

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL JOSIAH CARUSO,
Petitioner,

vs,

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK, AND
THE HONORABLE MARY KAY
HOLTHUS, DISTRICT JUDGE,

Respondents,

and

THE STATE OF NEVADA,

Real Party In Interest.

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Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 82362

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

**ANSWER TO PETITION FOR WRIT OF PROHIBITION OR
MANDAMUS**

COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, District Attorney, through his Deputy, John Niman, on behalf of the above-named respondents and submits this Answer to Petition for Writ of Mandamus and Opposition to Stay in obedience to this Court's order filed August 19, 2020, in the above-captioned case. This Answer and Opposition is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 16th day of March, 2021.

Respectfully submitted,

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

BY */s/ John T. Niman*

JOHN T. NIMAN
Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney

**MEMORANDUM OF
POINTS AND AUTHORITIES
STATEMENT OF THE CASE**

Petitioner Samuel Caruso (“Caruso”) was initially charged with 7 counts of Sexual Assault, 2 counts of Open or Gross Lewdness, and 1 count of Burglary.¹ At a preliminary hearing on December 9, 2019, Caruso was represented by Ryan Hamilton, Esq., and the State was represented by Deputy District Attorneys Melanie Scheible and Ekaterina Derjavina. Following the preliminary hearing, Caruso was held to answer all the charges in the Criminal Complaint and the matter was bound over to district court.

On December 2, 2020, Caruso filed a Motion to Dismiss Case and Exclude Evidence for District Attorney's Violation of the Separation of Powers under the Nevada Constitution (“Motion to Dismiss”). SC_0003-19.² The State filed a response to Caruso’s Motion to Dismiss on December 9, 2020. SC_0020-65. On December 14, 2020, Caruso filed a Reply to the State’s Response. SC_0066-72. On

¹ Despite their burden to do so, Caruso has failed to provide this Court any documents regarding the underlying procedural history of his case. Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 603 (2007) (noting appellant has the burden of providing this court with an adequate appellate record, and when the appellant “fails to include necessary documentation in the record, [this court] necessarily presume[s] that the missing portion supports the district court's decision’’); NRAP 30(b)(3). The State has nevertheless provided this procedural history background, as included in its Opposition to Caruso’s Motion to Dismiss (SC_0020-21), to this Court as it is relevant to understanding the case.

² As this is the numbering system Caruso has included in his appendix, the State following those identifiers for this Court’s convenience.

December 18, 2020, the district court denied Caruso's Motion to Dismiss. An order reflecting that decision was filed on December 22, 2020. SC_0001.

Caruso's jury trial is currently scheduled for November 8, 2021.

STATEMENT OF THE FACTS³

On June 21, 2019, 16-year-old R.R. spent the day with her friends, going to a movie, The M Resort, and to a friend's house (identified as A.J.) in the evening. RA6-7. R.R. and her friends got back to A.J.'s house around midnight, where R.R. met Caruso for the first time. RA6; RA9; RA18. R.R. and her friends consumed alcohol with Caruso and R.R. became so intoxicated that she vomited. Id. Eventually she went to sleep around 4 A.M. on a couch in the living room with her boyfriend. RA9. Still under the influence of alcohol, R.R. was roused from her sleep by someone touching her breasts early in the morning hours of June 22, 2019. RA10-11; RA19. At first, R.R. thought it was her boyfriend, but when she realized she could hear her boyfriend breathing next to her, she knew it had to be someone else. Id. R.R. testified that she was terrified and her fight, flight, or freeze responses kicked in and she froze. RA19.

³ Despite their burden to do so, Caruso has failed to provide this Court any documents regarding the underlying factual basis supporting his criminal charges. Cuzze, 123 Nev. at 603; NRAP 30(b)(3). The State has nevertheless included in its Respondent's Appendix the transcript from Caruso's preliminary hearing.

Caruso started to touch R.R.'s buttocks and continued to fondle her breasts underneath her clothes as R.R. lay frozen in fear. RA12-13. Caruso moved his hands down to R.R.'s shorts and began touching her genital area under her shorts, but over her panties. Id. Caruso then moved R.R.'s panties aside and inserted his finger into her vagina. RA13. He placed his mouth over her genitals and moved his tongue over R.R.'s vulva. RA14.

Caruso briefly left as R.R. continued to lie frozen on the ottoman next to the couch. RA15. When Caruso came back, he placed R.R.'s left hand on his penis and tried to wrap her fingers around it, but her hand was completely limp. Id. R.R. could feel a condom on Caruso's penis. Id. When R.R. would not grab Caruso's penis, he again, moved her shorts and panties out of the way and placed his mouth on her genitals, attempting to perform oral sex on her. RA16. He then tried to insert his penis in her vagina. Id. For about 30 seconds, with the condom on and R.R.'s vagina still dry he pressed his penis against her vulva. Id. Caruso then stood up and walked towards the other side of the ottoman where he forced his penis into R.R.'s mouth. RA17.

Weeks later, on August 14, 2019, Caruso was working as an Uber driver. RA51-52. He encountered a young woman, L.R., when her friends ordered an uber to take L.R. back to their hotel because she was intoxicated. RA47. Caruso drove L.R. to the Hard Rock Hotel where she was staying and entered the hotel with her.

RA53. He rode the elevator with the intoxicated victim and followed her to her hotel room. Id. Once inside, he pushed L.R. onto a bed and pulled her pants off. RA37. He removed a tampon from L.R.'s vagina. Id. L.R. remembers her body being moved and experiencing pain while saying "stop" and "I don't want to." Id. When L.R. was awakened by her friends entering the room around 6:00 AM, she continued to experience pain in her anus, as well as a general sense of uneasiness. RA38. Unsure of whether she had been attacked or had a terrible dream, she talked to her friends about what she could recall of the incident, and they recognized the man she described as the driver of the Uber. RA40-41. L.R. identified Caruso in open court. RA40.

SUMMARY OF THE ARGUMENT

First, this Court should decline to entertain Caruso's Writ because it would violate the doctrine of separation of powers for the judiciary to determine who is qualified to serve as a State legislator. The Nevada Constitution is clear that the legislature decides who is qualified to serve as an elected representative, and this Court would be infringing on that constitutional legislative power by entertaining this writ.

Should this Court conclude otherwise, this is an issue more appropriate for appellate review because that is the plain, speedy, and adequate remedy at law. While Caruso points to alleged conflicting decisions currently pending before this

Court in other cases on Petitions for Writ of Mandamus, the procedural posture of those cases differ from Caruso's case and the writs are the only remedy available. Moreover, conflicting decisions, by themselves, are not sufficient to warrant mandamus relief when a regular appeal could establish precedential law in the ordinary course. Specifically, in those other cases, the defendant's cases have been dismissed and the State's only legal recourse is to petition this court for a Writ of Mandamus. Here, Caruso's case is still pending before the district court and the appropriate time to consider this argument is on appeal after Caruso's Judgment of Conviction is final.

Should this Court entertain Caruso's argument, it is not a violation of the doctrine of separation of powers for a Clark County deputy district attorney to serve as an elected member of the Nevada Legislature. Article 4 of the Nevada Constitution sets out who may and may not serve as an elected representative, and it does not exclude county prosecutors or employees. That interpretation should be given deference.

Moreover, a deputy district attorney does not hold public office and is merely a public employee with no policymaking authority in the executive branch. At no point while serving as a prosecutor or a legislator is either role impinging on the other. This is because a prosecutor-legislator does not simultaneously serve in both positions. A county prosecutor—who happens to serve as an elected legislator every

other year for 120 days—is not acting in her legislative capacity when prosecuting cases. She is neither amending, enacting, nor repealing laws and she is not enacting policies in the executive branch. Conversely, a legislator—who happens to serve as a prosecutor when the Legislature is not in session—is not enforcing the laws or engaging in prosecutions of anyone when serving as an elected legislator every other year for 120 days. Moreover, while she may support, propose, or oppose certain bills proposing changes to existing law, she does not have the sole authority to enact a law. Instead, after a bill has made its way through various committees, been subjected to public comment, and passed by both the Senate and Assembly, a bill must be signed and approved by the Governor before it becomes law; and she has no control over what the governor does. Therefore, it is not a violation of the doctrine of separation of powers for a county prosecutor to serve as an elected representative in the Nevada Legislature.

ARGUMENT

I. THE DOCTRINE OF SEPARATION OF POWERS PRECLUDES JUDICIAL REVIEW OF CARUSO’S UNDERLYING CLAIM

The question Caruso seeks an answer to is this: can a Clark County District Attorney serve as an elected member on the Nevada Legislature. Essentially, Caruso is asking this Court to determine who may or may not serve in the legislative branch. However, the doctrine of separation of powers precludes this Court—the judiciary—from interfering with the Legislative branches determination of who is qualified to

be elected and represent the people of Nevada every other year for 120 days in the Nevada Legislature. As Caruso acknowledges, the doctrine of separation of powers exists to prohibit one branch of government from “impinging on the functions of another.” Writ at 12 (quoting State v. Second Judicial Dist. Court in & for Cty. of Washoe, 134 Nev. 786, 790 (2018)(quoting Comm’n on Ethics v. Hardy, 125 Nev. 285, 292 (2009))). This necessitates that each branch must function independently in order to serve as a check against the powers of the others. Id. (quoting Blackjack Bonding v. City of Las Vegas Mun. Court, 116 Nev. 1213, 1219 (2000)).

Accordingly, this Court’s determination of who may or may not serve as an elected State legislator would violate the doctrine of separation of powers. Indeed, this Court has already held as much. In 2008, the Nevada Secretary of State Dean Heller sought clarification on whether government employees could serve on the legislature through a petition for writ of mandamus. Heller v. Legislature of the State of Nevada, 120 Nev. 456 (2004). In denying Secretary Heller’s writ the Nevada Supreme Court held that the “Nevada Constitution bars judicial review of a state executive branch employees service in the Legislature.” Id. at 466. While Heller applies to whether a member of the State executive branch could serve as a legislator, this Court’s holding should nevertheless apply here. The Heller Court held that it would be in violation of the separation of powers doctrine to judicially legislate who is eligible to serve in the Nevada Legislature because Article 4, § 6 of the Nevada

Constitution clearly states that only the Legislature has the authority to judge its members' qualifications. Id. at 468-72. That sentiment applies regardless of whether the legislator in question works in the State or county executive branch. The Legislature was given the specific authority in the constitution to qualify their members, and this Court held that "by asking us to declare that dual service violates the separation of powers, the secretary urges our own violation of the separation of powers." Id. at 459. This Court specifically held:

In the instant case, **the Nevada Legislature has not crafted a role for the judiciary in reviewing current members' qualifications.** Indeed, by statute, election contests for state assembly or senate seats may not be brought in a court, and may be filed only with the Secretary of State, who must then deliver the contest documents to "the appropriate house of the Legislature." Further, no legislator is claiming that his or her right to sit has been unconstitutionally denied. Nevertheless, the Secretary asks this court to judge legislators' qualifications based on their executive branch employment. This request runs afoul of the separation of powers and is not justiciable.

Id. at 472 (emphasis added).

Accordingly, the doctrine of separation of powers prohibits the judiciary from determining whether a person employed under the executive branch can suspend their job duties for a period of 120 days every other year and serve as an elected legislator for the Legislature.

II. SHOULD THIS COURT CONCLUDE THAT IT IS NOT A VIOLATION OF SEPARATION OF POWERS TO REVIEW CARUSO'S CLAIM, IT IS ONE TO BE ADDRESSED ON APPEAL

Caruso argues that a writ of mandamus is the appropriate legal vehicle to

consider whether a county prosecutor serving as a Legislator violates the doctrine of separation of powers because it is a legal matter of first impression in need of an answer. Petition for Writ of Prohibition or Mandamus (“Writ”) at 9-10. Caruso further argues that this Writ is appropriate because district court decisions on the subject conflict and there is no other plain, speedy, or adequate remedy at law. Id. at 11. However, a Writ of Mandamus is not the appropriate legal vehicle to raise this issue for two reasons.

This Court has expressly circumscribed mandamus relief as “a remedy distinguishable from all others listed therein, to the extent ‘it recognizes legal duty, and compels its performance where there is either [1] no remedy at law or [2] no adequate remedy.’” Walker v. Second Judicial Dist. Ct., 136 Nev. Adv. Op. 80 (2020) (quoting Thomas Carl Spelling, *A Treatise on Injunctions and Other Extraordinary Remedies* 1173 (2d ed. 1901)). The Walker Court further explained, “to the extent that appellate relief is available at the conclusion of a matter, it would typically be preferable to an extraordinary writ proceeding because [the Court] can issue a decision after ‘review[ing] the entire record in the regular way, when [it] can enjoy the advantage of having the whole case before [it].” Id. (internal quotation omitted).

“[M]andamus and prohibition are extraordinary remedies, and the decision of whether a petition will be entertained lies within the discretion of this court.” Hickey

v. Eighth Jud. Dist. Court, 105 Nev. 729, 731 (1989). However, extraordinary relief will not issue “where the petitioner has a plain, speedy and adequate remedy, such as an appeal, in the ordinary course of law.” Id. at 731. The petitioner carries “the burden of demonstrating that extraordinary relief is warranted.” Pan v. Eighth Judicial Dist. Ct., 120 Nev. 222, 228 (2004); see also NRAP 21(a). The Nevada Supreme Court has previously emphasized the “narrow circumstances” under which mandamus is available and has cautioned that extraordinary remedies are not a means for routine correction of error. State v. District Court (Riker), 121 Nev. 225 (2005).

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 (2000). Thus, a writ of mandamus will only issue to control a court’s arbitrary or capricious exercise of its discretion.” Id. citing Marshall v. District Court, 108 Nev. 459, 466 (1992); City of Sparks v. Second Judicial Dist. Court, 112 Nev. 952, 954 (1996); Round Hill Gen. Imp. Dist. V. Newman, 97 Nev. 601 (1981). The Nevada Supreme Court has reaffirmed on numerous occasions “that an appeal is generally an adequate legal remedy that precludes writ relief.” Pan, 120 Nev. at 223 (internal citation omitted). Further, “even if an appeal is not immediately available because the challenged order is interlocutory in nature, the fact that the order may ultimately be challenged on appeal

from the final judgment generally precludes writ relief.” Id. at 224.

Here, Caruso argues that this Court should entertain this Writ because the question of whether a county prosecutor may serve as an elected State legislator is an issue of first impression that “requires the Court’s urgent resolution.” Writ at 10. In support of this claim, Caruso offers a single sentence argument that “a significant number of prosecutions and convictions are constitutionally suspect due to the prosecutor-legislator simultaneous carrying out functions of two branches of government.” Id.

While this Court has not ruled whether a county prosecutor may serve as an elected member of the Nevada Legislature, that is not because this Court has not been presented with the opportunity to do so. Instead, it is because doing so violates the doctrine of separation of powers. Heller, 120 Nev. 456.

Further, Caruso’s claim that the number of prosecutions that occur while a prosecutor-legislator is carrying out Executive and Legislative duties is devoid of any legal or factual support. A single-sentence cannot entitle Petitioner to extraordinary mandamus review. Edwards v. Emperor’s Garden Restaurant, 122 Nev. 317, 330 n.38, (2006) (a party seeking review bears the responsibility “to cogently argue, and present relevant authority” to support his assertions); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, (1991) (defendant’s failure to present legal authority resulted in no reason for the district

court to consider defendant's claim); Maresca v. State, 103 Nev. 669, 673 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"); Randall v. Salvation Army, 100 Nev. 466, 470-71 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473 (1976) (issues lacking citation to relevant legal authority do not warrant review on the merits). Moreover, regardless of how many prosecutions the Clark County District Attorney's office undertakes, Caruso has not identified how many of those prosecutions involve prosecutor-legislators, which would be the only potentially relevant fact for this Court to consider. Caruso has further failed to acknowledge that his prosecution involved two prosecutors, only one of whom serves as a legislator. As Caruso has failed to provide that information, any claim that the number of prosecutions that occur annually in Clark County supports a conclusion that prosecutors cannot serve as legislators must fail.

Caruso further alleges that due to conflicting district court decisions on the subject, mandamus relief is warranted. Id. Caruso further claims that the district court's denial of his Motion to Dismiss is not appealable, making it so that the instant writ is their only legal course of action. Writ at 11. However, this Court has held that "[a] remedy does not fail to be speedy and adequate because, by pursuing it through the ordinary course of law, more time probably would be consumed than in a

mandamus proceeding.” Washoe County v. City of Reno, 77 Nev. 152, 156 (1961).

Here, even Caruso’s relied upon alleged “conflicting decisions” support the conclusion that appeal is the appropriate legal remedy. Specifically, Caruso cites to State v. Plumlee, Eighth Judicial District Court II, Case No. C-20-346852-A, and State v. Bills, Eighth Judicial District Court XXIII, Case No. C-20-351790-1, as conflicting decisions. In Plumlee, the district court dismissed Plumlee’s misdemeanor criminal conviction because the prosecutor was also an elected Nevada State Senator. Similarly, in State v. Molen, Eighth Judicial District Court XIX, C-20-348754-A, the district court granted Molen’s appeal from a denial of Molen’s motion to dismiss of a criminal complaint for violation of the Separation of Powers Doctrine. While the district court’s decision in Plumlee and Molen is at odds with the district court’s decision here, Plumlee was decided on appeal and not via a Writ of Mandamus. Moreover, both decisions are currently pending review before this Court. See, State v. Molen, Docket No. 82236; State v. Plumlee, Docket No. 82249. The State has done so because it has no other legal remedy. That is not the case here. Caruso’s adequate remedy is to file an appeal following any conviction. Accordingly, mandamus relief should not be granted.

In Bills, the defendant has simply filed a Motion to Remove the Clark County District Attorney's Office from Prosecution Based on the Separation of Powers Doctrine, or in the Alternative Motion to Dismiss Prosecution. However, the district

court has yet to rule on that Motion.

Moreover, while Caruso argues that Plumlee and Bills are conflicting decisions, procedurally, they are not. First, in Plumlee, on appeal, the district court reversed a defendant's misdemeanor conviction on separation of powers grounds. Here, the district court denied a motion to dismiss. Second, in Bills, the defendant has filed a Motion to Remove the Clark County District Attorney's Office from Prosecution Based on the Separation of Powers Doctrine, or in the Alternative Motion to Dismiss Prosecution, and the district court has yet to rule on that motion. As such, it can hardly be claimed it is a conflicting decision.

Further, as explained in greater detail in both the Petitions for Writ of Mandamus filed in State v. Plumlee and State v. Molen, and the Nevada Legislature's Amicus Curiae Brief Supporting Reversal of the District Court's Interpretation and Application of the Separation-Of-Powers Provision in Article 3, Section 1 of the Nevada Constitution filed in Nevada Supreme Court Case Nos. 82236 and 82249 ("Amicus Brief"), those decisions are conflicting simply because the district court incorrectly reversed Plumlee's and Molen's convictions. RA90-178.⁴

⁴ While the district court was not provided the Amicus Brief when denying Caruso's Motion to dismiss because it had not been drafted, in the State's Opposition to Caruso's Motion to Dismiss, the State attached as an exhibit a memo from the Legislative Counsel Bureau including law and analysis similar to the filed Amicus Brief. SC_0033-65; RA90-178. Should this Court conclude that any arguments

Moreover, Caruso's claim that the district court's denial of his Motion to Dismiss is non-appealable fails. In the event Caruso is convicted of a crime, he may then file an appeal challenging this and any other issue he believes warrants this Court's review after his Judgment of Conviction is filed.

III. THE DISTRICT COURT DID NOT ERR WHEN IT DENIED CARUSO'S MOTION TO DISMISS

To the extent this Court concludes that this issue is proper for mandamus relief, the district court properly denied Caruso's Motion to Dismiss. Before, the district court, Caruso argued that his case should be dismissed because it is a violation of the Doctrine of Separation of Powers for a county prosecutor to serve as a legislator. SC_0003-19. The district court denied Caruso's Motion to dismiss pursuant to the arguments and legal authority included in the State's Opposition to Caruso's Motion to Dismiss. SC_001. In the instant Writ, Caruso does not explicitly argue that the district court's decision was error. Instead, Caruso argues that this Court should reconsider Caruso's argument because of allegedly conflicting decisions on the subject. Writ at 7-8. As the standard issue for a writ is when the district court exceeds its discretion, Caruso has ignored his burden by failing to allege that the district court has done so. Office of the Washoe County DA v. Second

raised in that Amicus Brief, but not included in the memo filed before the district court, support affirming the district court's decision here, this court may do so as it "will affirm the judgment of a district court if it reached the correct result for the wrong reason" Wyatt v. State, 86 Nev. 294, 298 (1970).

Judicial Dist. Court, 116 Nev. 629, 635 (2000). Simply citing to allegedly conflicting decisions is insufficient.

Regardless, the district court correctly denied Caruso’s Motion to Dismiss. Caruso argues that “there is little question that Deputy DA Scheible exercises both legislative and executive power” and explains that as a prosecutor, DA Scheible makes charging decisions in criminal cases—an exercise of executive power—while also serving as a State Senator where she writes law—a legislative function. Writ at 14-18. However, Caruso’s argument is based largely on a fundamental misunderstanding of the functions of both the Legislature and the District Attorney’s Office.

Article 3, § 1 of the Nevada Constitution states:

The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

This Court has previously considered what constitutes legislative, executive, and judicial powers:

Legislative power is the power of law-making representative bodies to frame and enact laws, and to amend and repeal them ... The executive power extends to the carrying out and enforcing the laws enacted by the legislature ... ‘Judicial Power’ ... is the authority to hear and determine justiciable controversies. Judicial power includes the authority to enforce any valid judgment, decree, or order.

Galloway v. Truesdell, 83 Nev. 13, 19 (1967).

The general premise behind the separation of powers doctrine is to prevent one branch of government from encroaching on the powers of another branch. Clinton v. Jones, 520 U.S. 681, 699 (1976). However, when examining the relationship between these three branches, the United States Supreme Court has held that “the Framers did not require—and indeed rejected the motion that the three Branches must be entirely separate and distinct.” Mistretta v. United States, 488 U.S. 361, 380 (1989). Instead, the doctrine of separation of powers was created to be a pragmatic, flexible template of overlapping functions and responsibilities so that the branches could form a workable government. Id. at 381.

Additionally, the doctrine of separation of powers as contained in the Nevada Constitution cannot be read in a vacuum, and must instead be interpreted in conjunction with the rest of the Nevada Constitution. Article 4 governs the Legislative Department, including when the Legislature meets and who may and may not serve as an elected official. Article 4 § 4 states that Senators shall be chosen from the qualified electors of their respective districts and that no Senator shall serve more than 12 years. Article 4 § 6 grants each House the authority to determine the qualifications of its own members. Article 4 § 8 specifically prohibits a member of the Legislature from accepting an appointment to a civil office of profit while serving. Article 4 § 9 makes certain federal officers ineligible for serving in the

Legislature. The Nevada Constitution does not contain any specific provisions concerning incompatible public offices that would prohibit legislators from holding positions of public employment with the local government.

This Court has been clear that the rules of statutory interpretation apply to constitutional interpretation. Strickland v. Waymire, 126 Nev. 230, 238 (2010). The interpretive doctrine that reads a statutory list as a closed and exclusive is known as *expressio unius est exclusio alterius*, which means that the statute excludes all that it does not expressly include:

the interpretive canon *expressio unius est exclusio alterius* expressing one item of [an] associated group or series excludes another left unmentioned. If a sign at the entrance to a zoo says “come see the elephant, lion, hippo, and giraffe,” and a temporary sign is added saying “the giraffe is sick,” you would reasonably assume that the others are in good health. The force of any negative implication, however, depends on context. The *expressio unius* canon applies only when circumstances support[] a sensible inference that the term left out must have been meant to be excluded.

NLRB v. SW General, Inc., 137 S.Ct. 929, 940 (2017) (internal quotation marks and citations omitted).

This Court has long held that “the Legislature is entitled to deference in its counseled selection of [an] interpretation.” Nev. Mining Ass’n v. Erodes, 117 Nev. 531, 540 (2001). Furthermore, to the extent there is any ambiguity, uncertainty or doubt concerning the interpretation of the separation-of-powers provision, the interpretation given to it by the Legislature “ought to prevail.” Dayton Gold & Silver Mining, 11 Nev. 394, 400 (1876) (“[I]n case of a reasonable doubt as to the meaning

of the words, the construction given to them by the legislature ought to prevail.”). Therefore, this Court should presume that if the drafters of the Constitution intended to exclude employees of a county executive branch from serving as an elected State official, it would have included that in the Nevada Constitution.

Further, any argument that it simply did not occur to the Framers to do so must fail because Article 4 § 32 explains that the legislature is also responsible for establishing certain county officers, including the Clark County District Attorney's Office. In accordance with that provision, NRS Chapter 252.070(1) states:

All district attorneys may appoint deputies, who are authorized to transact all official business relating to those duties of the office set forth in NRS 252.080 and 252.090 to the same extent as their principals and perform such other duties as the district attorney may from time to time direct. **The appointment of a deputy district attorney must not be construed to confer upon that deputy policymaking authority for the office of the district attorney or the county by which the deputy district attorney is employed.**

(emphasis added).

NRS 252.070(1) makes it clear that a deputy district attorney only serves under the district attorney and does not hold a public office by virtue of prosecuting cases. The Ninth Circuit has held that Clark County District Attorneys are county officers, not acting as state executive officers when prosecuting defendants. Webb v. Sloan, 330 F.3d 1158, 1164-65 (9th Cir. 2003). This Court has further distinguished public officers (i.e. the district attorney) from public employees: “A public office is distinguishable from other forms of employment in that its holder

has by the sovereign been invested with some portion of the sovereign functions of government.” State ex rel. Mathews v. Murray, 70 Nev. 116, 120-21 (1953). The duties of a public officer are fixed by law and involve an exercise of the sovereign functions of the State, such as formulating state policy. Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195 200-06. Public employees, on the other hand, are created by mere administrative authority and discretion. A deputy district attorney is a public employee, not a public officer. *See* State ex rel. Mathews v. Murray, 70 Nev. 116, 120-21, 258 P.2d 982, 984 20 (1953).

NRS 252.070(1) makes clear that deputy district attorneys have no policymaking power, so that their authority as prosecutors has been sufficiently constrained as to not implicate the separation of powers doctrine. This Court has concluded as much. In Price v. Goldman, this Court agreed “that the term ‘district attorney’ not be construed to include his deputies.” 90 Nev. 299, 302 (1974). Next, in Lane v. Second Jud Dist. Ct., this Court held that Nevada’s district attorneys are not acting as state officers of the executive branch when they conduct criminal prosecutions and that the doctrine of separation of powers was inapplicable. 104 Nev. 427, 437 (1988). Accordingly, it is not a violation of separation of powers for a county prosecutor to serve as a State Senator because the separation of powers doctrine does not preclude public employees from serving in two different branches of government.

Further, Petitioner's reliance on Del Papa v. Steffen, 112 Nev. 369, 377 (1996); and State v. Second Jud. Dist. Ct in & for City. Of Washoe, 134 Nev. 783, 786 (2018), fails. Both Del Papa and City of Washoe are inapplicable as both pertained to the judiciary impinging on an executive function or vice versa. Neither dealt with whether a legislator may work as a prosecutor when the Legislature is not in session.

First, in Del Papa, Justices of the Nevada Supreme Court undertook an executive function while also acting within their role as members of the judiciary. The justices had previously ordered that the proceedings of "the Whitehead case" be kept confidential and appointed a "Special Master" to investigate the source of the leaked information when they discovered that the confidentiality order had been violated. Id. at 371-72. In concluding that the justices did not have the authority to initiate an investigation into the information leaks, this Court held that investigating the source of leaked information pertaining to actions justices undertook in their judicial capacity violated the doctrine of separation of powers because investigating a prospective violation of law was a purely executive function. Id. at 377-78. The Del Papa Court made clear that it is the judiciary's responsibility to "hear and determine justiciable controversies," while it is the executive's responsibility to carry "out and enforce laws enacted by the legislature." 112 Nev. at 377. However, the justices in Del Papa were doing both things at the same time and in regard to the

same case.

Similarly, this Court in City of Washoe held that it was a violation of the doctrine of separation of powers for a prosecutor to interfere with a district court's sentencing decision. 134 Nev. at 787-88. There, a prosecutor had to agree before a district court judge could sentence a defendant to veterans' court. Id. This Court held that "[i]n requiring that a prosecutor stipulate to the district court's decision, the effect of NRS 176A.290(2) is to afford an executive veto over a judicial function." Id. at 787. In sum, the holding of City of Washoe is that one branch of a government cannot interfere with the functioning or decisions made by a different branch. That is not what is happening here.

Both Del Papa and City of Washoe dealt with members of the judiciary or executive simultaneously engaging in activities reserved to a different branch of government. Moreover, both dealt with the judiciary investigating a case they were meant to be presiding over, or a prosecutor influencing a judicial decision of case they were prosecuting. Unlike both del Papa and City of Washoe, a county prosecutor A is not engaging in legislative functions while prosecuting criminal defendants, and is not prosecuting cases when representing the citizens of Nevada as an elected legislator. Moreover, despite Caruso's claims to the contrary, a legislator—even a legislator-prosecutor—does not make the law and they do not have *carte blanche* to decide what laws to amend, repeal or create. While a legislator

can support or sponsor laws, they do not have the exclusive authority to enact that law. Instead, laws are made when a constitutional majority of both the Senate and Assembly votes to approve a bill. Nev. Mining Ass'n v. Erodes, 117 Nev. 531, 536 (2001). In that process, a prosecutor-legislature can vote for a law that the majority of the Legislature rejects or can vote against a law that the majority of the Legislature approves. While the legislator-prosecutor is engaged in that process, she is not in a courtroom trying to hold a person accountable for their crimes and is not preventing any other prosecutor from doing so. Even after both the Senate and Assembly votes to approve a bill, the Governor must sign and approve that bill before it becomes a law. Id. Common sense would then dictate that a legislator-prosecutor cannot be said to enact laws that they could then use to target a specific defendant.

Conversely, when a legislator is acting as a prosecutor, they do not have *carte blanche* on what laws to enforce. A prosecutor-legislator cannot predict which defendant will break which law, further negating any claim that a prosecutor-legislature could be incentivized to enact laws targeting a specific defendant. Id. When a prosecutor is enforcing the law in a court of law, they are not engaging or impinging on the functioning of the legislative branch because nothing about their prosecution of any defendant would impede the Legislature's ability to make, amend, or repeal laws. Accordingly, while a prosecutor-legislator is prosecuting Caruso, she is not the only prosecutor assigned to Petitioner's case and is not acting

in her role as a legislator or invoking her power as a legislator during Caruso's prosecution.

Moreover, despite Caruso's lofty claims that a "legislator-prosecutor is incentivized to write the law in ways that gave her advantage in a prosecution" or "decide not to fix gaps in the law that redound to her benefit" (Writ at 18), Caruso provides no authority and points to no fact indicating that such is the case here. Maresca, 103 Nev. at 673 (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"). Caruso has not established that prosecutor-legislator Scheible specifically targeted him when acting in her role as a legislature or that she wrote or amended the statutes criminalizing Sexual Assault, Open or Gross Lewdness, or Burglary. In fact, prosecutor-legislator Scheible was not elected to the Nevada Legislature until 2018 (<https://www.leg.state.nv.us/App/Legislator/A/Senate/Current/9>). All three statutes criminalizing Sexual Assault, Open or Gross Lewdness, or Burglary were codified well before then. Specifically, the statute criminalizing sexual assault— NRS 200.364 and 200.366—was drafted in 1977, and its last amendment occurred in 2015. Prosecutor-legislator Scheible was not serving in the Legislature at the time. Next, NRS 201.210, the statute criminalizing Open or Gross Lewdness, was drafted in 1963, and its last amendment occurred in 2017. Finally, NRS 205.060, the statute criminalizing burglary was codified in statute in 1967, having been a crime since

1911. While NRS 205.060 was amended in 2019, when prosecutor-legislator Scheible was serving as a legislator, the amendment lowered the penalties for burglaries of motor vehicles, structures, and businesses, and prosecutor-legislator Scheible voted to pass that amendment. Accordingly, any claim that prosecutor-legislator Scheible drafted any of those statutes to make her job as a prosecutor simpler or to specifically target Caruso fails.

Further, that a prosecutor-legislator would be incentivized to favor certain bills simply because they work as county prosecutors when the Legislature is in session is the broad type of claim that applies to any legislator. The Nevada Legislature is a biennial legislature, meeting every other year for 120 days. Nev. Const. Art. 4 § 2. As a part-time legislature, legislators realistically have other occupations when the Legislature is not in session. Indeed, as explained more fully in the Nevada Legislature’s Amicus Brief, government employees have served as elected members of the legislature for over 100 years. RA132-133.

It follows then that “it would prove difficult, if not impossible, to have a conflict-free legislature.” State ex rel. Stratton v. Roswell Ind. Schools, 806 P.2d 1085, 1093 (N.M. Ct. App. 1991). The reality is that every elected legislator has interests they advocate for as elected representatives. For instance, a teacher-legislator likely favors increased funding for education. A farmer-legislator likely favors certain agricultural regulations. Even criminal defense attorneys—like

Assemblyman Steve Yeager or Jason Frierson—likely favor bills reducing criminal penalties. Any potential conflict of interest experienced by a legislator who is also a public employee in another branch of state government are no greater than those conflicts experienced by other members of the Legislature. That is the nature of the democratic system: citizens elect legislators to represent a wide spectrum of interests. Accordingly, this Court should not be swayed by Caruso’s unsupported and overbroad argument as it could apply to every elected member of the Nevada Legislature.

Further, when Deputy District Attorney Scheible is prosecuting cases, she is not preventing the Legislative Branch from making, amending, or repealing laws. When Deputy District Attorney Scheible is representing the State of Nevada in the Legislature, she is not enforcing the laws being created, amended, or repealed. Instead, her service in the Legislature is a part-time position that requires service every other year for 120 days. During those 120 days, she exclusively serves the legislative branch, receives no compensation from any executive branch agency, and suspends her prosecutorial duties until the legislative session ends.

This is in stark contrast to the facts of both Del Papa and City of Washoe. Both Del Papa and City of Washoe involved a member of one branch of government impinging on function and power of another branch. In Del Papa, justices were acting as executive members by appointing an investigator to look into potential

violations of the law regarding a case they were presiding over. The justices in Del Papa were engaging in executive functions while serving as members of the judiciary *at the same time*. In City of Washoe, a prosecutor prevented a district court judge from fully exercising their sentencing discretion while actively engaged in a criminal prosecution. Neither is the case here. When the Legislature is in session, Deputy District Attorney Scheible does not continue working for or receiving compensation from the Clark County District Attorney's office and when the Legislature is not in Session, she does not receive compensation from the Legislature. Therefore, although Deputy District Attorney Scheible has employment when she is not serving at the Legislature, she is not simultaneously exercising legislative and executive powers and is thus not violating the doctrine of separation of powers.

CONCLUSION

Based on the foregoing, the State respectfully requests that Melton's Petition for Writ of Mandamus be DENIED.

Dated this 16th day of March, 2021.

Respectfully submitted,

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BY */s/ John T. Niman*

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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 16th day of March, 2021.

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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 6,768 words and 569 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 16th day of March, 2021.

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 16, 2021. 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 16, 2021, a copy was sent via email to District Court, Department 18's JEA for Judge Holthus:

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BY /s/ J. Garcia
Employee, District Attorney's Office

JTN/Julia Barker/jg