

IN THE SUPREME COURT OF THE STATE OF NEVADA

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.

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Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 83269

D.C. NO: C-16-319756-1

**PETITIONER'S OPPOSITION TO MOTION
TO DISQUALIFY JUSTICE DOUGLAS HERNDON**

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, ALEXANDER CHEN, and files this Opposition to Motion to Disqualify Justice Douglas Herndon. This response is filed pursuant to NRAP Rule 35(b)(1) and is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 6th day of August, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Alexander Chen*

ALEXANDER CHEN
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ARGUMENT

This Court should deny Real Party in Interest's (hereinafter "Defendant") request to disqualify Justice Herndon because Justice Herndon's participation in this appeal—which concerns no order or ruling made by Justice Herndon as a district court judge—cannot reasonably be expected to place Justice Herndon's impartiality into question.

Defendant relies upon Rule 2.11(A)(6)(d) of the Nevada Code of Judicial Conduct and NRS 1.225 to support his request to have Justice Herndon recused. Rule 2.11 states that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned" and includes a non-exhaustive list of examples necessitating such disqualification, one of which

being when a judge “previously presided as a judge over the matter in another court.” The purpose of this rule is clearly to prevent a judge or justice from reviewing his or her own decision on appeal—a situation that would be a clear conflict of interest and would undoubtedly strain any judge’s or justice’s impartiality. Nevada’s Rule 2.11 mirrors Rule 2.11 of the American Bar Association’s Model Code of Judicial Conduct, which has repeatedly been interpreted to mean “a judge who heard a case *on the trial level* will not be part of the panel hearing *an appeal from her own decision*.” Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics—The Lawyer’s Deskbook on Professional Responsibility* § 10.2-2.11(1) (2016) (emphasis added).

Similarly, NRS 1.225 covers the grounds and procedure for disqualifying a Supreme Court justice. According to NRS 1.225(1), “A justice of the Supreme Court...shall not act as such in an action or proceeding when the justice or judge entertains actual bias or prejudice against one of the parties to the action.” NRS 1.225 enumerates certain situations that would qualify as an actual or implied bias, but none of them would apply to Justice Herndon’s involvement as a district court judge on one of Defendant’s other cases.

The situations envisioned by NRS 1.225 and Rule 2.11 do not exist here. Defendant has another un-adjudicated case that Justice Herndon presided over while serving as a district court judge. As a district court judge, his responsibility was to

preside over his cases impartially, fairly, and without bias, prejudice, or harassment. See Rule 2.2 and 2.3 of the Nevada Code of Judicial Conduct.

The fact that Defendant has a separate case that Justice Herndon presided over is not a conflict. As a district court judge, all indications point to Justice Herndon performing his duties as required. Afterall, Defendant in that case never sought to have Justice Herndon disqualified for any reason. Therefore, the presumption exists that he performed his district court duties admirably.

Defendant now argues that Justice Herndon, who has never been involved with this specific case, should be disqualified simply because he presided over a separate case. Rule 2.11(6)(d) makes it clear that unless other biases or prejudices exist, the judge is only required to be disqualified from the case if the judge “previously presided as a judge over the matter in another court.” Clearly, this rule only pertains to matters and not persons.

Finally, Defendant argues that Justice Herndon should be disqualified because the State sought to introduce potential bad act evidence from the homicide case into this case. The bad act motion that was filed was denied in front of the district court judge that was hearing this case, not Justice Herndon. Therefore, Justice Herndon would have had zero involvement regarding the decision to deny the bad acts motion, and he would not be reviewing his own decision as a district court judge here.

Ultimately, the State is confident that Justice Herndon will recuse himself from this matter if for any reason his participation would be incompatible with the Nevada Code of Judicial Conduct. However, based upon the outward reasons asserted by Defendant, he should certainly not be required to be removed from deciding this appeal.

CONCLUSION

For the foregoing reasons, the State respectfully requests that Defendant's Motion to Disqualify Justice Douglas Herndon be DENIED.

Dated this 6th day of August, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
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BY; */s/ Alexander Chen*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 6, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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KATHLEEN HAMERS
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ALEXANDER CHEN
Chief Deputy District Attorney

BY /s/ E. Davis
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AC//ed