

2016 FEB 26 AM 11: 37

1 FOR PUBLICATION

2
3 IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

BY: 
DEPUTY CLERK OF COURT

4	COMMONWEALTH OF THE	)	CRIMINAL CASE NO. 15-0209 &
5	NORTHERN MARIANA ISLANDS,	)	CRIMINAL CASE NO. 15-0060
)	
	Plaintiff,	)	DPS CASE NO. 15-008665 &
6		)	DPS CASE NO. 15-002672
	v.)	
7	IVAN JONES CASTRO,	)	ORDER GRANTING DEFENDANT'S
	d.o.b. 03/03/77,	)	MOTION TO DISQUALIFY JUDGE
8		)	UNDER 1 CMC § 3308(b)(5)(iv) TO
	Defendant.	)	AVOID THE APPEARANCE OF
9		)	IMPROPRIETY (The undersigned judge
		)	was an attorney for a co-defendant in a
10		)	related criminal case)

11 I. INTRODUCTION

12 This matter came before the Court on February 24, 2016, at 9:00 a.m. in Courtroom 220 on
13 the defendant's motion to disqualify the undersigned judge from presiding over the case.¹
14 Defendant, Ivan Jones Castro, was present in Department of Corrections custody and was
15 represented by Assistant Public Defender Tillman Clark. The Commonwealth was represented by
Assistant Attorney General Emily Cohen. The Commonwealth did not oppose the motion.

16 Based on Castro's brief,² oral arguments, and the applicable law, his motion to disqualify the
17 undersigned judge is **GRANTED** pursuant to Section 3308(b)(5)(iv) of the Commonwealth Judicial
18 Reorganization Act.

19
20 ¹ Castro's motion is entitled, "Defendant's Motion to Recuse Judge Under 1 CMC § 3308(a)."

² The Commonwealth did not file an opposition brief.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

II. BACKGROUND

Criminal Case No. 15-0209

Castro is charged with two crimes as provided in The CNMI Sex Offender Registry Act: (1) failure to update registration information, filed pursuant to 6 CMC § 1369(a); and (2) impermissible contact with minors, filed pursuant to 6 CMC § 1633(c). Both charges are felony offenses punishable up to three years imprisonment, up to a \$2,000 fine, or both.³

The Undersigned Judge's Role as a Co-Defendant's Attorney in Criminal Case No. 10-0132

Six years ago, in 2010, Castro was charged by information of six crimes: (1) kidnapping, filed pursuant to 6 CMC § 1421; (2) conspiracy to commit kidnapping, filed pursuant to 6 CMC § 303(a); (3) sexual assault in the first degree, filed pursuant to 6 CMC §§ 1301(a)(1) and (2); (4) conspiracy to commit sexual assault in the first degree, filed pursuant to 6 CMC § 303(a); and (5) aggravated assault and battery, filed pursuant to 6 CMC § 1203(a); (6) disturbing the peace, filed pursuant to 6 CMC § 3101(a). All charges of Castro's were dismissed without prejudice on December 29, 2010. His co-defendant at the time was Angel Santos.⁴ The undersigned judge, then a court-appointed defense attorney, represented Santos in the related 2010 criminal case.⁵

17
18
19
20

³ Probation revocation proceedings have commenced against Castro in Case No. 15-0060, stemming from his sentence to the guilty plea entered for the crime of failing to update his registration information, filed pursuant to 6 CMC § 1369(a), and entered on July 1, 2015.

⁴ The four defendants in Case No. 10-0132 were: Ivan Jones Castro, Angel Jess Santos, Joseph C. Camacho, Jr., and Alfred P. Hocog. Castro had three co-defendants, including Santos.

⁵ In Case No. 10-0132, Santos pleaded guilty to the offense of conspiracy to commit sexual assault in the first degree and was sentenced, effective June 7, 2011. He later moved the trial court to withdraw this guilty plea, but his motion was denied. Santos appealed, but the Supreme Court affirmed the lower court's decision. *Commonwealth v. Santos*, 2013 MP 18. A different defense attorney represented Santos in the appellate case.

1 Castro now brings a motion to disqualify the undersigned judge⁶ pursuant to Section
2 3309(b) the Commonwealth Judicial Reorganization Act of 1989, as outlined in identical language
3 under Canon 3(D)(b) of the Commonwealth Code of Judicial Conduct.

4 III. DISCUSSION

5 A. General Disqualification.

6 Judges have a duty to sit when not disqualified that is equally as strong as the duty not to sit
7 when disqualified. *Laird v. Tatum*, 409 U.S. 824, 837 (1972).⁷ Courts in the CNMI apply
8 disqualification rules narrowly, in consideration of the reality that the islands comprise of a "very
9 small" jurisdiction. *C.D.C. Saipan, Ltd. v. Sekisui House, Ltd.*, No. 95-0830 (NMI Super. Ct. Sep.
10 26, 1997) (Memorandum Decision and Order at 3). Because the disqualification rules are modeled
11 after the 1974 amendments to the federal equivalent,⁸ this Court looks to federal law for guidance.
12 *Ishimatsu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 60.

13 Castro brings a general disqualification challenge pursuant to Section 3308(a) of the
14 Commonwealth Judicial Reorganization Act. 1 CMC § 3308(a) ("A justice or judge of the
15 Commonwealth shall disqualify himself or herself in any proceeding in which his or her
16 impartiality might reasonably be questioned.")⁹ The merits of a motion brought under this law are
17 evaluated from an objective standard, examined "from the perspective of a reasonable juror who is

18 ⁶ The Honorable Joseph N. Camacho was sworn in as an associate judge of the Superior Court on November 10, 2011.

19 ⁷ This principle forms a basis for the Court's recent judicial disqualification rulings. *E.g.*, *Commonwealth v. Ogumoro*,
20 No. 13-0073 (NMI Super. Ct. Oct. 9, 2014) (Order Denying D.'s Mot. to Disqualify at 4); *Commonwealth v. Tudela*,
No. 15-0048 (NMI Super. Ct. May 27, 2015) (Order Denying D.'s Mot. to Disqualify at 3).

⁸ 28 U.S.C. § 455 (1974) has been thrice amended since. The last amendment was in 1990.

⁹ While this language also appears in Canon 3(C)(a) of the Commonwealth Code of Judicial Conduct, the purpose of
Rule 3(C)(a) is to inform a judge of his or her ethical obligations, as opposed to providing a procedural method for a
litigant to ensure his or her right to impartial justice. The one exception appears to be Canon 3(D)(c), which requires
litigants to file an affidavit for specific disqualification on the basis of the judge's alleged bias or prejudice against a
party to the litigation. *Commonwealth v. Repeki*, 2004 MP 8 ¶ 16.

1 informed of all the surrounding facts and circumstances." *Repeki*, 2004 MP 8 ¶ 12. A judge is
2 presumed to be impartial, and the moving party carries the substantial burden of proving otherwise.
3 *Tudela*, No. 15-0048 (Order Denying D.'s Mot. to Disqualify at 3).

4 Castro alleges that, six years ago, the undersigned judge (a court-appointed defense attorney
5 at the time) once represented his co-defendant in the related 2010 criminal case. Castro also alleges
6 that, as the co-defendant's defense attorney, the undersigned judge had instructed his client to take
7 the witness stand against him.¹⁰ In the course of preparing for that stage in the course of trial, Castro
8 argues, the undersigned judge likely acquired information adverse to Castro, and that
9 disqualification must result. Castro's argument, distilled to its essence, is that application of the
10 "extrajudicial source" doctrine commands the undersigned judge's disqualification.

11 **B. Extrajudicial Source Factor.**

12 The extrajudicial source doctrine protects a defendant from the resulting bias where
13 information is acquired through knowledge that the subject ought not to possess or because the
14 knowledge is excessive in degree. *Liteky v. United States*, 510 U.S. 540, 550 (1994) (framing the
15 standard in the context of a criminal juror who has been biased or prejudiced by receipt of
16 inadmissible evidence or one who is so inflamed by the defendant's prior bad acts that he or she is
17 likely to find the defendant guilty no matter what). Even applying this doctrine, the Court is not
18 persuaded that disqualification must result on this ground.

19 Castro himself has not raised case citations that support his conclusion. But in construing
20 Castro's argument to be that the undersigned judge acquired knowledge about Castro that the now-

¹⁰ Court records do not show that Castro went to trial on his charges in Case No. 10-0132. Santos was the only defendant who pleaded guilty. At the time, the Office of the Attorney General dismissed without prejudice the charges asserted against Castro and the other two co-defendants, Camacho Jr. and Hocog. As of the filing of this order, the OAG has not re-filed the charges.

1 judge ought not to possess, that alone cannot be the basis for disqualification. *Liteky v. United*
2 *States*, 510 U.S. at 555, is instructive in this regard. There, the U.S. Supreme Court held that the
3 extrajudicial source doctrine applied to the federal general disqualification law, and whether a judge
4 acquired information from an extrajudicial source was a significant and determinative factor to
5 evaluating disqualification of a judge. *Id.* However, it also held that the extrajudicial source factor
6 alone could not show that a judge would be partial to one party at the expense of the other. It held
7 that the party seeking disqualification must show "pejorative effect": that there is some basis for
8 some "deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 556.
9 Here, Castro has not put forward any allegations, if proven to be true, that would satisfy the
10 pejorative effect requirement. Therefore, the Court denies Castro's motion for disqualification
11 pursuant to Section 3308(a).

10 **C. Specific Disqualification.¹¹**

11 Turning to Castro's claim for specific disqualification under Section 3308(b)(1), the Court is
12 similarly unpersuaded. Castro appears to allege that the undersigned judge has personal knowledge
13 of disputed evidentiary facts concerning the instant proceeding. 1 CMC § 3308(b)(1) ("(b) A justice
14 or judge shall also disqualify himself or herself in the following circumstances: (1) Where he or she
15 has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary
16 facts concerning the proceeding;"). However, Castro has not shown—what knowledge—the
17 undersigned judge, as a court-appointed defense attorney—could have acquired—in the related
18 2010 criminal case that would amount to a disputed material fact in this case.

19 ¹¹ Specific disqualification pursuant to 1 CMC § 3308(b) is non-waivable by the parties, whereas the grounds for
20 general disqualification pursuant to 1 CMC § 3308(a) may be waived.

1 The two charges levied against Castro in this case are: (1) failure to update registration
2 information, filed pursuant to 6 CMC § 1369(a); and (2) impermissible contact with minors, filed
3 pursuant to 6 CMC § 1633(c). As to the latter charge, the events in question are alleged to have
4 taken place five years after the events in the related 2010 criminal case, between August 25, 2015 to
5 October 13, 2015.

6 In contrast, the Court takes judicial notice that the six charges levied against Castro in the
7 related 2010 criminal case were: (1) kidnapping, in violation of 6 CMC § 1421; (2) conspiracy to
8 commit kidnapping, in violation of 6 CMC § 303(a); (3) sexual assault in the first degree, in
9 violation of 6 CMC §§ 1301(a)(1) and (2); (4) conspiracy to commit sexual assault in the first
10 degree, in violation of 6 CMC § 303(a); (5) aggravated assault and battery, in violation of 6 CMC §
11 1203(a); and (6) disturbing the peace, in violation of 6 CMC § 3101(a).

12 The elements to be proven in this case are different than the ones that were to be proven in
13 the related 2010 criminal case. Therefore, the Court denies Castro's motion for specific
14 disqualification pursuant to Section 3308(b)(1).

15 **D. 1 CMC § 3308(b)(5)(iv)—Judicial Disqualification Where the Judge is a Material Witness.**

16 Notwithstanding Castro's failure to articulate his disqualification claims under Section
17 3308(a) or Section 3308(b)(1), the undersigned judge nonetheless finds it necessary to grant his
18 motion. In determining partiality under the general disqualification statute, the Commonwealth
19 Supreme Court instructs that such decision must be in light of "all the facts as they exist, and not as
20 they are surmised or reported to be." *Repeki*, 2004 MP 8 ¶ 10.

 Accordingly, under *Repeki*, the Court must ensure that a meaningful factual record exists of
what facts the undersigned judge actually became aware of six years ago, in the course of
developing his legal theory in allegedly instructing his co-defendant client to testify against Castro.
In order to do so, Castro seeks to have the undersigned judge (referring to his role as the attorney

1 for one of Castro's co-defendants) sit on the witness stand, provide testimony, and disclose
2 privileged confidential information. While the testimony Castro seeks will be inadmissible under
3 the intangible work-product protection as provided in Rule 502 of the Rules of Evidence—the
4 undersigned judge may necessarily become a material witness to the described evidentiary
5 proceeding. Indeed, Castro has requested an evidentiary hearing in the form of alternative relief.
6 Presiding over such a case is barred under Section 3308(b)(5)(iv)¹²—and the Court grants Castro's
7 motion on this ground.

8 The Court notes that the allegations raised by Castro's motion, taken alone, do not support
9 disqualification. To preserve the integrity of the judicial system and to avoid any appearance of
10 impropriety, the law requires the undersigned judge to recuse or disqualify himself from this case.

11 In sum, the undersigned judge was the co-defendant's attorney, and may have been privy to
12 information about Castro that were not brought to light in trial or in a meaningful proceeding about
13 the facts of the case. In such circumstance, where the defendant is brought before the judge's
14 court—years later—, the law requires the fact-finder to determine whether disqualification is truly
15 necessary. The very judge subject to disqualification may not preside over the evidentiary
16 hearing—whether there is merit to the claim or not.

17 // // //

18
19 ¹² 1 CMC § 3308(b)(5)(iv) ("(b) A justice or judge shall also disqualify himself or herself in the following
20 circumstances: (5) He or she, or his or her spouse, or a person within the second degree of relationship to either of them,
or the spouse of such person: (iv) To the knowledge of the judge or justice is likely to be a material witness in the
proceeding.").

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

IV. CONCLUSION

For the foregoing reasons, Castro's motion to disqualify the undersigned judge is **GRANTED** pursuant to Section 3308(b)(5)(iv) of the Commonwealth Judicial Reorganization Act to avoid the appearance of impropriety. Accordingly, Castro's request for an evidentiary hearing is moot, and the Court need not reach that issue.

IT IS SO ORDERED this 26th day of February, 2016.



JOSEPH N. CAMACHO
Associate Judge