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AT _____ O'Clock _____ M
CLERK OF 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.

JOHN WILLIAM DAY.

Defendant.

Case No. **CR 2006 26112**

**MEMORANDUM DECISION AND
ORDER ON APPEAL**

I. PROCEDURAL BACKGROUND.

Defendant John Day was charged by criminal complaint with felony burglary. A Notice of Preliminary Hearing was filed on December 8, 2006, assigning the case to Magistrate Judge Friedlander for purposes of that hearing, and Magistrate Judge Marano and others were listed as an "alternative presiding judge." Day waived his preliminary hearing in writing, and since the charge was a felony, the case was assigned to district court, the undersigned district judge presiding. On February 5, 2007, a few days before trial, Day pled guilty before the undersigned. On February 22, 2007, the undersigned signed and filed an Order to Remand to Magistrate Division. On March 7, 2007, Administrative District Judge Luster signed and filed an Order Assigning Magistrate, which assigned Magistrate Judge Marano. On March 9, 2007, Day filed his Motion to Disqualify Magistrate Judge Marano, under I.C.R. 25. On March 14, 2007, Magistrate Judge Marano denied the motion as untimely. Day was sentenced by Magistrate Judge Marano on

August 29, 2008. On September 20, 2007, Day filed his Notice of Appeal on the issue of the denial of the disqualification motion. Both parties filed a brief on appeal and oral argument was held March 19, 2008.

II. ANALYSIS.

Day argues this listing of Judge Marano and others was only as an alternative for the preliminary hearing. Appellant's Brief, p. 1. A plain reading of the Notice of Preliminary Hearing filed December 8, 2006, cannot be read that narrowly.

Day states the issue on appeal is: "In a felony case that is later remanded to the magistrate division for a plea and resolution of the charge as a misdemeanor, must an automatic disqualification motion of the newly assigned 'remand' magistrate be filed prior to the original preliminary hearing, even though there is no way to know at that early stage that the matter will eventually be reduced to a misdemeanor?" Appellant's Brief, p. 1. The State argues: "It is common to resolve a case as a misdemeanor during the initial phases of a criminal action, leaving the cause within the jurisdiction of the magistrate court", and "This was a case of beer snatching and by its very nature is one where a misdemeanor resolution becomes highly likely." Respondent's Brief, p. 4. There are always felonies that resolve with reductions to misdemeanors, and that seems to be increasing in frequency locally. Thus, Day cannot argue that a remand was unexpected.

All of that misses the point. What is important is the language of I.C.R. 25. Idaho Criminal Rule 25(a)(2) allows a party to file a disqualification of a judge without cause (Day refers to this as an "automatic" disqualification), within "seven (7) days after service of a written notice setting the action for status conference, pre-trial conference, trial or for hearing on the first contested motion, or not later than fourteen (14) days after service of a

written notice specifying who the presiding judge or magistrate to the action will be.” If that is the only portion of I.C.R. 25 that is pertinent, Day loses, and the decision to deny the disqualification must be affirmed, because Day did not file his disqualification until about three months after the December 8, 2006 notice. This Court finds subsection (2) is not pertinent, for two reasons: First, subsection (4) more specifically applies to the facts of this case where the matter started in Magistrate Division for preliminary hearing, was bound over to District Court where a plea was entered and then has been remanded to Magistrate Division and a “new...magistrate” (as compared to the District Judge to whom it had been most immediately assigned) for sentencing. Second, listing Judge Marano as an “alternative presiding judge” on December 8, 2006, was only applicable for “trials” under subsection (6), and the remand to Magistrate Division on February 22, 2007, was only for sentencing.

The pertinent portions of I.C.R. 25(a) to this case are subsections (4) and (6). Subsection (4) addresses the situation with “New judge” assignments, and its first sentence must be broken into its two phrases. The first phrase of subsection (4), if applicable, leads you to subsection (6). The first phrase of subsection (4) is distinguished in bold and reads:

(4) New judge. **If at any time during the course of the proceedings, except under circumstances involving alternate judges or magistrates as set forth below in subparagraph (6),** a new judge or magistrate is assigned to preside over the case, each party shall have the right to file a motion for one (1) disqualification without cause as to the new judge or magistrate within the time limits set forth in subparagraph (2) of this rule.”

(bold added). Due to the language in bold, since Judge Marano was initially listed as an “alternative presiding judge” on December 8, 2006, I.C.R. 25(a)(6) should be analyzed.

That subsection reads:

(6) Alternate Judges. If the presiding judge intends to have a panel of judges as alternates to *try the case set for trial*, a notice or amended notice of *trial* setting shall include a list of judges who may alternatively be assigned to

preside at the trial if the presiding judge is unavailable to *try* the case. Upon service of the notice as to the panel, each party shall have the right to file one (1) motion for the disqualification without cause as to any alternative judge or magistrate not later than fourteen (14) days after service of written notice listing the alternative judge or magistrate who may *preside at the trial* of the case.

(italics added). The italicized portion of I.C.R. 25(a)(6) shows that subsection clearly only applies to alternate judges listed *for trial* only, and no other purpose. The italicized portion of I.C.R. 25 (a)(6) shows that **if** the order remanding back to magistrate division signed by the undersigned remanded the case back **for trial**, then quite plausibly the Notice of Preliminary Hearing filed December 8, 2006, listing Judge Marano as “alternative presiding judge” would be applicable, and Day’s disqualification on March 7, 2007, would be untimely. However, the undersigned’s Order to Remand to Magistrate Division, prepared by the State, reads in pertinent part: “IT IS HEREBY ORDERED that this matter be remanded to Magistrate Division to be set for *disposition*.” (italics added). This Order was based on the State’s Motion to Remand to Magistrate Division, in which the State moved to remand “...to magistrate division for *sentencing*.” (italics added). Thus, this matter was never remanded to Magistrate Division **for trial** as I.C.R. 25(a)(6) pertains. Instead, it was remanded to Magistrate Division **for disposition**. If the State had moved before the undersigned to reduce the charge to a misdemeanor and remand to magistrate division **for trial**, the remand would have arguably come under I.C.R. 25(a)(6), and Day would have lost his right to disqualify a judge without cause after fourteen days following the December 8, 2006, Notice of Preliminary Hearing listing Judge Marano as an alternative presiding judge. That would seem to be true even if Judge Marano were assigned as a trial judge and eventually took a plea and sentenced Day. However, since the State had the undersigned take Day’s plea, and then moved to remand “...to magistrate division for *sentencing*”, and since the Order to Remand to Magistrate Division prepared by the State

remands "...to Magistrate Division to be set for disposition," I.C.R. 25(a)(6) does not apply.

Since I.C.R. 25(a)(6) does not apply to this case, we must go back to the second phrase of I.C.R. 25(a)(4) which reads in pertinent part: "If at any time during the course of the proceedings...a new judge or magistrate is assigned to preside over the case, each party shall have the right to file a motion for one (1) disqualification without cause as to the new judge or magistrate within the time limits set forth in subparagraph (2) of this rule."

The question then becomes "Was Judge Marano a '**new**...magistrate...assigned to preside over the case'?" This Court cannot think of any reason why that would not be answered affirmatively. Immediately before the assignment to Judge Marano, the undersigned District Judge only, and no other District Judge or Magistrate Judge, was the assigned judge. Thus, ANY other judge assigned after the undersigned is going to be a "new judge or magistrate" under I.C.R. 25(a)(4). That being the case, Day's disqualification filed March 9, 2007, was timely given the assignment of Judge Marano on March 7, 2007.

The cases cited by the State are unpersuasive. The State in its brief admits "*State v. Keith La Fountain*, F06-22109" was dismissed while on appeal "leaving no affirmative decision on the Rule 25 issue." Respondent's Brief, p. 5. *State v. Larios*, 129 Idaho 631, 931 P.2d 625 (1997) is not on point as it was an appeal from District Court to the Idaho Supreme Court, then the Supreme Court remanded back to the same District Judge. The defendant in that case file a motion to disqualify claiming the hearing on remand was a separate action. The Supreme Court on appeal from the denial of the disqualification disagreed with the defendant, stating "...once the parties allow a judge to sit, the parties lose the option to disqualify the judge..." 129 Idaho 631, 633, 931 P.2d 625, 627, Respondent's Brief, pp. 5-7. At no time prior to the remand to Magistrate Division did

Judge Marano “sit” on Day’s case. The Court has read each of the three cases (two from Illinois and one from Missouri) cited by the State (Respondent’s Brief, pp. 7-8) and finds those cases not on point as they do not address a rule with language identical to I.C.R. 25.

More importantly, *People v. Ryan*, 262 Ill.App.3d 1, 636 N.E.2d 1126 (Ill.App. 1994) and *People v. Emerson*, 122 Ill.2d 411, 424, 522 N.E.2d 1109 (Ill.App. 1987) and *State v. Vermillion*, 486 S.W.2d 437 (Missouri 1972) are not even factually on point, as all three cases essentially deal with the same facts found in the Idaho case of *Larios*, as they all three deal with disqualifications sought in a criminal matter *following* an appeal. *Ryan* is not even remotely on point, as it dealt with a denial of an automatic right to disqualification that was reversed on appeal, assigned to a different trial judge and then the defendant filed a successive motion to automatically disqualify yet a different judge. The Appellate Court of Illinois held: “We hold that by originally moving in the trial court for a substitution under section 114-5(a) and ultimately prevailing in his first appeal to achieve this substitution, defendant thereby expended his only statutorily authorized automatic substitution and was not entitled to another following remand.” 262 Ill.App.3d 1, 5, 636 N.E.2d 1126, 1129. Thus, the only applicability of *Ryan* is on the remand of Day’s case, and upon re-assignment of a new magistrate, Day has no right to disqualify that new magistrate without cause as Day has already spent his one right to do so.

III. ORDER.

IT IS HEREBY ORDERED that the March 14, 2007, denial of Day’s Motion to Disqualify Without Cause is REVERSED. Day’s Motion to Disqualify was timely. This matter is remanded to Magistrate Division for an alternative Magistrate Judge to be assigned, and Day is to be re-sentenced. Day’s conviction remains. The Bench Warrant

filed February 15, 2008, for Day's alleged probation violation remains in effect.

Entered this 19th day of June, 2008.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of June, 2008, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
Donna Gardner
Hon. John P. Luster

Fax #

| **Lawyer**
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Deputy Clerk