

THE STATE OF NEVADA,  
Petitioner,  
  
vs.  
THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF CLARK,  
AND THE HONORABLE MONICA  
TRUJILLO, DISTRICT JUDGE,  
Respondent,  
  
And  
BRANDON ALEXANDER MCGUIRE,  
Real Party In Interest.

## MOTION TO DISQUALIFY JUSTICE DOUGLAS HERNDON

COMES NOW Real Party in Interest, BRANDON ALEXANDER MCGUIRE, by and through his attorney, KATHLEEN M. HAMERS, Chief Deputy Public Defender, and pursuant to Nevada Rules of Appellate Procedure 27 and 35, asks this Court to disqualify Justice Douglas Herndon from consideration of the instant appeal.

This Motion is based upon the following Memorandum and all papers and pleadings on file herein.

DATED this 29<sup>th</sup> day of July, 2021.

DARIN F. IMLAY  
CLARK COUNTY PUBLIC DEF.  
By /s/ Kathleen M. Hamers  
KATHLEEN M. HAMERS, #9049  
Chief Deputy Public Defender

DARIN F. IMLAY  
CLARK COUNTY PUBLIC DEF.  
By /s/ Shana S. Brouwers  
SHANA S. BROUWERS, #12337  
Deputy Public Defender

## **VERIFICATION**

**KATHLEEN HAMERS**, being first duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in the State of Nevada and the Chief Deputy Public Defender assigned to represent Real Party in Interest BRANDON ALEXANDER MCGUIRE, in the instant appeal.

2. I am more than 18 years of age and am competent to testify as to the matters stated herein. I am familiar with the procedural history of the case and the substantive allegations made by the State of Nevada. I also have personal knowledge of the facts stated herein or I have been informed of these facts and believe them to be true.

3. On July 26, 2021, the Petitioner, the State of Nevada, filed an Emergency Motion Under NRAP 27(e) and Petition for Writ of Mandamus or, In the Alternative, Prohibition. The Emergency Motion and Petition challenges Respondent District Judge Monica Trujillo's July 26, 2021 ruling granting Real Party in Interest's motion to strike the complaining witness E.H. due to the State's noncompliance with NRS 174.234's notice requirements.

4. On July 27, 2021, this Honorable Court issued an Order Requesting Written Order, Directing Answer to Petition, and Imposing

Temporary Stay. That Order was signed by Justice Elissa Cadish, Justice Kristina Pickering, and Justice Douglas Herndon.

5. Real Party in Interest McGuire has a pending homicide case in the Eight Judicial District Court, Case No. C-17-327272-1, which was filed on October 18, 2017. (App. 1) Then a District Court Judge, Hon. Douglas Herndon presided over the homicide case from its inception until he sworn in as a Justice of the Nevada Supreme Court on Monday, January 4, 2021, or for over three (3) years.

6. The homicide case over which Justice Herndon presided is linked to the sexual assault case underlying this appeal. The sexual assault case is an aggravator that the Notice of Intent to Seek Death Penalty is based on. (App. 6) Further, the State of Nevada previously moved to introduce bad act evidence from the homicide case, in the sexual assault case at issue here. (App. 10) That motion was denied. (App. 31)

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief. (NRS 53.045).

/s/ Kathleen Hamers  
KATHLEEN HAMERS

SUBSCRIBED and SWORN to before me  
This 29<sup>th</sup> day of July, 2021.

/s/ Carrie M. Connolly  
No. 94-2602-1, Exp. 10/11/21  
NOTARY PUBLIC in and for said  
County and State

## MEMORANDUM

NRAP 35 governs disqualification of a Justice or Judge from sitting in a particular case. The time for filing such a motion shall be “within 60 days after docketing the appeal under Rule 12” unless good cause is shown for failure to timely file such a motion. NRAP 35(a)(1). The State filed its Emergency Motion and Petition on July 26, 2021 and the case was docketed; this motion is therefore timely pursuant to NRAP 35.

A motion for disqualification “shall state clearly and concisely in separately numbered paragraphs each ground relied upon as a basis for disqualification with the specific facts alleged in support thereof and the legal argument, including citations to relevant cases, statutes or rules, necessary to support it.” NRAP 35(a)(2)(A).

As set forth herein, Mr. McGuire seeks disqualification of Justice Herndon pursuant to NRS 1.225 and Nevada Code of Judicial Conduct, Rule 2.11(A), because his “impartiality might reasonably be questioned” for the following reason: A reasonable person would harbor reasonable doubts about his impartiality.

**1. A reasonable person would harbor reasonable doubts about Justice Herndon’s impartiality in this appeal.** Under the objective "reasonable person" test that this Court has articulated for evaluating a

concern about the appearance of impropriety, the question is "whether a reasonable person, knowing all the facts, would harbor reasonable doubts about [the justice's] impartiality." PETA v. Bobby Berosini, Ltd., 111 Nev. 431, 438, 894 P.2d 337, 341 (1995). Justice Herndon has presided over Mr. McGuire's homicide case – where the instant case is an aggravator that the State's Notice of Intent to Seek Death Penalty is based on – for over three (3) years. (App. 1; App. 6) Moreover, the State of Nevada has moved previously to bring the facts of the homicide case into this sexual assault case as bad act or propensity evidence. (App. 10) The two cases are undeniably linked to one another and a reasonable person, knowing that the State has sought to introduce evidence from the homicide case into the sexual assault case, and evidence from the sexual assault case into the homicide case over which Justice Herndon presided for over three (3) years, would harbor reasonable doubts about Justice Herndon's impartiality in this appeal. Just as Justice Herndon would be precluded from hearing any appeal in the homicide case pursuant to Nevada Code of Judicial Conduct, Rule 2.11(A)(6)(d), he should likewise be precluded from presiding over the instant matter as it creates the appearance of impropriety as prohibited by NRS 1.225.

## **CONCLUSION**

For all the foregoing reasons, Mr. McGuire respectfully requests that Justice Herndon be disqualified from participating in the instant appeal.

Respectfully submitted,

DARIN F. IMLAY  
CLARK COUNTY PUBLIC DEF.  
By /s/ Kathleen M. Hamers  
KATHLEEN M. HAMERS, #9049  
Chief Deputy Public Defender

DARIN F. IMLAY  
CLARK COUNTY PUBLIC DEF.  
By /s/ Shana S. Brouwers  
SHANA S. BROUWERS, #12337  
Deputy Public Defender

## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that I have read this motion and supporting documents, and that motion and supporting documents are in the form required by NRAP 35.

2. I further certify that I believe all grounds asserted to be legally valid and all supporting factual allegations to be true and that the motion is made in good faith and not for purposes of delay or for other improper motive.

DATED this 29<sup>th</sup> day of July, 2021.

DARIN F. IMLAY  
CLARK COUNTY PUBLIC DEFENDER

By /s/ Kathleen M. Hamers  
KATHLEEN M. HAMERS, #9049  
Chief Deputy Public Defender

## **CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 29<sup>th</sup> day of July, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD  
ALEXANDER CHEN

KATHLEEN M. HAMERS  
SHANA S. BROUWERS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

MONICA TRUJILLO  
District Court, Department III  
200 Lewis Avenue  
Las Vegas, NV 89101

BY /s/ Carrie M. Connolly  
Employee, Clark County Public  
Defender's Office