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IN THE SUPREME COURT OF THE STATE OF IDAHO

PRESTON ADAM JOY,

Petitioner-Appellant,

v.

STATE OF IDAHO,

Respondent.

No. 45044

**Kootenai County Case No.
CV-2016-0003717**

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT,
IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE JOHN T. MITCHELL, PRESIDING

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INTRODUCTION

Preston Joy relies on the facts and arguments in his opening brief, and will not repeat those here, but he does wish to take this opportunity to respond to the following topics raised in the State's brief: (1) res judicata as an alternative ground for dismissal of the motion to disqualify the district judge in the post-conviction matter; (2) the State's request to affirm the district judge on different grounds than his incorrect ruling that Counts I to IV were untimely; and (3) the level of "prejudice" that is necessary to prove ineffective assistance of counsel for failing to file a motion to disqualify the judge automatically after reversal on appeal.

REPLY ISSUES

I.

Res judicata was not a proper basis on which to resolve the motion to disqualify Judge Mitchell in the post-conviction matter.

II.

This Court should not correct Judge Mitchell's error in dismissing certain claims as untimely by affirming on alternative grounds.

III.

Mr. Joy need not allege and prove that, had his counsel filed a timely motion for automatic disqualification, there is a reasonable probability that he would have been acquitted at the second trial.

ARGUMENT

I.

Res judicata was not a proper basis on which to resolve the motion to disqualify Judge Mitchell in the post-conviction matter.

In its brief, the State asserts that the district court dismissed Mr. Joy's motion to disqualify Judge Mitchell from presiding in the post-conviction matter, in part, on the ground of res judicata, and that Mr. Joy "does not appear to challenge this ruling on appeal." (Brief of Respondent, p. 6.)

Judge Mitchell reached the merits of this claim after mentioning, initially and without elaboration, that he was denying it "in part [on] stare decisis." (Tr. Hearing of 1/9/17, p. 42, ln. 13-15.) Res judicata or "stare decisis" was not a material part of his ruling, since he went on to address the merits. That is why Mr. Joy argued this issue the way he did in his opening brief. In any case, he disagrees that his argument failed to encompass all aspects of the ruling. He clearly framed the issue as: "The district court abused its discretion in denying Mr. Joy's motion for disqualification in the post-conviction action." (Brief of Appellant, p. 8.)

"Res judicata is comprised of claim preclusion (true res judicata) and issue preclusion (collateral estoppel)." *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). "Under principles of claim preclusion, a valid final judgment rendered on the

merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim." *Id.* (citation omitted).

This was not the "same claim." Judge Mitchell's bias, or lack thereof, was not frozen in time. Circumstances and facts change. Simply because he ruled on a previous motion to disqualify in a related criminal matter does not mean that that ruling stands in a new civil proceeding. Notably, Mr. Joy and his post-conviction counsel offered new information not contained in the previous motion that Judge Mitchell had denied in the criminal matter. These included Judge Mitchell's comments at the second sentencing hearing and the fact that the Judge sentenced Mr. Joy to nine years fixed, with one year indeterminate "as an incentive for good institutional behavior." (Tr., Hearing of 1/9/17, p. 38, ln. 5-21.) Mr. Joy took that as sarcastic comment since he would be required to serve at least 90% of the maximum sentence. (*Id.*) Also, Judge Mitchell denied Mr. Joy and opportunity to present live testimony to make a record and supplement his motion in the post-conviction matter. (Tr., Hearing of 1/9/17, p. 18, ln. 24-25; p. 19, ln 1-5.)

This was a new claim by the time of the post-conviction action. Mr. Joy had a renewed due process right to a fair and impartial judge in the post-conviction proceeding. To the extent that *res judicata* was material to the ruling below, it was an improper alternative basis on which to dismiss the motion.

II.

This Court should not correct Judge Mitchell's error in dismissing certain claims as untimely by affirming on alternative grounds.

As to Issue II in the Brief of Appellant, the State concedes that the district court erred in concluding that all claims related to the first trial were untimely. (Brief of Respondent, p. 13.) Judge Mitchell did not rely on any alternative grounds to dismiss those claims, but the State nonetheless claims that mootness and res judicata (as to Count II, which the State asserts was resolved on appeal) were raised in its motion for summary dismissal in the district court and are proper grounds on which to affirm. (*Id.*)

The Court should not be persuaded, at least as to claims that Mr. Joy's allegations that his counsel were conflicted and ineffective in failing to assert his right to a speedy trial (Counts I and IV). Success on those claims would mean that his attorneys unreasonably failed to preserve a right that, had it been asserted and granted, would have resulted in dismissal of the case. The remedy, then, would not be the new trial that Mr. Joy already received after remand from the first appeal. It would have been dismissal. Those claims were not moot.

III.

Mr. Joy need not allege and prove that, had his counsel filed a timely motion for automatic disqualification, there is a reasonable probability that he would have been acquitted at the second trial.

The State concedes in its brief that Mr. Joy alleged unreasonably deficient performance by his attorney for failing to file a motion for automatic disqualification of Judge Mitchell after the appellate reversal. (Brief of Respondent, pp. 15-16.) But the State claims that Mr. Joy has not alleged sufficient prejudice because he did not demonstrate how the result of the second trial would have been different had the motion been filed and granted. (*Id.* at 16.)

As he argued in his opening brief, Mr. Joy reasserts that the procedural stage at issue was the selection of the presiding judge, and the outcome of that stage was affected by counsel's failure to file a successful motion. (Brief of Appellant, pp. 20-21.) Idaho has chosen to confer on parties a right to automatic disqualification of the presiding judge when certain timeliness requirements have been met. The right to disqualify a judge should therefore be deemed structural in nature, and structural error is not readily susceptible to a prejudice analysis. Perhaps another way to think of this issue is, if counsel *had* filed a timely motion and if Judge Mitchell had denied the motion, the Idaho Supreme Court would have reversed on direct appeal regardless whether Mr. Joy could show prejudice. *See State v. Shafer*, 112 Idaho 1024, 1027, 739 P.2d

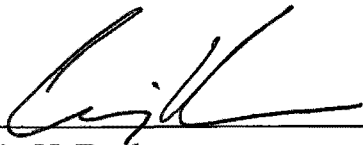
323, 326 (1987) (“Because the [automatic disqualification] motion was denied below, we must reverse and remand this case for a new trial.”).

If the Court does require some additional showing of prejudice beyond the success of the motion, however, it should focus on the reliability of the proceeding and not on the likelihood of an acquittal. *See, e.g., Thompson v. Florida*, 990 So.2d 482 (Fla. 2008) (holding that prejudice within the context of failing to file a motion to disqualify a judge means “a demonstration that the result of the proceeding has been rendered unreliable, and our confidence in the outcome of a proceeding has been undermined by counsel’s deficiency.”). Regardless whether the Court determines that Judge Mitchell was actually biased or even appeared to be biased by the time of the second trial, the Court should have enough of a concern for all the reasons cited that it should not have confidence in the fairness and reliability of the second trial and sentencing. At the very least, it is reasonably probable that a different judge would not have sentenced Mr. Joy to the maximum sentence of 10 years for this charge, with parole eligibility only one year before completion as a supposed “incentive for good institutional behavior.” The district court erred in summarily dismissing this claim without further development.

CONCLUSION

Mr. Joy respectfully requests that this Court vacate the district court’s judgment and remand for further proceedings in front of a different assigned judge.

Respectfully submitted on this 26th day of March 2018.

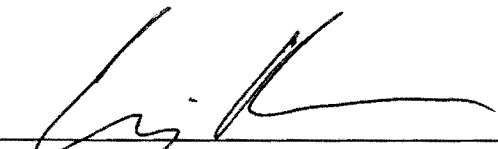


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CERTIFICATE OF SERVICE

This Reply Brief has been served on the following on this 26th day of March 2018, via email and by depositing copies in the United States Mail, postage pre-paid and addressed to:

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