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4 FOR PUBLICATION

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6 **IN THE SUPERIOR COURT**
7 **OF THE**
8 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

9 COMMONWEALTH OF THE NORTHERN)
10 MARIANA ISLANDS,)

11 Plaintiff,)

12 v.)

13 JOHN M. NAMAULEG,
14 D.O.B. 12/31/1972)

15 Defendant.)

CRIMINAL CASE NO. 10-0121(E)
DPS CASE NO. 10-004877

ORDER DENYING RECUSAL

16 **I. INTRODUCTION**

17 **THIS MATTER** came before the Court on August 18, 2010 at 9:00 a.m. in Courtroom
18 223A for Defendant's Motion to Disqualify Judge Wiseman from Presiding Over Any Further
19 Court Proceedings Related to Criminal Case No. 10-0121. The Government was represented by
20 Assistant Attorney General, Russell Lorfing. The Defendant appeared with counsel, Douglas
21 Hartig. After considering the oral and written arguments of the parties, legal authorities, and the
22 material facts, the Court renders its ruling below.

23 For the reasons discussed below, the Court **DENIES** Defendant's Motion to Recuse.

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25 **II. LEGAL AUTHORITY**

26 ***A. Recusal Legal Standard***

27 Defendant has moved this Court pursuant to 1 CMC § 3309(b) and the Commonwealth
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1 Code of Judicial Conduct Canon 3(D)(b) for this Court to recuse itself in this matter.¹ More
2 specifically, Defendant argues that disqualification is required under 1 CMC § 3308(b)(1), 1
3 CMC § 3308(a), and Canon 3 of the Commonwealth Code of Judicial Conduct because this
4 Court's ability to impartially serve as the fact-finder at Defendant's trial might reasonably be
5 questioned.

6 1 CMC § 3308(b)(1) states in pertinent part that a judge "shall disqualify
7 himself...[w]here [he] has a personal bias or prejudice concerning a party or personal knowledge
8 of disputed evidentiary facts concerning the proceeding." See 1 CMC § 3308(b)(1). When §
9 3308(b)(1) is the basis for disqualification, Canon 3(D)(c) of the Commonwealth Code of
10 Judicial Conduct establishes the procedure that must be followed which includes filing an
11 affidavit and having a separate judge determine whether disqualification is warranted. *Jesus C.*
12 *Tudela v. Superior Court*, 2010 MP 6 ¶ 13 (Slip Opinion, May 12, 2010).

13 A critical distinction between §§ 3308(a) and (b)(1) is that a motion to disqualify brought
14 under (b)(1) - alleging personal bias or prejudice - is subject to the affidavit requirements listed
15 in Canon 3(D)(c), while a motion brought under § 3308(a) is not. *Id.* at ¶ 15. Commonwealth
16 precedent firmly establishes that the procedural requirements of Canon 3(D)(c) must be fully
17 complied with when a judge is challenged on the basis of personal bias or prejudice. *Id.* at ¶ 17
18 citing *Saipan Lau Lau Dev., Inc., v. Superior Court*, 2000 MP 15 ¶ 4 n.6. These procedural
19 requirements include that (1) the motion be brought at the earliest possible date; (2) the motion
20 be accompanied by a party affidavit setting forth facts and reasons supporting a charge of bias;
21 and (3) the movant's attorney file a separate certificate in good faith. *Id.* citing *Saipan Lau Lau*
22 *Dev., Inc., v. Superior Court*, 2000 MP 15 ¶ 11.

23 Alternatively, 1 CMC § 3308(a) does not have such requirements. 1 CMC § 3308(a)
24 states, "[a] justice or judge of the Commonwealth shall disqualify himself or herself in any
25 proceeding in which his or her impartiality might reasonably be questioned." See 1 CMC §

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¹ 1 CMC § 3309(b) states, "[w]henever a party to any proceeding in a court of the Commonwealth believes that there are grounds for disqualification of the justice or judge before whom the matter is pending, that party may move for disqualification of the justice or judge, stating specifically the grounds for such disqualification."

1 3308(a). In addition, the test for recusal is “whether a reasonable person with knowledge of all
2 the facts would conclude that the judge’s impartiality might reasonably be questioned.” *Dev. Co.*
3 *v. Superior Court*, App. No. 97-1107 (N.M.I. Sup. Ct. Dec. 1, 1997)(Opinion at 8). *citing*
4 *Milgard Tempering, Inc. v. Selas Corp. Of Am.*, 902 F.2d 703, 714 (9th Cir. 1990). The
5 reasonable person standard is employed to prevent justice-shopping and to ensure that a justice
6 does not “at the mere sound of controversy,” abdicate his duty to preside over cases assigned to
7 him, including the most difficult cases.” *Bank of Saipan v. Superior Court (Disqualification of*
8 *Castro)*, 2002 MP 16 ¶ 29. Since the Commonwealth statute is fashioned after the federal
9 disqualification statute found at 28 U.S.C. § 455(a), the Court may look to federal law for
10 guidance when interpreting local statutory law. *In re Magofna*, 1 N.M.I. 454 (1990).

11 The federal statute provides that “[a]ny justice, judge, or magistrate judge of the United
12 States shall disqualify himself in any proceeding in which his impartiality might reasonably be
13 questioned.” The statute further states, “[t]he test for whether a judge should be recused is
14 whether the facts have been presented that, assuming their truth, would lead a reasonable person
15 to infer that bias or prejudice existed, thereby foreclosing impartiality.” *United States v. Int’l*
16 *Broth. of Teamsters*, 931 F. Supp. 1074, 1102 (S.D.N.Y. 1996); see 13D Wright, Miller &
17 Cooper, § 3549. Moreover, recusal is only warranted if the bias or prejudice is directed against a
18 party and stems from an extrajudicial source. *Davis v. Bd. of Sch. Com’rs of Mobile County*, 517
19 F.2d 1044, 1052 (5th Cir. 1975)(disqualification under § 455(a) is determined based on conduct
20 that demonstrates bias or prejudice towards a party and must be conduct that is “extra-judicial in
21 nature as distinguished from conduct within a judicial context”). Finally, a motion for recusal
22 should be filed only after a diligent review of all the facts and a sincere belief that the motion is
23 based on solid and meritorious ground.

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III. DISCUSSION

26 At the outset, it is important to note that “under established Commonwealth and federal
27 practice, a judge has the discretion to rule on a disqualification motion alleging that the judge’s
28 “impartiality might reasonably be questioned” under 1 CMC § 3308(a).” *Jesus C. Tudela v.*

1 *Superior Court*, 2010 MP 6 ¶ 1 (Slip Opinion, May 12, 2010). Since Defendant failed to submit
2 both an affidavit, as well as a certificate of counsel stating that his motion was made in good
3 faith, the Court will only address Defendant's argument concerning recusal based on evidence of
4 impartiality pursuant to 1 CMC § 3308(a).²

5 As stated above, 1 CMC § 3308(a) provides, "[a] justice or judge of the Commonwealth
6 shall disqualify himself or herself in any proceeding in which his or her impartiality might
7 reasonably be questioned." *See* 1 CMC § 3308(a). The test for recusal is whether a reasonable
8 person with knowledge of all the facts would conclude that the judge's impartiality might
9 reasonably be questioned. Therefore, the Court must examine whether a reasonable person with
10 knowledge of the surrounding facts of this case would find that the Court's impartiality could
11 reasonably be questioned.

12 Here, the basis for Defendant's Motion to Recuse is premised on the fact that the Court
13 demonstrated "hostility" toward the Defendant by not rejecting his plea agreement until after the
14 Defendant had pled guilty. However, the Court is troubled with Defendant's assertion that the
15 Court should have rejected the plea agreement before allowing Defendant to plead guilty. Such a
16 contention is totally without any merit. Rule 11 of the Com. R. Cr. P., patterned after the federal
17 rules, as well as this Court's practice in following said rule regarding change of plea hearings
18 provides for the proper procedure. It has been this Court's general policy, as well as nearly every
19 other state and federal court across the nation to go through the change of plea colloquy, allow
20 the Defendant to plead guilty, and if the Court was to reject the plea agreement to then give the
21 Defendant the opportunity to withdraw his guilty plea. In this case, the Court did just that. The
22 Court allowed Defendant to withdraw his guilty plea after the Court provided a basis for rejecting
23 the plea.

24 Procedurally, this Court approached Defendant's change of plea as it would any other,
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27 ² The Court would like to note that Defendant failed to comply with the requirements of Commonwealth Code
28 of Judicial Conduct Canon 3(D)(c), notwithstanding the fact that Defendant provided 1 CMC § 3308(b)(1) as a basis
for disqualification.

1 including reviewing Defendant's criminal history record prior to sentencing.³ However,
2 Defendant claims that because the Court made reference to a case the Government dismissed as
3 if the Court assumed guilt, recusal is warranted. The Court disagrees.

4 The fact that the Court knew of Defendant's criminal record, as well as Defendant's prior
5 criminal case and took this into consideration involving sentencing for the present crime presents
6 absolutely no legal basis to warrant recusal. A judge is allowed to consider all factors when
7 sentencing a defendant. Judges have virtually unfettered discretion regarding the information
8 they may consider for sentencing and need not draw such information through the narrow net of
9 evidence. *Williams v. People of State of N.Y.*, 337 U.S. 241 (1949). A judge can even consider
10 information from outside the courtroom, so long as it is reliable. *See generally State v. Cook*, 706
11 A.2d 603 (1998) (“[A] sentencing court has broad discretion to determine the information it will
12 consider, and due process requires only that it be reliable.”).

13 Indeed, the Court finds it extremely troubling that this motion is a *deja vu* similar to a
14 Motion for Disqualification Mr. Hartig filed 6 years ago, where one of the grounds for that
15 Motion was similar to the one here, with respect to the Defense counsel's misconception and
16 erroneous position regarding a judge's use of any reliable information at sentencing.

17 This Court issued a published decision in 2004, *Commonwealth v. Diego Mundo*, Crim.
18 No.04-0283 (NMI Sup. Ct. Dec. 28, 2004)(Order Denying Recusal), whereby Mr. Hartig moved
19 to recuse this Court from hearing any further motion regarding Criminal Case No. 04-0283
20 pursuant to 1 CMC § 3308(a). At that time this Court stated,

21 “A motion to recuse a judge is not just another procedural or evidentiary motion. It is a
22 direct attack on one of the basic principles of the judiciary, the impartiality of trial courts.
23 A recusal motion is unlike other motions in that the mere filing of the motion impacts
24 unfavorably upon the public's perception of the administration of justice. **As a result of
the foregoing principles, a motion for recusal should be filed only after a diligent
review of all the facts and a sincere belief that the motion is based on solid and
meritorious grounds.**” *Id.* at 2. (emphasis added)

25 The Court would be remiss not to remind Defense counsel and all attorneys practicing in
26 this Court of their obligation to the Court as an attorney to diligently review the legal merit or
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28 ³ It is important to note that a plea bargain essentially negotiates two variables: charges and sentences.

1 basis of their position prior to filing a motion to recuse a Judge, as well as for any other filing.

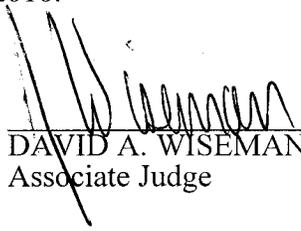
2 In addition, appellate courts routinely validate use of information regarding an offender's
3 criminal conduct the charges of which are merely pending or have been dismissed. *U.S. v. Metz*,
4 470 F.2d 1140 (3rd Cir. 1972) ("We hold that indictments for other criminal activity are of
5 sufficient reliability to warrant their consideration by a sentencing judge."); *U.S. v. Scroggins*,
6 880 F.2d 1204 (11th Cir. 1989). There is no Constitutional objection to a sentencing judge
7 knowing the existence of other pending charges against an offender. *Com. v. LeBlanc*, 346
8 N.E.2d 874 (1976).

9 Here, such observations made in Court and commentated on by the Court is information
10 that was available to the public and did not come from an extraneous source, and therefore, does
11 not constitute grounds for recusal. Judicial rulings alone almost never constitute a valid basis for
12 a bias or partiality motion. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). A judge is
13 presumed to be impartial, and [Defendant] bears the substantial burden of proving otherwise.
14 *First Interstate Bank of Arizona, N.A. v. Murphy, Weir & Butler*, 210 F.3d 983, 985 (9th Cir.
15 2000). In this case, Defendant has, indeed, failed to carry his burden and thus, failed to
16 demonstrate a right to recusal. The Court believes that a reasonable person with knowledge of
17 the surrounding facts of this case would find that the Court acted as a neutral and impartial
18 arbiter. As such, Defendant's Motion to Recuse is hereby **DENIED**.

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20 **IV. CONCLUSION**

21 For the forgoing reasons, the Court **DENIES** Defendant's Motion to Recuse.

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23 **SO ORDERED** this 23 day of August, 2010.

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27 DAVID A. WISEMAN
28 Associate Judge