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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**

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**CORRECTED BRIEF OF APPELLANT**

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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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## STATEMENT OF THE CASE

### Nature of the Case

Preston Adam Joy appeals from the district court's judgment summarily dismissing his amended petition for post-conviction relief.

### Statement of Facts and Course of the Proceedings

In 2009, the State charged Mr. Joy with second degree kidnapping, felony domestic battery, and forcible penetration by a foreign object. *State v. Joy*, Docket No. 42166, Opinion No. 707 at \*1 (Ct. App. 2015), (Clerk's R., p. 38.) These charges were based on a domestic incident between Mr. Joy and his wife at the time, Jennifer. (*Id.*)

The case went to a jury trial. The jury found Mr. Joy guilty of domestic battery, but it acquitted him of forcible penetration and it could not agree on the kidnapping charge. (Clerk's R., p. 38.) Before a new trial on the kidnapping charge, he entered a conditional guilty plea, reserving the right to appeal the court's pretrial, trial, and post-trial rulings. (*Id.*)

On appeal, the Idaho Supreme Court vacated Mr. Joy's judgment of conviction and remanded the case for a new trial. *State v. Joy*, 155 Idaho 1, 304 P.3d 276 (2013). In doing so, it found that the presiding district judge, Hon. John T. Mitchell, had abused his discretion in multiple ways. Though the Supreme Court found reversible error based on Judge Mitchell's decision to admit prior bad acts evidence, it also opined on the lower court's many other errors, including the refusal to give a lesser included

offense; quashing a subpoena duces tecum for relevant evidence on Jennifer's computer; erroneously admitting Jennifer's preliminary hearing testimony; improperly admitting Jennifer's statements to a detective; admitting a boot lace; and overruling the prosecutor's improper cross-examination questions. *Joy*, 155 Idaho at 3-16, 304 P.3d at 279-92.

Mr. Joy alleges that after the Supreme Court issued its opinion, but before the remittitur came down, he anticipated that the case would return to the district court for a new trial. (Clerk's R., p. 21; Petitioner's Verified Amended Petition for Post-Conviction Relief.) He wanted to disqualify Judge Mitchell, and he spoke to his appellate counsel about the process under Idaho Criminal Rule 25 to disqualify the court from presiding over any new trial. (*Id.*)

Based on that conversation, Mr. Joy called his appointed counsel in the district court, Sean Walsh, and requested that he file a timely motion to recuse under Rule 25. (*Id.*) Indeed, he called Walsh "many times before and at least once after the remittitur was filed ..." (*Id.*) Mr. Walsh agreed to file the motion to disqualify the judge, but then later told Mr. Joy that he was "too f---- busy." (*Id.*)

Nearly a year after the reversal on appeal, however, Mr. Walsh did file a "Request for Self-Recusal or in the Alternative Motion to Recuse for Cause." (Clerk's Record, Exhibit 1.) Judge Mitchell denied that request, in part on timeliness grounds



(Clerk's R. p. 21), and the case proceeded to a second trial on domestic battery and second-degree kidnapping.

This time, Mr. Joy was acquitted of the kidnapping charge but convicted of domestic battery. (Clerk's R., p. 19.) Judge Mitchell sentenced him to the maximum term allowed by law, ten years, with nine of those years determinate. (Clerk's R., p. 16.) The Idaho Court of Appeals ultimately affirmed the judgment in an unpublished opinion released on November 13, 2015. (Clerk's R., p. 16.)

Mr. Joy next filed a post-conviction petition on May 16, 2016, raising claims of ineffective assistance of counsel at his first trial, his second trial, and his second appeal, and a claim that he had been deprived of a fair and impartial judge. (Clerk's R., pp. 1-11.)

The court appointed counsel, who then filed an amended petition containing seven claims for relief, as follows:

Count I: Ineffective assistance of counsel at the first trial for waiving Mr. Joy's right to a speedy trial against his expressed instructions;

Count II: Ineffective assistance at the first trial for failing to challenge the sufficiency of the State's Information;

Count III: Ineffective assistance at the first trial for not subpoenaing witnesses and for not being prepared for trial;

Count IV: Ineffective assistance of counsel at the first trial because counsel did not disclose their relationship or their marriage, which affected their duties of loyalty to Mr. Joy;

Count V: Ineffective assistance of substituted counsel Sean Walsh on remand from the Idaho Supreme Court for failing assert Mr. Joy's right to a speedy trial and instead waiving that right;

Count VI: Ineffective assistance of Mr. Walsh on remand from the Idaho Supreme Court for failing to file a motion to disqualify the presiding judge immediately after the Idaho Supreme Court issued the remittitur vacating the judgment;

Count VII: Ineffective assistance of appellate counsel during the second appeal for conceding issues regarding a defective information; and

Count VIII: A claim that Mr. Joy was deprived of a fair and impartial judge because the judge exhibited bias against him throughout the proceedings.

(Clerk's R., pp. 15-26.)

Mr. Joy's post-conviction counsel also took another run at disqualifying Judge Mitchell from hearing the post-conviction matter by filing a motion for disqualification.

(Clerk's R., pp. 27-28.) After argument, Judge Mitchell denied the motion.<sup>1</sup> (*Id.* at 43; ln. 22-5.)

Judge Mitchell later granted the State's motion for summary dismissal of all claims in the amended petition. (Tr. Feb. 2, 2017 Hearing, p. 18; ln. 13-25; p. 19, ln. 1-25; p. 20, ln. 1-13.)

He first concluded that Counts I through IV, raising issues regarding counsel's performance at the first trial, including a claim that counsel did not preserve Mr. Joy's speedy trial rights, were time-barred because a petition as not filed within one-year of the conclusion of the first appeal. (Tr., p. 18, ln. 13-25; p. 19, ln. 1-8.)

Next, addressing Count V – in which Mr. Joy alleged that Attorney Walsh was ineffective in failing to assert Mr. Joy's right to a speedy trial at the *second* trial – the district court dismissed it because Mr. Joy "had his second trial." (Tr., p. 19, ln. 9-19.)

The court then joined Count VI – in which Mr. Joy contended that Mr. Walsh's failure to file an automatic disqualification motion under I.C.R. 25 after reversal of the conviction was ineffective assistance of counsel – with Count VIII – in which Mr. Joy

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<sup>1</sup> Mr. Joy's counsel also filed a motion to disqualify the Kootenai County Prosecuting Attorney's Office because one of Mr. Joy's trial attorneys, who was the subject of claims of ineffective assistance of counsel, had started working as a prosecutor. (Clerk's R., pp. 51-53.) The District Court denied that motion, insofar as it related to resolving the motion for summary dismissal, because the attorney's testimony was not needed at that stage in the proceeding. (Tr. Feb. 2, 2017 Hearing, p. 16; ln. 6-18.)

Mr. Joy does not appeal that determination but reserves the right to re-assert the issue should the case be remanded and proceed to an evidentiary hearing.

reasserted that he was deprived of a fair and impartial judge. (Tr., p. 19, ln. 20-21; p. 20, ln. 1-2.) Eliding the distinction in those different claims (ineffective assistance versus judicial bias), Judge Mitchell dismissed them after concluding that he had “already dealt with that [the issue of his bias or prejudice]” and because there was no “factual or legal basis in Counts 6 and 8 of the petition.” (Tr., p. 19, ln. 20-24.)

Finally, Judge Mitchell dismissed Mr. Joy’s allegation that his appellate counsel was ineffective in conceding an arguable issue on the second appeal related to a defective charging document (Count VII). (Tr., p. 20, ln. 3-8.)

Judgment was entered on June 8, 2017. (*Id.* at 71.)

Mr. Joy now appeals.

## ISSUES PRESENTED ON APPEAL

### I.

The district court abused its discretion in denying Mr. Joy's motion for disqualification in the post-conviction proceeding.

### II.

Given that Mr. Joy filed his petition within one year after a "proceeding following an appeal" became final, the district court erred as a matter of law in concluding that claims of ineffective assistance of counsel related to the first trial were time-barred under Idaho Code § 19-4902(a).

### III.

The district court erred in summarily dismissing Count VI in Mr. Joy's amended petition because he alleged facts that, if true, established ineffective assistance of counsel based on counsel's failure, immediately after the first appeal, to file a motion for the automatic disqualification of the presiding judge.

## ARGUMENT

### I.

**The district court abused its discretion in denying Mr. Joy's motion for disqualification in the post-conviction proceeding.**

#### 1. Introduction

Judge Mitchell presided over the first two trials and the post-conviction matter. By then, Mr. Joy had presented a wealth of evidence to show at least the strong appearance of bias or prejudice. Judge Mitchell should have granted Mr. Joy's motion to disqualify, and this Court should remand for reconsideration of the post-conviction petition by a different judge.

#### 2. Standard of Review

Whether it is necessary for a judicial officer to disqualify himself or herself in a given case is left to the sound discretion of the judicial officer. *Bradbury v. Idaho Judicial Council*, 149 Idaho 107, 113, 233 P.3d 35, 44 (2009).

"To determine whether a trial court has abused its discretion, this Court considers whether it correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with applicable legal standards, and whether it reached its decision by an exercise of reason." *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 51, 995 P.2d 816, 821 (2000).

### 3. Legal Standards Governing Judicial Disqualification

A fair hearing in front of a fair and impartial tribunal is a basic component of due process under the Fourteenth Amendment. *In re Murchison*, 349 U. S. 133, 135 (1955). A due process violation occurs when “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (citing *Withrow v. Larkin*, 421 U. S. 35, 47 (1975)).

Moreover, under Idaho Rule of Civil Procedure 40(b)(1)(D), a party may file a motion for disqualification of a judge for bias or prejudice at any time. The motion “must be accompanied by an affidavit of the party or the party's attorney stating the specific grounds upon which disqualification is based and the facts relied upon in support of the motion.” I.R.C.P 40(b)(2).

In *Bradbury v. Idaho Judicial Council*, the Idaho Supreme Court provided some guidance in applying these standards. There, it cited favorably to Chief Justice Rehnquist’s statement in *Microsoft Corp. v. United States*, 530 U.S. 1301 (2000), regarding when a judge should recuse himself or herself. *Bradbury*, 149 Idaho 107, 113, 233 P.3d 35, 44. The Idaho Supreme Court found the statement instructive because of the similarities between recusal requirements under state and federal law. Specifically, it quoted Chief Justice Rehnquist:

As this Court has stated, what matters under § 455(a) “is not the reality of bias or prejudice but its appearance.” *Liteky v. United States*, 510 U.S. 540,

548, 114 S.Ct. 1147 [1154] 127 L.Ed.2d 474 [486] (1994). This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.

*Bradbury*, 149 Idaho 107, 113-14, 233 P.3d 35, 44 (2009) (citing *Microsoft Corp. v. United States*, 530 U.S. at 1302.)

#### 4. Discussion

Mr. Joy's case had a long and circuitous path to the post-conviction proceeding, and he had alleged sufficient facts in support of his motion for disqualification that a reasonable observer would question Judge Mitchell's continued impartiality.

After the first trial, Judge Mitchell sentenced Mr. Joy to the maximum sentence allowed for domestic battery, ten years fixed. Idaho Code § 18-918(b). According to Mr. Joy's allegations in his amended petition, when he filed a Rule 35 motion to reduce his sentence after the first trial, the judge responded that he was "slack jawed" and that it was "mind boggling" that Mr. Joy would seek a reduction in sentence. (Tr., Jan. 9, 2017 Hearing, p.29, ln. 18-19.)

Nevertheless, on appeal the Idaho Supreme Court vacated the judgment and remanded after finding that the presiding judge had abused his discretion in several respects. He had let in wholesale prior bad acts evidence. He failed to instruct the jury to consider lesser included offenses. He allowed the prosecutor free reign, improperly, when cross-examining Mr. Joy. He allowed Jennifer Joy's statement to a detective to



come into evidence when it shouldn't have. He quashed a subpoena for relevant evidence. He allowed Jennifer's preliminary hearing testimony to be admitted erroneously. He allowed an exhibit to be admitted that lacked proper authentication. *State v. Joy*, 155 Idaho at 3-16, 304 P.3d at 279-92.

But it was more than just a pattern of unfavorable and erroneous rulings against Mr. Joy. According to his amended petition, on remand and before the second trial Judge Mitchell questioned the wisdom of the State's withdrawal of an Information Part II seeking a sentencing enhancement, which it brought forward for the first time after the successful appeal. (Clerk's R., p. 23.) The State withdrew the charge after defense counsel objected that its inclusion would be purely vindictive for winning on appeal. According to Mr. Joy, the judge nonetheless said that if it had not been withdrawn, he would have allowed it. (*Id.*) Also according to Mr. Joy's allegations, the judge continued the second trial after disregarding Mr. Joy's written assertion of his speedy trial rights. (*Id.*) He again sentenced Mr. Joy to the maximum term, but this time with nine years fixed instead of ten.

The facts in this record therefore include, among other things, a pattern and record of one-sided rulings and errors at the first trial; a maximum sentence; comments on the record expressing incredulity when the sentence was challenged; a chastising reversal on direct appeal; comments urging the filing of an Information Part II even when the State withdrew it; a failure to observe the defendant's desire to retain his

speedy trial rights; and a previous motion seeking disqualification for bias. Mr. Joy respectfully submits these facts developed over the course of several years would lead an objective observer to question the judge's continued impartiality. This Court should likewise so find and conclude that the district court erred in denying the motion.

In reaching that conclusion, this Court should turn aside any argument from the State that Mr. Joy did not strictly comply with Rule 40(b)(2) based on a supposed failure to file an affidavit in support. Judge Mitchell noted this purported deficiency, but Mr. Joy's counsel did provide an affidavit, which was the same affidavit that was filed in the previous motion to disqualify in the criminal matter. (See Exhibit 1, Jan. 9, 2017 Hearing.) He also incorporated the allegations in Mr. Joy's verified petition, which serves as sworn testimony. (Clerk's R., pp. 22-23, 27.) And he asked the district court to allow Mr. Joy to testify on the motion at the hearing, but that request was refused. (Tr., Jan. 9, 2017 Hearing, p. 18, ln. 24-25; p. 19, ln 1-5.) It is difficult to understand why live testimony, subject to cross-examination, could not serve as an adequate or perhaps superior substitute for written testimony.

For all of these reasons, the district court erred in refusing to step aside. This Court should remand for a new post-conviction proceeding in front of a different judge.

## II.

Given that Mr. Joy filed his petition within one year after a “proceeding following an appeal” became final, the district court erred as a matter of law in concluding that claims of ineffective assistance of trial counsel related to the first trial were time-barred under Idaho Code § 19-4902(a).

### 1. Introduction

Idaho Code § 19-4902(a) extends the time to file a post-conviction to one year after a “proceeding following an appeal.” Here, the Idaho Supreme Court vacated the judgment on direct appeal and remanded for further proceedings in 2013. Those proceedings were not final until the conclusion of the second appeal in late 2015. Mr. Joy filed his post-conviction petition in May of 2016, within one year after that appeal was final, and his claims related to the first trial were therefore timely.

### 2. Standard of Review

The determination of the applicable statute of limitation is a question of law over which this Court has free review. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 388, 403, 111 P.3d 73, 88 (2005).

### 3. Discussion

Counts I to IV in the amended petition raised claims of ineffective assistance of counsel at Mr. Joy’s first trial. The district court granted the State’s motion for summary

dismissal as to those counts after concluding that the petition “is not timely relative to anything involved in the first trial.” (Tr., Feb. 2, 2017 Hearing, p. 18, ln. 15.)

The district court was apparently persuaded by the State’s argument that because the remittitur in the first appeal came down on July 26, 2013, the one-year statute of limitations in Idaho Code § 19-4902(a) started to run and expired on July 26, 2014. (Clerk’s R., pp. 49-50.) According to that theory, the May 16, 2016 petition, to the extent that it raised claims related to the first trial, was nearly two years out of time. (*Id.*)

This argument is legally incorrect. The relevant portion of the statute reads, “[a]n application may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal *or from the determination of a proceeding following an appeal*, whichever is later.” Idaho Code § 19-4902(a) (emphasis added). A “proceeding following an appeal” includes “a remand of the criminal case to the trial court as a consequence of the direct appeal from a judgment of conviction” *Freeman v. State*, 122 Idaho 627, 629, 836 P.2d 1088, 1090 (Ct. App. 1992). Contrary to the State and the court’s interpretation, the timeliness of a post-conviction action is determined by the date when the judgment of conviction becomes final. *Peregrina v. State*, 158 Idaho 948, 951, 354 P.3d 510, 513 (2015).

In this case, the district court’s judgment was vacated by the Supreme Court’s order in the first appeal and did not become final until the second appeal concluded in late 2015. (Clerk’s R., p. 16.) The district court erred in finding that the statute of

limitations had expired as to Counts I to IV when the petition was filed within a year of finality, in May of 2016. This Court should therefore remand for consideration on the merits of those four claims.

### III.

**The district court erred in summarily dismissing Count VI in Mr. Joy's amended petition because he alleged facts that, if true, established ineffective assistance of counsel based on counsel's failure, immediately after the first appeal, to file a motion for the automatic disqualification of the presiding judge.**

#### 1. Introduction

In Count VI of the amended petition, Mr. Joy alleged that his appointed counsel was constitutionally ineffective in failing to file a motion to disqualify Judge Mitchell, pursuant to Idaho Criminal Rule 25, after the Idaho Supreme Court issued its remittitur in the first appeal. At that time, Mr. Joy had a renewed right to disqualify the presiding judge without showing any cause. Had the motion been filed, Judge Mitchell would have had no choice but to grant it and assign a different presiding judge.

#### 2. Standard of Review

When considering whether to dismiss a petition summarily, the district court must construe disputed facts in the petitioner's favor, though the court is not required to accept mere conclusory allegations, unsupported by admissible evidence, or conclusions of law. *State v. Payne*, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008). If the

petition, affidavits, and other evidence supporting the petition allege facts that, if true, would entitle the petitioner to relief, a post-conviction claim may not be summarily dismissed. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). If a genuine issue of material fact is presented, an evidentiary hearing must be conducted. *Kelly v. State*, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010).

This Court applies the same standards used by the lower courts and examines whether the petitioner's admissible evidence asserts facts which, if true, would entitle the petitioner to relief. *Ridgley v. State*, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010).

3. Legal Standards Governing Claims of Ineffective Assistance of Counsel

Mr. Joy was entitled to the effective assistance of counsel under the Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963). He also had a concomitant right under Article I, § 13 of the Idaho Constitution. *Murray v. State*, 156 Idaho 159, 164, 321 P.3d 709, 714 (2014).

The test for determining whether the defendant has been deprived of that constitutional right is two-fold: first, he must show that his counsel committed errors that fell below an objective standard of reasonableness; and, second, he must demonstrate that he suffered actual prejudice as a result of those errors. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); accord *Johnson v. State*, 156 Idaho 7, 10-11, 319 P.3d 491, 494-95 (2014). Prejudice in this context means that, but for counsel's errors,

there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S at 694. A reasonable probability is one that is “sufficient to undermine confidence in the outcome.” *Id.*

When a petitioner alleges ineffective assistance of counsel based on counsel's failure to file a motion, a "critical inquiry is whether the motion, if filed, should have been granted ..." *State v. Dunlap*, 155 Idaho 345, 385, 313 P.3d 1, 41 (2013).

#### 4. Discussion

In Count VI of his amended petition, Mr. Joy alleged that his appointed counsel failed to file a timely Idaho Criminal Rule 25 motion for disqualification despite his repeated requests that counsel do so. (Clerk's R., pp. 20-21.) Specifically, he claimed that after the Idaho Supreme Court released its opinion in the first appeal, but before it issued the remittitur, he anticipated that the case would return to the district court. (Clerk's R., pp. 20-21.) He talked to his appellate counsel about how he could accomplish disqualification of Judge Mitchell. (*Id.*) He then “requested many times before and at least once three days after the remittitur was filed that Mr. Walsh timely file a motion to disqualify the Hon. John T. Mitchell.” (*Id.*) His counsel at first agreed but later responded, “Preston, I am too f--- busy for your case. I do not know if I am going to withdraw or have it appointed to someone else in our firm.” (*Id.*) A motion to disqualify without cause was not filed, but Mr. Walsh did file a belated motion for self-

recusal nearly two years later. (*Id.*) That motion was denied, partly on timeliness concerns. (*Id.*)

These factual allegations, verified in Mr. Joy's amended petition, should have been presumed to be true for purposes of deciding whether summary dismissal was appropriate. *Payne*, 146 Idaho at 561, 199 P.3d at 136. The lower court instead erroneously conflated this issue with another claim in which Mr. Joy alleged that he did not receive a fair and impartial judge (Count VIII). (Tr. Feb. 2, 2017 Hearing, p. 19, ln. 20-21.) These are different claims with different standards (ineffective assistance of counsel v. biased judge). Had the district court properly construed the claim, it would have been required to deny the State's motion for summary dismissal and allowed the case to go to an evidentiary hearing.

This so because there was a window of time immediately after the Idaho Supreme Court's opinion became final in which Mr. Joy had a renewed right under Idaho law to disqualify Judge Mitchell without cause. That is, under Idaho Criminal Rule 25(a)(5), "[a]fter a trial has been held, if a new trial has been ordered by the trial court or by an appellate court, any party may file a motion for disqualification without cause of the presiding judge within the time limits set forth in subparagraph (2) of this Rule." I.C.R. 25(a)(5). Per subsection (a)(2) of the Rule, the motion must be filed within seven days of "written notice setting the action for status conference, pre-trial conference, trial or for hearing on the first contested motion," or within fourteen days of



written notice of who the presiding judge is, whichever occurs first. I.C.R. 25(a)(2). And the motion must be filed “before a status conference, a pre-trial conference, a contested proceeding or trial in the action.” *Id.*

There is no doubt that Mr. Joy wanted to avail himself of this right. No notice of a status conference was issued until a month after the remittitur. See *State v. Preston Joy*, Case History for CR-2009-0016183, Idaho State Repository, <https://goo.gl/SAaRjo>. Had his attorney simply followed through and done what he told Mr. Joy he would do, Judge Mitchell would have had no choice but to reassign the case.

These factual allegations meet the *Strickland* two-part standard for ineffective assistance of counsel. First, it was objectively unreasonable for Mr. Walsh not to file motion. The Idaho Supreme Court had just concluded in a published opinion that Judge Mitchell had made numerous errors in Mr. Joy’s trial, described elsewhere in this brief. It is understandable that Mr. Joy would lack confidence that the judge presiding over his case was going to give him a fair shake at a new trial. But there is no reason to speculate about Mr. Joy’s wishes, as he instructed Mr. Walsh to disqualify the judge. Any defense attorney, acting reasonably and in his client’s best interests in these circumstances, would have filed the Rule 25(a)(5) motion immediately after the remittitur had issued.

Nor is there evidence that Mr. Walsh made a tactical decision not to do so. To the contrary, Mr. Joy alleged in his verified petition that Mr. Walsh agreed that he would

file the motion and just simply got too busy. Being too busy is not a tactic. Further removing this case from any tactical concerns is that Mr. Walsh did, in fact, later file a motion for disqualification. If he was willing to do that, it makes little sense to say that he might have made a tactical decision not to file a motion in which he would need to make no allegations of bias against the judge. When analyzing a failure of trial counsel to make a motion that is neither strategic nor tactical, the Court examines the probability of success of the motion in question. *Estrada v. State*, 143 Idaho 558, 561, 149 P.3d 833, 836 (2006). Here, success was assured.

Because of that, there is at least a reasonable probability that, but for counsel's unreasonable error, the outcome would have been different. For Mr. Joy, his right to automatic disqualification was reinstated upon the Idaho Supreme Court's issuance of the remittitur and extended to seven days after the first notice of a status conference was sent. Had counsel filed the motion in that period of time, the motion would have successfully changed the presiding judge in the case. That is the relevant "outcome" for purposes of this claim.

The State should not be heard to argue that Mr. Joy failed to allege a reasonable probability that the outcome of the *second trial* would have been different had Judge Mitchell been disqualified. Such an argument focuses on the incorrect "outcome," and would set an impossible standard that could never be met.

To support Mr. Joy's position, this Court need look no further than *Hill v. Lockhart*, 474 U.S. 52 (1985). There, the United States Supreme Court held that the *Strickland* standard applies to defendants who enter a guilty plea and waive their right to a trial. *Id.* at 59. Proving prejudice in that situation, according to the Court, requires a showing that the defendant would not have pled guilty and instead would have insisted on going to trial. *Id.* It is not necessary for him to prove a reasonable probability that he or she would have been acquitted. *Id.*

In an analogous context, other jurisdictions have found that in a claim of ineffective assistance of counsel based on counsel's improper waiver of a jury trial, the prejudice component is satisfied if the petitioner can show that he or she would not have waived the jury trial. *State v. Keller*, 760 N.W.2d 451, 453 (Iowa 2009); *Commonwealth v. Mallory*, 941 A.2d 686, 704-05 (Penn. 2008). There is no need to show that had the case gone to a jury trial, there is a probability of an acquittal. *Mallory*, 941 A.2d at 704-05.

In these cases, prejudice is measured by assessing the effect that the error had on the outcome of the stage at issue. In *Hill*, it was the guilty plea stage. In *Keller* and *Mallory*, it was a stage in which the defendant had to decide whether to have a jury or a bench trial. Here, the stage was the selection of the presiding judge. Mr. Joy had a temporary right granted to him by Idaho law to, in effect, choose his presiding judge or,

at the very least, he had a right to choose who would *not* be his judge. He was prejudiced at that stage of the criminal matter by his counsel forfeiture of that right.

Mr. Joy alleged facts that, if true, would entitle him to relief on this claim. The district court's judgment as to Count VI should be reversed.

### 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 3rd day of November 2017.

A handwritten signature in black ink, appearing to read 'Craig Durham', written in a cursive style.

Craig Durham  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

This Brief has been served on the following on this 3rd day of November 2017, by depositing copies in the United States Mail, postage pre-paid and addressed to:

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A handwritten signature in black ink, appearing to read "Craig H. Durham". The signature is fluid and cursive, with a large initial "C" and "D".

Craig H. Durham