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Former Prosecutors: Nessel False Electors Case Not DOA After Comments

Attorney General Dana Nessel's case against the 16 Republican 2020 presidential electors charged with forgery may not be dead on arrival as some have surmised, two former prosecutors said following comments that appeared to weaken her main argument on intent.

The attorneys spoke to Gongwer News Service on Wednesday in the wake of news that Nessel, who brought the charges earlier this year, told an advocacy group that she believed the 16 GOP operatives were brainwashed to believe former President Donald Trump won the election.

Nessel has argued in the cases, which are pending pre-trial decisions in Lansing's 54-A District Court, that false electors knew that Trump lost to now President Joe Biden in the fall of 2020 but proceeded to meet unlawfully and file false documents certifying that Trump won to the National Archives.

Each of the 16 electors charged, including Republican National Committeewoman Kathy Berden and former Michigan GOP Co-Chair Meshawn Maddock, have pleaded not guilty, and said they were following federal law, historical precedent and orders from Trump's legal team to be ready, should evidence show the election was rigged in Biden's favor.

No such evidence ever materialized, and Trump lost all his battles in court to overturn the election.

Charges were filed by Nessel's office in state court after the case was forwarded to federal prosecutors with no follow-up.

Last week, the attorney general told a group called Protectors of Equality in Government that the false electors had been brainwashed and genuinely believed that the former president won. The comments were first reported by The Detroit News.

"People talk a lot about, 'Oh, why don't you start flipping some of those people so that they can become witnesses against the remaining defendants, the worst acting defendants?' The problem is, these are people who have been brainwashed, and when I say brainwashed, how do you flip someone who concedes that they did everything that they're accused of doing but what they say is, 'We believe that we were in the right,'" Nessel is reported to have said. "'We think that Donald Trump is the real winner of the election.' They legit believe that. They genuinely believe it, so how do you ... how do you ... somebody can't even plead guilty if they wanted to because they can't admit that what they did violated the law because they still think they're right."

Since then, political commentators on the political right have pointed to Nessel's remarks as an indication that she did not believe the arguments in her own case, that it was a political prosecution and that by admitting that the electors steadfastly understood Trump to be the winner, that blew up her argument for malicious intent to defraud.

However, others have said that Nessel was simply commenting on why it would be difficult to get the electors to cooperate with investigators given their strong political beliefs.

At least two of the electors by way of their attorneys this week filed motions to dismiss, arguing that Nessel's comments on the case were evidence that her office had no evidence of intent.

Those motions were filed by Kevin Kijewski and George Brown, attorneys for defendants Clifford Frost and Mari-Ann Henry, respectively. An excerpt of Nessel's comments also appeared in the filings.

Kijewski's filing in *People v. Frost* (54-A District Docket No. 23-02212) argues that the case should be dismissed due to prosecutorial misconduct, as the electors by her own admission did not have the requisite criminal intent required for the felony charges they face.

"Michigan courts are clear about the importance of specific intent that is required for the crime of forgery," he wrote. "Given that the AG stated that she knows that the defendant and the other fifteen Republican electors 'think that Donald Trump is the real winner of the election' and that 'they legit believe that,' then the defendant did not possess the specific criminal intent to cheat nor deceive as required by the statutes covered *supra*."

Kijewski also noted that Nessel made a comment about the Antrim County jury pool in the case against the now-acquitted defendants who were accused of providing material support to the plot to kidnap [Governor Gretchen Whitmer](#) in 2020. Nessel surmised that Antrim was heavily Republican and that the electors case potentially to be tried in Democratic Lansing.

Frost's attorney called that statement problematic.

"If anything, this makes it very clear that the AG is more focused upon securing a criminal conviction as opposed to seeking to administer justice and to follow the rule of law," Kijewski wrote.

In a statement provided to Gongwer, Kijewski elaborated on his argument that Nessel had political motives for seeking convictions.

"The attorney general's comments clearly demonstrate her true political motive for bringing about this unique prosecution that other prosecutors declined, both on the federal level and on the county level," he said. "Ms. Nessel's comments are not only defamatory, but are also damaging to the trust that people have in our judicial system, to the rule of law, and our democracy. The attorney general publicly admitted that Mr. Frost and the other individuals charged in this case did not have the requisite criminal intent; therefore, the charges should be immediately dismissed."

He went on to say that the U.S. Supreme Court has said that it was a prosecutor's duty to refrain from improper methods "calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

"Ms. Nessel's comments and actions here reveal that her methods and reasoning are absolutely flawed, and the only remedy available is an immediate dismissal of the charges," Kijewski added.

In the motion to dismiss filed by Brown in *People v. Henry* (54-A District Docket No. 23-02215), the attorney wrote that to establish intent, the prosecutor would need to demonstrate that the defendant acted with intention of cheating or deceiving.

"It is indisputable that any electoral votes cast by the defendant for the Republican ticket would have been legitimate if Donald Trump was the 'real winner of the election,'" Brown wrote. "The people now claim that the defendant believed Donald Trump won the election. If she had that belief, the defendant's alleged actions could not have been performed with the intent to cheat or deceive anyone."

In a separate statement, Brown said that Nessel's public claims about Henry's state of mind nullified the entire case.

"If Ms. Nessel believes what she said last week, the charges against Mrs. Henry should be immediately dismissed," Brown added.

Nessel Press Secretary Danny Wimmer told Gongwer that the department will respond to the motions in its upcoming filings with the court. Wimmer did not indicate when that might occur when asked.

Whether or not the case is in jeopardy remains an open question, but two former prosecutors who spoke to Gongwer said Nessel's comments may not have been an argument busting misstep.

Former Rep. David LaGrand, who served as an assistant prosecutor in Kent County before seeking office, said he perceived her comments as reflecting a worry that the defendants would use that as a defense and the difficult nature of trying to get someone — who believes something whole-heartedly — to flip.

"Dana is a really good attorney. So, I think that it's more like if I suggested a line of defense to you," LaGrand said. "Let's imagine you and I were going out for beer, and I said, 'Man, I got a tough case coming up. I'm worried that the guys I'm putting on trial don't just claim that they're crazy, they think they're Napoleon,' because that would be the obvious response. Saying I'm really stupid or I'm really crazy are also potential defenses. So, Dana may have (just) been giving a quick continuing education course to the defendants' attorneys on a Zoom call, but I think that's all she did. She suggested a line of defense ... that doesn't mean she's lost her case."

Asked if her comments rose to prosecutorial misconduct as Kijewski argued, LaGrand said no.

"Misconduct is something you do in a trial to a jury," he said. "Now, she may have problems with tainting her jury, but I absolutely give Dana credit for speaking the truth about the central, terrifying dynamic about what's going on in American politics right now. To say that's prosecutorial misconduct is a little bit like saying Trump saying every time he breaks the law and somebody tries to hold them accountable, that those people are picking on him."

Former U.S. Attorney Matthew Schneider, now a partner at Honigman, said that whether Nessel's comments will bust her case is yet to be seen.

"The defense certainly thinks so, but we haven't heard the attorney general's response to this argument yet," Schneider said in an interview. "We have to give the prosecutors the opportunity to respond in court and then the judge will be able to decide with the benefit of hearing both sides."

That said, her remarks and the fallout created a challenging development in the case, Schneider added.

"The attorney general's office charged eight counts, and every one of them mirrors the statutory requirement that the defendants had either the 'intent to injure or defraud' or simply the 'intent to defraud,'" he said. "Her comments appear to concede that the defendants legitimately believed they were intending to do what was right, which would appear to show that they had no intent to defraud."

Schnieder acknowledged that legal experts are now asking whether the prosecution can win the case in court, but that was the second step of the analysis.

"The first step is determining whether the attorney general's office has to voluntarily dismiss these cases," he said. "That's because Rule 3.8 of the Michigan Rules of Professional Conduct says a prosecutor shall not bring a case that is not supported by probable cause. If you've admitted you can't prove an important element of the case, then you'd have to ask yourself, 'how in the world do you have probable cause?'"

— By Ben Solis

[Back to top](#)

