

**IN RE DISQUALIFICATION OF SCHROEDER.**

**THE STATE OF OHIO v. JONES.**

**[Cite as *In re Disqualification of Schroeder*, 172 Ohio St.3d 1226,  
2023-Ohio-2166.]**

*Judges—Affidavits of disqualification—R.C. 2701.03—Affiant failed to comply with R.C. 2701.03(B)’s deadline for filing an affidavit of disqualification and failed to demonstrate that it was impossible for her to meet deadline—Application of impossibility exception to R.C. 2701.03(B) is limited to cases in which events giving rise to affidavit of disqualification occurred within seven days of next hearing, judge was assigned to underlying case within seven days of next hearing, judge scheduled next hearing to occur within seven days, or affiant had no seven-day window without hearing in which to file affidavit—An affiant must explain in affidavit of disqualification or in sworn statement submitted with affidavit why it was impossible to comply with R.C. 2701.03(B)—Affidavit dismissed.*

(No. 23-AP-043—Decided May 1, 2023.)

ON AFFIDAVIT OF DISQUALIFICATION in Ashtabula County Court of Common  
Pleas, General Division, Case No. 1997 CR 00221.

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**KENNEDY, C.J.**

{¶ 1} Colleen M. O’Toole, the Ashtabula County Prosecuting Attorney, has filed an affidavit of disqualification pursuant to R.C. 2701.03 seeking to disqualify Judge David A. Schroeder of the Ashtabula County Court of Common Pleas, General Division, from presiding over a death-penalty case on remand from the United States Court of Appeals for the Sixth Circuit. O’Toole has also filed a motion for leave to file her affidavit of disqualification “out of rule” and a motion

to supplement the affidavit of disqualification with additional pleadings relating to the death-penalty case.

{¶ 2} As explained below, O’Toole failed to comply with the statutory deadline for filing an affidavit of disqualification pursuant to R.C. 2701.03(B) and has failed to demonstrate that it was impossible for her to comply with that provision. Therefore, O’Toole’s affidavit of disqualification is dismissed, and her motion for leave is denied. The motion to supplement the affidavit of disqualification is dismissed as moot.

**The Allegations in O’Toole’s Motion for Leave**

{¶ 3} O’Toole filed her affidavit of disqualification on April 10, 2023. The next hearing in the death-penalty case was scheduled for April 13. She acknowledges that R.C. 2701.03(B) requires that an affidavit of disqualification be filed “not less than seven calendar days before the day on which the next hearing in the proceeding is scheduled.” Accordingly, she filed the motion for leave to file the affidavit of disqualification “out of rule.”

{¶ 4} In the motion, O’Toole argues that the primary basis for the affidavit of disqualification was a March 31, 2023 status conference and she states that she did not receive a transcript of that conference until Friday, April 7. She further asserts that April 7 and the two days following it were religious holidays. Therefore, O’Toole explains, she did not file the affidavit of disqualification until Monday, April 10—three days before the next scheduled hearing. Additionally, she argues that because Judge Schroeder had scheduled status conferences every two weeks, it was “very difficult” for her to comply with the seven-day statutory filing requirement.

{¶ 5} For those reasons, O’Toole argues that she has demonstrated “good cause” for filing her affidavit of disqualification “out of rule” and that her motion for leave “constitutes a reasonable request.”

### **The Statutory Deadline for Filing an Affidavit of Disqualification**

{¶ 6} R.C. 2701.03(B) provides that an affidavit of disqualification “shall be filed with the clerk of the supreme court not less than seven calendar days before the day on which the next hearing in the proceeding is scheduled.” The statute further requires that an affidavit of disqualification include “[t]he date of the next scheduled hearing in the proceeding or, if there is no hearing scheduled, a statement that there is no hearing scheduled.” R.C. 2701.03(B)(4). If an affidavit of disqualification “is not timely presented for filing” or does not include either the date of the next scheduled hearing or the statement that no hearing is scheduled, R.C. 2701.03(C)(2) prohibits the clerk of this court from accepting it.

{¶ 7} Based on the plain and unambiguous language of R.C. 2701.03, the clerk of this court cannot accept an affidavit of disqualification for filing if it is presented less than seven calendar days before the next hearing in the case. However, as explained below, a body of precedent has created an exception to the seven-day filing requirement.

#### *The Impossibility Exception*

{¶ 8} In 1999, former Chief Justice Thomas J. Moyer recognized an exception to the seven-day filing requirement of R.C. 2701.03(B) based on impossibility. *In re Disqualification of Leskovyansky*, 88 Ohio St.3d 1210, 723 N.E.2d 1099 (1999). In *Leskovyansky*, he held that “[t]he statutory provision that requires an affidavit to be filed on a timely basis will be set aside only when compliance with the provision is impossible, such as where the case is scheduled or assigned to a judge or the alleged bias or prejudice occurs fewer than seven days before the hearing date.” *Id.* at 1210. In 2004, the impossibility exception was further clarified when the burden was placed on the affiant to show that he or she has complied with the statutory filing deadline. *In re Disqualification of Eyster*, 105 Ohio St.3d 1246, 2004-Ohio-7350, 826 N.E.2d 304, ¶ 3.

{¶ 9} Since then, chief justices have limited the application of the impossibility exception primarily to those cases in which the alleged judicial bias or prejudice occurred within seven days of the next hearing date, *see, e.g., In re Disqualification of Suster*, 127 Ohio St.3d 1240, 2009-Ohio-7202, 937 N.E.2d 1026, ¶ 3-4; *In re Disqualification of Fragale*, 146 Ohio St.3d 1275, 2015-Ohio-5685, 57 N.E.3d 1164, ¶ 5; *In re Disqualification of Von Allman*, 165 Ohio St.3d 1203, 2021-Ohio-2391, 175 N.E.3d 587, ¶ 3, or the judge scheduled the next hearing to occur within seven days, *see, e.g., In re Disqualification of Halliday*, 166 Ohio St.3d 1228, 2021-Ohio-4481, 185 N.E.3d 1126, ¶ 6; *In re Disqualification of Squire*, 110 Ohio St.3d 1202, 2005-Ohio-7157, 850 N.E.2d 709, ¶ 3. The impossibility exception has also been applied when the affiant had no seven-day window without a hearing in which to file an affidavit of disqualification. *See, e.g., In re Disqualification of Heiser*, 164 Ohio St.3d 1230, 2021-Ohio-628, 173 N.E.3d 520, ¶ 5.

{¶ 10} Chief justices, however, have consistently stricken or dismissed late-filed affidavits of disqualification when the record showed that the affiant had a sufficient opportunity to timely file the affidavit. For example, in *In re Disqualification of Vavra*, 168 Ohio St.3d 1232, 2022-Ohio-2192, 200 N.E.3d 318, an attorney filed an affidavit of disqualification alleging that a judge had made prejudicial comments at a hearing. The attorney filed the affidavit three days before the next scheduled hearing and claimed that it was impossible for him to timely file the affidavit because, among other reasons, he had wanted to submit a transcript of the prior hearing and the court stenographer had failed to timely provide it to him. *Id.* at ¶ 4. Because the alleged bias occurred 13 days before the seven-day filing deadline, the chief justice found that the attorney “had sufficient time to file his affidavit within the statutory requirements” and therefore dismissed the affidavit of disqualification. *Id.* at ¶ 5.

{¶ 11} Similarly, in *In re Disqualification of Swenski*, 139 Ohio St.3d 1232, 2014-Ohio-2599, 11 N.E.3d 1187, an attorney filed an affidavit of disqualification against a judge assigned to a three-judge panel in a death-penalty case. The attorney filed the affidavit one day before the scheduled trial and alleged that the affidavit was based on a comment that he had heard about the judge 12 days before the trial date. *Id.* at ¶ 5-6. The attorney claimed that after hearing the comment, he attempted to verify the factual basis for the comment and then contacted the court’s presiding judge. *Id.* at ¶ 6. But considering that the attorney had five days between learning about the comment and the statutory filing deadline, the chief justice found that he “had sufficient opportunity to file the affidavit in a timely manner but instead attempted to resolve the issue through other means.” *Id.* at ¶ 8.

{¶ 12} A review of relevant caselaw shows that chief justices have refused to excuse an affiant’s failure to comply with the seven-day filing requirement unless it was truly impossible for the affiant to comply with R.C. 2701.03(B). *See, e.g., In re Disqualification of Rapp*, 151 Ohio St.3d 1227, 2017-Ohio-7429, 88 N.E.3d 960 (an affiant’s claim that she was not notified of the next hearing until six days before that hearing did not excuse her failure to comply with the seven-day requirement when the affidavit of disqualification was based on events that occurred between a month and two years before the hearing date); *In re Disqualification of Synenberg*, 138 Ohio St.3d 1214, 2013-Ohio-5916, 3 N.E.3d 1199 (an affiant’s claim that his car broke down en route to filing an affidavit of disqualification did not excuse his failure to comply with the seven-day requirement); *In re Disqualification of Cornachio*, 158 Ohio St.3d 1222, 2019-Ohio-5486, 141 N.E.3d 995 (an affiant’s discovery five days before the next hearing of allegedly prejudicial information on a judge’s social-media page did not excuse her failure to comply with the seven-day requirement when the judge had posted the information more than a year before the hearing date); *In re Disqualification of Gaul*, 147 Ohio St.3d 1219, 2016-Ohio-7034, 63 N.E.3d 1211

(an affiant’s claim that he was out of state on a work assignment did not excuse his failure to comply with the seven-day filing requirement); *In re Disqualification of Pokorny*, 166 Ohio St.3d 1227, 2021-Ohio-4488, 185 N.E.3d 1126 (an affiant’s claim that the post office had failed to timely deliver his affidavit of disqualification did not excuse his failure to comply with the seven-day requirement when the alleged bias occurred between four and seven weeks before the next hearing date).

*Allegations of Impossibility Must Be Part of a Sworn Affidavit*

{¶ 13} In 2015, in *In re Disqualification of Daugherty*, 145 Ohio St.3d 1208, 2015-Ohio-5668, 47 N.E.3d 859, ¶ 4, application of the impossibility exception was further limited to cases in which the affiant averred in a sworn affidavit “that compliance with the seven-day deadline was impossible.”

{¶ 14} Following *Daugherty*, an affiant must explain in his or her affidavit of disqualification—or in another affidavit submitted with the affidavit of disqualification—why it was impossible to comply with the seven-day filing requirement. Similar to other factual allegations relating to affidavits of disqualification, *see, e.g., In re Disqualification of Stucki*, 156 Ohio St.3d 1236, 2019-Ohio-1624, 125 N.E.3d 963, ¶ 5, unsworn factual allegations purporting to justify a late-filed disqualification request will not be considered.

*Current Status of the Law*

{¶ 15} A party or a party’s counsel must file an affidavit of disqualification “not less than seven calendar days before the day on which the next hearing in the proceeding is scheduled.” R.C. 2701.03(B). This requirement is subject to an impossibility exception established by caselaw, which may be summarized as follows.

{¶ 16} When an affiant raises the impossibility exception to the seven-day filing requirement of R.C. 2701.03(B), the burden is on the affiant to prove impossibility. The affiant must establish impossibility in the affidavit of disqualification or within a sworn statement submitted with the affidavit of

disqualification. And application of the impossibility exception is limited to cases in which the events giving rise to the affidavit of disqualification occurred within seven days of the next hearing, the judge was assigned to the underlying case within seven days of the next hearing, the judge scheduled the next hearing to occur within seven days, or the affiant had no seven-day window without a hearing in which to file an affidavit of disqualification.

### **Analysis**

{¶ 17} O’Toole filed her affidavit of disqualification three days before the next scheduled proceeding in the underlying death-penalty case. For the reasons explained below, she has failed to establish that she should be excused from satisfying the seven-day filing requirement of R.C. 2701.03(B).

{¶ 18} First, O’Toole has not averred that it was impossible for her to comply with the seven-day filing requirement. In her affidavit of disqualification, she seeks to be released from the requirement “for good cause.” But as explained above, mere “good cause” is not the standard for excusing a failure to comply with the seven-day requirement of R.C. 2701.03(B). Rather, the affiant must show that it was impossible to comply with the provision.

{¶ 19} Second, O’Toole has not included in her affidavit of disqualification factual averments explaining why it was impossible to comply with the deadline. Instead, she filed a separate motion for leave to file “out of rule” in which she attempted to explain why she did not file her affidavit of disqualification until three days before the next hearing. Under *Daugherty*, those allegations “must be part of a sworn affidavit.” 145 Ohio St.3d 1208, 2015-Ohio-5668, 47 N.E.3d 859, at ¶ 4. The allegations in O’Toole’s motion for leave were not confirmed by oath or affirmation or made before a person having authority to administer such an oath or affirmation. See *In re Disqualification of Donnelly*, 134 Ohio St.3d 1221, 2011-Ohio-7080, 982 N.E.2d 713, ¶ 3.

{¶ 20} Third, the record shows that O’Toole had sufficient opportunity to timely file an affidavit of disqualification. The next hearing in the case was scheduled for April 13. Therefore, under R.C. 2701.03(B), O’Toole had until April 6 to file her affidavit of disqualification. In her affidavit, she did not assert that any bias or prejudice occurred within seven days of the April 13 hearing date. Rather, she alleged that Judge Schroeder demonstrated bias or prejudice at status conferences held on January 27, February 14, February 24, March 13, and March 31. Even if the judge’s conduct during the March 31 status conference was the primary impetus for O’Toole’s seeking his disqualification, she had six days after the March 31 status conference to file her affidavit to meet the filing deadline. Chief justices have previously held that six days—or less—is sufficient to file an affidavit of disqualification. *See, e.g., In re Disqualification of Berkowitz*, 152 Ohio St.3d 1227, 2017-Ohio-9425, 95 N.E.3d 402, ¶ 4; *see also Swenski*, 139 Ohio St.3d 1232, 2014-Ohio-2599, 11 N.E.3d 1187, at ¶ 6.

### **Conclusion**

{¶ 21} O’Toole filed her affidavit of disqualification less than seven days before the next hearing date, and she has not established that it was impossible for her to comply with the seven-day filing deadline of R.C. 2701.03(B). Therefore, her affidavit of disqualification was not timely filed.

{¶ 22} The affidavit of disqualification is dismissed, and the motion for leave to file “out of rule” is denied. The motion to supplement the affidavit of disqualification is dismissed as moot. The case may proceed before Judge Schroeder.