

IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE M. FLOYD,
Defendant.

v.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK; AND
THE HONORABLE MICHAEL P. VILLANI,
DISTRICT JUDGE,

STATE OF NEVADA
Plaintiff/Real Party in Interest.

ZANE M. FLOYD,
Petitioner.

v.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK; AND
THE HONORABLE MICHAEL P. VILLANI,
DISTRICT JUDGE,

WILLIAM GITTERE, Warden, Ely State
Prison; AARON FORD; Attorney General,
State of Nevada

Respondent/Real Parties in Interest

Supreme Court Clerk
Electronically Filed
Jun 24 2021 03:17 p.m.
Elizabeth A. Brown
District Court Case Nos.
99C159897
Clerk of Supreme Court
Habeas Court Case No.
A-21-832952-W

**PETITION FOR WRIT
OF MANDAMUS AND
PROHIBITION**

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WILLIAM GITTERE, Warden, Ely State Prison; AARON FORD;
Attorney General, State of Nevada

Respondent/Real Parties in Interest

NRAP 26.1 DISCLOSURE

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

1. The Clark County Public Defender's office represented Mr. Floyd in his pretrial, trial, and direct appeal proceedings.
2. David M. Schieck represented Mr. Floyd during his initial state post-conviction proceedings.
3. The Federal Public Defender, District of Nevada, has represented Mr. Floyd for all subsequent proceedings, including the proceedings below.

/s/ David Anthony

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I. NEV. R. APP. P. 17 STATEMENT

This is retained by the Supreme Court under NRAP 17(a) because this is a death penalty case.

II. RELIEF SOUGHT

Floyd asks this Court to order the Eighth Judicial District Court to disqualify the Clark County District Attorney's Office from representing the State in proceedings related to his execution.

Alternatively, Floyd asks for an order prohibiting the Eighth Judicial District Court from allowing the Clark County District Attorney's Office to represent the State in proceedings related to his execution.

III. ISSUES PRESENTED

Whether the Clark County District Attorney's Office should be disqualified where the district attorney withheld prosecution of Floyd's execution for five months, the district attorney timed filings and public statements related to Floyd's execution to correlate with the Legislature's consideration of a death penalty abolition bill, the district attorney instructed "legislative leaders" to consider this case in their consideration of the death penalty abolition bill, and two legislative

leaders are employed by the district attorney as deputy district attorneys.

IV. NEVADA CONSTITUTIONAL PROVISION

Article 3, Section 1 of the Nevada Constitution provides:

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

(emphasis added).

V. STATEMENT OF THE FACTS

On November 2, 2020, the United States Supreme Court denied Floyd’s Petition for Writ of Certiorari in Floyd’s federal habeas proceedings.¹ This ended all then-pending litigation in Floyd’s case, and the next step towards Floyd’s execution was for the Clark County District Attorney to seek a warrant of execution.

However, the State filed nothing in November or December of 2020. The State filed nothing in January or February or March of 2021.

¹ *Floyd v. Gittere*, No. 19-8921, 141 S. Ct. 660 (Nov. 2, 2020).

Nothing happened in Floyd’s case until Assembly Bill 395, which would have abolished capital punishment in Nevada, was read for the first time and referred to the Committee on Judiciary, on March 24, 2021.² Two days later, on March 26, 2021, the *Las Vegas Review-Journal* published an article announcing the Clark County District Attorney would be seeking a warrant of execution in Zane Floyd’s case, quoting the District Attorney himself:

“I think the timing is good,” Wolfson said. “Our legislative leaders should recognize that there are some people who commit such heinous acts, whether it be the particular type of murder or the number of people killed, that this community has long felt should receive the death penalty.”

...

“I’m not purposefully moving forward with Floyd because of the Legislature. But because they’re occurring at the same time, I want our lawmakers to have their eyes wide open because this is a landmark case.”³

² Bill History, Assembly Bill 395 (81st Session 2021), available at <https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/8006/Overview>.

³ 1APP164.

But still, for nineteen days, nothing happened in Floyd’s case. On April 13, 2021, the Assembly approved A.B. 395.⁴ The following day, the Clark County District Attorney moved for a warrant of execution.⁵

Floyd moved to disqualify the Clark County District Attorney’s Office, on the basis that two of its deputy district attorneys served as legislators in violation of Nevada’s Constitution, and that the District Attorney’s statement and timing created a specifically identifiable impropriety.⁶

Meanwhile, Assembly Bill 395, which passed the Assembly with unanimous Democratic support, languished in the Democratically controlled Senate, where the deputy district attorneys—both Democrats—serve as the Majority Leader and the Chair of the Senate Judiciary Committee.⁷ For four weeks, the Chair of the Senate

⁴ *See* Bill History, *supra* n. 2.

⁵ 1APP174-235.

⁶ 2APP236-50.

⁷ *See* 3APP522–24; *see also* Bill History, *supra* n. 2.

Judiciary Committee did not schedule Assembly Bill 395 for a hearing.⁸ On May 13, 2021, the day before the second committee deadline, the Governor said in a statement, “there is no path forward for Assembly Bill 395 this legislative session.”⁹ He added, “I strongly believe that this discussion requires robust communication and input so that the voices of victims’ families and advocates of the proposed measure can be heard.”¹⁰

The next day, on May 14, 2021, the Eighth Judicial District Court heard argument on Floyd’s motion to disqualify the Clark County District Attorney’s Office. That afternoon, the district court issued a minute order denying Floyd’s motion. That same day, the deadline for passage out of second committee came and went; the Chair of the

⁸ See Bill History, *supra* n.2; see also S. Standing R. 53(10) (81st Session 2021), available at https://www.leg.state.nv.us/Session/81st2021/Docs/SR_Senate.pdf.

⁹ 3APP521.

¹⁰ *Id.*

Senate Judiciary Committee never scheduled a hearing on Assembly Bill 395, and so the bill died.¹¹

On May 18, the district court issued its formal written order denying Floyd's motion, stating:

Senators Cannizzaro and Scheible are on leave of absence from the District Attorney's office and, therefore are not performing executive branch functions under their current status as legislators, they are being compensated by the legislative branch of government opposed to the executive branch, and while serving in the legislatures they are not under the control of the elected District Attorney. As such, the Court finds that under the present scenario there is not a separation of powers violation.¹²

Floyd moved for reconsideration.¹³ After vacating argument for the motion and receiving no opposition from the State, the district court denied the motion a month later, in a single-sentence order.¹⁴

¹¹ Bill History, *supra* n.2; *see also* Nev. Legis. J. Standing R. 14.3(3) (81st Session 2021), available at https://www.leg.state.nv.us/Session/81st2021/Docs/SR_Joint.pdf.

¹² 3APP552–55.

¹³ 3APP560–68.

¹⁴ 3APP584; 3APP585.

VI. REASONS WHY THE WRIT SHOULD ISSUE

This Court is not only endowed with “broad discretion in determining whether disqualification is required” but is affirmatively “responsible for controlling the conduct of attorneys practicing before” it. *See Brown v. Eighth Jud. Dist. Ct. (Thalgott)*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269 (2000). As this Court has noted, these issues present the “delicate and sometimes difficult task of balancing competing interests.” *Id.* at 1205, 14 P.3d at 1270.

Nevada courts will grant a motion to disqualify if there is “at least a reasonable possibility that some specifically identifiable impropriety did in fact occur,” and “the likelihood of public suspicion or obloquy outweighs the social interest which will be served by a lawyer’s continued participation in a particular case.” *Id.* This Court has recognized that “a petition for mandamus relief generally is the appropriate means to challenge district court orders regarding attorney disqualification.” *Liapis v. Second Jud. Dist. Ct. (Liapis)*, 128 Nev. 414, 418, 282 P.3d 733, 736 (2012).

Because the Clark County District Attorney's Office is in violation of Article 3, § 1 of the Nevada Constitution, a specific and identifiable impropriety has occurred. This constitutional violation creates not just the likelihood but the reality of public suspicion and obloquy, and no social interest is served by allowing the Clark County District Attorney's Office to represent the State.

A. A specific and identifiable impropriety has occurred because the Clark County District Attorney's Office is in violation of Art. 3, § 1 of the Nevada Constitution.

In interpreting the Nevada Constitution, this Court is guided by the principle that it “was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from their technical meaning.” *Strickland v. Waymire*, 126 Nev. 230, 234, 235 P.3d 605, 608 (2010) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008)). Analyzing a provision of the Constitution begins with its text. *Miller v. Burk*, 124 Nev. 579, 590–91, 188 P.3d 1112, 1119–20 (2008).¹⁵ This Court will “apply the plain

¹⁵ For ease of reference, Floyd has collected pertinent definitions from legal and non-legal dictionaries close-in-time to the adoption of the

meaning of a [constitutional provision] unless it is ambiguous.”

Landreth, 127 Nev. 180, 251 P.3d at 166. A provision is ambiguous if it is susceptible to two or more reasonable but inconsistent interpretations. *Strickland*, 126 Nev. at 234, 235 P.3d at 608. And, if a provision is ambiguous, this Court “may look to the provision’s history, public policy, and reason to determine what the voters intended.” *Miller*, 124 Nev. at 590, 188 P.3d at 1120.

As for the plain language of Nevada’s separation-of-powers provision, “[u]nlike the United States Constitution, which expresses separation of powers through the establishment of three branches of government, Nevada’s Constitution goes one step further; it contains an express provision prohibiting any one branch of government from impinging on the functions of another.” *Commission on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103–04 (2009) (citations omitted); *see also* Nev. Const. Art. 3, § 1; *Knickmeyer v. State*, 133 Nev. 675, 680–81, 408 P.3d 161, 167 (Nev. Ct. App. 2017) (explaining separation of

Nevada Constitution. *See* J.J.S. Wharton, *Law Lexicon, or Dictionary of Jurisprudence* (2d Am. Ed. 1860), 1PP001–014; Joseph E. Worcester, *Dictionary of the English Language* (1860), 1APP015–029; Alexander M. Burrill, *A Law Dictionary & Glossary* (2d ed. 1867), 1APP030–45.

powers “is a central tenet of our constitutional structure and a fundamental bulwark of democratic freedom.”). Separation of powers provisions, like Nevada’s, “suggest[] that for each branch of government, there is a corresponding identifiable function” G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U Ann. Surv. Am. L. 329, 338 (2003). “This encourages an interpreter to employ what is usually referred to as the formalist approach to the separation of powers—that is, identifying whether a particular power is legislative, executive, or judicial and then ensuring that it is exercised only by the appropriate branch.” *Id.*¹⁶

The Clark County District Attorney’s Office is in violation of this proscription because two deputy district attorneys currently serve in the Nevada Senate. This concentration of executive and legislative powers and functions is unconstitutional.

¹⁶ This approach is most consistent with this Court’s approach of construing the Nevada Constitution based on the plain meaning as it would have been understood at the time of adoption. *Compare id. with Strickland*, 126 Nev. at 234, 235 P.3d at 608. However, as will be discussed below, even under a “non-formalist” construction of the separation of powers provision, the Clark County District Attorney’s Office is in violation of the constitutional provision. *See* n.26 & accompanying text below.

1. Prosecution belongs to the Executive Department; legislation belongs to the Legislative Department.

Two powers are relevant here: prosecution and legislation.

Prosecution is a power properly belonging to the Executive Department; because it is a “power,” it is also a “function appertaining” to the Executive Department. Similarly, creating law is a power properly belonging to the Legislative Department; because it is a “power,” it is also a “function appertaining” to the Legislative Department.¹⁷

a. Prosecution of criminal offenses is both a power properly belonging to and a function appertaining to the Executive Department.

“The executive power extends to the carrying out and enforcing the laws enacted by the Legislature.” *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.3d 237, 242 (1967). Prosecution of offenses is a “quintessential” part of this power. *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting). Indeed, in a long line of cases, this Court has so held. *See, e.g., State v. Second Jud. Dist. Ct. (Hearn)*, 134 Nev.

¹⁷ The language of Art. 3, § 1 suggests that “functions” are broader than “powers,” but that if one is exercising a power of one department, that person is necessarily exercising a function of that department too. *See* 1APP009–10 (definition of “power”); 1APP004 (definition of “function”).

783, 786, 432 P.3d 154, 158 (2018) (“[C]harging decisions are within the executive realm and sentencing decisions are inherently judicial functions.”); *Schoels v. State*, 114 Nev. 981, 991, 966 P.3d 735, 741–42 (1998) (Shearing, J., concurring) (“Charging decisions are primarily a matter of discretion for the prosecution, which represents the executive branch of government.”); *Sandy v. Fifth Jud. Dist. Ct. (State)*, 113 Nev. 435, 440, 935 P.2d 1148, 1150–51 (1997) (noting judicial power to reject plea bargains is a necessary check on “the abuse of prosecutorial (executive) prerogatives”); *Righetti v. Eighth Jud. Dist. Ct. (State)*, 133 Nev. 42, 46, 388 P.3d 643, 647 (2017) (“And permitting a district court to accept such a guilty plea would allow the judiciary to invade a realm where the executive branch maintains *almost exclusive control*, in violation of separation-of-powers principles.” (emphasis added)).¹⁸

¹⁸ Other jurisdictions have reached the same conclusion. *See, e.g., People v. Delavega*, 273 Cal. Rptr. 3d 843, 852 (Cal. Ct. App. 1st 2021); *Anderson v. Florida*, 291 So.3d 531, 535 (Fla. 2020); *In re Jackson*, 51 A.3d 529, 538 (D.C. 2012); *Washington v. Rice*, 246 P.3d 234, 241 (Wash. Ct. App. 2011).

That prosecution is a power properly belonging to the Executive Department is also consistent with the plain meaning of Art. 3, § 1. As a near contemporaneous dictionary explained:

EXECUTIVE, that branch of government which performs the functions of state. It differs from *legislative* and *judicial*, thus: the body that deliberates and enacts laws is legislative: the body that judges and applies laws in particular cases is judicial: and the body that carries the laws into effect, or superintends the enforcement of them, is executive, which power, in all monarchies, is vested in the sovereign.¹⁹

That prosecution is a power properly belonging to the Executive Department is also consistent with the common law understanding of separation of powers.²⁰ As a law professor explained in summarizing the history of state separation of powers, the executive power was “the king’s prerogative,” which included prosecution of the law. *See* Jonathan Zasloff, *Taking Politics Seriously: A Theory of California’s Separation of Powers*, 51 UCLA L. Rev. 1079, 1098 (2004); *see also* 1

¹⁹ 1APP285.

²⁰ The framers of Nevada’s Constitution regularly referred to the common law in their deliberations. *See, e.g.*, Andrew J. Marsh, *Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada* 681, 701, 719 (July 4, 1864).

William Blackstone *258 (“IN criminal proceedings or prosecutions for offenses, it would still be a higher absurdity, if the king personally sate in judgment; because in regard to these he appears in another capacity, that of prosecutor.”).

Finally, other provisions of the Nevada Constitution recognize that prosecution is a power of the Executive Department. The Executive Department is charged, through the Governor, to “see that the laws are faithfully executed.” Art. 5, § 7. No other provision of the Nevada Constitution directly addresses the execution of the laws, indicating that the power of prosecution belongs to the Executive Department.²¹ Nevada’s statutes further support that prosecution is a power of the Executive Department. The Attorney General—a named officer of the Executive Department—has supervisory responsibility over all district attorneys. *See* NRS 228.120(2). Indeed, the Attorney General must “prosecute or defend” in front of the Nevada Supreme Court “[a]ll causes to which the State may be a party.” NRS 228.140(1)(a). Thus, the

²¹ This is especially so because the duties of the Attorney General and the existence of District Attorneys are in the discretion of the Legislature. *See* Art. 5 §§ 19, 22; Art. 4, § 32.

district attorney's role as "public prosecutor" is a role under the supervision of the Executive Department. *See* NRS 252.080; NRS 228.120(2).²² And all criminal actions are "prosecuted in the name of the State of Nevada, as plaintiff." NRS 169.055.

Because of the core importance of prosecution to the Executive Department, the distinction between powers and functions is not relevant. Prosecution of criminal offenses is a "power[] properly belonging to" the Executive Department. It follows that prosecution is also a "function[] appertaining to" the Executive Department.

- b. Creating law is a power properly belonging to the Legislative Department; voting on bills, exercising discretion related to hearing bills, and scheduling bills are functions appertaining to the Legislative Department.**

"[L]egislative power is the power of law-making representative bodies to frame and enact laws, and to amend or repeal them."

Galloway, 83 Nev. at 20, 422 P.2d at 242.²³ This Court has explained

²² Notably, the Attorney General's Office has unilateral authority to "[a]pppear in, take exclusive charge of and conduct any prosecution." NRS 228.120(2).

²³ *See* 1APP432 (definition of "legislature").

that, “except where limited by Federal or State Constitutional provisions, that power is practically absolute.” *Id.* Many functions appertain to the Legislative Department, including serving on committees, voting on bills, and scheduling hearings. *See* Nev. S. Standing R. 40(1) (81st Sess. 2021); *see also* Nev. S. Standing R. 43 (81st Sess. 2021).

The Senate Majority Leader enjoys great discretion in exercising functions appertaining to the Legislative Department. *See, e.g.*, Nev. S. Standing R. 40(1) (81st Sess. 2021) (appointing standing and select committees, determining majority-minority party composition, and appointing majority leader’s party); *id.* (designating committee chair); Nev. S. Standing R. 6(4)(a) (appointing interim committees). So, too, do committee chairs. No one but the Chair of the Committee may “determine the agenda of each meeting of the committee,” subject only to the qualifications that members may request an agenda item or that a majority of the committee may “by vote, add an item.” *See* Nev. S. Standing R. 53(9) (81st Session 2021). If a bill is not placed on an agenda, it cannot be voted out of committee and will fail to meet the bill

deadlines for the session. *See* Nev. S. Standing R. 53(5) (81st Sess. 2021); Nev. Joint Standing R. 14.3(1) & (3) (81st Sess. 2021). And these functions continue between regular sessions.²⁴

2. The senator-prosecutors and the Clark County District Attorney are in violation of Article 3, § 1.

Here the separation of powers violation goes in two directions. First, the senator-prosecutors are in violation of Art. 3, § 1 because they, as senators, are charged with powers properly belonging to the Legislative Department, but as prosecutors exercise functions appertaining to the Executive Department. Second, the Clark County District Attorney is a person charged with powers properly belonging to the Executive Department, but as the supervisor of the senator-prosecutors, exercises functions appertaining to the Legislative Department.

Both violate the Nevada Constitution.

²⁴ *See, e.g., The Nevada Legislature: Interim Committees*, <https://www.leg.state.nv.us/App/InterimCommittee/REL/Interim2021>; *see also* Assembly Bill 443 (81st Session 2021), § 6(2)(c)(noting majority leader of the senate has appointment power to interim committees).

a. The senator-prosecutors are violating separation of powers by exercising functions appertaining to the Executive Department.

There can be no question that the two senator-prosecutors are “charged with the exercise of powers properly belonging to one of these departments”—the Legislature. *See Nev. Const. Art. 3, § 1; Nev. Const. Art. 4, §1.* Thus, the senator-prosecutors are prohibited from “exercise[ing] any functions appertaining to either of the others” *Nev. Const. Art. 3, § 1.*

But, as discussed above, there can also be no question that the prosecution of offenses under Nevada law is a “function” “appertaining” to the Executive Department. *See § A.1 above.* By law, deputy district attorneys prosecute offenses. *See NRS 252.070(1).* So the senator-prosecutors exercise powers properly belonging to the Legislative Department and also exercise functions appertaining to the Executive Department. As this Court recently explained, the Nevada Constitution’s use of the word “any,” demonstrates a “provision has broad application.” *Legislature v. Settlemeyer*, No. 81924, 137 Nev. Adv. Op. 21, slip op. at *8–9 (May 13, 2021). Thus, for the Senators, Art.

3, § 1’s prohibition “has broad application and applies to all” functions appertaining to the Executive Department. *Id.*

This is a violation of the constitution whether the Court follows a formal or flexible approach to interpreting the provision.²⁵ Even the “flexible” approach requires personnel to be completely distinct between departments. *See, e.g.,* Zasloff, 51 UCLA L. Rev. at 1095–108 (“In other words, history strongly supports a flexible, nonformalist understanding of separation of powers in which functions of the office are fluid but personnel are distinct.”).²⁶ The senator-prosecutors dual roles violate the mandate that personnel be distinct. And it is worth emphasizing that this dual-role exists both during and in-between Legislative Sessions.

²⁵ As indicated above, the “formalist” approach to construction is more consistent with this Court’s jurisprudence governing how to construe the Nevada Constitution.

²⁶ Zasloff traces the history of separation of powers provisions in state constitutions from Virginia’s state constitution to California’s. 51 UCLA L. Rev. at 1102–03. Nevada’s Constitution borrowed from California’s. *See* Michael W. Bowers, *The Nevada State Constitution* 11, 14 (2d ed. 2014); *see also* Cal. Const. Art. III (1849).

b. The Clark County District Attorney is violating separation of powers by exercising functions appertaining to the Legislative Department.

Nor can there be a question that the Clark County District Attorney—and his deputies—are persons charged with the exercise of powers properly belonging to the Executive Department. As explained above, prosecution is a power properly belonging to the Executive Department. *See* § A.1.a above. By law, both the Clark County District Attorney and deputy district attorneys are the “public prosecutor.” NRS 252.080; *see also* NRS 252.070(1) (“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 . . .”).²⁷

There can also be no question that the two senator-prosecutors exercise functions appertaining to the Legislative Department. As discussed above, their role as senators gives them lawmaking powers. *See* § A.1.b above. And, pursuant to those powers, the senators exercise many functions related to legislating.

²⁷ The State has conceded that the Clark County District Attorney is an “executive agency.” 3APP483.

But, the Clark County District Attorney himself exercises functions appertaining to the Legislative Department because the senator-prosecutors are in a subordinate position to him. After all, the senator-prosecutors work for the Clark County District Attorney. Thus, when the deputy district attorneys act, they do so with the same authority and “to the same extent as their principals” and are authorized to “perform such duties as the district attorney may from time to time direct.” NRS 252.070. Disentangling their acts as deputy district attorneys from their acts as legislators is not feasible. Indeed, by using the phrase “no person,” Art. 3, § 1 instructs this Court not to be pulled into a line-drawing exercise: if the person is “charged with the exercise of powers properly belonging to one of these departments,” then that person shall not “exercise any functions appertaining” to the others. Nev. Const. Art. 3, § 1.

The need for a blanket prohibition is especially clear here. The Clark County District Attorney timed the filing of this case to coincide with relevant legislation. And then the Clark County District Attorney, through publicized comment, instructed “legislative leaders” to

“recognize that there are some people who commit such heinous acts” and further that he wanted “our lawmakers to have their eyes wide open.”²⁸ The Senate Majority Leader and the Chair of the Senate Judiciary Committee are “legislative leaders.” This creates a problem that the separation of powers provision specifically seeks to avoid: the appearance that executive powers are manipulating the legislative process. This appearance is present regardless of whether the manipulation is real or successful. And, when the Chair of the Senate Judiciary Committee did not schedule the relevant legislation for a hearing, the apparent success only fed the appearance of executive department manipulation.²⁹

Complete separation of powers, as required by the Nevada Constitution, avoids this problem altogether, and for good reason. If legislation fails, it should do so without the appearance that one branch of government is dominating another.

²⁸ 1APP164.

²⁹ *See, e.g.*, 3APP576–78 (explaining fate of abolition bill depended on senate-prosecutors under control of death penalty supporter Steve Wolfson); 3APP556–59 (similar); 3APP579–83 (suggesting abolition bill “never really had much hope in a Senate led by a prosecutor”).

3. None of the distinctions drawn below by the State or the district court are relevant.

The State and the district court both offered distinctions to support that there is no separation of powers violation. None of these distinctions apply.

a. The senator-prosecutors' leave status is irrelevant.

The district court reasoned that disqualification was unnecessary because, according to representations made by the deputy district attorney assigned to Floyd's case, the senator-prosecutors were on unpaid leave from the District Attorney's Office during the legislative session, receiving pay from the Legislative Department.³⁰ Critically, however, the court conducted no factual development, despite Floyd's Motion for Reconsideration specifically noting this problem.³¹ Thus, important facts related to the specific employer-employee relationship between the district attorney and his deputies remain unknown. For example, the record does not indicate how a period of "leave without

³⁰ 3APP552–54; 3APP585.

³¹ 3APP560–68.

pay” factors into other discretionary decision of the Clark County District Attorney, like promotions, raises, or seniority-based layoffs.³² Nor is it clear how the District Attorney exercises his discretion to grant unpaid leave to senator-prosecutors, or how those senator-prosecutors serve terms of 120 days when unpaid leave is limited to 90 days.³³

In any event, the district court erred for a separate reason: the leave status of the senator-prosecutors is irrelevant to Floyd’s disqualification motion. As an initial note, the senator-prosecutors were employed by the Clark County District Attorney’s Office in November, December, and January, while the office was not moving Floyd’s case forward. During this time, the failure to act in Floyd’s case was as consequential to this disqualification issue as the district attorney’s filings and statements to the press. In addition, the legislative session is now over so, presumably, the senator-prosecutors are no longer on leave; under the logic of the district court’s order, the separation of powers is, again, violated. But because of the ability for the Legislature

³² 1APP125–26, 1APP128.

³³ 1APP129–30; *see also* Nev. Const. art. 4 § 2 (sine die is the “end of the 120 th consecutive *calendar day*” (emphasis added)).

to hold interim sessions and participate in interim committees on issues including the death penalty, the senator-prosecutors' legislative duties have not ended.

Moreover, the senator-prosecutors are still employees of the Clark County District Attorney, even when they are on unpaid leave. *See, e.g., DeVito v. Chicago Park Dist.*, 83 F.3d 878, 880 (7th Cir. 1996) (noting “commonsense understanding that an employee on unpaid leave is still an ‘employee’ in that he is still under the control of his employer (*e.g.*, he could still be fired or demoted).”). The employer-employee power hierarchy remains. *See id.*

b. The distinction between functions and “sovereign” functions is irrelevant.

The State argued that “the type of person that the Constitution is referring to is someone that the Constitution has expressly granted powers” and, specifically, that “[t]hese are positions that are charged with a sovereign function of government.”³⁴ This is incorrect: “sovereign function” appears nowhere in Article 3, § 1, and the State’s

³⁴ 2APP467.

cited case, *State ex rel. Kendall v. Cole*, 38 Nev. 215, 148 P. 551 (1915), discusses a different provision of the Nevada Constitution, Art. 4, § 8. *Kendall*, 148 P. at 551–52.

Moreover, the distinction between “sovereign functions” and non-sovereign functions is unhelpful to the Clark County District Attorney because prosecution is a “sovereign function.” *See, e.g., Hooper v. State*, 248 P.3d 748, 749 (Idaho 2011) (“When a county prosecutor charges a defendant in a criminal proceeding, he or she is exercising the State’s inherent sovereign power to prosecute crime” (collecting cases)). Like other public officers, deputy district attorneys take an oath, which “is some indication by which to determine if a position is an office.”

Compare Kendall, 148 P. at 553 *with* NRS 252.070(3). Deputy district attorneys are “charged by law with duties involving an exercise of some part of the sovereign power of the state,” namely prosecution. *Compare Kendall*, 148 P. at 553 *with* NRS 252.070(1) *and* NRS 169.055.³⁵

³⁵ Indeed, the treatises cited in *Kendall* also demonstrate that prosecution is a sovereign function. Some relevant sections have been excerpted and can be found in the Appendix. *See* 1APP046–51, 1APP052–56; *see* Floyd R. Mechem, *A Treatise on the Law of Public*

c. The distinction between District Attorneys and deputy district attorneys is irrelevant.

The district court also distinguished between the elected District Attorney and deputy district attorneys, quoting in whole NRS 252.070(1).³⁶ But the district court did not explain the statute’s relevance to the court’s analysis.³⁷ Ostensibly, it was because the State argued, without citing supporting authority, that the distinction between the elected District Attorney and deputy district attorneys means that deputy district attorneys do not “hold public office” by virtue of prosecuting cases.³⁸ This assumes too much. First the framers of the Nevada Constitution knew how to limit a prohibition to “civil office,” as evidenced by the fact that they used the phrase in Article 4, § 8.

Offices and Officers (1890), 1APP047 (§ 18, executive officers cause the laws to be executed); App. 1APP050 (§ 570, deputy to an officer is herself “public officer”); *compare* 1APP049 (§ 38, where duties prescribed by law, bond required, and oath of office administered, deputy is public officer) *with* NRS 252.070(1)–(3); *compare* Bruce Wyman, *The Principles of the Administrative Law Governing Relations of Public Officers* (1903), 1APP054 (§ 44 “The essential thing is that in some way or other the officer is identified with the government.”) *with* NRS 169.055.

³⁶ 3APP553.

³⁷ *Id.*

³⁸ 2APP467.

Second, the State’s argument incorrectly assumes that Art. 3, § 1 is focused on the office as opposed to the powers or functions. But Art. 3, § 1 is unambiguously focused on the powers and functions exercised by a “person” not whether that person is serving in multiple “public offices.” Thus, senators are prohibited from exercising “*any* function appertaining” to the Executive Department. And, prosecutors are prohibited from exercising “*any* function appertaining” to the Legislative Department. How the role is described or labeled—whether a “public office” or not—is irrelevant to the analysis under Article 3.

Third, and finally, the State’s argument incorrectly assumes that, because deputy district attorneys do not have “policymaking authority,” they are not “public officers.” As discussed above, *Kendall*, and the treatises supporting it, demonstrate that deputy district attorneys are public officers. *See* n.35 above. Though elected district attorneys and deputy district attorneys do not possess all the same powers, for purposes of “public office,” what matters is the power they do share: prosecution, a fundamental executive power. Moreover, deputy district attorneys swear an oath, may be required to provide “[b]onds for

faithful performance,” and their duties are provided for under law. *See* NRS 252.070. The fact that they do not possess “policymaking authority for the office of the district attorney or the county by which the deputy district attorney is employed” does not change the fact that prosecution is itself a power of the executive branch. *See* NRS 252.070.

4. This violation of the Nevada Constitution led to a specific and identifiable impropriety.

The violation of separation of powers is, itself, a specific and identifiable impropriety. However, here, the specific and identifiable impropriety goes much farther because of the Clark County District Attorney’s actions. The Clark County District Attorney delayed the execution of Zane Floyd for five months; when the Clark County District Attorney finally took action in this case, it was not with a filing, but with an interview to the press, which included explicit instructions to “legislative leaders”; and when the Clark County District Attorney finally filed documents in this case, it was timed with near-perfect correlation with legislation.³⁹ Even if this Court were to hold that,

³⁹ *See* Bill History, *supra* n.2; 1APP163-66; 1APP174-235.

generally, a separation of powers violation is not, standing alone, a “specific and identifiable impropriety,” the misconduct of the Clark County District Attorney in this case requires this Court to find such an impropriety here.

Below the State argued that the “specific and identifiable impropriety” standard only applies to conflicts of interest, and further, that *State v. Eighth Jud. Dist. Ct. (Zogheib)*, 130 Nev. 158, 321 P.3d 882 (2014), provides the applicable standard.⁴⁰ There, this Court explained that for a conflict of interest to be imputed to the entire prosecutor’s office, “the appropriate inquiry is whether the conflict would render it unlikely that the defendant would receive a fair trial unless the entire prosecutor’s office is disqualified from prosecuting the case.” *Zogheib*, 130 Nev. at 165, 321 P.3d at 886. The State’s argument is wrong.

Nothing in the logic or text of this court’s disqualification jurisprudence suggests it is limited to conflicts of interest. *See, e.g., Brown*, 116 Nev. 1200, 14 P.3d 1266. Moreover, an ethical violation, “in itself, is neither a necessary nor a sufficient condition for

⁴⁰ 2APP471-72.

disqualification.” *In re Estate of Myers*, 130 P.3d 1023, 1025 (Col. 2006) (en banc); *see also Cronin v. Eighth Jud. Dist. Ct. (Engelstad)*, 105 Nev. 635, 638, 642, 781 P.2d 1150, 1152, 1154 (1989) (disqualification based on improper communication with represented party), *overruled on other grounds in Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Ct. (Ins. Comp. of the West)*, 123 Nev. 44, 54 n.26, 152 P.3d 737, 743 n.26 (2007).

But, more importantly, these facts show why a conflict of interest is the wrong frame; questions regarding conflicts of interest simply cannot address the problems posed by a separation of powers violation. Separation of powers is meant to prevent a singular interest from being supported by multiple branches of government. “The accumulation of powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.” *The Federalist No. 47* (Madison). The tyranny referenced is not a conflict but a concentration of interest. The Clark County District Attorney has too much power in support of its interests. Indeed, in the same Federalist Paper, Madison quotes Montesquieu explaining, “When the legislative and executive powers are united in the same person or body . . . there

can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.” *Id.*

“The Founders recognized that the combination of legislative and prosecutorial power is a much more explosive mixture than the combination of judicial and prosecutorial powers because the *former would likely lead to the abuse of power due to the highly political nature of the legislature.*” Todd David Peterson, *Federal Prosecutorial Independence*, 15 Duke J. Const. L. Pub. Pol’y 217, 237 (2020) (emphasis added). Separating the powers of prosecution from the power of legislation is “designed to protect [the process of prosecution] from political influence and unfairness to those who are subject to criminal investigation and prosecution.” *Id.* at 261. The potential for abuse of power and politicization is present even if the defendant receives the “fair trial” referenced in *Zogheib*. 130 Nev. at 165, 321 P.3d at 886.

Thus, this Court should not apply the *Zogheib* conflict of interest standard, and instead should ask whether there is “at least a reasonable possibility that some specifically identifiable impropriety did

in fact occur.” *Brown*, 116 Nev. at 1205, 14 P.3d at 1270. It did. So, the only remaining question is whether “the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer’s continued participation in a particular case.” *Id.*

B. The Clark County District Attorney’s violation of Art. 3, § 1 creates a likelihood of public suspicion and no social interest is served by allowing the Clark County District Attorney’s Office to continue to represent the State.

The political implications of the Clark County District Attorney’s March 26 statements to the *Las Vegas Review-Journal* were immediately apparent. The article itself drew the connection, referencing the Assembly Bill and noting that “Floyd’s execution could take place as lawmakers wrap up their 2021 session, barring any further legal hurdles.”⁴¹ Indeed, the Clark County District Attorney himself seemed to appreciate the political implications by telling “legislative leaders” to “recognize that there are some people who commit such heinous acts”⁴² Other quoted individuals remarked on

⁴¹ 1APP164.

⁴² *Id.*

the politics of the Clark County District Attorney's decision.⁴³ Social media reactions expressed suspicion and concern about the Clark County District Attorney's motivations.⁴⁴ Subsequent reporting as the bill progressed also noted the connection.⁴⁵

These political implications raise serious questions regarding the Clark County District Attorney's separation of powers violation. How closely was the Clark County District Attorney working with his senator-prosecutors? Were they exchanging information related to the

⁴³ *Id.* at 165 (quoting Scott Coffee: "These things are always politicized to some extent," and Franny Forsman, "Moving forward on it now just seems like this is the wrong time Let people think about this. Let the legislators think about this. (Prosecutors) are trying to put this case front and center with the Legislature. Doing that with someone's life is inappropriate.").

⁴⁴ *See, e.g.*, 1APP162 (Michelle Rindels retweeting *Review-Journal* article, and paraphrasing Wolfson claiming coincidence); 1APP157 (Dayvid Figler noting "coincidence"); 1APP156 ("Doesn't seem like a coincidence with the attached statement."); 1APP159 (Michael Kagan: "And abolish political stunts involving killing people while we are at it."); 1APP158 (Bob Fulkerson: "Wolfson has pulled some cynical moved before, but using a human life to whip up base instincts for blood revenge to prevent the death penalty abolition bill from moving forward takes the cake."); 1APP160 ("Actively using a human life to fight a political battle....there are no words for this stunt."); 1APP161 (Jon Ralston: "Coincidence").

⁴⁵ *See, e.g.*, 2APP251-53 ("Soon after the bill was introduced last month, Wolfson's office announced that it is seeking an imminent order of execution"); 1APP167-70 ("Some critics have said the timing suggests prosecutors are using Floyd's life as part of a political play.");

execution warrant of Zane Floyd and the abolition bill? Was the timing of the execution warrant of Zane Floyd to politically aid the senator-prosecutors? The answers to these questions, or others, matter less than that reasonable members of the public might ask them. *See Cronin*, 105 Nev. at 641–42, 781 P.2d at 1154 (applying objective standard). The disqualification standard asks not whether the public suspicion is confirmed, but whether there is a reasonable likelihood of it. *Id.*

And there can be no question that such a reasonable likelihood exists. Media coverage of the abolition bill in Nevada consistently noted that the Senate Majority Leader and the Chair of the Senate Judiciary Committee are prosecutors for the Clark County District Attorney’s office.⁴⁶ After the death penalty bill failed, coverage continued to note

⁴⁶ 1APP171-73. (“The bill faces a more uncertain climate in the Senate, where Senate Majority Leader Nicole Cannizzaro (D-Las Vegas), who is a prosecutor, would not commit on Tuesday to giving the bill a hearing. Both Cannizzaro and Melanie Scheible (D-Las Vegas), who chairs the Senate Judiciary Committee, have day jobs at the Clark County District Attorney’s Office.”); 3APP510-20; *see also* 3APP508-09 (“State Sens. Nicole Cannizzaro and Melanie Schieble, both Democrats from Las Vegas, work as criminal prosecutors under Clark County District Attorney Steve Wolfson—who not only supports capital punishment, but is actively seeking an execution date for a man convicted of walking into a Las Vegas supermarket and killing four people in 1999.”); 3APP505-07 (“But a part of Democratic senators, both

the connection, sometimes attributing the connection as part of the reason the bill failed.⁴⁷ This reasonable likelihood would exist, though, notwithstanding the media coverage. The Clark County District Attorney has a supervisory role over the two senator-prosecutors; he made his policy preference known, and used the powers of his office to highlight a case and tell “legislative leaders” to consider that case in the exercise of their legislative functions. This use of power creates a dilemma for the senator-prosecutors: they may vote in line with their boss or vote against him and risk their stature within the office. Placing the senator-prosecutors in this position violates the public trust.

There is no social interest in allowing the Clark County District Attorney to continue the prosecution in this case. Until the State moved for the execution, this case had not been litigated in the state for a

of whom work as prosecutors when the legislature is not in session, may derail the effort.”); 1APP167-70.

⁴⁷ *See, e.g.*, 3APP570-75 (“No single cause of death is named on the legislative coroner’s report, but interviews with involved parties suggest a combination of factors—ranging from personal belief, mixed gubernatorial signals, potential election-related considerations and *the fact that two senators responsible for hearing the bill work for the Clark County district attorney . . .*” (emphasis added)); *see also* 3APP522-24.

decade. The last deputy district attorney listed on the case has since retired.⁴⁸ The trial attorneys on this case have also retired.⁴⁹

On the other hand, there is a strong social interest in disqualifying the Clark County District Attorney's Office. End-stage litigation in a death penalty case is always of high media and political interest. The citizens of the State of Nevada deserve the assurance that the lawyers representing the State and seeking Floyd's execution are doing so to "see that the laws are faithfully executed" and not to further agendas or manipulate the other branches of government. *See Nev. Const. Art. 5, § 7.*

VII. CONCLUSION

Based on the foregoing, Floyd respectfully requests that this Court issue a writ of mandamus, order the Eighth Judicial District court to disqualify the Clark County District Attorney's Office from representing the State of Nevada in this matter, and order the Eighth Judicial

⁴⁸ *See Floyd v. State*, Respondent's Ans. Br., at 45, No. 51409 (Nev. Oct. 8, 2009) (Steven Owens, Chief Deputy District Attorney).

⁴⁹ *See, e.g., Tr.* (July 18, 2000) (William T. Koot, Deputy District Attorney, Stewart L. Bell, District Attorney).

District Court to “appoint some other person to perform the duties of the district attorney.” NRS 252.100.

DATED this 24th day of June, 2021.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony
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Assistant Federal Public Defender

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

VERIFICATION PURSUANT TO NRAP 21(A)(5)

Pursuant to NRAP 21(a)(5), and under the penalty of perjury, the undersigned declares the following: that he is an Assistant Federal Public Defender acting for Zane Michael Floyd, petitioner in the above captioned petition; that he has read the foregoing PETITION FOR WRIT OF MANDAMUS AND PROHIBITION and knows the contents thereof and that the same is true and correct to his own knowledge, except as to those matters set forth on information and belief, and as to those matters he believes to be true.

Executed on June 24, 2021.

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(9), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14 point font: or

☐ This brief has been prepared in a monospaced typeface using Word Perfect with Times New Roman, 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c) it is either:

☒ Proportionately spaced. Has a typeface of 14 points or more and contains 6, 952 words: or

☐ Monospaced. Has 10.5 or few

☐ Does not exceed pages.

3. Finally. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that

this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted,

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with NRAP Rule 25(c)(1)(C) the undersigned hereby certifies that on this 24th day of June, 2021, I personally served a true and correct copy of the foregoing PETITION FOR WRIT OF MANDAMUS AND PROHIBITION by email to:

Alexander Chen
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

Further Service on the following party was made via UPS on June 24th 2021:

Hon. Michael Villani
District Judge
Department XVII
Regional Justice Center
200 Lewis Ave
Las Vegas, NV 89155

/s/ Sara Jelinek
An Employee of the
Federal Public Defender, District of Nevada

NOTICE OF FILING

In accordance with NRAP 21(a)(1), the undersigned hereby certifies that on this 24th day of June, 2021, I personally served a true and correct copy of the foregoing PETITION FOR WRIT OF MANDAMUS AND PROHIBITION, by email to:

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Chief Deputy District Attorney
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