation] of the legislature is not final, its decision upon this point is to be treated by the courts with the consideration which is due to a co-ordinate department of the state government, and in case of a reasonable doubt as to the meaning of the words, the

construction given to them by the legislature ought to prevail." Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394, 399-400 (1876).

This Court has also stated that when the meaning of a constitutional provision involving legislative operations or procedures is subject to any uncertainty, ambiguity or doubt, the Legislature may rely on an opinion of LCB Legal which interprets the constitutional provision, and "the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining Ass'n, 117 Nev. at 540. For example, when the meaning of the term "midnight Pacific standard time," as formerly used in the constitutional provision limiting legislative sessions to 120 days, was subject to uncertainty, ambiguity and doubt following the 2001 regular session, this Court explained that the Legislature's interpretation of the constitutional provision was entitled to deference because "[i]n choosing this interpretation, the Legislature acted on Legislative Counsel's opinion that this is a reasonable construction of the provision. We agree that it is, and the Legislature is entitled to deference in its counseled selection of this interpretation." Id.

With regard to state and local government employees serving as legislators, the Legislature has chosen to follow LCB Legal's long-standing interpretation of the separation-of-powers provision for decades, and it has acted on LCB Legal's opinion that this is a reasonable construction of the separation-of-powers provision.

As a result, "the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining Ass'n, 117 Nev. at 540.

Therefore, under the rules of constitutional construction, the Legislature's long-standing interpretation of the separation-of-powers provision "should be given great weight." Howell, 26 Nev. at 104 ("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."). Furthermore, to the extent there is any ambiguity, uncertainty or doubt concerning the interpretation of the separation-of-powers provision, the interpretation given to it by the Legislature "ought to prevail." Dayton Gold & Silver Mining, 11 Nev. at 400 ("[I]n case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature ought to prevail.").

(2) Case law from other jurisdictions.

Several courts from other jurisdictions have decided cases involving the legal issue of whether a state constitutional separation-of-powers provision prohibits legislators from being state or local government employees. However, the cases from the other jurisdictions are in conflict on this issue.

In State ex rel. Barney v. Hawkins, 257 P. 411, 412 (Mont. 1927), an action was brought to enjoin the state from paying Grant Reed his salary as an auditor for

the state board of railroad commissioners while he served as a member of the state legislature. The complaint alleged that Reed was violating the separation-of-powers provision in the state constitution because he was occupying a position in the executive branch of state government at the same time that he was serving as a member of the state legislature. Id. at 412. At the time, the separation-of-powers provision in the Montana Constitution provided that "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others." Id. at 413. The complaint also alleged that Reed was violating section 7 of article 5 of the state constitution, which provided that "[n]o senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under the State." Id. The Montana Supreme Court framed the issue it was deciding as follows:

> The only question for us to decide is—is the position of auditor, held by Grant Reed, a civil office(?); for, if it be a civil office, he is holding it unlawfully; and, if it be not a civil office, he is not an officer, but only an employee, subject to the direction of others, and he has no power in connection with his position, and is not exercising any powers belonging to the executive or judicial department of the state government. In the latter event, Article IV of the Constitution [separation of powers] is not involved.

Id.

After considering voluminous case law concerning the definition of a "civil office," including cases from Nevada that will be discussed below, the Montana

Supreme Court determined that Reed was not exercising any portion of the sovereign power of state government when he was acting as an auditor for the board of railroad commissioners and that, therefore, Reed did not occupy a civil office. Id. at 418. Rather, the court found that Reed was simply an employee "holding a position of employment, terminable at the pleasure of the employing power, the Board of Railroad Commissioners." Id. Thus, because Reed did not occupy a civil office, the court concluded that he had "no powers properly belonging to the judicial or executive department of the state government, for he is wholly subject to the power of the board, and, having no powers, he can exercise none; and, therefore, his appointment was not violative of Article IV of the Constitution [separation of powers]." Id.

The reasoning of the Montana Supreme Court was followed by the New Mexico Court of Appeals in State ex rel. Stratton v. Roswell Ind. Schools, 806 P.2d 1085, 1094-95 (N.M. Ct. App. 1991). In Stratton, the Attorney General argued that two members of the state legislature were violating the separation-of-powers provision in the state constitution because the legislators also occupied positions as a teacher and an administrator in local public school districts. Id. at 1088. At the time, the separation-of-powers provision in the New Mexico Constitution was identical to the separation-of-powers provision interpreted by the Montana Supreme Court in Hawkins: "no person or collection of persons charged

with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others[.]" Id. at 1094.

Like the Montana Supreme Court, the New Mexico Court of Appeals determined that a violation of the separation-of-powers provision could occur only if the members of the legislature were invested in their positions as school teacher and school administrator with sovereign power that properly belonged to another branch of government. Id. Because only public officers exercised sovereign power, the court determined that the separation-of-powers provision "applies [only] to public officers, not employees, in the different branches of government." Id. at 1095. After considering the nature of the public school positions, the court concluded that "[p]ublic school instructors and administrators are not 'public officials.' They do not establish policy for the local school districts or for the state department of education." Id. at 1094. Instead, "[a] school teacher employed by a common school district is [an] 'employee' not [an] 'officer', and the relationship between school teacher and school board is contractual only." Id. at 1095 (citing Brown v. Bowling, 240 P.2d 846, 849 (N.M. 1952)). Therefore, because the school teacher and school administrator were not public officers, but simply public employees, the court held that they were not barred by the separation-of-powers provision from being members of the legislature. Id.

The Colorado Supreme Court has also adopted this view. Hudson v. Annear, 75 P.2d 587, 588-89 (Colo. 1938) (holding that a position as chief field deputy for the state income tax department was not a civil office, but a position of public employment, and that therefore a legislator could occupy such a position without violating Colorado's separation-of-powers provision). See also Jenkins v. Bishop, 589 P.2d 770, 771-72 (Utah 1978) (Crockett, J., concurring in a memorandum per curiam opinion and arguing that Utah's separation-of-powers provision would not prohibit a legislator from also being a public school teacher); State v. Osloond, 805 P.2d 263, 264-67 (Wash. Ct. App. 1991) (holding that a legislator who served as a judge pro tempore in a criminal case did not violate the principle of separation of powers as recognized in Washington, which does not have an express separation-of-powers provision in its constitution).

In stark contrast to the foregoing court decisions are several court decisions from Indiana, Oregon and Nebraska. 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.

In State ex rel. Black v. Burch, 80 N.E.2d 294 (Ind. 1948), actions were brought to prevent the state from paying four members of the state legislature salaries that they had earned while occupying positions with various state

commissions and boards in the executive branch of government. After reviewing the relevant statutes relating to these positions, the court held that the legislators' positions in the executive branch "are not public offices, nor do they in their respective positions, perform any official functions in carrying out their duties in these respective jobs; they were acting merely as employees of the respective commission or boards by whom they were hired." Id. at 299. In other words, "[i]n performing their respective jobs, none of these [legislators] were vested with any functions pertaining to sovereignty." Id. Having determined that the legislators occupied positions of public employment, rather than public offices, the court's next task was to determine whether such public employment in another branch of state government violated Indiana's separation-of-powers provision, which provided at the time that "no person, charged with official duties under one of these departments[,] shall exercise any of the functions of another[.]" Id. The court framed the issue as follows: "[I]t now becomes necessary for this Court to determine what is the meaning of the phrase 'any of the functions of another,' as set out in the above quoted section of the Constitution." Id.

In interpreting the use of the term "functions," the court noted that the term "power" had been used instead of the term "functions" in the original draft of the separation-of-powers provision. Id. at 302. However, the term "functions" was inserted in the final version of the provision that was adopted by the drafters of the

constitution. Id. The court then stated that "[i]t would seem to us that these two words are interchangeable but, if there is any distinction, the term 'functions' would denote a broader field of activities than the word 'power.'" Id. The court also quoted extensively from the decision in Saint v. Allen, 126 So. 548 (La. 1930), in which the Louisiana Supreme Court held that a member of the state legislature was prohibited from being employed by the executive department of state government pursuant to the separation-of-powers provision in the Louisiana Constitution, which provided at the time that "[no] person or collection of persons holding office in one of [the departments], shall exercise power properly belonging to either of the others[.]" Saint, 126 So. at 550. In particular, the Louisiana Supreme Court held that:

> It is not necessary, to constitute a violation of the 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. The words "exercise power," speaking officially, mean perform duties or functions.

Id. at 555.

Based on the Saint case and other court decisions, the Indiana Supreme Court in Burch concluded that:

> In view of the fact that it is obvious that the purpose of all these separation of powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments, and that this object can be obtained only if § 1 of Art. 3 of the Indiana Constitution is read exactly

> as it is written, we are constrained to follow the New York and Louisiana cases above cited. If persons charged with official duties in one department may be employed to perform duties, official or otherwise, in another department the door is opened to influence and control by the employing department. We also think that these two cases are logical in holding that an employee of an officer, even though he be performing a duty not involving the exercise of sovereignty, may be and is, executing one of the functions of that public office, and this applies to the cases before us.

80 N.E.2d at 302.

The reasoning of the Indiana Supreme Court was followed by the Oregon Supreme Court in Monaghan v. School Dist. No. 1, 315 P.2d 797 (Or. 1957), *superseded by* Or. Const. art. XV, § 8. In that case, the court was asked "to determine whether or not [a state legislator, Mr. Monaghan,] is eligible for employment as a teacher in the public schools of this state while he holds a position as a member of the [state] House of Representatives." Id. at 799. At that time, the separation-of-powers provision in the Oregon 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. Mr. Monaghan argued that the term "official duties" was synonymous with the term "functions," and that therefore the separation-of-powers provision applied only to a person holding a public office in more than one department of state government and not to a person merely occupying a position of public employment. Id. at 801. The court flatly rejected this argument:

> It is not difficult to define the word "official duties." As a general rule, and as we think the phrase is used in the section of the constitution, they are the duties or obligations imposed by law on a public officer. 67 C.J.S. Officers § 110, p. 396; 28 C.J.S. Duty, p. 597. There can be no doubt that Mr. Monaghan, as a legislator, is "charged with official duties." But the exercise of the "functions" of a department of government gives to the word "functions" a broader sweep and more comprehensive meaning than "official duties." It contemplates a wider range of the exercise of functions including and beyond those which may be comprehended in the "official duties" of any one officer.
>
> It may appear to some as a construction of extreme precaution, but we think that it expresses the considered judgment and deliberation of the Oregon Convention to give greater force to the concepts of separation by thus barring any official in one department of government of the opportunity to serve any other department, even as an employee. Thus, to use the language of O'Donoghue v. United States, supra [289 U.S. 516], in a sense, his role as a teacher subjugates the department of his employment to the possibility of being "controlled by, or subjected, *directly or indirectly*, to the coercive influence of" the other department wherein he has official duties and vice versa. (Emphasis supplied.) In the Burch case, supra [80 N.E.2d 294, 302], when considering the word "functions" in its similar setting in the Indiana Constitution, the court observed that the term "functions" denotes a broader field of activities than the word "power."
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> * * *
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> Our conclusion is that the word "functions" embodies a definite meaning with no contradiction of the phrase "official duties," that is, he who exercises the functions of another department of government may be either an official or an employee.

Id. at 802-04. Although acknowledging that a public school teacher was not a public officer, the court concluded, nevertheless, that a public school teacher was a public employee who was exercising one of the functions of the executive department of state government. Id. at 804-06. Therefore, the court held that Mr.

Monaghan could not be employed as a public school teacher while he held a position as a member of the state legislature. Id.; see also Jenkins, 589 P.2d at 773-77 (Ellett, C.J., concurring and dissenting in a memorandum per curiam opinion and arguing that Utah's separation-of-powers provision would prohibit a legislator from also being a public school teacher).

After the decision in Monaghan, the Oregon Constitution was amended to permit legislators to be employed by the State Board of Higher Education or to be a member of any school board or an employee thereof. In re Sawyer, 594 P.2d 805, 808 & n.7 (Or. 1979). However, the amendment did not apply to other branches of state government. Id. In Sawyer, the Oregon Supreme Court was asked whether the state's separation-of-powers provision prohibited a judge from being regularly employed as a part-time professor at a state-funded college. The court answered in the affirmative, stating that:

> It is true that Judge Sawyer is not a full-time teacher. In our opinion, however, a part-time teacher regularly employed for compensation by a state-funded college to perform the duties of a teacher also performs "functions" of the executive department of government within the meaning of Article III, § 1, as construed by this court in Monaghan.

Id. at 809. The court noted, however, that "[w]e do not undertake to decide in this case whether the same result would necessarily follow in the event that a judge should occasionally, but not regularly, lecture at a state-funded college, but without other responsibilities as a teacher." Id. at 809 n.8.

Finally, in State ex rel. Spire v. Conway, 472 N.W.2d 403 (Neb. 1991), the Attorney General brought an action claiming that the separation-of-powers provision of the Nebraska Constitution prohibited a person from occupying a position as an assistant professor at a state-funded college while simultaneously serving as a member of the state legislature. At the time, Nebraska's separation-of-powers provision provided that "no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others." Id. at 404.

Unlike most other courts, the Nebraska Supreme Court determined that, under certain circumstances, an assistant professor at a public college could be considered to be holding a public office. Id. at 406-07. However, despite this determination, the court found that the public officer-public employee distinction was not "determinative of the [separation-of-powers] issue now under consideration, for article II does not speak in terms of officers or employees; it speaks of persons 'being one of' the branches of government." Id. at 408. Rather, the court found that "[t]he unusual expression 'being one of these departments' is not clear; accordingly, construction is necessary. One thing that is clear, however, is that 'being one of these departments' is not intended to be synonymous with 'exercising any power of' a branch." Id. at 409.

After considering the text and history of the Nebraska Constitution, the court determined that the provision should be construed to read, "no person or collection of persons being [a member of] one of these departments." Id. at 412. Based on this construction, the court held that the separation-of-powers provision "prohibits one who exercises the power of one branch--that is, an officer in the broader sense of the word--from being a member--that is, either an officer or employee--of another branch." Id. The court then applied this construction to conclude that an assistant professor at a state college is a member of the executive branch and that a legislator, therefore, could not occupy such a position during his term in the legislature. Id. at 414-16. Specifically, the court held that:

> Although we have neither been directed to nor found any case explicitly stating that the state colleges are part of the executive branch, there are but three branches, and the state colleges clearly are not part of the judicial or legislative branches.
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> * * *
>
> The Board of Regents of the University of Nebraska performs a function for the university which is identical to that of the Board of Trustees of the Nebraska State Colleges. While the Board of Regents is an "independent body charged with the power and responsibility to manage and operate the University," it is, nevertheless, an administrative or executive agency of the state. As the regents are part of the executive branch, so, too, are the trustees.
>
> Since the Board of Trustees, which governs the state colleges, is part of the executive branch, those who work for those colleges likewise are members of that branch. Respondent, as an assistant professor at the college, is thus a member of the executive branch within the meaning of article II.

* * *

> Respondent is therefore a member of one branch of government, the executive, exercising the powers of another, the legislative, and, as a consequence, is in violation of article II of the state Constitution.

Id. at 414-15 (citations omitted).

This Court should reject the reasoning of the courts of Indiana, Oregon and Nebraska. Instead, this Court should follow the reasoning of the courts of Montana, New Mexico and Colorado and conclude that the separation-of-powers provision does not prohibit legislators from holding positions as state executive branch employees or local government employees. This reasonable interpretation of the separation-of-powers provision is supported by the text and structure of the Nevada Constitution and by the concept of the "citizen-legislator," which is a concept that is the cornerstone of an effective, responsive and qualified part-time legislative body.

(3) Interpretation of Nevada's separation-of-powers provision.

It is a fundamental rule of constitutional construction that the Nevada Constitution must be interpreted in its entirety and that each part of the Constitution must be given effect. State ex rel. Herr v. Laxalt, 84 Nev. 382, 386 (1968). Therefore, the separation-of-powers provision in the Nevada Constitution cannot be read in isolation, but rather must be construed in accordance with the Nevada Constitution as a whole. Thus, the meaning of the phrases "no persons charged with the exercise of powers properly belonging to one of these

departments" and "shall exercise any functions, appertaining to either of the others" cannot be based on a bare reading of the separation-of-powers provision alone. Rather, these phrases must be read in light of the other parts of the Nevada Constitution which specifically enumerate the persons who are to be charged with exercising the powers and functions of state government. As stated by this Court:

> [Article 3, Section 1] divides the state government into three great departments, and directs that "no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." As will be noticed, it is the state government as created by the constitution which is divided into departments. **These departments are each charged by other parts of the constitution with certain duties and functions, and it is to these that the prohibition just quoted refers**.

Sawyer v. Dooley, 21 Nev. 390, 396 (1893) (emphasis added).

According to this Court, the prohibition in Article 3, Section 1 applies only to persons who are charged by other parts of the Nevada Constitution with exercising powers or duties belonging to one of the three departments of state government. In other words, for the purposes of the separation-of-powers provision, the officers who are prohibited from exercising functions appertaining to another department of state government are limited to those officers in the legislative, executive and judicial departments who are expressly given powers and duties under the Nevada Constitution.

This construction of the separation-of-powers provision in the Nevada Constitution is consistent with the Utah Supreme Court's construction of an identical separation-of-powers provision in section 1 of article V the Utah Constitution. As to that provision, the Utah Supreme Court has held:

> [T]he prohibition of section 1, is directed to a "person" charged with the exercise of powers properly belonging to the "executive department." The Constitution further specifies in Article VII, Section 1, the persons of whom the Executive Department shall consist. Thus it is the "persons" specified in Article VII, Section 1, who are charged with the exercise of powers belonging to the Executive Department, who are prohibited from exercising any functions appertaining to the legislative and judicial departments.

State v. Gallion, 572 P.2d 683, 687 (Utah 1977); accord Robinson v. State, 20 P.3d 396, 399-400 (Utah 2001).

Consequently, a constitutional officer is an officer of the legislative, executive or judicial department who is "charged with the exercise of powers properly belonging to one of these departments." Nev. Const. art. 3, § 1; see also People v. Provines, 34 Cal. 520 (1868). No other person may exercise the powers given to a constitutional officer by the Nevada Constitution. As a result, when the Nevada Constitution grants powers to a particular constitutional officer, "their exercise and discharge by any other officer or department are forbidden by a necessary and unavoidable implication. Every positive delegation of power to one officer or department implies a negation of its exercise by any other officer, department, or person." King v. Bd. of Regents, 65 Nev. 533, 556 (1948) (quoting State ex rel.

Crawford v. Hastings, 10 Wis. 525, 531 (1860)). Thus, the constitutional powers of each department may be exercised only by the constitutional officers from that department to whom the powers have been assigned.

Even though it is only the constitutional officers of each department who may exercise the constitutional powers given to that department, the Framers realized that each department would also be charged with the exercise of certain nonconstitutional functions. Accordingly, the Framers provided for the creation by statute of nonconstitutional officers who could be charged by the Legislature with the exercise of nonconstitutional functions. See Nev. Const. art. 15, §§ 2, 3, 10 and 11. As observed by this Court:

> [T]he framers of the constitution decided for themselves that the officers named [in the constitution] were necessary and should be elected by the people; but they left it to the legislature to decide as to the necessity of additional ones, whether state, county, or township. . . . The duty of deciding as to the necessity of any office, other than those named in the constitution, is placed upon the legislature[.]

State ex rel. Perry v. Arrington, 18 Nev. 412, 417-18 (1884). As a result, the Nevada Constitution recognizes two distinct types of offices, "one which is created by the constitution itself, and the other which is created by statute." Douglass, 33 Nev. at 93 (quoting People v. Bollam, 54 N.E. 1032, 1033 (Ill. 1899)).

Like the framers of other state constitutions, the Framers of the Nevada Constitution could have simply stated that a constitutional officer shall not exercise any "powers" appertaining to another department of state government. However,

the Framers of the Nevada Constitution provided that a constitutional officer shall not exercise any "functions" appertaining to another department of state government. The Framers used the term "functions" because they realized that, in each department of state government, the functions of the department would be performed by constitutional officers **and** by nonconstitutional officers. Thus, had the Framers used only the term "powers" in Article 3, Section 1, the separation-of-powers provision would have been too restrictive in its meaning, for it may have been construed simply to mean that a constitutional officer in one department could not exercise the powers entrusted to the constitutional officers in another department. To avoid this restrictive construction, the Framers used the term "functions" to ensure that a constitutional officer in one department could not perform the **sovereign functions** entrusted to both constitutional officers **and** nonconstitutional officers in another department.

Therefore, by using the term "functions," 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. Because public employees do not exercise the sovereign functions of state government, the Framers did not intend to prohibit a constitutional officer from holding a position of public employment in

another department of state government. This conclusion is based on a well-established body of case law which holds that public officers are the only persons who exercise the sovereign functions of state government and that public employees do not exercise such sovereign functions.

In State ex rel. Kendall v. Cole, 38 Nev. 215 (1915), the Nevada Supreme Court discussed extensively the attributes of a public office, and the court also cited numerous cases that had been decided in other jurisdictions well before the Nevada Constitution was drafted in 1864. See Bradford v. Justices of Inferior Ct., 33 Ga. 332 (1862); Shelby v. Alcorn, 36 Miss. 273 (1858); see also Annotation, Offices Within Constitutional or Statutory Provisions Against Holding Two Offices, 1917A L.R.A. 231 (1917). From these cases, this Court concluded that the single most important characteristic of a public office is that the person who holds such a position is "clothed with some portion of the sovereign functions of government." Cole, 38 Nev. at 229 (quoting Attorney-General v. McCaughey, 43 A. 646 (R.I. 1899)). In later cases, this Court expressed a similar view:

> The nature of a public office as distinguished from mere employment is the subject of a considerable body of authority, and many criteria of determination are suggested by the courts. Upon one point at least the authorities uniformly appear to concur. A public office is distinguishable from other forms of employment in that its holder has by the sovereign been invested with some portion of the sovereign functions of government.

State ex rel. Mathews v. Murray, 70 Nev. 116, 120-21 (1953) (citation omitted). Simply put, "the sovereign function of government is not delegated to a mere employee." Eads v. City of Boulder City, 94 Nev. 735, 737 (1978).

Thus, in each department of state government, only two types of persons are empowered to exercise the sovereign functions of that department, those who hold constitutional offices and those who hold nonconstitutional offices. This is how the Framers of the Nevada Constitution understood the structure and organizational framework of each department of state government, and this is why the Framers used the word "functions" in Article 3, Section 1—to prohibit a constitutional officer in one department of state government from holding any other **public office** that was empowered, either by the constitution or statute, to exercise the sovereign functions of another department of state government. Because public employees do not exercise the sovereign functions of state government, a broader construction of the term "functions" to include public employees would not be consistent with the manner in which the sovereign functions of government are exercised in Nevada.

Moreover, a broader construction of the term "functions" to include public employees would run counter to "the constituency concept of our legislature in this state, which can accurately be described as a citizens' legislature." Stratton, 806 P.2d at 1093. The Framers of the Nevada Constitution realized that "[i]n a

sparsely populated state . . . it would prove difficult, if not impossible, to have a conflict-free legislature." Id. In addition, any potential conflicts of interests experienced by a legislator who is also a public employee in another branch of state government are no greater than those conflicts experienced by other members of the Legislature. As stated by Justice Crockett of the Utah Supreme Court:

> In our democratic system, the legislature is intended to represent the people: that is, to be made up from the general public representing a wide spectrum of the citizenry. It is not to be doubted that legislators from the ranks of education are affected by the interests of that calling. But all other legislators also have interests. No one lives in a vacuum.

Jenkins, 589 P.2d at 771 (Crockett, J., concurring).

Finally, it is clear that the Framers intended the Nevada Legislature to be a part-time legislative body. In particular, the Framers provided for biennial legislative sessions in Article 4, Section 2 of the Nevada Constitution, and they originally limited those biennial sessions to 60 days in Article 4, Section 29. Although Article 4, Section 29 was repealed in 1958, the fact that the citizens of Nevada voted in 1998 to limit biennial sessions to 120 days is a clear indication that the citizens of Nevada, like the Framers, want the Nevada Legislature to be a part-time legislative body.

The economic reality of a part-time Legislature is that most legislators must continue to be employed in other occupations on a full-time or part-time basis during their terms of legislative service. This is as true today as it was when the

Nevada Constitution was originally adopted. Given this economic reality, it is likely that the Framers fully expected that public employees, like other citizens, would be members of the Legislature, especially since some of the most qualified and dedicated citizens of the community often occupy positions of government employment. As stated by Chief Justice Hastings of the Nebraska Supreme Court in his dissent in Conway:

> A senatorial position in the Nebraska Legislature is a part-time position. Therefore, it is not uncommon for senators to have additional sources of income and careers. An uncompromising interpretation of the separation of powers would inhibit the ability of a part-time legislature to attract qualified members.

472 N.W.2d at 417 (Hastings, C.J., dissenting). Therefore, construing the term "functions" in Article 3, Section 1 to prohibit a member of the Nevada Legislature from occupying a position of public employment would not comport with the concept of the "citizen-legislator" that was undoubtedly envisioned by the Framers of the Nevada Constitution.

Based on this construction of the separation-of-powers provision, if a legislator holds another position in state government, the deciding issue under the Nevada Constitution should be whether the other position is a public office or a position of public employment. If the other position is a public office, then the legislator would be prohibited by the separation-of-powers provision from holding the public office. However, if the other position is merely a position of public

employment, then the legislator would not be prohibited by the separation-of-powers provision from holding the position of public employment.

As discussed previously, this Court has addressed the distinction between a public officer and a public employee on many occasions. See State ex rel. Kendall v. Cole, 38 Nev. 215 (1915); State ex rel. Mathews v. Murray, 70 Nev. 116 (1953); Mullen v. Clark Cnty., 89 Nev. 308 (1973); Eads v. City of Boulder City, 94 Nev. 735, 737 (1978). As recently as 2013, this Court reaffirmed that "as is clear from our jurisprudence, officers are fundamentally different from employees." City of Sparks v. Sparks Mun. Ct., 129 Nev. 348, 361 (2013). In one of its more recent cases on the issue, this Court restated the two fundamental principles that distinguish a public officer from a public employee. Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195, 200-06 (2001) (holding that, for the purposes of the Open Meeting Law, the position of community college president is not a public office).

The first fundamental principle is that a public officer must serve in a position created by law, not one created by mere administrative authority and discretion. Id. The second fundamental principle is that the duties of a public officer must be fixed by law and must involve an exercise of the sovereign functions of the state, such as formulating state policy. Id. Both fundamental principles must be satisfied before a person is deemed a public officer. See Mullen v. Clark Cnty., 89 Nev.

308, 311 (1973). Thus, if a position is created by mere administrative authority and discretion or if the person serving in the position is subordinate and responsible to higher-ranking policymakers, the person is not a public officer but is simply a public employee. These fundamental principles are best illustrated by the cases of State ex rel. Mathews v. Murray, 70 Nev. 116 (1953), and Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195 (2001).

In Mathews, the defendant accepted the position of Director of the Drivers License Division of the Public Service Commission of Nevada. 70 Nev. at 120. The Attorney General brought an original action in quo warranto in this Court to oust the defendant from that position because when the defendant accepted his position in the executive branch he was also serving as a State Senator. Id. The Attorney General argued that the defendant acted in violation of the separation-of-powers provision of the Nevada Constitution. Id. Before this Court could determine the constitutional issue, it needed to have jurisdiction over the original action in quo warranto. Id. Because an original action in quo warranto could lie only if the defendant's position in the executive branch was a public office, the issue before this Court was whether the position of Director of the Drivers License Division was a public office or a position of public employment. Id. This Court held that the Director's position was a position of public employment, not a public

office, and thus this Court dismissed the original action for lack of jurisdiction without reaching the constitutional issue. Id. at 124.

In concluding that the Director's position was a position of public employment, this Court reviewed the statutes controlling the state department under which the Drivers License Division operated. Id. at 122. This Court found that the position of Director of the Drivers License Division was created by administrative authority and discretion, not by statute, and that the position was wholly subordinate and responsible to the administrator of the department. Id. at 122-23. In this regard, this Court stated:

> Nowhere in either act is any reference made to the "drivers license division" of the department or to a director thereof. Nowhere are duties imposed or authority granted save to the department and to its administrator. It appears clear that the position of director was created not by the act but by the administrator and may as easily by him be discontinued or destroyed. It appears clear that the duties of the position are fixed not by law but by the administrator and may as easily by him be modified from time to time. No tenure attaches to the position save as may be fixed from time to time by the administrator. The director, then, is wholly subordinate and responsible to the administrator. It cannot, then, be said that that position has been created by law; or that the duties which attach to it have been prescribed by law; or that, subject only to the provisions of law, the holder of such position is independent in his exercise of such duties. It cannot, then, be said that he has been invested with any portion of the sovereign functions of the government.

Id. at 122-23.

In DR Partners, this Court was asked to determine whether the position of community college president was a public office for the purposes of the Open

Meeting Law, which is codified in chapter 241 of NRS. Although the Open Meeting Law does not define the term "public office" or "public officer," this Court found that the definition of "public officer" in chapter 281 of NRS was applicable because "[t]he Legislature's statutory definition of a 'public officer' incorporates the fundamental criteria we applied in Mathews and Kendall, and is in harmony with those cases, as we subsequently confirmed in Mullen v. Clark County." 117 Nev. at 201.

When this Court applied the fundamental criteria from Mathews and Kendall and the statutory definition from chapter 281 of NRS to the position of community college president, this Court concluded that the position of community college president was not a public office. DR Partners, 117 Nev. at 202-06. In reaching this conclusion, this Court first found that the position of community college president is not created by the Nevada Constitution or statute, but is created by administrative authority and discretion of the Board of Regents. Id. Second, this Court found that a community college president does not exercise any of the sovereign functions of the state. Id. Instead, a community college president is wholly subordinate to the Board of Regents and simply implements policies made by higher-ranking state officials. Id. As explained by this Court:

> The community college president holds an important position, but the sovereign functions of higher education repose in the Board of Regents, and to a lesser degree in the chancellor, and not at all in the community college president.

* * *

> Because the president is wholly subordinate and responsible to the Board, and can only implement policies established by the Board, we conclude that the community college president does not meet the statutory requisites of a public officer set forth in NRS 281.005(1)(b).

Id. at 205-06.

Accordingly, state executive branch employees and local government employees are not public officers because they do not exercise any sovereign functions appertaining to the executive branch of state government. As a result, the separation-of-powers provision does not prohibit legislators from holding positions of public employment because persons who hold such positions of public employment do not exercise any sovereign functions appertaining to the state executive branch. Therefore, even if the separation-of-powers provision is interpreted to apply to local governments, the provision still would not prohibit legislators from holding positions of public employment as deputy district attorneys with county governments because deputy district attorneys are county employees who do not exercise sovereign functions belonging to the state executive branch when they participate in criminal prosecutions.

CONCLUSION

Based on the foregoing, the Legislature asks this Court to issue a writ to Respondents, the Eighth Judicial District Court and the Honorable Richard Scotti, District Judge, reversing and vacating the district court's decision in these cases

because the decision was based on a clearly erroneous interpretation and application of constitutional and statutory law.

DATED: This **16th** day of February, 2021.

By: /s/ Kevin C. Powers

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CERTIFICATE OF COMPLIANCE

1. We hereby certify that this 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point font and Times New Roman type.

2. We hereby certify that this amicus curiae brief complies with the type-volume limitations of NRAP 21(d) and NRAP 32(a)(7) because, excluding the parts of this brief exempted by NRAP 32(a)(7)(C), this brief is proportionately spaced, has a typeface of 14 points or more, and contains **15,076** words, which exceeds the type-volume limitation of 7,000 words. **However, we certify that a motion to exceed the type-volume limitation for this brief will be filed pursuant to NRAP 32(a)(7)(D)**.

3. We hereby certify that we have read this amicus curiae brief, and to the best of our knowledge, information and belief, it is not frivolous or interposed for any improper purpose. We 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 this 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. We understand that we may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: This **16th** day of February, 2021.

By: /s/ Kevin C. Powers

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the **16th** day of February, 2021, pursuant to NRAP 25 and NEFCR 9, I filed and served a true and correct copy of Nevada Legislature's Amicus Curiae Brief Supporting Reversal of the District Court's Interpretation and Application of the Separation-of-Powers Provision in Article 3, Section 1 of the Nevada Constitution, by means of the Nevada Supreme Court's electronic filing system, directed to:

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/s/ Kevin C. Powers
An Employee of the Legislative Counsel Bureau

AFFIDAVIT OF GUY L. ROCHA
ASSISTANT ADMINISTRATOR FOR ARCHIVES AND RECORDS
DIVISION OF STATE LIBRARY AND ARCHIVES
DEPARTMENT OF CULTURAL AFFAIRS

STATE OF NEVADA)
) ss:
CARSON CITY)

I, Guy L. Rocha, being first duly sworn, state that I have personal knowledge and am competent to testify to the following:

1. I am the Assistant Administrator for Archives and Records of the Division of State Library and Archives of the Department of Cultural Affairs of the State of Nevada.

2. Based on my research, I have not found any official records specifically detailing the occupations of state legislators who served in the Nevada Legislature during the 1800s and early 1900s. Information concerning the occupations of state legislators who served in the Nevada Legislature during this period must be obtained from Nevada newspapers that are indexed and from other historical records.

3. The earliest known example that I have been able to find of a state legislator who held a position as a state executive department employee while serving simultaneously as a member of the Nevada Legislature is Assemblyman August C. Frohlich. Mr. Frohlich was elected to the Nevada Assembly in November 1930. During the 1931 Legislative Session, Mr. Frohlich operated the Commercial Soap Company in Reno. After the 1931 Legislative Session, Mr. Frohlich sold his interest in the Commercial Soap Company. During his legislative term, Mr. Frohlich was appointed on February 26, 1932, as a purchasing agent for the State Mental Hospital located in Sparks. The appointment was made by Dr. George R. Smith, the Superintendent of the State Mental Hospital. Mr. Frohlich held his position of state employment until October 1, 1932. I have not found any evidence in Nevada newspapers of an official resignation by Mr. Frohlich from his

seat in the Nevada Assembly before or after Mr. Frohlich accepted his position with the State Mental Hospital. During his legislative term, Mr. Frohlich also was a local candidate in Reno for a seat on the School District Board of Trustees, but he lost at the election held on April 2, 1932. At the general election held on November 8, 1932, Mr. Frohlich was again a local candidate in Reno, and this time he was elected to the Office of Justice of the Peace.

4. Another early example that I have been able to find of a state legislator who held a position as a state executive department employee while serving simultaneously as a member of the Nevada Legislature is Assemblyman Harry E. "Hap" Hazard. Mr. Hazard was elected to the Nevada Assembly in November 1938 while working for the Las Vegas Review-Journal. After the 1939 Legislative Session, Mr. Hazard was appointed by the State Tax Commission as the supervisor of the Liquor Division of the State Tax Commission effective April 16, 1939. Mr. Hazard relocated from Las Vegas to Carson City where Mr. Hazard worked in the Executive Department during the remainder of his legislative term. I have not found any evidence in Nevada newspapers of an official resignation by Mr. Hazard from his seat in the Nevada Assembly before or after Mr. Hazard accepted his position with the State Tax Commission. Mr. Hazard was not a member of the Nevada Legislature during the 1941, 1943 and 1945 Legislative Sessions. In 1946, Mr. Hazard was again elected to the Nevada Assembly. During the 1947 Legislative Session, Mr. Hazard served as the Speaker of the Assembly. While a member of the 1947 Legislature, Mr. Hazard also served as a member of the Board of the Clark County Housing Authority, a local government agency.

5. The earliest known example that I have been able to find of a state legislator who held a position as a local government employee while serving simultaneously as a member of the Nevada Legislature is Assemblyman Mark Richards Averill. Mr. Averill served in the Nevada Assembly during the 1903 Legislative Session, and Mr. Averill also served as the clerk of a local school

district during his legislative term. Another early example is Mr. Averill's daughter, Ruth Averill, who served in the Nevada Assembly during the 1921 Legislative Session. Ruth Averill was a primary school teacher during her legislative term.

DATED this 29th day of April, 2004.

GUY L. ROCHA

Subscribed and sworn to before me this 29th day of April, 2004.

Notary Public in and for the State of Nevada

KAREN KADE
NOTARY PUBLIC - NEVADA
Appt. Recorded in CARSON CITY
No.93-2272-3 My Appt. Exp. Jan. 10, 2005

AFFIDAVIT OF DONALD O. WILLIAMS
RESEARCH DIRECTOR
RESEARCH DIVISION OF THE LEGISLATIVE COUNSEL BUREAU

STATE OF NEVADA)
) ss:
CARSON CITY)

I, Donald O. Williams, being first duly sworn, state that I have personal knowledge and am competent to testify to the following:

1. I am the Research Director of the Research Division of the Legislative Counsel Bureau of the State of Nevada.

2. Based on research conducted by the Research Division of the Legislative Counsel Bureau, beginning with the 1967 Session of the Nevada Legislature, public employees have served as members of the Nevada Legislature during each Regular Session convened over the past 37 years. The following table indicates the number of state legislators who held positions as public employees while serving simultaneously as members of the Nevada Legislature during each Regular Session convened since 1967:

Year of Legislative Session:	Number of state legislators who held positions as public employees:
1967	2
1969	1
1971	2
1973	7
1975	4
1977	7
1979	6
1981	5
1983	7
1985	9
1987	12
1989	13
1991	13
1993	12
1995	10

Year of Legislative Session:	Number of state legislators who held positions as public employees:
1997	12
1999	14
2001	13
2003	14

DATED this 28th day of April, 2004.

DONALD O. WILLIAMS

Subscribed and sworn to before me this 28th day of April, 2004.

Notary Public in and for the State of Nevada

EVELYN BENTON
NOTARY PUBLIC - NEVADA
Appt. Recorded in CARSON CITY
No.02-79243-3 My Appt. Exp. Dec. 12, 2006

OFFICE OF THE SECRETARY OF STATE

DEAN HELLER
Secretary of State

March 25, 2004

The Honorable Brian Sandoval
Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701

Dear Attorney General Sandoval,

On March 1, 2004, you issued an opinion to my office, wherein you found that Article 3, Section 1 of the Nevada Constitution bars any employee from serving in the executive branch of government and simultaneously serving as a member of the Nevada State Legislature. Based on that opinion, I hereby request that, as my counsel, you bring an action on my behalf to compel the Legislature to follow the Nevada Constitution, and receive a determination from the Nevada Supreme Court concerning whether the separation of powers doctrine also bars local government employees from simultaneously serving in the Legislature.

As you are aware, there are currently several members of the Nevada State Legislature that are also serving as state executive branch employees, county government employees or city government employees. Based on your opinion, it appears that many or all of these members may be violating the separation of powers doctrine contained in the Nevada Constitution. Because the Legislature has delegated to me the power under NRS 293.124 to enforce all "state and federal laws relating to elections in this state," I believe that action should be taken to require the Legislature to compel its members to serve consistent with the Constitution. In addition, it is imperative that the state of the law be clarified prior to May 3, 2004 when candidate filing begins for the 2004 election.

As we have discussed, I believe that you can proceed on my behalf in one of two ways. The first option would be to petition the Nevada Supreme Court for a writ of mandamus to compel the State Legislature to unseat any member who is currently violating the Constitution. As part of that action, the Supreme Court would be required to determine which legislators are improperly serving in dual positions, including local positions if the court so determines that dual service involving local government employees is prohibited. A second option would be to proceed under NRS 29.010 to reach agreement with the Legislature that a controversy exists and request the Nevada Supreme Court's ruling in the same manner as option one. Because time is of the essence with candidate filing "around the corner," I request that you only proceed under NRS 29.010 if you are able to obtain the Legislature's agreement by March 31, 2004 to proceed in this manner.

ONE HUNDRED ONE NORTH CARSON STREET, SUITE THREE
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Because this matter involves compliance with the provisions of the Nevada Constitution, and as set forth above we have little time for appeals or other post judgment relief, I am requesting you bring the above referenced petition in the Nevada Supreme Court; if you determine an alternate legal strategy is appropriate, please consult with me before proceeding on my behalf. Indeed, as we discussed, the Nevada Supreme Court has original jurisdiction to issue writs of mandamus pursuant to the Nevada Constitution Article 6, Section 4 as well as Nevada Revised Statutes Section 34.150, et seq.

Please do not hesitate to contact me if you have any questions or require additional information.

Respectfully,

Dean Heller

DEAN HELLER
Secretary of State

ONE HUNDRED ONE NORTH CARSON STREET, SUITE THREE
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San Francisco Chronicle

LEADING NEWSPAPER of the PACIFIC COAST

Weather Report

1865 SAN FRANCISCO, CAL., SATURDAY, OCTOBER 28, 1916 VOL. CIX, NO.

KENHAYN AND FERDINAND IN DEATH GRAPPL

Illinois Girl to Wed Japanese Will Start for Orient Today

Miss Marie P. Cox of Evanston, Ill., who sails for Japan today to become the bride of Tukyo Yamada, a Japanese dentist of Osaka, whom she met when he was a student at Northwestern University.

Miss Marie P. Cox of Evanston, Ill., to Be Married at Osaka to Dr. Tukyo Yamada

WHEN the Pacific Mail liner Venezuela sets her course today toward the land of the rising sun, the most excited passenger on board will be Miss Marie P. Cox of Evanston, Ill., who is bound for Osaka to be married to the man of her choice, Dr. Tukyo Yamada, a Japanese dentist, who is said to be one of the most successful in Japan.

The wedding will take place on Miss Cox's arrival and will be celebrated with all the dignity and ceremony of the ancient customs of Japan. The romance of the pretty American girl and her husband-to-be began a year and a half ago when Dr. Yamada was a student of dentistry at Northwestern University, Chicago.

Miss Cox is a stenographer, although she was educated as a teacher, a vocation which, she says, she may take up in her new home in order to keep busy.

She arrived here several days ago in company with Mrs. Misuki Shimada, wife of the secretary of the Chicago Japanese Y. M. C. A., who is returning to Tokio after eight years to visit her people. Both have been living quietly in a Japanese hotel at 22 South Park.

"I first met Dr. Yamada at the dental clinic at Northwestern University," said Miss Cox last night. "I had been sent there to be one of the doctors on humans, and found him through the courtesy of Dr. Yamada.

"Our romance began right there. Dr. Yamada was graduated in June, 1915, and a little later returned to Japan, where he had been graduated from a dental college before coming to America. He proposed before leaving, and I accepted him without my parents or friends knowing anything about it. In fact, no one back home knows that I am going to Japan to marry Mr. Yamada, and while I do not regret my decision, I don't want them to know it. I started for Japan once before, but had to return home, and even then my family did not learn of my plans.

"Dr. Yamada's family, he has written me, is building a beautiful American bungalow for us, fearing I may not like the Japanese houses.

"The only thing that worries me is whether I can find something to do. I have been told that Dr. Yamada is wealthy, although he never mentioned that to me, and that there will be servants so that I will have no housework, but I will teach the Japanese children to speak English if I can find nothing else to do. I am sure I am going to be very happy, although today, with the long ocean voyage before me, I surrendered to the blues and cried a long time."

Miss Cox, who is 21 years old, is a striking brunette and is well educated. She declined to give any information as to her family, saying she did not want them to learn of her plans.

Strike of Car Women In Paris Spreading

PARIS, October 27, 6:35 P. M.—A strike of street car employes which began in the suburbs of Paris yesterday, is reported to be spreading to the central district. The strike has not yet resulted in the stoppage of the service. The Intransigeant says the strike is due to the high prices of food and the insufficient wages paid the employes, especially the women, who receive 5 francs a day.

HUGHES IS CHEERED BY THRONGS AT ROCHESTER

Nominee Makes Short Work of Wilson's Argument in the Latter's Speech at Cincinnati

SAYS THE PRESENT PROSPERITY IS FALSE

Anti-Dumping Provision of Underwood Revenue Bill Is Declared to Be Worse Than Useless

Special Dispatch to The Chronicle.

ROCHESTER (N. Y.), October 27.—Charles E. Hughes did not miss a single trick tonight in his reply to President Wilson's speech yesterday at Cincinnati, in which the President scoffed at the Republican warnings against European trade competition after the war as "silly imaginings." About 5000 men and women crowded into Old Convention Hall not only appreciated Hughes' logic, but enjoyed the fun he had at Wilson's expense. The Republican candidate did some ... in ... with Wilson's scoffing.

SHIFTING WILSON ATTITUDE

The shifting Wilson attitude on preparedness, declared Hughes, is like the defense of the man who was accused of stealing a copper kettle. He had two defenses, one that he did not take the kettle, and the other that it had a hole in it.

"The anti-dumping clause attached to the Underwood bill, Hughes said, "holds the palm for legislative phrasing." He called it one of the "marvels of recent legislation," and branded it not only as farcical, "but worse than useless."

PARTY GETS A SCARE

These two features were the principal points in a speech which wound up a successful tour through the central-western part of the State, always a Republican stronghold. Enthusiastic audiences greeted him at Utica, Auburn, the home of William H. Seward, at Geneva and at Rochester.

Hughes declared in his speech at Utica that he would "leave to the Secretary of War his difficulties in the effort to extricate himself from the unfortunate suggestions which were reported to have been made by him in a recent utterance."

STANDS FOR PEACE, NOT WAR

It was Hughes' first speech of the day. "It is said that a vote for me means a vote for war," Hughes asserted. "What a preposterous suggestion! A vote for me is a vote for lasting peace, because it is a vote for maintaining the honor of the country, for maintaining both the self-respect and the esteem of all of the nations of the earth.

"I am amazed at the charge that is thus brought in the light of the actions which our Government have taken with respect to our neighboring country of Mexico. If there was ever a policy menacing in safety, a policy which was the opposite of a policy for the conservation of peace, it was the policy which was there pursued—if, indeed, it could, in view of the inconsistency of action taken, be called a policy at all.

"I leave to the Secretary of War ...

(Continued on Page 2, Column 3)

Diver Deutschland Reported Nearing The Virginia Coast

NORFOLK (Va.), October 27.—The German undersea merchantman Deutschland, according to reports in circulation in Norfolk and Baltimore tonight, is due at the Virginia capes in the next few hours, en route to Baltimore.

It is declared she sailed from Bremen two weeks ago and successfully eluded all British patrol boats safely.

It was reported tonight that the Deutschland passed in the capes shortly after nightfall and proceeded up the bay, but this could not be confirmed.

ABOLISH HEALTH BOARD ADVISE SURVEY EXPERTS

Centralization of Authority in Single Commissioner Recommended

Abolition of the Board of Health as at present constituted and the centralization of authority and responsibility in a single commissioner, is the leading suggestion of the municipal research survey of San Francisco in regard to public health.

The survey finds that the present members of the Board are doing fairly well, but that the system is bad in that it is wide open to political influence, which, it is stated, has doubtless been exercised in the past and may be again in the future.

OPPOSES FUMIGATION

Another drastic recommendation, and one showing how doctors change their theories, is that suggesting that fumigation of private premises after cases of scarlet fever and diphtheria be abandoned. The writer of this part of the survey, who is himself a physician, admits that health officers in several cities have quietly abandoned this fumigation without disaster to the community.

Under a single commissioner the divisions suggested are: Publicity and education, accounts and records, with bureaus of food inspection, sanitary inspection, medical service, school hygiene and laboratories.

An unusual amount of red tape is found in the records of the Board, which it is suggested be cut out, and it is urged that the adoption of the single commissioner of health plan would aid in this result.

ADVICE PARTLY FOLLOWED

An insert in the report states that the Board of Health has already followed the recommendations of the survey in the matters of uniform hospital records, form of certificates and uniform system of statistics.

Full time service of physicians in the health department service is recommended. Sanitary inspectors, in uniform are advised, as is a dog muzzling ordinance.

The report contains the following on public health expenditures in San Francisco:

"The health department was allowed $[illegible] for the fiscal year 1916-17. The report finds that the ...

(Continued on Page 2, Column 4)

Mackensen Captures Hirsova

Roumanian Army Seizes Two Valleys

Petain Is Surrounding Vaux

Desperate Pursuit Is Kept Up on Rear and Flank of Routed Army in Dobrudja

French Commander Leaves Shattered Fortress in Pocket in Drive on Verdun Front

LONDON, October 28, 3:02 A. M.—The German troops on the Transylvania front have reached Campolung, twenty miles within the Roumanian border, says a Petrograd dispatch to the Chronicle.

By ARTHUR S. DRAPER

Special Correspondent of The Chronicle in London

LONDON, October 27.—The defeated Russo-Roumanian army in the Dobrudja is still in flight before Mackensen. Though the invading forces apparently have made no effort as yet to throw troops across the Danube at Cernavoda, they are continuing without pause the pursuit of the entente forces to the north.

The Roumanians and Russians have been driven north of Hirsova and Constanta positions on the Danube and Black sea coast respectively, about thirty miles north of the Constanza-Cernavoda railroad line. That the enemy is in hot pursuit is indicated by the fact that Mackensen's advanced columns are already in Hirsova.

FERDINAND THREATENED IN TRANSYLVANIA

Meanwhile, on the Transylvanian front, the situation is steadily assuming a more threatening aspect for King Ferdinand's troops.

Although Falkenhayn's forces have been held in check, and even thrust back at some places, in several vital sectors they are smashing ahead relentlessly.

On the western frontier of Moldavia the Roumanians have rallied and turned back the foe; in the passes of Southern Transylvania the Teutons appear to be still holding the upper hand and extending long tentacles into the enemy's country that seriously menace the key points of Western Roumania.

ROUMANIANS CAPTURE VILLAGE AND HEIGHTS

In the Trotus and Oituz valleys the Roumanians captured today the village of Hatna and the Dragaretul Heights, nine miles northeast and southeast respectively of these. In the final valley the Roumanians also pushed forward, inflicting losses on the Teutons. Elsewhere in the western section of the battle front the fiercest attacks of Falkenhayn's troops were rolled back by the firm stand of the Roumanians and their Russian allies.

In the valley of the Jiul the Roumanians have withdrawn to the southern exit of the Vulcan pass. South of Kronstadt they have also been compelled to fall back. Here the Teutons have now reached Azuga, five miles south of Predeal and well inside the Roumanian border.

ROUMANIAN OUTLOOK IN WEST FRONT BRIGHTER

South of Torzburg pass the Germans claim progress in the direction of Campolung, but there is little doubt that the Roumanians have the situation at that point well in hand.

In the extreme northern tip of the front, in the south of Bukowina, the Austro-German troops failed to hold the enemy, who broke through and seized a dominating position near Dorna Watra.

The successful Roumanian operations in the Trotus and Oituz valleys are important in their possible effects. The Trotus, Oituz and Trotus sectors are closely linked up in the present fighting. Success to any is very likely to bring victory in all three. Here, too, the Roumanians are showing a bolder front than elsewhere, and apparently are better supplied with guns and ammunition.

LONDON, October 27.—Steadily the French are closing in on Fort Vaux, the last great stronghold held by the Germans in the arc north of Verdun. Last night Petain's troops edged nearer their objective in operations directed from the west and south. This seems to indicate that the French commanders aim to trap the ruined fortress within a pocket rather than to smash their way into it by frontal attacks.

"The efficient curtain of fire directed by the French guns held the Germans in their trenches the entire day. Only once did they threaten a strong assault on the French lines, west of Douaumont.

GUNS SMASH DAY'S ONLY CONCERTED ATTACK

This move was broken up before it was well under way. The remainder of the day the forces of the Crown Prince contented themselves with a continuous bombardment of the French positions along the whole line.

Heavy rains precluded all but light operations and artillery activity on the Somme front. The British carried out successful raids on enemy trenches south of the Ancre. Despite the bad weather the allied aeroplanes took the air and fought a number of engagements with hostile craft.

One British pilot performed a notable feat, when, single-handed, he attacked and routed a squadron of ten German machines. He was immediately reinforced. Two British and three German planes were felled during these encounters.

CHALONS BOMBED BY RAIDING AEROPLANES

During the series of raids on railway stations and other points of military importance 264 bombs were dropped by the air fighters, including 240 on Chalons station.

Now, as before, predictions regarding the allied advance. The rest is calculable, which during the fighting at the decisive battle of the Marne was higher than ever before in history, governs the French and British commanders in their plan of offensive.

Progress has been very real but has been made at terrific cost. The problem before the allied generals is to measure the value of each hectare of ground gained by the price to be paid for it in man-power.

LOSSES OF SOMME BEAT 1914 CAMPAIGN

British staff estimates of the casualties during the early weeks of the Somme battle show the losses in excess of those of the entire Franco-Prussian war.

If the Anglo-French commanders had been willing to squander life, they undoubtedly could have advanced ... the Bapaume-Peronne road within the month.

Bullets Fly in Battle With Jitney Bandits

Policeman F. J. Kerr Exchanges Shots With Four Robbers

After holding up and robbing Patrick Duggan, proprietor of a saloon at Twenty-sixth and Mission streets, and the patrons early this morning, ... four ... bandits escaped in a jitney, but not before a ... shots were exchanged between them and Policeman Francis J. Kerr. None of the shots took effect. The robbers, each of whom wore a white mask, ... [illegible]

SEA BAT FOUGHT ENGLI CHANN

British Claim Two Destroyers Sunk; One Warship Is Mi and One Agrou

ONE EMPTY TRANS ALSO SENT TO

Berlin Denies Loss; 15 Enemy Craft, In 2 or 3 Fighters, or Damaged

LONDON, October 27. ... man torpedo-boat attempted to raid ... cross-channel transport ... night, but the attempt fail ... official statement issued ... the Admiralty today. ... German destroyers were ... the others were driven o...

ONE BRITISH SHIP MISSING; ONE AGR

One British torpedo-boat the Flirt, is missing ... statement adds, and ... stroyer, the Nubian, was ... a torpedo and ran agro... members of the crew ... were saved.

The German destroyers ... in sinking one empty tra... Queen. The crew was sa...

The British Admiralty ... ment follows:

"During last night the ... tempted a raid with ten ... on our cross-channel tra... vice. The attempt failed

BRITISH TROOPSH SUNK; CREW SAV

"One empty transport, was sunk. The whole c... was saved.

"Two of the enemy were sunk and the ... driven off.

"H. M. torpedo-boat Flirt, Lieutenant Richard ... R. N., is missing, and ... may be lost, but nine ... have been saved.

"H. M. torpedo-boat ... Nubian, Commander Montag... R. N., was disabled by ... and taken in tow, but, ... bad weather, the tow par... grounded."

14 ENEMY SHIPS SUNK, SAYS BERL

BERLIN, October 27 ... October 28, 12:45 A. M ... eleven outpost steamers ... three torpedo-boat destroy... pedo boats were sunk ... Tuesday night in the ... official ... "Folkestone ... according to an official ... tion issued here. The ... flotilla returned safely ... without any loss.

"The communication ... "Parts of our torpedo ... from a thrust by ... through the Straits of ...

(Continued on Page 2, Col. 4)

French Liner on Fire Makes Harbor of Fayal in Azores

Steamer Chicago, With Blazing Cargo and 265 Passengers on Board, Wins Race With Death

LONDON, October 27.—The French Line steamer Chicago has arrived at Fayal, Azores island, according to Lloyd's. The utmost is being done to extinguish the fire aboard.

NEW YORK, October 27.—Advices ... from London received here today stated that the French Line steamship Chicago, which left ... the fire is not serious and that the passengers on board are in no immediate danger. The Chicago carries only second and ...

Cupid Is Outdone In Contest With Imp of Divorce

Marriage licenses ... Divorce suits filed ...

These cold, unsympathetic figures ...

D TO ATE ATER UP

Substitution Flat Price, mption and ome, Is uiry

HEARINGS TS PILE UP

Average Increase in Individual Per Cent, rvey of unts

INCREASE in ... of "house... ... in pre... investigation be... of Commission the meters in... ... books in the ... came ... was ... 18 per ... the little tick... the sidewalk, ... to the arith... ... hydraulic ... these ... 1.98 under their ... the first month ... they would ... the readings, ... for that month ... collected. In ... the meters, for ... the water ... consumers found ... This is ... more than 18 ... rate.

ATES

... the company ... they did not ... but allowed ... and the like ... month.

... in which ... the consum... ... was a tall ... irrigation of ... supposed to be ... which had some

... the first "for ... paid, but for ... paid at the old ... on the total ... consumers of the ... paid by the ... they would ... over on the aver... more than they ... rate.

... increase of 18 per ... does not tell the ... individual cases ... the rate, little ... actually involved ... one particular ... with three families ... it was about $40, ... is 3 per cent of ... of water used, ... meters, had ... of $1.50. These ... therefore charged ...

under the church law, every Episcopalian ...untry. ...revious pastoral let... ...h secular rather than ...ffairs. It reviewed ...e United States and ...e Orient, and pointed ...ntry the threat that ...tionalism which as... ...'role of group self-patriotism." ...ngers may lie lurking ...tern horizon," it as... ...ely be averted by a ...s which has not al... ...in our dealings with

...LIF GAPING"

...he church were ad... ...anctify their wealth ...ly of their substance ... it being added that ...Armenia, Poland and ...e gaping to the sky ...dumb appeal to God ...letter in part follows: ...involved today in... ...fusion which finds ...expression in the ...Europe. No self-iso... ...art is possible. The ...nations are inter... ...hreads of a tapestry. ...never again be sec... ...world is henceforth ...me being in a dis... ...ering unity, in days... ...ality whose order and ...n. Here and there ...ms of lifeless space. ...stance in the human ...but from the head to ...quivering, sensitive ...expediency may in ...re neutrality of the ...annot hold in leash ...of the individual cit... ...annot be passionless ...manhood.

...FOR SMUGNESS

...at our Nation is not ...no ground for smug... ...upon us the search... ...ity of exalting the ...peace and incorpor... ...our national life. ...o often assumes the ...group selfishness or ...n. Local conditions ...t form this disease ...nder it breaks forth ...rash of war; here in ...prosperity which is ...manhood to decay. ...that in some quar... ...sake of gain, still ...wheels of industry ...t souls of her little ...allows human life to ...o the inventions of ...luction from lack of ...rds, that heeds but ...cry of the poor and ...not at peace, even ...not at war. If pres... ...re to act as peace... ...half of the warring ...r aspirations be tem... ...eflection that we are ...e common disease of... ...uption of war is a ...a cause. God hates ...mpty peace as much ...unrighteous war.

...GIVE LITTLE

...dly said that in pro... ...er swollen wealth, ...ribution to the inno... ...in Europe is the ...e. A few have given ...to laying down their ...n due proportion to ...e; the vast majority ...g. If America comes ...rld disorder richer in ...rer in manhood, she ...n herself the penalty ...ife or even of losing ...least of all so vast ...a one as ours, is

the productive forces of manhood are at the same moment shaped into social order. The only thorough preparedness is that exemplified by Christ, the preparedness of character based upon life with God.

WARRING NATIONS TEACH US

"Would that our peace today were like rivers and our righteousness as the waves of the sea. Then we would be indeed an ensign to the nations. But how different a case it is. The nations now at war have as much to teach us as we have to teach them. They rebuke our worship of comfort and money by the daily offering, upon a reeking altar, of life and treasure; they declare to us that intoxicating liquor, which is so freely and carelessly drunk in our land, is a national menace to be dispensed with at the cost of lowered revenue, but with the gain of heightened virility; they teach us that food is the staff of physical life, not an invitation to daintiness and gluttony; they rebuke our spiritual poverty by the splendor of their spiritual eagerness which, out of their tragedy, brings new visions from God and breeds new virtues in men; they shame our self-indulgence by a degree of self-sacrifice that is royal.

"Whatever apology or explanation may be made, at home or abroad, for the world confusion, it is none the less an outcome and a revelation of unchristian principles that have dominated the life of Western Christendom and of which both the church and the nations have need to repent.

GREED USURPS THRONE

"Greed of possessions, of honor or pleasure have literally dethroned God from his supreme place among men. The sole cure is to exalt God.

"Thus far the church has been only strong enough to see and covet, not strong enough to consummate her ideal. Her own disunion dims her hopes and hinders her progress. A divided church is powerless to create an undivided world.

"History makes plain to us that man's extremity is God's opportunity. Beneath every pall of tragedy lies hidden the glory of God—new visions of faith, new counsels of virtue—to be revealed and discovered by those who look not at the things which are seen, but at things which are not seen, and wrestle with God for a blessing."

Hermon Van Luven Is Buried on Birthday

Late Banker's Funeral Is Held From the Masonic Temple

On what would have been his forty-eighth birthday, had he lived, the funeral of the late Hermon Van Luven, cashier and secretary of the Union Trust Company, was held yesterday from the Masonic Temple, at Oak street and Van Ness avenue.

The services were conducted by California Lodge, No. 1, F. and A. M., of which Van Luven was a member and formerly treasurer. Jesse M. Whited, master of the lodge, officiated, assisted by Acting Senior Warden Harry L. Dewey and Junior Warden Raimon F. Conlisk.

San Francisco Lodge, No. 3, B. P. O. E.; Islam Temple of the Mystic Shrine, and the Scottish Rite bodies were represented. The interment was private.

would be elected President of the United States. Julius Pincus, Portland hop man, took the Wilson end at even money.

Sheville, a few days ago, backed Hughes to the extent of $10,000 at odds of 10 to 8 in favor of the Republican nominee, so this makes $11,... posted by him.

MEASURE ALARMS LEGISLATORS ON 'SIDE' PAYROLL

Amendment No. 6 Would Endanger Double Pay if It Carried at Election

SACRAMENTO, October 27.—Some thirty-five or forty legislators in the employ of the State in various capacities are anxiously awaiting the result of the November election; for if the electorate should adopt amendment six on the ballot, known as the ineligibility to office measure, State Controller John S. Chambers probably will refuse to draw warrants in favor of legislators then in the employ of the State. The act is construed to mean that resignations as legislators either before or after election will not be able to circumvent its intent.

Section 19 of the act reads: "No Senator or Assemblyman shall, during the term for which he shall have been elected, hold or accept any office, trust or employment under the State; provided, that this provision shall not apply to any office filled by election by the people."

There are a number of Senators and Assemblymen whose terms expire on January 1, 1917, and it is possible that they might agree to work for the State a month and three-quarters gratis in order to hold their positions, but there are also a number of legislators who will either be re-elected or are holdover Senators.

Company Sues Former President for $7500

Services of Attorney J. L. Taugher Subject of Dispute

The controversy between John L. Taugher, an attorney of this city, and the Moore Filter Company of Portland, Me., was renewed yesterday by the filing in the United States District Court of a suit by the company against Taugher for $7500.

It is alleged that Taugher, while president and director of the company in 1913, had the directors vote to pay him $12,500 for his services, although he was entitled to only $5000.

In a suit in the Federal Court three months ago Taugher was awarded $18,500 for legal services for the company. The company gave notice of appeal.

largest Roumanian seaport, and of the Danube bridgehead, Tchernavoda, brings the Dobrudja ... of October 19 to October ... glorious end and the result is ... blow to the Roumanian campaign.

"The victorious advance of the allied German, Bulgarian and Turkish troops came at the end of September to a standstill before the strong hostile main positions of Toprai-Sari, Txopadin and Rachova. It was necessary, therefore, to rearrange the positions of our artillery and to organize the reserves and this caused long delay because of the peculiar nature of the Dobrudja war theater.

RUSSIANS HOLD CENTER

"The main hostile positions in the east began at Bestaghiol and ended in the west on the Danube. This position had been strongly fortified prior to the outbreak of the war. Toprai-Sari and Txopadin were constructed like fortresses. They had strong forces as garrisons and were armed with heavy artillery.

"The Russians held the center while the Roumanians had to defend both wings. The general line of the central allies stretched south of the hostile main position from Tatlageacu and Amuzacea Cavacian and Enigea to the west of Bairu.

"The attack began on the morning of October 19. The weather being bright, the artillery was better able to measure the distances and its fire was more efficient. The right wing of the enemy after two hours of artillery fire and tenacious fighting was thrown from the first positions. On the evening of the first day of the battle the following line had been reached: The heights 39, 70 and 74, southwest of Tuzla, and the heights south of Mura-Tanu-Burun, south of Toprai-Sari. Farther to the west the enemy on this day was detained by uninterrupted attacks which forced him from several points of support.

TUZLA OCCUPIED

"On October 20 the battle was continued with the utmost energy. The fighting for Toprai-Sari especially was violent and the enemy had evacuated the district south of Tuzla. Tuzla itself was occupied without any fighting. In the evening the right wing

The Turkish troops showed great bravery and took prisoner more than 1500 Russians.

"On October 21 the battle concentrated around Toprai-Sari and Txopadin, which were the keys to the situation. Masked artillery and infantry attacks of the central allies against the position south of Toprai-Sari forced the enemy to yield at midday.

"Field Marshal von Mackensen, with his staff, observed from Height 90 the retreat of the hostile masses as they streamed backward and under the influence of our most efficient artillery fire at many places their retirement was turned into a mad flight.

"After the fall of Toprai-Sari and Txopadin, the main resistance of the enemy seemed to have been broken. On the evening of this hot battle day the central allied troops stood along a line from Tschirghel-Mulciova, north of Toprai-Sari-Txopadin-Sapata, to Razal. The pursuit was continued, and our artillery during the night was brought ahead into the new positions.

WARSHIPS ENTER FRAY

"On October 23, seven Russian warships tried to operate from the sea between Constanza and Tuzla against the right wing of the central allies, but the ships were not successful, since they were forced by counter measures to keep a long distance away from the coast.

"No time was left to the defeated enemy for the defense of Constanza if he wanted to save himself. Reinforced by German and Bulgarian infantry, the Bulgarian cavalry captured the Roumanian support, and on the same evening the right wing of the pursuing troops reached Islamtepe and Kalarup.

"On October 23, the defeated enemy once more tried to concentrate his forces near Medjidie. Fresh Russian forces were thrown into the engagement as soon as they arrived. These troops were routed in the same quick procession, and in the evening Medjidie was captured after a hard struggle. To the west we occupied the heights northeast of Rachova.

"Army aeroplanes contributed much to our success by excellent reconnoitering.

bor...

Mrs. ... the ... yester... cis H... ture ... Nels... lice ... turned ... stfan... invest... Capta... Quade... establ... died ... from ... pany ... work... home ... the ... Mrs. ... Mrs. ... Fran... night ... after ... the h... in ... Read ... and ... husb... three

Cit...

A ... A. S... ... was ... Wor... the ... to a... ... tunn... vard ... vehi... conn...

"The Royal Tiara," a Felix Boyd Story, Will Begin in The Bee

THE SACRAMENTO BEE

SACRAMENTO, CAL., SATURDAY EVENING, OCTOBER 28, 1916 —32 PAGES

...nce Loaf Can Be Sold ...r 10 Cents With a Profit for All---Riverside Baker

...October 28.—John E. Newberry, a baker here, declared to ...rat to-day that a twenty-four-ounce loaf of bread can be ...10 cents with a profit to all concerned.

...erry's figures for the cost of production for a bakery using ...rrels of flour a day are:

...sas hard wheat, $9.21 per barrel; labor, working up each ...other costs, per barrel, $1.58. Total, $12.84.

GOOD PROFIT FOR BAKERS.

...figured 200 twenty-four-ounce loaves to the barrel of ...t of production of 7½ cents a loaf, which he said could be ...he retailer at 8½ cents a loaf, by a bakery working up ...s of flour per day, with a profit of $40 a day.

...ed his price of flour, in spite of higher figures in Los ...an Francisco by a review of wheat and milling costs.

Bay Bakers Defend Increased Cost

...NCISCO, October 28.—Increased prices of bread were defended ...a statement by the baking expert of a large flour com... ...e cost of production on the basis of an output of a thou... ...s a day is, according to the statement:

..., $28.40; labor, $4; wrapping, 90 cents; repairs, 30 cents; ...ery, $3.17; advertising and soliciting, $1.25; interest and ...s; office expenses, $1.67; depreciation, $1.46; interest on in... ...ents; broken loaves (5 per cent. allowance), $1.44. Total ...es, $46.22.

...ment concludes that "anybody who knows merchandising ...the basis of these costs a retail price of 6 cents per loaf ...evitable as long as flour remains at its present figure."

ROAD WORK IS TO START NOV. 1ST.

County Engineer Will Be Instructed to Begin Surveying on That Date

BONDS MAY BRING RECORD RETURN

If Sold Before December 20th They Will Command Higher Price Than Similar Issues

Active work of surveying for the complete system of highways in Sacramento County, as provided for in the bond issue a few weeks ago, will begin within the next few days.

At a conference yesterday afternoon between the County Supervisors, F. B. McKevitt, Chairman of the County Highway Commission; J. C. Havely, representing the Good Roads Association; District Attorney Bradford, County Auditor Lincoln Williams, and County Treasurer Frank K. Christophel, arrangements were made to advance $12,000 out of the general fund of the county so that survey work may begin at once. The money will be paid back into the general fund when the bonds are sold some time around the first of the year.

Will Call Meeting.

Following a decision to advance the funds, Chairman McKevitt announced that he will call a meeting of the Highway Commission for Tuesday, October 31st, and County Engineer R. M. Morton will be instructed to begin work on November 1st, the day following.

Morton will at once organize his staff of surveyors and they will be put into the field with the hope of getting far enough along so that contracts may be let during the Winter months for road work to begin in the early Spring. There will be at least two surveying gangs with possibly three or four. Surveys will be made in both the Fourth and Fifth Supervisorial Districts.

Record Price.

J. C. Havely, speaking for President Peltier of the Good Roads Association, told the Supervisors that if the bonds were printed and the sale set for December 15th to 20th, the bonds would bring the highest price ever paid in the State of California for similar bonds. He said that President Peltier had made inquiries among bond men and it was the opinion of all that the sale should take place around December 15th to 20th, and that the premium offered would be exceedingly high. Peltier estimated that the premium would run in the neighborhood of $30,000.

Following the conference, the Supervisors passed a resolution ordering bids to be submitted on November 5th for the printing of the bonds. The Supervisors hope to have the bonds printed in time to advertise their sale for December 15th to 20th.

To Draw Coin as Needed.

Under an opinion rendered by District Attorney Bradford the Supervisors authorized the County Highway Commission to draw on the general funds as needed up to a total of $12,000. The money used by the Highway Commission will be divided equally between the road funds of the Fourth and Fifth Supervisorial Districts and will be refunded out of the premium to be paid when the bonds are sold.

ENGLAND MAY EASE UP ON BLACKLIST

Reply to Restrictive Trade Measure Received by the State Department; To Be Published Later

SOME FIRMS ARE ALREADY OFF LIST

Points Raised by Reply Expected to Result in Further Diplomatic Representations

WASHINGTON, October 28.—Great Britain's note in reply to American representations against the commercial blacklist was received to-day at the State Department. Arrangements regarding its publication will be made later.

It is understood to reiterate the contention for the right to blacklist, but offers methods of relief to Americans in certain circumstances.

Answers American Note.

The British note is in reply to the American note of July 28th, which denounced the blacklist as "an arbitrary interference with neutral trade," and "inconsistent" with true justness, sincere amity and impartial fairness which should characterize dealings of friendly governments with one another." The names of some American firms already have been taken from the blacklist; and the British note is understood to offer means of removing others.

Terms of Reply.

The British note is understood to take the line of argument it is unprecedented for a neutral to claim that a belligerent should in effect compel its subjects to trade with the enemy, and that it violates no law for the British Government to prevent its subjects from doing so. While the British Government admits the rights of all persons in neutral countries to engage in legitimate commercial transactions, it argues that such a right does not limit the right of other governments to restrict the activities of their own Nationals.

Point at Issue.

The point at issue in the controversy is whether the nationality or the domicile of the owner of goods gives character as neutral or belligerent. Previously, Great Britain and the United States have argued that domicile was decisive regardless of nationality. The continental European position has been that nationality was decisive. In the previous negotiations over the blacklist England took a position between the two theories.

The subject probably will be carried on in further diplomatic correspondence.

STOCKYARDS TO BE BUILT HERE

$30,000 Plant Planned for West Sacramento; Work to Start in Thirty Days

Stockyards with buildings to cost $30,000 are projected for West Sacramento, and will be in operation early next year, according to J. W. ..., who has been engaged in planning the details for several months. A lease for the property was signed to-day.

Work is to be begun on the yard grading and buildings within the ...

MINISTERS OPPOSED PARADE

General Protest of Clergymen Caused Last Minute Hitch in "Johnson Unanimous Club" Tour

OFFICERS ADMIT NOW THAT DATE WAS BAD

Plans Now Being Laid for Automobile Pageant Through This City Next Saturday Night

Ministerial opposition has proven an effective obstacle to the automobile tour of Sacramento County, which was to have been made to-morrow and next Sunday by the Johnson Make It Unanimous Club.

The contention that politics and religion do not mix has received recognition by the committee in charge of the tour, so the medium whereby many persons had planned to get into personal touch with hundreds of voters in neighboring communities has been abandoned.

Langford's Statement.

While various reasons for the action are ascribed, Rev. S. Fraser Langford, pastor of the First Baptist Church, to-day made the unequivocal statement that he was one of several clergymen in this city who had protested against the tour. He said:

"I protested, and most emphatically, against the tour. And I am prepared to protest again if necessary.

"I know that other ministers, one of them in an outside town, took similar action.

"I don't believe the tour would have been good politics. I was against it for this reason and also particularly because I don't believe politics should be intruded upon the day of worship.

Churches for Johnson.

"I understand the purpose of the tour is in the interests of ... No? Well, that was my understanding.

"Practically all of the religious voters of this county are going to vote for Johnson, and they would have resented the intrusion of any political demonstration on Sunday.

"I am convinced I share the general opinion of clergymen and churchgoers in Sacramento."

Harrison's Protest.

There were other protestants besides himself, according to the Rev. William E. Harrison, pastor of the Westminster Presbyterian Church. He said:

"I called at Governor Johnson's headquarters when I learned of the proposed tour to register a protest. I gave my card to the Secretary then and told her the church-going voters in this county would vote for the Governor and that it would be an insult to hold such a political parade on the Sabbath. I do not think it would be at all proper. And it would be unnecessary.

"There were other ministers who protested, several from the outside, but I don't care to disclose their identity."

Bills' Change of Heart.

Charles B. Bills, President and Manager of the Pioneer Fruit Company, after apparent enthusiasm for the project only a few days ago, informed the committee, of which he is Chairman, that he did not favor the tour and it would have to be

(Continued on page five)

LOS ANGELES COUNTERFEITER

Blue Sky ... Califor... Many

Report of Commis... Wildcat Schemers ... Than a Milli... Were Deni... Depa...

FIGURES showing ... hundreds of thous... lege of securing ... motion schemes, are ... State Commission of ... Johnson to-day, by ... Department in dealing ... the report.

In the first twel... 1915, to September 1, ... is shown by Commiss... of stocks of bonds of ... by the Blue Sky Law ... bought up by the publ...

USED BY ...LARS IS ...LIEF

...ck Bedroom of ...me and Are ...eved to Have ...ged Men

AMENDMENT TO TAX LAW IS UPHELD

Superior Judge Sturtevant Decides Corporations Protesting Collections by State Cannot Recover

SAN FRANCISCO, October 28.—Superior Judge George A. Sturtevant of this city in a decision handed down here to-day, decided that corporations protesting the collection of taxes by the State during the last four years can not recover them, and that the amendment to the tax laws, passed by the Legislature four years ago, is constitutional.

Wells Fargo Suit.

Judge Sturtevant's decision was handed down in the action of the Wells Fargo Express Company against the State, which sought to collect approximately $50,000 in taxes, which the plaintiff has paid under protest during the last four years and which it alleged the State had no right to collect.

Judge Sturtevant held the company could not recover the taxes paid and the State had the right to so collect them.

Assistant Attorney General Raymond Benjamin, who handled the case for the State, said to-day Judge Sturtevant's decision was one of the most important handed down in years. He said that substantially $9,000,000 in taxes collected by the State from corporations doing an interstate business was affected.

FORMER SOLICITOR ADMITS EMBEZZLEMENT

H. Brewster, former insurance solicitor who was employed by Waters, Crouch and Waters, yesterday afternoon pleaded guilty to petty embezzlement. Justice of the Peace ... was called in to hear the case by Police Judge J. J. Henderson, who stated that he did not care to preside.

Sentence was suspended in the case, as Brewster has promised to make good the $97 which he misappropriated.

Gas Bombs, With ... Smell, Exploded i... Union Restaura...

SAN FRANCISCO, Oct... One of the barrows ... warfare, namely, ... are becoming a ...

Girls, Ghosts and Witches Are Y. W. ... Halloween

PROHIBITION

—brock of Vine Street
r her aunt, Mrs. Mary
ncoln, Neb.

League of the Wesley
ntertained at the home
. Warner last evening.
ns were enjoyed. About
were present.

ency committee of the
rs Association will
p. m. Tuesday at the
Chairman, J. C. Van
nial Heights.

Stahl entertained the
Club at her home last
occasion was marked
nds of the members be-
as guests of the even-

G CLASS
PENS MONDAY NIGHT

October 23.—The
class will convene at the
h School on Monday
a course opened last
nly a few of the women
d for the class knew of

local Women have
the class. Sessions
every Monday evening.

Oak Park Parlor, Native Sons.

Rev. W. B. Re[illegible] has been called to fill the pulpit [illegible] South Methodist Church at Wheatland.

Albert Steen, Fred Steen and William Collins bagged a score of cottontails in a hunting trip to Franklin yesterday.

START McFARLAND CLUB.

OAK PARK, October 25.—Friends of Ray D. McFarland, candidate for the Assembly, met at Red Men's Hall last evening and organized a McFarland Non-partisan Club. The following officers were elected: John Orr, President; R. E. O'Neill, Vice President; Gordon Oliver, Secretary; Dr. Henry Buckman, Treasurer. The Membership Committee appointed consists of N. D. Hopton, Cliff Yost, George Uhl, D. H. Holdridge, Manuel Cassell, John Gabelsih, R. G. Currier, F. H. Honston, J. H. Silva and J. O. Schreck.

GHOST DANCE TO-NIGHT.

RIVERBANK (Yolo Co.), October 25.—The ghost dance to be given by the Riverbank Improvement Club will be held to-night. A jitney service from Washington will be maintained.

TION IS WHEREVER ITTED TO VOTE

League's Attitude Men Who Oppose Laws Getting Nowhere

use of Representatives in 914. Representative Hob- ome, speaking for the League, declared the ition forces of the Na- make prohibition the sue of the next election, gain a two-thirds ma- two houses of Congress, an administration which he open nor under- cover ten this reform."

15, the national office of oon League issued an or- ment from Washington to that the United prohibi- of the country would g other things, any can- President "who advocates tate's Rights policy of h the liquor traffic."

ng candidates for Presi- Woodrow Wilson and ang Hughes. Neither of prohibitionist, but each his attitude. President Wil- lared openly he is against or rather he has refused answer to a question that his view, and that he has rious times so expressed

hibition Is Losing.

last Fall a prohibition to the State Constitution ted by a majority larger

CHAMBERS STUDIES AMENDMENT NO. 6

Proposal to Make Legislature Members Ineligible to State Jobs Is Perplexing

State Controller John S. Chambers is investigating the effect on the jobs of a score or more of State Senators and Assemblymen should Amendment No. 6 on the ballot carry at the election next month.

The Proposed Measure.

This is the measure proposed to prohibit members of the Legislature holding positions of public trust during the term of their office. Section 19 reads as follows:

"No Senator or Assemblyman shall, during the term for which he shall have been elected, hold or accept any office, trust or employment under the State; provided, that this provision shall not apply to any office filled by election by the people.

Controller Chambers said to-day that his attention has been called to the possibilities of the proposed amendment and that he is now considering it, although it will be impossible to state the policy of his office in the matter of drawing warrants, in the event that the measure is adopted, until he has had opportunity to study the provision of the law more fully.

The passage of the law would most inconvenience the held-over Senators and Assemblymen, although legislators whose terms expire January 1, 1917, and who are not seeking re-election would be affected considerably.

Those Affected.

Among those who will be inconvenienced by the passage of the law are the following: Senator E. S. Birdsall of Auburn, Secretary of State Lunacy Commission; Senator E. J. Tyrrell of Oakland, attorney for the same Commission; Assemblyman Frank H. Mouser of Los Angeles, Inspector for the State Motor Vehicle Department; Senator Henry W. Lyon of Los Angeles, Assistant Labor Commissioner; Assemblyman Lee P. Gebhart of Sacramento, who is with the State Pharmacy Commission; Assemblyman Harry A. Encell of Berkeley, Examiner for the State Railroad Commission; Assemblyman Charles Godsil of San Francisco, of the State Pharmacy Board; Assemblyman Walter W. Chenoweth of Sacramento, head auditor at the Folsom State Prison; Assemblyman A. E. Shartell of Alturas, attorney for the State Inheritance Tax Commission.

MEETING CALLED FOR IRRIGATION DISTRICT

After adopting resolutions endorsing the Cosumnes irrigation project the Sacramento Realty Board yesterday called a meeting of residents of the Cosumnes District in an endeavor to assist in the forming of an irrigation district under the Wright Act. The meeting of representatives of the district, located southeast of Sacramento, will be held in the office of D. W. Carmichael at 4 o'clock Monday afternoon.

Followed Discussion.

The resolutions followed discussions of the formation of irrigation districts in El Dorado, Amador and Sacramento Counties and from a business standpoint ation project shown to that is under the provisi Wright Act. The propose district will include ab acres. It is believed the toward its formation will at the meeting Monday.

RESTA OUT, AITK WINS AUTO

NEW YORK, October Aitken won the gold trop lile race at the Sheep track here to-day. His 56.37.65. Galvin was 56.45.31. Wilcox third, th

Dario Resta dropped out after breaking all speed for fifty miles. His time an average of 109.55 mil A broken crank shaft car.

Aitken's average of 102 hour is a new American seven seconds behind record.

DISCHARGED SA FIRES BULLET IN

SAN FRANCISCO, Oct W. Kent, Assistant Sec milk company, rallied nett, one of his travelli off the road and inform

ADVERTISEMENTS

Hon. Gill Wilson

Amendments to Constitution

and

Proposed Statutes

with

Arguments Respecting the Same

To be Submitted to the Electors of the State of California at the General Election on

TUESDAY, NOVEMBER 7, 1916

Index, ballot titles with numbers, and conclusions appear in last pages
Proposed changes in provisions are printed in black-faced type
Provisions proposed to be repealed are printed in italics

INELIGIBILITY TO OFFICE.

6

Initiative measure amending Section 19 of Article IV of Constitution. Declares that no Senator or Member of Assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this State; provided that this provision shall not apply to any office filled by election by the people.

YES	
NO	

The electors of the State of California present to the secretary of state this petition, and request that a proposed amendment to section nineteen of article four of the Constitution of the State of California, as hereinafter set forth, be submitted to the people of the State of California for their approval or rejection, at the next ensuing general election, or as provided by law. The proposed amendment is as follows:

The people of the State of California do enact as follows:

Section nineteen of article four of the Constitution of the State of California is hereby amended to read as follows:

PROPOSED AMENDMENT.

Section 19. No senator or member of assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this state; provided, that this provision shall not apply to any office filled by election by the people.

Section nineteen of article four, proposed to be amended, now reads as follows:

EXISTING PROVISIONS.

Section 19. No senator or member of assembly shall, during the term for which he shall have been elected, *be appointed to any civil* office *of profit* under this state *which shall have been created, or the emoluments of which have been increased, during such term*, except such offices as may be filled by election by the people.

ARGUMENTS IN FAVOR OF INELIGIBILITY TO OFFICE AMENDMENT.

It has always been the aim of any republican form of government to remove the legislative branch of the government from the control of the executive branch. It is evident that where a member of the legislature is holding a paid position in the executive department of the state that the separation which should exist between these two branches of the government is at an end. The American theory has always been that those who execute the laws should not be the same individuals as those who make the laws, yet one who is both an assemblyman and a member of the executive department is in just that position. It would not be an edifying spectacle, nor would it make for civic decency, to see such an individual introducing a bill in his legislative capacity which would increase the pay he would receive in his executive capacity.

There is another reason why this measure should pass. We should remember that a legislator who is holding a position on the state pay roll is too apt to allow the wishes of the one responsible for his appointment to dictate the manner in which his vote shall be cast. A man in such a position, is, to say the least, not in that independent frame of mind which should be possessed by the ideal legislator.

There can be no doubt that a vote "Yes" on this measure will tend materially to raise the standard of the California legislature of the future.

RICHMOND P. BENTON,
Assemblyman Sixty-sixth District.

While some of our most efficient officials have been men holding appointment under the state, at the same time being members of the legislature, the practice is one which some day may be subjected to abuse. The proposed law to render a member of the legislature ineligible to any office under the state, other than an elective office, during the term for which he shall have been elected, is therefore in the interest of good government and should be adopted.

Once such a law is written into our statutes, we eliminate the incentive which a legislator may have to favor a law creating a position to which later he may contemplate appointment.

The legislator should have no selfish interest in connection with the enactment of any law or the creation of any office. The proposed law without doubt will very largely eliminate the possible selfish considerations.

Here and there the state, by reason of such a law, will actually suffer, as it frequently happens that the most highly specialized man for work in connection with a certain department of state is a member of the legislature. There are instances of that sort today, where, by the enactment of such a law, the state will lose the services of especially qualified and conscientious officials.

To my mind, however, the advantages from the proposed law wholly outweigh the disadvantages, and the net result of such a law will be beneficial alike to the legislature and to the public.

DR. JOHN R. HAYNES.

ARGUMENT AGAINST INELIGIBILITY TO OFFICE AMENDMENT.

To pass this constitutional amendment is in effect to say that every governor and member of the state legislature is dishonest and without integrity or character, because those who urge its adoption are loud in their cries that it will prevent the governor from bartering for legislative votes by appointing senators and assemblymen who favor administration measures to state offices, and that it will further destroy the incentive for members of the legislature to vote with the governor in the hope of obtaining a state position in reward thereof. It is certainly a sad commentary on the integrity of our governors and legislators by thus stigmatizing executive and legislative service. And even if this amendment should pass, could not the governor, were he so lacking in integrity and unmindful of the obligations of his high office, secure the same legislative votes by appointing relatives or political friends of such servile members of the legislature who would sell their honor and barter the trust reposed in them by their constituents? Its adoption must inevitably fail in the accomplishment of any purpose except to close other avenues of political service to legislators.

Do you realize that under this amendment a senator or assemblyman could not take a civil service examination for a state position?

In many instances it makes for efficiency to appoint upon commissions members of the legislature who have given careful study to the needs, aims and objects of a commission created or a law enacted.

Another argument advanced by the proponents of this measure is that members of the legislature who are appointed to state offices receive two salaries, but the records will show that leaves of absence are invariably obtained by such appointees during sessions of the legislature and the actual time of the legislative session is generally about eighty days every two years. Thus the people lose nothing, while the incumbent of a state position who is a member of the state legislature is better fitted through his legislative experience for the discharge of his duties.

The American people love fair play; they like to reward efficient and faithful public service by promotion, yet the adoption of this proposed measure would render every member of the legislature ineligible for promotion to higher positions and graver duties and responsibilities, however efficient and meritorious his services in the legislature may have been.

THOS. P. WHITE,
Presiding Judge, Police Court, Los Angeles.