

District Court, Chaffee County, COLORADO 142 Crestone P.O. Box 279 Salida, Colorado 81201 (719) 539-2561	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> Case No.: 2021CR78 Division: 2
<p>Plaintiff(s): THE PEOPLE OF THE STATE OF COLORADO,</p> <p>v.</p> <p>Defendant(s): MORPHEW, BARRY LEE</p>	
Order Re: Defense Motion to Disqualify Judge Murphy (D-55)	

The Court has reviewed the Motion, the People’s Responses to the Motion and Mr. Morphey’s Reply. After giving careful consideration to the issue, the facts and the law, and for reasons detailed below, the Court hereby GRANTS the Motion and disqualifies itself from any further participation in this case.

I. FACTS

On October 13, 2021, this Court disqualified itself from hearing the case of *The People v. Shoshona Darke*, Chaffee County case 21M351. The reason the Court disqualified on that case was that the firm of McDermott, Stuart and Ward had entered their appearance on behalf of Shoshona Darke. As the Court stated on the record on October 13, 2021, the Court has a longstanding personal friendship with Sean McDermott, who is a partner in the firm of McDermott, Stuart and Ward. Therefore, the Court had to disqualify from that case.

A hearing for this case was held on December 14, 2021. At that hearing, the Court made a record regarding the Court’s relationship with Mr. McDermott. For the sake of clarity, the Court will do the same in this Order.

The Court has known Mr. McDermott for at least 40 years. The Court attended the same schools as Mr. McDermott—including high school. Mr. McDermott is close friends with the Court’s sister and brother in law and they socialize regularly. Mr. McDermott is the god father of the Court’s niece. Mr. McDermott and the Court were both deputy state public defenders in the late 1990s and early 2000s and talked often about our jobs. Mr. McDermott and the Court have spent time together during fishing trips and we socialize when in Denver. The last time the Court saw Mr. McDermott was at a graduation ceremony in May of 2021.

Also discussed at the hearing on December 14, 2021, was the fact that both the prosecution and the defense may call Shoshona Darke as a witness in this case. As described in the Motion and the accompanying affidavit by Mrs. Eytan, Shoshona Darke was also the subject of at least two search warrants and her alleged relationship with Mr. Morphew was featured in the arrest warrant affidavit. That alleged relationship may be used by the prosecution in their case presentation.

If Shoshona Darke is called as a witness in this case, her attorney will be present and will be advising her regarding her Fifth Amendment privilege (see Supplemental affidavit of Martin Stuart). It is also possible that other legal issues, such as scope of immunity (if given) and scope of testimony will also have to be decided by the Court—after advice and input from Mrs. Darke’s attorney. Although less likely from a legal perspective, it is also possible that Mrs. Darke and her attorney may try to challenge the search warrants issued by the Court that involve her or her property.

Mrs. Eytan stated that the Motion was filed on December 13, 2021 because she only learned about the Court’s disqualification on the Darke case on December 9, 2021. There is good cause for the Motion being filed when it was.

II. LAW

The disqualification of a judge from a particular case is governed by both rule, statute and Judicial Canon.

Colorado Revised Statute 16-6-201 states:

(1) A judge of a court of record shall be disqualified to hear or try a case if:

(a) He is related to the defendant or to any attorney of record or attorney otherwise engaged in the case; or

(b) The offense charged is alleged to have been committed against the person or property of the judge or of some person related to him; or

(c) He has been of counsel in the case; or

(d) He is in any way interested or prejudiced with respect to the case, the parties, or counsel.

(2) Any judge who knows of circumstances which disqualify him in a case shall, on his own motion, disqualify himself.

(3) A motion for change of judge on any ground must be verified and supported by the affidavits of at least two credible persons not related to the defendant, stating facts showing the existence of grounds for disqualification. If the verified motion and supporting affidavits state facts showing grounds for disqualification, the judge must enter an order disqualifying himself. After disqualifying himself, the judge may require a full hearing upon the issues raised by the affidavits and shall request that another judge conduct the hearing. The other judge shall make findings of fact with regard thereto, and such findings shall be included as a part of the trial court record.

Colorado Rule of Criminal Procedure Rule 21(b) states:

(1) Within 14 days after a case has been assigned to a court, a motion, verified and supported by affidavits of at least two credible persons not related to the defendant, may be filed with the court and served on the opposing party to

have a substitution of the judge. Said motion may be filed after the 14-day period only if good cause is shown to the court why it was not filed within the original 14-day period. The motion shall be based on the following grounds:

- (I) The judge is related to the defendant or to any attorney of record or attorney otherwise engaged in the case; or
- (II) The offense charged is alleged to have been committed against the person or property of the judge, or of some person related to him; or
- (III) The judge has been of counsel in the case; or
- (IV) The judge is in any way interested or prejudiced with respect to the case, the parties, or counsel.

(2) Any judge who knows of circumstances which disqualify him in a case shall, on his own motion, disqualify himself.

(3) Upon the filing of a motion under this section (b), all other proceedings in the case shall be suspended until a ruling is made thereon. If the motion and supporting affidavits state facts showing grounds for disqualification, the judge shall immediately enter an order disqualifying himself or herself. Upon disqualifying himself or herself, the judge shall notify forthwith the chief judge of the district, who shall assign another judge in the district to hear the action. If no other judge in the district is available or qualified, the chief judge shall notify forthwith the state court administrator, who shall obtain from the Chief Justice the assignment of a replacement judge.

Colorado Judicial Canons also require a judge to disqualify if the judge's impartiality "might reasonably be questioned" including situations where the judge has a "personal bias" concerning a party or a party's attorney. (Canon 2.11(A))

In deciding whether to disqualify, the Court must consider both the "actuality" of the conflict as well as the "appearance of fairness." *People v. Garner*, 806 P.2d 366 (Colo.1991) "Either actual prejudice on the part of the trial judge or its mere appearance can require the disqualification of that judge." *Estep v. Hardeman*, 705 P.2d 523 (Colo.1985) "Even if the judge is entirely convinced of her own impartiality, she must take care not to allow the justice system to be impugned by an appearance of partiality." *People v. Botham*, 629 P.2d 589 (Colo.1981) This concern must be given the "highest consideration in ruling on a motion for disqualification" to secure the confidence of litigants and maintain public respect for the courts. *Smith v. Dist. Ct.*, 629 P.2d 1055 (Colo.1981)

III. OPINION

The two questions the Court must answer are 1) does the Court's relationship with Mr. McDermott rise to the level required for disqualification and 2) does Mr. McDermott's involvement in this case require the Court to disqualify.

The answer to the first question is fairly obvious. As recited above, the Court has a long-standing personal friendship with Mr. McDermott. Because Mr. McDermott's firm represents Mrs. Darke, and because conflicts with one attorney are imputed to a firm, the Court disqualified itself from Mrs. Darke's case. If Mr. McDermott or his firm represented Mr. Morphew, the Court would clearly have to disqualify from Mr. Morphew's case and would have done so without a Motion being filed.

It is the second question that is more difficult to answer. The role of Mr. McDermott and his firm is somewhat attenuated in relation to Mr. Morphew's case. The McDermott firm does not represent Mr. Morphew—instead, they represent a person who may testify at Mr. Morphew's trial and who will likely be part of the prosecution's theory of the case.

As stated in the prosecution's original response, disqualification under this circumstance "presents a novel legal question in Colorado." The caselaw cited by both sides focuses on the first question (does the relationship rise to the level of disqualification) rather than the second question (is the attorney with whom the judge has a relationship involved enough in the matter at issue to require disqualification). Apparently, this issue remains a "novel legal question" in Colorado and therefore the Court must do its own analysis.

The Court first focuses on the wording of the Rule, the statute and the Judicial Canon.

The statute states that a judge must disqualify if "he is in any way interested or prejudiced with respect to the case, the parties, or counsel." (emphasis added)

The Rule requires a judge to disqualify if "the judge is in any way interested or prejudiced with respect to the case, the parties, or counsel." (emphasis added)

The Canon requires disqualification if "the judge's impartiality might reasonably be questioned." Comments following the Canon state "a judge is disqualified whenever the judge's impartiality might reasonably be questioned." (emphasis added)

Thus, the statute and the Rule are very broad in terms of when a judge must disqualify. The words "in any way" imply that even if the conflict is attenuated—as is the case here—the Court must disqualify.

Similarly, the conflict does not have to attach to the attorney of record on the case at issue. Instead, the conflict can attach "with respect to the case." So even though the McDermott firm is not an attorney for a party to the case, they are involved "with respect to the case".

Finally, the Canon requires the Court to recuse—even if the Court does not believe it has a conflict—if the judge's impartiality might reasonably be questioned.

Here, at the very least, the Court hearing this case will likely have to rule on issues surrounding Mrs. Darke's testimony. The Court will have to make those rulings after hearing from Mr. Darke's counsel. If the Court rules in favor of Mrs. Darke and her counsel, the argument could be made that the Court was doing so because the Court favors Mrs. Darke and her counsel based upon the Court's friendship with Mr. McDermott.

Thus, even though the conflict relates to a very small portion of the case, and even though the Court does not personally believe the relationship with Mr. McDermott would affect the Court, the Court finds that it has no choice but to disqualify.

The Court explored the possibility of disqualifying for only that portion of the case involving Mrs. Darke but declines to do so as the caselaw does not support such an approach. See *Beckford v. District Court of Larimer County in Eight Judicial Dist.*, 698 P.2d 1323, 1329 (Colo. 1985)

Once a disqualification occurs, the Rule requires the disqualifying judge to notify the Chief Judge of the district of the disqualification and it is then the Chief Judge's responsibility to appoint a replacement judge, if from within the district, or to notify the Chief Justice if a replacement judge can not be appointed from within the district.

This Court also serves as the Chief Judge of the 11th Judicial District. In order to avoid an extension of the conflict into the replacement decision, this Court, as Chief Judge, entered a Chief Judge Directive in 2017 that transferred the replacement role to the District Administrator in the event that the Chief Judge disqualifies from a case. (See Chief Judge Directive 17-04, attached)

IV. ORDER

The Court hereby grants the Defense Motion to Disqualify Judge Murphy. The Court will have no further role in this case or in the determination of the replacement judge. The District Administrator will contact the Chief Justice in order to determine a replacement judge.

IT IS SO ORDERED.

By the court, this 30th day of December, 2021.

/s/ Patrick W. Murphy?

Chief Judge, 11th J.D.

Chief Judge Directive 17-04

Assignment of Cases when the Chief Judge is Disqualified:

This Chief Judge Directive supersedes any previous Chief Judge Directives or Orders that may exist relating to this subject.

Upon the disqualification of the Chief Judge of this District in a criminal case under Rule 21 or in a civil case under Rule 97, it shall be the responsibility of the District Administrator of the Eleventh Judicial District to select and appoint from among the remaining District Court judges of the District a successor judge.

When this should occur, there shall be no consultation between the undersigned and the District Administrator regarding who should be the successor judge.

Done in Salida, Colorado, this 30th day of March 2017.

/s/ Patrick W. Murphy, Chief Judge, 11th Judicial District