IN THE SUPERIOR COURT

OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, vs. JIN XIONC, Defendant.	CRIMINAL CASE NO. 01-0028T **ORDER DENYING RECUSAL**

BACKGROUND

THIS MATTER came before the Court on December 20, 2001 at 9:00 a.m. in courtroom 223 A for a change of plea. Assistant Attorney General Aaron Romano, Esq., appeared on behalf of the Government. Public Defender Douglas Hartig, Esq., appeared on behalf of Defendant JIN XIONG. During the proceeding the Court refused to accept, for the second time, the proposed plea agreement reached between the Commonwealth and the Defendant.

In refusing to accept the plea agreement, the Court stated, "The court, reviewed the facts of this case and feels it is a real egregious crime because it was committed on a tourist. Crimes committed on [the] tourist industry will be dealt with severely by this court . . .". (Tr. p.3 at l-2) The Court went on to state that, "the Court would not want this person staying in the CNMI." (Tr. p.3 at 5-6) .

In apparent response to the Court's rejection, and without any objective signs of communication with the Defendant, the Public Defender orally moved for this Court's recusal pursuant to 1 CMC § 3808 (a).

In addition to the Defendant moving the Court, the Assistant Attorney General has taken the unusual action of joining in on the motion. A search of Commonwealth case law along with the case law of the 9th Circuit failed to reveal any case in which the prosecution moved the court for recusal based upon a claim of impartiality by the sitting *court against* the accused.

ISSUES PRESENTED FOR REVIEW

1. Whether this Court violated 1 CMC $3308 (a) by viewing the proposed plea agreement of a defendant who will later be prosecuted before the Court.
2. Whether this Court violated 1 CMC § 3308 (a) by the comments it made when not accepting a proposed plea agreemerit between the government and the public defender.

DISCUSSION

A. Recusal Standard

A Commonwealth of the Northern Mariana Islands Judge is not, and should not be, immune from questions about impartiality or other misconduct. The lack of such immunity is amply demonstrated by the mere existence of 1 CMC § 3308 and § 3309. However, a motion to recuse a judge is not just another procedural or evidentiary motion. It is a direct attack on one of the basic principles of the judiciary, the impartiality of trial courts. A recusal motion is unlike other motions in that the mere filing of the motion impacts unfavorably upon the public's perception of the administration of justice. Ramirez v. The State Bar of California, 28 Cal.3d 402,414 (1980).

Pursuant to 1 CMC 3308 (a), "A justice or judge of the Commonwealth shall disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned." The test for recusal is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." Saipan Lau Lau

Dev. Co. v. Superior Court, App. No. 97-1107 (N.M.I. Sup. Ct. Dec. 1, 1997) (Opinion at 8). *citing* Milgard Tempering, Inc. v. Selas Corn. of Am., 902 F.2d 703, 714 (9th Cir. 1990); see *also* Commonwealth v. Kainat, App. No. 95-0006 (N.M.I. Sup. Ct. Sept. 27, 1996) (Opinion at 4). Since the Commonwealth statute is fashioned after the federal disqualification statute found at 28 U.S.C. § 455 (a), the court may look to federal law for guidance when interpreting local statutory law. In re Magofna, 1 N.M.I. 454 (1990).

B. Viewing the Plea Agreement

The first issue to be decided is whether this Court violated 1 CMC § 3308 (a) by viewing the proposed plea agreement of a defendant who will later be prosecuted before the Court. In supporting the argument that the Court did violate 1 CMC § 3308 (a), the AGO states three times in its recusal brief that the Court viewed "privileged" information by reviewing the plea agreement (AGO Br. pp. l-2) The AGO concludes that the Court will no longer be impartial toward the *Defendant* since viewing the "privileged" information. The Court disagrees for two reasons.

First, it is well settled that a defendant waives his 5th Amendment right against self-incrimination, along with many other Constitutional guarantees when entering a guilty plea. Sieling v. Evman, 478 F.2d 211,213 (9th Cir. 1973) *citing* Kerchevel v. United States, 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed.1009 (1927); See ***also*** Bovkin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969); McCarthy v. U.S., 394 U.S. 459,466, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1961).

By agreeing to plead guilty in his plea agreement with the Commonwealth, even though he did not actually plead guilty, Defendant JIN XIONG waived any "privilege" that may have been afforded to him prior to the agreement. The AGO is quick to assert "privilege", yet fails to supply any case law supporting the such assertion. Without more, the argument that the plea agreement contained "privileged" information is without merit.

Second, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. See United States v. Grinnell Corn., 384 U.S. 563, 583, 86 S.Ct. 1689, 1710, 16 L.Ed.2d

778 (1966).

In addition,

> [O]pinions 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 the fair judgment impossible.

Liteky v. United States, 510 U.S. 540,553, 114 S.Ct. 1147, 1156, 127 L.Ed2d 474 (1994). See *also* United States v. Monaco, 852 F.2d 1143, 1147 (9th Cir. 1988), *cert denied, 488* U.S. 1040 (1989) (holding that a judge's impartiality *could nut* [emphasis added] be attacked on the basis of information and belief while acting in his or her judicial capacity).

Any knowledge that the Court has regarding the Defendant's proposed plea of guilty was learned through the prior judicial ruling of rejecting the plea agreement. This Court learned that the Defendant would plead guilty while acting in its judicial capacity because the plea agreement was brought before this Court. Accordingly, the fact that the Defendant decided to plead guilty in two different plea agreements before this Court does not serve as a basis to later challenge the impartiality of the Court since the Court viewed the plea agreements while acting within its "judicial capacity."

Further, allowing a Defendant to claim that a judge is impartial because the judge rejects a plea agreement would have a serious effect on the efficient administration of justice. It is clearly within the discretion of a judge to accept or reject a plea agreement. Commonwealth of the Northern Mariana Islands v. Ge Ai Ping, App. No. 97-053 (N.M.I. Sup. Ct. July. 26, 1999) (Opinion at 3). If a Defendant could move for recusal because the judge rejects the proposed plea agreement, the judiciary would come to a grinding halt because the logical extension is that the defendant could do the same thing to every judge and never have to stand trial.

Therefore, the claim of recusal based upon the viewing of the "privileged" information contained within the plea agreement is rejected.

C. The Tourist Comments

The essence of the Public Defender's motion is that the Court's comments regarding the

victim of the crime and the Defendant exhibit impartiality. In refusing to accept the plea agreement, the Court stated, "The court, reviewed the facts of this case and feels it is a real egregious crime because it was committed on a tourist. Crimes committed on [the] tourist industry will be dealt with severely by this court . . .". (Tr. p.3 at l-2) The Public Defender asserts that "This gives at least the appearance of some finding based upon extrajudicial facts as there does not appear to be anything in the record stating that the victim is a tourist." (PD Br. p. 3 at 18-20) The Public Defender concludes his statement by stating, "References as to facts which do not appear in the record would give a reasonable person aware of this circumstance to question the appearance of impartiality." (PD Br. p. 4 at l-3)

Here, the PD's assertion that nothing in the record states that the victim was a tourist is not entirely correct. The Declaration of Probable Cause filed in the case states as follows:

> That on January 09, 2000 around 2:00 p.m. Ms. Ho-Miao-Chia went to Tachogna Beach with two of her friends . . . At around 4:00 p.m. Ms. Ho-Miao-Chia and seven other individuals went on a boat called Big Boyz II . . . At the reef Mr. Jin Xiong acting as a *tour guide* [emphasis added] for Big Boyz II Company took Ms. Ho-Miao-Chia . . . snorkeling on the reef.

(Decl. Prb. Cs. p. 1 at ¶ 3)

Knowing that Ms. Ho-Miao-Chia and "seven" other individuals went on a local tour boat called "Big Boyz II" and that the Defendant was acting within the capacity of a "tour guide," it does not take a leap of logic to conclude that the victim was a tourist on a tour boat. However, assuming arguendo that the Court drew an impermissible inference, the PD's argument fails nonetheless.

It is no secret that the incident leading to the arrest of the Defendant was publicized in the paper and on the television. Assuming that the Court learned that the victim was a tourist from the news accounts, then the knowledge may have come from an extrajudicial source. The Supreme Court has articulated the following rule:

> [J]udicial remarks . . . that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do

> so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Liteky v. United States, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994).

Despite Petitioners' selective quotation and creative emphasis of elements of the quoted portion of the December 20 hearing, they have provided no evidence that this Court is incapable of rendering a fair judgment. The quoted portion of the transcript, when viewed in its entirety, indicates only that this Court is considering the impact of the plea agreement on the relevant interests. *See* United States v. Mack, 655 F.2d 843, 847 (8" Cir. 1981) (judges must independently assess "relevant factors" that include the rights of defendants and the interests of justice) They do not indicate that the Court is incapable of rendering fair judgment.

Further, Pursuant to 1 CMC 3308 (a), and the relevant case law, a justice or judge is only under a duty to disqualify himself or herself in any proceeding in which his or her impartiality might ***reasonably*** [emphasis added] be questioned. In determining what is "reasonable" for purposes of this analysis, "we cannot neglect to take into account the geographical location and the population of the Commonwealth. The size of a jurisdiction is clearly relevant to the issue because what might be reasonable on the island of Manhattan may not be reasonable on the island of Saipan and vice versa." Boria v. Tenorio, Civ. No. 97-1124A (N.M.I. Super. Ct. Nov. 26, 1997) (Order denying recusal).

A judge would not be very effective or efficient in a community the size of Saipan if the judge was bound to recuse himself or herself from cases that were covered in the newspaper and on television. If this were the appropriate standard for determining when recusal was necessary, either very few cases could be heard by a Commonwealth Judge, or Commonwealth Judges would be rendered hermits or cave dwellers upon their appointment. A trial judge "cannot, and should not, erase from his mind all knowledge of the case before trial begins. Sealv, Inc. v. Easy Living Inc., 743 F.2d 1378, 1383 (9th Cir. 1984).

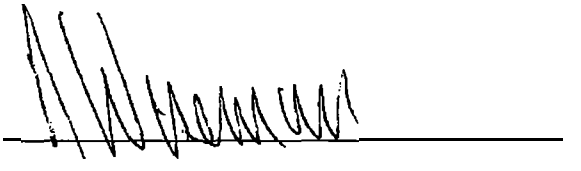
A judge is presumed to be impartial, and Petitioners bear the substantiaf burden of proving otherwise. First Interstate Bank of Arizona, N.A. v. Murphy, Weir & Butler, 210 F.3d

983,985 (9th Cir. 2000); Hirsh v. Justices of Sunreme Court of State of Cal., 67 F.3d 708,713 (1995) *quoting* Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464-1465, 43 L.Ed.2d 712 (1975). Petitioners have failed to carry this burden and thus fail to demonstrate a right to recusal.

CONCLUSION

For the foregoing reasons, Petitioner's Motion to Recuse is hereby **DENIED.**

So ORDERED this 16 day of January, 2002.



DAVID A. WISEMAN, Associate Judge