

IN THE SUPREME COURT OF THE STATE OF NEVADA

Michael Lee,)	
Petitioner)	
	)	Electronically Filed
vs.	)	Mar 04 2022 09:49 a.m.
	)	Elizabeth A. Brown
	)	Clerk of Supreme Court
The Eighth Judicial District Court of	)	District Court Case: C-11-277650-1
the State of Nevada, in and for the)	
County of Clark, and the Honorable D.)	
Barker, Senior District Judge,	)	PETITION FOR WRIT OF
Respondent,	)	MANDAMUS AND/OR
	)	PROHIBITION
and)	
)	
The State of Nevada,	)	Action requested by:
Real Party in Interest.	)	March 13, 2022
_____)	

EMERGENCY PETITION UNDER NRAP 27(e)

NEVADA DEFENSE GROUP
Kelsey Bernstein, Esq.
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dsheets@defendingnevada.com
Attorney for Petitioner

NRAP 27(e) CERTIFICATE

This Certificate is made pursuant to NRAP 27(e)(3):

A. The telephone number and addresses of the parties to this Petition are as follows:

Petitioner: Michael Alan Lee
Counsel: Kelsey Bernstein, Esq.
Nevada Defense Group
714 S. Fourth Street
Las Vegas, Nevada 89101
Phone: (702) 988-2600

Respondent: Eighth Judicial District Court, and the Honorable
D. Barker, Senior District Judge
Regional Justice Center
200 Lewis Avenue
Department IX
Las Vegas, Nevada 89101
Phone: (702) 671-4395

Real Party in Interest: State of Nevada
Counsel: Steve Wolfson, Esq.
Clark County District Attorney's Office
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101
(702) 671-2500

B. The following facts and circumstances are offered to show the nature of the emergency:

1. Petitioner Michael Lee is charged with First Degree Murder, and trial is set to begin on March 14, 2022.
2. Defense filed a Motion to Disqualify the lead prosecutor individually and the Clark County District Attorney's Office in its entirety based in part on three primary conflicts of interest:
 - a. The District Court's inadvertent disclosure of Defense's confidential trial strategy to the State;
 - b. The State permitting one witness in this trial to act as legal counsel for other witnesses in the same trial; and
 - c. The State's failure to maintain an appearance of professionalism and propriety with a material witness.
3. On March 1, 2022 the District Court denied Defense's Motion to Disqualify via Minute Order, but the District Court's decision did not fully address the first conflict of interest, and failed to address the remaining conflicts in their entirety.
4. Calendar Call is currently set for March 4, 2022 and Jury Trial set to begin on March 14, 2022.
5. Undersigned Counsel believes irreparable harm will result if the Clark County District Attorney's Office is permitted to continue

prosecuting this case through jury trial despite the conflicts of interest.

6. Undersigned Counsel believes these circumstances constitute an emergency because the Minute Order was issued on March 1, 2022, Undersigned Counsel is filing the instant Petition as early as possible after the District Court's Minute Order denying relief, and there is less than 14 days until jury trial is set to begin.

C. Respondent and Real Party in Interest have been electronically served with a copy of this Petition as follows:

Respondent:

dept09lc@clarkcountycourts.us; served on March 4, 2022

Real Party In Interest:

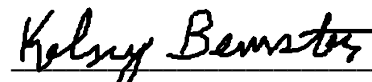
motions@clarkcountyda.com; served on March 4, 2022

pdmotions@clarkcountyda.com; served on March 4, 2022

john.giordani@clarkcountyda.com; served on March 4, 2022

Dated this 4 day of March, 2022.

NEVADA DEFENSE GROUP
Respectfully Submitted By:



Kelsey Bernstein, Esq.
Nevada Bar No. 13825

NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed.

DATED this 4 day of March, 2022.

NEVADA DEFENSE GROUP
Respectfully Submitted By:



KELSEY BERNSTEIN, ESQ.
Attorney for Petitioner

JURISDICTIONAL STATEMENT

This proceeding invokes the original jurisdiction of the Nevada Supreme Court.

NRAP 17 ROUTING STATEMENT

This matter may be assigned to the Nevada Court of Appeals pursuant to NRAP 17(b) as an original proceeding that is not presumptively retained by the Nevada Supreme Court.

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

I. Statement of the Facts

This is a first degree murder re-trial following the reversal of Petitioner Michael Lee's original conviction. On post-conviction appeal, this Court held that Mr. Lee's original trial counsel was ineffective, and reversed Mr. Lee's conviction on the insufficiency of the evidence; further, the Order of Reversal held that the error undermined this Court's confidence in the jury's verdict such that a reversal on the merits was warranted. Following remand, Defense filed a series of bail motions to address that Mr. Lee was being unconstitutionally held without bail after the reversal (Appellant's Appendix, Bates 164-67).

In one of these bail arguments, the State conceded on the record that monetary bail was previously set before the first trial, and more significantly, the evidence is sufficient for **second degree** murder. Specifically, the minutes from the bail argument on January 16, 2020 reflect: "Mr. Giordani argued the Supreme Court reversed the case, however stated the evidence was sufficient for second degree murder" (Bates 124). However, the State continued to request Mr. Lee be held without bail, and over Defense objection he is currently housed without bail in the Clark County Detention Center.

On or about January 7, 2022, Defense filed two separate Ex Parte Applications for Records and Order Under Seal (Bates 166). The documents were filed under temporary seal with the District Court. Prior to granting the Applications, the Court requested Defense file an Amended Ex Parte Application with additional information to justify the ex parte nature of the request and why the documents should be filed under seal (Bates 088).

Pursuant to the District Court's request, on January 20, 2022, Defense filed under seal two Amended Ex Parte Applications for Record and Order containing supplemental information, including: substantial confidential trial strategy, including significant aspects of Defense's *entire* trial strategy; why the records were necessary for two key witnesses in the trial and how the records requested related to that trial strategy; and why the State cannot be made aware of Defense's record request without revealing this confidential trial strategy (Bates 166).

Given the extreme sensitivity of the material, Defense stressed in both the Application itself and the accompanying Order the need for strict confidentiality, and included a request for the Application to remain under seal whether the Application was granted or denied; similarly, the Order included a provision to file under seal.

However, on February 7, 2022, the entire substance of both Applications – including all of Defense’s confidential and privileged trial strategy, as well as the signed Order (including a provision to seal) – was filed publicly (Bates 097). The documents were electronically served to *five* different emails in the District Attorney’s Office, as well as the Attorney General’s Office, a key witness in the case which was the subject of one of the Applications, and three separate Eighth Judicial District Court departments (Bates 097-98).

Although the Court filed the documents under seal less than an hour later, it was not possible to recall the service of the documents. Therefore, unfortunately through no fault of either Defense or the State, the State had been made aware of highly sensitive, privileged trial strategy information which goes to the heart of the trial issue itself.

This case stems from the death of Brodie Aschenberger by child abuse. Although the State charged Mr. Lee with the crime, it is the position of Defense that the murder was actually committed by Arica Foster, the child’s biological mother. One of the Ex Parte Applications requested records from witness Alayne Opie, who is Arica Foster’s sister and the child victim’s aunt. Ms. Opie is a practicing attorney in Las Vegas, Nevada.

Pursuant to the subpoena duces tecum that was authorized by the District Court, Ms. Opie disclosed to Defense Counsel parts of a text message conversation between her and the lead prosecutor on the case (Bates 128-32; 141-42). In these text messages, the prosecutor disparages Defense Counsel, falsely tells the witness that Defense is “fabricating” issues, and appears to accept a personal benefit from Ms. Opie, who gave the prosecutor her home address and gate code for him to use as parking to avoid traffic.

Based on these messages and subsequent investigation into Ms. Opie, Defense Counsel became aware that Ms. Opie appeared to be acting as a legal representative for Ms. Foster as well as other witnesses in the case with whom she shares a familial relationship. The State is aware of and has sanctioned this legal relationship between the witnesses in the case.

As a result of these conflicts, Defense filed a Motion to Disqualify the District Attorney’s Office and Appoint a Special Prosecutor (Bates 054). The Motion had sworn declarations from three individuals as well as numerous exhibits (Bates 065-098). The State’s substantive Opposition was one paragraph, and contained *no law or authorities* (Bates 108-09). In response, Defense filed a Reply that contained more detailed information regarding the conflicts that existed which would prevent Mr. Lee from receiving a fair trial

(Bates 110). Defense also requested the State's Opposition be stricken as procedurally deficient for failing to cite to any legal authorities (Bates 111); this request was never addressed, nor was the State's facially improper pleading.

Oral argument on the Motion to Disqualify was held on February 25, 2022 (Bates 157). The matter was taken under advisement. On March 1, 2022, the District Court issued a Minute Order which ultimately denied the Motion to Disqualify (Bates 157). The District Court ruled:

The Court finds that it is not likely that the Defendant's trial will be unfair. The case is approximately eleven (11) years old and set for retrial; the evidence can be weighed a fair result on the merits can be found without this extreme remedy. Therefore, Defendant's Motion to Disqualify the District Attorney's Office and Appointment of a Special Prosecutor is hereby DENIED (Bates 157-58).

This emergency Petition for Writ of Mandamus and/or Prohibition follows.

II. Relief Sought

Petitioner prays this Honorable Court issue a writ of mandamus and/or prohibition, directed to the Respondent District Court, ordering said Court to disqualify the Clark County District Attorney's Office and appoint a special prosecutor based on an existing conflict of interest.

III. Issues Presented

1. Whether the District Court abused its discretion in finding that disclosure of the Defense's confidential trial strategy to the State will not affect Mr. Lee's right to a fair trial;
2. Whether the District Court abused its discretion by omitting the exercise of its discretion when it failed to address several of the conflicts of interest raised by Defense;
3. Whether the District Attorney's Office should be disqualified from prosecuting this case based on existing conflicts of interest, which individually and in aggregate carry the appearance of impropriety, and which irreparably harm Mr. Lee's constitutional right to a fair trial.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Standard of Review (Mandamus and Prohibition)

This Court may issue a Writ of Mandamus to enforce the performance of an act which the law enjoins as a duty, especially resulting from an office, or to compel the admission of a party to the use and enjoyment of a right to which he is entitled and from which he is unlawfully precluded by such inferior tribunal. NRS 34.160.

A writ of mandamus will issue to control a court's arbitrary or capricious exercise of its discretion. *Office of the Washoe County DA v. Second Judicial District Court*, 5 P.3d 562, 566 (2000) (citing *Marshall v. District Court*, 108 Nev. 459, 466, 836 P.2d 47, 52 (1992)); *City of Sparks v. Second Judicial District Court*, 112 Nev. 952, 954, 920 P.2d 1014, 1015 (1996); *Round Hill Gen. Imp. Dist. V. Newman*, 97 Nev. 601, 637 P.2d 534 (1981). It is within the discretion of the Court to determine if such writ will be considered. *Scrimmer*, 998 P.2d at 1193; see also *State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 662 P.2d 1138 (1983).

"We have indicated that mandamus is the appropriate vehicle for challenging attorney disqualification rulings." *State v. Eighth Judicial Dist. Court*

of the State, 130 Nev. 158, 161, 321 P.3d 882, 884 (2014); *Collier v. Legakes*, 98 Nev. 307, 646 P.2d 1219 (1982)

As to the alternative Writ of Prohibition, Nevada Revised Statute 34.420 states: The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person from exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. The object of a writ of prohibition is to restrain inferior courts from acting without authority of law in cases where wrong, damage, and injustice are likely to follow from such action. *Olsen Family Trust*, 110 Nev. 548, 552 (1994); *Silver Peaks Mines v. Second Judicial District Court*, 33 Nev. 97, 110 P. 503 (1910). Like Mandamus, Petitions for Writ of Prohibition are addressed to the sound discretion of this Court, and may only issue where there is no plain, speedy, and adequate remedy at law. NRS 34.330; *Jeep Corp. v. Second Judicial District Court*, 98 Nev. 440, 442-43, 652 P.2d 1183, 1185 (1982).

In this case, Petitioner has no plain, speedy or adequate remedy at law. Petitioner is in interlocutory status and cannot independently appeal the denial of the Motion to Disqualify of his case to the Eighth Judicial District Court without a specific grant of statutory authority, which does not exist in this case.

Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990) (no right to appeal exists where no statute or court rule provides for an appeal).

Petitioner further has no speedy and adequate remedy at law, and will suffer irreparable harm if the trial goes forward before he is able to raise these issues on direct appeal. If trial proceedings, the trial will reveal the same confidential strategy that Petitioner sought to keep sealed from the State; therefore, it is imperative that trial only proceed with a prosecuting authority that does not have an existing conflict of interest or pre-existing knowledge of this trial strategy. Otherwise, in the event these issues result in reversal on direct appeal, any subsequent prosecution will be able to determine this trial strategy through examination of transcripts. As a result, Petitioner has no interlocutory remedy, and forcing Petitioner to proceed with trial in order to raise the issue on direct appeal will further substantiate the issues raised herein – that Petitioner is not afforded a fair trial when his trial strategy is revealed to the prosecution.

II. Standard of Review (Disqualification)

A request to disqualify a party is within the discretion of the trial court. “The district court has broad discretion in attorney disqualification matters,

and this court will not overturn its decision absent an abuse of that discretion.” *Waid v. Dist. Ct.*, 121 Nev. 605, 609, 119 P.3d 1219, 1222 (2005).

However, failure to exercise discretion can it itself be an abuse of discretion. This Court has set forth three separate ways the lower court can abuse its discretion: “if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason,” “if the action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact,” and “a failure to exercise discretion is generally encompassed within the meaning of abuse of discretion.” *Foster v. State*, 133 Nev. 1010, 396 P.3d 150 (2017) (internal citations omitted).

The appointment of a special prosecutor following disqualification is authorized per NRS 252.100. “The disqualification of a prosecutor's office rests with the sound discretion of the district court. In exercising that discretion, the trial judge should consider all the facts and circumstances and determine whether the prosecutorial function could be carried out impartially and without breach of any privileged communication.” *Collier v. Legakes*, 98 Nev. 307, 309-10, 646 P.2d 1219, 1220 (1982) (citing *Tomlin v. State*, 81 Nev. 620,

407 P.2d 1020 (1965); *Hawkins v. 8th District Court*, 67 Nev. 248, 216 P.2d 601 (1950); *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980)).

Petitioner further requested the disqualification be imputed to the entire Clark County District Attorney's Office. Although the Supreme Court initially utilized an "appearance of impropriety" standard in *Collier* to govern prosecutorial disqualification, that standard was amended in criminal cases to "whether the individual lawyer's conflict would render it unlikely that the defendant would receive a fair trial unless the conflict is imputed to the prosecutor's office." *State v. Eighth Judicial Dist. Court of the State (Zogheib)*, 130 Nev. 158, 160, 321 P.3d 882, 883 (2014):

There is, however, a broader concern in criminal cases that cannot be overlooked: the defendant's right to a fair trial. Based on that concern we agree with *Collier* that an individual prosecutor's conflict of interest may be imputed to the prosecutor's entire office in extreme cases. But rather than making that determination based on an appearance of impropriety, we conclude that the appropriate inquiry is whether the conflict would render it unlikely that the defendant would receive a fair trial unless the entire prosecutor's office is disqualified from prosecuting the case. This approach strikes the correct balance between the competing concerns of the State and the right of the defendant to a fair trial. *Id.*

Additionally, the Court has addressed a non-exhaustive list of factors to take into consideration specifically when the disclosure of privileged information is not due to the fault of the receiving party:

This court has not previously determined what factors a district court should consider when presented with a motion to disqualify an attorney who has received an opposing party's privileged information, yet played no part in obtaining the information.

...

The court went on to identify a nonexhaustive list of factors to aid trial courts in determining whether disqualification is appropriate:

- 1) [W]hether the attorney knew or should have known that the material was privileged;
- 2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
- 3) the extent to which the attorney reviews and digests the privileged information;
- 4) the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;
- 5) the extent to which movant may be at fault for the unauthorized disclosure; [and]
- 6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.

We now adopt these factors. *Merits Incentives, Ltd. Liab. Co. v. Eighth Judicial Dist. Court*, 127 Nev. 689, 699, 262 P.3d 720, 726 (2011)

III. Grounds for Disqualification

The following grounds are offered to disqualify the District Attorney's Office, beginning with the least egregious.

1. The State's Demonstrated Lack of Objectivity Towards Petitioner

Following remand after this Court's reversal of his conviction, Defense filed a series of bail motions to address that Mr. Lee was being held without bail. Defense argued that detaining him without bail was in direct contradiction to this Court's ruling, because there cannot be proof evident and presumption great that Petitioner committed murder in the first degree when the reversal of his conviction was based in part on the evidence supporting a theory of child neglect, not abuse.

Additionally, Petitioner had monetary bail prior to the first trial, and because the conviction was reversed, the presumption of innocence re-attached. There was no change in circumstances to warrant Mr. Lee being held without bail, when he was previously held on monetary bail, except for this Court's reversal of the conviction.

Despite this, the State continued to request that Mr. Lee be detained without bail. In one of these bail arguments, the State even conceded on the record that the evidence is sufficient for second degree murder.

The State is also continuing to prosecute Mr. Lee for first degree murder and has openly stated on the record that there are no negotiations offered, except to plead straight to first degree murder. The State conceded on the record that the evidence supports *second* degree murder, yet it continued to request that Mr. Lee be detained without bail, continued to prosecute him for first degree murder, and only offered a negotiation to plead guilty to first degree murder. In aggregate, the State's actions create an implication of vindictive prosecution and disregard to Mr. Lee's constitutional rights.

In the District Court proceedings, the Court failed to address this conflict of interest. In failing to address it, the Court failed to exercise its discretion, and thus abused its discretion. See also, *Massey v. Sunrise Hosp.*, 102 Nev. 367, 371, 724 P.2d 208, 210 (1986) ("A court's failure to exercise discretion (when available) is error").

2. The State Providing False Statements to Key Witnesses Regarding the Case

On October 8, 2021, both Defense and the State indicated they would be ready for trial. Several months prior, Defense had requested a complete copy of the State's discovery to ensure it had a complete file, as Petitioner's legal file had been passed through several attorney's offices since the initiation of the case more than 11 years ago. In response to Defense's request, the State provided a flash drive with 3.28gb worth of data, exactly 1,711 individual files (Bates 114).

On November 16, Defense sent via e-mail an additional discovery request for metadata from the photographs taken to determine the date, time and location of the photos. In response to this metadata request, one week before trial (and months after both parties announced ready), the State provided an additional flash drive to Defense that contained 91gb of additional discovery, or 8,774 files (Bates 115).

For *years* the State claimed that these 1,711 files were "everything" in its possession, but one week before trial, the State provided a flash drive with additional discovery that was **7 times** the amount of discovery previously

disclosed. The State also opposed the Defense's request to continue the trial based on the untimely disclosures.

At the same time that the State dumped the discovery, the State informed the witness, Alayne Opie, that the Defense is requesting to continue the trial because Defense was "fabricating" discovery issues (Bates 128). This falsity appeared to have the intended effect on the State's witness.

In the District Court proceedings, the Court failed to address this conflict of interest. In failing to address it, the Court failed to exercise its discretion, and thus abused its discretion.

3. The Disclosure of Defense's Entire Trial Strategy to the State

On February 7, 2022, the District Court inadvertently publicly filed and served the entire substance of both Ex Parte Applications – including all of Defense's confidential and privileged trial strategy, which was only disclosed at the Court's request (Bates 097). The documents were electronically served to *five* different emails in the District Attorney's Office, as well as the Attorney General's Office, a key witness in the case which was the subject of one of the Applications, and three separate Eighth Judicial District Court departments (Bates 097-98).

Although the Court filed the documents under seal less than an hour later, Defense consulted with both the chief judge and supervisor of the District Court Clerk's Office, who confirmed it was not possible to recall the electronic service of the documents. Therefore, unfortunately through no fault of either Defense or the State, the State had been made aware of highly sensitive, privileged trial strategy information which goes to the heart of the trial issue itself. Additionally, given that service was made to five separate emails in the Clark County District Attorney's Office, there is no viable screening mechanism that would ensure full screening of the privileged information.

The same day of the disclosure, Defense also sent the State an "ignore and destroy" email regarding the disclosures. The State did not respond. Additionally, during oral argument on the Motion to Disqualify, the prosecutor would not confirm or deny whether he looked at the privileged documents, only stating that he "did not know" if he had opened or read the privileged material.

In this case, there is no doubt that the prosecutor received confidential and privileged information that would strongly and adversely impact Mr. Lee's right to a fair trial; there is no greater confidential and privileged information that would affect these rights than the disclosure of Defense's entire trial strategy and the basis of why it must *not* be disclosed to the State. Additionally,

it is impossible to guarantee that Mr. Lee would receive a fair trial absent the disqualification of the entire District Attorney's office, as the Court's accidental dissemination of this material caused it to be served to at least five different individuals in the office (the exact exposure is impossible to calculate, as some of the emails that received electronic service are believed to be accessible by more than one person in the District Attorney's Office).

Using the *Merits Incentives* factors, the State knew the material was privileged, as Defense sent an email the same day stating that privileged information had been inadvertently disclosed; the prosecutor would neither confirm nor deny that he read the privileged information, or whether it was before or after receiving the notice; the privileged information is significant, and directly pertains to Mr. Lee's ability to receive a fair trial because it allows the State to preemptively prepare for and address the strategy and impeachment that Defense would have utilized; neither the State nor Defense was at fault for the accidental service of this information; and Petitioner would suffer prejudice in having his entire trial strategy revealed to the prosecution a month before trial.

The District Court's denial of Petitioner's Motion to Disqualify on these grounds was an abuse of discretion. Although this was the only conflict that was

addressed by the District Court, the following is the entirety of its substantive ruling:

The Court looks to *State v. Eighth Judicial Dist. Ct. (Zogheib)*, 130 Nev. 158 (2014) for direction and notes the test is whether the conflict(s) would render it unlikely that the Defendant would receive a fair trial unless the office is disqualified from prosecuting the case. The Court finds that it is not likely that the Defendant's trial will be unfair. The case is approximately eleven (11) years old and set for retrial; the evidence can be weighed a fair result on the merits can be found without this extreme remedy. Therefore, Defendant's Motion to Disqualify the District Attorney's Office and Appointment of a Special Prosecutor is hereby DENIED.

Even relying on *Zogheib*, the District Court's decision does not follow the rule of law. *Zogheib* specifically dealt with the imputation of the conflict from one prosecutor to the entire District Attorney's Office. "The question presented in this original proceeding is whether that conflict of interest was properly imputed to all of the lawyers in his office, requiring the disqualification of the Clark County District Attorney's Office." *Id.* at 159. *Zogheib* did not address when a conflict of interest exists, as the State conceded in that case that there was in fact a conflict. The only question that remained was whether that conflict could be imputed to the remainder of the office. "The State conceded that Wolfson has a conflict of interest that disqualifies him from representing the State against Zogheib in the underlying criminal prosecution...The

overarching question is whether Wolfson's conflict should be imputed to all of the lawyers in the district attorney's office." *Id.* at 161.

Because *Zogheib* deals only with imputation of an existing conflict from one prosecutor to the entire office, it was improper for the District Court to rely exclusively on this case to determine whether a conflict existed at all. The District Court's Minute Order states there is no conflict warranting disqualification because "[t]he case is approximately eleven (11) years old and set for retrial; the evidence can be weighed a fair result on the merits can be found without this extreme remedy."

Respectfully, the age of the case is not relevant to determining whether a conflict exists. The jury's ability to weigh the evidence is not relevant to determining whether a conflict exists. The conflict which exists is the disclosure of Defense's *strategy*, not evidence. The District Court relied on *Zogheib* to conclude that no conflict exists if Mr. Lee will receive a fair trial, but that is the standard for imputation of a conflict to the entire office, not whether a conflict exists at all.

For these reasons, the District Court's substantive ruling on this conflict was arbitrary and capricious, as it exceeds the bounds of law or reason and is based on an error of law.

4. The State has Failed to Maintain the Appearance of Propriety with State Witnesses

Most recently, Defense became aware of some disturbing interactions between the State and witness Alayne Opie. The situation became known to Defense when the State filed a Motion to Admit the Prior Testimony of Merridee Moshier, claiming that Ms. Moshier suffered from severe Lewy Body Dementia that made her legally incompetent to testify (Bates 001). Ms. Moshier's is both a nurse and the mother of Arica Foster, the other suspect in the murder.

Her testimony is significant, as Ms. Moshier testified in an expert witness capacity in the first trial that the bruises on the child victim could be dated to when the child was alone with Mr. Lee. In preparation of her cross examination, Defense has procured multiple expert witnesses to testify that it is medically impossible to "date" the infliction of bruises in the manner Ms. Moshier claimed in the first trial. Since it was Ms. Moshier's testimony that purportedly placed the child alone with Michael when the mortal blow was inflicted, cross-examination of Ms. Moshier on this suspect timeline is not only significant, but potentially dispositive to the case.

The State's Motion to admit her prior testimony would completely prevent the Defense from cross-examining her; as its basis, the State relied on

Ms. Opie's representations that her mother was mentally incompetent. Specifically, Ms. Opie provided a sworn affidavit that her mother Merridee Moshier had Lewy Body Dementia and substantial memory issues (Bates 155-56).

In its Motion and on the record, the State indicated that Ms. Moshier's mental infirmity began several years ago; however, Defense was able to determine after a cursory public search that Ms. Moshier is an actively licensed nurse in multiple states, including Nevada. Since a nursing license requires certification every two years, there were legitimate questions as to Ms. Opie's representations that Ms. Moshier was truly incompetent to testify (Bates 149).

Further investigation into the medical documentation provided by the State revealed strong inconsistencies in the representations made by Ms. Opie in her sworn affidavit. Specifically, Ms. Opie wrote that she believed her mother's Lewy Body Dementia diagnosis was so severe that Ms. Moshier was unable to drive or work as a nurse (Bates 156). However, a medical evaluation of Ms. Moshier just *one month* before the State's Motion to have her declared mentally incompetent appeared to show that Ms. Moshier was still driving, still working as a nurse, still dispensing medication to clients, and was not

diagnosed with Lewy Body Dementia (Bates 149-151). This led to additional inquiry into Ms. Opie's role in the case.

Ultimately, this inquiry revealed that Ms. Opie was not just herself a witness in the case, but appeared to be acting as a legal representative for other witnesses, including Arica Foster (her sister and the other primary suspect), and her mother, Ms. Moshier. Defense offered the following grounds to establish this legal relationship between the witnesses:

Alayne Opie was present with Arica Foster when she was being questioned about her son's death by law enforcement;

The State's Notice of Witnesses listed Alayne Opie at her law firm address as the contact for Arica Foster (Bates 134); specifically, the State's Notice of Witness List for Arica Foster provides her address as:

FOSTER, ARICA C/O Alayne Opie, 10845 Griffith Peak
Drive, #600, Las Vegas, NV 89135

Ms. Opie used her attorney credentials to log in to Odyssey and add herself to the electronic service list in this case, using her work e-mail and her law firm's name, address, and phone number (Bates 136);

In hearings on this case, Ms. Opie introduces herself to the Court using her name, bar number, and law firm (Bates 138);

The State has been conveying information to Ms. Opie about the trial, that Ms. Opie then further disseminates to the other witnesses; and

Per the State, Ms. Opie accepts service for subpoenas on behalf of the other witnesses, but when Defense attempted to subpoena Ms. Opie herself, she required the subpoena be submitted to the general counsel of her law firm.

Given the totality of circumstances, it objectively appears that Ms. Opie, a witness in the case, is serving in some legal capacity for other witnesses in the case. The State is aware of these objective indicia of a legal relationship, but failed to disclose such to the Court or Defense. Further, the State has directly endorsed this legal relationship by listing Ms. Opie as the contact information for Arica Foster on its pleadings, by agreeing to use Ms. Opie to convey trial information to other witnesses, and by agreeing to let Ms. Opie accept service of subpoenas on behalf of the other witnesses.

Another text message makes it clear that the prosecutor is also not objectively interacting with Ms. Opie. Given the clear opportunity to establish boundaries or maintain the appearance of propriety, the State failed to do so by not immediately rejecting the use of a witness's private property for personal use. Specifically, Ms. Opie provided the deputy her home address and gate code so he could park on her property to avoid traffic (Bates 141-42).

The State's lack of impartiality and objectivity has tainted Ms. Opie's perspective and testimony in this case. Further, that the State is using Ms. Opie

as a “point of contact” for other witnesses in this case means that a bias or taint as to Ms. Opie is equally attributable to the other witnesses. It is completely improper for the State to allow one witness who, by all objective accounts, is acting as a legal representative for other witnesses in the case to act as both a legal representative and independent witness in the same case.

Defense will not guess as to the State’s motivations behind the conduct it has displayed in this case, but its failure to maintain the appearance of propriety and objectivity toward a material witness in the case is evident. The conduct of the State has been increasingly egregious and has absolutely impacted Mr. Lee’s ability to receive a fair and impartial trial and due process rights. Coupled with the State’s improper conduct with a material witness in the case, which potentially has tainted multiple witnesses and created a conflict of interest by allowing a witness in a case to seemingly act with legal authority for other witnesses, the State should have been disqualified.

Like the other grounds raised, the District Court failed to address this *substantial* conflict of interest. In failing to address it, the Court failed to exercise its discretion, and thus abused its discretion.

In summation, there are too many objective indicia of a conflict in this case. As it pertains to the lead prosecutor, the State has displayed a complete

disregard for Mr. Lee's constitutional rights, not just with regards to his right to bail but also by withholding discovery, unreasonably opposing continuances caused by the State's actions, disparaging defense counsel to a material witness, falsely telling that witness that Defense is "fabricating" issues, appearing to accept a personal benefit from that same witness, and sanctioning a State witness acting as a legal representative for other witnesses.


Lastly, there is a conflict of interest which cannot be limited to specific individuals, that being the District Court's accidental service of the Amended Ex Parte Applications which contain Defense's confidential trial strategy. The revelation of Defense's trial strategy to the lead prosecutor on the case will absolutely have a prejudicial effect on Mr. Lee's ability to receive a fair trial. This conflict must be imputed to the entire District Attorney's Office, as there are no less than 5 individuals in the office that received the disclosure and the scope of the disclosure cannot be ascertained because several of the recipient e-mails are accessible by multiple people.

CONCLUSION

For these reasons, Petitioner respectfully requests this Court issue a writ of mandamus and/or prohibition directing the District Court to disqualify the Clark County District Attorney's Office and appoint a special prosecutor.

DATED this 4 day of March, 2022.

NEVADA DEFENSE GROUP
Respectfully Submitted By:




KELSEY BERNSTEIN, ESQ.
Attorney for Petitioner

VERIFICATION OF KELSEY BERNSTEIN, ESQ.

1. I am an attorney at law, admitted to practice in the State of Nevada.
2. I am the attorney handling this matter on behalf of Petitioner.
3. The factual contentions contained within the Petition are true and correct to the best of my knowledge.

Dated this 4 day of March, 2022.

NEVADA DEFENSE GROUP
Respectfully Submitted By:



KELSEY BERNSTEIN, ESQ.
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

1. I 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 with 14 point, double spaced Cambria font.
2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7)(A)(ii) because it is proportionally spaced, has a monospaced typeface of 14 points or more and contains 6,444 words.
3. 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(c), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4 day of March, 2022.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 4 day of March, 2022, I served a true and correct copy of the Petition to the last known address set forth below:

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