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10 UNITED STATES DISTRICT COURT

11 DISTRICT OF NEVADA

12 JOSE DECASTRO, )  
 )  
 13 Plaintiff, )  
 )  
 14 vs. )  
 )  
 15 CLARK COUNTY, NEVADA; JUDGE )  
 ANN E. ZIMMERMAN in her individual )  
 16 capacity; JUDGE MICHELLE LEAVITT in )  
 her individual capacity; AGNES BOTELHO, )  
 17 in her individual capacity; BRANDEN )  
 BORQUE, in his individual capacity, )  
 )  
 18 Defendants.

Case No: 2:25-cv-00899-APG-BNW

**DEFENDANTS AGNES BOTELHO  
 AND CLARK COUNTY’S  
 REPLY IN SUPPORT OF MOTION  
 TO DISMISS COMPLAINT**

19 COME NOW, Defendants Agnes Botelho and Clark County, by and through counsel  
 20 of record, Deputy District Attorney Oliva C. Denue and pursuant to Fed. R. Civ. Pro. 12(b)(6)  
 21 and the attached memorandum of points and authorities and hereby file with this Court their  
 22 Reply to Plaintiff’s opposition (ECF # 19) filed against them in this matter.

23 **POINTS AND AUTHORITIES**

24 **I. INTRODUCTION**

25 Absolute immunity protects prosecutors from their actions while acting as an advocate.  
 26 Unquestionably, defendant Botelho’s actions here—arguing sentencing during a criminal  
 27 proceeding and presenting witness testimony— are entitled to absolute immunity and require  
 28

1 dismissal. Moreover, the claims brought against Clark County must be dismissed as Clark  
2 County is not a “person” for 42 U.S.C. § 1983 purposes who may sued. Even if Clark County  
3 could be sued under 42 U.S.C. § 1983, Plaintiff has nonetheless failed to meet pleading  
4 requirements to sustain the claim. Therefore, this court should grant the motion to dismiss.

## 5 II. ARGUMENT

### 6 A. Defendant Botelho’s Conduct is Squarely Protected Advocacy.

7 Plaintiff blanketly and incorrect asserts that Botelho’s “handling of evidence  
8 implications and her post-sentencing escalation reflect administrative or enforcement conduct  
9 rather than core advocacy.” ECF No. 19, P.4. Indeed, Plaintiff did not, and cannot, point to  
10 any facts that place Botelho’s conduct outside the realm of immune advocacy. In fact,  
11 Plaintiff’s own description of events concedes that Botelho’s actions are protected. Botelho  
12 is therefore entitled to immunity and dismissal.

13 A prosecutor is entitled to absolute immunity from suit for actions that are “intimately  
14 associated with the judicial phase of the criminal process.” *Imbler v. Patchman*, 424 U.S. 409,  
15 430 (1976). When a prosecutor is acting as an advocate, they are entitled to absolute  
16 immunity. *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 678 (9th Cir.  
17 1984). Advocating in connection with sentencing fits squarely within a traditional function of  
18 an advocate. *See Peace v. Baker*, 697 F. Supp. 1145, 1147 (D. Nev. 1988); *Brown v. California*  
19 *Dep’t of Corr.*, 554 F.3d 747, 750-751 (9th Cir. 2009). And prosecutors enjoy absolute  
20 immunity from claims that they used perjured testimony at trial. *Genzler v. Longanbach*, 410  
21 F.3d 630, 637 (9th Cir. 2005).

22 It is only when a prosecutor functions as an administrator, rather than as an officer of  
23 the court, that absolute immunity is not warranted. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273  
24 (1993) (quoting *Imbler*, 424 U.S. at 431). That is, “[w]hen a prosecutor performs the  
25 investigative functions normally performed by a detective or police officer” the prosecutor is  
26 no longer working as an advocate and thus absolute immunity is not in play. *Id.* For example,  
27 “if a prosecutor plans and executes a raid on a suspected weapons cache, he has no greater  
28 claim to complete immunity than activities of police officers allegedly acting under his

1 direction.” *Id.* at 274 (quoting *Hampton v. Chicago*, 484 F.2d 602, 608-09 (7th Cir. 1973))  
2 (internal quotations omitted). But acts undertaken as a prosecutor “which occur in the course  
3 of his role as an advocate for State, are entitled to the protections of absolute immunity.” *Id.*  
4 at 273.

5 Here, Botelho’s conduct is squarely that of an advocate: presenting the State’s criminal  
6 case and arguing for sentencing. There are simply no facts whatsoever that demonstrate that  
7 Botelho was acting as an administrator or that Botelho undertook investigatory acts typical to  
8 that of law enforcement. A prosecutor’s role advocating for sentencing, at any stage of the  
9 case, is a traditional function entitling Botelho to immunity. A prosecutor does not lose the  
10 protections of immunity for arguing sentencing both at a bench trial and at a bail hearing,  
11 contrary to Plaintiff’s assertions. Nor does the procedural posture of the hearing change the  
12 traditional function of the advocate warranting immunity. Moreover, any allegation  
13 concerning false testimony at trial is entitled to absolute immunity. Plaintiff’s blanket  
14 assertions to the contrary are belied by the facts of this case. Botelho is entitled to absolute  
15 immunity and this court should grant the motion to dismiss.<sup>1</sup>

16 **B. Clark County Should be Dismissed from this Suit.**

17 Plaintiff argues that the *Monell* claim should proceed because Plaintiff gave a  
18 threadbare recitation of elements of a *Monell* claim. ECF No. 19, P. 5.

19 1. Clark County is not a “Person” under 42 U.S.C. § 1983.

20 In the complaint, Plaintiff invokes 42 U.S.C. § 1983 as the basis for the claims alleged.  
21 ECF No. 7, P. 10-14. 42 U.S.C. § 1983 applies only to a “person” acting under color of state  
22 law; thus, Plaintiff must establish that the conduct alleged was undertaken by a “person.” The  
23 term “person” in 42 U.S.C. § 1983 does not include an arm of a state or officials acting in their  
24 official capacities. *See Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989).

25 When a county acts as a state office, the county is not a “person” for § 1983 purposes.  
26

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27 <sup>1</sup>Plaintiff argues that even if absolute immunity applies, Botelho “remains necessary for limited discovery on  
28 Clark County’s policies and customs.” ECF 19, No. 4. Should any of Plaintiff’s claims move forward, Plaintiff may  
utilize the proper procedures of discovery as outlined in the Federal Rules of Civil Procedure; Botelho may not remain a  
named defendant solely because plaintiff believes Botelho could provide discoverable information.

1 See *Weiner v. San Diego County*, 210 F.3d 1025, 1030 (9th Cir. 2000). District attorneys who  
2 act as state officers when exercising their prosecutorial functions preclude § 1983 claims  
3 against the county because the state is the relevant actor. *Id.*; see also *Jackson v. Barnes*, 749  
4 F.3d 755, 767 (9th Cir. 2014) (“The District Attorney's Office, however, acts as a state office  
5 with regard to actions taken in its prosecutorial capacity, and is not subject to suit under §  
6 1983.”). The Eleventh Amendment affords immunity to the states, and Nevada has not waived  
7 its Eleventh Amendment immunity. See *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf &*  
8 *Eddy, Inc.*, 506 U.S. 139, 144 (1993); NRS 41.031.

9 Here, Plaintiff has alleged no facts to support that Clark County is a “person” subject  
10 to suit under § 1983. Indeed, Clark County acts as an arm of the state when prosecuting crimes.  
11 And Clark County is protected by Eleventh Amendment immunity here. Thus, § 1983 does  
12 not permit Plaintiff’s suit.

13 2. Plaintiff has failed to plausibly state a claim to relief against Clark County.

14 Moreover, even if Clark County were a “person” subject to suit, Plaintiff has  
15 nonetheless failed to plausibly state a claim for relief. To avoid a dismissal under Fed. R. Civ.  
16 P. 12(b)(6), a complaint must plead “enough facts to state a claim to relief that is plausible on  
17 its face.” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting  
18 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). “A claim has facial plausibility when the  
19 plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
20 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).  
21 Importantly, a plaintiff’s obligation to provide the grounds for relief requires “more than labels  
22 and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”  
23 *Twombly*, 550 U.S. at 555 (internal citations and quotations omitted).

24 The framework for holding Clark County liable under § 1983 is outlined in *Monell v.*  
25 *Dep’t of Social Services*, 436 U.S. 658 (1978). To state a *Monell* claim, Plaintiff must allege  
26 facts to show: “(1) that he possessed a constitutional right of which he was deprived; (2) that  
27 [the County] had a policy; (3) that the policy amounts to deliberate indifference to [plaintiff’s]  
28 constitutional right; and (4) that the policy is the moving force behind the constitutional

1 violation.” *Anderson v. Warner*, 451 F.3d 1063, 1070 (9th Cir. 2006).

2 Plaintiff has wholly failed to meet the pleading burden in this case. For Plaintiff’s  
3 claims against Clark County, Plaintiff does not allege any facts as to any required elements of  
4 the claim. Instead, Plaintiff vaguely alleges a conspiracy to retaliate “against police critics.”  
5 ECF No. 7, P. 13. ¶ 74(b). A conclusory allegation that “Clark County maintained customs,  
6 policies, and practices causing these constitutional violations” that “demonstrates [a]  
7 deliberate indifference to constitutional rights” does not meet the pleading burden. ECF No.  
8 13, P. 6. ¶ 74, 74(c); see *Twombly*, 550 U.S. at 555. Plaintiff has failed to plead any factual  
9 content to show that Clark County is liable for any alleged misconduct. Plaintiff cannot merely  
10 recite elements of a claim while alleging no factual content to meet the pleading burden.  
11 Therefore, this court should grant the motion to dismiss.

12 **III. CONCLUSION**

13 Defendant Botelho is entitled to absolute immunity for traditional actions undertaken  
14 as an advocate. Plaintiff cannot point to any fact or action to demonstrate that Botelho did  
15 anything other than act as an advocate in a criminal proceeding. Any suggestion that Botelho’s  
16 actions were administrative or investigatory are improper. Additionally, Clark County is not  
17 a “person” subject to suit under 42 U.S.C. § 1983 and, even if it were, the complaint wholly  
18 fails to plausibly state a claim to relief. For these reasons, this court should grant the motion  
19 to dismiss.

20 DATED this 2<sup>nd</sup> day of February, 2026.

21 STEVEN B. WOLFSON  
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