

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0641

ROBERT L. ALLUM.,

Plaintiff and Appellant,

v.

STATE OF MONTANA,

Defendant and Appellee.

**STATE OF MONTANA’S RESPONSE IN OPPOSITION TO  
APPELLANT’S MOTION TO RECUSE JUSTICES FOR CAUSE**

On Appeal from the Montana Eighteenth Judicial District Court, Gallatin  
County, Cause No. DV-16-2021-0000162-DK, The Honorable Peter B. Ohman,  
Presiding

APPEARANCES:

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## **INTRODUCTION**

Defendant/Appellee, the State of Montana (hereinafter “the State”), pursuant to M.R.App.P. 16, hereby submits its Response in Opposition to Appellant’s February 8, 2022, Motion to Recuse Justices Laurie McKinnon, James A. Rice, Beth Baker, Jim Shea, Dirk Sandefur, and Ingrid Gustafson for cause. Appellant’s motion fails to set forth any justification for the recusal or disqualification of six of the seven members of the Montana Supreme Court save one: that the named Justices have a history of ruling against Appellant. Appellant’s Motion at 1. The Court previously ruling against Appellant does not establish grounds for disqualification or recusal. Appellant’s motion should be denied.

## **BACKGROUND**

The present appeal marks Appellant’s fourth appearance before this Court on the same issue: his belief that the Montana Workers’ Compensation Court is an unconstitutional entity that deprived him his constitutional rights. Appellant filed a Petition in the Workers’ Compensation Court on July 10, 2019. While his case was pending, Appellant filed two Petitions to the Montana Supreme Court for writs of supervisory control challenging the constitutionality of the Montana Workers’ Compensation Court (OP 19-0597; OP 19-0695). This Court denied both Petitions.

Following his trial in the Workers’ Compensation Court, Appellant sought to bring his constitutional arguments before this Court on appeal. *Allum v. Montana*

*State Fund*, 2020 MT 159N, 400 Mont. 561, 464 P.3d 1012 (*Allum I*). The Court observed Appellant was instructed “numerous times” by the Workers’ Compensation Court, and by this Court, on the proper procedure for bringing a constitutional challenge before the Workers’ Compensation Court and he refused to properly raise his arguments. *Id.* at ¶ 3. The Court declined to consider Appellant’s arguments for the first time on appeal and affirmed the judgment of the Workers’ Compensation Court. *Id.* at ¶ 4.

Following this Court’s ruling in *Allum I*, and in part because of it, two other courts rejected Appellant’s arguments on the grounds of *res judicata*. The Federal District Court for the District of Montana granted summary judgment to the State in *Allum v. Montana*, 2020 U.S. Dist. LEXIS 155970 (D. Mont. 2020) (appeal dismissed as frivolous in *Allum v. Montana*, 2021 U.S. App. LEXIS 24866 (9<sup>th</sup> Cir. 2021)). Appellant then unsuccessfully attempted to raise his arguments again in the Eighth Judicial District Court, the case leading to the present appeal.

### **ARGUMENT**

The disqualification of judges, including justices of the Montana Supreme Court is governed by Mont. Code Ann. § 3-1-803 (2001) and Rule 2.12 of the Montana Code of Judicial Conduct.<sup>1</sup> Mont. Code Ann. § 3-1-803 provides:

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<sup>1</sup> Mont. Code Ann. § 3-1-805 (2003) also governs the disqualification of judges for cause, but it does not pertain to justices of the Montana Supreme Court. *McLaughlin v. Montana State Legislature*, 2021 MT 120, ¶ 13, ft.nt. 3, 404 Mont. 166, 489 P.3d 482 (“Section 3-1-803, MCA, applies to all judges, including justices, in Montana. In contrast, § 3-1-805, MCA, which provides a procedure for adjudicating challenges for cause does not apply to justices.”)

Any justice, judge, justice of the peace, municipal court judge or city court judge must not sit or act in any action or proceeding:

1. To which he is a party, or in which he is interested;
2. When he is related to either party or any attorney or member of a firm of attorneys of record for a party by consanguinity or affinity within the third degree, computed according to the rules of law;
3. When he has been attorney or counsel in the action or proceeding for any party or when sitting in a case on appeal he as a judge in the lower court rendered or made the judgment, order, or decision appealed from.

Rule 2.12(A) of the Montana Code of Judicial Conduct provides that a judge shall disqualify themselves “in any proceeding in which the judge’s impartiality might reasonably be questioned. . . .” “Absent evidence to the contrary, the ‘presumption of honesty and integrity in those serving as adjudicators’ stands.” *Reichert v. State*, 2012 MT 111, ¶ 50, 365 Mont. 92, 278 P.3d 455 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed. 2d 712 (1975)).

Appellant’s motion fails to raise any valid argument that the Justices named in his motion require recusal or disqualification from his appeal. His argument that the Justices should recuse themselves is not supported by any affidavit or evidence of bias or prejudice. Instead, Appellant asserts that because the Justices ruled against him in the past, they violated his constitutional rights and so must recuse themselves from the present appeal. This assertion is insufficient to call the Justices’ impartiality into question.

The fact that the Justices of this Court previously ruled against Appellant does not establish any bias or prejudice against Appellant. The Montana Supreme Court routinely takes up appeals from litigants who were previously unsuccessful before the Court. For example, the same justices sitting on a criminal defendant's appeal will often be the same justices that take up an appeal of that defendant's post-conviction proceedings, or an appeal following subsequent revocation proceedings. The same justices who rule on matters of supervisory control will often be the same justices ruling on a subsequent appeal, as was the case in *Allum I*. Under the relief requested by Appellant, once a justice of this Court has ruled against a party, that justice is henceforth disqualified from sitting on any future related matter brought by that party. This position is not only unworkable, it lacks any support in statute, case law, or rule.

It is apparent Appellant seeks a different outcome than he has received in prior rulings, both from this Court and from others, but that does not warrant the recusal or disqualification of the Justices of this Court. *See Wallace v. Law Office of Bruce Spencer, PLLC, LHP, Inc.*, 2021 Mont. LEXIS 525, \*3 (Order denying a motion to disqualify the entire Montana Supreme Court, *en banc*, from an appeal and noting an apparent desire for a different outcome from past decisions is not a legal reason for disqualification.) As the Court observed in *Wallace*, Rule 2.7 of the Montana Code of Judicial Conduct requires that a judge “shall hear and decide matters

assigned to the judge, except when disqualification is required by Rule 2.12 or other law.” The comment on the same rule also cautions that “[u]nwarranted disqualification may bring public disfavor to the Court and to the judge personally.”

Appellant’s motion for six of the seven justices of this Court to recuse themselves is not supported by any evidence of bias or prejudice, or that the Justices of this Court are disqualified under Mont. Code Ann. § 3-1-803. His dissatisfaction with the Court’s prior rulings is insufficient to warrant disqualification or recusal. There is no colorable argument that any justice of the Court should be disqualified or recused from this case.

### **CONCLUSION**

Appellant’s motion to recuse Justices McKinnon, Rice, Baker, Shea, Sandefur, and Gustafson for cause is without merit and should be denied.

DATED this 22<sup>nd</sup> day of February 2022.

/s/ Ben Williams

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) and Rule 16(2)-(3) of the Montana Rules of Appellate Procedure, I certify that this Response in Opposition to Appellant's Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 1,189 words, excluding the caption, the certificate of service, and the certificate of compliance.

DATED this 22<sup>nd</sup> day of February 2022.

/s/ Ben Williams

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*Attorney for Defendant/Appellee State of Montana*

## **CERTIFICATE OF SERVICE**

I, Ben Williams, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to the following on 02-22-2022:

Robert L. Allum (Appellant)  
132 W. Magnolia Drive  
Belgrade MT 59714  
Service Method: Conventional

Electronically signed by John Klein on behalf of Ben Williams  
Dated: 02-22-2022