STATE OF IDAHO)
County of KOOTENAI)ss

FILED______________________

AT___________ O'clock _____M
CLERK, DISTRICT COURT

____
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, *Plaintiff,* vs. **TIMOTHY EUGENE ESTEP,** *Defendant.*	Case No. **CRF 2010 15488** **ORDER DENYING DEFENDANT'S MOTION TO DISQUALIFY JUDGES CHAMBERED IN KOOTENAI COUNTY, AND ORDER DENYING DEFENDANT'S MOTION FOR LEAVE TO WITHDRAW OR TO ALLOW DEFENDANT TO PROCEED PRO SE WITH STAND BY COUNSEL**

I. INTRODUCTION AND PROCEDURAL HISTORY.

This matter was originally assigned to Judge Benjamin Simpson. Trial before a jury was scheduled to begin with Judge Simpson on December 10, 2012. On November 14, 2012, Judge Simpson disqualified himself from this case voluntarily, pursuant to I.C.R. 25(d). On November 16, 2012, John T. Mitchell, the Administrative Judge for the First Judicial District of the State of Idaho, reassigned the case to District Judge John T. Mitchell. The trial date of December 10, 2012, was not modified as a result of this reassignment.

On November 21, 2012, the defendant Estep, through his attorney, filed a "Motion to Disqualify Judges Chambered in Kootenai County". That motion was made "for cause" pursuant to I.C.R. 25(b). Motion to Disqualify Judges Chambered in Kootenai County, p. 1. Idaho Criminal Rule 25(c) requires "Any such disqualification for cause shall be made by a

motion to disqualify accompanied by an affidavit of the party or that party's attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion." No affidavit was filed by Estep or his attorney.

Idaho Criminal Rule 25(c) also requires a hearing before granting or denying such motion. A hearing was held on November 26, 2012. The hearing was held five days after Estep filed his "Motion to Disqualify Judges Chambered in Kootenai County", because under I.C.R. 25(e), "Upon the filing of a motion for disqualification, the presiding judge shall be without authority to act further in such action except to grant or deny such motion for disqualification…"

At that November 26, 2012, hearing, counsel for Estep first moved to continue the hearing on his motion to disqualify. Estep wanted time to come up with evidence to support his motion. The State of Idaho objected to such continuance, given the fact that trial is two weeks away, and given the fact that it has taken two years to get to this point, and the case has yet to be tried. The Court denied Estep's motion to continue the hearing on his motion to disqualify. Estep's desire to have additional time to come up with evidence to support his motion flies in the face of I.C.R. 25(c) that the motion itself be accompanied by an affidavit. The rule does not allow a party to file a motion and then request additional time to see if the party can come up with evidence that would support the claims made in the motion.

At the conclusion of the November 26, 2012, hearing, the Court denied Estep's motion to disqualify, but indicated it would set forth its reasoning in a written decision.

Estep claims in his "Motion to Disqualify Judges Chambered in Kootenai County" (but not by any affidavit), that his motion is made on the "…grounds that the Post Falls Police Department Contacted Kootenai County District Court Staff on November 14, 2012 and reported that Defendant had made a death threat against a judge chambered in Kootenai County." Motion to Disqualify Judges Chambered in Kootenai County, p. 1. Estep also

claims in his motion (and not by any affidavit): "Defendant asserts that the publication of the alleged threat by the Post Falls Police Department and by Court Staff has caused all judges chambered in Kootenai County to have a bias or a prejudice against him." *Id.,* p. 2. Finally, in his motion (and not by any affidavit), Estep claims: "Furthermore, Defendant asserts that the publication of the alleged threat has caused all judges chambered in Kootenai County to have an interest in the proceedings in as much as there may be a perception that any future incarceration of Defendant would eliminate any alleged threat from Defendant to the judges chambered in Kootenai County." *Id.*

II. ANALYSIS OF ESTEP'S MOTION TO DISQUALIFY JUDGES CHAMBERED IN KOOTENAI COUNTY.

This Court is mindful of and appreciates the fact that this is a matter committed to the Court's discretion. *State v. Brown,* 121 Idaho 385, 392, 825 P.2d 482, 489 (1992). *See also Desfosses v. Desfosses,* 120 Idaho 27, 29-30, 813 P.2d 366, 368-69 (Ct.App. 1991); *Roselle v. Heirs and Devisees of Archie Grover,* 117 Idaho 530, 533, 789 P.2d 526, 529 (Ct.App. 1990).

Estep's "Motion to Disqualify Judges Chambered in Kootenai County" must be denied for several reasons.

First, Estep has failed to follow the requirement of I.C.R. 25(c) that "Any such disqualification for cause shall be made by a motion to disqualify accompanied by an affidavit of the party or that party's attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion." This failure to file an affidavit is not a mere technicality. In Estep's situation, Estep's failure to file such an affidavit causes there to be no factual basis to Estep's motion. There is no way for this Court to assess the truth of any of the claims Estep asserts. There is no way for this Court to assess the truth that it was the Post Falls Police Department which contacted Kootenai County District Court

Staff on November 14, 2012, and reported that Defendant had made a death threat against a judge chambered in Kootenai County. Until this motion was made, the undersigned had no understanding that Estep had in fact made such claims. But after reading such motion and even after the November 26, 2012, hearing, without an affidavit, the Court has no way to assess whether it was in fact the Post Falls Police that contacted District Court Staff, which District Court Staff was contacted, and what was said and by whom. Finding out "what was said" is crucial because Estep has moved to disqualify all judges in the First Judicial District. Based on Estep's motion alone, without an affidavit, this Court has no way of knowing whether in fact Estep made any threat at all, whether it was mere miscommunication by Post Falls Police, or whether it is entire fabrication. Via Estep's motion, this Court has no way of knowing whether Estep made a threat, and if he did make a threat, this Court has no way of knowing to what judge or judges was it made. Estep's failure to follow the Idaho Criminal Rules by failing to file an affidavit is fatal to his motion to disqualify.

Second, there is nothing in Idaho Criminal Rule 25 that allows a person to make a motion to disqualify *all judges* within a judicial district. This Court can find no appellate case law that would support such a procedure. The Court finds that the proper procedure is to move to disqualify each judge in sequence as they are assigned. Essentially, that is how this Court is deciding Estep's motion to disqualify, but there will be no reassignment to yet another district judge as this Court denies Estep's motion.

Third, from a factual standpoint, Estep's claim has no merit. The undersigned is not, in fact, prejudiced against Estep even if his claims as made in his motion are true that the Post Falls Police Department Contacted Kootenai County District Court Staff on November 14, 2012, and reported that Defendant had made a death threat against a judge chambered in Kootenai County. Even if Estep had made a threat against the undersigned specifically, the undersigned is not, in fact, prejudiced against Estep. While a threat against a judge is

not a daily occurrence, such threats do occur. The unfortunate reality is that such threats are a part of the job of being a judge. In fact, in the month of November 2012, Estep's general threat against the judiciary is not the first threat made against the undersigned. The first threat made this month was specifically made against the undersigned. The second threat made in the month of November was a general threat made by a different person. Estep's threat is the third this Court has had to deal with this month.

Fourth, from a legal standpoint, Estep's claim has no merit. The Idaho Supreme Court squarely answered this question in *State v. Brown,* 121 Idaho 385, 825 P.2d 482 (1992). In *Brown,* the defendant Robert L. Brown pled guilty to rape, robbery, and aggravated battery, and the State agreed to drop the charges of battery with the intent to commit a serious felony, attempted murder in the first degree, grand theft and second degree burglary. The evidence showed Brown had entered a business in Lewiston, Idaho, forced a female employee into a back room, beat her on the head with a brick, raped her, stabbed her twice in the chest with a knife, and cut her throat. 121 Idaho 385, 386, 825 P.2d 482, 483. Miraculously, Brown's victim survived. *Id.* At sentencing, the district court judge admitted into evidence a "death list" in which Brown threatened to kill various people. 121 Idaho 385, 387-88, 825 P.2d 482, 484-85. Brown moved to disqualify the judge after reading the "death list", and "The trial judge denied the motion and stated that Brown's threat against the judge had no effect on the judge's impartiality." Brown appealed. The Idaho Supreme Court held the trial judge did not abuse his discretion by not disqualifying himself. 121 Idaho 385, 392, 825 P.2d 482, 489. That portion of the Idaho Supreme Court's decision reads, in its entirety:

> Brown asserts that the trial judge should have disqualified himself upon learning of Brown's death threat against him. We conclude that the trial judge did not abuse his discretion in not disqualifying himself.
>
> After the trial court admitted the death threat list at the sentencing hearing, Brown's attorney moved pursuant to I.C.R. 25 to have the trial judge disqualify himself on the grounds that the judge was biased or prejudiced against Brown. In denying the motion, the judge stated the

> death list's personal threat against the judge would not affect the sentencing, and that the judge was not biased or prejudiced against Brown.
>
> Whether a trial judge should grant a motion for disqualification is left to the sound discretion of the judge. *Sivak v. State,* 112 Idaho 197, 206, 731 P.2d 192, 201 (1987). Applying the analysis of *State v. Hedger,* we conclude that the trial judge did not abuse his discretion by not disqualifying himself.

121 Idaho 385, 392, 825 P.2d 482, 489.

Fifth, as stated by the Idaho Court of Appeals upholding a denial of a motion for disqualification for cause by a judge: "Suspicion, surmise, speculation, rationalization, conjecture, innuendo, and statements of mere conclusions…may not be substituted for a statement of facts." *Desfosses v. Desfosses,* 120 Idaho 27, 30, 813 P.2d 366, 369 (Ct.App. 1991), *citing Walker v. People,* 126 Colo. 135, 248 P.2d 287, 295 (1952). At this time, this is all Estep has provided is "suspicion, surmise, speculation, rationalization, conjecture, innuendo, and statements of mere conclusions", when he claims "Defendant asserts that the publication of the alleged threat by the Post Falls Police Department and by Court Staff has caused all judges chambered in Kootenai County to have a bias or a prejudice against him." Motion to Disqualify Judges Chambered in Kootenai County, p. 2. There is absolutely no basis for Estep's claim that all judges chambered in Kootenai County have a bias or prejudice against Estep. There is certainly no basis for Estep's claim that this Court has a bias or prejudice against Estep, as it simply does not. Even if Estep had made a threat (this Court has no evidence of such) against this particular judge, the undersigned (this Court has no evidence of such), this Court would not be affected at trial or at any subsequent sentencing by any such threat.

III. ANALYSIS OF ESTEP'S MOTION FOR LEAVE TO WITHDRAW OR TO ALLOW DEFENDANT TO PROCEED PRO SE WITH SAND-BY COUNSEL.

On November 21, 2012, defendant Estep also filed a "Motion for Leave to Withdraw or to Allow Defendant to Proceed Pro Se With Stand-By Counsel", pursuant to I.C.R. 41. 1.

The reason given in this motion was that Estep "…has repeatedly informed the below signed counsel of his desire to fire counsel and have counsel removed from the case." Motion for Leave to Withdraw or to Allow Defendant to Proceed Pro Se With Stand-By Counsel, p. 1. At oral argument on November 26, 2012, counsel for the State of Idaho objected to this motion, that it was simply an attempt by Estep to again continue this case. At oral argument on November 26, 2012, counsel for Estep told the Court that Estep no longer wishes to proceed pro se, but that Estep had told his attorney Estep was going to pursue bar complaints. Again, there is no affidavit to that effect. Even if there were an affidavit that Estep intended to bring a bar complaint in the future, such would be inherently speculative and accorded no weight.

IV. CONCLUSION AND ORDER.

Based upon the above discussion,

IT IS ORDERED that the defendant TIMOTHY EUGENE ESTEP's Motion to Disqualify Judges Chambered in Kootenai County pursuant to I.C.R. 25(d) is DENIED.

IT IS FURTHER ORDERED that the defendant TIMOTHY EUGENE ESTEP's Motion for Leave to Withdraw or to Allow Defendant to Proceed Pro Se With Stand-By Counsel pursuant to I.C.R. 44.1 is DENIED.

IT IS FURTHER ORDERED the trial scheduled to begin at 9:00 a.m. on December 10, 2012, will proceed as scheduled with the undersigned presiding.

DATED this 26th day of January, 2013.

____

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the ___________ day of January, 2013 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Sean Walsh Faxed to (208) 327-7445]

Prosecuting Attorney – Robert Green

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:__________________________
Deputy