IN THE SUPREME COURT OF THE STATE OF NEVADA

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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

Petition for Rehearing

I. Introduction

Zane Floyd petitions this Court for rehearing, following this Court's order denying Floyd's Petition for a Writ of Mandamus. Because this Court overlooked or misapprehended material questions of fact and law in his case, this Court should grant rehearing. *See* NRAP 40(c)(2).

II. Argument

A. This Court overlooked material questions of fact and law in applying an "actual" impropriety standard instead of the applicable "reasonable possibility" standard.

Disqualification is appropriate where 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." *Brown v. Eighth Jud. Dist. Ct. (Thalgott)*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269 (2000).[1]

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[1] As addressed below, this Court's reference to *State v. Eighth Judicial Dist. Ct. (Zogheib)*, 130 Nev. 158, 165, 321 P.3d 882, 886 (2014), conflates the "specifically identifiable impropriety" standard for disqualification under *Brown* with the "appearance-of-impropriety" standard rejected by *Zogheib*. Both the State and Floyd agreed that *Brown* provides the standard for disqualification. *See* Pet. at 7; State's Ans. at 7. Because this Court has not overruled the "specifically identifiable impropriety" standard, it controls here.

However, this Court did not ask whether the facts show a "reasonable possibility" of a specifically identifiable impropriety.

Instead, this Court held Floyd to a higher standard by holding that he did not "demonstrate[] that there is a separation-of-powers violation related to dual service in this case because the deputy district attorneys that serve in the Legislature have had no involvement in prosecuting Floyd's case or seeking the execution warrant." Order at 3. The Court continued that "Floyd has not put forward any evidence establishing that CCDA Wolfson exerted improper authority over his deputies in their capacities as legislators." *Id.* This reasoning effectively requires a showing of an actual impropriety—much more than a "reasonable possibility" of an impropriety. *See Brown*, 116 Nev. at 1205, 14 P.3d at 1269. That this "actual impropriety" standard is much higher than the "reasonable possibility" standard is demonstrated by *Brown* itself, where this Court held that the mere employment relationship

between a personal secretary and two law firms was sufficient to establish a "reasonable possibility." *Id.* at 1205, 14 P.3d at 1270.[2]

Floyd's petition asked this Court to find a reasonable possibility of a specifically identifiable impropriety based on facts readily knowable: the deputy district attorneys are also state senators, the Clark County District Attorney timed action in Floyd's case to correspond with the legislative session, and the district attorney's public statements conveyed instruction to subordinate employees in his office. No factual development is required to ascertain these facts. *See* NRS 47.130. This Court's order, however, would require Floyd to show actual participation of the Senator-Prosecutors in the prosecution of his case, or actual exertion of influence by the Clark County District Attorney over his deputies. The factual development required for these showings could only be met through discovery or an evidentiary hearing. This Court's reasoning invites future litigants to seek discovery of prosecutors' interactions.

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[2] Importantly, the "reasonable possibility" did not establish the right to disqualification: Petitioner Brown still had to show a "likelihood of public suspicion or obloquy." *Id.*

Consider the questions posed by the facts of this case:

- Why did the Clark County District Attorney wait until the Assembly Bill to abolish the death penalty was proposed before announcing his intention to move forward on an execution warrant for Floyd?
- Why did the district attorney announce his decision to seek an execution warrant to the press instead of through a court pleading?
- Why did the district attorney wait to file a motion to seek a warrant of execution until the day after the Assembly approved the abolition bill?
- What communications about the abolition bill did the Clark County District Attorney have with the Senator-Prosecutors?
- What communications did anyone in the Clark County District Attorney's office have with the Senator-Prosecutors about the abolition bill?

- What role, if any, did the Clark County District Attorney's public statements and highlighting of Floyd's case have on their considerations of pending legislation?

Requiring lower courts and the applicable witnesses to engage in this kind of factual development—as this Court's order implies—puts both district judges and prosecutors in an untenable position.

Nor is it a solution to hold that *no* factual development will be allowed under an actual impropriety standard. This Court, time and time again, has recognized the judiciary's obligation to regulate the attorneys who practice in the courts of this state. *Brown*, 116 Nev. at 1205, 14 P.3d at 1269. A necessary component of that role is considering motions to disqualify counsel for improper behavior, whether unethical or unconstitutional. *Id*. Factual development is a fundamental component of the judiciary's role in adjudicating cases between parties that dispute facts.[3]

[3] Relatedly, this Court overstates its inability to review the Senator-Prosecutors in their roles as legislators. Though "the power to discipline legislators for disorderly conduct is a function constitutionally committed to each house of the Legislature," this Court retains its

Thus, this Court should reconsider its order and apply the "reasonable possibility" standard to the facts of this case. Here, there is a reasonable possibility of a specifically identifiable impropriety because: (a) the Clark County District Attorney's Office is in violation of the Separation of Powers clause of the Nevada Constitution; (b) the Clark County District Attorney timed a statement to the press that he was pursuing a warrant in Floyd's case to coincide with the unveiling in the Assembly of a death penalty abolition bill; (c) in that same statement, the Clark County District Attorney instructed that "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"; (d) in the same statement the Clark County District Attorney instructed "our lawmakers to have their eyes wide open because this is a landmark case"; and (e) the Clark County District

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authority to supervise the legal profession. *See* NRS 2.120; *see also* NRS 7.25 (declaring that the "State Bar of Nevada" is "under the exclusive jurisdiction and control of the Supreme Court"); *see also Brown*, 116 Nev. at 1205, 14 P.3d at 1269 (recognizing courts "are responsible for controlling the conduct of attorneys practicing before them").

Attorney then timed that actual motion seeking a warrant of execution to happen the day after the Nevada Assembly voted to approve the death penalty abolition bill. Any one of these actions might not be sufficient to establish a specifically identifiable impropriety; cumulatively, however, they reflect that the Clark County District Attorney sought to exploit his office's separation of powers violation by using this case to influence pending legislation.[4]

B. This Court overlooked material questions of fact in failing to give Floyd an opportunity to develop facts showing an actual impropriety.

In the alternative, this Court overlooked that Floyd has not been given an opportunity to develop the facts in support of his motion, and thus this Court should remand for Floyd to seek discovery or for the district court to conduct a hearing on whether an actual impropriety has occurred. This Court's order relies on two facts for which the parties have had no opportunity to present or develop evidence: (1) that "the

[4] To reiterate: this Court's finding that there is a reasonable possibility of a specifically identifiable impropriety, by itself, will not establish Floyd's right to disqualification. He must still show a likelihood of public suspicion or obloquy." *Brown*, 116 Nev. at 1205, 14 P.3d at 1270. As discussed in his petition and reply, Floyd makes this showing. *See* Pet. at 33–37; Reply at 34–37.

deputy district attorneys that serve in the Legislature have had no involvement in prosecuting Floyd's case or seeking the execution warrant," and (2) that "Floyd has not put forward any evidence establishing that CCDA Wolfson exerted improper authority over his deputies in their capacities as legislators." Order at 3. But Floyd cannot have provided such evidence because neither the Senator-Prosecutors nor the Clark County District Attorney were required to make any representations of fact about their interactions or communications related to legislation or Floyd's case.

The question of the need for factual development came up during the lower court proceedings. *See* 3APP566 (requesting document production and designation of a person most knowledgeable so that the parties could receive testimony). The district court initially denied Floyd's motion because the Senator-Prosecutors were on leave; Floyd sought reconsideration on the basis that relying on the specific employer-employee relationship as a basis for denial required factual

development. 3APP553; 3APP565–66. Nonetheless, Floyd was not given this opportunity.[5] 3APP585.

As discussed above, this Court has not historically imposed an "actual" impropriety standard; correspondingly, the standard for factual development is not developed. Regardless: whatever standard this Court imposes, the unique circumstances of Floyd's case show that he is entitled to factual development. The timing of action seeking Floyd's warrant of execution, the Clark County District Attorney's comments to the Las Vegas Review Journal, and the employment of state senators as Clark County deputy district attorneys are sufficient proffers for factual development.

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[5] That this Court and the district court relied on different facts, and both without giving the parties the opportunity to develop a factual record, supports Floyd's argument that the "reasonable possibility" standard is more appropriate than the "actual" impropriety standard in this Court's Order. An "actual impropriety" standard without factual development invites inconsistent decisions regarding which facts are dispositive: without factual development, there will always be a fact that the movant failed to show. The upshot of this Court's decision is that it simultaneously imposes a heightened factual evidentiary standard while Floyd was specifically deprived of the opportunity to present facts to meet that standard. Neither the district court nor this Court have suggested that Floyd could have done anything more under the circumstances to support his evidentiary proffer as a perquisite to obtaining further factual development.

C. This Court overlooked material questions of law in conflating the "appearance of impropriety" standard and the "specifically identifiable impropriety" standard.

The Court's order notes "in *Zogheib*, this court specifically rejected the impropriety standard referenced by Floyd in evaluating a request to disqualify the entire district attorney's office." Order at 3. Two related, but distinct, strands of this Court's jurisprudence are relevant here.

First is this Court's jurisprudence related to disqualifying attorneys. The State and Floyd agree that the applicable standard is whether 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." *Brown*, 116 Nev. at 1205, 14 P.3d at 1270; *see* Pet. at 7; *see also* State's Ans. at 7 (citing *Cronin v. Eighth Jud. Dist. Ct.*, 105 Nev. 635, 641, 781 P.2d 1150, 1153 (1989)). This rule of law has not been overruled.

Second is this Court's jurisprudence related to whether the conflict of interest of one individual prosecutor is imputed to the entire prosecutors' office. *See Zogheib*, 130 Nev. 158, 321 P.3d 882. In this

context, this Court discussed the "appearance of impropriety" standard as it related to the canons of professional responsibility. *Id.* at 162–63, 321 P.3d at 885. As this Court explained in *Zogheib*, the use of the "appearance of impropriety" standard came from Canon 9 of the American Bar Association's Code of Professional Responsibility. *Id.* at 162, 321 P.3d at 885. The American Bar Association, however, had subsequently replaced the code with the Model Rules of Professional Conduct; Nevada, too, had replaced its previous professional conduct rules. *Id.* at 163, 321 P.3d at 885. The "appearance of impropriety" standard, thus, was obsolete when this Court considered it in *Zogheib*.

So, this Court replaced that standard with one that asks whether an individual prosecutor's conflict of interest "would render it unlikely that the defendant 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. *Zogheib* did not purport to overrule this Court's general disqualification jurisprudence: indeed, this Court cited with apparent approval *Liapis v. Second Judicial Dist. Ct.*, 128 Nev. 414, 420, 282 P.3d 733, 737 (2012), and *Brown*, 115 Nev. at 1205, 14 P.3d at

1270, both cases that rely on the "specifically identifiable impropriety" standard. Rather, *Zogheib* applies only in the limited circumstance it addressed: whether to impute a conflict of interest to an entire prosecutors' office.

This circumstance is not present here, and this Court overlooked *Zogheib*'s narrow reach in relying on it. Floyd did not assert a conflict of interest. Indeed, the separation of powers violation asserted by Floyd is the opposite: the Clark County District Attorney's office has too much power in support of its interests. But, more fundamentally, *Zogheib*'s logic does not carry over to the specifically identifiable impropriety presented here. There are no "confidences of a former client" to keep; the unique facts presented here are unlikely to repeat, so there is little risk of courts "unnecessarily interfer[ing] with the performance of prosecutor's duties," of "many unnecessary disqualifications," or of "limit[ing] mobility from private practice." *Id.* at 164, 321 P.3d at 886. Nor is the *Zogheib* standard helpful here, in which there is neither a conflict of interest nor a trial to implicate state and federal due process rights.

Nonetheless, the specifically identifiable impropriety relates to the entire Clark County District Attorney's office because it relates to the district attorney himself, the execution warrant's timing, whether the district attorney's statements had any influence on subordinate employees in his office, and his office's existing separation of powers violation. That is, the specifically identifiable impropriety is akin to other structural errors, in which the fairness of a trial might not be implicated, but the public's right to a fair and transparent system of government is. Thus, the Supreme Court has explained that the structural error doctrine "ensure[s] insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). Some rights are "not designed to protect the defendant from erroneous conviction but instead protect[] some other interest." *Id.* at 1908. Alternatively, the effect of some kinds of error "are simply too hard to measure." *Id.* The Clark County District Attorney's separation of powers violation—coupled with his statements and the timing of his office's actions in seeking a warrant—are akin to these kinds of

interests. The separation of powers provision does not directly relate to preventing erroneous convictions; nor is the harm caused by it easily measured. Thus, even if this Court applies *Zogheib*'s imputation standard, the specifically identifiable impropriety must be imputed to the entire office.

D. This Court overlooked material questions of law and fact in ignoring how the Clark County District Attorney exercised his discretion in seeking Floyd's execution warrant.

In denying Floyd's petition this Court noted that the Clark County District Attorney did not violate the separation of powers by seeking an execution warrant because "he is authorized to do so under NRS 176.495." Order at 3. This Court further noted that "as the officer with policymaking authority for his office, NRS 252.070(1), he is permitted to speak publicly about pending criminal legislation." *Id.* This Court's analysis overlooks facts and law.

First, Floyd's argument was not that seeking an execution warrant by itself, was a separation of powers violation. *See, e.g.*, Pet. at 29. Rather, the Clark County District Attorney's timing of the request for a warrant was a component of the specifically identifiable

impropriety supporting the disqualification motion. *Id.* To reiterate: the Clark County District Attorney did not take any actions related to Floyd's execution warrant for almost five months.[6] The ostensible first action related to Floyd's execution warrant was timed to correlate with the unveiling of an abolition bill, namely the Clark County District Attorney's comment to the Review Journal that he would be seeking the execution warrant.[7] Then, nineteen days later, the State actually filed the motion to seek a warrant—the day after the Assembly voted to approve the abolition bill.[8] The district attorney's statutory authority to seek a warrant of execution does not explain the district attorney's discretionary action in timing that motion with the pending legislation. It was this discretionary timing that contributed to the specifically identifiable impropriety.

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[6] *Compare Floyd v. Gittere*, No. 19-8921, 141 S. Ct. 660 (Nov. 2, 2020), *with* 1APP164.

[7] *Compare* Bill History, Assembly Bill 395 (81st Session 2021), available at https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/8006/Overview (bill "[r]ead first time" on Mar. 24, 2021), *with* 1APP164 (Mar. 26, 2021 article).

[8] *Compare* Bill History, Assembly Bill 395, *supra* n.7 (passed in Assembly on Apr. 13, 2021), *with* 1APP178 (motion filed Apr. 14, 2021).

Second, this Court overlooked that the district attorney's public comments were more than "speak[ing] publicly about pending criminal legislation." Order at 3. The district attorney's statements instructed "legislative leaders" to "recognize" Floyd's case and to "have their eyes wide open."[9] Both Senator-Prosecutors have leadership roles within the legislature.[10] One of the Senator-Prosecutors was the Chair of the Senate Judiciary, who had the discretion—which she exercised here—to not schedule the bill for a committee hearing, and effectively kill the bill without a vote.[11] Thus, the district attorney's statements were not mere public speaking about pending criminal legislation, but also messages to "legislative leaders"—including to the Senator-Prosecutors who are also his subordinate employees. In this regard, this Court's distinction between exerting "improper" authority and "proper" authority overlooks

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[9] 1APP164.

[10] *See Legislator Information: 81st (2021) Session*, available at https://www.leg.state.nv.us/App/Legislator/A/Senate/81st2021 (listing Nicole J. Cannizzaro as Majority Leader); *see also Senate Judiciary Comm.* (81st Session), available at https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Committee/329/Overview (listing Melanie Scheible as Senate Judiciary Chair).

[11] *Compare* Nev. Legis. J. Standing R. 14.3 (81st Sess. 2021) *with* Bill History, Assembly Bill 395, *supra* n.7 (passed in Assembly on Apr. 13, 2021).

that any exertion of authority that the Clark County District Attorney exercised over the Senator-Prosecutors is a specifically identifiable impropriety. *See* Order at 3.[12]

But, also the district attorney provided improper commentary about Floyd and his case, explaining "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" and that Floyd's was a "landmark case."[13] As Floyd indicated in his Reply, these comments were inconsistent with Nevada's Rules of Professional Conduct, which advise that prosecutors should not make "extrajudicial comments that have a substantial

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[12] This Court also materially misapprehends NRS 252.070(1) as granting the district attorney leave to "speak publicly about pending criminal legislation." Order at 3. NRS 252.070(1) clarifies that deputy district attorneys do not have policymaking authority for the district attorney's office; it does not affirmatively grant the district attorney authority to speak publicly about criminal legislation.

[13] 1APP164.

likelihood of heightening public condemnation of the accused." *See* Reply at 6 n.5; *see also* Nev. R. Prof'l Conduct 3.8(f).[14]

Thus, this Court's order overlooks that the Clark County District Attorney's actions—waiting five months to take action on Floyd's warrant of execution, making inflammatory remarks about Floyd's case, and using those remarks to instruct subordinate employees to take particular action in their legislative deliberations—would appear to a reasonable person as applying pressure to the Senator-Prosecutors. Such pressure is a question separate from any question of statutory authority to seek a warrant of execution.

III. Conclusion

For the foregoing reasons, Floyd requests that this Court grant his petition for rehearing and disqualify the Clark County District

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[14] *See also* American Bar Association, *Criminal Justice Standards: Prosecution Function*, Standard 3-1.10(b) ("The prosecutor should not make, cause to be made, or authorize or condone the making of, a public statement that the prosecutor knows or reasonably should know will have a substantial likelihood of prejudicing a criminal proceeding *or heightening public condemnation of the accused*, but the prosecutor may make statements that inform the public of the nature and extent of the prosecutor's or law enforcement actions and serve a legitimate law enforcement purpose."); *id.* at Standard 3-1.4(a) ("[T]he prosecutor should be circumspect in publicly commenting on specific cases or aspects of the business of the office.").

Attorney's Office from participating in his case, or, in the alternative, that this Court reconsider its decision and remand the case for further factual development to meet the evidentiary burden the Court just imposed upon him.

Dated this 10th day of January, 2022.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ David Anthony
David Anthony
Assistant Federal Public Defender

/s/ Brad D. Levenson
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