

1
2 Ryan A. Hamilton, Esq.
3 Nevada Bar No. 11587
4 Sarah I. Perez, Esq.
5 Nevada Bar No. 12628
6 **HAMILTON LAW**
7 5125 S. Durango Dr., Ste. C
8 Las Vegas, NV 89113
9 (702) 818-1818
10 (702) 974-1139 (fax)
11 ryan@hamlegal.com
12 sarah@hamlegal.com
13 *Attorneys for Petitioner,*
14 *Samuel Josiah Caruso*

Electronically Filed
Mar 30 2021 05:11 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

11 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

12 SAMUEL JOSIAH CARUSO,

CASE NO: 82362

13
14 Petitioner,

D.C. No: C-19-345393-1

15 vs.

16
17 EIGHTH JUDICIAL DISTRICT
18 COURT, HONORABLE JUDGE
19 MARY KAY HOLTHUS

20 Respondents,

21 STATE OF NEVADA,

22 Real Party in Interest.
23
24

25 **PETITIONER'S REPLY IN SUPPORT**
26 **OF WRIT OF PROHIBITION OR MANDAMUS**

27 Comes now, Petitioner Samuel Josiah Caruso, by and through his
28 attorneys, Ryan A. Hamilton, Esq. and Sarah I. Perez, Esq., of Hamilton Law,

1 LLC, who hereby file the following reply in support for his petition for writ of
2 prohibition, or, in the alternative, writ of mandamus.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **Introduction**

5
6 No persons charged with exercising the powers belonging to one
7 branch shall concurrently exercise the functions of another branch. Nevada's
8 Separation-of-Powers clause under Article 3, Section 1 means what it says. A
9 legislator-prosecutor who enforces the very laws she is charged to write
10 violates Nevada's Separation of Powers and Petitioner's right to Due Process.
11
12 The Court should issue the writ.

13
14 **A. The Court's resolution of this question does not violate**
15 **the Separation of Powers**

16 The State argues, pursuant to *Heller v. Legislature of State of Nev.*,
17 120 Nev. 456, 473, 93 P.3d 746, 757 (Nev. 2004), that the Court cannot
18 decide this Separation-of-Powers question without itself violating the
19 Separation of Powers. But *Heller* is readily distinguishable. In *Heller* the
20 Nevada Constitution assigned the question before the Court – whether
21 certain legislators were qualified to serve in the Nevada Assembly – to be
22 decided by the Legislative Branch. Art. 4, § 6. Were the Judicial Branch to
23 decide a question the Nevada Constitution specifically assigned to the
24 Legislative Branch, the Judicial Branch plainly would impinge on the
25
26
27
28 Legislative Branch's powers.

1 Unlike in *Heller*, here there has been no claim that Deputy DA Scheible
2 is unqualified to serve as a legislator. Instead, Petitioner’s claim is that her
3 simultaneous prosecution of him while serving as a legislator is improper.
4

5 Moreover, in *Heller* this Court explained that although the Legislative
6 Branch retains the power to determine the qualifications of its own
7 members, courts may still act with respect to the qualifications of legislators
8 where the legislature has “(1) devised a role for the courts by statute, such as
9 election contests, (2) infringed upon personal constitutional rights, or (3)
10 imposed extra-constitutional qualifications.” *Heller v. Legislature of State of*
11 *Nev.*, 120 Nev. 456, 471, 93 P.3d 746, 755–56 (Nev. 2004). Here, this Court
12 has the power to review Petitioner’s claim that his prosecution violates
13 Nevada’s Separation of Powers and deprives him of his Constitutional right
14 to Procedural Due Process.
15
16
17

18
19 **B. The Court should exercise its discretion to resolve this**
20 **question of first impression with statewide importance.**

21 As the State notes in its Answer, the Court has not previously decided
22 whether a sitting senator who simultaneously serves as a prosecutor violates
23 Nevada’s Separation of Powers. This question requires urgent resolution as
24 presently two members of the Nevada legislature simultaneously serve as a
25 prosecutors. This question has implications that reach far beyond the parties
26
27
28

1 to this case. The dual roles of these legislator-prosecutors make a number of
2 criminal prosecutions Constitutionally suspect.

3 This Court routinely exercises its discretion when faced with important
4 legal question of first impression that arises with some frequency. *Cote H v.*
5 *Eighth Judicial Dist. Ct.*, 124 Nev. 36, 29, 175 P.3d 906, 908 (Nev. 2008). *Id.*
6 at 39-40, 908. When that occurs the interests of judicial economy favor
7 consideration of the petition. *Id.* That is precisely the case here.
8

9
10 Moreover, a writ of prohibition should issue in this case because the
11 criminal proceeding against Samuel is a legal nullity. *Del Papa v. Steffen*, 112
12 Nev. 369, 377, 915 P.2d 245, 250 (Nev. 1996)(holding that a writ of
13 prohibition should issue and concluded where an investigation violated the
14 Separation of Powers and, therefore, was a legal nullity. *Id.* at 253, 383). The
15 District Court lacks jurisdiction over the case. *See id.* The State continues to
16 prosecute Samuel without lawful authority and in violation of the Separation
17 of Powers.
18

19
20
21 Samuel has no plain, speedy, and adequate remedy at law. *Guerin v.*
22 *Guerin*, 114 Nev. 127, 953 P.2d 716 (1998); *Gladys Baker Olsen Family Trust*
23 *v. District Court*, 110 Nev. 548, 874 P.2d 778 (1994); NRS 34.320. As noted,
24 the District Court's denial of Samuel's motion to dismiss is not appealable. In
25 addition, there is no sensible reason to defer resolving this question until it
26 reaches the Nevada Courts of Appeal. The essential facts underlying this
27
28

1 Petition are undisputed – Deputy DA Scheible simultaneously serves as a
2 prosecutor in this case and a Senator in the Nevada legislature. There are no
3 additional facts that need to be developed for deciding this issue on appeal.

4
5 All in all, this is a question tailor-made for a writ. District Courts have
6 reached different results on this issue. And, the issue is novel with far-
7 reaching importance that warrants urgent consideration. This Court should
8 issue a writ.

9
10 **C. A Deputy District Attorney who simultaneously serves**
11 **as a Nevada Senator violates the Separation of Powers**
12 **of Nevada’s Constitution.**

13 The plain language of the Nevada Constitution prohibits a sitting
14 legislator from simultaneously serving as a prosecutor. The Separation-of-
15 Powers clause at Article 3, Section 1 provides:

16
17 1. The powers of the Government of the State of
18 Nevada shall be divided into three separate
19 departments,--the Legislative,--the Executive and the
20 Judicial; and no persons charged with the exercise of
21 powers properly belonging to one of these
22 departments shall exercise any functions,
23 appertaining to either of the others, except in the
24 cases expressly directed or permitted in this
25 constitution.

26 Nev. Const. art. III, § 1. The text is clear: no persons charged with exercising
27 the powers belonging to one branch shall exercise functions of another
28 branch. There is no question that legislator-prosecutor Scheible here is
exercising functions of both the Legislative and Executive Branches. She has

1 the power to write the law and then enforce it. Under the plain language of
2 the Nevada Constitution, her dual roles violate the Separation of Powers.

3 Despite the plain language of Article 3, Section 1, the State asserts in its
4 Answer that Ms. Scheible’s dual roles pose no Separation-of-
5 Powers problems for a variety of reasons. Each of the State’s assertions is
6 unavailing.
7

8 The State argues that Deputy DA Scheible is a county officer, not an
9 elected public official empowered with policymaking authority for the office
10 of the district attorney. The State asserts that only public officials exercise
11 sovereign functions of the State. *Answer*, at pp. 21-22. Under the State’s
12 argument only public officials can violate the Separation of Powers, and,
13 because the State deems Deputy DA Scheible not to be a public official, there
14 is no Constitutional problem.
15
16
17

18 The State’s argument quickly meets trouble. In *Del Papa v. Steffen*, 112
19 Nev. 369, 377, 915 P.2d 245, 250 (Nev. 1996), this Court explained that
20 “[t]he executive power extends to the carrying out and enforcing the laws
21 enacted by the legislature....” Deputy DA Scheible plainly exercises enormous
22 executive power in this case – she is using the power of the State in an effort
23 to imprison Petitioner, potentially for the rest of his life.
24
25

26 Nowhere does the State does dispute that Deputy DA Scheible makes
27 charging decisions. This Court explained in *State v. Second Judicial Dist.*
28

1 *Court in & for Cty. of Washoe*, 134 Nev. 783, 786, 432 P.3d 154, 158 (Nev.
2 2018), that charging decisions in a criminal case are an executive function.
3 *See also Stromberg v. Second Judicial Court*, 125 Nev. 1, 2-3, 200 P.3d 509,
4 510 (Nev. 2009). As any defendant quickly learns, prosecutors such as
5 Deputy DA Scheible possess enormous power and discretion over the case
6 and, more importantly, the future of the accused. Although Deputy DAs may
7 not possess policymaking authority under NRS 252.070(1), they are
8 “authorized to transact all official business relating to those duties of the
9 [elected District Attorney] ... to the same extent as their principals.... *Id.*
10 Among other things, Deputy DAs make charging decisions, lead criminal
11 investigations, negotiate plea deals, seek convictions, and, finally, make
12 sentencing recommendations. Prosecution is the very definition of executive
13 power, *i.e.*, carrying out and enforcing the law.
14
15
16
17

18 This Court’s decision in *State v. Second Judicial Dist. Court in & for*
19 *Cty. of Washoe*, 134 Nev. 783, 784, 432 P.3d 154, 157 (Nev. 2018), is fatal the
20 State’s argument that only elected public officials are imbued with sufficient
21 executive power to violate the Separation of Powers. There, this Court struck
22 down a statute that gave “the prosecuting attorney” – not just the elected
23 District Attorney – a veto over a court’s sentencing decision. *Id.* at 788, 159.
24
25 “...**[A]**ny prosecutorial power over the district court’s disposition at this
26
27
28

1 stage of the proceedings is offensive to the separation of powers.” *Id.*
2 (emphasis supplied).

3 Next, the State argues that the Separation of Powers has not been
4 violated because Deputy DA does not actively prosecute cases during the
5 legislative session. But whether the legislature is in session or not, Deputy
6 DA Scheible remains a legislator. Moreover, the 81st Session of the Nevada
7 Legislature is currently taking place.¹
8
9

10 Further, although Deputy DA Scheible serves in the legislature, the
11 State complains that Petitioner has not identified any specific legislation that
12 she alone passed and enforced against him. *Answer*, at pp. 24-25. But
13 avoiding even the *appearance* of impropriety is an important interest to
14 retain the public’s confidence in criminal proceedings. Having a legislator-
15 prosecutor enforce the very laws she is charged with writing undermines
16 confidence in the criminal justice system. It gives the impression that the
17 game is rigged.
18
19
20

21 In sum, the State’s overly nuanced and hyper-technical arguments fall
22 flat. Surely, the bedrock principle of the Separation of Powers does not hinge,
23 for example, on such happenstance matters as whether the Legislature has
24 been called into Session. Instead, the Court should read Article 3, Section 1 of
25 the Nevada Constitution to mean what it says. No persons charged with
26
27

28 _____
¹ See, e.g., <https://www.leg.state.nv.us/session/>

1 exercising the powers belonging to one branch shall concurrently exercise
2 functions of another branch. Doing so violates the Separation of Powers and
3 violates Petitioner's right to Due Process.

4 The Court should issue a writ of prohibition or mandamus.

5 Dated this 30th day of March, 2021.

6
7 **HAMILTON LAW**

8
9
10 By: /s/Ryan A. Hamilton
11 RYAN A. HAMILTON, ESQ.
12 SARAH I. PEREZ, ESQ.
13 Attorneys for Petitioner

14 **CERTIFICATE OF COMPLIANCE**

- 15 1. I hereby certify that this petition complies with the formatting
16 requirements of NRAP 32(a)(4), the typeface requirement of NRAP
17 32(a)(5), and the type style requirements of NRAP 32(a)(6) because
18 this brief has been prepared and proportionally spaced typeface using
19 Century Schoolbook 14-point font.
20
21 2. This petition complies with NRAP 21(d) in that contains fewer than
22 7,000 words.
23
24 3. I further certify that this petition is neither frivolous nor interposed for
25 any improper purpose. I understand I may be subject to sanctions if
26
27
28

1 the brief does not comply with the requirements of the Nevada Rules of
2 Appellate Procedure.

3 Dated this 30th day of March, 2021.
4
5

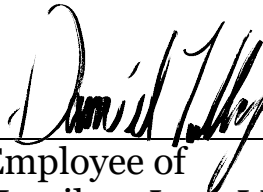
6 **CERTIFICATE OF SERVICE**

7 Pursuant to FRCP 5(b), I certify that I am an employee of HAMILTON LAW,
8 LLC, and that on this 30th day of March, 2021, **PETITIONER'S REPLY IN**
9 **SUPPORT OF WRIT OF PROHIBITION OR MANDAMUS** was served
10 via the Court's electronic filing system to the following persons:

11 AARON FORD
12 Nevada Attorney General

13 JOHN T. NIMAN
14 Deputy District Attorney

15 STEVEN B. WOLFSON
16 Clark County District Attorney
17 Office of the District Attorney
18 200 Lewis Avenue
19 Las Vegas, NV 89101

20 
21 _____
22 Employee of
23 Hamilton Law, LLC
24
25
26
27
28