

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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ZANE M. FLOYD

Petitioner,

vs.

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

Respondents,

And

THE STATE OF NEVADA,

Real Party in Interest.

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Elizabeth A. Brown  
Clerk of Supreme Court

CASE NO: 83108

D.C. No.: 99C159897

**ANSWER TO PETITION FOR WRIT  
OF MANDAMUS AND PROHIBITION**

COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, ALEXANDER G. CHEN, on behalf of the above-named Respondents and submits this Answer to Petition for Writ of Mandamus in obedience to this Court's order filed July 5, 2021 in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 2<sup>nd</sup> day of August, 2021.

Respectfully submitted,

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

BY /s/ Alexander G. Chen  
ALEXANDER G. CHEN  
Chief Deputy District Attorney  
Nevada Bar #010539  
Office of the Clark County District Attorney

**MEMORANDUM OF  
POINTS AND AUTHORITIES**

**STATEMENT OF THE CASE RELEVANT TO THIS PETITION**

On July 19, 2000, Petitioner Zane Floyd was unanimously found guilty beyond a reasonable doubt by a jury of his peers. The jury convicted Petitioner Floyd of four counts of Murder with Use of a Deadly Weapon, one count of Attempt Murder with Use of a Deadly Weapon, one count of Burglary with Use of a Deadly Weapon, one count of First Degree Kidnapping with Use of a Deadly Weapon, and four counts of Sexual Assault with Use of a Deadly Weapon. The case was prosecuted by former Clark County District Attorney Stewart Bell and one of his chief deputies, William Koot.

On July 21, 2000, the same jury unanimously found beyond a reasonable doubt that the mitigating factors did not outweigh the aggravating circumstances and

imposed a penalty of death for each of the four separate counts of Murder Use of a Deadly Weapon. Upon the jury's verdict imposing a penalty of death, Petitioner Floyd initiated voluminous litigation to overturn the jury's verdict. Petitioner Floyd's litigation eventually went to federal court where the Ninth Circuit Court of Appeals denied his appeal from the denial of a petition for a writ of habeas corpus. On November 2, 2020, slightly over twenty years from the jury's verdict, the United States Supreme Court denied certiorari which effectively ended Petitioner Floyd's pending litigation.

Upon receiving notification that Petitioner Floyd had exhausted his appellate remedies, the Real Party in Interest (hereinafter "the State") began to prepare the statutorily mandated filings in Petitioner's case, which included an extensive review of twenty years of procedural history. Coincidentally, the Nevada Legislature commenced their 81<sup>st</sup> session on February 1, 2021. Among the many proposed bills that eventually were introduced in the Legislature was A.B. 395, which called for the outright abolition of the death penalty.

On March 31, 2021, the Assembly Committee on Judiciary held a hearing where proponents and opponents of the bill testified.<sup>1</sup> The make-up of representatives in favor of the bill included multiple defense attorneys, including an

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<sup>1</sup> Video of the entire hearing can be found at <http://sg001-harmony.sliq.net/00324/Harmony/en/PowerBrowser/PowerBrowserV2/20210331/-1/?fk=7836&viewmode=1>

attorney from the Federal Public Defender of Nevada, which is the Office that currently represents Petitioner Floyd.

As part of the committee hearing, individuals were also called upon to voice opposition to the passage of A.B. 395. Included among the speakers that voiced opposition against the passage of A.B. 395 was the president of the Nevada District Attorney's Association, the District Attorney of the Washoe County, and the Clark County District Attorney, Steven Wolfson.

District Attorney Wolfson's testimony against the passage of A.B. 395 was consistent with an article published by the Las Vegas Review Journal on March 26, 2021.<sup>2</sup> In the article, District Attorney Wolfson indicated that the State would be seeking a warrant of execution in the coming weeks. Moreover, he was specifically quoted with the following:

"I think the timing is good...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."

"We [the State] would be moving forward with the Zane Floyd efforts at obtaining the order and warrant of execution notwithstanding the Legislature. ... **I'm**

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<sup>2</sup> 1 PA 163-166.

**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. They need to be aware that there are these kinds of people out there where the jury has spoken loudly and clearly.” (Emphasis added).

On April 14, 2021, the State filed a motion seeking the court's signature of an order and warrant of execution. Immediately upon the State filing its motion, Petitioner Floyd filed a motion with the district court seeking to remove the Clark County District Attorney's Office. The basis for removal was two-fold: (1) it argued that service of two deputies within the office that also served as legislators was in violation of the Nevada's Constitution and (2) the statement by DA Wolfson and the subsequent filings created a “specifically identifiable impropriety.”<sup>3</sup>

A.B. 395 was not passed during the legislative session. Governor Sisolak, who serves as the head of the executive branch, issued a statement prior to the ultimate demise of A.B. 395. It should be noted that Governor Sisolak is not a member of the Clark County District Attorney's Office. *See Nevada Constitution, Article 5, Section 1.* On May 13, 2021, a day before the committee deadline, Governor Sisolak issued a statement that said, “[A]t this time, there is no path forward for Assembly Bill 395 this legislative session. I've been clear on my position that capital punishment should

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<sup>3</sup> 2 PA 236-50.

be sought and used less often, but I believe there are severe situations that warrant it.”<sup>4</sup>

The following day, the district court heard oral arguments on Petitioner Floyd’s motion to have the State removed from seeking his order and warrant of execution. The district court took the matter under advisement, and later issued a written order denying Petitioner Floyd’s motion to have the Clark County District Attorney’s Office removed. According to the district court:

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 legislature 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.<sup>5</sup>

Petitioner Floyd then made a motion for reconsideration on the denial of his motion to have the State disqualified, but the district court issued a Decision and Order denying the reconsideration because there had been no change in circumstances. Petitioner Floyd then filed the instant Petition for Writ of Mandamus and/or Prohibition.

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<sup>4</sup> 3 PA 521.

<sup>5</sup> 3 PA 552-555

## **SUMMARY OF THE ARGUMENT**

The Separation of Powers Clause of the Nevada Constitution is not implicated by this case. Senators Cannizzaro and Scheible have had zero involvement with Petitioner Floyd's case. The conviction and statutes that apply to Petitioner Floyd's case predate their involvement in the legislature. Furthermore, there was nothing improper about District Attorney Wolfson's statements or reasons that the Clark County District Attorney's Office should be removed from his case.

## **ARGUMENT**

The district court is responsible for controlling conduct of attorneys that practice before them, and the district court has broad discretion in "determining whether disqualification is required in a particular case." Robbins v. Gillock, 109 Nev. 1015, 1018, 862 P.2d 1195, 1197 (1993). To prevail on a motion to disqualify opposing counsel, the moving party must establish "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur," and that 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." Cronin v. Eighth Judicial Dist. Ct., 105 Nev. 635, 641, 781 P.2d 1150, 1153 (1989). A district court's determination whether to disqualify an attorney should not be disturbed absent a showing that the district court abused its discretion. Id., at 640, 781 P.2d at 1153. Importantly, the parties should not be allowed "to misuse motions for

disqualification as instruments of harassment or delay.” Flo-Con Systems, Inc. v. Servsteel, Inc., 758 F.Supp. 456, 458 (N.D. Ind. 1990) *cited by* Brown v. Eighth Judicial Dist. Court, 116 Nev. 1200, 1270, 14 P.3d 1266, 1270 (2000).

Petitioner Floyd makes the argument that the district court abused its discretion by refusing to remove the Clark County District Attorney’s Office from proceeding on his case. Citing Brown v. Eighth Judicial Dist. Court’s two considerations, his first argument is that the Clark County District Attorney’s Office must be removed because the employment of two Nevada State Senators is a “specifically identifiable impropriety.” Petition, at 8-10. To meet the second requirement of Brown, Petitioner Floyd cites to comments made by District Attorney Wolfson, the timing of the State’s filings, and selective Twitter accounts as indicia and support for his position that public suspicion supports the notion that the Clark County District Attorney’s Office should be removed.<sup>6</sup>

However, unlike other cases however that have challenged the involvement of Deputy District Attorneys Cannizzaro and Scheible, this case does not implicate their exercise of any executive powers. Ultimately the bulk of Petitioner Floyd’s case was litigated well before Deputy District Attorneys Cannizzaro or Scheible were employees of the Clark County District Attorney’s Office, and certainly before

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<sup>6</sup> 1 PA 156-162.



either of them sought elected office. Now, the Clark County District Attorney's has sought to fulfill its statutory obligations pursuant to NRS 176.495 and NRS 176.505, namely to obtain an order and warrant of execution for Petitioner Floyd. In doing so, Petitioner Floyd argues that the Clark County District Attorney's Office should be prohibited from satisfying its duties because proposed legislation, which would have inured to his personal benefit, was not passed.

Petitioner's petition amounts to an argument that the entire Clark County District Attorney's Office should not be permitted to handle any cases because Deputy District Attorneys Cannizzaro and Scheible are employed - that the entire office is in poor standing and in violation of the Nevada Constitution because of their employment. Similarly, if such was true, the equally logical yet incorrect conclusion would be that the laws passed by the Nevada Legislature would also carry no weight or authority because its membership was unlawfully and illegitimately comprised. This simply should not, and cannot, be true.

**A. THE DUAL SERVICE OF TWO DEPUTY DISTRICT ATTORNEYS THAT ALSO SERVE IN THE LEGISLATURE IS NOT AN IDENTIFIABLE IMPROPRIETY**

Although Deputy District Attorneys Cannizzaro and Scheible have never been involved with this case, Petitioner Floyd tries to disqualify the entire Clark County District Attorney's Office based on their service in the citizen-based legislature. His argument is that service to the Legislature is a specifically identifiable impropriety.

Article 3, Section 1(1) of the Nevada Constitution 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; 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 expressly directed or permitted in this constitution.”

Through the Nevada Constitution, each branch is given a specific role: “the legislature enacts laws, the executive branch is tasked with carrying out and enforcing the laws, and the judicial power is the authority to hear and determine justiciable controversies.” N. Lake Tahoe Fire v. Washoe Cnty. Commi’rs, 129 Nev. 682, 310 P.3d 583 (2013). Under our system of government, it is fundamental that the powers vested in the executive, legislative, and judicial departments be exercised without intrusion. City of North Las Vegas ex. Rel. Arndt v. Daines, 92 Nev. 292, 550 P.2d 399 (1976).

The general premise behind the separation of powers doctrine is to prevent one branch of government from encroaching on the powers of another branch. Comm’n on Ethics v. Hardy, 125 Nev. 285, 292, 212 P.3d 1098, 1103 (2009). This Court has previously considered what constitutes legislative, executive, and judicial powers: “Legislative power is the power of law-making representative bodies to frame and enact laws, and to amend and repeal them...The executive power extends

to the carrying out and enforcing the laws enacted by the legislature... ‘Judicial Power’...is the authority to hear and determine justiciable controversies. Judicial power includes the authority to enforce any valid judgment, decree, or order.” Galloway v. Truesdell, 83 Nev. 13, 19, 422 P.2d 237, 241-242 (1967).

While the Nevada Constitution states that no person charged with the exercise of functions shall exercise the functions in a separate department, the type of person that the Constitution is referring to is someone that the Constitution has expressly granted powers. These are positions that are charged with a sovereign function of government. State ex rel. Kendall v. Cole, 38 Nev. 215, 148 P.2 551 (1915). The Nevada Constitution is only referring to public officers, not all employees of those officers. For instance, in Kendall the Nevada Supreme Court listed numerous positions that while part of a judicial or executive office would not qualify as an “officer” as defined by the Constitution. Id. Similarly in Sawyer v. Dooley, this Court pointed out that “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 [Article 3 §1] refers.” 21 Nev. 390, 32 P. 437 (1893). Thus, the type of person that is meant to be prohibited from exercising dual functions is limited to those exercising a sovereign function, not a mere employee of an agency.

Under Nevada’s Constitution, the Legislature is responsible for establishing certain county officers, including the District Attorney’s Office. Article 4 § 32. The

formation of such offices is clearly not violative of the separation of powers because the power is specifically proscribed by the Constitution. NRS Chapter 252 was the legislature's conveyance of policymaking authority on the principal prosecutor. NRS 252.070 is the legislative enactment that allows the district attorney to appoint deputy district attorneys that work under the elected district attorney. Notably, NRS 252.070(1) explicitly states, "The appointment of a deputy district attorney must not be construed to confer upon that deputy policymaking authority for the office of the district attorney or the county by which the deputy district attorney is employed." NRS 252.070(1) makes it clear that a deputy district attorney only serves under the district attorney, and does not hold a public office by virtue of prosecuting cases.

Not only does NRS 252.070 indicate there is a difference between the elected district attorney and a mere deputy, but other cases have indicated the legal difference as well. For instance, in Price v. Goldman, this Court made it clear that deputy district attorneys do not have the authority to authorize wire intercepts. 90 Nev. 299, 301. 525 P.2d 598, 599 (1974). Relying upon the specific enumerated reasons, the Nevada Supreme Court agreed that 'district attorney' is not synonymous with everyone that works for a district attorney's office.

A deputy district attorney similarly is not the type of public officer that the Nevada Constitution contemplated because a deputy district attorney is merely an employee of an agency. *See State ex rel. Mathews v. Murray*, 70 Nev. 116, 120-21,

258 P.2d 982, 984 (1953). A deputy district attorney's responsibilities are provided for by statute. However, as the statutes above make clear, a deputy is not the same as an elected public official. A deputy simply does not possess the same powers or authority that was contemplated for the separation of powers clause. Since a deputy district attorney is a "public employee," the separation of powers doctrine as listed in Article 3 §1 is not applicable.

Specifically, for district attorneys this Court has held that the separation of powers was not applicable to the district attorney's office. Lane v. Second Jud. Dist. Ct., 104 Nev. 427, 437, 760 P.2d 1245, 1251 (1988). In citing NRS 252.110, which sets forth the powers inured to the district attorney, the Court indicated that the district attorney is not an office created via the Nevada State Constitution, thus the separation of powers doctrine is inapplicable.

Although Deputy District Attorneys Cannizzaro and Scheible are mere employees of an executive agency thus putting them outside of the purview of the separation of powers clause, it should be noted that they do not simultaneously exercise their functions. Nevada's legislative bodies meet for session once every other year. During those times, neither individual serves any type of executive function. Instead, both serve with their fellow legislators, which come from all different professions and backgrounds, to collectively propose, debate, and pass various laws. This argument that Petitioner Floyd makes simply lacks merit,

especially considering that neither individual has had any involvement with his case. All legislators have a personal and professional background where they can draw from their experiences, this principle is no different for Deputy District Attorneys Cannizzaro and Scheible. The mere fact that Deputy District Attorneys Cannizzaro and Scheible possess knowledge and experience from their positions should not be construed as a negative or illicit attribute.

Moreover, this Court should recognize that even though there is a separation between the branches of government, the practicality of the situation is that the functions of various branches can and do have interplay. Nevada's statutory scheme for passing laws confirms this. For instance, the Governor, as the leader of the executive branch, is permitted to draft and submit up to one hundred ten legislative measures during the legislative session. NRS 218D.175. Assuming that a proposed bill is passed by the Legislature, the Governor is required to then sign the bill into law. NRS 218D.660. When the law is passed, the executive branch is then tasked with enforcement of the law. This textbook example of a bill being passed that has substantial influence and involvement of the executive power. However, under Petitioner Floyd's rationale, the entirety of Nevada's legislative process is violative of the Separation of Powers Clause because executive branch is making decisions that can have an impact upon the legislative branch. If the Governor is permitted to

be involved with the process, then it must follow that mere employees of the District Attorney's Office would not be violating the Separation of Powers Clause.

**A. Membership Is The Sole And Exclusive Function Of The Legislative Body Itself**

The composition and qualifications of an individual to serve in the Legislature is left to the Legislature itself. With the separate bodies of government in mind, the Nevada Constitution does place certain specified limitations on the eligibility for membership. Article 4 § 4 states that Senators shall be chosen from the qualified electors of their respective districts and that no Senator shall serve more than 12 years. Article 4 § 6 grants each House the authority to determine the qualifications of its own members. Article 4 § 8 specifically prohibits a member of the legislature from accepting an appointment to a civil office of profit while serving. Article 4 § 9 makes certain federal officers ineligible for serving in the legislature. Article 6, § 11 even goes so far as to specifically say that judicial officers while they are serving are ineligible for other offices including any legislative positions. However, no such proscription applies to other agency employees. Clearly, of all the restrictions and qualifications set forth in the Nevada Constitution, there is no limitation that constitutionally prohibits a legislator that works as an employee for an executive agency. The principle that the Legislature is to determine its members' qualifications is also supported and recognized by the Nevada Supreme Court. *See Heller v. Legislature of State of Nev.*, 120 Nev. 456, 462, 93 P.3d 746, 750 (2004).

The Legislature is given deference in determining who is qualified to be a member of the Legislature. As seen in Heller, this Court refused to address this issue on the merits because to address the issue presented would in itself be a violation of the separation of powers. The Legislature was given the specific authority in the constitution to qualify their members, and this Court stated “by asking us to declare that dual service violates the separation of powers, the secretary urges our own violation of the separation of powers.” Id., at 459, 93 P.3d at 748.

Despite the argument that Petitioner Floyd attempts to make, there is simply no basis to remove the Clark County District Attorney’s Office from the case on the grounds that the Office is in violation of Article 3 § 1 of the Constitution. Here, Deputy District Attorneys Cannizzaro and Scheible were not and are not involved with Petitioner Floyd’s case. When they are serving as deputy district attorneys, they are merely serving as employees of an executive branch agency, and the separation of powers clause is not applicable to them. Finally, they are not simultaneously serving in both branches of government. Deputy District Attorneys Cannizzaro and Scheible fulfill their legislative responsibilities by taking leave from the District Attorney’s Office. When serving in the Legislature, they are only exercising legislative functions.

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## **II. THERE IS NO CONFLICT TO DISQUALIFY THE CLARK COUNTY DISTRICT ATTORNEY'S OFFICE**

While Petitioner Floyd has couched this argument based on an alleged a separation of powers issue, what he in essence is requesting is that this Court remove the District Attorney's Office from carrying out its lawful and statutory duty. Petitioner Floyd cannot argue that the Clark County District Attorney's Office is negating its statutory duty because even in its own pleading, it acknowledges that Petitioner Floyd has exhausted his appeals. Petition, at 2. Petitioner Floyd argues the District Attorney's Office waited nineteen days to request an Order and Warrant of Execution. However, absent from his argument is that the State should not have done so because he acknowledges that the State was within its rights under the statute to seek an order and warrant. Instead Petitioner Floyd wants the District Attorney's Office to be disqualified for actually doing what its function and purpose is, namely to enforce the laws of the State of Nevada. Petitioner Floyd attempts to make this argument by explaining that the Clark County District Attorney's involvement creates a "likelihood of public suspicion and no social interest is served." Petition, at 9.

Even more scrutiny should apply when a defendant is trying to nullify an entire prosecutor's office from handling his case. When a party wishes to disqualify a prosecutor, such impropriety must take the form of a conflict of interest. See NRPC 1.7, 1.9, 1.11; United States v. Kahre, 737 F.3d 554, 574 (2013) ("proof of a

conflict [of interest] must be clear and convincing to justify removal of a prosecutor from a case.”). Petitioner has failed to demonstrate, or even address, the existence of a conflict of interest. Black’s Law Dictionary defines “conflict of interest” as follows:

- 1) A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.
- 2) A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent. *Black’s Law Dictionary* (11th ed. 2019).

The disqualification of lawyers who work in government offices is governed by Nevada Rule of Professional Conduct 1.11. Rule 1.11(d) specifically states that lawyers who are in government offices “does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees.”

Petitioner Floyd, citing the standard in Brown, argues that the Clark County District Attorney’s Office should be removed based on a “likelihood of public suspicion” that “outweighs the social interests which will be served by a lawyer’s continued participation in a case.” Petition, at 33-37. Although Brown was in the context of a single attorney that would be disqualified, and not an entire prosecutor’s office, the general sentiment expressed in Brown is similar to the overruled case of Collier v. Legakes, 98 Nev. 307, 646 P.2d 1219 (1982). In Collier, the Nevada

Supreme Court at the time implied that disqualification of a prosecutor's office may be required "in extreme cases where the appearance of unfairness or impropriety is so great that the public trust and confidence in our criminal justice system could not be maintained without such action." Id. at 310, 646 P.2d at 1221. Both Brown and Collier use a standard that has to do with perception and society's overall interest in having a fair system of justice.

However, this Court later overruled Collier and has provided direct guidance as to the standard for removal of an entire district attorney's office. State v. Eighth Jud. Dist. Ct. (Zogheib), 130 Nev. 158, 321 P.3d 882 (2014). While most cases that involve a conflict-of-interest deal with the removal of private attorneys or firms, additional scrutiny should apply when removing an entire district attorney's office, and courts should "not unnecessarily interfere with the performance of a prosecutor's duties." Id., at 164, 321 P.3d at 886. Ultimately, the Court in Zogheib determined that "the appropriate inquiry is whether the conflict would render it unlikely that the Petitioner would receive a fair trial unless the entire prosecutor's office is disqualified from prosecuting the case." Id., at 165, 321 P.3d at 886.

The problem for Petitioner Floyd is that he cannot even meet the first factor that requires an actual conflict for removal. Moreover, the district court, and now this Court, is not being asked to remove the District Attorney's Office at a trial stage. Petitioner Floyd has already been convicted and has lost his appellate and post-

conviction remedies. This situation is not like Collier or Zogheib, which both dealt with the issue of whether an entire district attorney's office would need to be removed from a case because the office was employing an attorney who had previously represented the defendant. Even though the district attorney's offices were not barred from prosecuting in both Collier and Zogheib, here, there is not even an allegation that the Clark County District Attorney's Office has any confidential or intimate knowledge about Petitioner Floyd. The only conflict that Petitioner Floyd is trying to manufacture is that by performing its statutory duties, the District Attorney's Office should be removed from proceeding on his case. His only support for the removal is that there was a bill introduced that would have abolished the death penalty, but he provides no legal support that prosecutors are obligated to refrain from prosecuting statutes that are being considered by the Legislature.

In so much as Petitioner Floyd tries to impute a conflict using the separation of powers argument, neither Deputy District Attorney Cannizzaro or Scheible has ever worked on his case. Thus, even assuming *arguendo* that a conflict exists with regards to those two deputies, which the State adamantly maintains that there is no conflict, it would still give no basis to remove the entire Clark County District Attorney's Office from fulfilling its obligations. If in Zogheib the District Attorney's Office was properly able to remain on the case even though the elected District Attorney had previously represented the Petitioner, then it can hardly be the case

that the entire District Attorney's Office should be removed when two deputies have never been involved with the case happen to serve in a Legislature that considered a bill regarding the death penalty.

Additionally, although Petitioner Floyd is using an old standard that has already been repudiated by this Court, even under his proposed standard he would still have no right to removal of the District Attorney's Office. While Petitioner Floyd wishes to use District Attorney Wolfson's words in a Las Vegas Review Journal article as a basis for removal, he cites to no rule or authority that the District Attorney said anything incorrect or impermissible, either by statute or the Nevada Rules of Professional Conduct.<sup>7</sup> In fact, while Petitioner Floyd makes the argument that the State's filing is purely political, District Attorney Wolfson testified at the Committee on Judiciary hearing on March 31, 2021 and never once even uttered Petitioner Floyd's name. Thus, despite Petitioner Floyd's attempt at casting scrutiny on the timing of the State's efforts to actualize the jury's verdict, he has no evidence whatsoever that the District Attorney's Office is doing anything improper that would warrant its removal from this case.

Petitioner Floyd argues for removal of the Clark County District Attorney's Office on political grounds. Petition, at 32-37. However, his request is transparent

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<sup>7</sup> 1 PA 163-166.

when considering that he has no issue with any other individual's political statements about the death penalty, so long as the position favors his own. He is represented by an office that testified in favor of A.B. 395. He is seeking that the Attorney General's Office take over his case, but he has no problem with the fact that the Attorney General has made public concerns regarding to the death penalty.<sup>8</sup> Apparently, the only entity that is not permitted to speak of the death penalty, in his mind, is the agency that prosecuted him.

He continues his argument by raising hypothetical questions of potential separation of powers violations such as conversations the District Attorney's Office may have had with the two Senators. Although there would be nothing improper if conversations about potential legislation did take place, Petitioner Floyd is still unable to present evidence of any such conversation. Moreover, even the timeline used by Petitioner Floyd clearly shows that all actions taken by the Assembly (not even the Senate where the deputy district attorneys serve) were matters of public record.

Not only is Petitioner Floyd's hypothetical not true, but another member of the Assembly, Clara Thomas, also works as an employee for the District Attorney's

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<sup>8</sup> David Ferrara, Nevada's top officials disagree on capital punishment, Las Vegas. Rev. J. (Apr. 11, 2021), available <https://www.reviewjournal.com/local/local-nevada/nevadas-top-officials-disagree-on-capital-punishment-2325897/>

Office<sup>9</sup>. Assemblywoman Thomas voted in favor of A.B. 395, which would abolish the death penalty. There simply is no merit to the image that Petitioner Floyd wants to portray that District Attorney Wolfson pressured any of the citizen legislators from voting in a way that deviates from their own personal conscience.

Furthermore, Petitioner Floyd makes no mention of the members of the Legislature that also serve in the Public Defender's Office (and previously the Clark County District Attorney's Office), including Assemblyman Jason Frierson who voted in favor of the passage of A.B. 395<sup>10</sup>. NRS 260.010 legislatively mandates that the boards of county commissioners provide for an office of public defender. Thus, similar to the District Attorney's Office which is legislatively created, public defenders also carry out an executive function to ensure that the laws are properly being applied within the courts. To be clear, Assemblyman Frierson absolutely should be able to serve in his legislative and executive capacities. However, the State finds it curious that Petitioner Floyd would lobby to remove the District Attorney's Office under the guise of a separation of powers argument while never mentioning members that support A.B. 395 that are part of a non-legislative entity.

Petitioner Floyd attempts to distinguish his position by explaining that the appearance of impropriety, whether actual or merely perceived, is enough to

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<sup>9</sup> <https://www.leg.state.nv.us/App/Legislator/A/Assembly/81st2021/17>

<sup>10</sup> <https://www.leg.state.nv.us/App/Legislator/A/Assembly/Current/8>

disqualify the Clark County District Attorney's Office. Petition, at 22. He cites to the fact that A.B. 395 did not get a hearing in front of the Senate as proof of his point. However, as mentioned before, other people aside from the Clark County District Attorney's Office were also not in favor of A.B. 395 as it was written. The Governor indicated that he would not support the bill in the way that it was written. None of the Republican Assemblymembers voted in favor of A.B. 395. While he wishes to make it seem like passage of the bill was a foregone conclusion that was thwarted by two individual Senators, he conveniently ignores positions that did not support an outright abolition of the death penalty.

Petitioner Floyd concludes his argument by explaining that the "citizens of the State of Nevada deserve the assurance that the lawyers representing the State and seeking Mr. Floyd's execution are doing so to 'see that the laws are faithfully executed.'" Petition, at 37. As to this statement the State absolutely agrees. The District Attorney's Office is tasked by law with the responsibility of seeking an order and warrant of execution that satisfies the jury's judgment of death against Petitioner Floyd. To ignore the jury's verdict by not seeking an order and warrant of execution would be the ultimate failure to faithfully execute the laws of this State.

### **CONCLUSION**

Based on the foregoing, the State respectfully requests that Petitioner's Petition for Writ of Mandamus and/or Prohibition be DENIED.



Dated this 2nd day of August, 2021

Respectfully submitted,

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

BY */s/ Alexander G. Chen*

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## **AFFIDAVIT**

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

Dated this 2<sup>nd</sup> day of August, 2021.

BY */s/ Alexander G. Chen*

ALEXANDER G. CHEN

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## **CERTIFICATE OF COMPLIANCE**

1. **I hereby certify** that this Answer to Mandamus Writ complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 5,360 words and 467 lines of text.
3. **Finally, I hereby certify** that I have read this Answer to Mandamus Writ, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2<sup>nd</sup> day of August, 2021.

Respectfully submitted

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BY */s/ Alexander G. Chen*

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## **CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 2, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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ALEXANDER G. CHEN  
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I, further certify that on August 2, 2021, a copy was sent via email to District Court, Department 17's JEA for Judge Villani:

OLIVIA BLACK - JEA  
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BY /s/ E. Davis  
Employee, District Attorney's Office

AGC//ed