DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 Sixth Street Boulder, Colorado 80302	DATE FILED: July 26, 2024 5:52 PM
PEOPLE OF THE STATE OF COLORADO v. **AHMAD AL ALIWI ALISSA** Defendant	**COURT USE ONLY**
Michael T. Dougherty, District Attorney, Reg. #41831 1777 Sixth Street Boulder, CO 80302 Phone Number: (303) 441-3700 FAX Number: (303) 441-4703 E-mail: mdougherty@bouldercounty.gov	Case No. 21CR497 Div: 13
Response to Defendant's Motion for Recusal (D-057)	

On July 8, 2024, Ahmad Al Aliwi Alissa (the "Defendant") filed his Motion for Recusal (D-057). This Court should deny his request. In support of this response, the People further state as follows:

BACKGROUND

On March 22, 2021, Defendant drove to the Table Mesa King Soopers store in Boulder armed with a semi-automatic Ruger AR-556 pistol (often referred to and described as an assault rifle), other guns, large capacity magazines, and a large amount of ammunition. Soon after he arrived at the store, he began shooting victims in the parking lot before continuing into the store and shooting other victims. Ultimately, he murdered 10 people, and shot in the direction of many others.

Defendant is charged with ten counts of Murder in the First Degree (F1), forty-seven counts of Attempted Murder in the First Degree (F2), one count of Assault in the First Degree (F3), six counts of Possession of a Large-Capacity Magazine During the Commission of a Felony (F6), and

forty-seven counts of Crime of Violence with a Semiautomatic Assault Weapon as a Sentence Enhancer.

SUMMARY

In his motion, Defendant asserts that due process requires Chief Judge Bakke recuse herself from this case due to actual bias on the Court's part which undermines Defendant's right to a fair trial. Absent a showing of actual bias, Defendant asserts that recusal is warranted because a reasonable observer might have doubts about the Court's impartiality. In support of their claims of actual bias and the appearance of partiality, Defendant points to comments in open court and emails sent to the parties. Those statements by the Court, both written and oral, had been directly communicated to defense counsel.

Defendant's motion fails to provide vaild reasons or sufficient basis for recusal. Absent a sufficient basis to justify the extraordinary step of recusal, this Court should deny the motion in its entirety. In their motion, Defendant fails to cite any cases for the proposition that moving a case to trial is evidence of bias, particularly when the case has been pending for over three (3) years. Additionally, Defendant fails to cite any authority to support their argument that communicating with the Jury Commissioner about trial logistics is evidence of bias, or that it is improper to engage in those communications while there is a pending motion to change venue.

Defendant's motion states, "Judge Bakke has demonstrated a substantial interest on her part in getting this case to trial as quickly as possible at the behest of the victims and the victim[s'] families." But that is *required* by the Victims' Rights Act (VRA), which mandates that victims and their families "be assured that in any criminal proceeding the court . . . will take appropriate action to achieve a swift and fair resolution of the proceedings." § 24-4.1-302.5(1)(o), C.R.S.

Compliance with the Victims' Rights Act cannot constitute impermissible bias if the VRA is to have any meaning under the law.

Furthermore, Defendant's motion fails to acknowledge that this Court has carefully balanced the rights of Defendant, victims' rights and judicial economy for over three (3) years. A careful review of the record demonstrates this to be true. In support of Defendant's motion for recusal, the two accompanying affidavits point to a total of nine (9) communications by the Court. Seven (7) of those have come in the past two-and-half months, as the Court and parties prepared for the trial. In analyzing the grounds for recusal, the Court should consider the entire record.

Most recently, the Court partially granted Defendant's motion to continue and properly denied Defendant's motion to change venue. Following those rulings, Defendant has now filed this motion for recusal. Defendant's dissatisfaction with the Court's denial of their motions is not a basis for recusal. Caselaw and common sense do not support recusal when the Court rules against one party or the other on an issue, absent a sufficient showing of bias or partiality.

LEGAL ANALYSIS

A defendant has the right to a fair trial before an unbiased judge. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009); *People v. Hall*, 2021 CO 71M, ¶ 27; *People v. Julien*, 47 P.3d 1194, 1197 (Colo. 2002). The question of whether disqualification is required is guided by the Due Process Clauses of the United States and Colorado Constitutions; § 16-6-201(1)(d), C.R.S., and Crim. P. 21(b); or the Colorado Code of Judicial Conduct ("C.J.C.") 2.11.

The Due Process Clause of the United States Constitution guarantees a fair trial before a fair judge. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009). Similarly, Colorado's Due Process Clause, Colo. Const. art. II, § 25, also guarantees "the right to a trial before an impartial

judge," *Hall*, ¶ 20.

When a judge has been assigned to preside over a case, she has a "duty to sit" unless she is subject to recusal. *People v. Owens*, 219 P.3d 379, 386-87 (Colo. App. 2009) (citing, in part, *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995) ("[W]e are mindful that a judge has as strong duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require.")). In *Smith v. District Court*, 629 P.2d 1055 (Colo.1981), the court held, "unless a reasonable person could infer that the judge would in all probability be prejudiced against the defendant, the judge shall remain on a case."

"A reasonable person in this context is one who is a well-informed, thoughtful and objective observer, rather than [a] hypersensitive, cynical, and suspicious person." *Owens*, 219 P.3d at 387. It is the duty of a judge to remain on a case absent a showing that she is disqualified. *Walker v. People*, 248 P.2d 287 (Colo. 1952).

"Basic to our system of justice is the principle that a judge must be free of all taint of bias and partiality." *People v. Jennings*, 2021 COA 112, ¶ 18 (*citing People v. Mentzer*, 2020 COA 91, ¶ 5). A judge may not preside over a case if she is unable to be impartial. Whether a judge should recuse from a case "depends entirely on the impropriety or potential appearance of impropriety caused by [their] involvement." *Id.*

To be clear, the mere assertion that a judge would not give a fair trial does not demonstrate actual prejudice. *Young v. People*, 130 P. 1011 (Colo. 1913). Rather, the facts asserted by a defendant must establish that the judge has a bias or prejudice that will prevent her from dealing fairly with the defendant. *Walker*, 248 P.2d 287.

In *Sanders v. People*,24 CO 33, ¶ 29, the Colorado Supreme Court recently stated that "due process mandates recusal "when, objectively speaking, 'the probability of actual bias on the part

of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Citing Rippo v. Baker*, 580 U.S. 285, 287 (2017) (per curiam) (emphases added) (quoting *Withrow v. Larkin,* 421 U.S. 35, 47 (1975)).

Actual bias is shown where "the judge had a substantial bent of mind against" a litigant, *People v. Drake*, 748 P.2d 1237, 1249 (Colo. 1988), or the judge exhibited "a deep-seated antagonism toward [the defendant] that rendered the proceedings inexorably unfair," *Jennings*, ¶ 32. Throughout the pendency of this case, Chief Judge Bakke has made numerous discretionary rulings to protect Defendant's rights.

Defendant's motion and the accompanying affidavits focus only on the Court's recent rulings, including a motion to continue and motion to change venue. It is clear that a judge's adverse rulings, without more, are insufficient to establish actual bias. *Bocian v. Owners Ins. Co*., 2020 COA 98, ¶ 24 ("Unless accompanied by an attitude of hostility or ill will toward a party, a ruling by a judge on a legal issue is insufficient to show bias that requires disqualification.") (*citing Brewster v. Dist. Ct*., 811 P.2d 812, 814 (Colo. 1991))); *see also Saucerman v. Saucerman*,461 P.2d 18, 22 (1969) ("[R]ulings of a judge," even if "erroneous, numerous and continuous, are not sufficient in themselves to show bias or prejudice.").

Even remarks that are "critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not" establish bias, unless they reveal an opinion that derives from an extrajudicial source or reflect "such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky v. United States,* 510 U.S. 540 (1994). As addressed further below, there is no showing or evidence of any critical or disapproving comments by Chief Judge Bakke.

Contrary to their blanket assertion, Defendant's motion fails to demonstrate that Chief Judge Bakke is actually biased, so recusal is not required. *See People In Interest of A.P.*, 2022 CO 24,

¶ 29 ("Only when a judge was actually biased will we question the reliability of the proceeding's result."). A defendant asserting actual bias on the part of a trial judge must establish that the judge had a substantial bent of mind against" them. *People v. Drake,* 748 P.2d 1237, 1249 (Colo. 1988). Such bias must be established clearly in the record; mere speculative statements and conclusions are not enough. *Id.*

The thrust of Defendant's motion is that Chief Judge Bakke must recuse herself "... because objectively there is the probability of actual bias on Judge Bakke's part that is sufficiently high to undermine ... right to a fair trial." Defendant's motion is woefully insufficient as a matter of law. Defendant simply points to emails sent by the Court to all parties and comments made to the victims during proceedings in open court.

There is a difference between a judge who has actual bias and one who has the appearance of impropriety. Colorado's Code of Judicial Conduct requires a judge to recuse from "any proceeding in which the judge's impartiality might reasonably be questioned." *People in Interest of A.G.*, 262 P.3d 646, 650 (Colo. 2011). Actual bias, however, "exists when, in all probability, a judge will be unable to deal fairly with a party; it focuses on the judge's subjective motivations." *Id.* Defendant fails to provide a sufficient basis of either standard.

If actual bias is not demonstrated, the Court must still examine Section 16-6-201(1)(d) which provides, in pertinent part, "A judge of a court of record shall be disqualified to hear or try a case if: . . . [h]e is in any way interested or prejudiced with respect to the case, the parties, or counsel." Crim. P. 21(b)(1)(IV), also states that a motion for recusal may be filed when "[t]he judge is in any way interested or prejudiced with respect to the case, the parties, or counsel."

In *Sanders,* ¶ 31,, the Colorado Supreme Court provided some helpful examples of when recusal *may* be required, such as, "(1) a judge was being investigated for bribery by the same

district attorney's office that was prosecuting the defendant, *Rippo*, 580 U.S. at 285; (2) a state supreme court justice participated in the decision as to whether to uphold a postconviction court's order granting relief to a death row inmate, notwithstanding the fact that the justice had been the district attorney who had approved the decision to seek the death penalty in the first place, *Williams*, 579 U.S. at 4; and (3) a state supreme court of appeals judge who had voted with the majority to reverse a fifty million dollar judgment against a civil defendant had received over three million dollars in campaign contributions from that defendant's board chairman and principal officer while campaigning for the position on the supreme court of appeals to which he was ultimately elected, *Caperton*, 556 U.S. at 872–73." Those examples illustrate when recusal may be required – and the significant failure of Defendant to provide a sufficient basis in the instant case.

As the Colorado Supreme Court further explained in *Sanders*, "section 16-6-201(1)(d) and Crim. P. 21(b) require judicial disqualification when 'it could be reasonably inferred from the facts alleged in the motion [to recuse] and supporting affidavits that the judge has a bias or prejudice that will in all probability prevent him or her from dealing fairly with a party.'" *Id.*, ¶ 40 (*citing People v. Arledge*, 938 P.2d 160, 166–67 (Colo. 1997) and *People v. Dist. Ct.*, 898 P.2d 1058, 1061 (Colo. 1995) (stating that the test for the legal sufficiency of a motion to disqualify is whether the motion and supporting affidavits state facts from which it may reasonably be inferred that the judge has a bias or prejudice that will in all probability prevent the judge from dealing fairly with a party.").

It is important in the analysis of Defendant's motion and affidavits to consider the test defined by the *Sanders* decision, which "requires the moving party to show that the judge's interest is 'a direct, certain, and immediate interest, and not one which is indirect, contingent, incidental, or

remote.' *citing Watson v. People*, 394 P.2d 737, 738 (Colo. 1964) (quoting 30A Am. Jur. Judges § 101 (1958))." Defendant has failed to do so.

Defendant has failed to meet the legal standard provided in Section 16-6-201(1)(d), and Crim. P. 21(b), which require a judge's recusal when the circumstances establish an objectively reasonable probability that the judge will be unable to deal fairly with a party. Additionally, as required under C.J.C. 2.11(A), Defendant has failed to establish an appearance of partiality.

In evaluating Defendant's motion, it is important to note that courts must, in addition to the rights of a defendant, balance victims's rights and judicial economy in deciding motions and setting trial dates. With regards to Defendant's motion to continue, whether to grant a motion to continue a trial "is addressed to the sound discretion of the trial court, and [its] ruling will not be disturbed in the absence of an abuse of discretion." *People v. Alley*, 232 P.3d 272, 273 (Colo. App. 2010) (citing *People v. Hampton,* 758 P.2d 1344, 1353 (Colo. 1988)). Trial courts are provided "broad discretion" on matters of continuances, including difficulties associated with "assembling the 12 witnesses, lawyers, and jurors" for a new trial date if a continuance is granted. *People v. Ahueroddaydya,* 403 P.3d 171, 175 (Colo. 2017) (*quoting Morris v. Slappy,* 461 U.S. 1, 11 (1983)). "Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Id*.

Courts must consider the potential prejudice of a delay to the People, the age of the case, both in the judicial system and from the date of the offense, the timing of the request to continue, the impact of the continuance on the Court's docket and the position of the victims.

Courts are required to consider the "grave interests at stake in seeing further procrastination be avoided and that the trial be commenced without delay." *United States v. Bentvena*, 319 F.2d

916, 935 (2d Cir. 1963) (*cited in People v. Brown*, No. 06CA1751, 2011 WL 1195778 * 5 (Colo. App. Mar. 31, 2011)). Continuances may not be granted where they "would interfere with the prompt dispatch of business in the various courts, tend to prolong the trial of criminal cases, and unnecessarily add materially to the expense of proper operation of the court system." *Arellano v. People*, 484 P.2d 801, 803 (Colo. 1971) (holding the defendant did not carry his burden in showing continuance was necessary when weighed against the public interest).

Defendant's motion states, "Judge Bakke has demonstrated a substantial interest on her part in getting this case to trial as quickly as possible at the behest of the victims and the victim[s'] families." As noted above, weighing the impact to victims is *required* by the VRA, which mandates that victims and their families "be assured that in any criminal proceeding the court . . . will take appropriate action to achieve a swift and fair resolution of the proceedings." § 24-4.1-302.5(1)(o), C.R.S. In fact, the logical end of Defendant's argument is that any judge who verbalizes a desire to protect a victims' right to a resolution must recuse herself, which of course would significantly delay resolution in any and every case.

In setting a trial date and addressing scheduling matters, Chief Judge Bakke is exercising due care to balance the different interests – including the logistical hurdles in a trial with many victims, witnesses, and experts on both sides. Jury selection will be very involved. In fact, Defendant filed a motion for a jury questionnaire (D-43), a motion for a list of prospective jurors (D-45), motion for inclusion of an unconscious bias video for prospective jurors, motion for closed voir dire (D-52), and a motion for a joint statement of factual information to be read to the jury prior to voir dire (D-38). In a case of this nature, as reflected by Defendant's motions, it is expected that jury selection will be a lengthy and involved process. The Court's efforts to manage jury selection appropriately, and to include the parties in those decisions, is entirely appropriate.

As noted above, Defendant points to approximately nine (9) comments by the Court over the past three (3) years in support of their motion. Most of those statements were after a trial date was set by the parties. It is illogical for Defendant to point to Chief Judge Bakke's statements on September 7, 2021, as evidence that she, as the motion states, "… has been pushing to move the case along." Those statements were made nearly three (3) years ago.

Defendant references several, recent instances of purported bias. In the May 3, 2024, email cited by Defendant, Chief Judge Bakke stated, "With the understanding I have not made any decisions on any pending issues before the Court …" and then went on to address logistical matters that would be before the Court on May 7, 2024. In the motion and affidavits, Defendant neglects to mention that the Court actually granted, in part, Defendant's motion to continue. Throughout the subsequent emails from the Court, there has been a continuing effort to keep both sides informed and to invite input in the timing and logistics for jury selection. This approach should be the gold standard and not the basis for recusal. The alternatives to these emails would be more court hearings, less input from the attorneys, or less preparation for a trial of significant magnitude and corresponding logistical demands.

It is noteworthy that the accompanying affidavits include, but fail to address, this portion of the Court's comments on May 7, 2024 in granting, in part, Defendant's motion to continue: "I have to weigh Mr. Alissa's rights, his right to effective counsel ... so you need to trust me. I'm trying to get this decision right. I'm going to grant the continuance." Judge Bakke went on to add, "the other thing I feel that I need to speak to is counsel for Mr. Alissa ... if I thought they were purposefully delaying, if they were doing anything that was unprofessional, that was impacting this case, I would not tolerate it. I do not believe that they are doing that. I do believe that they are doing what they have to do for their client. I just want to put it out there." The Court's

comments were noteworthy at the time, as is Defendant's failure now to address those comments in their motion for recusal. Those comments demonstrate a lack of bias and, also, the appearance of impartiality expected and required of all judges.

Of course, judges can and likely do feel compassion for victims, witnesses, and defendants, and yet they perform their functions professionally, in a fair and unbiased manner. Under the law, trial judges should sit on the cases assigned to them, and recuse themselves only where required, to prevent litigants from misusing disqualification motions as a means of judge-shopping. *See Marriage of Mann*, 655 P.2d 814, 818 (Colo. 1982). Here, Defendant has failed to provide a sufficient basis for recusal. The record stands for itself. Over the past three (3) years, Chief Judge Bakke has granted requests and motions by Defendant and carefully balanced Defendant's rights, the rights of victims, as well as the need for this case to be resolved. None of the allegations asserted in Defendant's motion are supported by the record.

WHEREFORE, the People respectfully request this Court deny Defendant's Motion for Recusal.

Respectfully submitted,

MICHAEL T. DOUGHERTY
DISTRICT ATTORNEY

By:
s/Michael T. Dougherty
Michael T. Dougherty
July 26, 2024

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing served via the Colorado e-filing system/hand-delivered on July 26, 2024, and addressed as follows:

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