

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Criminal Appeal

COURT MINUTES

November 09, 2020

C-20-346852-A Jennifer Lynn Plumlee, Appellant(s)
vs
Nevada State of, Respondent(s)

November 09, 2020 12:16 AM Minute Order

HEARD BY: Scotti, Richard F. **COURTROOM:** No Location

COURT CLERK: Kathryn Hansen-McDowell

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- The Court GRANTS Appellant s Motion to Reconsider, based on the violation of Appellant s Constitutional rights to procedural due process, as explained below. Appellant Jennifer Plumlee was deprived of her Constitutional rights of procedural due process because her prosecutor, Deputy District Attorney Scheible, also served as a Legislator at the time of the trial, in violation of the Separation of Powers doctrine which doctrine exists as a fundamental feature of American government, and as a express clause in the Nevada Constitution. Nev. Const. Art. 3, Sec. 1. An individual may not serve simultaneously as the law-maker and the law-enforcer of the laws of the State of Nevada.

The plain and unambiguous language of the Nevada Constitution is that: The powers of the Government of the State of Nevada shall be divided into three separate departments, - the Legislative, - the Executive and the Judiciary; 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.

Nev. Const. Art 3, sec. 1. This is commonly known as the Separation of Powers clause. It is undisputed that Prosecutor Scheible was a person charged with the exercise of powers within the legislative branch of government at the time of the trial. Further, there is no reasonable dispute that, as prosecutor, she was charged with the exercise of powers within the executive branch. The

enforcement of the laws of the State of Nevada are powers that fall within the executive branch of the government of the State of Nevada. See Nev. Const. Art. 5, sec. 7. Prosecutor Scheible was enforcing the laws of the State of Nevada, and representing the State of Nevada, and thus was exercising the powers delegated to her within the executive branch. It is not mere coincidence that District Attorneys are frequently referred to as the State or the government.

Deputy District Attorney Scheible did not have the legal authority to prosecute Appellant, thus the trial was a nullity.

The Separation of Powers doctrine historically exists to protect one branch of government from encroaching upon the authority of another. But more than that, it exists to safeguard the people against tyranny the tyranny that arises where all authority is vested into one autocrat a person who writes the law, enforces the law, and punishes for violations of the law.

Our Founding Fathers understood that consolidated power was the genesis of despotism. A dispersion of power, they understood, was the best safeguard of liberty. As explained by James Madison, The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny. Federalist No. 47 (3rd para.).

One who serves in the legislative branch in making the law must not and cannot simultaneously serve in the executive branch as a prosecutor of the State laws. This Court finds that it is a violation of procedural due process of nearly the highest order for a person to be tried and convicted by a public official who in charge of both writing and enforcing the law.

The authorities cited by the State are very clearly wrong and distinguishable.

In 2004 Attorney General Brian Sandoval issued an opinion that local executive branch employees are not prohibited from serving in the legislature. But that opinion did not specifically consider that a Deputy District Attorney enforcing the laws of the State of Nevada, and representing the State of Nevada, is actually exercising powers belonging to the State executive branch.

In August 8, 2020 the Legislative Counsel Bureau issued an opinion that local governments and their officers and employees are not part of one of the three departments of state government. But, like the AG Opinion mentioned above, that opinion did not specifically consider that a Deputy District Attorney enforcing the laws of the State of Nevada, and representing the State of Nevada, is actually exercising powers belonging to the State executive branch.

The States reliance on Lane v. District Court, 760 P.2d 1245 (Nev. 1988) is misplaced. The issue in Lane was whether the Judiciary was improperly interfering with the functions of the Executive Branch. The Nevada Supreme Court did not squarely reach the issue whether the due process rights of a criminal defendant were violated when prosecuted by an Assistant District Attorney who also served in the Legislature. Here, this Court is not directing the Office of the District Attorney to do or not to do anything; rather, this Court is protecting the rights of the accused.

The State attempts to draw a distinction between a public officer and a mere public employee. As to the former, the State acknowledges that the Separation of Powers Doctrine does apply to a person holding an Office established by the Constitution. But the State invents out of thin air the notion that the Doctrine does not apply to an employee who carries out executive functions. The States purported authority, State ex rel. Mathews v. Murray, 70 Nev. 116 (1953) does not stand for its proposition. Mathews merely held that a petition for Writ of Quo Warranto could not be used to remove a public employee, only a public officer. While there might be a meaningful distinction

between a public employee and public officer in some situations, it is not evidence in the words of the Nevada Separation of Powers doctrine.

The State wrongly relies on *Heller v. Legislature of the State of Nevada*, 120 Nev. 456 (2008) which held that the judiciary could not determine whether a legislator must be removed for violating the Separation of Powers doctrine where the legislator also served in the Executive Branch. That case was based on lack of standing, rather than the merits. Further, this is not a case of the Judiciary determining the qualifications to be a member of the Legislature, or to work for the District Attorneys office. Rather this case involves the due process rights of an accused; and, in this case, those rights were violated.

The Appellant was deprived of her constitutional rights to procedural due process even if the Nevada Separation of Powers clause as written does not apply to any persons employed by local governments. The Separation of Powers doctrine is such a clear, vital, and well-recognized aspect of the American system of government, existing long before the adoption of the Nevada Constitution. This Court finds that it is fundamental to American jurisprudence that a criminal defendant shall not be prosecuted by a person who is simultaneously the law-maker and the law-enforcer of the laws of the State of Nevada.

The Court finds that Appellant did not waive her right on appeal to raise the issue of separation of powers. Raising it in the Motion for Reconsideration is the same as raising it in the original appeal brief as the initial appeal is still pending.

Accordingly, the Court GRANTS the Appeal, REVERSES the conviction, and ORDERS the Bond, if any, returned to Appellant.

Appellant shall prepare the Order, consistent herewith, correcting for any scrivener error, and adding appropriate context and authorities. Further, Appellant shall submit the Order, pursuant to the electronic submission provisions of AO 20-17.

CLERK'S NOTE: The above minute order has been distributed to: Craig Mueller: cmueller@muellerhinds.com, Alexander Chen: alexander.chen@clarkcountyda.com and Melanie Scheible: melanie.scheible@clarkcountyda.com