IN RE DISQUALIFICATION OF SCHROEDER.

THE STATE OF OHIO *v.* JONES.

[Cite as *In re Disqualification of Schroeder*, 172 Ohio St.3d 1238, 2023-Ohio-3171.]

Judges—Affidavits of disqualification—S.Ct.Prac.R. 21.02(D) and R.C. 2701.03—Supplemental affidavits failed to meet the filing requirements under S.Ct.Prac.R. 21.02(D) and R.C. 2701.03—Affiant failed to demonstrate bias, prejudice, or an appearance of impropriety—Motion to seal granted in part and denied in part—Motions to supplement denied—Disqualification denied.

(No. 23-AP-061—Decided July 7, 2023.)

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

KENNEDY, C.J.

{¶ 1} Colleen 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 to seal her affidavit of disqualification and two motions to supplement her affidavit of disqualification.

{¶ 2} As explained below, on the authority of *In re Disqualification of Schroeder*, 172 Ohio St.3d 1232, 2023-Ohio-3170, 225 N.E.3d 1060, because exhibit F of the affidavit of disqualification is a confidential competency evaluation of the defendant in the death-penalty case, the motion to seal is granted in part and

denied in part. The clerk of this court is ordered to maintain that exhibit under seal and to unseal the affidavit of disqualification and all other exhibits.

{¶ 3} Further, because O'Toole did not comply with the filing requirements of R.C. 2701.03 and S.Ct.Prac.R. 21.02(D), the motions to supplement the affidavit of disqualification are denied.

{¶ 4} Lastly, O'Toole has failed to establish that Judge Schroeder is biased or prejudiced against her, the state of Ohio, or the defendant or that Judge Schroeder cannot be impartial and open-minded in the death-penalty case. Therefore, the affidavit of disqualification is also denied.

Motion to Seal

{¶ 5} Simultaneously with filing her affidavit of disqualification, O'Toole filed a motion to seal the affidavit of disqualification. On filing, the clerk of this court filed the affidavit of disqualification and the exhibits to the affidavit of disqualification under seal pending a decision on the motion to seal.

{¶ 6} O'Toole filed a similar motion to seal in *Schroeder*, 172 Ohio St.3d 1232, 2023-Ohio-3170, 225 N.E.3d 1060. On July 7, 2023, O'Toole's motion to seal in *Schroeder* was granted in part and denied in part.

{¶ 7} Because the issues raised in O'Toole's motion to seal in this affidavit-of-disqualification proceeding are the same as those raised in her motion to seal in *Schroeder*, the reasoning of the decision in that matter applies to this case. Therefore, the motion to seal is granted in part and denied in part. The clerk of this court is ordered to maintain under seal exhibit F of the affidavit of disqualification and to unseal the affidavit of disqualification and all other exhibits.

Motions to Supplement the Affidavit of Disqualification

{¶ 8} O'Toole filed two motions to supplement the affidavit of disqualification. In the motions, she attempts to introduce new factual allegations or new documents in support of the affidavit of disqualification. O'Toole has failed, however, to include an *affidavit* with the motions and has failed to identify

the date of the next scheduled hearing in the death-penalty case or to include a statement that no hearings are scheduled, as required by R.C. 2701.03 and the Rules of Practice of the Supreme Court of Ohio.

{¶ 9} S.Ct.Prac.R. 21.02(D) provides that the clerk of this court may accept supplemental or additional *affidavits* of disqualification "provided that the supplemental or additional *affidavits* meet the filing requirements set forth in S.Ct.Prac.R. 21.01(C) and R.C. 2701.03." (Emphasis added.) R.C. 2701.03 and S.Ct.Prac.R. 21.01(C) identify the filing requirements for an original affidavit of disqualification and require that any party or counsel seeking to disqualify a judge file an *affidavit* of disqualification that includes (1) the jurat of a notary public or another person authorized to administer oaths or affirmations and (2) the date of the next scheduled hearing in the underlying case or a statement that there is no hearing scheduled. In other words, "the supplemental affidavit must meet the filing requirements for an original affidavit of disqualification." *In re Disqualification of Ondrey*, 170 Ohio St.3d 1213, 2022-Ohio-3204, 209 N.E.3d 734, ¶ 9.

{¶ 10} Because O'Toole failed to comply with R.C. 2701.03 and S.Ct.Prac.R. 21.02(D), the motions to supplement the affidavit of disqualification are denied.

Allegations and Response

{¶ 11} O'Toole argues that Judge Schroeder should be disqualified from the death-penalty case because he "appears to have a personal bias in the subject matter of the case" and because his "role in the proceedings has [led] to the appearance that [his] impartiality may be impaired." She has divided her arguments into four categories: (1) the judge has refused to address the defendant by his legal name, (2) the judge has failed to resolve the conflict between the defendant and his court-appointed counsel, (3) the judge has demonstrated bias and prejudice against the state of Ohio, and (4) the judge has violated the Code of Judicial Conduct.

{¶ 12} Judge Schroeder filed a response to O'Toole's affidavit of disqualification, along with his own affidavit, denying that he has any bias against either party or counsel and denying that he lacks impartiality or an open mind. Specifically, in response to the four categories, he asserts that (1) he addressed the defendant by his previous name, "Odraye Jones," for purposes of "continuity and clarity" in accord with the name the Sixth Circuit used, (2) he will hear the defendant's motion for self-representation after completion of the competency hearing, (3) he lacks any bias or prejudice against the state of Ohio, and (4) he has not engaged in any judicial misconduct. The judge states that he has acted properly at all times to enforce the court's orders and to protect the rights of both parties.

Disqualification of a Common-Pleas-Court Judge

{¶ 13} R.C. 2701.03(A) provides that if a judge of a court of common pleas "allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court," then that party or counsel may file an affidavit of disqualification with the clerk of this court. Granting or denying the affidavit of disqualification turns on whether the chief justice determines that the allegations of interest, bias, prejudice, or disqualification set forth in the affidavit exist. R.C. 2701.03(E). The allegations must be "specific," and the affiant must support them with relevant facts. R.C. 2701.03(B)(1).

{¶ 14} "The term 'bias or prejudice' 'implies a hostile feeling or spirit of ill-will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts.' " *In re Disqualification of O'Neill*, 100 Ohio St.3d 1232, 2002-Ohio-7479, 798 N.E.2d 17, ¶ 14, quoting *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956), paragraph four of the syllabus.

{¶ 15} A judge is accorded a "presumption of impartiality" in an affidavit-of-disqualification proceeding. *In re Disqualification of Celebrezze*, 101 Ohio St.3d 1224, 2003-Ohio-7352, 803 N.E.2d 823, ¶ 7. "The proper test for determining whether a judge's participation in a case presents an appearance of impropriety is * * * an objective one. A judge should step aside or be removed if a reasonable and objective observer would harbor serious doubts about the judge's impartiality." *In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, 884 N.E.2d 1082, ¶ 8.

Analysis

{¶ 16} As set forth above, O'Toole has divided her affidavit of disqualification into four categories. Before addressing those allegations, a summary of the relevant facts in the death-penalty case is necessary.

Chronology of the Relevant Facts

{¶ 17} In 1998, a jury found the defendant guilty of aggravated murder for killing an Ashtabula police officer. The court sentenced the defendant to death. Ohio courts affirmed the conviction and sentence through direct appeal and postconviction review.

{¶ 18} On August 22, 2022, however, the United States Court of Appeals for the Sixth Circuit held that the defendant's trial counsel had performed ineffectively during the sentencing phase of the defendant's trial. *Jones v. Bradshaw*, 46 F.4th 459 (6th Cir.2022). The Sixth Circuit reversed the death sentence and remanded the case to the district court with instructions to issue a writ of habeas corpus vacating the defendant's death sentence unless the state of Ohio conducted a new penalty-phase proceeding within 180 days of remand. *Id*. at 489.

{¶ 19} The Sixth Circuit's mandate was issued on November 17. The defendant's case was originally remanded to Judge Marianne Sezon, another judge of the Ashtabula County Court of Common Pleas, General Division. On December 2, Judge Sezon issued a gag order prohibiting all parties, the attorneys and their

staffs, and court personnel "from disseminating information and/or commenting; discussing; or otherwise opining on the merits, defenses, facts, or any other matters relating to this case outside of the hearings in this matter and/or pleadings to be filed in the matter."

{¶ 20} On December 20, Judge Sezon recused herself from the death-penalty case. After another judge recused himself, the case was assigned to Judge Schroeder on January 3, 2023.

{¶ 21} Judge Schroeder held status conferences on January 27, February 14, February 24, March 13, and March 31. At the first status conference, counsel agreed that the 180-day mandate from the Sixth Circuit would expire on May 16 and that completing a new penalty-phase proceeding by that deadline was likely not possible.

{¶ 22} During the five status conferences, the judge, counsel, and the defendant discussed several recurring issues, including which party should seek an extension of the Sixth Circuit's 180-day mandate and the best way to do so, the defendant's requests to represent himself and waive counsel, the defendant's competency to stand trial, counsel's compliance with the court's gag order, and the length of time counsel would need to prepare for and try the new penalty-phase proceeding.

{¶ 23} At the first status conference, O'Toole stated that the state of Ohio would seek an extension of the mandate from the Sixth Circuit. But during the March 13 status conference, she stated that her office had not sought an extension and would not be seeking an extension.

{¶ 24} On April 10, O'Toole filed an affidavit of disqualification against Judge Schroeder alleging that his conduct during the five status conferences had demonstrated bias or prejudice. O'Toole's affidavit of disqualification was dismissed for failing to comply with the time limits established in R.C. 2701.03(B), which requires 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." *See In re Disqualification of Schroeder*, 172 Ohio St.3d 1226, 2023-Ohio-2166, 225 N.E.3d 1055.

{¶ 25} O'Toole filed a second affidavit of disqualification on May 5. Since then, the state of Ohio, through the attorney general's office, secured from the Sixth Circuit a 190-day extension of the mandate. With that background in mind, the allegations in the affidavit of disqualification will now be addressed.

Allegation One

{¶ 26} O'Toole alleges that Judge Schroeder has demonstrated bias and prejudice against the defendant by refusing to call him by his legal name. O'Toole asserts that, while in prison, the defendant changed his name from Odraye Jones to Malik Allah U Akbar; however, Judge Schroeder continues to refer to him as "Mr. Jones." O'Toole argues that the judge is violating the defendant's constitutional rights and has demonstrated "bias and prejudice against his Muslim faith."

{¶ 27} In response to the affidavit of disqualification, Judge Schroeder asserts that O'Toole's allegation is "false" and "disparag[ing]" and that by using the name "Odraye Jones," Judge Schroeder was merely following the practice of the federal court.

{¶ 28} "Allegations of bias or harassment based on race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation strike at the heart of the judiciary and are among the most serious that can be directed at a judge." *In re Disqualification of Harris*, 155 Ohio St.3d 1278, 2018-Ohio-5423, 121 N.E.3d 391, ¶ 5. Therefore, " 'such claims must be proven by clear evidence establishing the existence of bias.' " *Id.*, quoting *In re Disqualification of Donofrio*, 135 Ohio St.3d 1253, 2012-Ohio-6338, 986 N.E.2d 13, ¶ 5.

{¶ 29} The record shows that during the January 27 status conference, Judge Schroeder explained that because the Sixth Circuit had remanded the case to

the trial court, he would address the defendant by the same name used by the Sixth Circuit. The judge stated that "in the interest of continuity and clarity," he would continue to refer to the defendant as "Mr. Jones." Judge Schroeder further stated that the defendant's counsel could file a motion regarding which name the court should use. There is no document in the record of this proceeding to support a finding that defense counsel filed any such motion.

{¶ 30} Other than speculative assertions in the affidavit of disqualification, O'Toole has failed to submit any evidence supporting her claim that the judge's use of the name "Mr. Jones" demonstrates that he is biased against the defendant or the defendant's Muslim faith. Allegations based on innuendo and speculation "are insufficient to establish bias or prejudice." *In re Disqualification of Flanagan*, 127 Ohio St.3d 1236, 2009-Ohio-7199, 937 N.E.2d 1023, ¶ 4. Therefore, this allegation is without merit.

Allegation Two

{¶ 31} O'Toole alleges that on January 27, the defendant began asking to represent himself but that Judge Schroeder has not "resolved the conflict existing between appointed counsel and the defendant by * * * hold[ing] a *Faretta* hearing." She claims the judge has "created bias and prejudice as well [as] perhaps structural error" by violating the rights of both the defendant and the state of Ohio and "by allowing matters to proceed opposite the stated wishes of the defendant."

{¶ 32} In response, Judge Schroeder explains that during the January 27 status conference, defense counsel requested a competency evaluation of the defendant. On March 27, upon completion of the first competency evaluation, defense counsel requested a second opinion and another competency evaluation of the defendant. Further, Judge Schroeder states that O'Toole consented to both competency evaluations.

{¶ 33} Judge Schroeder argues that it is "axiomatic that a defendant cannot knowingly, intelligently, and voluntarily waive his right to counsel in a *Faretta*

[h]earing if he is not competent to proceed in the matter." *See Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The judge's response indicates that the "threshold issue of competency" must first be determined before the judge can decide whether a defendant has voluntarily and intelligently waived his right to counsel. The judge asserted that the competency hearing was set for May 15, but the hearing was postponed because of the filing of the affidavits of disqualification.

{¶ 34} In *Faretta*, the United States Supreme Court held that the Sixth Amendment to the United States Constitution guarantees a defendant in a criminal trial an independent right to self-representation and that a defendant may proceed to defend himself when he voluntarily and intelligently elects to do so. *Id.* at 819.

{¶ 35} This court has held that determining whether a defendant has properly invoked the right to self-representation is "a critical duty" of the trial court, especially in a capital case. *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 28. As recognized by the *Faretta* court, "the trial court must be sure that the criminal defendant 'knowingly and intelligently' forgoes the 'traditional benefits associated with the right to counsel.' " *Obermiller* at ¶ 30, quoting *Faretta* at 835. Therefore, "a defendant's unambiguous assertion of the right to self-representation triggers a trial court's duty to conduct the *Faretta* inquiries to establish that the defendant is knowingly and voluntarily waiving his constitutional right to counsel." *Id.*

{¶ 36} It is an accurate statement that since the initial January 27 status conference, the defendant has repeatedly stated that he wants to represent himself and has requested to waive court-appointed counsel. But O'Toole's assertion that the judge has "created bias and prejudice" is not an accurate statement. Defense counsel requested and the state agreed to the competency evaluation of the defendant. On agreement of the defense and the state, the judge ordered the competency evaluation.

{¶ 37} On review of the first competency report, defense counsel asked for a second opinion and the state agreed. The judge ordered the second competency evaluation of the defendant and set the matter for a competency hearing. That hearing is now stayed pending resolution of this affidavit-of-disqualification proceeding. Judge Schroeder has not yet decided the competency issue, and, therefore, the defendant's court-appointed counsel has spoken on the defendant's behalf at the status conferences since January 27.

{¶ 38} As to O'Toole's allegation that allowing the proceedings to move forward with court-appointed counsel over the defendant's objections has created "structural error," such allegation is not properly reviewed in an affidavit of disqualification proceeding. "[T]he issue before the chief justice in disqualification proceedings is a narrow one" and is " 'limited to determining whether a judge in a pending case has a bias, prejudice, or other disqualifying interest that mandates the judge's disqualification from that case.' " *In re Disqualification of Burge*, 142 Ohio St.3d 57, 2014-Ohio-5871, 28 N.E.3d 48, ¶ 4, quoting *In re Disqualification of Kate*, 88 Ohio St.3d 1208, 1209-1210, 723 N.E.2d 1098 (1999). "[R]eviewing legal errors is not the role of the chief justice in deciding affidavits of disqualification." *In re Disqualification of D'Apolito*, 139 Ohio St.3d 1230, 2014-Ohio-2153, 11 N.E.3d 279, ¶ 5.

{¶ 39} "In affidavit-of-disqualification proceedings, the burden falls on the affiant to submit sufficient argument and evidence to support the disqualification request." *In re Disqualification of Spon*, 134 Ohio St.3d 1254, 2012-Ohio-6345, 984 N.E.2d 1069, ¶ 24. On this record, O'Toole has not supported her allegation that Judge Schroeder created bias or prejudice merely because he has not yet heard the defendant's motion for self-representation. Therefore, the allegation is without merit.

Allegation Three

{¶ 40} O'Toole alleges that Judge Schroeder's conduct at the five status conferences "demonstrated a clear bias toward [O'Toole] and the [s]tate of Ohio." These allegations have three subparts.

{¶ 41} First, O'Toole alleges that Judge Schroeder is "obsessed" with the Sixth Circuit's 180-day mandate and that "multiple times on the record in the public square [he has] accused [her] of a host of ethical issues" relating to the best way to seek an extension from the Sixth Circuit. According to O'Toole, the judge wrongly believed that the state of Ohio had the responsibility to seek the extension. She also asserts that the judge's "constant berating" of her resulted in the victim's family questioning her competency and that the judge's facial expressions show his "serious bias" against the prosecution.

{¶ 42} Second, O'Toole alleges that Judge Schroeder has conducted his own independent investigation to determine whether she or anyone from her office violated the court's gag order. Specifically, she alleges that during the February 14 and March 13 status conferences, the judge "aggressive[ly]" questioned her and attorneys from her office about various newspaper articles and accused her of livestreaming a prior status conference. The judge, O'Toole claims, made an assumption that she spoke to the media without giving her a proper opportunity to respond to his questions.

{¶ 43} Third, O'Toole alleges that after the conclusion of the March 31 status conference, Judge Schroeder held an "extrajudicial hearing" concerning an incident that occurred between the family of the victim and Assistant Prosecuting Attorney Christopher Fortunato. According to O'Toole, after the status conference was completed, Judge Schroeder sua sponte recalled the case and improperly heard testimony from witnesses in the gallery. O'Toole claims the improper "extrajudicial hearing" resulted in her "being called a narcissist on the record" by a member of the victim's family. O'Toole further states that the judge failed to call

Fortunato to testify and therefore heard only one side of the story. She believes that Judge Schroeder should have addressed the incident in his chambers and that his failure to do so resulted in additional negative media attention about the prosecutor's office. O'Toole argues that the "extrajudicial conduct * * * has severely prejudiced the [s]tate, and likely tainted any possible jury pool."

{¶ 44} In response, Judge Schroeder denies any bias against the state of Ohio and claims that O'Toole has made "baseless dishonest statements calculated to mislead" the chief justice.

{¶ 45} In response to the three subpart allegations, the judge first states that he was "absolutely correct" to focus on the need to extend the 180-day mandate so that the interests of justice could be served. If he had not pressed to obtain an extension, the judge asserts, the conditional writ from the federal court would have become absolute, thereby jeopardizing the state of Ohio's ability to seek the death penalty.

{¶ 46} Second, he asserts that despite the court's gag order, local newspapers have published articles that include direct quotes from O'Toole about the death-penalty case. He claims that he had "not just the right, but the duty" to question O'Toole and her staff about the articles to protect the jury pool and determine whether anyone had violated the gag order. He denies conducting any independent investigation and states that he "merely read the newspaper."

{¶ 47} Third, the judge explains that the situation that arose at the conclusion of the March 31 status conference was an "issue of first impression" for him. He states that immediately after the conference, his staff informed him that Fortunato had been involved in an incident with family of the victim and that Fortunato had allegedly instructed them to leave the courtroom. Considering the constitutional rights of victims under Article I, Section 10a of the Ohio Constitution (known as "Marsy's Law"), the judge states that he brought the parties back into the courtroom to allow any witness, including individuals from O'Toole's office,

to testify about the incident. Three witnesses testified, and all counsel were given the opportunity to question the witnesses. According to the judge, O'Toole did not request that Fortunato testify.

{¶ 48} As stated above, the burden falls on the affiant to submit "specific allegations" of bias and prejudice, R.C. 2701.03(B)(1). Many of O'Toole's allegations are vague and unsubstantiated. For example, she alleges that the judge has acted "unhinged," that she has endured "constant berating and public spectacle," that the judge has an "obsession" with her, and that he "created a climate of fear, confusion and hostility." O'Toole submitted transcripts and audio recordings for each of the five status conferences, but she failed to specifically cite which record and what portion of the record supports these allegations.

{¶ 49} It is not the role of the chief justice "to sift through hundreds of pages of transcript to find support for [an affiant's] allegations or to speculate what conduct he [or she] considers hostile." *In re Disqualification of Forchione*, 134 Ohio St.3d 1235, 2012-Ohio-6303, 983 N.E.2d 356, ¶ 30. As the affiant, it was O'Toole's burden to not only identify specific allegations of bias but to ensure the "allegations could be verified by the record," *In re Disqualification of Sheward*, 136 Ohio St.3d 1262, 2013-Ohio-4244, 995 N.E.2d 1201, ¶ 6.

{¶ 50} As for the allegations that O'Toole did attempt to support with pinpoint record citations, the record does not support a finding that the judge's conduct amounted to bias or prejudice against her or the state of Ohio. For example, the judge's questioning of O'Toole and her staff about how the state of Ohio intended to comply with the Sixth Circuit's mandate is not evidence of hostility or animus. Nor was the judge's mere questioning of O'Toole and other assistant prosecuting attorneys about whether they had been complying with the court's gag order. Even if Judge Schroeder appeared frustrated with O'Toole or if she interpreted the judge's questions as accusatory, " '[i]n general, a judge will not be disqualified merely for voicing disapproval of an attorney's actions or for

interrogating the attorney in what the attorney considers a confrontational tone,' " *In re Disqualification of Bickerton*, 170 Ohio St.3d 1286, 2023-Ohio-1104, 212 N.E.3d 962, ¶ 16, quoting *In re Disqualification of Stormer*, 166 Ohio St.3d 1203, 2021-Ohio-4671, 182 N.E.3d 1208, ¶ 5. The record is insufficient to conclude that Judge Schroeder has crossed a line and abandoned his neutral role. *Compare In re Disqualification of Winkler*, 135 Ohio St.3d 1271, 2013-Ohio-890, 986 N.E.2d 996, ¶ 11 (disqualifying a judge whose comments "crossed the line between acceptable sentencing comments about a defendant's character and comments that convey the appearance of bias or prejudice").

{¶ 51} O'Toole makes two specific allegations about the "extrajudicial hearing" after the March 31 status conference. First, she argues the hearing has prejudiced the state. Second, she alleges the hearing has "likely" tainted the prospective jury pool.

{¶ 52} Judge Schroeder admits the incident after the March 31 status conference was an issue of "first impression"—balancing the right of the family of the victim to be present at all proceedings with the allegation that an assistant prosecutor had instructed the family of the victim to leave the courtroom. He believed it was best to formally address the incident by allowing witnesses to the incident to testify and permitting counsel for the state and the defendant to question those witnesses, while preserving a record of the proceedings. O'Toole argues the judge should have handled the matter in chambers, outside of public view.

{¶ 53} In the year following the adoption of the 1851 Ohio Constitution, the General Assembly "required by an act passed February 19, 1852 (50 Ohio Laws, 67-71), that a different oath of office should be administered to the judge than the oath required to be taken by other officers, and that act still remains the law of this state." *State ex rel. Weinberger v. Miller*, 87 Ohio St. 12, 27, 99 N.E. 1078 (1912). That oath requires the judge to "support the Constitution of the United States and the Constitution of the state of Ohio, to administer justice without respect to

persons, and faithfully and impartially to discharge and perform all the duties incumbent upon him as such judge according to the best of his ability and understanding." *Id*.; *see also* R.C. 3.23. The legislature's adoption of a judge's separate and distinct oath recognizes the difference between a judge and other officers in government.

{¶ 54} Article I, Section 10 of the Ohio Constitution guarantees the right of every person accused of a crime to a public trial. Article I, Section 10a(A) of the Ohio Constitution also guarantees victims of crime "justice and due process" and certain rights that "shall be protected in a manner no less vigorous than the rights afforded to the accused." Those rights include the right to be "treated with fairness and respect" and the right "to be present at all such proceedings." Article I, Section 10a(A)(1) and (2), Ohio Constitution.

{¶ 55} Moreover, Crim.R. 42(D) mandates that "[i]n a capital case and post-conviction review of a capital case, the trial court shall conduct all pretrial and post-trial conferences on the record."

{¶ 56} Judge Schroeder was not present when the alleged incident between Fortunato and the family of the victim happened. In the aftermath, the judge was balancing the constitutional right of the defendant to a public trial, the constitutional right of the family of the victim to be present at all proceedings, and the mandates of Crim.R. 42(D).

{¶ 57} The judge's decision to preserve the record—i.e., to permit those persons who wanted to testify about the alleged incident to do so while being questioned by counsel for the state and the defense—is not evidence of bias or prejudice against O'Toole, the assistant prosecutors, or the state of Ohio. O'Toole asserts that the judge failed to call Fortunato to testify and therefore heard only one side of the story. But it was not the role of the judge to decide whom to call to testify. Why O'Toole did not contact Fortunato to have him testify is unknown. The record shows that any person who wanted to testify about the incident between

Fortunato and the family of the victim was permitted to testify, and O'Toole and defense counsel were given an opportunity to ask questions.

{¶ 58} The judge has a duty and obligation to uphold the Ohio Constitution, including the preservation of the defendant's right to a public trial and the rights of the family of the victim to be present in the courtroom for those proceedings, and to comply with the requirements of Crim.R. 42(D). The judge did not have a duty on behalf of the state to advocate or call witnesses. Based on this record, there is no evidence that the judge is prejudiced against the state.

{¶ 59} Moreover, O'Toole may have wanted the matter handled in chambers, behind closed doors, and out of hearing of the defendant, the family of the victim, and the public and without a record of the proceedings. But that was not her decision to make. The duty and obligation to uphold constitutional rights and comply with Crim.R. 42(D) is that of the trial judge.

{¶ 60} As to O'Toole's additional allegation that the judge "likely" tainted the jury pool, as stated above, every person accused of a crime has a constitutional right to a public trial, Article I, Section 10, Ohio Constitution, and every victim of a crime has a constitutional right to be present at every proceeding, Article I, Section 10a, Ohio Constitution. However, "the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). Accordingly, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 48, citing *Press-Enterprise Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

{¶ 61} If O'Toole believed an overriding government interest was at stake, then it was incumbent on her—not the judge—to seek closure of the "extrajudicial hearing" on March 31.

{¶ 62} The allegations here are not supported by evidence that Judge Schroeder is biased or prejudiced against O'Toole, members of her office, or the state. Moreover, the determination whether a judge lacks impartiality or an open mind turns on whether a "reasonable and objective observer would harbor serious doubts about the judge's impartiality." *Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, 884 N.E.2d 1082, at ¶ 8. Based on this record, no reasonable and objective observer would question the judge's impartiality or whether he lacks an open mind. Therefore, the allegation is without merit.

Allegation Four

{¶ 63} Lastly, O'Toole alleges that Judge Schroeder's conduct during the status conferences violated Canon 1 and three rules of the Code of Judicial Conduct. In response, Judge Schroeder denies the allegations.

{¶ 64} Determining whether the judge has violated the Code of Judicial Conduct, however, is beyond the reach of an affidavit-of-disqualification proceeding. As stated above, "the issue before the chief justice in disqualification proceedings is a narrow one" and is " 'limited to determining whether a judge in a pending case has a bias, prejudice, or other disqualifying interest that mandates the judge's disqualification from that case.' " *Burge*, 142 Ohio St.3d 57, 2014-Ohio-5871, 28 N.E.3d 48, at ¶ 4, quoting *Kate*, 88 Ohio St.3d at 1209-1210, 723 N.E.2d 1098. An affidavit of disqualification is "not the appropriate mechanism for determining whether a judge has followed the Code of Judicial Conduct." *In re Disqualification of Capper*, 134 Ohio St.3d 1271, 2012-Ohio-6287, 984 N.E.2d 1082, ¶ 19. Judicial-misconduct complaints are heard by the Board of Professional Conduct and ultimately decided by all justices of the Supreme Court of Ohio. *Burge* at ¶ 4.

{¶ 65} To the extent that O'Toole argues that Judge Schroeder's alleged misconduct establishes that the judge is biased and prejudiced against her or that the judge lacks impartiality or an open mind, for the reasons set forth above, the affidavit of disqualification is denied.

Conclusion

{¶ 66} "Tension between a judge and a county prosecutor is bound to occur in our adversary system. Both sides seek to attain justice, but they do not always agree on what that means. However, principles of professionalism require judges and prosecutors to give proper respect to each other and to treat each other with the dignity and courtesy that each office deserves." *Id.* at ¶ 27. O'Toole and Judge Schroeder have been critical of each other's handling of the death-penalty case since the remand from the Sixth Circuit. But a prosecutor's disagreement or dissatisfaction with a judge's rulings is not evidence that the judge is biased or prejudiced against the prosecutor, the staff of the prosecutor's office, the state, or the defendant or evidence that the judge lacks impartiality or an open mind. Therefore, a prosecutor's disagreement with a judge's rulings does not merit the granting of an affidavit of disqualification.

{¶ 67} For the reasons explained above, O'Toole's motion to seal is granted in part and denied in part. The clerk of this court is ordered to maintain under seal exhibit F and shall unseal the affidavit of disqualification and all other exhibits. O'Toole's motions to supplement her affidavit of disqualification and the affidavit of disqualification are denied. The case may proceed before Judge Schroeder.
