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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROBERT JOE MOODY, Appellant.	2 CA-CR 2010-0043 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR43804

Honorable Clark W. Munger, Judge
Honorable Jan E. Kearney, Judge
Honorable John S. Leonardo, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After the Arizona Supreme Court affirmed his two first-degree murder convictions but vacated his death sentence, *State v. Moody*, 208 Ariz. 424, ¶ 236, 94 P.3d 1119, 1168 (2004) (*Moody II*), Robert Moody was sentenced to two consecutive natural-life terms in prison. He appeals these sentences, arguing that the superior court erred in denying his various motions for change of judge and recusal and that his sentences consequently violated his due process rights under the federal and state constitutions. Because the incidents cited by Moody, considered both individually and collectively, fail to demonstrate bias on the part of the sentencing judge, we affirm.

Moody I **and** ***Moody II***

¶2 We set forth the facts pertinent to the resolution of the issues before us. A more complete background of this case is reported at *Moody II*, 208 Ariz. 424, ¶¶ 2-16, 94 P.3d at 1130-32. In November 1993, Moody attacked a friend of his former girlfriend in her home and, while holding her at knifepoint, forced her to write him two checks for $500 each. *Id.* ¶¶ 2-3. He then shot and killed her. *Id.* ¶ 4. Five days later, Moody attacked and restrained a neighbor in her home, took her cash and bank cards, and, after leaving to withdraw additional cash from her bank account, returned and slit her throat, stabbed her, and bludgeoned her to death. *Id.* ¶¶ 5-6.

¶3 After a jury trial, Moody was convicted of two counts of first-degree murder and sentenced to death, but his convictions and sentence were vacated on appeal. *State v. Moody*, 192 Ariz. 505, ¶¶ 1, 24, 968 P.2d 578, 578, 582 (1998) (*Moody I*). On remand, another jury again found him guilty of two counts of first-degree murder, and he was again sentenced to death. *Moody II*, 208 Ariz. 424, ¶ 1, 94 P.3d at 1130. Our

supreme court affirmed his convictions but vacated his death sentence, concluding it had been imposed under a procedure that the United States Supreme Court had found unconstitutional in *Ring v. Arizona*, 536 U.S. 584 (2002) (*Ring II*). *Moody II*, 208 Ariz. 424, ¶¶ 209, 236, 94 P.3d at 1164, 1168.

Resentencing

¶4 Between May 2005 and October 2008, Moody and his advisory counsel filed, between them, nine motions requesting a change of judge for cause and one motion requesting that the sentencing judge recuse himself. The sentencing judge denied the motion for recusal, and the presiding judge of the Pima County Superior Court, *see* Ariz. R. Crim. P. 10.1(b), reviewed and denied Moody's various motions for change of judge without a hearing. Because Moody argues that judicial bias manifested itself in several different rulings and comments, individually and in the aggregate, that were made by the sentencing judge, we set forth in some detail the circumstances that he asserts demonstrated bias.

May 2005 Motion: Withdrawal of Counsel

¶5 In May 2005, Moody's then-counsel moved to withdraw "for the reason that irreconcilable differences have arisen that preclude . . . continued representation." At a hearing on the motion, the following discussion occurred:

> THE COURT: I am led somewhat to the concern that any attorney who represents Mr. Moody is going to have irreconcilable differences. Mr. Moody, you may sit down.
>
> THE DEFENDANT: Could I make a record?
>
> THE COURT: You may sit down right now.

> We simply aren't ever going to find an attorney who doesn't have irreconcilable differences with Mr. Moody and, if that's the situation, the court simply is going to stop allowing counsel to withdraw, and we'll try the case and, if he wants to appeal on that basis, we'll do that. Mr. Moody?
>
> THE DEFENDANT: Yes, Your Honor. . . .
>
> . . . .
>
> I would like to object to the court's position that it just stated prejudging, the statement that there's no attorney that's not going to have irreconcilable—
>
> THE COURT: I haven't prejudged anything. Do not ever misstate what I state. I did not draw that conclusion. I did not prejudge it.
>
> THE DEFENDANT: Maybe I mischaracterized, but I repeated what you said.
>
> THE COURT: No, you did not.

Two weeks later, Moody filed a motion for change of judge, arguing, among other things, that the sentencing judge's comments revealed a "bias and prejudice" against him. The presiding judge noted that the motion was untimely and neither it nor the accompanying affidavit required by Rule 10.1(b) was signed or notarized. The judge nevertheless addressed the merits of the motion and found "no evidence of bias or partiality on the part of [the sentencing judge]." The sentencing judge thereafter granted the motion to withdraw that had been the subject of the May hearing and suggested "[i]t would be appropriate to appoint [Moody's post-conviction-relief counsel] as trial counsel" if counsel agreed.

July and September 2006 Motions: Competency Evaluation

¶6 In June 2006, Moody filed a motion to waive counsel and represent himself. Before ruling on the motion, the sentencing judge held a hearing and ordered that Moody undergo a mental and physical examination to determine whether he was competent to waive his right to counsel. At the hearing, after Moody objected to the examination on the ground that the judge had not articulated reasonable grounds to question his competency, the judge addressed separate issues relating to Moody's post-conviction proceedings pursuant to Rule 32, Ariz. R. Crim. P., and the following exchange took place:

> MR. MOODY: I would like to ask the Court to make a ruling basically—basically a rule of law—
>
> THE COURT: No, no. If you want to make a motion, file a written motion. I am not going to entertain—
>
> MR. MOODY: This rules with 32.8. [*sic*]
>
> THE COURT: Your motion did not include that. File—
>
> MR. MOODY: I am asking you to make findings of fact and conclusions of law on every motion I bring before you under Rule 32.
>
> THE COURT: If it is—I have. I have. Thank you. Okay?
>
> MR. MOODY: The issue I am asking you—
>
> THE COURT: Sir, I have ruled on that.
>
> MR. MOODY: Are you going to let me speak?

THE COURT: I am not going to let you take over this courtroom just because you open your mouth.

MR. MOODY: I would like to make a record.

THE COURT: You are entitled to make a record. Just because you want to talk doesn't mean you get the floor as long as you want to. Thank you.

. . . .

MR. MOODY: Well, Judge, I have one other thing. Since I just now received a June 7, 2006, minute entry.

THE COURT: File a motion, counsel.

MR. MOODY: And I would like to ask the Court to order the State—

THE COURT: Sir, file a motion.

MR. MOODY: You are not listening to my motions when I file them, so how am I going to get a hearing in this court?

THE COURT: You are not filing understandable or reasonable motions. If you don't file understandable and reasonable motions, then they are going to be denied.

MR. MOODY: Well, if I have a chance to make a record of the motion I did file, I could explain to you—

THE COURT: You are not going to make a record on a motion that doesn't make sense, counsel. You don't get to file a nonsensical motion and then come in and try to verbally make motions, file—

MR. MOODY: Is this motion above your head? Is that what you are saying?

THE COURT: Sir, this hearing is done. Thank you.

Nine days later, Moody filed a motion for change of judge. The presiding judge denied the motion, finding "no evidence of bias or partiality on the part of [the sentencing judge] and therefore no legally sufficient grounds for a change of judge."

¶7 In September 2006, the sentencing court ordered *sua sponte* a competency evaluation pursuant to Rule 11.2(a), Ariz. R. Crim. P. Through counsel, Moody filed a written objection to the evaluation, arguing that the court had failed to include in its order reasonable grounds to support the examination as required by Rule 11.3(a) and had failed to allow Moody to submit the names of three experts from which the court could choose one to conduct the evaluation, as required by Rule 11.3(c). The court overruled the objection, finding Moody's motion was based on a misapprehension that the state had requested the Rule 11 hearing when in fact it was ordered on the court's own motion. In its under-advisement ruling, the court nevertheless set forth several reasons underlying its determination that a competency evaluation was warranted and also granted Moody leave to submit a list of "three qualified mental health experts."

¶8 On September 25, although still represented by counsel at this point, Moody filed a pro se motion for change of judge, arguing that by "review[ing] the trial and appellate record" to inform its determination that a competency evaluation was warranted, the sentencing judge "allowed himself to be tainted by the uncounseled record [in] *Moody I*," which explained his "biased and prejudiced opinions, words and actions." Moody's attorney filed a separate motion for change of judge, challenging the sentencing judge's denial of his requests for hearings on the issue of Moody's right to represent himself and alleging that the judge had violated Rule 11.3(c) by *sua sponte* appointing

two experts to perform the competency evaluation. Moody's counsel contended, based on these various rulings, that the sentencing judge had "failed to perform [his] duties impartially and without bias or prejudice" and that Moody consequently was "entitled to a change of judge since a fair and impartial hearing[] and re-sentencing trial cannot be had by reason of the prejudice of the court."

¶9 The presiding judge considered only the motion filed by counsel, which he denied after noting that bias must arise from an "extra-judicial source" rather than what a judge has done in his participation in the particular case, and again finding "no evidence of bias or partiality on the part of [the sentencing judge]." The sentencing judge then granted Moody's motion to represent himself and reappointed his counsel as advisory counsel.

September 2007 Motions: Involuntary Absence from Hearing

¶10 In August 2007, a hearing was held regarding Moody's motion to continue the date of his *Ring II* sentencing trial and his request for additional investigative assistance. Apparently due to an oversight, Moody was not transported to the courthouse for the hearing; however, his advisory counsel was present. The sentencing judge granted Moody one hundred additional hours of investigative services. The judge also granted his motion to continue but deferred setting the new trial date until Moody could be present at the next scheduled hearing in September. At that hearing, Moody objected to the sentencing court's decision to proceed with the earlier hearing in his absence because it had left him "unable to make a record." The following colloquy then took place:

MR. MOODY: I understand your point, Judge. I mean you have never—

THE COURT: Mr. Moody, you can make a record if you want to. We're not going to argue about it.

MR. MOODY: Well, I need to make a clear objection.

THE COURT: Then file a written, clear objection.

MR. MOODY: Judge please let me—

THE COURT: File a written objection, Mr. Moody.

MR. MOODY: Judge, when I file my motions, you then dismiss them and the state doesn't respond to them.

. . . .

THE COURT: Mr. Moody, you made your objection. You've made your record. That's the end of it. If you want to appeal, you may, but that's the end. I've ruled. Period.

MR. MOODY: Okay. Well, is there a reason why I was not present on the 1st?

THE COURT: I think it's because somebody at the jail didn't get the message you were to be transported that day.

MR. MOODY: Was there a reason why—

THE COURT: Counsel, I've answered the question, period.

MR. MOODY: I'm asking another question, Judge.

THE COURT: I'm not here to be subjected to your questions, period.

MR. MOODY: Well, I object to the Court—

THE COURT: Thank you.

MR. MOODY: —providing myself representation on the 1st, because there was no way I could make a record because I wasn't present.

THE COURT: You have a transcript. Your advisory counsel was here. If you feel you've been prejudiced, file an appropriate motion.

As the hearing continued, another exchange took place:

MR. MOODY: . . . I'm asking you[,] are we going to deal with these motions for dismissal today?

THE COURT: What's the State's position?

MS. JOHNSON: The State filed a response to those motions based on—

MR. MOODY: Objection, Judge. That's a misstatement of the—

THE COURT: Please stop.

MR. MOODY: I'm going to make an objection any time I feel the need to, Judge—

THE COURT: Mr. Moody, you will get a chance to make your objection.

MS. JOHNSON: —at the time—

THE COURT: Period.

MR. MOODY: So you can correct—

THE COURT: Please be quiet. Let somebody else do some talking here.

Near the end of the hearing, a final exchange occurred:

THE COURT: And the double jeopardy has been dealt with by the Supreme Court on appeal, so I deny your motion.

MR. MOODY: Judge—

THE COURT: I've denied it.

MR. MOODY: Judge—

THE COURT: I've denied it, Mr. Moody.

MR. MOODY: I want to make a record. Please let me make my record.

THE COURT: No.

MR. MOODY: Are you denying me to make a record on—

THE COURT: Mr. Moody—

MR. MOODY: —on the motions that are filed?

THE COURT: Mr. Moody. Mr. Moody.

MR. MOODY: Are you denying me my opportunity—

THE COURT: Mr. Moody, listen. It's—

MR. MOODY: —to be heard according to the law?

THE COURT: Be quiet and listen.

MR. MOODY: Are you denying that, Judge?

THE COURT: I am about to revoke your right to represent yourself.

MR. MOODY: (Indicating.)

THE COURT: Yes, I can.

> Mr. Moody, when I authorized you to represent yourself, I made it clear that if you took actions that were contrary to the requirements of an officer of the court, you would be removed as your own counsel. That continues to stand. You may make a record, but not in the manner in which you are doing it.
>
> . . . .
>
> MR. MOODY: . . . [I]f the Court is going to proceed in the manner that it is proceeding and the State is going to proceed in this manner, I move then to waive a jury trial and ask the Court to sentence me to death today because, as the Court has indicated, I'm not going to get a fair hearing in any hearing that the Court is going to provide or a jury, so I might as well—
>
> THE COURT: Motion is denied.

¶11 Ten days later, Moody filed a pro se motion for change of judge, arguing, *inter alia*, that the sentencing judge had exhibited bias by proceeding with the August hearing despite his involuntary absence and reiterating that he believed he could not receive a fair and impartial hearing before the sentencing judge. Advisory counsel joined in Moody's motion and further moved to disqualify the entire bench of the Pima County Superior Court on the ground that Moody's cause had been before five judges of that court over the life of the case and "any assigned judge will have already predetermined the allegations contained in the numerous motions that have [been] and will be filed."

¶12 The presiding judge denied both motions.[1] With respect to the disqualification of the sentencing judge, the presiding judge found that "[t]he words and actions of the court of which Defendant complains arose directly from Defendant's

[1]A different presiding judge had assumed office in the interim since Moody's previous motion for change of judge.

inappropriate courtroom conduct" and concluded that the sentencing judge's response demonstrated no ill will toward Moody, "much less the level of hostility and animus required for his removal from the case." The presiding judge also declined to disqualify the entire superior court bench, explaining, "The mere length of time during which this case has been pending, with the attendant voluminous proceedings, is not unique, and does not warrant the relief requested." Moody sought special action relief in this court, but we declined to exercise jurisdiction.

April 2008 Motion for Recusal: Substantial Interest in Proceedings

¶13 In April 2008, Moody requested that the sentencing judge recuse himself pursuant to Canon 3(E)(1), Ariz. Code Judicial Conduct, Ariz. R. Sup. Ct. 81 (2008),[2] based on the allegation that the judge and his brother had interests that could be substantially affected by the proceeding. Moody specifically alleged that, prior to his appointment to the bench, the judge and his brother had been law partners and during that time the judge's brother had publicly supported the candidacy of David White, the prosecutor in Moody's first trial, for the office of Pima County Attorney. Moody pointed to a number of the sentencing judge's purported interests that he argued required disqualification, including the judge's and his brother's "financial, professional, family, political and reputation interests," which Moody claimed could be affected by the proceedings in his case given the judge's alleged associations with White. *See* Canon

[2]The current version of this rule is located at R. 2.11(A), Ariz. Code of Judicial Conduct, Ariz. R. Sup. Ct. 81. *See* Ariz. Sup. Ct. Order R-09-0007 (Sept. 1, 2009).

3(E)(1)(d)(iii) (2008). Moody also asserted that the judge's brother was "likely to be a material witness in the proceeding." *See* Canon 3(E)(1)(d)(iv) (2008).

¶14 The sentencing judge denied the motion, explaining in detail why he concluded none of the provisions of Canon 3(E) required his disqualification. With respect to Moody's particular complaints, the judge stated that neither he nor any person described in subsection (d) "is known by the judge to have an interest that could be substantially affected by the proceeding [or] is to the court's knowledge likely to be a material witness in the proceeding." Moody petitioned this court for special-action relief, and we again declined to exercise jurisdiction.

May and June 2008 Motions: Destroyed Documents and Denial of Stay

¶15 In May 2008, Moody again moved for a change of judge, asserting, *inter alia*, that the sentencing judge had failed to review and had destroyed confidential documents from the Arizona State Bar pertaining to an investigation of David White. While the motion was pending before the presiding judge, a hearing was held before the sentencing judge relating to other pending motions. Although Moody and advisory counsel moved to stay proceedings on the ground that a motion for change of judge was pending, the judge declined to issue the stay and heard argument on the motions, ultimately taking them under advisement. In denying the stay, the judge stated that he had not received a copy of any motion for change of judge.

¶16 The following day, the presiding judge denied the motion for a change of judge, observing,

> The findings of the assigned judge pertaining to the State Bar records do[] not indicate the circumstances under which the file copies of the State Bar records were shredded, only that this apparently occurred, and that complete copies were obtained for use in the current phase of the case. The documents in question were not part of the Court file, but were copies provided to the assigned judge to facilitate an *in camera* review.

The presiding judge again found no evidence of bias. Moody subsequently filed another motion for a change of judge, this time arguing that the sentencing judge's refusal to grant a stay of the May 27 hearing while his previous motion for change of judge was pending demonstrated bias. He also maintained that the judge "had to lie" when he stated he had not received a copy of the motion for change of judge. The presiding judge denied this motion too, noting she had not been called upon to determine whether the sentencing judge had erred by conducting the hearing in violation of Rule 10.6, Ariz. R. Crim. P., but rather to determine whether the failure to postpone the May 27 hearing, notwithstanding the then-pending motion for change of judge, in itself provided grounds for a change of judge. She concluded it did not.

October 2008 Motion: Denial of Oral Motion to Dismiss Death Penalty Notice

¶17 At an October 2008 status conference, the sentencing judge set a date for the *Ring II* sentencing trial. During the hearing, the following exchange occurred between the judge and Moody:

> MR. MOODY: The only other part I would add is I would move to dismiss the allegation of the death penalty to solve everybody's scheduling problems today.

> THE COURT: Motion denied. June 2nd—and let me state for the record, I think that's insulting to the victims in this case, Mr. Moody.
>
> MR MOODY: And why is that, Judge?
>
> THE COURT: Just let me finish, Mr. Moody. It's disrespectful to the family of the people you murdered. That's how it's insulting.

Moody once again moved for a change of judge, arguing that the sentencing judge's "sharp rebuke" to his "legally valid and proper motion to dismiss the State's allegation of the death penalty" evidenced "a hostile feeling or spirit of ill-will" toward him. Moody accused the judge of failing to manage the case properly and professionally and of having "allow[ed] prosecutorial misconduct to . . . delay resentencing for over four . . . years." The presiding judge denied the motion, reasoning, "As on previous occasions, the complained-of remarks by the trial judge arose directly from Defendant's own conduct, in this case his flippant treatment of the proceedings and his aggressive discourtesy to the court and failure to abide by the court's directives."

¶18 The state ultimately did withdraw its notice of intent to seek the death penalty, after Moody withdrew his waiver of counsel and accepted representation, and the superior court imposed two consecutive terms of natural life in prison. We have jurisdiction over Moody's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(4). *See also* Ariz. R. Crim. P. 10.1(b) ("Allegations of interest or prejudice which prevent a fair and impartial hearing or trial may be preserved for appeal.").

Discussion

¶19 Moody argues he was sentenced in violation of due process because the sentencing judge was biased against him and his motion for recusal and various motions for change of judge were erroneously denied. Specifically, he asserts that "[r]ulings[] and comments made by [the sentencing judge] demonstrated a deep seated animus toward [him] and favoritism towards the State and victims' families, which required the Judge to recuse himself and/or the presiding judge to assign the case to another judge or jurisdiction." We review for an abuse of discretion the denial of a motion for change of judge based on a claim of judicial bias, *State v. Ramsey*, 211 Ariz. 529, ¶ 37, 124 P.3d 756, 768 (App. 2005), but review constitutional issues and purely legal issues *de novo*. *Moody II*, 208 Ariz. 424, ¶ 62, 94 P.3d at 1140. However, judicial bias, if found, constitutes structural error, *State v. Ring*, 204 Ariz. 534, ¶ 46 & n.9, 65 P.3d 915, 933 & n.9 (2003) (*Ring I*), for which prejudice is presumed and vacatur mandatory. *State v. Valverde*, 220 Ariz. 582, ¶ 10, 208 P.3d 233, 236 (2009).[3]

¶20 "The constitutional right to a fair trial includes the right to a fair and impartial judge." *State v. Ellison*, 213 Ariz. 116, ¶ 35, 140 P.3d 899, 911 (2006). Rule 10.1(a), entitles a criminal defendant to a change of judge "if a fair and impartial hearing or trial cannot be had by reason of the interest or prejudice of the assigned

[3]Our supreme court's observation that judicial bias constitutes structural error appears to abrogate prior authority that required a defendant to prove resulting prejudice before an appellate court would vacate his conviction. *See, e.g., State v. Thompson*, 150 Ariz. 554, 558, 724 P.2d 1223, 1227 (App. 1986) ("The party seeking recusal must show how any proclivity on the part of the trial court prejudiced him.").

judge." We strictly construe, however, any provision relating to disqualification of judges "to safeguard the judiciary from frivolous attacks upon its dignity and integrity and to ensure the orderly function of the judicial system." *State v. Perkins*, 141 Ariz. 278, 286, 686 P.2d 1248, 1256 (1984), *overruled on other grounds by State v. Noble*, 152 Ariz. 284, 731 P.2d 1228 (1987). "Judges are presumed to be impartial, and the party moving for change of judge must prove a judge's bias or prejudice by a preponderance of the evidence." *State v. Smith*, 203 Ariz. 75, ¶ 13, 50 P.3d 825, 829 (2002). "'The fact that a judge may have an opinion as to the merits of the cause or a strong feeling about the type of litigation involved, does not make the judge biased or prejudiced.'" *Perkins*, 141 Ariz. at 286, 686 P.2d at 1256, *quoting State v. Myers*, 117 Ariz. 79, 86, 570 P.2d 1252, 1259 (1977).

¶21 Judicial rulings alone do not support a finding of bias or partiality without a showing of an extrajudicial source of bias or a deep-seated favoritism. *Ellison*, 213 Ariz. 116, ¶ 40, 140 P.3d at 912; *State v. Schackart*, 190 Ariz. 238, 257, 947 P.2d 315, 334 (1997); *Smith v. Smith*, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App. 1977). Moody does not point to an extrajudicial source of bias,[4] and we disagree that recusal was

[4]Moody does not reurge the argument from his motion for the sentencing judge's recusal based on his brother's alleged support of David White's candidacy for Pima County Attorney in 1996. Nor would such an attenuated ground provide a basis for finding judicial bias. *See State v. Smith*, 203 Ariz. at 79-80, 50 P.3d at 829-30 (no basis for disqualification if judge's professional relationship is "sufficiently attenuated that an informed, disinterested observer would not entertain significant doubt that justice would be done in [defendant]'s sentencing"); *cf.* Ariz. Jud. Ethics Adv. Comm. Op. 00-01 at 3 (2000) (judge whose son is county prosecutor may act as presiding and criminal judge and need not notify all defendants of son's position, where judge disqualifies himself in any case in which son is involved).

required. The rulings and comments Moody points to, considered both individually and in the aggregate, fail to exhibit deep-seated animus or favoritism or otherwise overcome the presumption of impartiality. *See State v. Smith*, 203 Ariz. 75, ¶ 13, 50 P.3d at 829; *see also State v. Hill*, 174 Ariz. 313, 326, 848 P.2d 1375, 1388 (1993) (considering arguments of bias individually and in aggregate).

¶22 The sentencing judge's May 2005 statement that he was "led somewhat to the concern that any attorney who represents Mr. Moody is going to have irreconcilable differences" does not demonstrate bias. As our supreme court observed in *Moody I*, one of the factors a court must evaluate when considering a motion to substitute counsel is "'whether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict.'" 192 Ariz. 505, ¶ 11, 968 P.2d at 580, *quoting State v. LaGrand*, 152 Ariz. 483, 486, 733 P.2d 1066, 1069 (1987). And Moody's claim is further undermined by the fact that the judge ultimately allowed counsel to withdraw. *See Ellison*, 213 Ariz. 116, ¶ 40, 140 P.3d at 912 (finding no bias from trial court's rulings in favor of state because court ruled in defendant's favor in "several" instances).

¶23 As for the August 2007 hearing from which Moody apparently was involuntarily absent, although we do not condone conducting a hearing in the absence of a self-represented criminal defendant who has not waived his presence *see State v. Bohn*, 116 Ariz. 500, 503, 570 P.2d 187, 190 (1977) (defendant has right to be present "at every critical stage of his trial"), Moody does not assign error on appeal to the trial court's

decision to proceed in his absence.[5] Instead, the narrow question we are called upon to decide is whether proceeding with the hearing—despite Moody's absence—demonstrated bias on the part of the sentencing judge. We agree with the presiding judge that "[t]he record contains no hint that the [sentencing judge]'s determination to go forward . . . was the result of any desire to disadvantage Defendant or to interfere with his conduct of the case, or of any animus toward Defendant." We also observe that, despite Moody's absence, the sentencing judge granted his requests for additional investigative services and his motion to continue the *Ring II* sentencing trial, further weakening Moody's claim of bias. *See Ellison*, 213 Ariz. 116, ¶ 40, 140 P.3d at 912.

¶24 With respect to the exchanges between the sentencing judge and Moody at various hearings cited above, we disagree with Moody that they substantiate his claims of bias, as they do not evince "'a deep-seated favoritism or antagonism that would make fair

[5]Nor do we find any error to be fundamental. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (fundamental error is that "'going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial'"), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore apparent fundamental error). Minor violations of a defendant's right to be present are reviewed for harmless error. *Compare State v. Lawrence*, 123 Ariz. 301, 305-07, 599 P.2d 754, 758-60 (1979) (defendant's absence from *in camera* proceedings in which court responded to jury requests for clarification of instructions was minor and therefore reviewed for harmless error), *with State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 17-20, 953 P.2d 536, 540-41 (1998) (defendant's involuntary absence from entire jury selection process too substantial to be harmless error), *and State v. Ayers*, 133 Ariz. 570, 571, 653 P.2d 27, 28 (App. 1982) (same). In any event, even if the error were fundamental, Moody could not have been prejudiced given that the court granted his motion to continue and his request for additional investigative services, which were the subjects of the hearing. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607 (prejudice required for reversal due to fundamental error).

judgment impossible.'" *State v. Henry*, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997), *quoting Liteky v. United States*, 510 U.S. 540, 555 (1994). The United States Supreme Court has explained that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky*, 510 U.S. at 555. The *Liteky* Court also remarked that "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display," do not establish bias or partiality. *Id.* at 555-56; *see also State v. Gonzales*, 181 Ariz. 502, 511-12, 892 P.2d 838, 847-48 (1995) (concluding defendant "was a difficult litigant" and, "while the judge understandably became impatient with him, particularly while he was acting *pro per*, none of the exchanges [between the judge and defendant] would support [a] claim of bias"); *Hill*, 174 Ariz. at 323, 848 P.2d at 1385 ("Even the best trial judge can run short on patience and turn from diplomacy to exasperation. While patience is a virtue, trial judges are human, and we recognize the difference between irritation and favoritism.").

¶25 We see nothing in the exchanges between Moody and the sentencing court that would rise to the level of antagonism necessary to demonstrate bias. Rather, these exchanges reflect Moody's own repeated attempts to continue to argue motions after unfavorable rulings, general disregard for the judge's directives, and even occasional instances of overt disdain for the court. By virtue of his position, the judge is vested with broad discretion in managing courtroom proceedings, including "the authority and the obligation to ensure that counsel, litigants, jurors, court personnel and spectators behave

civilly." *State v. Whalen*, 192 Ariz. 103, 108, 961 P.2d 1051, 1056 (App. 1997) (affirming trial court's decision revoking defendant's self-representation because he refused to conduct his defense from counsel table); *cf. E.L. Jones Constr. Co. v. Noland*, 105 Ariz. 446, 452, 466 P.2d 740, 746 (1970) (trial court vested with great discretion in conduct and control of trial). The sentencing judge acted commensurately with that obligation.

¶26 The record supports the presiding judge's conclusion in her November 2008 ruling that Moody had not demonstrated bias because "the complained-of remarks by the trial judge arose directly from [Moody]'s own conduct, in this case his flippant treatment of the proceedings and his aggressive discourtesy to the court and failure to abide by the court's directives." Thus, as in *Gonzales*, we see no bias arising from the court's comments or actions. 181 Ariz. at 511-12, 892 P.2d at 847-48. We therefore find no abuse of discretion in the respective presiding judges' conclusions that none of the exchanges evinced "'a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Henry*, 189 Ariz. at 546, 944 P.2d at 61, *quoting Liteky*, 510 U.S. at 555.

¶27 Finally, Moody suggests the respective presiding judges erred by denying his requests for change of judge without first holding hearings on the motions. *See* Ariz. R. Crim. P. 10.1(c). But a presiding judge is required to grant a hearing on a Rule 10.1 motion only when it alleges facts which, if taken as true, would entitle the defendant to relief. *State v. Eastlack*, 180 Ariz. 243, 255, 883 P.2d 999, 1011 (1994) ("We will not require presiding judges to hold meaningless hearings when no grounds for relief are

stated in the first instance."). As set forth above, the facts alleged by Moody in his respective motions do not demonstrate bias or partiality. The presiding judges therefore properly ruled on the motions without first holding hearings. *See id.*

Conclusion

¶28 For all the foregoing reasons, we conclude Moody has not demonstrated that the sentencing judge exhibited or harbored a "'deep-seated favoritism or antagonism'" toward either party to this prosecution. *Henry*, 189 Ariz. at 546, 944 P.2d at 61, *quoting Liteky*, 510 U.S. at 555.[6] Thus, we find no error in the superior court's denial of his motions for recusal and change of judge and likewise reject his argument that his sentences were imposed in violation of due process. *See Hill*, 174 Ariz. at 322, 326, 848 P.2d at 1384, 1388 (rejecting defendant's due process argument where no bias shown). Accordingly, Moody's sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

[6]We also note that in his written ruling declining to recuse himself, the sentencing judge expressly declared he had "no personal bias concerning any party or any attorney involved in this case."