

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**

GIOVANNI MARCELLO MENDIOLA,)

Petitioner,)

vs.)

STATE OF IDAHO,)

Respondent.)

Case No. **CV 2004 8005**

**ORDER DENYING STATE'S
MOTION FOR
DISQUALIFICATION**

I. BACKGROUND.

This is a Post-Conviction relief case. The Respondent State claims that the parents of Brendan Butler, the victim killed by Petitioner Giovanni Mendiola, contributed financially to a person who opposed the undersigned in the May 23, 2006, primary election. As such, the State claims the undersigned should be disqualified from the post-conviction proceedings.

On April 20, 2006, Kootenai County Prosecutor William J. Douglas signed a pleading entitled "State's Motion for Disqualification for Cause or Alternative Voluntary Disqualification Pursuant to I.R.C.P. 40(d)(2) and (3) and I.C.R. 25(b) and (d)" (State's Motion). The State's Motion was filed on April 20, 2006. The State submitted no brief in support of the State's Motion, and only submitted an affidavit of William J. Douglas, again dated and filed April 20, 2006. The Petitioner did not respond to the State's Motion. As required in any motion for disqualification for cause, a hearing was held on the State's Motion on May 8, 2006. At that hearing, Chief Deputy Prosecuting Attorney for Kootenai County, Lansing Haynes appeared for the State, and Andrew Parnes appeared telephonically.

II. ANALYSIS.

The State contends in the State's Motion, that "there exists at least the appearance of bias or prejudice, or potential actual bias or prejudice in this case because of the extensive and other support given to this Court's challenger in the primary election on May 23, 2006." State's Motion, p. 1. However, the only evidence of this is found in the Affidavit of William J. Douglas, and that affidavit contains nothing more than impermissible hearsay:

5. Mr. Butler advised me that he and Mrs. Butler have provided a substantial financial contribution in the amount of one thousand dollars (\$1000) and will continue to provide financial and other support to this Court's challenger in the upcoming election for District Judge scheduled for May 23, 2006.

Affidavit in Support of State's Motion for Disqualification, p. 2, ¶ 5. The State has offered no exception to the rule against hearsay, nor any argument as to why such is not hearsay. The State has offered no affidavit of Mr. or Mrs. Butler. Accordingly, the State has no admissible evidence to support the State's Motion. The Idaho Rules of Evidence apply to cases under the Uniform Post Conviction Proceedings Act, with the exceptions noted in I.C. § 19-4907. I.R.E. 101(d)(4). From a factual standpoint, the State's Motion must be denied. A conclusory allegation creates no basis to disqualify a judge in a post-conviction case, and "Mandating a judicial disqualification on such unsubstantiated assertions would delay the administration of justice and promote frivolous disqualifications efforts." *Martinez v. State*, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct.App. 1995).

Even if the State could cure this evidentiary defect, there would be no reason to grant the State's motion. The Affidavit of William J. Douglas makes it clear that it is the State of Idaho that is making this motion, not the Butlers. According to William J. Douglas' Affidavit:

7. The *state* is concerned that financial and vocal support by the murder victim's family of this Court's challenger in the upcoming election will give the appearance of bias or prejudice, or potential bias or prejudice, for [sic?] against a party to this action.

Affidavit in Support of State's Motion for Disqualification, p. 2, ¶ 7. (emphasis added). The State

has furnished no case law nor offered any legal argument in support of the State's motion. From a legal standpoint, the State's Motion must be denied.

The case of *Rocha v. Ahmad*, 662 S.W2d 77 (Ct.App.Texas 1983) concerned a motion to disqualify two Justices of the Court of Appeals of Texas who had been given campaign contributions by a Texas attorney. The Court of Appeals of Texas unanimously (five other justices in addition to the two that were sought to be disqualified) decided those Justices were not to be disqualified from a case involving those attorneys, and held as follows:

It is not surprising that attorneys are the principal source of contributions in a judicial election. We judicially know that voter apathy is a continuing problem, especially in judicial races and particularly in contests for a seat on an appellate bench. A candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. *Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge's opponent.*

662 S.W.2d at 78. (emphasis added). The thought that a person, not even a party, who is interested in any litigation could contribute funds to an *opponent*, and then use that newly created fact in an effort to disqualify the judge who was assigned to the case from its inception, is indeed troubling. Essentially, this would allow anyone who is a party in any pending case, or even a non-party in a pending case, assigned to a judge who finds himself or herself in a contested election, to "buy" a different judge simply by making a financial contribution to his or her opponent. This Court notes that this post-conviction relief claim was filed on November 3, 2004, and that the State appeared on November 19, 2004. No motion for disqualification without cause was made by the State at the time when it could have been made. The motivation is extremely questionable when a party, or an interested person(s) who are represented by a party, have long ago passed on an opportunity for an automatic disqualification, only to a year and a half later attempt to renew that opportunity by simply contributing to an opponent's judicial campaign.

In *River Road Neighborhood Association v. South Texas Sports, Inc.*, 673 S.W.2d 952 (Ct.App.Texas 1984), the Court of Appeals of Texas held that even though owners and chairman of South Texas Sports contributed 21.7% of one justice's campaign and 17.1% of another justice's campaign, that was not sufficient reason for disqualification and did not present a situation where "his impartiality might reasonably be questioned." 673 S.W.2d 952, 953. The facts of the present case are much more attenuated. First, Butlers are not attorneys, nor are they parties. They are victims of the crime in a different criminal case which underlies this instant civil post-conviction relief action. Second, even if Douglas' affidavit could be considered, Butlers have given money to an opponent, not to the undersigned. That has absolutely "no direct pecuniary or personal interest" to the undersigned. *Id.* There is simply no possible way that the undersigned could "gain or lose anything of a pecuniary or personal nature because of any judgment which might be rendered in this case." *Id.*

The State makes its motion pursuant to I.R.C.P. 40(d)(2) and (3) and I.C.R. 25(b) and (d). This post-conviction case is a *civil* matter, not a *criminal* matter, and the Idaho Rules of Civil Procedure apply, and the Idaho Rules of Criminal Procedure do not apply. *Peltier v. State*, 119 Idaho 454, 456, 808 P.2d 373, 375 (1991); *Paridis v. State*. 110 Idaho 534, 536, 716 P.2d 1306, 1308 (1986). Thus, there is no merit to the State's motion under I.C.R. 25(b) and (d). The State cites I.R.C.P. 40(d)(2), but neglects to inform the Court as to which subpart they are claiming under. This Court assumes the State is claiming under I.R.C.P. 40(d)(2)(A)(4): "That the judge or magistrate is biased or prejudiced for or against any party or the case in the action." Not surprisingly, since the rule reads "...the judge or magistrate *is* prejudiced...", all cases interpreting that provision deal with allegations where the judge or magistrate *had made decisions* that allegedly showed bias or prejudice. *Bell v. Bell*, 122 Idaho 520, 835 P.2d 1331 (Ct.App. 1992); *Merrill v. Gibson*, 139 Idaho 840, 87 P.3d 949 (2004). Obviously that has not happened in the present case.

Contrary to the State's citation, there is no I.R.C.P. 40(d)(3). It is assumed that the State was mistaken and meant I.R.C.P. 40(d)(4). Voluntary disqualification is not warranted under I.R.C.P. 40(d)(4) based on the above case law, and based on the fact that even if there were evidence of any financial contribution by the Butlers to the undersigned's opponent, such would have absolutely no bearing on any decision to be made by this Court in this post-conviction case. This Court notes that if statements made by the sentencing judge against the defendant were not grounds to show bias for disqualification in a subsequent post-conviction relief case, then the mere fact that the parents of a victim contributed to the undersigned's opponent in a judicial campaign pales in comparison. *Martinez v. State*, 126 Idaho 813, 815-16, 892 P.2d 488, 490-91 (Ct.App. 1995); *Freeman v. State*, 114 Idaho 521, 523-25, 757 P.2d 1240, 1242-44 (Ct.App. 1988). To allow even voluntary disqualification under the facts in the present case would open the floodgates to disqualification every four years during the election cycle, and it would "promote frivolous disqualifications efforts." *Martinez v. State*, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct.App. 1995).

III. ORDER.

IT IS HEREBY ORDERED that the "State's Motion for Disqualification for Cause or Alternative Voluntary Disqualification Pursuant to I.R.C.P. 40(d)(2) and (3) and I.C.R. 25(b) and (d)" is hereby **DENIED** as it completely lacks both a factual and legal basis.

Dated this 12th day of May, 2006.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of December, 2007 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Andrew Parnes Fax 208.726.1187
Kootenai Co. Pros.

Giovanni Mendiola
IDOC # 71876

By: _____
Deputy

