MICHAEL PHILLIP ANSELMO, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 81382

March 10, 2022 505 P.3d 846

Appeal from a district court order dismissing a postconviction petition for genetic marker analysis. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Reversed and remanded with instructions.

[Rehearing denied April 15, 2022]

[En banc reconsideration denied May 13, 2022]

Holland & Hart LLP and *Sydney R. Gambee, J. Robert Smith*, and *Jessica E. Whelan*, Las Vegas; *Rocky Mountain Innocence Center* and *Jennifer Springer*, Salt Lake City, Utah, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Marilee Cate*, Appellate Deputy District Attorney, Washoe County, for Respondent.

Before the Supreme Court, Cadish, Pickering, and Herndon, JJ.

OPINION

By the Court, Cadish, J.:

This appeal presents issues concerning Nevada's statutory scheme governing postconviction petitions for genetic marker analysis. A jury convicted appellant of first-degree murder in 1972. In 2018, he filed a postconviction petition for genetic marker analysis, seeking to examine the DNA found on various pieces of evidence under a procedure that was not available at the time of his trial. The district court concluded that appellant failed to show a reasonable possibility that the State would not have tried him, or the jury would not have convicted him, had he obtained exculpatory evidence through the testing because the jury heard similar exculpatory evidence but nevertheless convicted him.

Under NRS 176.09183(1), the district court must assume that the requested genetic marker analysis will produce exculpatory DNA evidence and order such analysis if a reasonable possibility exists that the petitioner would not have faced prosecution or conviction had the exculpatory results been obtained before trial. Applying that statute to the facts here, we conclude that the district court acted outside the bounds of its discretion in denying appellant's petition, as the State tried appellant on a felony-murder theory based on rape

and DNA evidence that would have excluded appellant as the perpetrator necessarily creates a reasonable possibility that he would not have faced prosecution or conviction for felony-murder.

Additionally, the existence or nonexistence of evidence relevant to the claims in the petition for genetic marker analysis necessarily impacts the district court's resolution of the petition. Thus, to the extent the custodian's inventory of evidence merely described the packaging holding the evidence in the State's possession, rather than the items of evidence contained therein, we agree with appellant that the inventory lacked sufficient detail for the district court to determine whether the evidence on which appellant sought testing existed. Consequently, appellant's motion for relief as to the inventory should have been granted. Accordingly, we reverse the district court's order and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

The female victim disappeared from a hotel employee parking lot near the Cal-Neva Lodge at Lake Tahoe on July 15, 1971. Two days later, appellant Michael Anselmo found the victim's body and reported it to the police. The responding officers noted that the victim was nude. Several days later, Anselmo told the police where they could find the victim's jacket and keys, which the police recovered.

After conducting an autopsy, the coroner concluded that the victim died from strangulation. He further concluded that the perpetrator manually strangled the victim with his right hand. The perpetrator also stabbed the victim 15 times, which the coroner concluded was a contributing cause of death. The autopsy revealed evidence of sexual assault, and the coroner recovered semen from the victim. The semen did not contain any sperm, which indicated that either the male supplier was sterile or had a vasectomy, or the sperm degenerated before the victim's body was found.

Several officers interviewed Anselmo at different times. Throughout those interrogations, Anselmo asserted that another individual, John Soares, killed the victim. During an interview on July 18, Anselmo went into a comatose state and law enforcement transported him to the hospital. After the hospital discharged Anselmo, Detective Gordon Jenkins interrogated him. While Anselmo initially reaffirmed that Soares committed the murder, he eventually confessed to the crime. The State charged Anselmo with first-degree murder.

At trial, the State argued that Anselmo committed first-degree murder under the felony-murder rule. Specifically, the State introduced evidence that the victim had sexual intercourse between 12 and 24 hours before her death and that, due to the timeline of her activities, the only time the intercourse could have occurred was shortly before the victim's death. The State emphasized that the

victim was found nude and that "the facts scream out to tell [the jury]" that the victim "was murdered in the perpetration of rape." In support, the State introduced evidence that the victim had an inflamed cervix and the coroner recovered semen from the victim's vaginal cavity. The forensic pathologist testified that there was no sperm found in the semen, which could be due to either the degenerative nature of sperm or the sterility of the semen's supplier.

Alternatively, the State argued that Anselmo committed first-degree murder under a willful, deliberate, and premeditated theory. In support, the State introduced evidence that the perpetrator stabbed the victim in the neck and chest 15 times. It argued that the perpetrator forced the victim from the parking lot to the clearing where the police recovered her body, which showed the perpetrator had time to form premeditation. The State also introduced evidence that Anselmo had been lurking in the employee parking lot during the early morning hours the day before the victim went missing. It introduced evidence of a struggle occurring in the car that the victim was using that night. Finally, the State relied on the fact that Anselmo (1) knew the body's location; (2) knew the location of the victim's jacket and keys, which the perpetrator had tossed into Lake Tahoe; and (3) confessed to committing the crime.

Anselmo's primary defense theory was that John Soares murdered the victim. Anselmo testified that he saw Soares in Reno the day before the victim went missing. On the night the victim went missing, Anselmo stated that he played pool and other games at the Cal-Neva Lodge's lounge until 1 a.m. When he left the club, Anselmo testified that he heard a scream and went to investigate it. He alleged that Soares emerged from the bushes near the Lodge, took Anselmo into the brush, and showed Anselmo the victim's body. Anselmo claimed Soares threatened him to keep quiet and directed Anselmo to throw the victim's coat into Lake Tahoe, which Anselmo conceded he did.

In support of this theory, Anselmo pointed to evidence that police in the Lake Tahoe area had received a report that Soares was in the area. In closing argument, Anselmo reminded the jury that he had consistently told police that Soares killed the victim. He argued his confession was both involuntary and inconsistent with the facts of the killing. Specifically, he pointed out that he confessed to choking the victim with her nylon shirt while the pathologist concluded that the perpetrator likely choked the victim with his right hand. He identified other inconsistencies, like the fact that he confessed to stabbing the victim 3 to 4 times, whereas the autopsy identified approximately 15 stab wounds, and the fact that his description of the knife did not match the actual stab wounds. Further, he argued that the fact that he could show police where he disposed of the victim's jacket and keys, but not the knife, supported his innocence

because he claimed Soares told him to dispose of the jacket and keys, not the knife. Finally, he argued that he could not have been the source of the semen recovered because he was not sterile. The jury found Anselmo guilty of first-degree murder and sentenced him to life without the possibility of parole. The jury's verdict was a general verdict that did not indicate which theory of first-degree murder the jury relied on to convict Anselmo.

In October 2018, Anselmo filed a postconviction petition requesting genetic marker analysis of the victim's clothes, the victim's fingernail clippings, blonde hair found in the victim's car, and the rape kit. He argued that the testing, which did not exist at the time of trial, would create a reasonable possibility that the jury would not have convicted him because it would reveal that another individual killed the victim. The district court found that Anselmo met the procedural requirements of NRS 176.0918 and set a hearing on the petition, directing the agency having custody of the evidence to prepare an inventory of all evidence related to Anselmo's claims. After the evidence custodians filed several inventories, Anselmo moved for an order to show cause, arguing the inventories were insufficient because they failed to identify all the evidence in the State's possession. In particular, he asserted that the inventories described the packaging in which the evidence was stored, as opposed to the evidence itself, or that the inventories were otherwise vague.

The State opposed the motion to show cause, arguing that the statutory scheme did not require the evidence custodians to open sealed evidence and provide descriptions of the contents therein. The district court denied the motion, concluding that the inventories were sufficient and that Anselmo failed to provide authority showing the evidence custodians were required to identify to whom the evidence belonged or to what the evidence pertained at the time of the crime.

The district court held a hearing on the petition. Anselmo argued that exculpatory DNA evidence would have contradicted his confession in which he claimed to have had sex with the victim. Regarding judicial estoppel, he asserted that the statutory scheme does not prohibit individuals who confessed to the crime from seeking genetic marker analysis. The State argued that the jury heard similar exculpatory evidence that another person committed the crime and still convicted Anselmo. The State asserted that overwhelming evidence supported the conviction, and thus, exculpatory genetic marker evidence would not create a reasonable possibility that Anselmo would not have been tried or convicted otherwise. It also contended that judicial estoppel applied because Anselmo confessed to committing the crime at a Pardons Board hearing in 2005.

The district court dismissed Anselmo's petition. It concluded that the jury heard similar exculpatory information when the pathologist

testified that the semen may not have been from Anselmo. It further found that the felony-murder theory was secondary to the State's premeditated-and-deliberate-murder theory, and "[t]hus, the fact that Mr. Anselmo's DNA may or may not be found inside or on [the victim] is not of consequence." The court also observed that the jury found Anselmo guilty beyond a reasonable doubt after (1) hearing testimony about his suspicious behavior on the night the victim disappeared and during the searches and discovery of her body, (2) considering evidence as to his inconsistent statements to law enforcement and his knowledge of the location of the victim's belongings, and (3) considering his confession and corresponding argument that it was made involuntarily. The district court made no findings regarding the State's judicial estoppel argument.

DISCUSSION

The district court abused its discretion by denying Anselmo's petition because Anselmo demonstrated a reasonable possibility that he would not have been tried or convicted if exculpatory results had been obtained from the genetic marker analysis

Anselmo argues that he satisfied the reasonable-possibility standard. Specifically, he asserts that the identity of the perpetrator is in question, as he denied that he was the perpetrator and he does not match the description of the perpetrator that one of the victim's roommates gave. He also contends that the presumed presence of another individual's DNA creates a reasonable possibility that he would not have been tried or convicted because it (1) supports his contention that his confession was coerced and corroborates his earlier statements that another individual murdered the victim, (2) corroborates his testimony that he disposed of the victim's jacket and keys at the direction of the actual perpetrator, (3) gives the jury reason to believe his similarly exculpatory evidence, and (4) might contradict Soares's testimony that Soares was not in the Tahoe area at the time of the murder. We agree.

While we review an order denying a petition for genetic marker analysis for an abuse of discretion, NRS 176.09183(1) (providing that the district court must order genetic marker analysis "if the court finds" that the enumerated requirements are satisfied), we review questions of statutory interpretation de novo, *Washington v. State*, 132 Nev. 655, 660, 376 P.3d 802, 806 (2016). When interpreting a statute, we look to the statute's plain language. *Id.* If a statute's plain language is unambiguous, we enforce the statute as written. *Id.*

As relevant here, a court must order a genetic marker analysis if it finds that

> (a) The evidence to be analyzed exists;

> (b) Except as otherwise provided in subsection 2, the evidence was not previously subjected to a genetic marker analysis, including, without limitation, because such an analysis was not available at the time of trial; and
>
> (c) One or more of the following situations applies:
>
> (1) A reasonable possibility exists that the petitioner would not have been prosecuted or convicted *if exculpatory results had been obtained through a genetic marker analysis* of the evidence identified in the petition . . . .

NRS 176.09183(1) (emphasis added). The plain language of the statute requires the district court first to assume that the genetic marker evidence would be exculpatory and then ask whether there is a "reasonable possibility" that the petitioner would not have been convicted or prosecuted in light of the exculpatory genetic marker evidence.[1] Such an interpretation is consistent with the statutory scheme, as the results of the genetic marker testing must be "favorable to the petitioner" for the petitioner to then move for a new trial based on newly discovered evidence, NRS 176.09187, and is consistent with other jurisdictions' interpretations of analogous statutes, *see, e.g.*, *Lambert v. State*, 435 P.3d 1011, 1019 (Alaska Ct. App. 2018) ("Importantly, the defendant need not show any likelihood that the DNA results will actually be favorable to his claim of innocence. Instead, he need only show that, assuming the results are as favorable as the defendant has shown they could be, these favorable results would raise a reasonable probability that the outcome of the defendant's trial would be different." (emphasis and internal quotation marks omitted)).

The "reasonable possibility" standard is satisfied if there is "a real possibility that the [exculpatory] evidence would have affected the result."[2] *Roberts v. State*, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994) (emphasis and internal quotation marks omitted), *overruled on other grounds by Foster v. State*, 116 Nev. 1088, 13 P.3d 61 (2000); *cf. James v. State*, 137 Nev. 384, 388, 492 P.3d 1, 5 (2021) (concluding that a reasonable possibility does not exist "when the results of the analysis would be irrelevant to the State's theory of the crime or the defendant's defense"). The first theory the State

[1]The governing statute does not require the petitioner to show, or even assert, that he is actually innocent of the crime. Instead, the petition need only explain "[t]he rationale for why a reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of" the identified evidence. NRS 176.0918(3)(b).

[2]In analyzing whether this standard is met, we look at the actual charge of which the petitioner stands convicted, which is first-degree murder. No party has argued that we should look at whether Anselmo would have been prosecuted or convicted of *any* crime as opposed to the crime the State chose to prosecute and of which the jury convicted him.

proposed in closing arguments was felony murder based on rape. While the State also presented a willful, deliberate, and premeditated theory as an alternative, the jury returned a general guilty verdict. Thus, the jury could have convicted Anselmo on the felony-murder theory based on the rape of the victim. Therefore, genetic marker evidence that definitively excludes Anselmo as the supplier of the semen recovered from the victim creates a reasonable possibility that the jury would not have convicted Anselmo because it directly contradicts the State's felony-murder theory. Moreover, as Anselmo points out, genetic material recovered from under the victim's fingernails would allow a jury to infer that the victim fought back against the perpetrator and, if analyzed and shown to be exculpatory, would create a reasonable possibility that the jury would not have convicted Anselmo, as it supports the defense theory that another individual assaulted the victim.

The State's contrary arguments are not persuasive. While the State asserts that the jury considered and rejected similarly exculpatory evidence, the evidence it identifies is not the same as the presumed exculpatory evidence the genetic marker analysis would produce. For example, the State points out that the pathologist testified that the semen *may not have been* Anselmo's due to the lack of sperm. But that testimony still allowed the jury to conclude that Anselmo *may have* provided the DNA, and indeed, the State argued that Anselmo was the source of the semen and that the sperm had simply degenerated. NRS 176.09183, however, requires the district court to assume that the DNA evidence would exclude Anselmo, and thus, the jury would have received evidence that the semen *was not* from Anselmo. Moreover, the fact that the State had other circumstantial evidence of Anselmo's guilt does not preclude a reasonable-possibility finding because the district court must ask only whether there is a real possibility that the jury would not have convicted Anselmo if it had exculpatory genetic marker testing results.[3]

[3]The State argues that the principle of judicial estoppel provides additional support for the district court's dismissal of Anselmo's petition because Anselmo allegedly took an inconsistent position in a Pardons Board hearing. Judicial estoppel applies if, among other things, the same party takes two different positions in judicial or quasi-judicial administrative proceedings. *Marcuse v. Del Webb Cmtys., Inc.*, 123 Nev. 278, 287, 163 P.3d 462, 468-69 (2007). However, the State provides no authority or analysis to support the proposition that a Pardons Board hearing is a quasi-judicial proceeding for purposes of applying judicial estoppel and instead assumes that it is. Because not every administrative hearing is quasi-judicial, *see State ex rel. Bd. of Parole Comm'rs v. Morrow*, 127 Nev. 265, 273-74, 255 P.3d 224, 229-30 (2011) (adopting the judicial functions test to determine when an administrative hearing is a quasi-judicial hearing), and it is not obvious that a Pardons Board hearing would qualify, we conclude that the State's argument is not cogent, and thus, we need not consider it, *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (concluding that this court need not address issues not cogently argued and supported by relevant authority).

The district court abused its discretion when it concluded that the State's inventory was sufficient

Anselmo argues that the State's inventory of the evidence was insufficient because it lacked sufficient detail to identify the evidence remaining in the State's custody. We agree to the extent that the inventory described the packaging of some of the items of evidence as opposed to the actual evidence contained within it.[4]

Reviewing the district court's interpretation of NRS 176.0918(4) de novo, *Washington*, 132 Nev. at 660, 376 P.3d at 806, we conclude that an inventory that describes only the packaging in which the evidence is contained, as opposed to the actual evidence, is insufficient. The purpose of making postconviction genetic testing available to a convicted felon is to evaluate evidence that may contain genetic marker information pertinent to the investigation and prosecution that led to the conviction, NRS 176.0918(1), and to that end, NRS 176.0918(4)(c)(2) requires the State to provide a detailed list "of all evidence relevant to the claims in the petition . . . that may be subjected to genetic marker analysis." Here, the inventory, while sufficiently detailed regarding some pieces of evidence, described the containers of other pieces of evidence as opposed to the evidence itself. For example, the inventory described some pieces of evidence as "small paper canister," "film canister," and "one cardboard 'FONDA ONE PINT U.S. LIQUID MEASURE' canister." The inventory as to those pieces of evidence does not satisfy the statutory directive to produce an inventory of relevant evidence that may be tested because the district court cannot determine what evidence is inside a "small paper canister" or "film canister" for purposes of evaluating its relevancy or whether it should be tested. Accordingly, the district court improperly denied Anselmo's motion for an order to show cause related to the insufficient evidence inventory. *See Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012) (noting that discovery orders are generally reviewed for an abuse of discretion); *cf. State v.*

[4]The State argues that we lack jurisdiction to review the district court order denying Anselmo's motion regarding the sufficiency of the inventory because (1) the inventory order is not a final judgment and (2) the evidence custodians are not parties to this appeal. Neither argument is persuasive. While the inventory order is not a final judgment, we may review "any decision of the [district] court in an intermediate order or proceeding, forming a part of the record." NRS 177.045. Further, because we have the statutory authority to review an order denying a petition for genetic marker testing, NRS 176.09183(6), we may likewise review this intermediate decision pertaining to the allegedly insufficient evidence inventory. Moreover, NRS 176.0918(4)(c) gives the district court the authority to order each evidence custodian to provide an inventory of all relevant evidence. Thus, should we conclude that the evidence inventories are insufficient, we can instruct the district court to exercise its authority over the evidence custodians to require that the custodians provide sufficiently detailed inventories of the evidence.

Nye, 136 Nev. 421, 423-25, 468 P.3d 369, 371-72 (2020) (holding, in the context of an inventory search, that an inventory was insufficient because it did not detail all the contents of the defendant's bag).

The State's contrary arguments are not persuasive. First, the crux of the State's argument is that there is no statutory requirement that evidence custodians must open or manipulate sealed containers until the district court orders testing of an item in that container. However, the district court can only order testing if it finds "[t]he evidence to be analyzed exists." NRS 176.09183(1)(a). The district court cannot determine whether relevant evidence exists if the inventory merely describes the evidence container, e.g., "film canister," as opposed to the evidence itself.[5] Similarly, the State's argument that it need not open a sealed container until the court orders that item to be tested lacks merit, as such an interpretation would frustrate the detailed statutory scheme that requires the inventory after the petition meets the requirements and then allows a hearing for the court to determine exactly which, if any, pieces of evidence it should order to be tested. *See* NRS 176.0918(4)(c); NRS 176.09183(1)(a).

CONCLUSION

When determining whether to grant a petition for genetic marker analysis under NRS 176.09183(1)(a), the district court must assume that the analysis will produce exculpatory evidence and then ask whether there is a reasonable possibility that the petitioner would not have been tried or convicted due to that exculpatory evidence. Further, an evidence custodian's inventory of evidence is insufficient if it merely describes the packaging in which evidence is contained as opposed to the evidence within. On the record before us, the district court abused its discretion by denying Anselmo's petition for genetic marker analysis because he showed a reasonable possibility that, assuming exculpatory results, the jury would not have convicted him. The district court also abused its discretion when it concluded the inventory was sufficient as to the items that were identified only by their packaging because such a description does not satisfy the statutory requirement for an evidence inventory.

[5]At oral argument before this court, the State expressed concern that opening the sealed items may affect the chain of custody. However, opening and testing of evidence in sealed containers does not break the chain of custody as long as the evidence custodians follow their established procedures for handling evidence. *See Burns v. Sheriff*, 92 Nev. 533, 534-35, 554 P.2d 257, 258 (1976) (concluding that the chain of custody was established when the arresting officer testified that he placed the evidence in a sealed and initialed envelope in the evidence locker, and the chemist testified that she retrieved the sealed envelope from the evidence locker, opened the envelope and tested the evidence within it, and then placed the evidence back in the evidence vault in a newly resealed and initialed envelope).

Accordingly, we reverse the district court's order and remand for further proceedings. Upon remand, the district court must instruct the evidence custodians to submit a new evidence inventory that details the evidence within the containers it previously identified but did not open. After the district court receives and reviews the new evidence inventories, it must order genetic marker analysis of any relevant evidence it concludes exists.

PICKERING and HERNDON, JJ., concur.

SCOTT CANARELLI, Beneficiary of the SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST DATED FEBRUARY 24, 1998, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE LINDA MARIE BELL, Chief Judge, Respondents, and LAWRENCE D. CANARELLI; HEIDI CANARELLI; and FRANK MARTIN, Special Administrator for the ESTATE OF EDWARD C. LUBBERS, Former Trustees, Real Parties in Interest.

No. 82299

March 24, 2022 506 P.3d 334

Original petition for a writ of mandamus or, alternatively, prohibition challenging the disqualification of a judge.

Petition granted.

Cadish, J., with whom Pickering and Herndon, JJ., agreed, dissented.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg* and *Abraham G. Smith*, Las Vegas; *Solomon Dwiggins & Freer, Ltd.*, and *Dana A. Dwiggins* and *Craig D. Friedel*, Las Vegas, for Petitioner.

Campbell & Williams and *J. Colby Williams, Philip R. Erwin*, and *Donald J. Campbell*, Las Vegas, for Real Parties in Interest.

Hayes Wakayama and *Liane K. Wakayama*, Las Vegas, for Real Party in Interest Frank Martin, Special Administrator for the Estate of Edward C. Lubbers.

Before the Supreme Court, En Banc.

OPINION

By the Court, Silver, J.:

In this writ proceeding, petitioner asks us to reinstate to a case a district court judge who was disqualified because her impartiality could reasonably be questioned after she reviewed notes, produced in discovery, that we later determined were privileged. *See Canarelli v. Eighth Judicial Dist. Court* (*Canarelli I*), 136 Nev. 247, 464 P.3d 114 (2020). Because the alleged questionable impartiality does not arise from an extrajudicial source, we determine that the disqualification standard set forth in *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (1996), controls. Applying that standard, and review-

ing the record here, we conclude that there is no evidence that Judge Gloria J. Sturman formed an opinion demonstrating deep-seated favoritism or antagonism against either party. Therefore, we conclude that the district court erred by disqualifying Judge Sturman.

FACTS AND PROCEDURAL HISTORY

Petitioner Scott Canarelli is the beneficiary of the Scott Lyle Graves Canarelli Irrevocable Trust. Scott's parents, real parties in interest Lawrence and Heidi Canarelli, conveyed minority interests in their business entities to Scott, which Scott contributed to the Trust. They also made discretionary payments from the Trust to Scott. Lawrence and Heidi, along with their attorney, real party in interest Edward Lubbers, served as trustees (collectively, the former trustees). Lubbers became the sole trustee in 2013 after Lawrence and Heidi resigned. Lubbers thereafter entered into an agreement to sell the Trust's ownership in Lawrence and Heidi's business entities. After learning of the purchase agreement, Scott filed a petition to compel Lubbers to provide an inventory and accounting for the Trust and all information related to the purchase agreement. Lubbers retained counsel and kept notes reflecting his preparations for, and communications with, those attorneys. In early 2018, Lubbers passed away before Scott could obtain Lubbers' deposition.

During discovery, the former trustees inadvertently disclosed documents containing Lubbers' notes. They attempted to claw back the documents, arguing that Lubbers' notes were privileged. Scott moved for a determination of privilege, and the discovery commissioner found that portions of the notes were protected by attorney-client privilege and the work product doctrine, but other portions were discoverable. Scott and the former trustees objected to the commissioner's findings, and Judge Sturman conducted a hearing and proceeded to review Lubbers' notes in order to rule on the parties' objections. Judge Sturman generally adopted the discovery commissioner's recommendation, thereby allowing Scott to retain portions of Lubbers' notes. The former trustees obtained a stay and pursued writ relief, which we granted after concluding that Lubbers' notes were privileged and undiscoverable. *Canarelli I*, 136 Nev. at 248, 464 P.3d at 117.

After we decided *Canarelli I*, the former trustees moved to disqualify Judge Sturman, challenging her ability to remain impartial after reviewing the privileged notes. The matter came before the chief judge. Judge Sturman filed an answer denying any bias or prejudice and asserting that her review of Lubbers' notes had not created any personal knowledge of the facts that would warrant disqualification under the canons of judicial ethics. The chief judge granted the disqualification motion, citing Nevada Code of Judicial Conduct (NCJC) Rule 2.11(A) and concluding Judge Sturman's

impartiality may be reasonably questioned based on her review of Lubbers' notes. This writ petition followed.

DISCUSSION

We exercise our discretion to entertain the writ petition

"A writ of mandamus is available to compel the performance of an act which the law . . . [requires] as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary or capricious exercise of discretion."[1] *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 907-08 (2008) (internal quotation marks and footnote omitted) (alterations in original). Mandamus is an extraordinary remedy, available only when there is no "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; *see also Cote H.*, 124 Nev. at 39, 175 P.3d at 908.

The decision to entertain a petition for a writ of mandamus is within our sole discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). "Because an appeal is ordinarily an adequate remedy, this court generally declines to consider writ petitions challenging interlocutory district court orders." *Helfstein v. Eighth Judicial Dist. Court*, 131 Nev. 909, 912, 362 P.3d 91, 94 (2015). However, when a writ petition presents an opportunity to clarify an important issue of law and doing so serves judicial economy, we may elect to consider the petition. *Id.* Similarly, writ relief may be appropriate where the petition presents a matter of first impression and considerations of judicial economy support its review. *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court*, 132 Nev. 544, 547, 376 P.3d 167, 170 (2016).

Scott's writ petition raises a legal issue of first impression with statewide importance—the disqualification standard where the alleged bias originates from the judge's performance of her judicial duties rather than from an extrajudicial source. Additionally, clarifying the judicial disqualification standard serves judicial economy by providing guidance for future disqualification matters. We therefore elect to consider the writ petition.

Kirksey v. State *governs where the alleged bias arises from the judge's performance of her judicial duties*

"[A] judge has a general duty to sit, unless a judicial canon, statute, or rule requires the judge's disqualification." *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1253, 148 P.3d 694, 700 (2006); *see also* NCJC Rule 2.7 ("A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law."). Judges are presumed to be unbiased, *Millen*, 122 Nev. at 1254, 148 P.3d at 701, and a judge's decision

[1]Scott alternatively seeks a writ of prohibition. In light of Scott's requested relief, we consider his petition as one for a writ of mandamus.

not to recuse herself will not be overturned absent a clear abuse of discretion. *Rivero v. Rivero*, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009), *overruled in part on other grounds by Romano v. Romano*, 138 Nev. 1, 501 P.3d 980 (2022); *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 431, 437, 894 P.2d 337, 341 (1995), *overruled on other grounds by Towbin Dodge, LLC v. Eighth Judicial Dist. Court*, 121 Nev. 251, 260-61, 112 P.3d 1063, 1069-70 (2005). But determining the proper disqualification standard is a question of law that we review de novo. *See Cannizzaro v. First Judicial Dist. Court*, 136 Nev. 315, 317, 466 P.3d 529, 531 (2020) (addressing attorney disqualification and explaining that this court reviews de novo the interpretation of the rules governing the appropriate standard for disqualification).

Scott argues that the district court erred by applying NCJC Rule 2.11(A) because *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (1996), provides the proper disqualification standard. He contends Judge Sturman did not exhibit the favoritism or antagonism required by *Kirksey* to warrant disqualification. We agree.

Generally, "what a judge learns in his official capacity does not result in disqualification," so a party alleging judicial bias "must show that the judge learned prejudicial information from an extrajudicial source." *Kirksey*, 112 Nev. at 1007, 923 P.2d at 1119 (internal quotation marks omitted); *see also Whitehead v. Nev. Comm'n on Judicial Discipline*, 110 Nev. 380, 428 n.45, 873 P.2d 946, 976 n.45 (1994) (noting "the rule that a disqualifying bias must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from participation in the case"). An extrajudicial source of bias is predicated on "something other than rulings, opinions formed, or statements made by the judge during the course of trial." 48A C.J.S. Judges § 252 (2014). Considering that principle, we held in *Kirksey* that where the alleged bias does not stem from an extrajudicial source, the party seeking disqualification must show the judge formed an opinion based on the facts introduced during the proceedings and that this "opinion displays 'a deep-seated favoritism or antagonism that would make fair judgment impossible.'" 112 Nev. at 1007, 923 P.2d at 1119 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

In this case, the source of alleged bias comes from Judge Sturman's review of privileged notes. Judge Sturman reviewed those notes to resolve the parties' discovery dispute—a pretrial matter that was a core function of Judge Sturman's job as a judge and that she had a duty to decide, and one that she could not have reasonably decided without reviewing those notes herself.[2] Although Judge Sturman acted in her official capacity, the former trustees urge us to apply NCJC Rule 2.11(A) in lieu of the gen-

[2]Judge Sturman averred that she was not biased or prejudiced against any party or attorney, and the former trustees do not contest this assertion.

eral rule we established in *Kirksey*. NCJC Rule 2.11(A)(1) requires a judge to recuse herself "in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or has personal knowledge of facts that are in dispute in the proceeding." The remaining circumstances described in NCJC Rule 2.11(A)(2)-(6) concern bias arising from an extrajudicial source. *See* NCJC Rule 2.11(A)(2) (when someone closely related to the judge is involved in the proceeding); NCJC Rule 2.11(A)(3) (when the judge or the judge's fiduciary or close family member "has an economic interest in" the case); NCJC Rule 2.11(A)(5) (when the judge made an extrajudicial public statement "that commits or appears to commit the judge to reach a particular result"); NCJC Rule 2.11(A)(6) (when the judge was substantively involved in the matter before becoming the presiding judge on that case). Because the situations described in NCJC Rule 2.11(A)(2)-(6) concern extrajudicial sources of potential bias, we interpret NCJC Rule 2.11(A)(1) to concern extrajudicial bias as well. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides the context for each of its parts.").

We also turn to *Liteky v. United States*, where the United States Supreme Court considered a similar issue. In that case, the Court applied the extrajudicial source doctrine to a federal statute that, like NCJC Rule 2.11(A), requires recusal "whenever 'impartiality might reasonably be questioned.'" 510 U.S. 540, 548, 554 (1994) (quoting 28 U.S.C. § 455(a)). The Court explained that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 555. Because our standard in *Kirksey* is derived from *Liteky*, and in that case the Court concluded that the extrajudicial source doctrine applied to a federal statute that is similar to NCJC Rule 2.11(A), we see no reason to deviate from this line of reasoning.[3] *Liteky*, 510 U.S. at 553; *Kirksey*, 112 Nev. at 1007, 923 P.2d at 1119.

[3]Although the *Liteky* concurrence opined that "a nearly dispositive extrajudicial source factor" was unnecessary because "district and appellate judges possess the wisdom and good sense to distinguish substantial from insufficient allegations," 510 U.S. at 565 (Kennedy, J., concurring), we decline to adopt that position or deviate from the *Liteky* majority, as under the dissent's lower standard, a party's subjective assertion—that the evidence to be admitted or excluded is such that merely reviewing it creates an appearance of bias—is sufficient to implicate NCJC Rule 2.11(A) and require recusal even when the judge avers that he or she can remain impartial.

Maintaining confidence in the judiciary's independence and impartiality is important, but we cannot hold that NCJC Rule 2.11(A) requires disqualification for *every* situation in which a judge is exposed to prejudicial evidence while ruling on evidentiary disputes. To do so would encroach on a judge's duty to preside over his or her assigned cases. Judges deciding motions in limine or motions to suppress often must review extremely prejudicial evidence to determine whether that evidence is admissible. For example, a judge ruling on a motion to suppress an involuntary confession must review the defendant's confession and the underlying circumstances under which the defendant confessed. *See, e.g.*, *Passama v. State*, 103 Nev. 212, 215-16, 735 P.2d 321, 323-24 (1987) (reviewing the transcript of the defendant's confession to conclude that the defendant's confession was involuntary). Broadly applying NCJC Rule 2.11(A) under such circumstances would open the door for a motion to recuse every time any judge or justice reviews inadmissible evidence as part of their judicial duties, simply because the party seeking to exclude the evidence could later assert the evidence is so prejudicial that reviewing it necessarily raises the appearance of impartiality. *See City of Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 649, 940 P.2d 134, 138 (1997) ("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."). Moreover, abiding by the former trustees' proposed solution of having other judges determine such matters would hinder judicial efficiency, as judges would be forced to intervene in each other's cases whenever a party asserts that the inadmissible evidence *might* cause the presiding judge to exude bias. Instead, we follow our long tradition of expecting judges, including every one of our limited jurisdiction judges in the State of Nevada, to disregard improper, inadmissible, or impalpable evidence and base their findings and decisions on only admissible evidence. *State, Dep't of Highways v. Campbell*, 80 Nev. 23, 33, 388 P.2d 733, 738 (1964) ("[W]here 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."); *see also Randell v. State*, 109 Nev. 5, 7-8, 846 P.2d 278, 280 (1993) (explaining that, when sentencing, judges are able to listen to the victim impact statements without undue influence because "[j]udges spend much of their professional lives separating the wheat from the chaff" (internal quotation marks omitted)). Therefore, we conclude that what a judge learns during the course of performing judicial duties generally does not warrant disqualification unless the judge forms an opinion that "displays 'a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Kirksey*, 112 Nev. at 1007, 923 P.2d at 1119 (quoting *Liteky*, 510 U.S. at 555).

Accordingly, because nothing in the record indicates that the question of partiality comes from an extrajudicial source, we do not apply NCJC Rule 2.11(A). Instead, because Judge Sturman gained knowledge of the alleged prejudicial facts while acting in her official capacity, *Kirksey* governs here. Applying that standard, Judge Sturman averred she was not biased or prejudiced, and nothing in the record shows she formed an opinion displaying deep-seated bias that would warrant disqualification under *Kirksey*. We therefore conclude that the district court abused its discretion by applying the NCJC Rule 2.11(A) standard to disqualify Judge Sturman.[4]

CONCLUSION

When the alleged bias or question of partiality arises from a judge's exercise of her duties, the party seeking the judge's disqualification must show that the judge has formed an opinion displaying deep-seated favoritism or antagonism toward the party that would prevent fair judgment. *Kirksey*, 112 Nev. at 1007, 923 P.2d at 1119. Because the record does not show that Judge Sturman's review of Lubbers' notes created such bias or prejudice against the former trustees, we conclude that the district court abused its discretion by disqualifying Judge Sturman.[5] Accordingly, we grant the petition for writ relief and direct the clerk of this court to issue a writ of mandamus instructing the chief judge to reinstate Judge Sturman as the presiding judge in the underlying matter.

Parraguirre, C.J., and Hardesty and Stiglich, JJ., concur.

Cadish, J., with whom Pickering and Herndon, JJ., agree, dissenting:

I believe the majority applies an incorrect standard to the disqualification motion in this case, and I therefore dissent. The majority holds that NCJC Rule 2.11(A)'s objective standard does not even apply to a disqualification challenge where the source of the alleged judicial bias is not extrajudicial, and instead, adopts a significantly higher standard for disqualification in such circumstances. Because no textual basis for these distinctions exists in the applicable rule, and the majority's disqualification standard undermines public confidence in the integrity of the judiciary, I cannot agree.

The Nevada Code of Judicial Conduct provides, in pertinent part, that a judge must

> disqualify himself or herself in any proceeding in which the judge's impartiality *might reasonably be questioned*, including

[4]Scott also argues the district court abused its discretion by failing to address whether the former trustees waived their argument regarding attorney-client privilege. We need not reach this issue in light of our decision.

[5]Our disposition moots the pending motion for leave to submit privileged material for *in camera* review. Accordingly, we deny real parties in interest's motion.

> but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

NCJC Rule 2.11(A) (emphasis added). We have previously recognized that Rule 2.11(A) adopts an objective approach to judicial disqualification, *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 431, 436, 894 P.2d 337, 340 (1995) (per curiam) (noting that "the test for whether a judge's impartiality might reasonably be questioned is objective; whether a judge is actually impartial is not material"), *overruled in part on other grounds by Towbin Dodge, LLC v. Eighth Judicial Dist. Court*, 121 Nev. 251, 260-61, 112 P.3d 1063, 1069-70 (2005), and accordingly, reflects the Code of Judicial Conduct's "primary policy . . . 'to promote public confidence in the judiciary,'" *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1255, 148 P.3d 694, 701 (2006) (quoting *Hogan v. Warden*, 112 Nev. 553, 558, 916 P.2d 805, 808 (1996)).

Nevertheless, the majority all but ignores this standard and our caselaw applying it. *See, e.g.*, *Ybarra v. State*, 127 Nev. 47, 51-52, 247 P.3d 269, 272-73 (2011) (applying an objective standard for disqualification of whether a "person [would] reasonably . . . doubt" the judge's "impartiality"). Instead, it concludes that when the source of alleged bias comes from the judge's performance of her duties in the case, disqualification requires a showing of "a deep-seated favoritism or antagonism that would make fair judgment impossible." Majority at 109 (quoting *Kirksey v. State*, 112 Nev. 980, 1007, 923 P.2d 1102, 1119 (1996) (per curiam)). The majority's conclusion imposes a much higher standard for disqualification than the objective standard of whether a "judge's impartiality might reasonably be questioned" based on her "personal knowledge," "personal bias," or personal "prejudice concerning a party or a party's lawyer," as set forth in Rule 2.11(A)(1). While Rule 2.11(A) requires disqualification even for the appearance of partiality, the majority's standard requires not just actual partiality but what amounts to extreme "favoritism" or "antagonism" that renders "fair judgment *impossible*." Majority at 109 (emphasis added) (internal quotation marks omitted) (quoting *Kirksey*, 112 Nev. at 1007, 923 P.2d at 1119). While such circumstances likely occur rarely, those circumstances that the majority's standard does not capture still threaten to undermine "public confidence in [the judiciary's] independence, impartiality, integrity, and competence." *See* NCJC Preamble.

The majority's standard also lacks textual support. The majority attempts to write its standard into Rule 2.11(A) solely because other "situations described in [Rule 2.11(A)] concern extrajudicial sources of potential bias." Majority at 108. There is no reason, and certainly no basis in the text of the Code of Judicial Conduct, to simply toss out the objective standard because the source of the judge's alleged par-

tiality arose from her duties as a judge. Contrary to the majority's reasoning, Rule 2.11(A) focuses on the extent to which the judge's "impartiality might reasonably be questioned," not on the source of the bias, as dispositive to the need for disqualification. I cannot agree that a "personal bias or prejudice concerning a party or a party's lawyer" does not warrant disqualification if it developed from information learned during the course of the judge's duties but does warrant disqualification if the same information came from an extrajudicial source. Yet the majority's standard produces such a result.

Further, the circumstances which compel disqualification, and on which the majority rely to conclude that Rule 2.11(A) concerns only extrajudicial sources, are not exhaustive. NCJC Rule 2.11(A) (requiring disqualification "in any proceeding in which the judge's impartiality might reasonably be questioned, *including but not limited to* the" provided circumstances (emphasis added)). The comment suggests the same: "Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply." NCJC Rule 2.11 cmt. 1. Because the text does not distinguish between the sources of bias, I cannot agree with the majority's decision to treat disqualification differently depending on where the source of bias developed.

The majority's reliance on our decision in *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (1996), is misplaced. There, we applied the U.S. Supreme Court's standard in *Liteky v. United States*, 510 U.S. 540 (1994), to govern disqualification under NRS 1.230, rather than Rule 2.11(A), based on the judge's acquisition of allegedly "prejudicial information" from the current proceedings. *See Kirksey*, 112 Nev. at 1005-07, 923 P.2d at 1118-19. We stated that the *Liteky* standard applied to the disqualification challenge because the source of the alleged bias was not extrajudicial.[1] *Id.* at 1007, 923 P.2d at 1119. However, our application of *Liteky* arose under NRS 1.230, which does not contain Rule 2.11(A)'s objective standard. *See id.* at 1005, 923 P.2d at 1118. Instead, it provides for disqualification if "the

[1]In deeming the source of bias relevant to disqualification under NRS 1.230, we relied on our decision in *Goldman v. Bryan*, 104 Nev. 644, 764 P.2d 1296 (1988), *overruled in part on other grounds by Halverson v. Hardcastle*, 123 Nev. 245, 265, 163 P.3d 428, 442-43 (2007). *See Kirksey*, 112 Nev. at 1007, 923 P.2d at 1119. In *Goldman*, we addressed an allegation of actual bias and noted the "general rule" that knowledge acquired in a judge's "official capacity does not result in disqualification." 104 Nev. at 653, 764 P.2d at 1301. But we did not meaningfully discuss Rule 2.11(A) as it then existed, and our conclusion that the appellant failed to establish "a reasonable inference of bias stemming from an extrajudicial source" did not foreclose disqualification based on information acquired during official court proceedings. *See id.* at 652-53, 764 P.2d at 1301-02; *cf. Allum v. Valley Bank of Nev.*, 112 Nev. 591, 593-94, 915 P.2d 895, 897 (1996) ("We have specifically held that a judge is not disqualified *merely* because of his or her judicial rulings." (emphasis added)).

judge entertains *actual* bias or prejudice," or if "implied bias exists" based on the judge's relationship to the parties. *See id.* (emphasis added) (quoting NRS 1.230(1)-(2)). Moreover, the petitioner there argued that the judge was actually biased, not that his impartiality could reasonably be questioned under an objective standard, and accordingly, we held only that the *Liteky* standard applied to such allegations of actual bias under NRS 1.230, without citation or reference to Rule 2.11(A). We then concluded that the petitioner had failed to show that the information established actual bias or "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 1007, 923 P.2d at 1119 (quoting *Liteky*, 510 U.S. at 555). Thus, *Kirksey* did not address whether or how this standard applies to Rule 2.11(A), and therefore, it does not govern our decision here.

The majority's reliance on *Liteky* here is similarly flawed because Rule 2.11(A)'s objective standard allows consideration of the source of the bias as relevant to disqualification and does not have the same jurisprudential development on which *Liteky*'s creation of a heightened standard relied. *Liteky* considered whether the extrajudicial-source doctrine, which had developed from and applied to a specific federal disqualification provision of 28 U.S.C. § 144 related to bias or prejudice (requiring disqualification of a judge who harbors "personal bias or prejudice" against a party), also applied to the newly created "'catchall' recusal provision" of 28 U.S.C. § 455(a) (requiring disqualification "in any proceeding in which [a judge's] impartiality might reasonably be questioned"). *Liteky*, 510 U.S. at 541, 544, 548.

The Court reasoned that the extrajudicial-source doctrine in the context of § 144's "bias or prejudice" standard reflected an attempt to delineate between "a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess, . . . or because it is excessive in degree." *Id.* at 550 (emphasis omitted). Similarly, the court reasoned that "partiality," as contained in § 455(a), "does not refer to all favoritism, but only to such as is, for some reason, wrongful or inappropriate." *Id.* at 552. Accordingly, the court concluded that the extrajudicial-source doctrine of the bias-or-prejudice standard of § 144 applied to the objective standard of § 455(a). *Id.* at 554.

Nevertheless, the Court recognized that the source of a judge's bias or prejudice neither necessarily gives rise to disqualifying bias nor "necessarily precludes [disqualifying] bias." *Id.* at 554-55 (describing "the existence of a significant (and often determinative) 'extrajudicial source'" as a "factor" (emphasis omitted)). Similarly, the objective standard in Rule 2.11(A) impliedly allows consideration of the source of the bias to determine whether a person might reasonably question the judge's impartiality.

Notwithstanding that the U.S. Supreme Court viewed the extrajudicial-source doctrine as only a factor, it then held, with no citation to authority, that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings . . . do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555. The Court appeared to justify its holding on the belief that "as a practical matter," the sort of wrongful or inappropriate "predispositions" that warrant disqualification "rarely" develop "during the course of" judicial proceedings. *Id.* at 551, 554. While the observation may be true, that fact alone does not justify a heightened standard for disqualification. As Justice Kennedy noted in his concurrence, the Court's rule for intrajudicial and extrajudicial sources of bias did not derive from the text of the federal statute. *Id.* at 558 (Kennedy, J., concurring in the judgment only). Similarly, as I note above, Rule 2.11(A) does not delineate between the sources of bias and does not contain the majority's standard for disqualification based on intrajudicial sources of bias. Instead, the text of Rule 2.11 focuses on "the appearance of partiality." *See id.* at 563 (Kennedy, J., concurring); *see also PETA*, 111 Nev. at 436, 894 P.2d at 340. The majority's emphasis on the source of the bias or prejudice "distracts from the central inquiry" of whether the judge harbors partiality or displays an appearance of partiality. *See Liteky*, 510 U.S. at 558 (Kennedy, J., concurring).

Moreover, the majority says, as a reason to treat the source of bias as dispositive for the standard applied to the disqualification motion, that it "see[s] no reason to deviate" from *Liteky*'s creation of such a rule. Majority at 108. Aside from *Liteky*'s lack of textual basis, its rule derives from the belief that a heightened standard is necessary to identify only those sources that give rise to "wrongful or inappropriate" partiality as sufficient to trigger disqualification. *See Liteky*, 510 U.S. at 552-55. But as noted above, an objective standard, as Rule 2.11(A) contains, permits consideration of the source of bias, as well as the degree to which the source creates "reasonable doubts about [the judge's] impartiality," *PETA*, 111 Nev. at 438, 894 P.2d at 341, as relevant factors to whether the judge harbors or appears to harbor partiality, "without resort" to a heightened standard, *see Liteky*, 510 U.S. at 565 (Kennedy, J., concurring).

The majority also believes that the *Kirksey* standard preserves "judicial efficiency" because the objective standard would impede a judge's ability to decide "motions in limine or motions to suppress." Majority at 109. While I agree with the majority that Rule 2.11(A) does not warrant disqualification "for *every* situation in which a judge is exposed to prejudicial evidence while ruling on evidentiary disputes," Majority at 109, I do not share its concern that the objective standard yields such results or subjects judges to such challenges.

In most circumstances, the judge's performance of her duties, such as ruling on common motions, would not cause a reasonable person to question the judge's impartiality. Judges are charged regularly with reviewing evidence ultimately found inadmissible, and they are deemed capable of ignoring that evidence in ruling on a case's merits. Thus, I agree with Justice Kennedy's comments in his *Liteky* concurrence:

> Although the source of an alleged disqualification may be relevant in determining whether there is a reasonable appearance of impartiality, that determination can be explained in a straightforward manner without resort to a nearly dispositive extrajudicial source factor. . . . [D]istrict and appellate judges possess the wisdom and good sense to distinguish substantial from insufficient allegations and that our rules, as so interpreted, are sufficient to correct the occasional departure.

510 U.S. at 565 (Kennedy, J., concurring). I believe Judge Sturman acted appropriately in carrying out her duties to review the documents in question to evaluate whether they were privileged. Indeed, the district court here did not abuse its discretion when it found substantial evidence to support that Judge Sturman did not harbor any personal bias or prejudice because of her review of the privileged documents.

However, as noted above, Rule 2.11 directs the district court to consider both actual and ostensible partiality. *See* NCJC Rule 2.11(A). Turning to the district court's decision to disqualify Judge Sturman here, the court found "no evidence that Judge Sturman ha[d] formed an opinion that would make fair judgment impossible" but expressed concern that Judge Sturman's review of notes later deemed privileged—which "spoke directly on the merits of Mr. Canarelli's petitions" and "contained Mr. Lubbers's personal assessment of the risk faced by the Former Trustees"—would cause a reasonable person to question her impartiality "as the ultimate trier of fact." I cannot find that the court abused its discretion in so holding. I therefore dissent.

LILLIAN LACY HARGROVE, Appellant, *v.* THOMAS REID WARD, Respondent.

No. 81331

March 24, 2022 506 P.3d 329

Appeal from a district court order denying a request for child support. Eighth Judicial District Court, Family Division, Clark County; Bill Henderson, Judge.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied May 13, 2022]

Breeden & Associates, PLLC, and *Adam J. Breeden*, Las Vegas, for Appellant.

Roberts Stoffel Family Law Group and *Amanda M. Roberts*, Las Vegas, for Respondent.

Before the Supreme Court, Parraguirre, C.J., Stiglich and Silver, JJ.

OPINION

By the Court, Stiglich, J.:

This appeal asks us to determine for the first time whether a district court may award retroactive child support in a paternity action initiated after the child reached the age of majority. We additionally consider the circumstances under which a parent's promise to support a child is enforceable.

NRS 125B.030 provides that the physical custodial parent of a child may recover from the parent without physical custody child support for 4 years immediately preceding the filing of a support action. The statute is silent on whether a parent can file for retroactive child support under NRS 125B.030 for the first time after the child has reached the age of majority. We answer that one may, holding that the 3-year statute of limitations to bring a paternity action after the child reaches the age of majority applies to a parent's request for retroactive child support. Accordingly, we reverse in part the district court's order and remand for further proceedings. We also determine that a promise in writing to support a child is enforceable under NRS 126.900(1) when the writing sets forth a clear commitment to provide support in specific terms. As the district court correctly determined that no written promise was made here, we affirm as to the district court's denial of child support under NRS 126.900(1).

FACTS AND PROCEDURAL HISTORY

Appellant Lillian Hargrove and respondent Thomas Ward were never married but had one child together as a result of their relationship. The parties' son, G.W., was born on December 3, 1999. Paternity is not disputed by the parties, and Ward is named as the father on G.W.'s birth certificate. The parties never obtained a formal custody or child support order during G.W.'s minority. After Hargrove and G.W. moved to Las Vegas in 2009 and Ward remained in the Lake Tahoe area, Ward had only minimal involvement in G.W.'s life. Hargrove alleged that the parties agreed at that time that instead of Ward paying child support, he would visit G.W. and remain actively involved in G.W.'s life. Hargrove alleged that in April 2012 the parties verbally agreed that Ward would deposit $400 per month into Hargrove's bank account for the support of G.W. Ward disputes that the parties ever agreed to do so.

On March 12, 2019, 1 year and 3 months after G.W. turned 18, Hargrove filed a paternity action against Ward in order to seek back child support. Hargrove asked the district court to recognize the parties' agreement for $400 a month under NRS 126.900(1). Alternatively, Hargrove argued that even without an agreement, under NRS 125B.030, she was entitled to retroactive child support. The district court concluded that it did not have the legal authority to grant post-emancipation child support. Hargrove subsequently appealed.

DISCUSSION

Ward did not make an enforceable promise under NRS 126.900(1)

We first consider Hargrove's argument that she had an enforceable agreement with Ward for a monthly support payment under NRS 126.900(1).[1] Hargrove argues that Ward agreed to pay her child support of $400 monthly beginning in 2012.

This court reviews a district court's order regarding a child support determination for an abuse of discretion. *Miller v. Miller*, 134 Nev. 120, 125, 412 P.3d 1081, 1085 (2018). "Questions of statutory construction, including the meaning and scope of a statute, are questions of law, which we review de novo." *Id.* at 122, 412 P.3d at 1083 (alterations and internal quotation marks omitted). This court will defer to and uphold the district court's findings that are not clearly erroneous and are supported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009).

NRS 126.900(1) provides that "[a]ny promise in writing to furnish support for a child, growing out of a supposed or alleged parent and child relationship, does not require consideration and is enforceable according to its terms." The construction of this statute is a matter

[1]NRS 126.900 was substituted in revision for NRS 126.371 in 2013.

of first impression. When a statute's language is unambiguous and its meaning is clear, interpreting courts may not look beyond the statute itself. *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000). If a statute is ambiguous, however, courts may consider "other sources such as legislative history, legislative intent and analogous statutory provisions." *Id.* at 294, 995 P.2d at 485.

Specifically at issue here is the meaning of "promise in writing." We conclude that this phrase is unambiguous as used in the statute. A "promise" states an intent to act in a particular manner and a willingness to be bound to do so. *Promise*, *Black's Law Dictionary* (11th ed. 2019) (defining promise as "[t]he manifestation of an intention to act or refrain from acting in a specified manner, conveyed in such a way that another is justified in understanding that a commitment has been made; a person's assurance that the person will or will not do something"). And a "writing" is a tangible recording of an expressed statement. *Writing*, *Black's Law Dictionary* (11th ed. 2019) ("Any intentional recording of words in a visual form, whether in handwriting, printing, typewriting, or any other tangible form that may be viewed or heard with or without mechanical aids.").

Hargrove argues that NRS 126.900(1) should be interpreted to create a mechanism to enforce informal agreements. We disagree. Nothing in the statute supports this interpretation. The statute specifically forecloses a consideration requirement, NRS 126.900(1), and the Legislature could have directed that informal commitments were enforceable under this statute had it intended to, *see Ramacciotti v. Ramacciotti*, 106 Nev. 529, 531, 795 P.2d 988, 989 (1990) (concluding that the Legislature did not intend a requirement that it could have included in the relevant statute but did not). The statute also provides that a promise within its ambit "is enforceable according to its terms," implying that such a promise must specifically set out the terms committed to, rather than encompassing informal agreements. *See* NRS 126.900(1). And the legislative history further disfavors Hargrove's claim, as the deputy attorney general describing the bill explained that this statute serves to make enforceable an agreement where a parent "will end up signing a promise to support," with no discussion of more casual arrangements. Hearing on S.B. 294 Before the Assemb. Judiciary Comm., 60th Leg., at 6 (Nev., May 2, 1979); *see also* 1979 Nev. Stat., ch. 599, § 24, at 1276-77 (enacting S.B. 294, later codified as NRS 126.900).

Hargrove argues that text messages over a period of 11 months, banking records, and her testimony show Ward's promise in writing to make monthly support payments.[2] The district court found that

[2]To the extent that Hargrove argues that she had an oral agreement with Ward that was enforceable under NRS 126.900(1), the claim fails, as the statute does not encompass any commitment not in writing.

Ward did not undertake a legally binding obligation. Substantial evidence supports the determination that Ward did not promise to make ongoing payments, which is not clearly wrong. First, we observe that neither the banking records nor Hargrove's testimony supports Hargrove's claim, as neither demonstrates Ward's expression of intent to act in a particular manner. While either may be evidence of an agreement, neither shows a promise by Ward or a writing memorializing it. And while a text message may constitute a "writing," the text messages between Hargrove and Ward in the record here do not demonstrate a "promise" to make ongoing support payments. In a May 15, 2013, message, Hargrove described "this offer": payment of $300 by the 4th of each month. Ward never specifically responded to that "offer." The text messages cannot be said to contain Ward's promise to act in accordance with those terms.[3] In other text messages, Ward did not state an intent to make ongoing payments in such a manner that specific terms of that commitment might be ascertained and enforced. In sum, the text messages in the record do not show a tangible statement by Ward committing to act in the particular manner that Hargrove alleges. And as no promise was expressed, we need not consider the requirement that the promise relates to a parental relationship. *Cf.* NRS 126.900(1) (requiring the promise to be "growing out of a supposed or alleged parent and child relationship"). The district court therefore did not abuse its discretion in denying Hargrove's NRS 126.900(1) claim, and we affirm its order denying relief in part.

NRS 125B.030 permits the recovery of retroactive child support after the child reaches the age of majority

While Hargrove may not recover under NRS 126.900(1), we hold that a parent may file for retroactive child support after a child has reached the age of majority under NRS 125B.030. NRS 125B.030 provides that,

> [w]here the parents of a child do not reside together, the physical custodian of the child may recover from the parent without physical custody a reasonable portion of the cost of care, support, education and maintenance provided by the physical custodian. In the absence of a court order for the support of a child, the parent who has physical custody may recover not

[3]In an August 4, 2013, text message, Hargrove asked, "Are you going to be able to deposit money tomorrow?" and Ward responded, "Yes." This arguably constitutes a "promise in writing" under NRS 126.900(1), though it does not indicate amount or show the more extensive promise Hargrove alleges. It appears that Ward made a corresponding deposit to satisfy this promise.

In two other messages, Ward commits to send money "as soon as i [sic] can" or in "a bit." These commitments are too vague to fall within the statute's scope because they lack terms specific enough to be "enforceable according to [their] terms." NRS 126.900(1).

> more than 4 years' support furnished before the bringing of the action to establish an obligation for the support of the child.

NRS 125B.030 does not limit when an action for support of the child may be brought. Instead, the statute limits the *recovery* for retroactive child support to the 4 years immediately preceding the action.

This is not to say, however, that there is no limit on when a parent may bring an action for retroactive child support. NRS 126.081(1) provides that an action to establish paternity "is not barred until 3 years after the child reaches the age of majority." And NRS 126.161(4)(a) provides that a judgment or order establishing paternity "*may* . . . [c]ontain any other provision directed against the appropriate party to the proceeding, concerning the duty of support." (Emphasis added.) Thus, it appears that NRS Chapter 126 contemplates the imposition of retroactive child support obligations in paternity actions filed within 3 years after the child attains the age of majority.

Other jurisdictions have established that retroactive child support may be awarded in timely filed paternity actions. For example, in *Carnes v. Kemp*, 821 N.E.2d 180, 182 (Ohio 2004), the issue was whether "a court ha[s] subject-matter jurisdiction to award retroactive child support payments in a paternity action initiated after the child has reached the age of majority." (Internal quotation marks omitted.) The Supreme Court of Ohio concluded it does, reasoning that because an individual is statutorily authorized, in Ohio, to bring a paternity action up to 5 years after the child reaches the age of 18, and because a court has authority to order support after paternity is established, a court has the authority to order retroactive child support in an action commenced before the child turns 23. *Id*. at 184.

The New Mexico Court of Appeals held the same, reasoning that "[i]t is not logical to apply a more lenient statute of limitations to a paternity action but then apply a stricter limitations period to the child's cause of action to seek support." *Padilla v. Montano*, 862 P.2d 1257, 1263 (N.M. Ct. App. 1993). "A paternity proceeding is a civil action to compel a putative father to support his child," and the purpose of the statute will not be met if a "child is [not] afforded a reasonable length of time in which to secure the support which is due[;] a determination of paternity [alone] is of limited value." *Id*. at 1262-63; *see also Campagna v. Cope*, 971 So. 2d 243, 248 (Fla. Dist. Ct. App. 2008) (declining to limit retroactive child support to actions filed while the child is a minor because the plain language of the statute does not contain such limiting language).[4]

[4]Although some of these cases may be distinguishable in that a child brings the action for child support instead of a parent, NRS 126.071(1) provides that "[a] child, his or her natural mother, a man presumed or alleged to be his or her father or an interested third party may bring an action . . . to declare the

We agree with this reasoning and hold that an action for retroactive child support may be maintained after a child has reached the age of majority. Thus, because a parent may bring a paternity action up to 3 years after the child reaches the age of majority, and because a court may order a parent to pay child support after paternity is established, we hold that a parent has 3 years after the age of majority to seek retroactive child support.

CONCLUSION

Here, Hargrove brought the paternity action on March 12, 2019, 1 year and 3 months after G.W. turned 18, within the period permitted by NRS 126.081(1). Thus, her request for retroactive child support was timely. As Hargrove was permitted to bring a paternity action, she was correspondingly permitted to seek retroactive child support. The district court therefore abused its discretion by concluding that it did not have the authority to grant retroactive child support.[5] Ward, however, did not make a promise in writing to make monthly support payments, and the district court therefore correctly denied Hargrove's NRS 126.900(1) claim. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

Parraguirre, C.J., and Silver, J., concur.

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existence . . . of the father and child relationship." *See also Campagna*, 971 So. 2d at 248 (concluding that if a parent supported a child in his or her minority, "the parent maintains his or her standing to recover the other parent's share of any" retroactive child support).

[5]We reject Ward's numerous arguments in opposition. Although NRS 125B.050(1) uses the term "minor child," Ward does not cogently argue how that term correlates to NRS 125B.030's language. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that this court need not consider claims that are not cogently argued or supported by relevant authority). Further, although NRS 126.161(3) requires the inclusion of child support in a paternity order if the child is a minor, it does not provide that one is *prohibited* if the child is not a minor. Instead, the broad language of NRS 126.161(4)(a) provides that an order "*may*" include "any other provision . . . concerning the duty of support." (Emphasis added.)

THE NEVADA INDEPENDENT, Appellant, *v.* RICHARD WHITLEY, in His Official Capacity as the DIRECTOR OF THE NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES; THE STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES; and SANOFI-AVENTIS U.S. LLC, Respondents.

No. 81844

March 24, 2022 506 P.3d 1037

Appeal from a district court order denying a petition for a writ of mandamus in a public records matter. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Affirmed.

Robert L. Langford & Associates and *Matthew J. Rashbrook* and *Robert L. Langford*, Las Vegas, for Appellant The Nevada Independent.

Aaron D. Ford, Attorney General, *Heidi Parry Stern*, Solicitor General, *Steve Shevorski*, Chief Litigation Counsel, and *Akke Levin*, Senior Deputy Attorney General, Carson City, for Respondents Richard Whitley and the State of Nevada Department of Health and Human Services.

Bailey Kennedy and *John R. Bailey, Dennis L. Kennedy, Sarah E. Harmon*, and *Rebecca L. Crooker*, Las Vegas, for Respondent Sanofi-Aventis U.S. LLC.

McCracken, Stemerman & Holsberry, LLP, and *Richard G. McCracken* and *Paul L. More*, San Francisco, California, for Amicus Curiae Culinary Workers Union Local 226.

Before the Supreme Court, Parraguirre, C.J., Stiglich and Silver, JJ.

OPINION

By the Court, Stiglich, J.:

Nevada's public records law shines a light on government conduct. It permits Nevadans insight into whether the officials they elected are holding true to their promises. But this law's illumination ends where statutory confidentiality provisions begin.

In this appeal, we consider whether the federal Defend Trade Secrets Act (DTSA) prohibits disclosure, under the Nevada Public Records Act (NPRA), of documents from pharmaceutical compa-

nies and pharmacy benefit managers collected under S.B. 539. The Nevada Independent (TNI) petitioned the district court to order the Department of Health and Human Services (DHHS) to release such documents, arguing that the documents constituted public records that must be made available to it. The district court determined that the information in these documents comprised trade secrets protected under the DTSA and that the documents thus were not subject to disclosure under the NPRA. TNI appeals the district court's order.

As a matter of first impression, we hold that because the DTSA classifies these requested documents, obtained pursuant to S.B. 539, as confidential trade secrets, these documents are shielded from disclosure under the NPRA.

BACKGROUND

Most states, including Nevada, have adopted some form of the Uniform Trade Secrets Act. *See* NRS Chapter 600A. To compliment these state trade secret laws, Congress, in 2016, amended the Economic Espionage Act of 1996 by passing the DTSA to further ensure trade secret protections in national and global economies. H.R. Rep. No. 114-529 (2016), *as reprinted in* 2016 U.S.C.C.A.N. 195, 198. The DTSA created a federal cause of action for misappropriation of trade secrets and defined "misappropriation" to include disclosure of a trade secret without the owner's consent, among other things. 18 U.S.C. §§ 1836, 1839(5)(b). Like the uniform act, the DTSA classifies as trade secrets information (A) that the owner has taken "reasonable measures" to keep secret and (B) that "derives independent economic value" from "not being generally known to" or "readily ascertainable through proper means" by an entity that can economically benefit from the information's disclosure or use. 18 U.S.C. § 1839(3).

One year later, in responding to the rapidly increasing price of insulin for Nevada residents, then-Governor Brian Sandoval signed into law S.B. 539. 2017 Nev. Stat., ch. 592. That bill, now codified in NRS 439B.600-.695, requires pharmaceutical manufacturers and pharmacy benefit managers (PBMs) to submit to DHHS documentation regarding the cost structure of insulin medication in Nevada. As relevant here, S.B. 539 requires DHHS to compile lists of essential diabetes medications, manufacturers to report the pricing information of these drugs and justify any price increases, and PBMs to disclose the rebates they negotiate. NRS 439B.630-.645.

Importantly, S.B. 539 also amended Nevada's version of the Uniform Trade Secrets Act to exclude from trade secret protections "any information" that a manufacturer or PBM is required to report per S.B. 539. NRS 600A.030(5)(b). Nevertheless, after S.B. 539 was passed, two organizations representing pharmaceutical companies

sued Governor Sandoval, DHHS Director Richard Whitley, and the Nevada Legislature, claiming that S.B. 539's elimination of trade secret protections is preempted by the DTSA and is constitutionally suspect. The case was dismissed after DHHS promulgated regulations, NAC 439.730-.740, to harmonize S.B. 539, the NPRA, and the DTSA.

A reporter for TNI thereafter made a public records request to DHHS for all reports submitted by pharmaceutical manufacturers and PBMs under S.B. 539. Relevant here, TNI sought the names of pharmaceutical manufacturers and PBMs that submitted annual reports pursuant to S.B. 539, and the annual reports themselves.[1] DHHS responded by providing the names of manufacturers and PBMs and some general information about the diabetes drugs but did not disclose other parts of the Manufacturer Essential Diabetes Drug Reports, including (1) the cost of producing the drug, (2) the total administrative expenditure relating to the drug, and (3) the profit margin the manufacturer earned by producing the drug. DHHS explained that, proceeding under NAC 439.730-.740, it believed disclosing this information would constitute misappropriating trade secrets under the DTSA, such that this information was confidential and not subject to release under the NPRA. TNI and DHHS subsequently exchanged another similar request and response.

As a result of DHHS's refusal to provide the requested information, TNI filed a mandamus action in the district court to compel disclosure under the NPRA, also challenging the validity of NAC 439.730-.740. Sanofi-Aventis U.S. LLC, a pharmaceutical company that submitted records pursuant to S.B. 539, moved to intervene, which the district court allowed. Sanofi thereafter presented an affidavit from its Vice President and Head of Diabetes and Primary Care Sales, James Borneman, who attested to the steps Sanofi takes to safeguard its trade secrets and the potential economic hardship Sanofi would suffer from the trade secrets' disclosure. For example, Borneman affirmed that pricing inputs and rationale are restricted internally within Sanofi and are shared on a need-to-know basis only, subject to nondisclosure agreements. The public disclosure of this information, Borneman declared, could be used by Sanofi's competitors and customers in, *inter alia*, price negotiations with insurers to Sanofi's financial detriment. TNI moved to compel Borneman's testimony or in the alternative to strike his affidavit from the record. The district court denied this motion.

[1]TNI also requested written opinions by the Nevada Attorney General's Office regarding S.B. 539's implementation in 2017. DHHS did not produce these opinions, a decision which TNI does not challenge on appeal. We therefore do not consider it. *See Las Vegas Review Journal v. City of Henderson*, 137 Nev. 766, 768, 500 P.3d 1271, 1275 (2021) (determining that an issue not raised in an appellant's opening brief need not be considered).

The district court then denied TNI's writ petition. The district court determined that "[t]he DTSA's definition for trade secrets places these reports squarely under confidentiality protections," since DHHS demonstrated that the reports are subject to reasonable efforts to maintain their secrecy and that the reports derive independent economic value from such secrecy. *See* 18 U.S.C. § 1839(3). Next, the district court found that NAC 439.730-.740 are valid regulations because DHHS has broad discretion to develop regulations that "foster efficient enforcement of codified legislation" (in this case, S.B. 539) and DHHS reasonably interpreted the governing statute in adopting the regulations. The district court opined that these regulations ensured that NPRA requests for information DHHS had gathered due to S.B. 539 did not run afoul of the DTSA because, while the regulations' "confidentiality protections are not automatic," they ensured that the affected entity had the opportunity to contest the release of what it believes to be confidential information in court. This appeal followed.

DISCUSSION

TNI has not demonstrated that NAC 439.730-.740 are invalid regulations

TNI contends that NAC 439.735 and NAC 439.740 are invalid regulations because they were not authorized by the Nevada Legislature, conflict with S.B. 539, and "operate as a line-item veto over the NPRA."[2] We disagree.

NRS 439B.685 allows DHHS to adopt regulations it deems "necessary or advisable to carry out the provisions of NRS 439B.600 to 439B.695, inclusive." Relevant here, DHHS utilized this enabling provision to promulgate NAC 439.735 and NAC 439.740 to harmonize the NPRA, S.B. 539, and the DTSA. NAC 439.735(1) permits a manufacturer or PBM to submit a request for confidentiality to DHHS to prevent public disclosure of any information it reasonably believes could lead to the misappropriation of a trade secret under the DTSA. The requesting manufacturer or PBM must describe the information it seeks to protect with particularity and explain why public disclosure would lead to misappropriation of a trade secret under the DTSA. NAC 439.735(2)(a)-(b). DHHS must determine whether it agrees with this assessment if it receives an NPRA request for the ostensibly confidential information. NAC 439.735(3). If DHHS agrees with the manufacturer's or PBM's assessment, it must deny the NPRA request. NAC 439.735(4). However, if DHHS does not agree, then it must provide the manufacturer or PBM a

[2]TNI also argues that NAC 439.730 is invalid but does not cogently argue this point or support it with salient authority. We therefore decline to consider it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

period of 30 days before releasing the information to allow the affected entity the opportunity to challenge DHHS's determination in court. NAC 439.735(5). NAC 439.740 requires DHHS to include only aggregated data that does not disclose the identity of any manufacturer or PBM in its public reports submitted pursuant to NRS 439B.650 and descriptions of trends in prescription drugs and how those prices affect the prevalence and severity of diabetes in Nevada and healthcare in the state more generally.

Agency regulations are presumed valid. *See* NRS 233B.090; *Montage Mktg., LLC v. Washoe County ex rel. Washoe Cty. Bd. of Equalization*, 134 Nev. 294, 297, 419 P.3d 129, 131 (2018). And this court generally defers to an agency's interpretation of a statute that the agency is tasked with enforcing. *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co*., 116 Nev. 290, 293, 995 P.2d 482, 485 (2000). It is well established, however, that "[a]dministrative regulations cannot contradict or conflict with the statute they are intended to implement." *Roberts v. State*, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988); *accord Clark Cty. Social Serv. Dep't v. Newkirk*, 106 Nev. 177, 179, 789 P.2d 227, 228 (1990). Where an agency regulation directly conflicts with the unambiguous language of the statute, a court may invalidate it. *See Newkirk*, 106 Nev. at 179, 789 P.2d at 228.

Contrary to TNI's allegation, NAC 439.735 does not contradict S.B. 539. First, NRS 439B.685's unambiguous language, while not specifically directing DHHS to protect the confidentiality of these documents, nonetheless authorizes DHHS to promulgate these regulations. *See Newkirk*, 106 Nev. at 179, 789 P.2d at 228. Although TNI contends that NAC 439.735 "invit[es] unelected members of the executive branch to make judicial determinations regarding confidentiality" and delays production of public records in violation of the NPRA, we determine that its claims are unfounded. NAC 439.735 does not act as a unilateral bar on disclosure of documents otherwise entitled to be part of the public record. It merely creates a process by which DHHS can determine whether the requested records fall within the DTSA's protection of trade secrets. Should DHHS determine that the DTSA does not afford the records such protection, NAC 439.735 places the burden on the pharmaceutical company or PBM to challenge the DHHS's determination in court. Likewise, any DHHS determination that the requested records are confidential can be contested by the requester in court. *See* NRS 239.011. It is the district court judge, therefore, that makes the ultimate determination regarding confidentiality, not DHHS. In fact, TNI concedes in its reply brief that NAC 439.735 presents no bar to the production of the requested records. In sum, TNI has not overcome the presumption that NAC 439.735 is valid, and we therefore defer to DHHS's interpretation of S.B. 539. *See* NRS 233B.090;

Montage Mktg., LLC, 134 Nev. at 297, 419 P.3d at 131; *State Farm Mut. Auto. Ins. Co.*, 116 Nev. at 293, 995 P.2d at 485.[3]

TNI next contends that NAC 439.740 directly conflicts with the Legislature's intent in passing S.B. 539 to create transparency in the market for diabetic medication. It argues that the Legislature did not grant DHHS the authority to promulgate NAC 439.740 and exempt material from public disclosure. Not so.

This court first looks to the plain language of a statute when interpreting a statutory provision. *Clay v. Eighth Judicial Dist. Court*, 129 Nev. 445, 451, 305 P.3d 898, 902 (2013). Where a statute is unambiguous, we do not go beyond it to divine legislative intent. *Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983).

Here, the plain language of NRS 439B.650 is clear. It requires DHHS to analyze the reports submitted by pharmaceutical companies and PBMs and compile its own report documenting such analysis. It does not, as TNI maintains, prohibit DHHS from anonymizing the data it collects per S.B. 539. Thus, NAC 439.740 does not conflict with NRS 439B.650, and DHHS had the authority to promulgate the regulation under NRS 439B.685. Therefore, we conclude that TNI's challenge of NAC 439.740 fails as well.[4]

The district court did not abuse its discretion by admitting James Borneman's declaration

TNI next contends that the district court abused its discretion by admitting Borneman's declaration after determining the declaration was not based solely on his personal knowledge. We determine that the admission of Borneman's declaration was proper.

A lay witness may testify on a matter if the witness has personal knowledge of the matter to which he or she is testifying. NRS 50.025(1)(a). Personal knowledge may come from a witness's review of files and records, *Wash. Cent. R.R. Co., Inc. v. Nat'l Mediation Bd.*, 830 F. Supp. 1343, 1353 (E.D. Wash. 1993), or be inferred from the witness's position, *In re Kaypro*, 218 F.3d 1070, 1075 (9th Cir. 2000). We review the district court's decision to admit or exclude evidence for an abuse of discretion. *M.C. Multi-Family, LLC*

[3]TNI alternatively argues that NAC 439.735 leads to an unreasonable delay in the production of public records by providing pharmaceutical companies and PBMs 30 days to respond to NPRA requests. However, it does not provide salient authority on how this process leads to an unreasonable delay under the NPRA, so we do not consider it. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

[4]As with NAC 439.735, TNI maintains NAC 439.740 delays public record requests under the NPRA but fails to cogently demonstrate how so. We therefore do not consider this claim. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

v. Crestdale Assocs., Ltd., 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). A district court abuses its discretion when its decision is "in clear disregard of the guiding legal principles." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014) (internal quotation marks omitted).

Borneman proffered a declaration as Sanofi's Vice President and Head of Diabetes and Primary Care Sales about the confidential information included in Sanofi's reports, the steps Sanofi takes to safeguard its trade secrets, and the potential economic hardship Sanofi would suffer if the trade secrets were publicly disclosed. Two paragraphs of Borneman's six-page declaration were recited almost verbatim from Sanofi's website and from the testimony of other Sanofi employees; these paragraphs discussed Sanofi's headquarters and mission statement.

As Head of Diabetes and Primary Care Sales for Sanofi, Borneman's personal knowledge of Sanofi's procedures regarding its protection of trade secrets language may be inferred. *See In re Kaypro*, 218 F.3d at 1075. Furthermore, personal knowledge may be presumed because Borneman had access to Sanofi's files and records in preparing his declaration. *See Wash. Cent. R.R. Co.*, 830 F. Supp. at 1353. Therefore, given the broad discretion that the district court enjoys in its admission of evidence, its refusal to strike the declaration was proper, despite its conclusion that Borneman did not testify solely from personal knowledge. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 598-99, 245 P.3d 1198, 1202 (2010) (holding that "[t]his court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason"); *M.C. Multi-Family*, 124 Nev. at 913, 193 P.3d at 544.

The district court did not abuse its discretion by denying the writ petition

The gravamen of this appeal is TNI's claim that the district court abused its discretion by determining that the requested records are trade secrets under the DTSA. The DTSA classifies as trade secrets information (A) that the owner has taken "reasonable measures" to keep secret and (B) from which the owner "derives independent economic value" that is not "readily ascertainable through proper means" by an entity that can obtain economic benefit from the information's disclosure. 18 U.S.C. § 1839(3). "[T]he definition of what may be considered a 'trade secret' is broad." *InteliClear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 657 (9th Cir. 2020). The government bears the burden of demonstrating by a preponderance of the evidence that the public records at issue are confidential. NRS 239.0113; *Pub. Emps.' Ret. Sys. of Nev. v. Nev. Policy Research Inst., Inc.*, 134 Nev. 669, 671, 429 P.3d 280, 283 (2018). We review a district court's decision to deny a writ petition for an abuse of

discretion, but we review its decision de novo where the petition raises a question of statutory interpretation. *Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010).

The first inquiry into whether information is a protected trade secret is whether its owners have taken "reasonable measures" to keep the information secret. 18 U.S.C. § 1839(3). Owners of proprietary information may take a variety of approaches that constitute "reasonable measures" to protect their trade secrets. For example, the Ninth Circuit has noted that "[c]onfidentiality provisions constitute reasonable steps to maintain secrecy." *InteliClear*, 978 F.3d at 660 (citing *MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 521 (9th Cir. 1993)). It is well-established that a confidential disclosure of a trade secret to an employee does not negate the disclosed information's status as a trade secret. *Id.* at 661; *United States v. Nosal*, 844 F.3d 1024, 1043-44 (9th Cir. 2016); *United States v. Chung*, 659 F.3d 815, 825-26 (9th Cir. 2011).

We determine that the district court appropriately concluded that the measures that manufacturers and PBMs have taken to protect their information are sufficient to meet the first prong of the DTSA. The district court noted that DHHS places significant limitations on who has access to the requested records and privatizes the information that is shared, and that manufacturers and PBMs have submitted requests for confidentiality to prevent the release of their trade secrets. This analysis is further bolstered by Borneman's declaration. In it, he notes that Sanofi restricts access to pricing information and rationale. He mentions that Sanofi shares this proprietary information only on a need-to-know basis and further protects these secrets by entering into nondisclosure agreements with employees who have access to them. In sum, these confidentiality provisions are sufficient to constitute "reasonable measures" at preserving the information's secrecy under the DTSA. *Cf. InteliClear*, 978 F.3d at 660-61.

In the alternative, TNI maintains that manufacturers and PBMs have waived any trade secret protections they may have had by voluntarily submitting the requested documents to DHHS, relying on *Amgen, Inc. v. California Health Care Services*, 260 Cal. Rptr. 3d 873 (Ct. App. 2020). In *Amgen*, the California Court of Appeal considered whether pharmaceutical manufacturers lose trade secret protection for the price-increase notices they submit pursuant to California S.B. 17. *Id*. at 876-77. In relevant part, S.B. 17 requires manufactures to provide 60 days' notice to PBMs of an increase in drug prices. *Id.* at 878-79. The PBMs are required to notify large purchasers (i.e., those who provide coverage to over 500 people) of the price increase. *Id*. A news entity made a public records request under California's analog to the NPRA for the price-increase notices. *Id*. at 877. Amgen filed a petition for writ of mandamus,

invoking state trade secret privilege to block disclosure. *Id*. The court held that Amgen's disclosure of the price increases to the purchasers eroded the documents' trade secret protections, since no statutory or regulatory provision "requires the purchasers to keep the price increase notices confidential or otherwise restricts the purchasers' use of the information in the notices." *Id*. at 879.

We are unpersuaded by TNI's citation to *Amgen*. Nevada law differs from California's with respect to trade secret protections. Whereas the California statutory and regulatory provisions did not provide confidentiality protection for the requested information in *Amgen*, NAC 439.735 permits manufacturers and PBMs to request confidentiality for any information they submit to DHHS that they believe constitutes a trade secret. *See Amgen*, 260 Cal. Rptr. 3d at 879; *cf. Food Mktg. Inst. v. Argues Leader Media*, ___ U.S. ___, ___, 139 S. Ct. 2356, 2366 (2019) (determining that information is confidential where it is "both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy"). Furthermore, it is fundamentally unfair to conclude that a manufacturer or PBM waives its trade secret protections in the requested records by submitting them to DHHS pursuant to S.B. 539—a mandate it is powerless to ignore. *See Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 149 (D.C. Cir. 2001) (concluding that an agency's legal authority to obtain records from a private party dictates whether the submission of those records is mandatory).[5] Therefore, because manufacturers and PBMs turned over these documents with the expectation of confidentiality, such disclosure is not inconsistent with our determination that the company has taken "reasonable measures" to keep the information secret with respect to the DTSA. *See InteliClear*, 978 F.3d at 660-61.

We next consider the second step of the DTSA's trade secret test, which considers whether the owner derives economic value from the information's nondisclosure and whether the information is not "readily ascertainable through proper means" by an entity that can obtain economic benefit from the information's disclosure. 18 U.S.C. § 1839(3). TNI contends that the requested documents, which contain pricing information on insulin medications, cannot be considered trade secrets because they do not provide economic value to the manufacturers and PBMs. TNI argues that no manufacturer enjoys an economic advantage from keeping insulin prices secret, pointing out that two manufacturers listed their insulin medications at identical prices in 2016. Because manufacturers list identical prices for the same insulin medication, TNI maintains that they enjoy no economic benefit from keeping those prices secret.

[5]Indeed, NRS 439B.695 provides that DHHS may impose an administrative penalty on noncompliant manufacturers and PBMs for each day of their failure to conform with S.B. 539's disclosure requirements.

We determine that the district court was within its discretion to conclude that the requested records, which identified "drug cost structure, marketing and advertising costs, rebate strategies, and profit information," comprised trade secrets under the DTSA because the manufacturers and PBMs "derive[ ] independent economic value . . . from [this information] not being generally known." 18 U.S.C. § 1839(3)(B). TNI's pointing to two different manufacturers listing insulin at the same price in 2016 is insufficient to prove that manufacturers do not derive economic value from the secrecy of their pricing regime, or even that every manufacturer prices insulin identically. Even if manufacturers did price insulin identically, Borneman's declaration attests to the fact that manufacturers could still glean an economic advantage over others by becoming privy to their costs and expenses during production and marketing. And even though the fact that two manufacturers priced insulin identically is part of the public record, this does not deprive the manufacturers' pricing scheme, more generally, from trade secret protection. *See Mallet & Co., Inc. v. Lacayo*, 16 F.4th 364, 386 (3d Cir. 2021) ("[I]nformation will not necessarily be deprived of protection as a trade secret because parts of it are publicly available."). Thus, we conclude that the district court appropriately determined that manufacturers and PBMs gain an economic benefit by keeping the requested documents confidential from their competitors and the public.

As we have noted before, "[t]he obligation to disclose . . . is not without limits." *Republican Att'ys Gen. Ass'n v. Las Vegas Metro. Police Dep't*, 136 Nev. 28, 31, 458 P.3d 328, 331 (2020). Since we hold that these documents are declared by law (i.e., the DTSA) to be confidential trade secrets, we conclude that they are exempt from disclosure under the NPRA. *See* NRS 239.010(1) (permitting public examination of governmental records unless those records are "declared by law to be confidential"); *Republican Att'ys Gen. Ass'n*, 136 Nev. at 31, 458 P.3d at 331 ("[T]he NPRA yields to more than 400 explicitly named statutes, many of which prohibit the disclosure of public records that contain confidential information.").

We therefore conclude that the district court's denial of the writ petition was within its discretion. On the facts before us in the record, DHHS has demonstrated that the requested records satisfy the DTSA's two-step test for confidentiality by showing that manufacturers and PBMs have taken reasonable measures to shield the requested records from disclosure and that these entities derive economic value from the requested records' secrecy.[6]

[6]TNI also contends that the Eleventh Amendment's sovereign immunity protects DHHS and Whitley from suit in federal court if they release the requested records. Since we determine that the requested records are exempt from disclosure, we need not consider this hypothetical issue. *See Echeverria v. State*, 137 Nev. 486, 489, 495 P.3d 471, 475 (2021) (reaffirming that this court lacks the authority to issue advisory opinions).

CONCLUSION

The NPRA permits the disclosure of government documents that are not declared by law to be confidential. In this opinion, we hold that the requested documents are confidential under the DTSA and are thus exempted from disclosure under the NPRA. We also determine that TNI has not demonstrated that NAC 439.730-.740 are invalid regulations and that the district court reached the correct outcome in admitting James Borneman's declaration. For these reasons, we affirm the district court's judgment.

Parraguirre, C.J., and Silver, J., concur.