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SUPERIOR COURT
OF GUAM

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CLERK OF COURT

BY: 

IN THE SUPERIOR COURT OF GUAM

PEOPLE OF GUAM,

vs.

NICHOLAS WAYNE MOORE,

Defendant.

CRIMINAL CASE NO. CF0313-21

DECISION AND ORDER

INTRODUCTION

This matter is before the Honorable Vernon P. Perez for the limited purpose of addressing Defendant Nicholas Wayne Moore's ("Defendant") *Motion in Limine* to Recuse and Statement of Objection Pursuant to 7 GCA § 6107 ("Motion to Recuse"), filed October 31, 2023.

BACKGROUND

Defendant is charged with (1) two counts of Aggravated Assault (As a Second Degree Felony) with attached Special Allegation: Deadly Weapon Used in the Commission of a Felony; (2) one count of Terrorizing (As a Third Degree Felony) with attached Special Allegation: Deadly Weapon Used in the Commission of a Felony; and (3) one count of Possession of an Unregistered Firearm (As a Third Degree Felony). (Am. Superseding Indictment, Jun. 13, 2022). This matter was assigned to Judge Alberto E. Tolentino ("Judge Tolentino") on October 19, 2021. *See* Order Terminating Judge Pro Tempore Appointment, Oct. 19, 2021. The matter proceeded to trial on the Amended Superseding Indictment June 15, 2022, and continued throughout the fall of 2022. On November 9, 2022, the court adjourned trial until January 10, 2023, to allow trial jurors an opportunity to travel over the holidays. Judge Tolentino was unable to resume trial on January

1 10, 2023, due to medical issues that developed throughout the holiday break. On January 9, 2023,
2 Defendant filed an Ex Parte Motion for a Mistrial. On January 10, 2023, the parties appeared
3 before Judge Arthur R. Barcinas who presided over the matter in a case management role to
4 address housekeeping issues. On January 23, 2023, Judge Barcinas granted Defendant's Motion
5 for a Mistrial. The matter was subsequently presided over by Judge Maria T. Cenzone and Judge
6 John C. Terlaje until Judge Tolentino's return to the bench on May 15, 2023.¹ See Notice of
7 Judge Assignment, Jan. 23, 2023 (Judge Cenzone assigned); Notice of Judge Assignment, Mar. 9,
8 2023 (Judge Tolentino re-assigned); Amended Criminal Trial Scheduling Order, Mar. 13, 2023
9 (signed by Judge Terlaje for Judge Tolentino).

10 On May 15, 2023, Jury Selection and Trial commenced for the second time before Judge
11 Tolentino. After four days of jury selection, Defendant filed a Motion for Mistrial. In light of
12 the Motion, the fifth day of jury selection was cancelled.

13 On June 2, 2023, Defendant filed an Ex Parte Motion for Release with Conditions. On
14 June 5, 2023, the parties appeared before Judge Tolentino for a Motion Hearing. At the hearing,
15 counsel for Defendant indicated they needed time to prepare to defend more serious charges at
16 trial in another matter before another judge and requested that the instant matter be placed on hold
17 pending the other case. (Minute Entry, Jun. 5, 2023). Defendant was released back on electronic
18 monitoring the following day. (Release from Confinement, Jun. 5, 2023).

19 On August 8, 2023, the parties returned to court for Further Proceedings. At the hearing
20 it was noted that the instant matter would proceed to trial after Defendant's trial in another matter
21 before another judge and that there was a motion pending. (Minute Entry, Aug. 8, 2023). Further
22 Proceedings were set for November 14, 2023.

23 On October 3, 2023, Defendant filed a Reassertion of Speedy Trial.
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25

26 ¹ Judge Elyze M. Iriarte also briefly presided over this matter after Defendant's re-assertion of speedy trial on May
27 5, 2023. See Notice, May 5, 2023; Minute Entry, May 8, 2023. The matter did not proceed to trial before Judge
28 Iriarte, however, in light of the Government's withdrawal of its waiver of Judge Iriarte's conflict of interest after the
Pre-Trial Conference on May 8, 2023.

1 On October 12, 2023, the court issued a notice scheduling Jury Selection and Trial for
2 October 16, 2023. (Notice of Hearing, Oct. 12, 2023).

3 On Friday, October 13, 2023, the Government, by and through Assistant Attorney General
4 Grant Olan, filed an Ex Parte Motion to Continue Jury Selection and Trial, requesting to continue
5 jury selection and trial until after October 26, 2023. The Government indicated that Defense
6 counsel did not object to a short continuance.

7 On Monday, October 16, 2023, Jury Selection and Trial commenced for the third time.
8 A jury of twelve and four alternates was empaneled the following day.

9 On October 17, 2023, Defendant filed a Motion in Limine for Mistrial Resulting from
10 Violations Banning Media Recording and Public Access, and Failure to Maintain Sufficient
11 Room and Seating and Public Trial. Judge Tolentino denied the Motion from the bench the same
12 day.

13 On October 26, 2023, the parties returned to court for a Pre-Trial Conference. Several
14 things were discussed at the hearing, including Defendant's request for a mistrial; Defendant's
15 indication that a motion to disqualify the prosecutor may be forthcoming; and the Government's
16 indication that it may be filing a motion regarding an unavailable witness. (Minute Entry, Oct.
17 26, 2023). Opening Statements were scheduled to begin on October 30, 2023 at 9:00 a.m. *Id.*

18 On October 31, 2023, Defendant filed the instant Motion, moving for Judge Tolentino's
19 recusal in this matter. Defendant moves for Judge Tolentino's recusal pursuant to 7 G.C.A. §
20 6105(a) because his "admissions regarding delaying trial until a prosecutor was available, itself,
21 is sufficient evidence of bias and an appearance of partiality." (Mot. Recuse at 4, Oct. 31, 2023).

22 On November 7, 2023, Judge Tolentino filed his Answer to Statement of Objection,
23 denying that his recusal is appropriate in this matter. Judge Tolentino denies "the existence of
24 bias for the Government and/or even the existence of an appearance of partiality as alleged by
25 Defendant." (Answer at ¶ 5, Nov. 7, 2023).

26 On November 17, 2023, pursuant to 7 G.C.A. § 6107, the question of whether Judge
27 Tolentino should be disqualified from continuing to preside over this matter came before this
28 recusal court. *See* Notice of Assignment of Recusal Judge, Nov. 17, 2023.

DISCUSSION

Title 7 G.C.A. section 6105 sets forth the substantive grounds under which a judge must be disqualified. Where a judge fails to disqualify him or herself, any party to that proceeding may move to disqualify the judge pursuant to 7 G.C.A. § 6107.

Under section 6105(a), “[a]ny judge shall disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned.” 7 G.C.A. § 6105(a). “[W]hat matters is the appearance of bias, not actual bias.” *People v. Camaddu*, 2015 Guam 2 ¶ 74 (citing *Van Dox v. Superior Court*, 2008 Guam 7 ¶ 32) (internal quotation marks omitted). “The appearance of bias is judged from the standard of a ‘reasonable person’ who knows all the facts, and understands the ‘contexts of jurisdictions, parties, and controversies involved.’” *Id.* “Section 6105 is taken from the federal disqualification statute, 28 U.S.C.A. § 455, and the Guam Supreme Court has held that the federal courts’ interpretation of the federal statute is instructive for the purpose of interpreting 7 GCA 6105.” *People v. Tennesen*, 2010 Guam 12 ¶ 25 (citing *Ada v. Gutierrez*, 2000 Guam 22 ¶ 12 n.2). “Section 455(a) asks whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits. The reasonable person in this context means a well-informed, thoughtful observer, as opposed to a hypersensitive or unduly suspicious person.” *Clemens v. U.S. Dist. Ct. for Cent. Dist. of California*, 428 F.3d 1175, 1178 (9th Cir. 2005) (internal citations and quotation marks omitted). The “Supreme Court of Guam, interpreting the disqualification statute, has ... stated that disqualifying bias must normally stem from extrajudicial sources.” *Tennesen*, 2010 Guam 12 ¶ 32 (citing *Van Dox*, 2008 Guam 7 ¶ 35). “[A] case generally must involve apparent bias deriving from an extrajudicial source, meaning something above and beyond judicial rulings or opinions formed in presiding over the case.” *United States v. Bergrin*, 682 F.3d 261, 282 (3d Cir. 2012) (citing *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

Under section 6105(b)(1), “[a] judge shall also disqualify himself or herself . . . where he or she has personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.” 7 G.C.A. § 6105(b)(1). “[B]ias sufficient to justify recusal must be a personal one and not one arising from the judge’s view of the law. Impressions

1 based on information gained in the proceedings are not grounds for disqualification in the absence
2 of pervasive bias.” *In re M. Ibrahim Khan, P.S.C.*, 751 F.2d 162, 164 (6th Cir. 1984) (internal
3 quotation marks and citations omitted).

4 Defendant objects to Judge Tolentino continuing to preside over this matter because of
5 how the third Jury Selection and Trial proceeded in this matter. *See generally*, Mot. Recuse.
6 Defendant argues that there is evidence of bias and an appearance of partiality because Judge
7 Tolentino denied the parties’ stipulated request to continue trial; Judge Tolentino proceeded to
8 commence selection with only two of Defendant’s three legal counsels due to his concerns with
9 Defendant’s speedy trial rights; and Judge Tolentino subsequently delayed the start of evidence
10 until a prosecutor was available over Defendant’s objection. *Id.* Defendant sets forth that:

11 In fact, the Court not only granted the prosecutor its requested delay, but without
12 explanation failed to set trial until after a status hearing on October 26, 2023, the
13 first date prosecutor Sean Brown returned to the Office of the Attorney General.
14 During that hearing, the Court set trial for the following Monday, October 30, 2023.
15 The Court has not provided a reason for the two week delay. When the Court
16 rejected the parties’ stipulation to continue, the Defendant made abundantly clear
17 we were ready for trial the next day. Attorney Lujan returned that night and we
18 asked to begin trial Wednesday.

19 * * *

20 The prosecution was not involved in another criminal trial at any time during these
21 proceedings. Additionally, the prosecutor asking for the continuance was doing so
22 because he had a planned vacation and not because he was in an ongoing trial.
23 Finally, the current prosecutor was also not in a criminal trial because he had not
24 even returned to the Attorney General’s Office until October 26, 2023. There was
25 no representation to the Court by the prosecution that it needed the two week
26 continuance granted by the Court, *sua sponte* because of other ongoing criminal
27 trials. The Court did not indicate during jury selection nor today that it needed to
28 delay the commencement of trial by two weeks because of an ongoing criminal
matter involving Judge Tolentino.

Mot. Recuse at 2; 10.

In his Answer, Judge Tolentino explains:

That I decided to avoid further delay and thus proceed with jury selection with
Defendant’s two other experienced and competent trial lawyers, Michael F.

1 Phillips, Esq., and William L. Gavras, Esq., and who were able to and did
2 effectively participate in jury selection;

3 That I was also aware that the prosecutor assigned to handle the trial, Attorney Sean
4 Brown, was not going to be available until October 26, 2023, the date he would be
re-employed by the Attorney General's office;

5 That once the jury was empaneled and the Defendant's speedy trial rights secured
6 the undersigned deemed it was reasonable and proper to delay the start of the trial
7 on October 26, 2023, for Attorney Brown to prosecute the case and that if anything
the delay allowed defense counsel more time to prepare;

8 That none of my actions undertaken in this case were demonstrative of a bias for
9 the Government nor indicative of prejudice against the Defendant.

10 (Answer at ¶¶ 16-19).

11 "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality
12 motion. . . . Almost invariably, they are proper grounds for appeal, not recusal." *Liteky*, 510 U.S.
13 at 555. Judge Tolentino indicates that he "was uncertain how much time remained on the speedy
14 trial clock after multiple assertions and waivers by Defendant over the course of this case" and
15 that after Defendant's reassertion on October 3, 2023, he "undertook to identify an opening in
16 [the court's] calendar and to re-arrange its docket to allow jury selection and trial on the matter
17 . . . for October 16, 2023 at 9:00 a.m." (Answer at ¶¶ 11-12). The Court's review of the record
18 indicates a significant number of written assertions and waivers of speedy trial by Defendant. *See*
19 *Assertion of Speedy Trial*, Apr. 26, 2022; *Waiver of Speedy Trial*, Jun. 21, 2022; *Waiver of*
20 *Speedy Trial*, Jan. 23, 2023; *Assertion of Speedy Trial*, Mar. 28, 2023; *Limited Waiver of Speedy*
21 *Trial*, Mar. 31, 2023; *Waiver of Speedy Trial*, Apr. 13, 2023; *Assertion of Speedy Trial*, May 5,
22 2023; *Waiver of Speedy Trial*, Jun. 5, 2023; *Reassertion of Speedy Trial*, Oct. 3, 2023. The Court
23 further notes that Judge Tolentino began the October 26, 2023 Pre-Trial Conference by stating
24 that:

25 First off, we have selected a jury all primed up and ready to go as a result of the
26 assertion of speedy trial on behalf of Mr. Moore, and the court wanted to make sure
27 that, that we had a jury already selected so that we can preserve his right to a speedy
28 trial. The second thing was the court, we were waiting for you to come back, Mr.
Brown, because Mr. Olan is currently off island and that it had been represented

1 that you would be ready to go for trial once you got back into the office, which was
2 supposed to be today.

3 (Pre-Trial Conference Tr. at 3: 18-15 – 4: 1-5, Oct. 26, 2023).

4 Upon review, the Court does not find that Judge Tolentino's decision to grant the
5 Government's request for a continuance to "reveal such a high degree of favoritism or antagonism
6 as to make fair judgment impossible." *Liteky*, 510 U.S. at 555. "Bias cannot be inferred from a
7 mere pattern of rulings by a judicial officer, but requires evidence that the officer had it 'in' for
8 the party for reasons unrelated to the officer's view of the law, erroneous as that view might be."
9 *McLaughlin v. Union Oil Co. of California*, 869 F.2d 1039, 1047 (7th Cir. 1989) (citations
10 omitted). "Normally the judge's rulings at trial do not constitute grounds for recusal because they
11 can be corrected by reversal on appeal." *Johnson v. Trueblood*, 629 F.2d 287, 291 (3d Cir. 1980).
12 At this time, the Court does not find that there is any appearance of bias or partiality nor is there
13 any actual bias or partiality in Judge Tolentino's decision to continue trial under 7 G.C.A. §
14 6105(a) and § 6105(b)(1). The Court therefore DENIES Defendant's Motion in Limine to Recuse
15 Judge Tolentino.

16 CONCLUSION

17 For the foregoing reasons, the Court hereby DENIES Defendant's Motion in Limine to
18 Recuse. The Court returns this matter to Judge Tolentino for further disposition.

19 IT IS SO ORDERED this 21st day of November, 2023.



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22 HONORABLE VERNON P. PEREZ
23 Judge, Superior Court of Guam
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