

<p>DISTRICT COURT, CHAFFEE COUNTY, COLORADO</p> <p>Court Address: 142 Crestone Ave. Salida, CO 81201</p> <p>Court Phone: (719) 539-2561</p>	<p>DATE FILED: December 13, 2021 3:13 PM</p>
<p>THE PEOPLE OF THE STATE OF COLORADO,</p> <p>v.</p> <p>BARRY LEE MORPHEW, Defendant.</p>	<p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 21CR78</p>
<p>Iris Eytan, #29505 Dru Nielsen, #28775 Eytan Nielsen LLC 3200 Cherry Creek South Drive, Suite 720 Denver, CO 80209 Telephone: (720) 440-8155 Facsimile: (720) 440-8156 Email: iris@eytan-nielsen.com dru@eytan-nielsen.com</p> <p><i>ATTORNEYS FOR DEFENDANT BARRY LEE MORPHEW</i></p>	<p>Courtroom/Division: 2</p>
<p align="center"><b>MOTION FOR DISQUALIFICATION OF JUDGE MURPHY [D - 55]</b></p>	

Mr. Barry Morphey, by and through undersigned counsel, pursuant to Section 16-6-201, C.R.S., Colo. Crim. P. Rule 21, the Colorado Constitution, and the U.S. Constitution, hereby requests an order disqualifying Judge Patrick Murphy from any further participation in this case.

The factual support for this Motion is provided in this Motion and in the accompanying Affidavits, all of which this Court must accept as true.<sup>1</sup>

This motion is based on this Court's disclosure of a very substantial personal conflict with Sean McDermott, a partner in the law firm that represents Shoshona Darke. Because that law firm will be appearing in court in this case, representing Ms. Darke as a witness which can include interposing objections, it appears that the same conflict exists in this case.

### **STANDARD**

Colorado law and Supreme Court Rules dictate that this Court has **no discretion to deny this Motion**. "If the verified motion and supporting affidavits state facts showing grounds for disqualification, the judge **must** enter an order disqualifying himself." § 16-6-201 (3), C.R.S. (emphasis added); Crim. P. 21(b)(3). It is not a debatable motion.

This Court must accept the facts alleged as true and may not pass on their truth or falsity.<sup>2</sup>

### **CONFERRAL STATEMENT**

Because this Motion is not discretionary and depends upon the facts set forth in the Motion and accompanying affidavits, conferral was not attempted. The prosecution has no standing to dispute the facts set forth, and this Court is without power to do so.

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<sup>1</sup> All attachments and exhibits to this motion or any of the Supporting Affidavits, including the Affidavits themselves, are incorporated by reference into this motion and each other. It is Mr. Morphew's intention that this motion and its attachments and exhibits, by any label, are intended to be the supporting Affidavits referred to in § 16-6-201 (3) and the Crim. P. 21(b)(1).

<sup>2</sup> See numerous cases cited in the Legal Authority Section, below, including e.g. *Carr v. Barnes*, 580 P.2d 803 (Colo.1978)("The judge may not pass upon the truth or falsity of statements in the motion and supporting affidavits. ... For purposes of determining legal sufficiency, the motion and affidavits must be considered at face value; i.e., the facts set out must be accepted as true.").

## FACTS

1. This Motion is based upon a recent conversation Defense Counsel Iris Eytan had with Martin Stuart, Ms. Darke's attorney.<sup>3</sup> He advised Ms. Eytan that, on October 13, 2021, this Court found that it has a bias or prejudice with respect to the law firm of McDermott, Stuart, & Ward, LLP ("MSW"), which represents Shoshona Darke, and that said bias or prejudice is so strong as to require this Court to recuse itself from the legal case involving Shoshona Darke, *People v. Shoshona Darke*, Chaffee County No. 2021 M 351. In that case, Ms. Darke is accused of trespassing when she allegedly went to the front porch of Mr. Morphew's previous home, and one of Mr. Morphew's neighbors to retrieve a package that UPS or FedEx had misdelivered to the wrong address.

2. Apparently, this Court's declaration was made in the presence of MSW associate Joshua Nowak, who conveyed this Court's statements and actions to Martin Stuart, who has now related these events to undersigned counsel.<sup>4</sup> See Exhibit A, Affidavit from Mr. Nowak, and Exhibit B, Affidavit from Mr. Stuart submitted in support of this Motion. Due to the conflict, at the October 13, 2021 hearing Ms. Darke's case was re-assigned from District Court Judge Murphy to County Court Judge Bull. See Exhibit D.

3. Undersigned counsel's investigation confirms this Court's statements about a substantial conflict with the law firm representing Ms. Darke. This Court has a very close, long-standing personal relationship with Sean McDermott that rises to "interest" or "prejudice" with

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<sup>3</sup> Counsel is taking steps to obtain the transcript of the October 13, 2021 hearing in Ms. Darke's case. It does not appear that a written order was entered. The minute order does not include the description of the conflict this Court stated on the record. See Exhibit A, Affidavit of Joshua Nowak, who appeared in court for the firm of McDermott, Stuart and Ward on behalf of Ms. Darke.

<sup>4</sup> Even though Deputy District Attorneys Aaron Pembleton and Joanne Morando are listed as counsel on both cases, the prosecution didn't bring this matter to the attention of undersigned counsel.

respect to this case and decisions that may arise with respect to Shoshona Darke. This relationship extends to other members of the families of both Sean McDermott and this Court.

4. MSW was retained to represent Ms. Darke in May 2021 when the 11<sup>th</sup> Judicial District DA's office issued a search warrant to search her home. *See* Exhibit B.

5. Because of this Court's on-the-record statements describing the conflict and the facts of the conflict that are known to this Court, there would be a very substantial appearance of impropriety if this Court continued to preside over Mr. Morphew's case. Ms. Darke will continue to be represented by McDermott, Stuart, and Ward before this Court, particularly when she testifies as a witness at any pertinent pre-trial hearings or trial. *See* Exhibit B. The prosecution has made Ms. Darke a central figure in Mr. Morphew's case, including but not limited to:

- In February 2021, this Court also signed a pen register trap and trace on Ms. Darke's phone, and issued search warrants for Ms. Darke's WhatsApp, Instagram, Facebook, Apple ID, ATT records and Microsoft accounts in. *See* 21SW11-17 filed with this Court.
- On May 6, 2021, this Court (Judge ) signed a search warrant for Mr. Morphew's Ford 2020 F350. The contents of this Affidavit for Search Warrant were duplicated in numerous other search warrants that were authorized by this Court, and there are numerous references to Shoshona Darke and her role in the prosecution's theory of the case. This Court signed and attested its belief that the allegations in the Affidavit established probable cause and also attested to the Officer's signature. *See* 21SW40 filed with this Court.
- Ms. Darke is also highlighted in the Arrest Affidavit for Mr. Morphew that was signed on May 5, 2021 by this Court, and made public on September 20, 2021. There is a description of her alleged relationship to Mr. Morphew, photographs

of her, what appears to be a driver's license photo of Ms. Darke, and a description of the collection of surveillance obtained from a pole camera placed on her property. *See* May 5, 2021, Affidavit for a Warrant for the Arrest of Barry Morphew, filed with this Court, pages 122-125.

- On May 24, 2021, this Court signed a search warrant permitting broad search powers on Ms. Darke's house, that included the collection of her taxes, cell phone, financial records, and personal cards and letters. Subsequent to the search, Ms. Darke was represented by MSW in connection with the execution of that warrant and depending on what evidence the prosecution seeks to introduce at motions or trial, Ms. Darke may well be involved in court, with her attorney, during challenges to the validity of the various search warrants granted to seize and search her home, belongings and personal records. In other words, this Court cannot rule out the very real possibility of having to rule on multiple matters related to Ms. Darke and in those matters, she will be represented by Sean McDermott's law firm.
- In its Motion to Modify Bond Conditions, the prosecution requested that this Court order Mr. Morphew to move to the address where Ms. Darke lives.<sup>5</sup> The prosecution did not disclose her name or the fact she resided at that residence, but as the prosecution knows and Mr. Morphew stated in his opposition, that is her known address and it continues to be clear that the prosecution is trying to establish a motive in this case through the appearance of a close relationship between Ms. Darke and Mr. Morphew.

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<sup>5</sup> See "People's Motion to Modify Bond Conditions P-24 (filed 9/21/2021), p. 2, para. 4.

- On October 29, 2021, the prosecution filed a witness list including Ms. Darke as a prosecution witness.<sup>6</sup>
- In one discovery dump alone, the prosecution listed at least 362 rows of documents identifying items related to Ms. Darke.
- There is no question but that, when the prosecution calls Ms. Darke to testify at trial, she will be accompanied by her attorney in the courtroom. This Court will have to give her a full Fifth Amendment advisement and she will be entitled to consult her MSW attorney regarding each pertinent question.<sup>7</sup>
- Typically, in such circumstances when a key prosecution witness is represented by counsel and has a separate case pending, there is a likelihood of other issues arising. These can range from issues regarding witness immunity, scope of testimony, assertions of constitutional rights while testifying, and a wide range of other legal topics. Every such issue that arises in this case will bring this Court's actual conflict with Sean McDermott and his law firm – and the appearance of the same – to the fore. And, here as the Court may be aware Ms. Darke's case involves Mr. Morphew, Mr. Morphew was certainly a topic of Commander Walker's interrogation of Ms. Darke after she was arrested. *See* Exhibit B. The media regarding Ms. Darke's arrest highlights her alleged relationship with Mr. Morphew and to Mr. Morphew's case. *See* Exhibit C, Affidavit of Iris Eytan.

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<sup>6</sup> See District Attorney's "Notice of Endorsement of Witness" (filed 10/29/2021) Both the document and the pages are unnumbered. This reference is to the PDF page number.

<sup>7</sup> *See People In Interest of K.S-E.*, 2021 COA 93, 497 P.3d 46 (Colo. App. 2021) (The availability of the privilege turns on the nature of a particular question and the exposure that it invites, therefore, determination of a witness's Fifth Amendment rights are on a question-by-question basis during the proceeding.).

## LEGAL AUTHORITY

The statute and rule prescribe a very specific procedure this Court must use to determine this motion. This Court “must evaluate the sufficiency of the motion and affidavits, accepting the facts stated therein as true.” *People v. Roehrs*, 2019 COA 31, ¶ 12, 440 P.3d 1231, 1235:

- § 16-6-201 (3), C.R.S. “If the verified motion and supporting affidavits state facts showing grounds for disqualification, the judge **must** enter an order disqualifying himself.
- Crim. P. 21(b)(3): “If the motion and supporting affidavits state facts showing grounds for disqualification, the judge **shall immediately** enter an order disqualifying himself or herself.”

These requirements are not discretionary. They are mandatory. *See Carr v. Barnes*, 580 P.2d 803 (Colo.1978)(“The judge may not pass upon the truth or falsity of statements in the motion and supporting affidavits. ... For purposes of determining legal sufficiency, the motion and affidavits must be considered at face value; i. e., the facts set out must be accepted as true.”); *People v. District Court (Third District)*, 192 Colo. 503, 510, 560 P.2d 828, 833 (Colo. 1977);<sup>8</sup> *Brewster v. District Court (Seventh District)*, 811 P.2d 812, 814 (Colo. 1991); *See S.S. v. Wakefield*, 764 P.2d 70, 73 (Colo. 1988). “The trial judge has no discretion in the matter of recusing himself upon finding the affidavits sufficient under the rule to allege prejudice. He immediately loses all jurisdiction in the matter except to grant the change.” *People v. District Court (Third District)*, *supra*. “Denials or explanations by the judge” were not to be considered. *Estep v. Hardeman*, 705 P.2d 523, 526 (Colo. 1985).

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<sup>8</sup> The Court hearkened back to the 1915 case of *People ex rel. Burke v. District Court*, 60 Colo. 1, 8—9, 152 P. 149, 152 (1915): “The change of judge is conditioned, not upon the actual fact of his prejudice, but upon the imputation of it. The facts set forth in the recusation must, for the purposes of the motion, be accepted as true, notwithstanding they may be known to the judge and all mankind to be false. The whole matter is left with the conscience of the petitioner and affiants, and when affidavits fulfilling the requirements . . . are presented, the change must be made, and the truth of the matter is not open to question.”

“The court must examine both the actuality and the appearance of fairness in light of the facts alleged.” *Roehrs*, ¶ 12, 440 P.3d at 1235. *Accord, Estep v. Hardeman*, 705 P.2d 523, 526 (Colo. 1985) (either actual prejudice or its mere appearance suffice). A motion is legally sufficient when it states “facts from which it may reasonably be inferred that the judge has a bias or prejudice that will prevent him from dealing fairly with the defendant.” *Ibid*, quoting *People v. Botham*, 629 P.2d 589, 595 (Colo. 1981).<sup>9</sup>

“We start with the precept, basic to our system of justice, that a judge must be free of all taint of bias and partiality.” *People v. Julien*, 47 P.3d 1194, 1197 (Colo. 2002); *People v. Mentzer*, 2020 COA 91, ¶ 5, 487 P.3d 1236, 1238. “Even if the judge is entirely convinced of her own impartiality, she [or he] must take care not to allow the justice system to be impugned by an appearance of partiality.” *Roehrs*, 2019 COA 31, ¶¶ 8-11 *People v. Roehrs*, 2019 COA 31, ¶ 12, 440 P.3d at 1235, citing *Botham*, 629 P.2d at 595. “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.’ ” *Ibid*, quoting *Smith v. Beckman*, 683 P.2d 1214, 1216 (Colo. App. 1984)

Section 16-6-201(1)(d), C.R.S. 2019, and Crim. P. 21(b)(1)(IV) provide that a judge shall be disqualified when he or she is “in any way interested or prejudiced with respect to the case, the parties, or counsel.” Canon 2 of the Colorado Code of Judicial Conduct, which applies “regardless of whether a motion to disqualify is filed,”<sup>10</sup> states that “[a] judge shall perform the duties of judicial office impartially, competently, and diligently.” Applying that canon to disqualification, Rule 2.11(A) states as follows:

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<sup>9</sup> The *Botham* Court also reached an “other act evidence” issue that is not pertinent here. In 1991, the Supreme Court observed that *Botham*’s evidentiary ruling had been superseded by the adoption of the Rules of Evidence. See *People v. Garner*, 806 P.2d 366 (Colo. 1991).

<sup>10</sup> Commentary, note [2].

(A) A judge shall disqualify himself or 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 personal knowledge\* of facts that are in dispute in the proceeding.

Commentary [1] to the Canon states: “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 (5) apply.”

Under the code, “impartiality” means the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.” *Roehrs*, ¶ 10 n.4 (quoting C.J.C., Terminology).

Judge Murphy’s prior ruling in Ms. Darke’s case, his disclosure of his conflict, and the facts set forth in this Motion and the accompanying affidavits compel his disqualification in this case because his “impartiality might reasonably be questioned.” *People v. Gallegos*, 251 P.3d 1056, 1063 (Colo.2011). Even if Judge Murphy could act impartially notwithstanding his prior disqualification from Darke’s case and the reasons therefore, he is still disqualified because a reasonable observer might have doubts about his impartiality.

If this Court denies the Motion, it would violate Mr. Morphew’s right to due process and a fair trial, U.S. Const., amend. XIV; Colo. Const., art. II, §§16, 25, as well as his rights under the statutes, rules, and Canons *cited supra*.



**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of December, 2021, a true and correct copy of the foregoing **MOTION FOR DISQUALIFICATION OF JUDGE PATRICK MURPHY [D-55]** as well as its supporting affidavits and all attachments and exhibits which are incorporated by reference were served via CCE as follows:

11<sup>th</sup> Judicial District Attorney's Office  
101 Crestone Ave.  
Salida, CO 81201

*s/ Tonya Holliday* \_\_\_\_\_  
Tonya Holliday