IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ALAN LEE, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE DAVID BARKER SENIOR JUDGE, Respondents, STATE OF NEVADA, Real Party in Interest.	Electronically Filed Mar 10 2022 02:43 p.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO: 84328

ANSWER TO EMERGENCY PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy District Attorney, KAREN MISHLER on behalf of the above-named respondents and submits this Answer to Emergency Petition for Writ of Mandamus and/or Prohibition in obedience to this Court's order filed March 8, 2022 in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 10th day of March, 2022.

Respectfully submitted,

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

BY */s/ Karen Mishler*
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
Office of the Clark County District Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The State has previously summarized the procedural history of this case as follows:

> On November 18, 2011, Defendant Michael Alan Lee [Petitioner] was charged by way of Information with: Count 1 – Murder (NRS 200.010, 200.030, 200.508) and Count 2: Child Abuse and Neglect with Substantial Bodily Harm (Felony – NRS 200.508).
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> Defendant's jury trial commenced on August 4, 2014. On August 15, 2014, the jury returned a verdict of guilty on both counts. On October 21, 2014, Defendant was adjudicated guilty and sentenced to life in prison without the possibility of parole. Defendant received no credit for time served, as all credit was applied to case C199242, a violent robbery series for which Defendant was on parole when he committed the instant offenses.
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> The Judgment of Conviction was filed on November 10, 2014. A Notice of Appeal was filed on November 24, 2014. On August 10, 2016, the Nevada Supreme Court Affirmed the Judgment of Conviction. Remittitur issued September 6, 2016. On May 12, 2017, Petitioner filed a Petition for Writ of Habeas Corpus. The State filed its Response on June 20, 2017. This Court denied the Petition on June 28, 2017. The Findings of Fact, Conclusions of Law and Order issued on July 31, 2017. Defendant filed a Notice of Appeal on September 19, 2017. On December 19, 2017, the Nevada Supreme Court dismissed the appeal and Remittitur issued. Defendant then filed a Second Petition for Writ of Habeas Corpus on February 6, 2018. Said Petition was denied, and Defendant appealed. On November 15, 2019, the Nevada Supreme Court reversed and remanded the case for a new trial, finding ineffective assistance of counsel for failing to object to a jury instruction.

Petitioner's Appendix ("PA") 104-05.

On February 11, 2022, Petitioner filed a Motion to Disqualify Attorney's Office and Appoint Special Prosecutor.[1] PA 54-98. On February 14, 2022, the State filed an Opposition. PA 99-109. On February 24, 2022, Petitioner filed a Reply.[2] PA 110-42. On March 1, 2022, the district court denied the Motion to Disqualify. On March 4, 2022, Petitioner sought extraordinary relief from this Court. The Order denying the Motion to Disqualify was filed on March 7, 2022. Petitioner's Supplemental Appendix ("PSA") 218-21. On March 8, 2022, this Court requested the State submit an expedited answer to the Petition.

STATEMENT OF FACTS

The State has previously summarized the facts of the case as follows:

> In December of 2008, Arica Foster gave birth to Brodie Aschenbrenner. Brodie's father was Dustin Aschenbrenner. When Arica's relationship with Brodie's father dissolved, she kept custody of Brodie. Brodie was a loving, fearless, and rambunctious child. In October of 2010, Arica met and began dating Defendant after they were introduced to each other by their respective sisters. At the time, Defendant was on parole in case C199242, an extremely violent series of armed robberies for which Defendant served six years in prison. Arica was unaware of the

[1]The sole basis offered for disqualification was that Petitioner's trial strategy had been revealed to the State due to Petitioner's Amended Ex Parte Applications for Records and Order Under Seal being electronically served on the prosecution and other parties in error. PA 56-98.

[2]In his Reply, Petitioner alleged *for the first time* that the District Attorney's Office was conflicted due to a lack of objectivity regarding Petitioner, the providing of false statements to a witness, and a failure to maintain the appearance of propriety. PA 113-18.

details of Defendant's past and his extremely violent nature, so she allowed him to be around her little boy, Brodie.
In the beginning of the relationship, Defendant and 2-year-old Brodie appeared to be getting along fine. In February of 2011, Arica, Brodie, and Defendant moved into an apartment together. At some point, Arica became concerned about Brodie's physical condition, as she started to notice bruises on Brodie. Arica noticed that the bruises were appearing on Brodie's face and were much darker than the normal everyday bumps Brodie used to get.

In early May of 2011, Arica and Defendant began to have arguments over Brodie. Defendant felt that Arica was babying Brodie too much and that Brodie should have been potty trained by that point. Arica and Defendant also argued about Defendant waking Brodie up in the early mornings to use the bathroom and changing him from his diaper into his pull-up underwear. Arica kept waking up and finding Brodie in his pull-up underwear instead of the diaper she had put on him the night before. Arica and Defendant also argued about keeping Brodie's bedroom door open at night. While Arica wanted the door open so she could hear Brodie at night, Defendant insisted on the door being closed. When Arica would wake up in the morning, she would find Brodie's bedroom door closed.
…
On June 13, 2011, Arica, Brodie and Defendant went to the swimming pool with Defendant's sister Jennifer and her two boys. Brodie swam in the pool and acted like his normal self. They left the swimming pool around 1:20 p.m. and Arica left for work around 4 p.m. Prior to leaving for work, Arica put Brodie down for a nap and then left him alone with Lee. Arica returned home around 8:15 p.m. and checked on Brodie. When she bent down to give Brodie a kiss, Arica noticed a quarter sized bruise on his forehead. When she asked Defendant about the bruise, he told her that Brodie fell in some rocks while leaving his friend Danny Fico's house.

The next morning June 14th, when Brodie woke up, Arica noticed that he had a lot more bruises on him than the night before. He had a couple of bruises on his forehead and the bruise on his cheek was a lot bigger and darker. Brodie also seemed very upset; he ran into Arica's room screaming and wanting to be cuddled. That type of behavior was not normal for Brodie. That day Arica, Brodie and Defendant had plans to

go the Mandalay Bay Shark Reef. After Brodie ate breakfast, Arica dressed him for the day. When Arica was dressing him, Brodie complained that his head hurt. Before leaving the house, Defendant mentioned to Arica that he did not want to bring Brodie anywhere because of his bruises – Defendant was concerned that people would think they beat him. Arica laughed it off, and they proceeded with their day.

Before going to the Shark Reef, they made a stop at the gas station where Defendant worked. Defendant told Arica that he did not want her to bring Brodie inside the store because of his bruises. Arica and Brodie went inside the store, while Defendant went to the car wash part of the gas station. Inside the store, Arica ran into Danny Fico, who commented on the bruises on Brodie's face. When they got to the Shark Reef and began walking inside, Brodie refused to hold Defendant's hand. Arica had to tell Brodie that if he did not hold Defendant's hand they would not go to the Shark Reef.

After the Shark Reef, they went to a McDonalds in Circus Circus to eat. While in McDonalds, Brodie had an accident and wet himself through his pull-ups. Defendant became annoyed and commented that Brodie should have been potty trained. Before returning home that day, Arica stopped by a hair salon. She left Brodie, who was sleeping in his car seat, with Lee. Arica was gone approximately 5-10 minutes. When she returned, Brodie was crying and screaming hysterically inside the car. Defendant claimed nothing had happened, and told her that Brodie just woke up when she got out of the car. Afterwards, they went to Best Buy where Brodie kept saying "night night," which was a way of him telling Arica he was tired and wanted to go to bed. Inside Best Buy, Brodie wanted to get a movie. Arica told Brodie that if he wanted the movie he had to be nice to Lee. However, when Defendant attempted to walk up to Brodie, Brodie got angry and kept saying "no, no, no," so Arica had to put the movie back. When they got home, Arica put Brodie in his room and went to make dinner. During dinner, Arica had to spoon feed Brodie to get him to eat, which was not normal.

After dinner, Arica put Brodie to bed. Arica then told Defendant she had to go grocery shopping and run some errands. Defendant got upset and asked Arica why she just didn't do it earlier. Arica told Defendant that if he didn't want her to leave Brodie with him, she would wake him up and take him with her. Defendant told her to just leave Brodie at

home. Arica was gone for approximately an hour. When Arica got home, she put the groceries away, took a bath and went to bed. At approximately 1:00 a.m. the next morning, June 15th, Arica woke up and noticed Defendant walking into their bedroom. Defendant told her that he went to use Brodie's bathroom and it stunk and he thought Brodie had thrown up.

Arica immediately got up to check on Brodie. When she went into Brodie's room Arica could smell vomit and saw that Brodie was covered in vomit. She took him to the bathroom, where he threw up again. Brodie told Arica that his head hurt. Arica cleaned Brodie up, laid him down on the couch in the living room, and laid next to him for a short time until Brodie drifted off to sleep. After Brodie fell asleep, Arica went back to bed. Sometime in the early morning when it was still dark outside, Defendant carried Brodie into the bedroom and laid him next to Arica. When Arica woke up around 8:50 a.m. she began rubbing Brodie's back. As she was rubbing his back, Arica noticed that he was cold to the touch. Arica jumped up out of bed and ran around the bed to face Brodie, whose eyes were open but not moving. At that point, Arica called 911. Brodie was pronounced dead at 11:00 a.m.

Clark County Coroner's Office Medical Examiner Dr. Lisa Gavin performed an autopsy on Brodie on June 16, 2011. The autopsy revealed Brodie had suffered fatal internal injuries along with several external injuries. Brodie's injuries were not only numerous, but were inflicted over an extended period of time. In other words, Defendant didn't just punch Brodie once, severing his internal organs and killing him – he beat him repeatedly over an extended period of time, as evidenced by the healing and acute injuries. Ultimately, Dr. Gavin determined Brodie died from blunt force trauma to his head and abdomen resulting in a transected duodenum and acute peritonitis. Dr. Gavin ruled Brodie's death a homicide.

PA 100-04.

ARGUMENT

I. STANDARD OF REVIEW

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.

Mandamus will not lie to control discretionary action unless it is manifestly abused or is exercised arbitrarily or capriciously. Office of the Washoe County DA v. Second Judicial Dist. Court, 116 Nev. 629, 635, 5 P.3d 562, 566 (2000). "A writ of mandamus will issue to control a court's arbitrary or capricious exercise of its discretion." Id. (quoting Marshall v. District Court, 108 Nev. 459, 466, 836 P.2d 47, 52 (1992)). This is an exceedingly heavy burden:

> An arbitrary or capricious exercise of discretion is one "founded on prejudice or preference rather than on reason," Black's Law Dictionary, 119 (9th ed. 2009) (defining "arbitrary"), or "contrary to the evidence or established rules of law," id. at 239 (defining "capricious"). See generally, City Council v. Irvine, 102 Nev. 277, 279, 721 P.2d 371, 372 (1986) (concluding that "[a] city board acts arbitrarily and capriciously when it denies a license without any reason for doing so"). A manifest abuse of discretion is "[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." Steward v. McDonald, 330 Ark. 837, 953 S.W.2d 297, 300 (1997); see Jones Rigging and Heavy Hauling v. Parker, 347 Ark. 628, 66 S.W.3d 599, 602 (2002) (stating that a manifest abuse of discretion "is one exercised improvidently or thoughtlessly and without due consideration"); Blair v. Zoning Hearing Bd. of Tp. Pike, 676 A.2d 760, 761 (Pa.Commw.Ct. 1996) ("[M]anifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.").

State v. Eighth Judicial District Court (Armstrong), 127 Nev. 927, 931-32,

267 P.3d 777, 780 (2011).

A writ of mandamus will only issue when the petitioner has no plain, speedy and adequate remedy at law. NRS 34.170. Scrimer v. Eighth Judicial Dist. Court, 998 P.2d 1190, 1193 (2000). It is within the discretion of the court to determine if such writ will be considered. Id.; see also State ex rel. Dep't Transp. v. Thompson, 99 Nev. 358, 662 P.2d 1338 (1983).

A writ of prohibition is an extraordinary form of relief that enables this Court to arrest the proceedings of any tribunal exercising judicial functions in excess of its jurisdiction. NRS 34.320; Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989). A writ of prohibition does not serve to correct errors; its purpose is to prevent courts from transcending the limits of their jurisdiction in the exercise of judicial but not ministerial power. Olsen Family Trust v. Dist. Ct., 110 Nev. 548, 551, 874 P.2d 778, 780 (1994); Low v. Crown Point Min. Co., 2 Nev. 75 (1866). However, "a writ of prohibition must issue when there is an act to be 'arrested' which is 'without or in excess of the jurisdiction' of the trial judge." Houston Gern. Ins. Co. v. Dist. Ct., 94 Nev. 247, 248, 78 Nev. P.2d 750, 751 (1978); Ham v. Eighth Judicial Dist. Ct., 93 Nev. 409, 566 P.2d 420 (1977); see also Goicoechea v. Fourth Judicial Dist. Ct., 96 Nev. 287, 607 P.2d 1140 (1980); Cunningham v. Eighth Judicial Dist. Ct., 102 Nev. 551, 729 P.2d 1328 (1986).

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 their action. Olsen Family Trust, 110 Nev. at 552, 874 P.2d at 781; Silver Peak Mines v. Second Judicial Dist. Ct., 33 Nev. 97, 110 P. 503 (1910). The decision to entertain an extraordinary writ petition lies within the discretion of this Court, and this Court considers whether "judicial economy and sound judicial administration militate for or against issuing the writ." NRS 34.330; Redeker v. District Court, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006).

II. THE DISTRICT COURT DID NOT MANIFESTLY ABUSE ITS DISCRETION BY DENYING PETITIONER'S MOTION TO DISQUALIFY BECAUSE PETITIONER DID NOT ESTABLISH A CONFLICT OF INTEREST EXISTED

Petitioner has failed to demonstrate that the district court acted arbitrarily or capriciously or manifestly abused its discretion in denying the Motion to Disqualify, or that the court acted in excess of its jurisdiction. The district court properly denied Petitioner's Motion to Disqualify, finding that Petitioner failed to demonstrate that the extreme remedy of disqualification of an entire district attorney's office was warranted. The district court was merely complying with the longstanding case law regarding conflicts and disqualifications.

"To prevail on a motion to disqualify opposing counsel, the moving party must first establish 'at least a reasonable possibility that some specifically identifiable impropriety did in fact occur,' and then must also establish that 'the likelihood of public suspicion or obloquy outweighs the social interests which will

be served by a lawyer's continued participation in a particular case.'" Brown v. Eighth Judicial Dist. Court, 116 Nev. 1200, 1205, 14 P.3d 1266, 1270 (2000) (quoting Cronin v. District Court, 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989)).

When a party wishes to disqualify a prosecutor, such impropriety must take the form of a conflict of interest. See NRPC 1.7, 1.9, 1.11; United States v. Kahre, 737 F.3d 554, 574 (9th Cir. 2013) ("proof of a conflict [of interest] must be clear and convincing to justify removal of a prosecutor from a case."). Further, "defendants must demonstrate prejudice from the prosecutor's potential conflict of interest." United States v. Kahre, 737 F.3d 554, 574 (9th Cir. 2013). Black's Law Dictionary defines "conflict of interest" as follows:

> 1) A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.
> 2) A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent.

Black's Law Dictionary (11th ed. 2019).

The second definition is clearly inapplicable here, as Petitioner's request for disqualification was not based upon competing interests between clients. As to the first definition, Petitioner has never made any showing of an incompatibility between the assigned prosecutor's public duties and private role. Petitioner also did not demonstrate or argue a conflict existed under any of the relevant professional

conduct rules. See, e.g., RPC 1.11 (special conflict of interest for former and current government officers and employees); RPC 1.7 (conflict of interest regarding current clients); RPC 1.8 (specific rules regarding conflicts of interest and current clients:); RPC 1.9 (duties to former clients); RPC 1.12 (former judge, arbitrator, mediator or other third-party neutral); RPC 1.18 (duties to prospective client). "[P]roof of a conflict must be clear and convincing to justify removal of a prosecutor from a case." United States v. Kahre, 737 F.3d 554, 574 (9th Cir. 2013).

Importantly, disqualification of a prosecutor "is not a mechanism to punish past prosecutorial misconduct. Instead, it is employed if necessary to ensure that *future* proceedings will be fair." People v. Dekraai, 5 Cal. App. 5th 1110, 1147, 210 Cal. Rptr. 3d 523, 553 (Ct. App. 2016). A conflict of interest exists when an attorney is in a situation requiring the attorney to fulfill incompatible roles. See NRPC 1.7, 1.9. "[T]hat a public prosecutor might feel unusually strongly about a particular prosecution…does not inevitably indicate an actual conflict of interest." People v. Bryant, Smith & Wheeler, 60 Cal. 4th 335, 376, 334 P.3d 573, 617 (2014).

As Petitioner requested the disqualification of the entire District Attorney's Office, the district court properly recognized that this was an extreme remedy. PSA 219. Disqualification of an entire prosecutor's office is a severe remedy which is strongly disfavored, and is only appropriate in extreme circumstances. Sheriff, Washoe Cty. v. Fullerton, 112 Nev. 1084, 1098, 924 P.2d 702, 711 (1996) ("a

prosecuting attorney's office should not be disqualified for a conflict of interest unless evidence establishes that an extreme situation exists."). Further, "parties should not be allowed to misuse motions for disqualification as instruments of harassment or delay." Brown v. Eighth Judicial Dist. Court, 116 Nev. 1200, 1205, 14 P.3d 1266, 1270 (2000).

This Court has stated "there are several policy arguments in favor of a test that limits the disqualification of an entire district attorney's office: there is a large cost to the county in paying for a special prosecutor to prosecute the case; an attorney is presumed to perform his ethical duties, including keeping the confidences of a former client; and the courts should not unnecessarily interfere with the performance of a prosecutor's duties." State v. Eighth Jud. Dist. Ct. (Zogheib), 130 Nev. 158, 164, 321 P.3d 882, 886 (2014) (internal citations omitted).

In Zogheib, the district court granted the defendant's motion to disqualify the District Attorney's Office, because District Attorney Steven Wolfson's previous law firm had represented the defendant, and Wolfson had been involved in that representation. Zogheib, 130 Nev. at 160-61, 321 P.3d at 883-84. This Court vacated the district court's order, stating 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. 130 Nev. 158, 164–65, 321 P.3d at 886.

Thus, disqualification of an entire prosecutor's office is never necessary unless there is a conflict of such nature that a defendant could not receive a fair trial without the disqualification. Petitioner has failed to meet this standard, both below and in the present Petition. As discussed more fully below, his offered reasons for requesting disqualification are legally insufficient.

Importantly, in Petitioner's Motion to Disqualify, Petitioner presented only one ground for requesting disqualification—that Petitioner's trial strategy had been mistakenly revealed to the State. PA 54-98. Accordingly, the State's Opposition only addressed that claim. PA 99-109. Ten days later, Petitioner filed a Reply to the State's Opposition, in which he alleged for the first time additional grounds for disqualification—a lack of objectivity, false statements to witnesses, and failure to maintain an appearance of propriety. PA 113-18. This is not an appropriate use of a reply, the purpose of which is to present reply points and authorities in response to opposing arguments, not to raise new claims. See Rule 13(4) of the Rules of the District Courts of the State of Nevada. See also Francis v. Wynn Las Vegas, LLC, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011) (arguments made for the first time in a reply brief are generally not considered); NRAP 28(c) (limiting reply briefs

"to answering any new matter set forth in the opposing brief").[3]

Petitioner alleges that the district court abused its discretion by failing to address the additional conflicts of interest raised in Petitioner's Reply. PA at 20, 22, 31. To the contrary, the district court could reasonably have decided to disregard the additional conflict of interest claims for Peittioner's failure to raise them in his original Motion to Disqualify, and for the fact that the Reply was untimely filed. Regardless, the record of the hearing on the Motion to Disqualify reflects that the district court reviewed and considered the claims raised in the Reply before denying the Motion to Disqualify. PSA 206. The Order denying the Motion to Disqualify indicates that the court considered and rejected Petitioner's additional claims that the assigned prosecutor "is not objective or fair." PSA 219. Regardless of the procedural defects in Petitioner's pleadings below, the State addresses Petitioner's original claim—that the District Attorney's Office should be disqualified due to mistaken disclosure of trial strategy—in section II(A), and the claims raised in Petitioner's Reply are addressed in section II(B)-(C).

[3]Ironically, in his Reply Petitioner criticized the State for failing to cite applicable authority in violation of subsection 6 of Rule 8 of the Nevada Rules of Criminal Procedure, yet ignored the fact that his Reply was untimely filed by 7 days pursuant to subsection 5 of Rule 8.

A. The Supposed Disclosure of Trial Strategy to the State Was Not a Basis to Disqualify the Assigned Prosecutor or the Entire District Attorney's Office Because It Did Not Create a Conflict of Interest

Petitioner apparently attempted to file under seal with the district court certain Ex Parte Applications for Record and Order, pertaining to two witnesses in this case. Although the request to file under seal was granted by the court, the Ex Parte Applications were electronically served in error on one of the assigned prosecutors, secretarial staff at the District Attorney's Office, the Attorney General's Office, a deceased lawyer, former defense counsel, and a witness. Petitioner maintains that this inadvertent disclosure revealed his entire trial strategy to the State, which necessitates the disqualification of the entire District Attorney's Office.

As a preliminary matter, Petitioner has failed to demonstrate that his entire trial strategy has in fact been revealed to the State. At the hearing on Petitioner's Motion to Disqualify, Chief Deputy District Attorney John Giordani, the assigned prosecutor in this case, informed the district court "I don't know what their trial strategy is." PSA 196. Mr. Giordani also submitted an affidavit to the district court which clearly states neither he nor any other employee in the District Attorney's Office read or became aware of Petitioner's trial strategy as a result of the inadvertent filing. Respondent's Appendix, at 2.

Furthermore, the claim that Petitioner revealed its entire trial strategy in its Ex

Parte Applications appears disingenuous. Petitioner's counsel represented to the district court that the Applications needed to be granted in a timely manner so that Petitioner could comply with the briefing schedule set regarding the State's Motion to Admit Prior Testimony of Merridee Moshier. PA 66. The issue of contention was whether or not the State's witness Ms. Moshier was competent to testify at the upcoming trial. It is unclear why revealing detailed information regarding trial strategy would have been offered to support this request.

It is also unclear from the record that there was even a sufficient basis offered for sealing the Ex Parte Applications for Record and Order. Though ex parte orders are fairly common practice, the sealing of such is unusual and it is not surprising that the district court asked for more information to support the request, noting that Petitioner had reciprocal discovery obligations. PA 88. Pursuant to NRS 174.245, defense counsel is required to provide copies of documents a defendant intends to introduce as part of his case in chief. Thus, if Petitioner wished to use the requested records in his case in chief at trial, this strategy would eventually have to be revealed to the State. Furthermore, in the instant Petition, a publicly filed document, Petitioner reveals his defense strategy, stating "it is the position of Defense that the murder was actually committed by Arica Foster, the child's biological mother." Petition, at 9. Given this public disclosure, it is disingenuous for Petitioner to claim his ability to defend himself at trial has been prejudiced through a filing error.

Regardless of whether Petitioner's trial strategy has been revealed to the State, Petitioner has failed to cite a single case or any other legal authority to support his claim that inadvertent disclosure of trial strategy can form the basis for disqualification of an individual prosecutor or an entire prosecuting agency. While Petitioner does cite one case in which this Court listed various factors to consider when determining whether disqualification is necessary due to the inadvertent disclosure of privileged information, this case did not involve the disqualification of an individual prosecutor or an entire prosecutor's office. Petition, at 18; Merits Incentives, LLC v. Eighth Jud. Dist. Ct. of State, ex rel. Cty. of Clark, 127 Nev. 689, 262 P.3d 720 (2011). A prosecutor's office may only be disqualified in extreme situations. This Court has emphasized that disqualification of a district attorney's office is a remedy only for extreme cases, noting that "the courts should not unnecessarily interfere with the performance of a prosecutor's duties." Zogheib, 130 Nev. 158, 164, 321 P.3d 882, 886 (2014). See also Sheriff, Washoe Cty. v. Fullerton, 112 Nev. 1084, 1098, 924 P.2d 702, 711 (1996) ("a prosecuting attorney's office should not be disqualified for a conflict of interest unless evidence establishes that an extreme situation exists.") (citing Collier v. Legakes, 98 Nev. 307, 646 P.2d 1219 (1982)). Unlike retained counsel in a civil matter, the deputies of the elected Clark County District Attorney have duties and responsibilities that are largely statutorily mandated. See NRS 252.110; NRS 252.070

Additionally, even if the factors from Merits Incentives were applicable to a request to disqualify a prosecutor's office, Petitioner provides no cogent argument as to how these factors are supposedly met in this case. It is Petitioner's burden to support his request for relief with such argument. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). Some of these factors are clearly not met, as it is undisputed that the State was not at fault for the disclosure, the record indicates that the assigned prosecutor is not aware of Petitioner's trial strategy, and Petitioner has not shown the disclosure has prejudiced him. 127 Nev. at 699, 262 P.3d at 726.

Petitioner criticizes the district court's reliance on Zogheib in deciding this matter, stating it is irrelevant for considerations as to whether or not a conflict exists. PA 25. While it is true that in Zogheib there was no dispute as to whether or not there was a conflict of interest pertaining to an individual prosecutor, in that case this Court did set forth the standard for considering whether an entire district attorney's office should be disqualified. Specifically, "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." 130 Nev. at 165, 321 P.3d at 886. In other words, Petitioner must demonstrate first that a conflict exists, and that the situation is so extreme that Petitioner cannot

receive a fair trial unless the entire prosecutor's office is disqualified. Petitioner has not made such a showing, either to this Court or to the district court. Accordingly, he is not entitled to extraordinary relief.

B. Lack of Objectivity Is Not a Basis for Disqualification Because Prosecutors are Not Required to be Objective Toward Defendants

Petitioner complains that the assigned prosecutor lacks objectivity because the prosecutor has requested Petitioner be held on monetary bail, has not extended an offer of negotiation other than an offer to plead to first degree murder, and continues to prosecute Petitioner for first degree murder. None of these complaints constitute a conflict of interest or even improper conduct. Nothing entitles Petitioner to receive a plea offer from the State. Petitioner appears to take offense at the fact that the State is prosecuting him at all. Petitioner may desire to have a less zealous prosecutor assigned to this case, but he has no authority to choose who prosecutes him.

The actions of which Petitioner complains amount to a prosecutor performing his mandatory duties. A prosecutor's public duties are to seek justice through the pursuit of criminal convictions. "Zealous advocacy in pursuit of convictions forms an essential part of the prosecutor's proper duties and does not show the prosecutor's participation was improper." People v. Vasquez, 9 Cal.4th 47, 65, 137 P.3d 199, 211 (2006). The fact that the assigned prosecutor is zealously seeking conviction, requesting bail, and declining to negotiate the case to a lesser offense in no way

amounts to a conflict of interest. Unsurprisingly, as none exists, Petitioner cites no authority suggesting that such actions amount to a conflict of interest.

Petitioner complains about a lack of objectivity, but Petitioner is not entitled to a neutral and objective prosecutor. As the United States Supreme Court has stated, "[p]rosecutors need not be entirely 'neutral and detached.' In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law." Marshall v. Jerrico, Inc., 446 U.S. 238, 248–49, 100 S. Ct. 1610, 1616 (1980). Objectivity is a requirement of the judiciary, not a prosecutor. See Dick v. Scroggy, 882 F.2d 192, 197 (6th Cir. 1989) ("although the prosecutor is an officer of the court, the role of the prosecutor is very different from that of the judge...Prosecutors are supposed to be advocates; judges are not."). See also United States v. Ziesman, 409 F.3d 941, 950–51 (8th Cir. 2005) (holding that a defendant had no legal basis for disqualification of an "angry prosecutor.").

Furthermore, Petitioner misstates the record by stating that the assigned prosecutor conceded that the evidence only supports second-degree murder. Petition, at 20. The court minutes cited by Petitioner are not a transcript, and do not constitute the official record of what was stated in court. Regardless, the court minutes indicate the prosecutor was referring to what this Court stated in its decision reversing the

denial of Petitioner's petition for a writ of habeas corpus, and was not an admission as to the state of the evidence.[4]

Petitioner concludes this claim with a mere *ipse dixit* that "the State's actions create an implication of vindictive prosecution and disregard to Mr. Lee's constitutional rights." Petition, at 20. Petitioner cites no authority to support this accusation, nor does he explain how any of the complained-of actions violate his constitutional rights. This unsupported, conclusory assertion deserves no consideration. Maresca, 103 Nev. at 673, 748 P.2d at 6; Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority).

C. Neither The State's Communications With Alayne Opie nor Ms. Opie's Actions Are a Basis for Disqualification Because They Do Not Constitute a Conflict of Interest

Petitioner complains that the assigned prosecutor made false statements to a witness in this case. Citing text message communications between the assigned prosecutor and witness Alayne Opie, Petitioner complains that the State accused defense counsel of engaging in "[f]abricated discovery 'issues.'" Petition, at 22; PA 128. Again, Petitioner does not explain how this communication amounts to a

[4]It appears the prosecutor was referring to the fact that this Court found error in the jury instructions regarding first-degree felony murder. See Lee v. State, No. 76330 (Order of Reversal and Remand, Nov. 15, 2019), at *2 (finding jury instructions erroneous because they "permitted the jury to find Lee guilty of first-degree murder for acts that did not necessarily constitute child abuse…").

conflict of interest. Petitioner does not have the authority to dictate how the State communicates with witnesses. The State is entitled to its opinion that defense counsel has engaged in delay tactics, and that there is no merit to Petitioner's claims regarding discovery. Petitioner's counsel may take offense, but that is insufficient to demonstrate a conflict of interest. Petitioner fails to explain how such communication reveals an incompatibility between one's private interests and one's public or fiduciary duties, or how any relevant rules of professional conduct concerning conflicts of interest were violated.

Petitioner also alleges that the State has failed to maintain the appearance of propriety with witness Alayne Opie. Petitioner bases much of this allegation on the fact that the State learned from Ms. Opie that witness Merridee Moshier (Ms. Opie's mother) had developed dementia and would be incompetent to testify at trial. The State then moved to admit Ms. Moshier's testimony from the previous trial in lieu of her testifying at the upcoming trial. PA 1-53. The State also submitted medical documentation of Ms. Moshier's symptoms to the Court. PA 5. Petitioner appears to doubt the veracity of Ms. Opie's representations regarding her mother's symptoms. But the district court has already ruled on the State's Motion, and held that it will question Ms. Moshier outside the presence of the jury to determine if she is competent to testify. PSA 42-44. Petitioner's counsel did not appear to object to this decision and it is not the subject of the instant Petition. Thus it is unclear how the

issue of Ms. Moshier's competency has created a conflict of interest or even prejudiced him in any way.

It is unclear what Petitioner means by "appearance of propriety." If Petitioner refers to the appearance of impropriety standard previously used by this Court, he ignores the fact that this standard has been expressly overruled by this Court. "[W]e overrule Collier to the extent that it relies on appearance of impropriety to determine when vicarious disqualification of a prosecutor's office is warranted." Zogheib, 130 Nev. at 164, 321 P.3d at 886.

Regarding Petitioner's allegations that Ms. Opie is acting as a legal representative for other witnesses, this is not supported by the record, nor does it constitute a conflict of interest for the State. Ms. Opie has informed the district court that she has "never rendered any legal advice or served as legal counsel for anybody in connection with this action." PSA 173. Furthermore, even if Ms. Opie did represent individuals in this matter, the State does not have authority or control over Ms. Opie and cannot dictate who she represents.

Petitioner complains that Ms. Opie was present when Arica Foster—her sister—was questioned by law enforcement, that her law firm address is listed as the address for Ms. Foster, that Ms. Opie is on Odyssey's electronic service list for this case, that Ms. Opie attends hearings in this case and provides her bar number, that she receives subpoenas and information from the State and relays them to other

witnesses. Again, Petitioner fails to demonstrate that any of these actions create a conflict of interest, or that these actions would not occur were the District Attorney's Office disqualified and a special prosecutor appointed. Criminal court hearings are open to the public and Ms. Opie is permitted to attend, as is any other individual. That Ms. Opie informs the court of her bar number when she appears does not establish that she is representing anyone in this case. The screenshot of the hearing provided by Petitioner reveals that Ms. Opie informed the court she was observing the case, not representing any party. PA 138. The screenshot also reveals that Ms. Opie was not the only attorney observing the proceedings.

The State has been unable to confirm that Ms. Opie was present during the police questioning of her sister, and Petitioner provides no citation to the record to support this assertion. Regardless, Petitioner fails to explain how such an occurrence means he is unable to receive a fair trial in the absence of the District Attorney's disqualification. The fact that Ms. Opie receives information from the State that she shares with other witnesses is more reflective of the fact that Opie is a family member of the other witnesses, not that she is functioning as an attorney. Again, Petitioner presents no authority establishing that one witness serving as a point of contact for other witnesses creates a conflict of interest that is so extreme it requires disqualification of an entire prosecutor's office.

Regarding Petitioner's allegation that the State is not "objectively interacting" with Ms. Opie, Petitioner has failed to define what it means to "objectively interact" with an individual, or establish that the manner in which the State communicates with its witnesses is a conflict of interest, is at all improper, or is even something Petitioner has the right to dictate. Petitioner complains that Ms. Opie offered to allow the assigned prosecutor to park on her property to avoid traffic. It is unclear whether or not the prosecutor has ever accepted such an offer. Regardless, Petitioner cites no authority establishing that the offer of such a minor benefit is improper or creates a conflict of interest. Petitioner also does not explain how this gives rise to such extreme circumstances that warrant disqualification of the entire District Attorney's Office.

CONCLUSION

The district court did not manifestly abuse its discretion or exceed its jurisdiction by denying Petitioner's Motion to Disqualify. Denial was required because Petitioner failed to demonstrate that he could not receive a fair trial unless the District Attorney's Office were disqualified. Petitioner's allegations that its trial strategy has been revealed to the District Attorney's Office, and that the assigned prosecutor is insufficiently impartial, do not demonstrate the existence of a conflict of interest. Accordingly, Petitioner is not entitled to extraordinary relief.

/ / /

Dated this 10th day of March, 2022.

Respectfully submitted,

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Nevada Bar #001565

BY */s/ Karen Mishler*
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AFFIDAVIT

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

Dated this 10th day of March, 2022.

BY */s/ Karen Mishler*
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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this Answer to Mandamus Writ complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 6,630 words and 571 lines of text.
3. **Finally, I hereby certify** that I have read this Answer to Mandamus Writ, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 10th day of March, 2022.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 10, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I, further certify that on March 10, 2022, a copy was sent via email to:

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KM/jh