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 Case No. 83108
District Court Case Nos. 99C159897
Habeas Court Case No. A-21-832952-W

REPLY TO STATE'S ANSWER TO PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

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I. INTRODUCTION

Zane Floyd's argument is narrow: the Clark County District Attorney cannot both represent the State in this case while exploiting this case and a separation of powers violation to influence the legislature. The State's Answer vastly overstates this argument. According to the State, Floyd "argues that the Clark County District Attorney should be prohibited from satisfying its duties because proposed legislation, which would have inured to his personal benefit, was not passed." Ans. at 9 (without citation). The State reads Floyd's petition as prohibiting "the entire Clark County District Attorney's Office" from handling "any cases," arguing that "the entire office is in poor standing and in violation of the Nevada Constitution," and that "the laws passed by the Nevada Legislature . . . carry no weight or authority." Ans. at 9 (without citation). Per the State, Floyd's position is that "service to the Legislature is a specifically identifiable impropriety." Ans. at 9 (without citation). And that "the entirety of Nevada's legislative process is violative of the Separation of Powers Clause because [the] executive branch is making decisions that can

have an impact upon the legislative branch." Ans. at 14 (without citation). These are not Floyd's arguments.

The State's framing of Floyd's arguments is specious: while hyperbolizing Floyd's Petition, the State minimizes the extreme power and discretion its position would afford district attorney offices. Thus, per the State, Art. 3, § 1 does not apply at all to district attorney offices. Ans. at 13 ("[T]he district attorney is not an office created via the Nevada Constitution, thus the separation of powers doctrine is inapplicable."). Employees of an executive agency are completely "outside the purview of the separation of powers clause." Ans. at 13; *see also id.* at 15 ("Clearly, of all the restrictions of 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."). Finally, even if holding two roles violated the separation of powers clause, the simple expedient of "not simultaneously exercis[ing] their functions" resolves any possible problem. Ans. at 13. Under the State's position, it is difficult to imagine any person who would ever be bound by Art. 3, § 1 of the Nevada Constitution.

Ultimately, though, the Court need not address outer limits of executive power. Floyd's petition does not present the expansive issues described by the State. Instead, this Court need address only the issue presented here: a narrow request based on specific and unique facts. Floyd seeks disqualification of the Clark County District Attorney's office. A specifically identifiable impropriety has occurred because two deputy district attorneys are also Nevada Senators, the Clark County District Attorney timed action in Floyd's case to correlate with pending legislation, and the district attorney made statements to the media with instructions to "legislative leaders" regarding both Floyd's case and pending legislation. Public suspicion has followed, and no social interest supports keeping the Clark County District Attorney on this case.

II. ARGUMENT

The parties do not dispute the applicable legal standards. The State agrees that the courts of Nevada are "responsible for controlling conduct of attorneys that practice before them." Ans. at 7. The State also agrees that the appropriate standard for determining whether to disqualify counsel is to evaluate whether there is "at least a reasonable

possibility that some specifically identifiable impropriety did in fact occur," and whether "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." *See* Ans. at 7 (quoting *Cronin v. Eighth Jud. Dist. Ct. (Englestad)*, 105 Nev. 635, 641, 781 P.2d 1150, 1153 (1989)); *accord Brown v. Eighth Jud. Dist. Ct. (Thalgott)*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269 (2000). But the State argues the test is not met here. The State is incorrect.

A. A specific and identifiable impropriety has occurred.

In denying that a specifically identifiable impropriety has occurred, the State addresses only one issue: whether the senator-prosecutors themselves are in violation of Art. 3, § 1. As will be discussed below, they are. However, the State misses—and thus fails to answer—the scope of the specifically identifiable impropriety here. It is not merely that two senator-prosecutors work in the Clark County District Attorney's Office. It is also the timing of the Clark County District Attorney's statements to the press, the timing of the filing in this case, and the appearance that the Clark County District Attorney

used this case to put political pressure on a legislature where two of his deputies serve.

To reiterate the timeline: On November 2, 2020, the United States Supreme Court denied Floyd's petition for writ of certiorari in Floyd's federal habeas case.[1] This was the first time since Floyd's criminal proceedings began that the State could move for a warrant of execution without an obvious and unambiguous right for Floyd to stay the execution pending his criminal and post-conviction proceedings.[2]

For five months nothing happened in Floyd's case. And when the Clark County District Attorney finally acted it was not with a court filing, but with a statement to the *Las Vegas Review-Journal*, on March 26, 2021.[3] These statements, quoted in full in both Floyd's Petition and the State's Answer, bear full quotation again:

> "I think the timing is good," Wolfson said. "*Our legislative leaders should recognize that there are people who commit such heinous acts*, whether it be the particular type of murder or the number of

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

[2] *See, e.g.*, NRS 176.415(3); NRS 176.487; 28 U.S.C. § 2262(a).

[3] 1APP163.

> 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*."[4]

The State does not address the propriety of the Clark County District Attorney ostensibly instructing "legislative leaders" to "recognize that there are some people who commit such heinous acts" and instructing "our lawmakers" "to have their eyes wide open because this is a landmark case,"[5] when subordinates in his office were serving as those "legislative leaders."

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[4] 1APP164 (emphasis added).

[5] The State notes that Floyd "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." Ans. at 21. Though Floyd's disqualification motion does not rely on Mr. Wolfson's statements as an independent ethical impropriety, Floyd notes that these statements are inconsistent with the "Special Responsibilities of a Prosecutor." *See* Nev. R. Prof'l Conduct 3.8. Prosecutors—even district attorneys—are prohibited from "making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused . . . ." Nev. R. Prof'l Conduct 3.8(f).

These remarks were published two days after Assembly Bill 395 was unveiled in the Assembly.[6] The State's Answer does not address the five months of inaction in Floyd's case, or that the Clark County District Attorney's remarks came so close after the Assembly Bill.

On April 13, 2021, the Nevada Assembly approved A.B. 395; the next day the Clark County District Attorney's Office filed its request for a warrant and order of execution.[7] The State's Answer does not address this timing either.

These improprieties are in addition to the fact that the Clark County District Attorney's Office is in violation of the Nevada Constitution's Distribution of Powers. *See* Nev. Const. art. 3, § 1.

1. The Clark County District Attorney's Office is in violation of Art. 3, § 1.

Article 3, Section 1 of the Nevada Constitution, reads in full:

> The powers of the Government of the State of Nevada shall be divided into three separate departments, —the Legislative, —the Executive

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[6] 1APP163; *see also* Bill History, Assembly Bill 395 (81st Session 2021), available at https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/8006/Overview.

[7] 1APP174.

> 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.

Here, two powers and functions are relevant: prosecution and legislation. Prosecution is a power and function properly belonging to the Executive Department. Legislation is a power and function properly belonging to the Legislative Department.

Two sets of "persons" are relevant: the senator-prosecutors and the Clark County District Attorney. The senator-prosecutors are charged with the exercise of Legislation, but they exercise a function—namely prosecution—appertaining to the Executive Department. The Clark County District Attorney is charged with the exercise of prosecution, but he exercises—through his subordinate employees—a function appertaining to the Legislative Department.

Both violate Art. 3, § 1.

a. The State does not dispute that prosecution is a power and function properly belonging to the Executive Department.

The State does not dispute that prosecution is a power and function properly belonging to the Executive Department. Indeed, the State could not dispute this point because substantial authority supports it. This Court has, in a long line of cases, acknowledged prosecution is part of the executive power. *See State v. Second Jud. Dist. Ct. (Hearn)*, 134 Nev. 783, 784, 432, P.3d 154, 158 (2018); *Schoels v. State*, 114 Nev. 981, 991, 966 P.3d 735, 741–42 (1998) (Shearing, J., concurring); *Sandy v. Fifth Jud. Dist. Ct. (State)*, 113 Nev. 435, 440, 935 P.2d 1148, 1150–51 (1997); *Righetti v. Eighth Jud. Dist. Ct. (State)*, 133 Nev. 42, 46, 388 P.3d 643, 647 (2017). The Nevada Constitution acknowledges it by charging the Governor with the "Responsibility for execution of the laws" and seeing "that the laws are faithfully executed." Nev. Const. Art. 5, § 7. Nevada's statutes, too, recognized that prosecution is a power belonging to the Executive Department by assigning the Attorney General with the responsibility of supervising all district attorneys. *See* NRS 228.120(2).

b. The State does not dispute that legislation is a power and function properly belonging to the Legislative Department.

The State also does not dispute that legislation is a power and function properly belonging to the Legislative Department. Here, too, the State could not dispute this point because substantial authority supports it. *See* Nev. Const. Art. 4, § 1; *see also Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Ct. (Thomas)*, 132 Nev. 784, 791, 383 P.3d 246, 251 (2016) ("[L]egislative power is the power of law-making representative bodies to frame and enact laws, and to amend or repeal them." (quoting *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967)).

c. The State does not dispute that the senator-prosecutors are persons charged with the exercise of powers properly belonging to the Legislative Department and are persons exercising functions appertaining to the Executive Department.

The State does not dispute that the senator-prosecutors, in their role as Nevada Senators, are persons charged with the exercise of powers properly belonging to the Legislative Department. Nor could it. *See* Nev. Const. Art. 4, §§ 1, 4. The State also does not dispute that, as

prosecutors, the senator-prosecutors exercise functions appertaining to the Executive Department—namely, prosecution. *See* NRS 252.070(1); NRS 252.080.

d. The State does not dispute that the Clark County District Attorney is a person charged with the exercise of powers properly belonging to the Executive Department and is exercising, through the senator-prosecutors, functions appertaining to the Legislative Department.

The State does not dispute that the Clark County District Attorney is a person charged with the exercise of a power properly belonging to the Executive Department, namely prosecution. NRS 252.080. The State also does not dispute that the Clark County District Attorney—through his deputies, that is the two senator-prosecutors—is exercising functions appertaining to the Legislative Department. *See* NRS 252.070(1) (deputies "are authorized to transact all official business . . . to the same extent as their principal[]," i.e., the District Attorney).

e. None of the distinctions drawn by the State are relevant.

To summarize, the State does not dispute the following propositions. Prosecution is a power and function belonging to the Executive Department. Legislation is a power and function belonging to the Legislative Department. Senator-prosecutors are persons charged with the exercise of powers properly belonging to the Legislative Department and are persons exercising functions appertaining to the Executive Department. The Clark County District Attorney is a person charged with the exercise of powers properly belonging to the Executive Department and is a person exercising, through two of his deputies, functions appertaining to the Legislative Department.[8]

Thus, the State does not dispute that, under any fair reading of Art. 3, § 1, the Clark County District Attorney and the two senator-prosecutors are in violation of the Nevada Constitution. *See, e.g.*, *Mendoza-Lobos v. State*, 125 Nev. 634, 639–40, 218 P.3d 501, 504–05

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[8] *See Polk v. State*, 126 Nev. 180. 185, 233 P.3d 357, 360 (2010) ("We have also determined that a party confessed error when that party's answering brief effectively failed to address a significant issue raised in the appeal.").

(2009) ("Accordingly, no branch of government may exercise functions appertaining to either of the others" and explaining setting criminal penalty is legislative function, but determining penalty within range is judicial function).

Nonetheless, the State urges this Court to ignore the language of the provision, the law governing executive and legislative powers, and any straightforward application of these principles. Instead, the State argues for distinctions not recognized or referenced in Art. 3, § 1, and that these distinctions dictate a holding that there is no separation of powers violation. The State is wrong.

(1) The senator-prosecutors' leave status is not relevant.

Without explicitly defending the district court's reasoning, the State writes, "it should be noted that [the senator-prosecutors] do not simultaneously exercise their functions." Ans. at 13. The State goes on to explain that "Nevada's legislative bodies meet for session once every other year" and that "[d]uring those times, neither individual serves any type of executive function." *Id.*

This argument presents many problems. First, as argued in Floyd's Petition, during this time the senator-prosecutors are still employees of the Clark County District Attorney's Office. Pet. at 25 (citing *DeVito v. Chicago Park Dist.*, 83 F.3d 878, 880 (7th Cir. 1996)). The Clark County District Attorney continues to be the boss of the senator-prosecutors, even if they are on leave. Thus, the Clark County District Attorney is a person charged with the power of prosecution, NRS 252.080, while exercising functions appertaining to the legislative department through his deputies. But also, because they are still deputy district attorneys—even if on leave—they are persons charged with the exercise of powers properly belonging to the executive department, *see* NRS 252.070(1) & NRS 252.080, while exercising legislative functions.

Second, though the legislative session meets biennially, *see* Nev. Const. Art. 4, § 2, the State is wrong to claim, "legislative bodies meet for session *once* every other year." Ans. at 13 (emphasis added). Legislative bodies meet periodically, even in between legislative sessions. *See, e.g.*, Interim Finance Comm., Meeting Notice and Agenda

(Aug. 18, 2021).[9] Indeed, 2020 hosted two special sessions. Thus, at any time the senator-prosecutors are exercising executive functions, they are also persons "charged with the exercise of powers properly belonging" to the Legislative Department.

Third, reading Art. 3, § 1 as prohibiting only "simultaneous" exercise of functions is wholly unworkable. If individuals may simply go on leave or merely "not simultaneously exercise their functions," as the State suggests, Art. 3, § 1 would not create any enforceable separation of powers. Under the State's logic, any official within one department could serve in the other departments, so long as they took leave from one position before exercising functions of another position. One person, under this logic, could be elected to the position of Governor, Justice of the Supreme Court, and state senator, so long as this person tagged in and out of roles. This reading of Art. 3, § 1 also invites chaos into other provisions of the Nevada Constitution. Consider term limits; the 12-

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[9] Available at https://www.leg.state.nv.us/App/InterimCommittee/REL/Interim2021/Meeting/22211; *see also* Interim Finance Comm., Members (listing one of the senator-prosecutors as member of the committee), available at https://www.leg.state.nv.us/App/InterimCommittee/REL/Interim2021/Committee/1773/Members.

year limit found in Articles 4 and 15 could be extended far beyond twelve calendar years if state officials can "take leave" from their roles any time they are not exercising functions. *See* Nev. Const. art. 4, §§ 3, 4; art. 15, §§ 3, 11. The State's position would also effectively negate the Nevada Constitution's other prohibitions of roles. *See, e.g.,* Art. 4, § 9 ("No person holding any lucrative officer under the Government of the United States or any other power shall be eligible to any civil office of Profit under this State . . . ."); Art. 4, § 8 (senators and members of the assembly ineligible for "any civil office of profit" created during session they served); Art. 6, § 11 (judges "ineligible to any office, other than a judicial office, during the term for which they have been elected or appointed").

Finally, there was no factual development on the senator-prosecutors' leave status permitted by the district court. As Floyd explained in his Petition, important facts about the senator-prosecutors' employer-employee relationship is not known. Indeed, in a current appeal raising questions under Art. 3, § 1, counsel for the Senate Majority Leader and the Chair of the Senate Judiciary Committee make

this same point: "Questions of dual service require intensive development of facts in specific circumstances, and resolution turns on issues unique to each plaintiff and defendant."[10] Should this Court determine that the senator-prosecutors' leave status is dispositive, this Court should remand for an evidentiary hearing. The State completely fails to address this point.

(2) The distinction between functions and "sovereign" functions is not relevant.

The State argues that Art. 3, § 1 is "referring to . . . someone that the Constitution has expressly granted powers." Ans. at 11. This position is not supported by the text of the Nevada Constitution. Under this logic, Art. 3, § 1 would not apply to the Attorney General, the Treasurer, or the State Controller because these individuals are not "expressly granted powers" by the Nevada Constitution. *See* Art. 5, § 22. Nor would Art. 3, § 1 apply to anyone who works in an administrative agency.

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[10] *Nevada Policy Research Inst. v. Cannizzaro, et al.,* No. 82341, Respondents Brittney Miller, Selena Torres, Jason Frierson, Nicole Cannizzaro, & Melanie Scheible's Joint Ans. Br., at 6–7 (July 22, 2021).

Along the same lines, and citing a single case, the State argues that "the separation of powers was not applicable to the district attorney's office." Ans. at 13 (citing *Lane v. Second Jud. Dist. Ct.*, 104 Nev. 427, 437, 760 P.2d 1245, 1251 (1988)). In the more than thirty years since this statement, this Court has consistently applied the separation of powers doctrine to district attorney offices. *See Hearn*, 134 Nev. at 784, 432, P.3d at 158; *Schoels*, 114 Nev. at 991, 966 P.3d at 741–42; *Sandy*, 113 Nev. at 440, 935 P.2d at 1150–51; *Righetti*, 133 Nev. at 46, 388 P.3d at 647. Floyd cites these cases in his Petition; the State addresses none of them. *See* Pet. at 11–12. Moreover, this reference in *Lane* is, at best, dictum. "A statement in a case is dictum when it is 'unnecessary to a determination of the questions involved.'" *City of Oakland v. Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 539, 267 P.3d 48, 52 (2011) (quoting *Argentena Consol. Mining Co. v. Jolley Urga*, 125 Nev. 527, 536, 216 P.3d 779, 785 (2009)). *Lane* is a published opinion arising from a petition for rehearing of a prior unpublished order. *Lane*, 104 Nev. at 437, 760 P.2d at 1251 (describing procedural

posture of case). The State's reference to the separation of powers being inapplicable to the district attorney comes from these sentences:

> Rather, the district attorney's duties and powers are prescribed by the legislature and are statutorily defined in NRS 252.110. Consequently, we *concluded* that the doctrine of separation of powers is inapplicable.

Compare Ans. at 13 *with Lane*, 104 Nev. at 437, 760 P.2d at 1251. But this portion of the *Lane* opinion was merely summarizing its unpublished order. The published opinion does not rely on this statement as part of its determination of the questions involved. Thus, it is dictum.[11]

Undeterred, the State goes on to explain that under Art. 3, § 1, "[t]hese are positions that are charged with a sovereign function of government," citing *State ex rel. Kendall v. Cole*, 38 Nev. 215, 148 P.2d 551 (1915). Ans. at 11. The State fails to address any of the points Floyd

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[11] The distinction between published and unpublished orders is particularly important here because the *Lane* opinion predates the ready availability of unpublished orders that lawyers are accustomed to today. Indeed, counsel for Mr. Floyd reached out to the Clerk of the Nevada Supreme Court in order to get a copy of the unpublished order in *Lane*. Dana Richards represented that the order is missing and not available from the files of the Nevada Supreme Court.

makes in response to this argument. *Compare* Ans. at 11 *with* Pet. at 25–26. To reiterate: *Kendall* is a case construing a completely different constitutional provision, Art. 4, § 8; that provision explicitly limits its scope to any "civil office." *See* Nev. Const. Art. 4, § 8. Thus, on its face *Kendall* does not apply to Art. 3, § 1.

But the State fails to resolve a much bigger problem with its argument: prosecution of criminal offenses *is* a sovereign function. *Compare* Ans. at 11 *with* Pet. at 26 (citing and quoting *Hooper v. State*, 248 P.3d 748, 749 (Idaho 2011) (collecting cases)).

Thus, the State's reliance on *Sawyer v. Dooley*, 21 Nev. 390, 32 P. 437 (1893), is misplaced. *See* Ans. at 11. *Sawyer* does not draw a distinction between functions and "sovereign" functions as the State suggests. But, more importantly, *Sawyer* does not address prosecution specifically. So, *Sawyer* explains, as to Art. 3, the "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." 32 P. at 439. But prosecution *is* a power charged to one of the Departments, namely the Executive Department. *See* Nev. Art. 5, § 1

("The supreme executive power of this State, shall be vested in a Chief Magistrate who shall be Governor of the State of Nevada."); *see also* Nev. Art. 5, § 7 ("He shall see that the laws are faithfully executed."). And so is law-making. Nev. Art. 4, § 1. Thus, even under *Sawyer*, the Clark County District Attorney and the senator-prosecutors are bound by Art. 3, § 1.

Moreover, the treatises relied on in *Kendall* confirm that prosecution is a sovereign function of the Executive Department. In *A Treatise on the Law of Public Offices and Officers*, Floyd R. Mechem explains, "Executive officers are those whose duties are mainly to cause the laws to be executed."[12] In *The Principles of Administrative Law Governing Relations of Public Officers*, Bruce Wyman explains one way to determine if an office is a "public office" is to examine the officer's relationship to the power bestowed: "The warrant to exercise powers is conferred, not by contract, but by law. It finds its source and limitation in some act of expression of governmental power. Oath, salary,

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[12] Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* (1890), 1APP047.

operation, scope of duties are signs of official status, but no one is essential. *The essential thing is that in some way or another the officer is identified with the government.*"[13]

The Clark County District Attorney is a "public officer." The Clark County District Attorney is tasked with prosecution, a duty that is "to cause the laws to be executed." *Compare* 1APP047 *with* NRS 252.080. He prosecutes cases captioned under the State of Nevada, clearly identifying him "with the government." *Compare* NRS 169.055 *with* 1APP054. The district attorney's powers and duties are conferred by law. *Compare* NRS 252.080 *and* NRS 252.110 *with* 1APP054.

(3) The distinction between the Clark County District Attorney and deputy district attorneys is not relevant.

The State argues that deputy district attorneys are not public officers. Setting aside that Art. 3, § 1 does not draw this distinction, the State is wrong: deputy district attorneys are public officers. This Court in *Kendall* explained that taking an oath and being "charged by law

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[13] Bruce Wyman, *The Principles of the Administrative Law Governing Relations of Public Officers* (1903), 1APP054 (emphasis added).

with duties involving an exercise of some part of the sovereign power of the state" both suggested that a person was a "public officer." *Kendall*, 148 P.2d at 553. *Kendall* is consistent with the treatises it cites. Mechem explains, "Where a public officer is authorized to appoint a deputy, the authority of the deputy, unless otherwise limited, is commensurate with that of the officer himself . . . . Such a deputy is himself a public officer, known and recognized as such by law." 1AOO050–51. Where there is doubt, Mechem explains, courts look to whether the appointment is provided or required by law, whether the law fixes the powers and duties of the deputies, whether the deputies must take an oath of office, and whether they must provide an official bond for performance of their duties. [14] When these are present, Mechem concludes, "deputies are usually regarded as public officers." [15]

NRS 252.070 clearly evidences an intent that deputy district attorneys are "public officers" under these factors. Deputy district attorneys are appointed by law. NRS 252.070(1). Their duties and

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[14] 1APP049.

[15] 1APP049.

powers are fixed by the same law. NRS 252.070(1). They are required to take the oath of office. NRS 252.070(3). Their performance is subject to an official bond, that either the district attorney is responsible for, or that the district attorney may require from the deputies.[16] NRS 252.070(2). Most importantly, they prosecute cases under the name of the State of Nevada. *Compare* 1APP054 ("The essential thing is that in some way or other the officer is identified with the government.") *with* NRS 169.055.

The distinction between the district attorney and his deputies does not withstand scrutiny even under the other Nevada cases cited by the State. For example, the State cites *Price v. Goldman*, 90 Nev. 299, 525 P.2d 598 (1974), for the proposition that *only* district attorneys—and not deputy district attorneys—may seek a wiretap, consistent with NRS 179.490. Ans. at 12. But *Price*'s reasoning was based on the statute's federal counterpart, which narrowly delineated who was authorized to seek a wiretap. *Price*, 90 Nev. at 301, 525 P.2d at 598.

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[16] An "official bond" is "[a] bond given by a public officer requiring the faithful performance of the duties of office." *Bond*, Black's Law Dictionary (11th ed. 2019).

Moreover, the State cannot seriously contend that in every instance where the Nevada Revised Statutes refers to a district attorney only, that deputy district attorneys may not act. Only the district attorney is the "public prosecutor," NRS 252.080; only the district attorney "shall . . . [a]ttend the district courts held in his or her county. . . ," NRS 252.090; only the district attorney may agree to suspend prosecution, NRS 205.469.[17] Indeed, NRS 176.495, like the statute in *Price*, commands a warrant to be drawn only "upon the application of the Attorney General or the district attorney of the county . . . ." *Compare* NRS 176.495 *with Price*, 90 Nev. at 301, 525 P.2d at 599 *and* NRS 179.460. Yet a deputy district attorney sought the warrant of execution below.[18]

The State also cites *State ex rel. Mathews v. Murray*, 70 Nev. 116, 258 P.2d 982 (1953) for the proposition that "[a] deputy district attorney" is "not the type of public officer that the Nevada Constitution

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[17] Examples of statutes that specify the district attorney but include functions performed by deputy district attorneys are legion. *See e.g.,* NRS 62C.100; NRS 125B.150; NRS 205.295; NRS 200.5081; NRS 205.471; NRS 361.720.

[18] *See* 1APP175.

contemplated because a deputy district attorney is merely an employee of an agency." *See* Ans. at 12. But the State withholds critical context: *Mathews* addressed whether the challenge was an appropriate "quo warranto" action.[19] *Mathews*, 70 Nev. at 120, 258 P.2d at 983. Under Nevada law such an action can only be brought "[a]gainst a person who usurps . . . a public office . . . ."[20] Thus, the critical question was whether the office was a public office under the quo warranto cause of action. *Mathews*, 70 Nev. at 120, 258 P.2d at 983; *see also* 1PRA031–32 (Mechem § 479).[21] *Mathews* did not purport to limit the scope of Art. 3, § 1 to public offices. Importantly, *Mathews* takes no position on whether deputy district attorneys are public officers. But *Mathews*, like *Kendall* relies on the Wyman and Mecham treatises, which, again, would characterize deputy district attorneys as public officers. *See Mathews*,

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[19] "Quo warranto" refers to the traditional cause of action available to challenge whether an alleged holder of public officer properly holds that public office. *See, e.g.*, 1PRA026; *see also* NRS 35.010.

[20] For ease of reference, Floyd attaches the relevant statute. *See* 1PRA049–52.

[21] The *Mathews* Court also cited *Mechem*. Relevant excerpts have been provided in the supplemental appendix. *See* 1PRA026–048.

70 Nev. at 121–22, 258 P.2d at 984 (citing Wyman, § 44; Mechem, §§ 1, 4).[22] Notably, Mechem lists examples of public officers subject to the quo warranto cause of action, and includes not just sheriffs, but also deputy sheriffs.[23] Indeed, Mechem identifies a justice of the peace as being incompatible with the offices of constable, sheriff, deputy sheriff, or coroner, relying on a separation of powers case from Maine.[24]

Art. 3, § 1 does not distinguish between active employees or employees on leave, between functions and sovereign functions, or between principals and their deputies. For this reason alone, this Court should reject the State's arguments. But if this Court believes these distinctions are relevant, the Clark County District Attorney's Office is in violation of Art. 3, § 1 because both the Clark County District Attorney and his deputies are public officers, and they exercise sovereign functions in those roles.

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[22] *See* 1APP054 (Wyman, § 44); 1PRA006–07, 1PRA010 (Mechem, § 1, 4).

[23] 1PRA032 (Mechem § 480).

[24] 1PRA020 (Mechem, § 423) (citing *Opinion of Judges*, 3 Maine 484, 486 (1826)). *Opinion of Judges*, 3 Maine 484, is included in the appendix. *See* 1PRA001–05.

(4) The distinction between the formalist approach and the flexible approach is not relevant.

As Floyd explained in his Petition, scholars suggest two approaches to interpreting separation of powers clauses in state constitutions. Under the "formalist approach," a court identifies whether a power is legislative, executive, or judicial, and then ensures that power is only exercised by that branch. *See* Pet. at 10 (quoting G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. Ann. Surv. Am. L. 329, 338 (2003)). This approach is most consistent with this Court's jurisprudence in interpreting the Nevada Constitution. *See, e.g.*, *Strickland v. Waymire*, 126 Nev. 230, 234, 235 P.3d 605, 608 (2010). And, as explained above and in his Petition, this approach shows that the Clark County District Attorney's Office is in violation of the Nevada Constitution. *See* § A.1.a–d above; *see also* Pet. at 11–22. The State does not directly dispute this approach, or the conclusions it yields.

The other approach is "flexible," "in which functions of the office are fluid but personnel are distinct." Jonathan Zasloff, *Taking Politics*

Seriously: A Theory of California's Separation of Powers, 51 UCLA L. Rev. 1079, 1106 (2004); *see also* Pet. at 19. Even under this approach, however, the senator-prosecutors are in violation of Art. 3, § 1 because the personnel between the district attorney's office and the Senate are not distinct. Floyd made this point, too, which the State does not directly address. Pet. at 19.

Nonetheless, the State hints at the flexible approach by urging this Court to consider "the practicality of the situation . . . that the functions of various branches can and do have interplay," relying on the example of the Governor proposing legislation. *See* Ans. at 14. Thus, according to the State, "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." *Id.* There are two problems with this argument. First, a formalist approach to Art. 3, § 1 does not lead to the conclusion that the Governor is in violation of the Constitution simply because he proposes legislation. Proposing bills, by itself, is not necessarily a "function appertaining" to the Legislative Department.

The Legislative Department must still assess and then vote on those bills. Second, if the State is suggesting the Court adopt the "flexible" approach, then this Court may accept "the practicality of the situation," but must then conclude that Art. 3, § 1 requires complete separation of personnel between branches of government.

But regardless of which approach this Court takes, the Clark County District Attorney's office violates Art. 3, § 1 in the circumstances presented here.

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

The Clark County District Attorney and the two senator-prosecutors are in violation of Art. 3, § 1. The Clark County District Attorney did not do anything with Floyd's execution until the Assembly unveiled a bill to abolish the death penalty. At that point, the district attorney told the *Las Vegas Review-Journal* that his office would be seeking a death warrant and he told "legislative leaders" to consider Floyd's case.[25] And when the Assembly passed the abolition bill, the

[25] 1APP163.

Clark County District Attorney's Office final sought a warrant the next day.[26]

These actions reflect that a specific and identifiable impropriety has occurred: the Clark County District Attorney's Office attempted to exploit its separation of powers violation and Floyd's execution to influence the legislature.

The State raises two arguments relevant to this specifically identifiable impropriety. The State writes, "The composition and qualifications of an individual to serve in the Legislature is left to the Legislature itself," adding, "The principle that the Legislature is to determine its members' qualifications is also supported and recognized by the Nevada Supreme Court." Ans. at 15 (citing *Heller v. Legislature of State of Nev.*, 120 Nev. 456, 93 P.3d 746 (2004)). But Floyd is not asking this Court to judge the qualifications of members to serve in the legislature; Floyd is asking this Court to exercise its "broad discretion in determining whether disqualification is required" because courts are "responsible for controlling the conduct of attorneys practicing before"

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[26] *Compare* Bill History, *supra* n.1 *with* 1APP174.

them. *See Brown,* 116 Nev. at 1205, 14 P.3d at 1269. The State concedes this Court has such authority. *See* Ans. at 7. Thus, *Heller* is unhelpful here.

The State also argues that a conflict of interest is a prerequisite to disqualification. *See* Ans. at 17–18. Floyd addressed this argument in his petition, but the State answered none of these points. *Compare* Ans. at 17–24 *with* Pet. at 30–33. Instead, the State cites three Nevada rules of professional conduct. Ans. at 17 (citing Nev. R. Prof'l Conduct 1.7, 1.9, 1.11). These rules do not purport to list the universe of ethical impropriety that would warrant disqualification. *See* Nev. R. Prof'l Conduct 1.7 (defining conflicts of interest of current clients); Nev. R. Prof'l Conduct 1.9 (describing duties to former clients); Nev. R. Prof'l Conduct 1.11 (describing special conflicts of interest of former and current government officers and employees). The State also cites as support *United States v. Kahre*, 737 F.3d 554, 574 (9th Cir. 2013), but that case also does not purport to limit disqualification to conflicts of interest.

The State overlooks that *Cronin v. Eighth Jud. Dist. Ct. (Engelstad)*, 105 Nev. 635, 638, 642, 781 P.2d 1150, 1152, 1154 (1989), cited by Floyd, involved disqualification based on improper communication with a represented party. *See* Pet. at 31. This failure is especially puzzling because the State quoted *Cronin* in describing the standard for disqualifying counsel. *See* Ans. at 7 (citing *Cronin*).[27] Thus, the State itself relies on a case that recognized disqualification is appropriate even if there is not a conflict of interest.

Regardless, as Floyd explained in his Petition, the concept of conflicts of interest is particularly ill-equipped to address violations of the separation of powers. Pet. at 31–33. Separation of powers violations involve too much power concentrated in support of a single interest, not a conflict between an individual's competing interests. Asking if the Clark County District Attorney has a conflict of interest misses the point because the problem is that office having too much power in pursuit of its interest. Instead, the question is whether the separation of

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[27] The State's argument related to *Collier v. Legakes*, 98 Nev. 307, 646 P.2d 1219 (1982) is unclear because Floyd did not cite to *Collier*. *See* Ans. at 18–19.

powers violation coupled with the Clark County District Attorney's statements and timing of Floyd's case are a specifically identifiable impropriety. For all the reasons explained above, they are.

B. The State does not dispute that the existing likelihood of public suspicion and obloquy outweighs any social interest in allowing the Clark County District Attorney to continue representing the State.

As Floyd recognized, a specifically identifiable impropriety is not alone sufficient to support disqualification. "[T]he likelihood of public suspicion or obloquy" must outweigh "the social interests which will be served by a lawyer's continued participation in the case." *Brown*, 116 Nev. at 1205, 14 P.3d at 1270. The State's answer nowhere disputes that public suspicion and obloquy have attached to the Clark County District Attorney Office's specifically identifiable impropriety. This public suspicion has not abated in the months since Floyd filed his petition.[28]

The State references other individuals who were involved with Assembly Bill 395. But many of these references are false or taken out

[28] *See, e.g.*, 1PRA058–69.

of context. For example, the State points to other individuals about whom Floyd does not complain to try to show that, "Apparently, the only entity that is not permitted to speak of the death penalty, in [Floyd's] mind, is the agency that prosecuted him." Ans. at 22. But these other individuals—employees of the Federal Public Defender, a deputy Clark County Public Defender, and a team clerk at the Clark County District Attorney—do not exercise powers or functions of two departments.[29] *See* Ans. at 22–23. The State misstates the issue: Floyd does not seek disqualification merely because the Clark County District Attorney took a position on pending legislation. Rather, Floyd seeks disqualification because the Clark County District Attorney attempted to exploit its separation of powers violation and use Floyd's case to influence the legislature. Moreover, nothing in Floyd's argument suggests that merely being an employee of a legislatively-created office, like a county public defender, is exercising an executive power.

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[29] Individual employees of the Federal Public Defender testified in favor of the bill, but none of these individuals testified on behalf of the Federal Public Defender. Though this distinction is legally irrelevant, the State is wrong to claim that the Federal Public Defender's office "testified in favor of A.B. 395." Ans. at 22.

Similarly, the State reads Floyd's petition as "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." Ans. at 22. This misstates both Floyd's position and the law. Floyd nowhere asks the Attorney General to "take over his case." Moreover, though the Attorney General has discretion to take over prosecution of this case, the district court lacks authority to appoint the Attorney General. NRS 228.120(3); *see also Attorney General v. Eighth Jud. Dist. Ct. (Morris)*, 108 Nev. 1073, 1075, 844 P.2d 124, 125 (1992). More importantly, though, this argument misses the point of Floyd's petition. It is not simply the Clark County District Attorney's statements that require disqualification. It is his statements *combined* with the role of two of his deputy district attorneys in the Legislature, and the timing of this case—a factual scenario not present in other prosecuting agencies.

The State also does not dispute that there is no societal interest in allowing the Clark County District Attorney to continue representing the State. As Floyd pointed out, both in his motion to disqualify and in

his petition, that none of the attorneys who tried this case still work for the district attorney's office. *See* 2APP247; Pet. at 36–37. Thus, any institutional knowledge of this case has since retired, and new counsel would be similarly situated. The State does not suggest otherwise.

III. CONCLUSION

The Clark County District Attorney's office employs two senator-prosecutors. This violates Article 3, § 1. The district attorney did nothing in this case for almost six months, and then timed action in this case to correlate with a death penalty bill in the legislature. The district attorney told "legislative leaders"—which included his employees—to consider this case as they considered abolishing the death penalty. This is a specifically identifiable impropriety. There is not just the likelihood but the reality of public suspicion and obloquy. No social interest weighs in favor of allowing the Clark County District Attorney to continue representing the State in this case.

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

DATED this 17th day of August, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 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:

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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*
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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on August 17, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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AARON D. FORD
Nevada Attorney General

/s/ *Celina Moore*
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 17th day of August, 2021, I served a true and correct copy of the foregoing document via UPS to:

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

/s/ Celina Moore
An Employee of the
Federal Public Defender,
District of Nevada