IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE MICHAEL FLOYD,

Petitioner,

vs.

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

Respondent,

And

THE STATE OF NEVADA,

Real Party in Interest.

Electronically Filed
Feb 02 2022 08:11 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 83108

D.C. NO: 99C159897

ANSWER TO PETITION FOR REHEARING

COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, ALEXANDER CHEN, on behalf of the Real Party in Interest and submits this Answer to Petition for Rehearing from this Court's issuance of a writ of mandamus filed December 23, 2021, in the above-captioned case. This answer is based on the following memorandum and all papers and pleadings on file herein.

/ / /

/ / /

/ / /

Dated this 2nd day of February, 2022

Respectfully submitted,

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

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #0010539
Attorney for Real Party in Interest
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155
(702) 671-2750

MEMORANDUM OF POINTS AND AUTHORITIES

ARGUMENT

The State requests that this Court promptly deny Petitioner Floyd's (hereinafter "Floyd") petition for rehearing. This Court did not err in upholding the district court's ruling that the Clark County District Attorney's Office would not be disqualified from handling Floyd's case. "The court may consider rehearing a matter in the following circumstances: (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." NRAP 40(c)(2). Rather than following the proscriptions of NRAP 40(c)(2), Floyd appears to be relitigating the issues raised in his underlying petition.

This petition came to this Court by way of the district court denying Floyd's motion to have the Clark County District Attorney's Office disqualified from handling his case. This Court did not err because the district court is responsible for controlling the attorneys that practice before them and whether disqualification is appropriate. Robbins v. Gillock, 109 Nev. 1015, 1018, 862 P.2d 1195, 1197 (1983). This Court has recognized that courts that face disqualification motions must weight competing interests between "the right to be represented by counsel of one's choice, each party's right to be free from the risk of disclosure of confidential information,

and the public's interest in the scrupulous administration of justice." Brown, 116 Nev. at 1205, 14 P.3d 1266. The district court's decision will stand absent a manifest abuse of discretion. Round Hill Gen. Imp. Dist. V. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

A. This Court did not err by requiring Floyd to show an "actual" impropriety

Floyd argues that reconsideration should be granted because this Court erred in applying an "actual" impropriety standard instead of a "reasonable possibility" standard. In arguing that disqualification of the Clark County District Attorney's Office is appropriate, Floyd largely relies on Brown v. Eighth Jud. Dist. Ct. (Thalgott), 116 Nev. 1200, 14 P.3d 1266 (2000). Brown holds that a party that wishes to disqualify opposing counsel must first establish "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur," and then it must establish "the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." Id. at 641, 781 P.2d at 1153.

1. This Court correctly held that the impropriety standard is not relevant for the disqualification of an entire district attorney's office

This Court did not err because it appropriately applied existing case law related to the disqualification of an entire district attorney's office. State v. Eighth Jud. Dist. Ct.(Zogheib), 130 Nev. 158, 165, 321 P.3d 882, 886 (2014). Zogheib

specifically repudiated the impropriety standard referenced by Floyd when applied to disqualifying an entire district attorney's office. A district attorney's office is only to be removed if there is a conflict that would "render it unlikely that the defendant would receive a fair trial unless the entire prosecutor's office is disqualified.[1]" State v. Eighth Jud. Dist. Ct., 130 Nev. 158, 165, 321 P.3d 882, 886 (2014).

Floyd has in no way demonstrated that he is not being treated fairly. The Clark County District Attorney's Office had an absolute right to pursue Floyd's lawful sentence. Floyd's personal desire to change his sentence does not mean that the Clark County District Attorney's Office has treated him unfairly or deprived him of due process.

2. Floyd does not even prevail under the "reasonable possibility" standard

Floyd, in citing the standard for disqualification of an attorney used in Brown, argues that this Court "did not ask whether the facts show a 'reasonable possibility' of a specifically identifiable impropriety." Pet. For Rehearing, p. 3. However, Floyd's underlying petition largely relied on the position that the "specifically identifiable impropriety" is the Clark County District Attorney's employment of two deputies that also serve in the Nevada Legislature. Floyd's position is that because the dual service violates the separation-of-powers clause of the Nevada Constitution,

[1] The Order Denying Petition in this case interpreted the phrase "fair trial" to mean "fair proceedings in lower court."

an identifiable impropriety has occurred.

However, the "reasonable possibility" standard is the reasonable possibility that there is an actual identifiable impropriety. Here, there is no reason to use the "reasonable possibility" standard because the subject matter of the alleged impropriety is not in dispute. It is not in dispute that Deputy District Attorneys Scheible and Cannizzaro are both employed by the Clark County District Attorney's Office. Moreover, it is irrefutable that Deputy District Attorneys Scheible and Cannizzaro were not assigned to Floyd's conviction, appeals, or current pleadings. They have had zero involvement with his case.

In urging this Court to use the "reasonable possibility" standard, Floyd glosses over the fact that the standard is to be read in conjunction with the district court believing in the possibility of an actual impropriety. Even from Floyd's viewpoint, there are only two arguments that he sets forth towards trying to establish this alleged impropriety. The first is that the Clark County District Attorney's Office is in a perpetual state of impropriety by employing the two deputy district attorneys. Floyd states in his Petition for Rehearing that his argument was not that seeking an execution warrant by itself was a separation of powers violation. Pet. For Rehearing, p. 15. Yet, in his Petition for Writ of Mandamus he clearly states "[B]ecause the Clark County District Attorney's Office is in violation of Article 3, § 1 of the Nevada Constitution, a specific and identifiable impropriety has occurred. Pet., p. 8.

This Court has not found that their employment alone is not a violation of the separation-of-powers clause that would prevent District Attorney Wolfson from seeking an execution warrant. Given that their employment is not an impropriety, then there is no reason to use the "reasonable possibility" standard here.

Floyd's second argument is that an impropriety exists proven by the timing of events in this case that occurred in this case. His argument relies upon comments that District Attorney Wolfson made combined with the timing of events that were not within his control. Per Floyd's opinion, District Attorney Wolfson's comments amounted to an instruction to legislative leaders, presumably including Deputy District Attorney's Scheible and Cannizzaro. Although Floyd's argument is solely based on unsubstantiated speculation and belied by the rest of District Attorney Wolfson's comments, even if believed Floyd's argument still fails.

First, the statements made by District Attorney Wolfson were public. He specifically stated that the decision to seek a warrant of execution against Floyd was not based on the legislative session. Thus, based on his full commentary, neither the district court nor this Court needed to speculate about the comments that were made. This was not some surreptitious code or signal to legislative leaders to force them to vote against the proposed bill. Thus, again the reasonable probability of an impropriety standard does not hold up here.

Second, is Floyd's argument that Wolfson is asserting improper authority

upon his deputies. However, this Court was correct in finding that there was no evidence to support their assertion. For instance, neither of the deputies serves in the Nevada Assembly. Thus, the coincidental timing of District Attorney Wolfson's comments and the filings in this case, which Floyd wants to assert as the impropriety, clearly had nothing to do with Deputy District Attorneys Scheible and Cannizzaro's legislative duties or powers. Floyd attempts to assert a cloud of impropriety without being able to identify anything improper.

As this Court noted, District Attorney Wolfson has the authority to seek an execution warrant pursuant to NRS 176.495. He also has the right to make statements about his decisions. NRS 252.070(1). Thus, based upon these facts alone, Floyd certainly could not seek to have District Attorney Wolfson and his office disqualified.

Floyd argues that the actions are worse because he believes that District Attorney Wolfson has applied pressure to his deputy attorneys, but this argument also fails, especially with regards to the history of Floyd's case. Floyd was convicted decades before District Attorney Wolfson assumed his office and Deputy District Attorneys Scheible and Cannizzaro entered the legislature. Floyd was convicted, and he was sentenced to the death penalty. Despite Floyd's desires and wishes that the death penalty be abolished in Nevada, it still stands as the law of the land. Thus in seeking out a warrant of execution, the Clark County District Attorney's Office was

following prevailing law.

Although Floyd presents no proof of actual impropriety by District Attorney Wolfson, it is also worth noting that in Brown, the disqualification revolved around a secretary that had previously worked for an attorney that represented the civil defendant. The secretary had left her employment with the previous attorney and ultimately worked for plaintiff's counsel that was suing the defendant that she previously helped to represent. In that case, it was deemed that even if plaintiff's counsel represented that the secretary had not divulged confidential information, there was still a reasonable possibility of a specifically identifiable impropriety. Namely, that the secretary would aid plaintiff's counsel by divulging privileged information she had acquired while working for the defendant's previous attorney.

Again, the context in which this case exists is incredibly different from the inquiry that was conducted in Brown. Here, Floyd argued that the employment of the two deputy district attorneys was an identifiable impropriety. However, the employment of two deputy district attorneys does not involve the type of confidential information that was implicated in Brown. Although the State maintains that Deputy District Attorneys Scheible and Cannizzaro have never been involved with Floyd's case, even for the sake of argument had conversations taken place with District Attorney Wolfson, there is no rule that prohibits individuals from discussing pending legislation. This is not a situation like Zogheib where the District Attorney has

confidential information and would thus be conflicted from communicating with other deputies. Any theoretical conversation between them would not have implicated the confidential type of information that was so crucial to removing plaintiff's counsel in Brown.

As this Court is aware, laws are subject to be changed in this State every other year when the legislature convenes. Various changes to the criminal justice system are discussed, some pass and many do not. Under Floyd's desired outcome, the mere proposal of legislation would be treated as something more despite never having passed the legislative process. The fact that Floyd wanted legislation to pass that would eliminate the death penalty should not entitle him to added protections against those that opposed the legislation, whether that be District Attorney Wolfson or the other deputy district attorneys he complains of.

This Court was correct in its interpretation that Floyd would have to show an actual impropriety for disqualification. The fact of the matter is that Floyd's complaint lies in who the Clark County District Attorney's Office employs. This Court properly held that there was no demonstrated violation of the separation-of-powers clause because of the lack of involvement of Deputy District Attorneys Scheible and Cannizzaro. To Floyd, their employment alone is the impropriety, and then he wants this Court to speculate about all the possibilities and conversations that could possibly exist without ever presenting an iota of evidence. He wants to

make it appear like passage of the bill to abolish the death penalty was a foregone conclusion, but as pointed out even in Floyd's own pleadings, Governor Sisolak stated that he did not agree with passage of the bill as it was written. Ultimately, he presents nothing actual to demonstrate that the Clark County District Attorney's Office should be disqualified.

Floyd argues that this case is unique and unlikely to repeat so that there is little risk of courts interfering with the prosecutor's duties. Pet. For Rehearing, p. 13. However, Floyd's argument still relies on its assertion that the Clark County District Attorney's Office is in violation of the separation-of-powers clause. This would mean that all defendants prosecuted by the Clark County District Attorney's Office, even if not prosecuted by Deputy District Attorneys Scheible or Cannizzaro (like this case), would be able to challenge their prosecutions on a bare and naked allegation that either of them was actually involved despite no evidence to support it.

CONCLUSION

The State respectfully requests that this Court deny the Petition for Rehearing.

/ / /

/ / /

/ / /

/ / /

Dated this 2nd day of February, 2022.

Respectfully submitted,

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

BY */s/ Alexander Chen*

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #0010539
Office of the Clark County District Attorney
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing 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 it 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 petition complies with the type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points, contains 2,072 words and 183 lines of text.

Dated this 2nd day of February, 2022.

Respectfully submitted,

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

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 89155-2212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 2, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

DAVID ANTHONY
BRAD D. LEVENSON
RANDOLPH M. FIEDLER.
Assistant Federal Public Defenders

ALEXANDER CHEN
Chief Deputy District Attorney

BY */s/ E. Davis*
Employee, District Attorney's Office

AC//ed