IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

SCOTT CANARELLI, Beneficiary of The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT, in and for the County of Clark, State of Nevada, and THE HONORABLE JUDGE BELL, District Judge,

Respondents,

And

LAWRENCE and HEIDI CANARELLI, and FRANK MARTIN, Special Administrator of the Estate of Edward C. Lubbers, Former Trustees,

Real Party in Interest.

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Case No.

District Court Case No. P-13-078912-T

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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Docket 82299 Document 2021-00658

VERIFICATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Under penalties of perjury, the undersigned declares that he or she is counsel for the real party in interest named in the foregoing petition and knows the contents thereof; that the pleading is true of his or her own knowledge, except as to those matters stated on information and belief, and that as to such matters he or she believes them to be true. This verification is made pursuant to NRS 15.010 and NRAP 21(a)(5).

Dated this 8th day of January, 2021.

By: /s/ Dana A. Dwiggins
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NRAP 26.1 DISCLOSURE

The undersigned hereby certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Real Party in Interest Scott Canarelli, as the beneficiary of The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 ("Trust") is being represented and/or has been represented in this litigation by: (1) Dana A. Dwiggins, Alexander G. LeVeque, Jeffrey P. Luszeck, Tess E. Johnson, Craig D. Friedel, and Roberto M. Campos of the law firm Solomon Dwiggins & Freer, Ltd.; and (2) Daniel F. Polsenberg and Abraham G. Smith of law firm Lewis Roca Rothgerber Christie LLP.

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ROUTING STATEMENT

This petition raises an important issue of statewide import, that is, what legal standard applies to the disqualification of a judge who is exposed to a judicial source of bias *while sitting as the trier of fact*.

Under Nevada law, a judge who is exposed to a judicial source of bias cannot be disqualified unless it results in "a deep-seated favoritism or antagonism that would make fair judgment impossible." Despite this established standard, the district court's chief judge adopted a new standard, under which a judge who is exposed to a judicial source of bias while sitting as the trier of fact is disqualified whenever an objective person might reasonably question their impartiality.

This lower standard is typically reserved only for circumstances where an extrajudicial source of bias is involved. Applying it to bench trials where the judge is introduced to information in the course of the judicial proceedings would dramatically impact—and even inhibit—how judges in bench trials and probate proceedings conduct *in camera* reviews, decide motions in limine, and even conduct themselves at trial, out of fear that any ordinary judicial exposure to privileged or inadmissible evidence may allow a party to question their impartiality and seek their disqualification.

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This adoption of such a judicially disruptive standard of disqualification is a matter that should be assigned to the Supreme Court pursuant to NRAP 17(a)(11)-(12) because it is a "[m]atter[] raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law," and a "[m]atter[] raising as a principal issue a question of statewide public importance."

Additionally, this case involves a trust with a corpus exceeding $5,430,000, thereby excluding it from those matters presumptively assigned to the Nevada Court of Appeals. NRAP 17(b)(14).

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INTRODUCTION

Disqualifying a sitting judge for doing her job is supposed to be difficult. But in the Eighth Judicial District, it has just gotten a lot easier. Even without evidence that a district judge holds any opinion that would make fair judgment impossible, the judge may be disqualified, so long as (1) the judge is the trier of fact, and (2) the judge encounters allegedly privileged information as part of a routine *in camera* inspection. This, according to the chief judge of the Eighth Judicial District, raises a reasonable suspicion of impropriety, tracing a clear map for any dissatisfied litigant to shop for a new judge.

The chief judge's disqualification order acknowledges that no Nevada precedent requires such a result; indeed, this Court has held that when a judge is exposed to information during judicial proceedings, the judge may be disqualified only when she exhibits "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Kirksey v. State*, 112 Nev. 980, 1007, 923 P.2d 1102, 1119 (1996). Nevertheless, the chief judge adopted a contrary standard based on a misreading of two out-of-state cases.

This Court should grant the petition and order that Judge Sturman, who was found to harbor no actual bias, again preside over this case.

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RELIEF SOUGHT

This Court should (1) hold that the heightened *Kirksey* standard for the disqualification of a judge when the purported bias stems from a judicial source applies regardless of whether the court even is sitting as the trier of fact, and (2) acknowledge that the district court already found that there is "no evidence" that the *Kirksey* standard has been met in this case. Based on this, this Court should issue a writ requiring the district court to reinstate Judge Sturman.

In the alternative, if this Court finds that the district court did properly disqualify Judge Sturman absent a waiver, it should remand the matter to Chief Judge Bell to consider whether the former trustees waived the privilege issue with respect to Lubbers' notes.

ISSUES PRESENTED

1. Did the district court err in creating an exception to the high-threshold *Kirksey* standard for judicial disqualification that applies where a judge is exposed to a judicial, as opposed to an extrajudicial, source of alleged bias where the judge is sitting as the trier of fact?

2. *Kirksey v. State*, 112 Nev. 980, 1007, 923 P.2d 1102, 1119 (1996) holds that when a judge is exposed to information during judicial proceedings, the judge may be disqualified only when she exhibits "a deep-seated favoritism or

antagonism that would make fair judgment impossible." Did the district court err in creating an exception to this standard when the judge is the finder of fact?

3. If the *Kirksey* standard applies, should Judge Sturman have been disqualified despite the chief judge's express finding that the *Kirksey* standard was not met, i.e., "there is no evidence that Judge Sturman has formed an opinion that would make fair judgment impossible"?

4. In the alternative, did the district court abuse its discretion in disqualifying Judge Sturman reviewing an allegedly privileged document without first determining whether the privilege had been waived, where waiver was at issue for disqualification?

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This case arises from a dispute over the Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998, and whether the trustees unlawfully withheld distributions from Scott.

In the underlying probate litigation, the Estate of Edward Lubbers, Larry Canarelli, and Heidi Canarelli (the "former trustees") produced Lubbers' notes related to a phone call with his attorneys and an in-person meeting with the other Former Trustees, Scott, and others.[1]

[1] Petitioner no longer has a copy of Lubbers' notes, but this Court can order their transmission, as it previously did. *Canarelli v. Eighth Judicial Dist. Court*, 136 Nev. Adv. Op. 29, 464 P.3d 114, 120 (2020).

Months later, the Former Trustees tried to claw back Lubbers' notes, arguing that they were privileged. The district court disagreed, but this Court ultimately upheld the claim of privilege. (2 APP000253-265,at 5:11- 6:4; 5 APP000892-895, at 2:13-3:2.)

The former trustees then moved to disqualify Judge Sturman because she had reviewed Lubbers' notes *in camera* in her judicial capacity, before this Court's determination that they were privileged.[2] Judge Sturman answered the motion, categorically denying any bias or prejudice toward any party.

Petitioner also noted that the former trustees had waived the attorney-client privilege, so Judge Sturman's exposure to Lubbers' notes could not warrant disqualification.[3]

The chief judge of the district court disqualified Judge Sturman—after nearly seven years of presiding over the underlying case—and avoided the waiver issue because it purportedly fell "outside the scope of disqualification proceedings."[4]

The chief judge recognized that the standard for disqualification based on information learned in the course of judicial proceedings is extraordinarily high:

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2 5 APP000896-909, at 12:18-19.

3 6 APP000968-997, at 1:20-2:2.

4 7 APP001357-1365, at 6:20-21.

> The Nevada Supreme Court has noted that while the general rule is that what a judge learns in his or her official capacity does not result in disqualification, "an opinion formed by a judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, constitutes a basis for a bias or partiality motion where the opinion displays 'a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Kirksey v. State*, 923 P.2d 1102, 1107 (Nev. 1996). However, "remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence." *Cameron v. State,* 968 P.2d 1169, 1171 (Nev. 1998).[5]

Nonetheless, the Court determined that the "deep-seated favoritism or antagonism" standard of *Kirksey* did not apply based on two cases: First, the U.S. Supreme Court in *United States v. Zolin* quoted an earlier case "which presented a delicate question concerning the disclosure of military secrets" and in that context observed that "'examination of the evidence, even by the judge alone, in chambers' might in some cases 'jeopardize the security which the privilege is meant to protect.'" 491 U.S. 554, 570 (1989). The chief judge presented the quote without context.[6] Second, in *Lund v. Myers*, the Arizona Supreme Court determined that *in camera* review of privileged materials is not necessary in all cases (such as when the

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5 7 APP001357-1365, at 4:9-17.

6 7 APP001357-1365, at 5:17-20.

claim of privilege is uncontested), and then the trial may consider whether to recuse herself under Canon 2.11. 305 P.3d 374, 377 (Ariz. 2013).[7]

Here, the chief judge disregarded Judge Sturman's determination that her exposure to the Lubbers' notes did not require her recusal. Instead, without any analysis of the particular notes or circumstances here, the chief judge determined that a reasonable person might question Judge Sturman's impartiality solely because she would be the trier of fact under NRS 153.031.[8]

The chief judge bypassed the threshold question of whether the former trustees' claim of privilege was waived. Even though the chief judge's decision rested on an assumption that the privilege was intact, the chief judge ruled that "[a] privilege determination is outside the scope of disqualification proceedings." [9]

WHY WRIT RELIEF IS APPROPRIATE

Petitioner does not have "a plain, speedy and adequate remedy in the ordinary course of law" (*see* NRS 34.170), because once the reassigned judge tries the underlying case, it will be too late to challenge on appeal Judge Sturman's disqualification. That is why this Court has held that mandamus is the appropriate tool for correcting judicial disqualification decisions generally, *Ivey v. Eighth*

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7 7 APP001357-1365, at 5:20-6:2.

8 7 APP001357-1365, at 6:3-15.

9 7 APP001357-1365, at 6:16-21.

Judicial Dist. Court, 129 Nev. 154, 158, 299 P.3d 354, 357 (2013), and specifically to reinstate a disqualified judge, *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Court*, 116 Nev. 640, 642, 5 P.3d 1059, 1060 (2000).

ARGUMENT ON THE MERITS

I. Standard of Review.

The legal standard for disqualifying a judge is a question of law reviewed *de novo*.[10] And while the question of whether a judge was appropriately disqualified is usually reviewed for an abuse of discretion,[11] the application of an incorrect standard is, itself, an abuse of discretion not entitled to deference. *Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 505–06 (2007). "[D]eference is not owed to legal error." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) (citing *United States v. Silva*, 140 F.3d 1098, 1101 n.4 (7th Cir. 1998)).

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[10] *Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 733 (Nev. 2017), cert. granted sub nom. *Franchise Tax Bd. of California v. Hyatt*, No. 17-1299, 2018 WL 1335506 (U.S. June 28, 2018); *Matter of L.J.A.*, 401 P.3d 1146 (Nev. 2017).

[11] *Kirksey*, 112 Nev. at 1007, 923 P.2d at 1119 ("We therefore conclude that the district court did not abuse its discretion in denying the motion to disqualify."); *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (recognizing that a writ of mandamus may issue to control an arbitrary or capricious exercise of discretion).

In this case, the order disqualifying Judge Sturman rests not on particular fact findings but on the application of a lower threshold for disqualification in a bench trial. This decision merits plenary review.

Indeed, the order is entitled to especially little weight because it overturns a separate discretionary decision, Judge Sturman's election not to recuse herself: "[W]here, as here, a judge or justice determines that he may not voluntarily disqualify himself, his decision should be given 'substantial weight,' and should not be overturned in the absence of a clear abuse of discretion." *Goldman v. Bryan*, 104 Nev. 644, 649, 764 P.2d 1296, 1299 (1988).

II. Under the Correct Legal Standard, Judge Sturman Did Not Exhibit Favoritism or Antagonism Necessary for Her Disqualification

A. The *Kirksey* Standard Insulates a Judge who Learns Information in Judicial Proceedings Against Disqualification

Nevada adheres to the majority rule[12] that

> *rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification.* The personal bias necessary to disqualify must "stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

[12] *See Liteky v. United States*, 510 U.S. 540, 544 (1994) (explaining that most Courts of Appeals have recognized that the "extrajudicial source" doctrine applies to 28 U.SC. § 455, the federal equivalent to NCJC 2.11(A)).

In re Petition to Recall Dunleavy, 104 Nev. 784, 789-90, 769 P.2.d 1271, 1274 (1998) (internal citation omitted) (emphasis added).

So ordinarily, "what a judge learns in his official capacity does not result in disqualification"; rather, "the party asserting the challenge must show that the judge learned prejudicial information from an extrajudicial source." *Kirksey*, 112 Nev. at 1007, 923 P.2d at 1119 (citing *Goldman v. Bryan*, 104 Nev. 644, 653, 764 P.2d 1296, 1301 (1988)). Recent unpublished orders confirm that "bias must stem from an extrajudicial source, something other than what the judge learned from her participation in the case." *Sean K. Claggett & Assocs. v. Eighth Judicial Dist. Court*, No. 79032, 451 P.3d 80 (Nev. Oct. 30, 2019) (unpublished) (citing *Rivero v. Rivero*, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009)); *Walker v. Eighth Judicial Dist. Court*, No. 70766, 383 P.3d 754 (Nev. Sept. 16, 2016) (unpublished) ("[R]ulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification.").

In *Kirksey*, this Court clarified that

> an opinion formed by a judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, constitutes a basis for a bias or partiality motion where the opinion displays "*a deep-seated favoritism or antagonism that would make fair judgment impossible*."

112 Nev. at 1007, 923 P.2d at 1119 (emphasis added) (quoting *Liteky*, 510 U.S. at 555, 114 S.Ct. at 1157) (refusing to disqualify a judge in a bench trial). Notably, the

U.S. Supreme Court case on which this standard is based emphasizes that it is met "only in the rarest of circumstances" and that although "wrong in theory, … it may not be too far off the mark as practical matter to suggest, as many opinions have, that 'extrajudicial source' is the *only* basis for establishing disqualifying bias or prejudice."[13]

B. *Kirksey*'s High "Favoritism or Antagonism" Threshold Applies Even when a Judge Reviews Privileged Communications *in Camera*

This standard applies when the judge reviews privileged communications. That is because an *in camera* inspection is perforce "in the course of fulfilling its judicial responsibilities"; "the court's exposure to these materials is not properly characterized as 'extrajudicial.'" *Tripp v. Executive Office of the President*, 104 F. Supp. 2d 30, 36 (D.D.C. 2000). In *Hayward v. Superior Court*, the first trial judge was disqualified for concealing a conflict and for expressing a bias against one spouse in a divorce case. 206 Cal. Rptr. 3d 102, 142–43 (Ct. App. 2016). After reassignment, that spouse asked that the new judge "also be disqualified, and her orders vacated," not only because she knew about the first judge's bias and discussed the case with her, but also "because she analyzed privileged communications between [the spouse] and her attorneys in camera." *Id.* The Court of Appeal rejected the argument, adhering to the principle that "[a] trial judge hears many items during

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[13] *Liteky*, 510 U.S. at 550, 114 S.Ct. at 1155 (emphasis in the original).

the course of a trial which are inadmissible, and she is called upon to rule on the admissibility of numerous evidentiary matters. The fact that she has heard these things does not mean that she cannot divorce them from her mind." *Id.* (internal quotation marks, citation, and brackets omitted). Indeed, the presumption is the opposite: the judge as factfinder will properly ignore the privileged evidence in her decision. *Id.* (citing *In re Marriage of Davenport*, 125 Cal. Rptr. 3d 292 (Ct. App. 2011)).

This is the consensus rule. *See Tripp v. Executive Office of the President*, 104 F. Supp. 2d 30, 36 (D.D.C. 2000); *State v. Davis*, 683 A.2d 1, 6–7 (Vt. 1996) ("The trial judge's exposure to defendant's privileged statements does not justify recusal from sentencing.").

And it accords with Nevada's longstanding rule that "where inadmissible evidence has been received by the court, sitting without a jury, and there is other substantial evidence upon which the court based its findings, the court will be presumed to have disregarded the improper evidence." *State ex rel. Dep't of Highways v. Campbell*, 80 Nev. 23, 33, 388 P.2d 733, 738 (1964); *accord Purl v. Purl*, 191 P. 297, 298 (Kan. 1920) (claim of privilege did not undermine judgment because "[a]ssuming that this evidence should have been excluded . . . it must be presumed that the court [in the bench trial] was influenced only by competent evidence"). That principle would not make sense if, in a bench trial, the trial judge's

exposure *in camera* to inadmissible or privileged information disabled it from presiding over a bench trial, at all.

C. Because Judge Sturman Encountered the Allegedly Privileged Notes During Judicial Proceedings and there Was No Evidence of Favoritism or Antagonism, She Should Not Have Been Disqualified

Here, the former trustees do not allege any extrajudicial source of bias; rather, they seek to disqualify Judge Sturman solely because she reviewed documents during an *in camera* review on an objection to a report and recommendation. This Court's eventual determination that the Lubbers' notes were privileged does not transform those notes into an extrajudicial communication; Judge Sturman encountered them on the job.

Accordingly, the chief judge correctly recognized that "[t]he general rule of law is that what a judge learns in their official capacity does not result in disqualification, unless the movant can show that the judge formed an opinion based on the facts and the opinion displays 'a deep-seated favoritism or antagonism that would make fair judgment impossible.'"[14]

In fact, Chief Judge Bell found that "Judge Sturman reviewed Mr. Lubbers' notes in an official judicial capacity, and there is no evidence that Judge Sturman

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14 7 APP001357-1365, at 5:14-17.

has formed an opinion that would make fair judgment impossible."[15] Based on that finding, Judge Sturman should not have been disqualified.

D. The District Court Erred by Creating an Exception to the *Kirksey* Standard for Judges in Bench Trials

Instead of applying *Kirksey*,[16] Chief Judge Bell disqualified Judge Sturman under a new standard: that a probate judge is disqualified upon exposure to a *judicial* source of bias "if a reasonable person, knowing all the facts, would harbor reasonable doubts about a judge's impartiality,"[17]—a lower standard reserved for *extrajudicial* sources of bias—merely because under NRS 153.031 she sits as the trier of fact.[18] That ruling was erroneous: (1) *Kirksey* applies to bench trials; (2) *Kirksey* already instructs when the impartiality of a judge exposed to judicial sources of bias can be

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[15] 7 APP001357-1365, at 6:4-6; *see also*, 6 APP001185-1190, at 6:3-7 ("Nor do I believe my prior review of the documents, which have now been excluded, have or hereinafter would, influence my impartiality in these proceedings. Finally, I know of no bias or prejudice for or against any party or attorney in this matter.").

[16] *See infra* at section II.A.

[17] NRS 153.031 (court may enter certain relief related to the affairs of trusts without a trial).

[18] 7 APP001357-1365, at 5:6-13, at (citing *Towbin Dodge, LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 121 Nev. 251, 254–55, 112 P.3d 1063, 1066 (2005). Such holding, if upheld by this Court, would likely have a dramatically more far reaching implications because such rationale would apply to all judges presiding over bench trials as the trier of fact—not exclusively probate judges.

questioned, so there is no discretion to apply a lower standard reserved for a judge's exposure to extrajudicial sources of bias; (3) there are significant policy rationales that justify applying a heightened standard to judicial sources of bias; and (4) the district court's standard ignores longstanding Nevada law about judges' ability to disregard prejudicial information when making their rulings.

1. Kirksey *Applies When the Judge is also the Trier of Fact.*

The chief judge acknowledged that the *Kirksey* standard would typically apply and that it was not met.[19] The purported distinction that Judge Sturman was the trier of fact is an invalid distinction because the judge in *Kirksey* was also the trier of fact.

In *Kirksey*, District Court Judge Lehman had learned, while presiding during the conviction phase, that Kirksey, before pleading guilty to murder, "had asked [his attorney] the fastest way to get a death sentence—by jury or three-judge panel."[20] Judge Lehman then acted as a factfinder during sentencing[21] Kirksey

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19 7 APP001357-1365, at 5:14-17 and 6:4-7.

20 *Kirksey*, 112 Nev. at 1007, 923 P.2d at 1119.

21 *Kirksey v. Baker*, 2:97-CV-0333-LRH-PAL, 2013 WL 5201974, at *1 (D. Nev. Sept. 13, 2013), *aff'd*, 612 F. App'x 459 (9th Cir. 2015) (A three judge panel was appointed to preside over sentencing. After a penalty hearing was held, the panel recommended the death sentence and judgment of conviction was thereafter entered.

argued that Judge Lehman's exposure to this communication disqualified him from the sentencing phase.[22] This Court disagreed, noting that information learned during judicial proceedings warrants disqualification only if "'a deep-seated favoritism or antagonism . . . would make fair judgment impossible.'"[23]

Cases nationwide confirm that *Kirskey*'s high threshold applies in bench trials. *Liteky*, on which *Kirskey* relies, expressly contemplates that:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (*as in a bench trial*) necessary to completion of the judge's task.

Liteky v. United States, 510 U.S. 540, 550–51 (1994) (emphasis added); *see also Jackson v. Microsoft Corp.*, 135 F. Supp. 2d 38, 40 (D.D.C. 2001) (acknowledging "deep-seated favoritism or antagonism" standard but voluntarily recusing because of publicity causing appearance of impropriety); *see also Ex parte Knotts*, 716 So. 2d 262, 264–65 (Ala. Crim. App. 1998) (applying *Liteky* in the context of a judicial override (then permitted) of a jury's decision not to impose a death sentence).

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22 *Id.*

23 *Kirksey*, 112 Nev. at 1007, 923 P.2d at 1119 (quoting *Liteky*, 510 U.S. at 555, 114 S.Ct. at 1157).

The notion of an exception to *Kirksey* for bench trials is wrong.

2. The Towbin *Disqualification Standard Applies Only to Extrajudicial Sources of Bias.*

After the time for a motion under NRS 1.235(1) has passed, as it has here, *Towbin*[24] permits disqualification based on exposure to *extrajudicial* sources of bias if that exposure causes "the judge's impartiality [to] reasonably be questioned." *See* NCJC 2.11(A). Tellingly, the examples in Canon 2.11(A) are exclusively extrajudicial sources of bias.[25]

That is because *Kirksey* already tells us when a judge's impartiality can "reasonably be questioned" after exposure to a *judicial* source of bias: only when the judge exhibits deep-seated antagonism or favoritism. Without that evidence, any charge of partiality is *per se* unreasonable. That is reflected in this Court's decisions, which routinely apply the *Kirksey* standard to judicial sources of bias and

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[24] 121 Nev. at 260, 112 P.3d at 1069.

[25] The *noscitur a sociis* cannon recognized by this Court instructs that when a statute contains a list, the "[a]ssociated words bear on one another's meaning." *Scott v. First Judicial Dist. Court*, 131 Nev. 1015, 1026, 363 P.3d 1159, 1167 (2015) (citations omitted). Here, even a cursory review of the situations meriting disqualification reveals that they each describe a judge's extrajudicial personal biases or interests.

the *Towbin* standard to extrajudicial sources of bias.[26] There is no "compelling reason" to overturn this precedent.[27]

Because "Judge Sturman reviewed Lubbers' Notes in an official judicial capacity," Judge Sturman's partiality could not be questioned without the antagonism that *Kirksey* requires.[28]

3. The Heightened Standard Is Necessary to Prevent Judge-Shopping

As then Circuit Judge Breyer explained, "the disqualification decision must reflect not only the need to secure public confidence through proceedings that

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[26] *Compare Williams v. State*, No. 78614, 463 P.3d 468 (Nev. May 22, 2020) (unpublished) (applying the *Kirksey* standard to overturn a sentence based on comments made by judge during the course of the sentencing phase); *Rose v. State*, 129 Nev. 1148 (2013) (applying the *Kirksey* standard and citing *Dunleavy*, where disqualification was sought due to the judges exclusion of evidence, denial of a continuance motion, and other decisions and statements made by judge in the proceedings), *with Ybarra v. State*, 127 Nev. 47, 50, 247 P.3d 269, 271 (2011) (applying the *Towbin* Standard where it was alleged that the Judge had represented the murder victim's sister in private practice); *Patraw v. Groth*, 127 Nev. 1165, 373 P.3d 949 (2011) (applying the *Towbin* Standard where the judge was accused of "having personal knowledge of facts that were in dispute due to his defense of a UNR faculty member in previous litigation.").

[27] *Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) ("[U]nder the doctrine of *stare decisis,* we will not overturn [precedent] absent compelling reasons for so doing.").

[28] 7 APP001357-1365, at 6:12-15 ("A reasonable person, aware of all the facts in the case, may reasonably question Judge Sturman's impartiality as the ultimate trier of fact because of the prejudicial effect of Mr. Lubbers's notes. Therefore, the Former Trustee' request to disqualify Judge Sturman is granted.").

appear to be impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking."[29]

This Court likewise noted that "the NCJC recognizes the tension between legitimate disqualification claims and judicial maneuvering: its preamble provides that 'the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.'"[30]

Accordingly, this Court distinguishes between judicial (*Kirksey*) and extrajudicial (*Towbin*) sources of bias. That distinction reflects reality: (1) the parties can control what a judge is exposed to in his or her judicial capacity, in contrast to extrajudicial sources of bias such as the judge's familial relations; and (2)

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[29] *In re Allied-Signal Inc*., 89-1823, 1989 WL 153070 (1st Cir. 1989) (emphasis in original); *Boston's Children First*, 244 F.3d 164, 167 (1st Cir. 2001) (discussing the federal equivalent of NCJC Rule 2.11(A)) (Courts must "balance two competing concerns: first, the courts must not only be, but seem to be, free of bias and prejudice, and second the fear that recusal on demand would provide litigants with a veto against judges.").

[30] *Hogan v. Warden, Ely State Prison*, 112 Nev. 553, 559, 916 P.2d 805, 808 (1996); *see also* Dunleavy, 104 Nev. at 790, 769 P.2d at 1275 ("To permit an allegation of bias, partially founded upon a justice's performance of his constitutionally mandated responsibilities, to disqualify that justice from discharging those duties would nullify the court's authority and permit manipulation of justice, as well as the court.")

judges are trained and presumed to ignore judicial sources of bias, in contrast to extrajudicial sources of bias that may affect the judge personally.[31]

Here, in ignoring that distinction, the district court undermined its purpose and enabled parties to "manipulat[e] the system for strategic reasons."[32]

Indeed, the district court's standard is particularly ripe for manipulation in probate cases or in districts with few judges: long after the deadline in NRS 1.235 has expired, a party can shop for a more favorable judge by exposing a judge to privileged materials *in camera*. Alternatively, the district court's standard would effectively ban *in camera* review by the judge presiding at trial, because every determination of privilege would disable the judge regardless of actual bias.[33] To

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[31] *See e.g.*, *United States v. Conforte*, 457 F. Supp. 641, 657 (D. Nev. 1978), *aff'd*, 624 F.2d 869 (9th Cir. 1980) (There is a "distinction between the judicial opinions or biases developed by a judge during the course of court proceedings and personal opinions or biases which have their origins in sources outside the courtroom. The former are generally regarded as inevitable and, in fact, as essential to judicial decision making. The latter form of prejudices, although they are also inevitable and necessary, are regarded as being potentially dangerous and disruptive of the objectivity and impartiality which are the essence of the administration of justice.").

[32] *In re Allied-Signal Inc.*, 89-1823, 1989 WL 153070 (1st Cir. 1989).

[33] Indeed, disregarding *Kirksey* would make appellate review impossible because this Court, like Judge Sturman, also reviewed the Lubbers' Notes *in camera* as part of the *en banc* decision in *Canarelli*, 136 Nev. Adv. Op. 29, 464 P.3d at 117 (2020). This Court's disqualification standards cannot condone such an absurd result.

avoid the threat of disqualification, judges in bench trials would likely have to abandon the common review of privilege determinations before and during trial and instead abdicate that responsibility to the chief judge. Not only would this rule seriously disrupt cases set for a bench trial, especially in Nevada's rural districts, but having other judges frequently review documents *in camera* or decide motions flies in face of a judge's duty to sit: EDCR 7.10(a)-(b) explains that only judges presiding over a proceeding should typically enter orders or "do any other act or thing" therein.[34] This Court has also underscored the importance of that duty: "[i]n Nevada, 'a judge has a general duty to sit, unless a judicial canon, statute, or rule requires the judge's disqualification.'"[35] By lowering the threshold for disqualification whenever a judge in a bench trial has to make a privilege determination, the district court's order neuters this fundamental duty.

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[34] Rule 7.10. Admittedly, there are exceptions for an "emergency" or when a judge requests the assistance from the other judge, however, the underlying concept is that judges have a duty to preside over their cases whenever possible. *Id.*

[35] *Ivey v. Dist. Ct.*, 129 Nev. 154, 161, 299 P.3d 354, 358 (2013) (*citing Millen v. Dist. Ct.*, 122 Nev. 1245, 1253, 148 P.3d 694, 700 (2006)); *see also Dunleavy*, 104 Nev. at 788, 769 P.2d at 1274 (quoting *Ham v. District Court*, 93 Nev. 409, 566 P.2d 420 (1977)) ("a judge has 'a duty to preside ... in the absence of some statute, rule of court, ethical standard, or other compelling reason to the contrary.'").

4. The District Court's Rule Encourages Judge Shopping

The high threshold for disqualifying a judge exposed to a judicial source of bias serves the "practical purpose of preventing parties from using the claim of partiality as a pretext for judge-shopping."[36] "It is important not to allow, or appear to allow . . . a negative veto over the assignment of judges . . . ."[37] Indeed, "[i]n the real world, recusal motions are sometimes driven more by litigation strategies than by ethical concerns .... [C]ourts cannot afford to spawn a public perception that lawyers and litigants will benefit by undertaking such machinations."[38] Moreover, as this Court has explained, "[a] lawyer should not be permitted to create a situation involving a judge and then claim that the judge should be disqualified because of the events the attorney created."[39]

Here, the district court's new standard for disqualifying judges in bench trials encourages parties who are dissatisfied with their assigned judge's substantive rulings to seek belated disqualification. Alternatively, it would burden other judges

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36 *Conforte*, 457 F. Supp. at 657.

37 *Arkansas Teacher Ret. Sys. v. State St. Bank & Tr. Co.*, 404 F. Supp. 3d 486, 497 (D. Mass. 2018).

38 *In re Cargill, Inc.*, 66 F.3d 1256, 1262–63 (1st Cir. 1995).

39 *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 644, 649, 940 P.2d 134, 138 (1997) (citing State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105, 1128–29 (1983))

to hear motions on evidentiary issues in cases not pending before them. To protect against judge-shopping, this Court should uphold the *Kirksey* standard.

E. The Cases that the District Court Relied on Do Not Support its Conclusion

The cases on which the district court relied actually highlight its error.

First, the citation to *United States v. Zolin*, 491 U.S. 554 (1989) is misplaced because it ignores critical context for its quote. There, the U.S. Supreme Court had nothing to say about disqualification or appearance of impropriety; rather, it set forth standards for when the district court could test a claim of privilege through *in camera* review. *Id.* at 572 (requiring a "factual basis adequate to support a good faith belief" based on any nonprivileged evidence that *in camera* review may establish the crime-fraud exception). The Court noted that its "endorsement of the practice of testing proponents' privilege claims through *in camera* review of the allegedly privileged documents has not been without reservation" and cited the extraordinary example of "a case which presented a delicate question concerning the disclosure of military secrets." *Id.* at 570–71 (citing *United States v. Reynolds*, 345 U.S. 1 (1953)). But in that extreme example, the national security interest would prevent *any* judge from reviewing the material. Nothing in *Zolin* even hints that once the district court determines that circumstances warrant *in camera* review, it should then be disqualified. *See id.* at 575 (describing the district court's task and scope of discretion on remand).

The Arizona Supreme Court's decision in *Lund v. Myers*, 305 P.3d 374 (Ariz. 2013) is likewise feeble support for the district court's ruling. There, again, the principal issue was whether *any* judicial officer ought to conduct an *in camera* inspection. *Id.* at 375 ("We hold that before reviewing a particular document, a trial court must first determine that in camera review is necessary to resolve the privilege claim."). The court observed that *in camera* review is unnecessary if the claim of privilege is undisputed, but "may be required" upon "a factual showing to support a reasonable, good faith belief that the document is not privileged." *Id.* at 377–78. The *Myers* court noted that some privilege reviews may raise questions of recusal:

> If in camera review is needed, the trial judge should consider whether another judicial officer should conduct the review in light of the possibility that a review of privileged materials may be so prejudicial as to require the judge's recusal. If the trial judge conducts an in camera review and upholds the privilege claim, the judge should consider whether recusal is then necessary . . . .

Id. at 377-78 (citing Ariz. Code of Judicial Conduct Rule 2.11). But the court then noted a difference between a judge's own assessment of recusal and a party's *motion* to disqualify the judge: "a party who can show *actual bias* may, of course, move for the judge's removal for cause." *Id.* (emphasis added). That actual-bias requirement is consistent with the *Litekey / Kirksey* "deep-seated favoritism or antagonism" standard.

The case-by-case approach suggested by *Myers* is inconsistent with the district court's blanket rule that *any* exposure to privileged materials through *in camera* review is disqualifying.

F. The District Court's Standard Violates the Principle that Judges as Triers of Fact Can Disregard Prejudicial Information

In applying a lower standard, the district court assumed that the trial judge's fact findings will reflect the privileged information acquired in the course of judicial proceedings.

But that is inconsistent with this Court's view of the judge as trier of fact: A judge is presumed to be unbiased.[40] So "where inadmissible evidence has been received by the court, *sitting without a jury*, and there is other substantial evidence upon which the court based its findings, the court will be presumed to have disregarded the improper evidence."[41]

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[40] *Millen v. District Court*, 122 Nev. 1245, 1254–55, 148 P.3d 694, 701 (2006); *see also* 7 APP001357-1365, at 3:20-21 (citing *Millen* for the same proposition).

[41] *McMonigle v. McMonigle*, 110 Nev. 1407, 1409, 887 P.2d 742, 744 (1994) (emphasis added) (quoting *Dept. of Highways v. Campbell*, 80 Nev. 23, 33, 388 P.2d 733, 738 (1964)), *overruled on other grounds*.

This principle is widely acknowledged: "trial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount or disregard it."[42] As one court explained:

> [E]xposure to inadmissible evidence in the course of pretrial proceedings generally does not require disqualification even where the judge is to serve as the factfinder. … Trained judges have the ability to exclude from their consideration irrelevant or improper evidence and materials which have come to their attention.[43]

And as discussed above, this presumption holds even when the judge as trier of fact reviews privileged information. For example, in *State ex rel. Marshall County Comm'n v. Carter*, the court held that "[trial court judges] are permitted to examine allegedly privileged materials *in camera*." 689 S.E.2d 796 (W. Va. 2010). In turn, it was argued that an administrative law judge (ALJ)

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[42] *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1077, 111 S.Ct. 2720, 2746, 115 L.E.2d 888 (1991).

[43] *State v. Medina*, 349 NJ.Super 108, 130, 739 A.2d 68, 80 (N.J. Super. Ct. App. Div 2002) (internal quotations and citations omitted) (emphasis added); *see also C.W. v. State*, 793 So.2d 74, 75 (Fla. Dist. Ct. App. 2001) (stating that, in comparison to inadmissible evidence being presented to a jury, "[c]learly, judges are in a better position to discard contested evidence.") (citation omitted); *State v. Read*, 147 Wash.2d 238, 242, 53 P.3d 26, 29 (Wash. 2002) (en banc) (recognizing that there is a presumption that "a judge in a bench trial does not consider inadmissible evidence in rendering a verdict."); *State v. Pickering*, 473 S.W.3d 698, 703 (Mo. Ct. App. 2015) (stating that "in a judge tried case, we presume that the trial judge was not prejudiced by inadmissible evidence and was not influenced by it in reaching a judgment unless it is clear from the record that the trial judge considered and relied upon the inadmissible evidence.") (internal quotations and citation omitted).

> should not be accorded the same power because an ALJ is a trier of fact. The implication is that an ALJ may be improperly influenced in their fact finding by knowledge of privileged material that is inadmissible at a hearing. We disagree. … As with [trial] court judges who conduct bench trials, ALJs are regularly required to rule on evidentiary matters which requires them to consider evidence which is ultimately determined to be inadmissible. In such circumstances, we properly expect the [trial] judge or the ALJ to disregard inadmissible evidence and to render a decision based on the evidence introduced at the trial or administrative proceeding.

See also Hayward v. Superior Court, 206 Cal. Rptr. 3d 102, 142–43 (Ct. App. 2016); *Tripp v. Executive Office of the President*, 104 F. Supp. 2d 30, 36 (D.D.C. 2000); *State v. Davis*, 683 A.2d 1, 6–7 (Vt. 1996).

It is irrelevant whether the document reviewed by the judge is inadmissible or privileged, as both can be prejudicial. Indeed, some nonprivileged inadmissible evidence, such as prior bad acts, insurance, or hearsay, may be more prejudicial than privileged information. Yet, Nevada law presumes a judge can disregard it in making its ruling. To hold that exposure to privileged information, without more, raises an appearance of impropriety would trample the presumption of impartiality to which judges are entitled.

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Here, if permitted to remain as the trier of fact, Judge Sturman will render her rulings based on the admissible evidence and is presumed to have disregarded her *in camera* review of Lubbers' notes.[44]

III. Alternatively, the District Court Abused its Discretion by Not Addressing the Threshold Question of Waiver.

While the former trustees' motion to disqualify Judge Sturman rested on the assumption that Lubbers' notes remained privileged, petitioner pointed out that the former trustees had waived that privilege, rendering the notes admissible.[45] Judge Sturman's exposure to them therefore does not warrant disqualification.

The chief district judge erroneously held that it could not decide the waiver issue because (1) this Court had already decided the Lubbers' Notes were privileged;[46] and (2) the issue was beyond the scope of the disqualification issue.[47] "A court's failure to exercise discretion (when available) is error." *Massey v. Sunrise Hosp.*, 102 Nev. 367, 371, 724 P.2d 208, 210 (1986). And here, the district

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44 110 Nev. at 1409, 887 P.2d at 744.

45 For a detailed factual and legal analysis regarding the Former Trustee's waiver of the attorney-client privilege with respect to Lubbers' Notes, *see* 6 APP000968-997 (the Countermotion), at 3:1-24:6.

46 7 APP001366-1389, at 21:8-9.

47 7 APP001366-1389, at 3:2-6.

court was required to make a finding regarding the waiver issue in order to determine whether disqualification was proper.

"Disqualification must be based on facts, rather than on mere speculation."[48] Waiver is a threshold issue; if the privilege is waived, the basis for disqualification—exposure to privileged information—disappears. So, while the chief judge was limited to deciding the disqualification issue, that issue is intertwined with the waiver question. That question, moreover, was properly presented, as the issue was not part of this Court's decision in *Canarelli v. Eighth Judicial District Court*, 136 Nev. Adv. Op. 29, 464 P.3d 114, 120 (2020).[49]

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[48] *Rippo v. State*, 113 Nev. 1239, 1248, 946 P.2d 1017, 1023 (1997); *see also Ybarra v. State*, 127 Nev. 47, 52, 247 P.3d 269, 272 (2011) (citing *Rippo*).

[49] As set forth in detail, in 7 APP001328-1351, at 6:18-12:17, it would have been improper for Petitioner to seek redress of the privilege waiver issue as part of the prior writ proceedings given that the district court determined Lubbers' notes were not privileged. *Heller v. Leg. Of Nev., 120 Nev. 456, 460-61 (2004)* ("'To demonstrate a beneficial interest sufficient to pursue a mandamus action, a party must show a direct and substantial interest that falls within the zone of interests to be protected by the legal duty asserted.' 'Stated differently, the writ must be denied if the petitioner will gain no direct benefit from its issuance and suffer no direct detriment if it is denied.'"); *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 444, 874 P.2d 729, 732 (Nev. 1994) (citing NRAP 3A(a)).

Thus, even if this Court upholds the district court's application of a lower disqualification standard, petitioner in the alternative asks that this Court order Chief Judge Bell to address the privilege waiver.[50]

CONCLUSION

For decades, this Court has worked to protect an unbiased judge's right to preside over a case. The judge's duty to sit, the presumption that a judge as the factfinder can disregard prejudicial information, and the "deep-seated antagonism or favoritism" standard for disqualifying a judge who is exposed to information in the course of proceedings—all serve the integrity of the judiciary and discourage judge-shopping. But the district court's disqualification order undercuts all of that in a dangerous new precedent. One need look no farther than this case to see its disastrous consequences: a respected jurist, who even the chief judge recognized had formed no "opinion that would make fair judgment impossible," was thrown off a case after more than seven years.

[50] The failure to do so would put petitioner in a procedural quagmire: If the reassigned judge determines the former trustees waived the privilege, then there would be a strong basis to overturn the disqualification but no mechanism to obtain relief.

This Court should hear the petition and grant the writ of mandamus.

Dated this 8th day of January, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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 Office Word 2010 in 14-point Times New Roman type style.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) 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 6939 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that 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 appropriate references to 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 8th day of January, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 5(b), I hereby certify that I am an employee of the law firm of Solomon Dwiggins & Freer, Ltd., and that on January 8, 2021, I filed a true and correct copy of the foregoing **PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**, with the Clerk of the Court through the Court's e-flex electronic filing system and notice will be sent electronically by the

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I further certify that a copy of the above-mentioned document will be served via U.S. Mail, postage prepaid, addressed to the above and as follows:

The Honorable Linda M. Bell
Eighth Judicial District Court
Department VII
Regional Justice Center
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Respondent

DATED: January 8, 2021.

/s/ Terrie Maxfield
An Employee of Solomon Dwiggins & Freer