IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0237

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHARLES HENRY PINNER,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Fifteenth Judicial District Court,
Roosevelt County, the Honorable David J. Cybulski, Presiding

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STATEMENT OF THE ISSUES

1. Did the prosecutor impermissibly employ dog-whistle racism at trial to deny Pinner due process of law and equal protection of the laws?

2. Was the defense counsel ineffective for failing to prevent the introduction of details of a job-related infraction that the parties had agreed to exclude, for telling jurors their female gender prevented him from zealously making a defense, and for suggesting Pinner had consensual oral sex with the complaining witness?

3. Does cumulative error entitle Pinner to a new trial?

4. Did the district court illegally impose costs of jury trial, cost of counsel, and a $20 Information Technology fee?

STATEMENT OF THE CASE AND OF THE FACTS

Charles Henry Pinner appeals from a jury verdict of the Fifteenth Judicial District Court, Roosevelt County, convicting him of Sexual Intercourse Without Consent and aggravated kidnapping. (Docs. 146 at 1-2 (attached as App. A).) Pinner requests a new trial because several trial errors, acting alone or cumulatively, deprived him of a fair trial. Pinner maintains his innocence.

The State alleged that on April 18, 2015, Patsy Shepherd, a 68-year-old, white, female—from Franklin, North Carolina, a small town in the Appalachian Mountains—was traveling westbound with her two sisters on Amtrak. (*See* Trial at 100, 135-41.) On April 19, 2015, early afternoon, Shepherd was in her sleeper room. (Docs. 1 at 2-3.) Shortly after the train left Wolf Point, Pinner allegedly came into Shepherd's sleeper room, said "hello," locked the door behind him, pulled up her blouse, lifted her up, and pulled her by the legs from the seat onto the floor, while removing one of her pant legs. (Trial at 174, 224-227.) Pinner allegedly inserted his fingers, tongue, and penis into Shepherd's vagina. (Trial at 175-76.)

On April 25, 2015, six days later, Shepherd reported to Amtrak Police in Los Angeles that she had been sexually assaulted. (Trial at 761.)

On April 29, 2015, Amtrak Police conducted a photographic lineup to identify Shepherd's attacker. (Trial at 862, 909.) Shepherd picked out a black man from the photo lineup who had dreadlocks, and it *was not* Pinner. (Trial at 882; *see* Exhibit 67 (attached as App. D).)

On May 1, 2015, Pinner was charged by Information of two counts: (1) sexual intercourse without consent (SIWC), and (2) aggravated kidnapping. (Docs 4.) On July 31, 2015, the State moved the court to dismiss charges without prejudice. The court granted this motion.

On December 16, 2015, the Montana Attorney General's office took over the case from local prosecutors. (*See* Docs 4 at 1.) Pinner was re-arrested and transported to Wolf Point to face the same charges. (*See* Docs 4 at 1.)

Following the hearing on motions in limine, the judge acknowledged that certain ethnicities in Roosevelt County do not feel obliged to show up for jury duty:

> Oh, how many potential jurors do you guys think we should call? Normal practice is what, a 100? Depending on the ethnic influations (sic) of some of the people, some people that are registered voters don't feel obliged to show up for jury duty. So, we have sometimes have a less than stellar attendance rate. We did have to actually declare a mistrial one year, one trial because we didn't get enough people to actual[ly] have a panel.

(8/24/16 Tr. at 90.)

By this, the judge acknowledged the racial dynamics and racial overtones in Roosevelt County and that the jury was probably not going

to be a fair cross section of the community in violation of the Sixth Amendment's guarantee of an impartial jury in criminal prosecutions.[1] *State v. LaMere*, 2000 MT 45, ¶ 37-38, 298 Mont. 358, 2 P.3d 204.

The percentage of women and men in Roosevelt County are close to 50/50.[2] Yet, the list of venire persons selected for Pinner's trial

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[1] Pursuant to Mont. R. Evid. 202(b)(6), the Court can take judicial notice of the civil suit brought in June 2017 by the American Civil Liberties Union (ACLU) against the Wolf Point School Board alleging that in 2013 to 2014, "non-white students" (especially Native Americans) were more than twice as likely to be suspended as their white peers. The ACLU complaint alleged:

> The Reservation is a racially mixed population marked by white economic and political power and by prejudice against Native people. Racial discrimination is especially evident in Wolf Point, the business center of the Reservation.
>
> The local manifestation of racial prejudice can be difficult for outsiders to recognize because it does not follow more familiar patterns of discrimination based on skin color or phenotype. Instead, Native and non-Native people in the area are racially classified as much by their tribal enrollment status, family connections, and names as by skin color.

https://www.aclumontana.org/sites/default/files/field_documents/fort_peck_reservation_title_vi_doj_complaint.pdf

[2] https://www.census.gov/quickfacts/fact/table/rooseveltcountymontana,US/PST045216

consisted of 125 persons: 66 percent of them female[3], and 34 percent male. (*See* Docs 97 at 1-3.)

Voir Dire

During the jury selection, one juror recognized race played a significant role in the fiber of this trial:

> **MS. NEWBY**: But there are a few people who come out of a severely dysfunctional background or even and I don't like [to] bring up race but there are people who hate black people I don't know what else to say.
> **[DEFENSE]**: Everyone's notice[d] that Charles is African American?
> **MS. NEWBY**: Who might just say this is my chance to get somebody. I mean there are things like that, that can happen.
> **[DEFENSE]**: Has anybody ever been falsely accused of doing something that they didn't do on the panel? Mr. McDonald, you raised your hand and what prompted you to raise your hand in response to that question?

(Trial at 69.)[4]

The defense counsel avoided probing venire persons on racial prejudice and insisted on his ideal of color-blind justice:

> **[DEFENSE]**: Are you willing to keep an open mind if you're selected as juror on this case and at least consider what

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[3] Based on the judge's comments, undersigned counsel posits that majority, if not all, of the 66 percent of the women venire persons were white.

[4] The defense later struck juror Newby through its preemptory challenge. (Docs 137 at 5.)

someone's motivation might be? To come in here and testify falsely that they were assaulted by Mr. Pinner.
MS. MORAN: Yes.
[DEFENSE]: Does Mr., does the fact that Mr. Pinner is African American, does that affect how you'd judged his case at all?
MS. MORAN: No.
[DEFENSE]: Why not?
MS. MORAN: I have no prejudice against African Americans.
[DEFENSE]: Everyone has heard the phrase, justice is blind? Are you all willing to be blind as to the race differences in this case? *(hear a couple uh huhs from the jurors)*

(Trial at 76-7.)

The judge interrupted this questioning to ask jurors if they wanted to break for lunch. The jury did not. After the interruption, the defense counsel moved on to question the jury about burden of proof and reasonable doubt and did not resume probing on racial prejudice. (Trial at 78.)

Opening Remarks

In its opening remarks, the prosecutor characterized Pinner as vulgar, crude, inappropriate, and not professional. (Trial at 112-14.) The prosecutor told the jury, three "very extroverted and friendly southern ladies" were on a "bucket list" trip passing through Montana when Shepherd was brutally raped. The prosecutor told the jury that

Pinner, upon meeting these "southern ladies," seemed to them as "nice and helpful," but also struck them as "vulgar," "crude," and "inappropriate." (Trial at 112-14.) The prosecutor told the jury when Shepherd asked Pinner if she could take a shower in her room, he remarked: "You can run around naked on my train." (Trial at 112-14.) The prosecutor told the jury:

> "And again, these are southern ladies and that just kind of wasn't what they were used to. . . . These are the southern ladies, ladies and gentlemen that suffered through some hard lives and the[y're] not the type that sends back a meal because they got the wrong thing but eat it without complaint.
>
> . . . .
>
> The defendant called them the blond-haired persons, or the three blondies.
>
> . . . .
>
> He said they were nice ladies, remember they were from Appalachia.

(Trial at 112-14,124.)

Also, in opening, the prosecutor branded Pinner an animal who was set off by something and went "crazy." The prosecutor told the jury, Pinner—"pinching", "licking," "kissing," "clawing," and "biting like an animal"—viciously attacked a defenseless, 68-year-old senior citizen, blonde-haired, southern lady to humiliate her and show her he was in

control in his domain the train. (*See* Trial at 116-17.) The prosecutor told the jury Pinner had called the sisters "three blonde bitches," and said: "Now I've banged all three of you blonde bitches." (Trial at 118-19.) No testimony proved Pinner ever called the sisters, "bitches." (Trial 177, 231, 240, 320.) "Bitch" or "bitches" originated from the prosecutor.

The prosecution's theory of the case was that the "phantom rapist on the train" was Pinner—a dreadlocked, black man, with a protuberant bump on his forehead, who limped owing to his deformity. (Trial at 904, 910, 915.) Pinner "had gone crazy" and brutally attacked Shepherd because he perceived a "slight" or "disrespect" from three "southern blondes" and his "fragile, narcissistic ego" could not take it. (Trial at 119-120,904, 915.) Something about these three "southern blondees" set him off and he went "crazy." (Trial at 119-120)—Maybe because the sisters excluded him from their group the night before or made fun of his disability. (Trial at 117, 912-913; *see also*, Trial at 910 (The prosecutor telling the jury that Pinner was the phantom rapist on the train, who "intimidated" three southern ladies and they sought protection from David Roberts, a white, male passenger, saying: "He's gone crazy, please stay with us.").) The prosecutor told the jury that

Pinner made sexual advances towards these southern ladies and then brutally attacked Shepherd—the weakest of the bunch and defenseless to fight—to show those "three blonde bitches" who was in charge of this car, his domain. (*See* Trial at 117-19.) The record shows Pinner never used the word "bitch." (Trial.)

Motions in Limine

Pinner filed a motion in limine to exclude Joseph Laturell's testimony. (Docs 1 at 5.) Laturell and Pinner had been cellmates. Laturell claimed Pinner referred to Shepherd and her two sisters as "Appalachian bitches" and spoke as though Pinner had sex with one of them. (Docs 1 at 5.) The defense asserted that the prosecution was only seeking to inflame the jury by claiming Pinner derogatorily referred to the sisters as "Appalachian bitches." (Docs 125 at 1-3.) Pinner argued that Laturell's testimony was impermissible character evidence—of other wrongs and crimes—that was more prejudicial than probative and should be excluded under Mont. R. Evid. 403. (Docs 125 at 1-3.)

Pinner also filed a motion of limine based on Mont. R. Evid. 404(b), to exclude any references to his prior criminal history and

disciplinary history at Amtrak. (Trial at 634.) Before the judge could rule on this motion, the parties agreed, without apprising the judge, that they would stipulate to such history and the prosecutor agreed not to elicit such history through testimony. (Trial at 634-35.) During Officer Michael MacDonald's testimony, the prosecutor briefly asked about Pinner's disciplinary history. In response to this questioning, the judge extensively elicited details of a disciplinary infraction:

> **THE COURT**: Uh, huh. Let me ask you this, as an employee, is it a big infraction if you let somebody stay in the fancy room and you've paid for the cheap room?
> **A:** Yes.
> **THE COURT**: So, if you let somebody upgrade and you don't tell anybody you're okay, but if they find out your behind's in trouble?
> **A:** Yes, definitely.
> **THE COURT**: Kindness is not allowed?
> **A:** Well, officially you should have changed the paperwork and obviously there's a fee difference.
> **THE COURT**: Well yeah, I assume there's a fee difference. Is that a serious enough to lose your job thing? Or is it just serious enough that they look at you and are mean and say you've been reprimanded?
> **A:** With his background, I would say that would be grounds for termination.
> **[DEFENSE]**: Your Honor, at this point, Defense is requesting a side bar.

(Trial at 632-33.)

The Jury

The impaneled jury had ten women and two men. (Trial at 95, 100-01.) The jury that rendered verdict consisted of eleven females and a male because a male juror fell ill and was substituted by a female juror. (Trial at 772.)

Case-in-Chief

Lois Sim and Dave Roberts' testimonies were introduced to allege that Pinner made aggressive sexual advances towards Shepherd's two sisters, Betty and Lois, and groped them. (Trial at 119-20, 320-468.)

During Shepherd's testimony, the prosecutor elicited testimony to show that Pinner was "crude," "vulgar," "not real professional," and "inappropriate." (Trial at 202-05.) The prosecutor asked:

> **Q:** How so?
> **A** His language.
> **Q** Not appropriate in your mind? How so? Can you give us an example?
> **A** Bitch.
> **Q** He used that word?
> **A** Yes.
> **Q** Who did he---how did he...
> **A** He said he didn't want to deal with that *bitch*.

(Trial at 202-05.)

On cross-examination, Shepherd recanted her testimony and said Pinner never called his white, female supervisor a "*bitch"* and instead had said: "he wasn't going to deal with that shit." (Trial at 205.)

Closing Remarks

In closing, the prosecutor called Pinner the "phantom rapist on the train," and told the jury Pinner was a small, insignificant man with a fragile, narcissistic ego who perceived a *slight* from these "*three blondes* from the *south*." (*See* Trial at 904-915.)

In his closing, the defense counsel argued Shepherd's story was not credible because Pinner, due to his disability, could not have lifted a 200-pound woman with one hand and pulled her pants off with the other. The defense continued:

> Then [Pinner] performs oral sex on her, which you have to consider back in the jury room if that's really part of power and control.
>
> . . . .
>
> That might be part of something other than power and control.

(Trial at 902.)

Sentencing

Pinner was found guilty of SIWC and aggravated kidnapping. (Trial at 920.) The court sentenced Pinner to 60 years in prison for the SIWC charge and a concurrent 10-year sentence for the aggravated kidnapping offense. (Oral Pronouncement at 20-21 (attached as App. B).) The court ordered Pinner to be ineligible for parole until he completed all the sexual offender treatment programs. (App. B at 21.)

The Pre-Sentencing Investigation report previously showed Pinner owned a house valued at $60,000. (Docs 140 at 7.) At sentencing, Pinner had no assets: no money in the bank; his house had been foreclosed; and he lost his employment and pension. (Docs 140 at 7; App. B at 5,16.) Pinner left his 23-year career at Amtrak with nothing. (App. B at 16; Docs 140 at 7.)

Over Pinner's objection, the district court imposed the costs of jury trial of $33,930.74 and the cost of a court-assigned attorney of $16,578. (App. B at 17.) Pinner objected to the costs of jury trial and the cost of the court-assigned attorney arguing he "does not have anything" or he "has zero." He argued such an imposition was "not proper" and "wrong" because he lacked the ability to pay. (App. B at 17.) Pinner asserted

that imposing these costs would have a chilling effect on people who exercise their right to a jury trial. (App. B at 17.)

Over Pinner's objections, the district court imposed costs of jury trial and cost of the court-assigned attorney. The court premised its imposition of costs upon the possibility that Pinner could "hit" the lottery after leaving prison or that a hypothetical "Uncle Bob" could bequeath Pinner a "ton of money" in the future. (*See* App. B at 25.)

Pinner timely appealed. (Docs 151.)

SUMMARY OF THE ARGUMENT

The prosecutor employed dog-whistle racism to secure a conviction. The dog-whistling exploited racist concepts and frames to brand Pinner as an animalistic, simple-minded brute, and to brand the complaining witness and her sisters as southern ladies to bolster their credibility.

Throughout trial, the prosecutor's strategy was to inject slighting remarks to tarnish Pinner's reputation in the minds of the jury. These improper remarks in opening, closing, and throughout trial warrants plain error review because they denied Pinner due process and equal protection of laws. The dog-whistling and slighting remarks rendered

the trial fundamentally unfair and compromised the integrity of the proceedings. There is a high likelihood that this prosecutor improperly aroused the jury's racial passion.

First, the prosecutor falsely told the jury that Pinner called the complaining witness and her sisters "bitches," "three blondees," or "three blonde bitches."

Second, the prosecutor characterized Pinner as a crude, vulgar, small-minded, animal who made lewd sexual advances toward white women—groping and raping white women to exercise power and control over them.

Third, the prosecutor contrasted the bestial brute with the trope of a southern belle. The prosecutor characterized the sisters as "southern ladies" who would never willingly fraternize with a black brute.

Fourth, for good measure, the prosecutor alluded to Pinner's "lengthy" disciplinary history at Amtrak and elicited details of his "big infraction" at work, to blacken Pinner's character in the jury's mind as impulsive and deceitful.

In addition, Pinner's defense attorney was ineffective for: (1) not preventing impermissible character evidence from getting into the

record, (2) for telling a majority-female jury that the gender of the female jurors impaired his ability to zealously advocate for Pinner, and (3) for suggesting that Pinner—who maintained his innocence—had consensual oral sex with Shepherd. The cumulative effect of all these errors entitles Pinner to a new trial.

In addition, over Pinner's objection, the district court imposed the costs of jury trial of $33,930.74 and the cost of a court-assigned attorney of $16,578. The trial court imposed these costs even though Pinner presented undisputed evidence that he had no resources whatsoever and it acknowledged Pinner "can't pay them." (App. B at 22-25.) It also erroneously imposed a $20 Information Technology Surcharge instead of $10. These impositions are illegal.

STANDARDS OF REVIEW

See the argument section.

ARGUMENT

I. THE PROSECUTOR'S MISCONDUCT IN EMPLOYING DOG-WHISTLE RACISM DURING OPENING REMARKS, AT TRIAL, AND AT CLOSING DENIED PINNER DUE PROCESS AND EQUAL PROTECTION OF LAWS.

A. Standard of Review

The Court reviews allegations of prosecutorial error *de novo*, considering the prosecutor's conduct in the context of the entire proceeding. *State v. Dobrowski*, 2016 MT 261, ¶ 8, 385 Mont. 179, 382 P.3d 490.

B. Law

"The prosecutor is the representative of the State at trial and must be held to a standard commensurate with his or her position." *State v. Lawrence*, 2016 MT 346, ¶ 20, 386 Mont. 86, 385 P.3d 968. As this Court has held, "the United States Supreme Court has rightly observed that a prosecutor's improper suggestions and assertions to a jury 'are apt to carry much weight against the accused when they should properly carry none.'" *Lawrence*, ¶ 20 (*quoting Berger v. United States*, 295 U.S. 78, 88 (1935)). Defendants have a fundamental due process right to "a fair trial by a jury." *State v. Hayden*, 2008 MT 274, ¶ 27, 345 Mont. 252, 190 P.3d 1091. "A prosecutor's misconduct may be grounds for reversing a conviction and granting a new trial if the conduct deprives the defendant of a fair and impartial trial." *Hayden*, ¶ 27; *Lawrence*, ¶ 13. Even in the absence of objection by defense

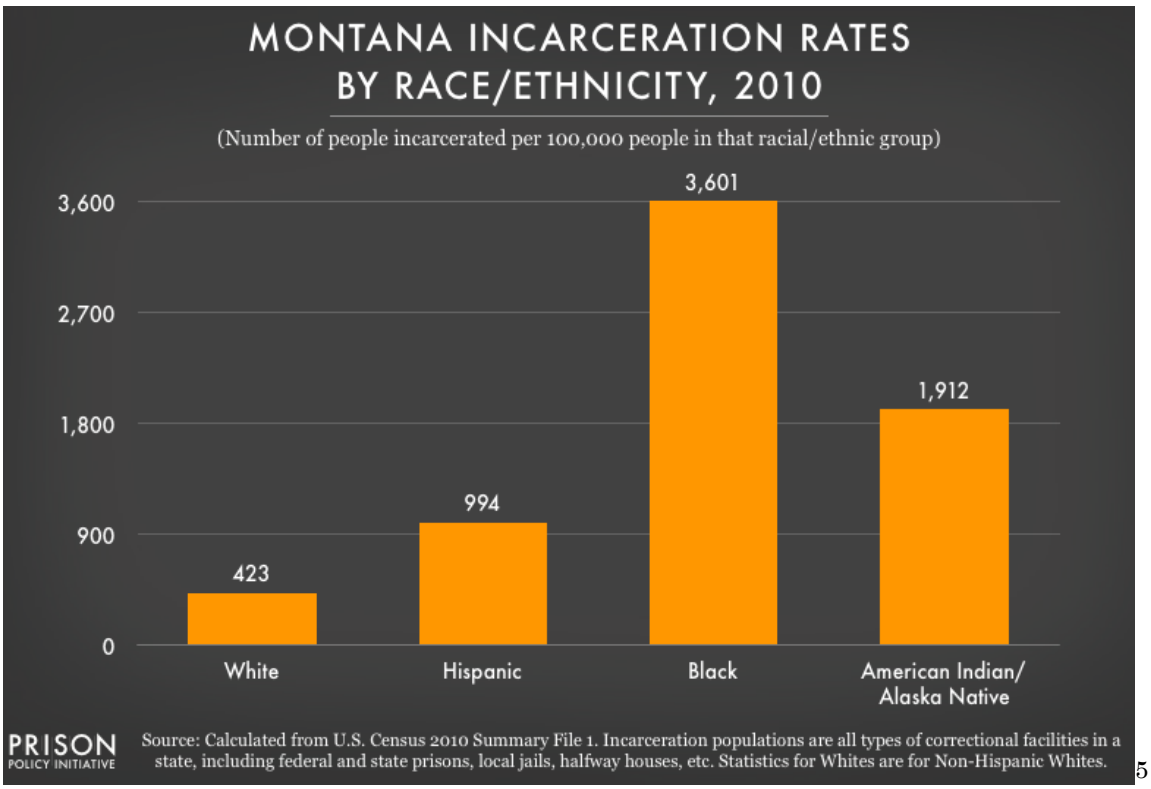
counsel, it is this Court's inherent duty to protect against such prosecutorial misconduct through plain error review. *Lawrence*, ¶ 22.

In *Lawrence*, ¶¶ 9-12, this Court held that a prosecutor's comment during closing argument that the presumption of innocence had been removed from the defendant warranted plain error review because it implicated the defendant's fundamental rights and left unsettled the fundamental fairness of proceedings and compromised the integrity of the judicial proceedings. The Court emphasized the presumption of innocence's bedrock importance to our criminal justice system. *Lawrence*, ¶ 10. The Court observed that defense counsel's failure to object does not relieve a prosecutor of her duty to jealously guard the defendant's constitutional right to a fair and impartial trial by jury. *Lawrence*, ¶ 17. "'[I]t is as much [the Prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction,'" the Court cautioned, "'as it is to use every legitimate means to bring about a just one.'" *Lawrence*, ¶ 17 (*quoting Berger*, 295 U.S. at 88). As in *Lawrence*, the prosecutor's comments here undercut a bedrock principle of our criminal justice system: the jury's job is to make an objective and

impartial finding as to whether the State has presented evidence proving each charged element beyond a reasonable doubt.

C. Discussion

According to the Prison Policy Initiative, Blacks, American Indian/ Alaska Natives, and Latinos are overrepresented in the Montana State Prison, while Whites are underrepresented as follows:



[5]

Improper appeals to racial prejudice could explain some of the disparity.

[5] https://www.prisonpolicy.org/profiles/MT.html

Appeals to Racial Prejudice

"Dog-whistle racism" refers to "the use of code words and themes which activate conscious or subconscious racist concepts and frames." *Lloyd v. Holder*, No. 11cv3154, 2013 WL 6667531, at 9 (S.D.N.Y. Dec. 17, 2013) ("[F]acially non-discriminatory terms" may "invoke racist concepts that are already planted in the public consciousness," such as "welfare queen," "terrorist," "thug," and "illegal alien.").

"Appeals to racial passion can distort the search for truth and drastically affect a juror's impartiality." *United States v. Doe*, 903 F.2d 16, 25 (D.C. Cir. 1990). The State cannot properly make an opening and closing argument that seeks to inflame the jury and urge jurors to decide a case on emotion. *State v. Ugalde*, 2013 MT 308, ¶ 117, 372 Mont. 234, 311 P.3d 772 (McKinnon, J., *dissenting*); *State v. Criswell*, 2013 MT 177, ¶¶ 55-57, 370 Mont. 511, 305 P.3d 760 (McGrath, C.J., *concurring*). Appeal to jurors' fears, emotions, passions, and prejudices are highly prejudicial and offensive to the dignity of the court. *Viereck v. United States*, 318 U.S. 236, 63 S. Ct. 561 (1943).

While appeals to racial prejudice are unlawful in all cases, "[c]oncern about fairness should be especially acute where a

prosecutor's argument appeals to race prejudice in the context of a sexual crime, for few forms of prejudice are so virulent." *Miller v. North Carolina*, 583 F.2d 701, 707 (4th Cir. 1978). Courts must be vigilant to improper exploitation of race at trial, through racial imagery and appeals to racial prejudice, both subtle and overt. Not all appeals to racial prejudice are blatant. Perhaps more effective but just as insidious are subtle references. *State v. Monday*, 171 Wash. 2d 667, 678, 257 P.3d 551, 557. Like wolves in sheep's clothing, a careful word here and there can trigger racial bias. *Monday*, 171 Wash. at 678, 257 P.3d at 557. The notion that the State's representative in a criminal trial, the prosecutor, should seek to achieve a conviction by resorting to racist arguments is so fundamentally opposed to our founding principles, values, and fabric of our justice system that it should not need to be explained. *Monday*, 171 Wash. 2d at 680, 257 P.3d at 557. Because appeals by a prosecutor to racial bias necessarily seek to single out a racial minority for different treatment, it fundamentally undermines the principle of equal justice and is so repugnant to the concept of an impartial trial that its very existence demands that

appellate courts set appropriate standards to deter such conduct. *Monday*, 171 Wash. 2d at 680, 257 P.3d at 558.

If courts allow government counsel in a criminal suit to inflame the jurors by irrelevantly arousing their deepest prejudices, the jury may become in her hands a lethal weapon directed against defendants who may be innocent. *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 659 (2d Cir. 1946). She should not be allowed to summon that thirteenth juror, prejudice. *Antonelli Fireworks Co.*, 155 F.2d at 659.

Prosecutors may not degrade or compare criminal defendants to animals. *State v. Roache*, 358 N.C. 243, 297 (2004). Such imagery violates the defendant's right to a fair, impartial jury, as it "improperly [leads] the jury to base its decision not on the evidence relating to the issue submitted, but on misleading characterizations, crafted by counsel, that are intended to undermine reason in favor of visceral appeal." *State v. Jones*, 355 N.C. 117, 133 (2002).

Animal imagery may have subtle or overt racial overtones, both of which run the risk of inflaming jurors' biases.

The image of the African American man as a "black brute" was proliferated (by cartoons, yellow journalism, and penny-dreadful novels,

amongst other media) extensively from the time of Reconstruction and throughout the Twentieth Century. Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis* ("*Racist Summation*"), 11 Mich. J. Race & L. 325, 345 (2006). "The brute caricature portrays black men as innately savage, animalistic, destructive, and criminal—deserving punishment, maybe death. *Racist Summation* at 345. This brute is a "fiend, a sociopath, an anti-social menace." David Pilgrim, *The Brute Caricature*.[6] The brute is an animal that is also brutally violent, incapable of thought, and acts completely on impulse. *Racist Summation* at 350-1. The political purpose of the characterization was to invoke fear on the part of the white audience, and to justify repressive measures towards Black Americans. *Racist Summation* at 345.

In recent times, this stereotype featured in *Buck v. Davis*, 137 S. Ct. 759, 765, 197 L. Ed. 2d 1 (2017) where the defense introduced an expert witness to testify that the immutable characteristic of black skin color carried with it an increased probability of future violence.

[6] http://www.ferris.edu/news/jimcrow/brute/

Also, the Central Park Five case presents a perfect example of how the brute caricature infected the entire proceedings—interrogations, pre-trials, and the jury verdicts. *See* N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 Cardozo L. Rev. 1315, 1357-59 (2004) ("*CentralParkFive*"). Under usual circumstances, the New York administrators spin a wooden wheel to blindly select a judge's name from a list of available judges. However, this procedure was side-stepped in the Central Park Five case. The case was assigned directly to Judge Thomas B. Galligan, a judge known to hand down severe sentences. *CentralParkFive* at 1358. Perhaps influenced by the myth of the Bestial Black Man, the administrators were convinced that the youths were guilty even before trial and delivered the case to Judge Galligan in hopes of securing the most severe sentence possible. *CentralParkFive* at 1358.

On August 23, 2002, Matias Reyes, a convicted rapist and murderer, signed a sworn statement confessing to a rape for which five youths were serving time. *CentralParkFive* at 1315. Reyes came across Kharey Wise in Prison. Wise was serving time for the rape Reyes

committed and was not coping well with prison. Reyes felt guilty and confessed to the rape attributed to Wise. *CentralParkFive* at 1316.

Following the rape, several black and Latino teenagers, involved in some minor assaults at Central Park, had been quickly rounded up and interrogated in connection with the rape. Each youngster falsely confessed to involvement in attacking and raping the white, female jogger. None confessed to raping her, but each said he had held or hit her, and each blamed the rape on one or more of the others. *CentralParkFive* at 1317. Each defendant later maintained his innocence, insisting the confessions were coerced. All five innocent youths were convicted and sentenced to prison terms between five and fifteen years. *CentralParkFive* at 1317. The press coverage and the attendant public outcry characterized the youths as "wolf packs," "rat packs," "savages," and "animals." Some publications went as far as branding them sub-human, animalistic, or sub-human creatures spurred into action by primal forces. *CentralParkFive* at 1348. The perception of the youths as savage was epitomized by a Newsday article entitled, "Like Bambi in Hunting Season." *CentralParkFive* at 1348; *see* Jones, D. Marvin, *Race, sex, and suspicion: the myth of the Black male*,

44 (2005) (And she was as defenseless as, in the words of one woman, "Bambi in hunting season" like an animal that has caught the scent of blood, buoyed by the excitement of the chase, the mob got out of control.). The white, female jogger became the perfect metaphor for white innocence, while the black males anchored the antebellum image of the black male as beast. *Race, sex, and suspicion at* 9.

When asked directly whether they believed that blacks as a group were more prone to violence and hostility, one study shows[7] that most white respondents agree that blacks are both hostile and aggressive. Jon Hurwitz, et al., *Racial stereotypes and whites' political views of blacks in the context of welfare and crime*, 41 Am. J. Pol. Sci. 30, 35 (1997). Further questioning of the respondents indicated that most had not themselves, nor had their acquaintances, been the victims of violent crime; it is clear that this association of black people with violent criminality is founded upon a deeply rooted and persistent ideological belief. *Racist Summation* at 345-46.

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[7] See the 1991 Race and Politics Study, undertaken by researchers from the University of California, available at http://sda.berkeley.edu/cgi-bin/hsda?harcsrc+natlrace.

The brute caricature is associated with fear and loathing; it is likely to be a strong motivating force, motivating a fear response when activated by external stimuli, such as a racist summation [on an inflammatory opening argument] during a criminal trial. *Racist Summation* at 345-46. Using the animal imagery, the prosecutor calls the jury's attention to a racial caricature, and dangerously "call[s] forth the [stereotype] in the minds of the listeners." *Racist Summation* at 347.

Indirect appeals to racism are just as likely to be effective as direct appeals, especially orations that connect the target of the racism with a virulent and powerful stereotype. *See Racist Summation* at 348.

For example, a prosecutor could describe the defendant's actions as animalistic, brutal, and impulsive to invoke the brute caricature. *Racist Summation* at 348-49.

In *State v. Wilson*, 404 So. 2d 968, 970-71 (La. 1981), two black defendants were charged with fatally shooting a white man during a racial confrontation in a shopping center parking lot. The prosecutor's repeated references to the defendants in closing argument as "animals" who armed themselves for the specific purpose of shooting "white

honkies" was held reversibly improper. The Louisiana Appellate Court observed that under state statute, a mistrial was mandatory when a prosecutor directly or indirectly referred to race or color, where the remark or comment was not material and not relevant and might create prejudice against the defendant in the jurors' minds. The purpose of this provision, the court explained, was to avoid the use of racial prejudice to obtain convictions. *Wilson*, 404 So. 2d at 970-71. The Louisiana Appellate Court commented that when alleged criminal conduct arises out of an incident among persons filled with racial animosity, our system of justice requires that those charged with the responsibility of conducting trials strictly avoid any actions which might influence the jury to decide the accused's guilt or innocence on the basis of prejudice, rather than on the law and the evidence. *Wilson*, 404 So. 2d at 970-71. The prosecutor's repeated use of the word "animals" as a description of the defendants, as well as his repeated references to "whitey" and "white honkies" in connection with the defendants' supposed characterization of whites, were obviously intended to appeal to racial prejudice, as they had no relevance to the elements of the crime of murder with which the defendants were charged and did not

tend to enlighten the jury as to a relevant fact. *Wilson*, 404 So. 2d at 970-71.

In *Carr v. State*, 208 So. 2d 886, 888-89 (Miss. 1968), the Mississippi Supreme Court held that the prosecutor in a rape trial committed reversible error during his closing argument, when he said that the defendant had a "beastly" nature. The court reasoned that while a trial judge has considerable latitude in controlling the argument of attorneys, personal vilification of the defendant is inconsistent with his right to a fair trial. *Carr*, 208 So. 2d at 888-89. The use of "beastly," the Mississippi Supreme Court concluded, combined with the prosecutor's reference to the defendant's story as "fantastic" and the admission of improper testimony, denied the defendant due process of law. *Carr*, 208 So. 2d at 888-89.

In *State v. Kingman*, 2011 MT 269, ¶ 58, 362 Mont. 330, 264 P.3d 1104, the prosecutor's remark at sentencing was that the court ought to view Kingman as an "animal" needing to be "caged." The Court recognized treatment which degrades or demeans persons, that is, treatment which deliberately reduces the value of persons, and which

fails to acknowledge their worth as persons, directly violates their dignity. *Kingman*, ¶ 58.

Here, the prosecutor carefully inserted code words to arouse fear and loathing of Pinner in the jury's mind. These code words were: "extroverted, friendly, southern ladies," "from Appalachia," "from the south," "not the type that . . .," "The defendant called them blond-haired persons," "three blondies," "blondee," "blonde bitches," "Ms. Blonde," "defenseless," "vulnerable" "animal," "sexual predator," "picked the wrong state in which to rape an old lady," (Trial at 918) "crude," "vulgar," "inappropriate," "just kind of wasn't what [southern ladies] were used to," "slight," "set off," "gone crazy," and "phantom rapist on the train," to evoke deep-seated fear and loathing against black males.

In its opening, the prosecutor told a ten-women jury that Pinner called three southern ladies, "*blonde bitches,*" or the "*three blondees*." (Trial at 113-119.) The prosecutor called Pinner an "animal" and repeatedly said: "three blondes from the south," "*blondee*," "*blonde bitches*," "*southern ladies*," and "*Appalachian bitches*" in connection with Pinner's supposed characterization of white women to appeal to racial prejudice. These code words have no relevance to elements of

SIWC or aggravated kidnapping with which Pinner was charged. *Wilson*, 404 So. 2d at 970-71. These code words did not tend to enlighten the jury as to a relevant fact.

The prosecutor appealed to jurors' virulent prejudice by suggesting, without an evidentiary basis, that Pinner had racial animosity toward all white women—from the white, female supervisor he called a "bitch," to the three southern ladies he derogatorily called "blonde bitches." The prosecutor told the jury that Pinner raped Shepherd because his "fragile ego" misperceived a "slight" or "disrespect" from the three "southern ladies" and he went out of control—they would not let him be part of their social group. (Trial at 915.) The prosecutor suggested to the jury that something "set off" Pinner's racial animosity toward these white, southern ladies. The simple-minded brute misread social cues and went "crazy." (*See* Trial at 117, 912-913.) So, Pinner viciously attacked Shepherd—by "pinching, licking, clawing, biting like an animal." (Trial at 118-19, 904.)

The prosecutor used these code words to insinuate, without an evidentiary basis, that Pinner was disrespectful to white women. (*See* Trial at 894-95.) The prosecutor told this jury that Pinner derogatorily

called southern ladies "bitches" to undermine reason in the jury's mind in favor of visceral appeal. (*See* Trial at 894-95.)

The prosecutor told this jury that three southern ladies were very afraid and "intimidated" by Pinner and they sought protection from a white, male passenger on the train, Dave Roberts. (Trial at 910.)

The prosecutor told this jury that Pinner raped "Ms. Blonde" to show those "three *blonde bitches*" who was in charge of his domain, the train car. (Trial at 117-119, 912-913.)

The prosecutor branded Pinner as a crude, vulgar, inappropriate, animalistic, and small-minded man—who lost control and had "gone crazy," spurred to action by something primal. The prosecution's theory of the case was that the "phantom rapist on the train" [8] was Pinner—a dreadlocked, black man, with a protuberant bump on his forehead, who limped from a deformity. (Trial at 904, 910, 915.) The prosecutor painted a picture that, at first, Pinner was just inappropriate, crude, and vulgar. Later, Pinner turned "sexual predator," inappropriately making aggressive sexual advances toward two strong southern ladies

[8] "For I am blackness itself, aren't I. ... The very heart of darkness. Blackness itself." Erik, the Phantom of the Opera. https://www.fanfiction.net/s/3022380/1/Blackness-Itself

who rebuffed him, and he eventually "took even farther liberties," viciously attacking and raping the most "vulnerable and defenseless, old" southern lady. (*See* Trial at 887, 904, 912-913.) This characterization dangerously invoked the antebellum image of the black male as beast.

The prosecution characterized the complaining witness and her two sisters as southern ladies or southern belles.[9] A Southern Belle is a character archetype of an upper-class, rich girl from the Deep South—or Sweet Home Alabama. [10] A Southern Belle is witty and charming,

[9] Southern Belle: http://tvtropes.org/pmwiki/pmwiki.php/Main/SouthernBelle

[10] http://tvtropes.org/pmwiki/pmwiki.php/Main/SouthernBelle

showing gregariousness and an outgoing personality, but never oversteps the boundaries—loyalty to her husband or family—of her station, gender, or race. [11]

In its rebuttal closing, the prosecutor characterized the defense's theory of the case as "fabrication" and called Pinner the "phantom rapist on the train"—a "sexual predator" who hunted "easy," "vulnerable," or "soft targets." (Trial at 887, 904.) These targets were "defenseless, old," white women. (*See* Trial at 912-913.)

In rebuttal closing, the prosecutor used the code word "fabrication" to tell the jury they ought to believe the account of three southern ladies over the untrustworthy account of Pinner.

The prosecutor wanted the jury to believe that if Pinner was impulsive—incapable of thought—in committing and lying about a "big infraction" that could end his career at Amtrak, then he must have committed the sexual offense charged. The prosecutor told the jury Pinner's account was a "fabrication" because he lied to Amtrak and to the jury about his "lengthy" disciplinary history. (Trial at 904.)

[11] http://tvtropes.org/pmwiki/pmwiki.php/Main/SouthernBelle

The code word "bitch" originated from the prosecutor's opening remarks. Primed by these opening remarks, Shepherd testified that Pinner had called his white, female supervisor a "bitch" but later recanted and clarified that Pinner never used the word "bitch." (*See* Trial at 202-05.)

The defense pointed out to the jury that Pinner never used "bitch" to refer to his white, female supervisor. (Trial at 205.)

During closing, the defense, now acutely aware the prosecutor was using appeals to prejudice, argued:

> And when I think about that, you know Mr. Pinner is not the same race as anybody in this courtroom or very many people in this town. But he is a person too and he is entitled to just the same protection that anybody else would be under the law.

(Trial at 871-72.)

In rebuttal closing, the prosecutor argued:

> Ladies and Gentlemen, the only fabrication in this case is the newly proposed existence of the phantom rapist on the train. The attendant named Charles, misidentified who now is the reason that we are all here today.

(Trial at 904.)

. . . .

> But that's enough to fit in and explain to some degree what was going on here. These three blondes from the South who

> maybe he perceived some slight from. And this was his train car and his domain. And he was not about to let them get by disrespecting him or whatever he perceived. And he showed them the power that he had over them.
>
> . . . .
>
> He even took even farther liberties and showed her that he could get into her space. Ms. Blonde, see what I can do? And then of course, Pat. The most vulnerable, the most alone and who decides when and where and under what circumstances this assault takes place? Charles Pinner.

(Trial at 912-913.)

The State said in closing rebuttal: "[t]hat [Shepherd] is here because she was raped or that this whole case is a malicious fabrication" by all three lying sisters. (Trial at 855.) The State claimed the defense was making the "hysterical women defense" by arguing: "Which you really can't believe the emotions that come out of the ladies. Let's throw in selfishness, attention seeking, mental illness and of course hysterical women defense." (Trial at 905.). The prosecutor vouched that these southern ladies were not just being hysterical—they must be believed. (Trial at 918.) Permitting the prosecutor to invoke racial stereotypes and prejudices compromises the "fundamental fairness of the proceedings" or "the integrity of the judicial process." *See State v. McDonald*, 2013 MT 97, ¶ 17, 369 Mont. 483, 299 P.3d 799.

The prosecutor again exhorted the jury that Pinner "picked the wrong state in which to rape an old lady." (Trial at 918.) He told the jury:

> And when [Shepherd] leaves Montana to go home to Franklin, North Carolina, she won't leave here with fear and trauma and pain and hurt. Not this time, not ever, but with the knowledge that she was believed, she was helped, and she was restored by the best of us. And she can take that home, she can heal.

(Trial at 918.)

The jury's "purpose and duty" is to "decide if the State has proved" the defendant's guilt beyond a reasonable doubt, based on the facts presented, not to decide the case on the basis of sympathy or advocacy for the victim. *State v. Ritesman*, 2018 MT 55, ¶¶9,27, 390 Mont. 399, 414 P.3d 261.

In reality, the jury's job, mandated by the Due Process Clause, is to find guilt only "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime." *In re Winship*, 397 U.S. 358, 364 (1970). Fundamentally, this due process standard and the presumption of innocence require jurors to err on the side of the defendant. The prosecutor told jurors they were the "best of us" and gave them a contrary description of the jury's job as "believing, healing, and

restoring" Ms. Shepherd. (Trial at 918.) He unconstitutionally directed jurors to err on the side of guilt. *Ritesman*, ¶ 27. The prosecutor's comments were part of a larger campaign to vouch for the three southern ladies' credibility and to apply moral pressure against anyone doubting their accusations. *See Ritesman*, ¶ 27; Trial at 855.

Personal vilification of the defendant is inconsistent with his right to a fair trial. *Carr*, 208 So. 2d at 888-89. Comparing Pinner to an animal disrespects his core humanity, *see Kingman*, ¶ 58, fundamentally undermines the principle of equal justice, and is repugnant to the concept of an impartial trial. *Monday*, 171 Wash. 2d at 680, 257 P.3d at 558. Such an egregious violation of equal justice warrants automatic reversal. *Chapman v. California*, 386 U.S. 18, 45, 87 S. Ct. 824, 838 (1967) In *Chapman*, the Supreme Court observed that there might be some errors of constitutional magnitude that might, in a particular case, be so unimportant and insignificant as to be harmless. *Chapman*, 386 U.S. at 23-24, 87 S.Ct. at 838. An error could not be so classified, however, unless the reviewing court were able to say, beyond a reasonable doubt, that there was no reasonable possibility that those improper methods might have contributed to the conviction.

Chapman, 386 U.S. at 23-24, 87 S.Ct. at 838. The prosecutor's due process and equal protection violations warrant plain error review and reversal. Failure to review and remedy this misconduct would leave unsettled the fundamental fairness of the trial and compromise the integrity of the jury's guilty verdicts. *See, e.g., Lawrence*, ¶¶ 11-12, 22.

This Prosecutor Got Away With Misconduct in *Aker*

Justice McKinnon's dissent in *State v. Aker*, 2013 MT 253, ¶¶41-43, 371 Mont. 491, 310 P.3d 506 is informative. There, the same prosecutor in the present case allowed "excess of zeal for conviction" or a "fancy for exaggerated rhetoric" to carry him beyond the permissible limits of argument in his rebuttal closing argument. Justice McKinnon reasoned that this prosecutor clearly exceeded the bounds of proper argument in *Akers* when he characterized three defense witnesses as "lazy, ill-bred, and poorly clothed, telling jurors that these three individuals come from a 'different social stratu[m],' and implying from personal knowledge that these witnesses 'are not being truthful.'" This prosecutor told the jury that the three witnesses belong to "that group of people where you're unemployed and collecting unemployment or workers' comp, and you play video games all day" and had personally

determined that these three were liars. *Aker*, ¶¶ 41. Justice McKinnon concluded that the prosecutor's disparagements of the defense witnesses and his assertions of personal knowledge about the truthfulness of their testimony were highly improper and unacceptable.

Here, this prosecutor, perhaps inspirited by the Court's imprimatur in *Akers* and still buoyed by excess zeal for conviction, exceeded bounds of proper argument.

II. DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT FOR NOT PREVENTING THE INTRODUCTION OF PINNER'S JOB-RELATED INFRACTIONS THAT THE PARTIES HAD AGREED TO EXCLUDE, FOR TELLING JURORS THEIR FEMALE GENDER PREVENTED HIM FROM ZEALOUSLY MAKING A DEFENSE, AND FOR SUGGESTING PINNER HAD CONSENSUAL ORAL SEX WITH THE COMPLAINING WITNESS.

A. Standard Of Review

The question of whether the performance of counsel was constitutionally deficient is a mixed question of fact and law. *McGarvey v. State*, 2014 MT 189, ¶ 14, 375 Mont. 495, 329 P.3d 576.

B. Law

The right to effective assistance of counsel is a fundamental right guaranteed by both the United States and Montana Constitutions. *Golie v. State*, 2017 MT 191, ¶ 7, 388 Mont. 252, 399 P.3d 892.

Ineffective assistance of trial counsel and ineffective assistance of appellate counsel claims are reviewed by applying the two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984); *Sanchez v. State*, 2012 MT 191, ¶ 20, 366 Mont. 132, 285 P.3d 540. "Under this test, the defendant must demonstrate (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defendant." *Sanchez*, ¶ 20.

Deficient performance occurs when "counsel's representation 'fell below an objective standard of reasonableness.'" *Golie*, ¶ 8. "To prove prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Golie*, ¶ 9.

On direct appeal, this Court reviews ineffective assistance claims only if they are record based. *State v. Fender*, 2007 MT 268, ¶ 9, 339 Mont. 395, 170 P.3d 971 (citations omitted).

However, this Court has also decided ineffective assistance claims on direct appeal where there is "'no plausible justification' for counsel's

conduct." *Fender*, ¶ 9 (failure to request jury instructions); *State v. Jefferson*, 2003 MT 90, ¶ 50, 315 Mont. 146, 69 P.3d 641 (admissions of client's guilt in opening and closing arguments). In *State v. Becker*, 2005 MT 75, ¶¶ 18-24, 326 Mont. 364, 110 P.3d 1, the Court found ineffective assistance of counsel on direct appeal where trial counsel failed to properly raise a double jeopardy objection. The Court noted that "counsel's failure to object on the proper grounds is a matter of record as it is shown in his brief in support of his motion to dismiss." *Becker*, ¶ 42. The Court held that the deficiency "so clearly fell below the reasonable range of professional conduct required that there is no possible justification for them and neither an explanation in the record for counsel's actions nor a postconviction hearing to determine counsel's reasons for his actions is necessary." *Becker*, ¶ 43. Review on direct appeal is, thus, also appropriate where there is no possible tactical reason for defense counsel's failure to act. *Becker*, ¶ 43.

C. Discussion

1. Rule 404(b) violation

Evidence of other crimes, wrongs, or acts is inadmissible as a general rule in Montana, M. R. Evid. 404(b), 403, and 609, and such evidence may not be admitted to prove a person's character and show that she acted in conformity with that character on a particular occasion. *State v. Franks*, 2014 MT 273, ¶ 14, 376 Mont. 431, 335 P.3d 725. Unfair prejudice may arise from evidence that provokes the jury's hostility or sympathy for one side, confuses or misleads the jury, or unduly distracts the jury from the main issues. *Franks*, ¶ 16. Rule 404(b) prohibits using evidence of other crimes, wrongs, or acts to prove the defendant's subjective character, disposition, or propensity (e.g., that she is inclined to wrongdoing in general, or that she tends to commit a particular type of wrongdoing) in order to show conduct in conformity with that character on a particular occasion. *See* Edward J. Imwinkelried, *Uncharged Misconduct Evidence vol. 1*, § 2:19, 103-05 (rev. ed., West 1998) (discussing Federal Rule of Evidence 404(b)); *United States v. Crowder*, 141 F.3d 1202, 1206 (D.C.Cir.1998) (same).

Essentially, Rule 404(b) disallows the inference from bad act to bad person to guilty person.

Groping Acts

It is deficient performance to not object to other "bad acts" alleging aggressive sexual advances and groping by your client in a rape trial. The defense attorney had a duty to identify any of the State's evidence that should be excluded as relevant only for an improper propensity inference (Rule 404) through a motion in limine. *See State v. Dist. Court of Eighteenth Judicial Dist. of Montana*, 2010 MT 263, ¶ 49, 358 Mont. 325, 246 P.3d 415 (Rather, it is up to the defendant—through counsel—to identify, maybe through a motion in limine, any of the State's evidence that she believes should be excluded as irrelevant (Rule 402), unfairly prejudicial (Rule 403), relevant only for an improper propensity inference (Rule 404), or inadmissible under some other rule, and to explain with argument and authority why the evidence should be excluded.).

Pinner is immediately prejudiced because if the jury believes the evidence that he made lewd sexual advances and groped Shepherd's other sisters, Betty and Lois (Trial at 119-20, 320-468), it will be led to

infer Pinner has a tendency toward lewd, aggressive sexual advances towards white women and infer Pinner is guilty of the sexual offense charged.

Big Infraction

The defense filed a motion in limine to prohibit the State from introducing his criminal history and his disciplinary history as impermissible character evidence under Rule 404(b). (Docs 116 at 1-2.) During the testimony of Officer MacDonald, the prosecutor elicited information about Pinner's infractions at Amtrak. MacDonald alluded Pinner had a "pretty lengthy" disciplinary history. The trial court itself inquired extensively into Pinner's infractions at Amtrak. (Trial at 632-33.) McDonald then claimed Pinner's latest infraction was "a big deal" and that by allowing guests to use a room without a proper ticket, with Pinner's disciplinary record, was an egregious infraction and was grounds for termination from Amtrak. (Trial at 633.) The defense requested a sidebar and explained to the court that the parties had stipulated—among themselves without informing the judge—not to argue a motion to bar impermissible Rule 404(b) evidence. (Trial at 635.) The parties stipulated that Pinner had a criminal and disciplinary

history and agreed not to elicit any details of such bad acts. (Trial at 634-35.) During his case-in-chief, the prosecutor reneged on this agreement and brought up Pinner's infractions. After the defense called a sidebar, the prosecutor justified his playing false by arguing Pinner had said multiple times that he had no disciplinary issues at Amtrak "and we knew otherwise, and it [was] lengthy." (Trial at 636.) The prosecutor acknowledged that probing into his disciplinary infractions could be "overly prejudicial" in violation of Rule 403. (*See* Trial at 636.) Despite the agreement, the prosecutor rationalized that he elicited details of the infraction to correct the record. (Trial at 636.) The prosecutor acknowledged there was a verbal agreement to exclude such evidence and agreed that a curative instruction was necessary. (Trial at 636.)

The defense asked the court to strike and disregard MacDonald's testimony concerning Pinner's disciplinary history and to give a curative jury instruction. The trial court gave this curative instruction but did not strike the inadmissible testimony from the record. (Trial at 885.) The trial judge acknowledged he did not know about the parties' agreement when he inquired at length about Pinner's disciplinary

history. (Trial at 636 ([**DEFENSE**]: I don't blame you for asking the question, Judge because you weren't a party to what we had agreed to and I...).)

There is no possible tactical reason for not failing to exclude details of Pinner's "big infraction." That is deficient performance. *Becker*, ¶ 43. The prosecutor wanted the jury to hear a witness alluding to Pinner's "lengthy" disciplinary history and to hear specific details of his "big infraction," in keeping with his single-minded objective of casting aspersion on Pinner's character. (Trial at 633.) The parties agreed to exclude such evidence. The jury heard it.

All through trial, the prosecutor led the jury by the nose, using *slighting* remarks to infer Pinner was a "bad man" inclined to wrongdoing in general. The slighting remarks aimed to show the jury Pinner was a "bad man" and from the negative character inference to conclude a "guilty man." A curative instruction (Trial at 885) cannot unring the bell of negative character inference and the irresistible suggestion of guilt.

2. Closing argument

Counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1510 (2018); *Cooke* v. *State*, 977 A. 2d 803, 842-846 (Del.2009) (counsel's pursuit of a "guilty but mentally ill" verdict over defendant's "vociferous and repeated protestations" of innocence violated defendant's "constitutional right to make the fundamental decisions regarding his case"); *State* v. *Carter*, 270 Kan. 426, 440, 14 P. 3d 1138, 1148 (2000) (counsel's admission of client's involvement in murder when client adamantly maintained his innocence contravened the Sixth Amendment right to counsel and due process right to a fair trial).

Autonomy to decide that the objective of the defense is to assert innocence belongs to the client. *McCoy*, 584 U. S. at 6. Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind the United States Supreme Court called "structural;" when present, such an error is not subject to harmless-error review. *McCoy*, 584 U. S. at 11. When a client expressly asserts that the objective of "his defence" is to maintain innocence of the charged criminal acts, his

lawyer must abide by that objective and may not override it by conceding guilt. U. S. Const. Amend. VI.

Where a client maintains innocence, there is no plausible justification for alluding that he had consensual oral sex with Shepherd as this undermined his ability to obtain an acquittal. *Jefferson*, ¶ 50.

In closing, defense counsel argued to a majority-women jury in a rape case that administering oral sex was something "other than power and control" of a victim (Trial at 902) alluding to consensual oral sex between Pinner and Shepherd. Pinner maintained he had no sexual contact of any kind with anyone. Jurors could have construed this argument as an admission of guilt.

There is no plausible justification for suggesting to a majority-women jury in a rape trial that the female gender of eleven jurors impeded defense counsel from zealously advocating for Pinner. (*See* Trial at 901.) In closing, defense counsel said he would have advocated more vigorously and in more graphic "detail"—how, given Pinner's disability, it was physically impossible for Pinner to have sexually assaulted Shepherd—if the jury had more men. (Trial at 901.)

III. CUMULATIVE ERROR WARRANTS REVERSAL

"The doctrine of cumulative error requires reversal of a conviction where a number of errors, taken together, prejudice a defendant's right to a fair trial." *State v. Ferguson*, 2005 MT 343, ¶ 126, 330 Mont. 103, 126 P.3d 463. "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) *citing Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973).

If this Court determines the dog-whistling, slighting remarks, admission of impermissible character evidence, and ineffective counsel, independently do not warrant reversal, Pinner submits that, taken together, these errors deprived him of a fair trial. *State v. Cunningham*, 2018 MT 56, ¶¶ 32-33, 390 Mont. 408, 414 P.3d 289.

Pinner's defense rested on his credibility and the jury believing he did not have any sexual contact with anyone. The prosecutor denigrated Pinner as a creepy, phantom, sexual predator, and simultaneously vouched that these southern ladies had no reason to lie.

Just like *Carr*, 208 So. 2d at 888-89, the prosecutor's use of "animal," referring to Pinner's version of events as "fabrication," the admission of evidence of Pinner's "big infraction," and an ineffective counsel, denied him due process of law. The defense counsel clung to his ideal of color-blind justice and kept silent as the prosecutor used improper methods—tacitly communicating to the jury these tactics were permissible.

IV. THE IMPOSITION OF THE COSTS OF JURY TRIAL, THE COST OF THE COURT-ASSIGNED COUNSEL, AND THE ADDITIONAL INFORMATION TECHNOLOGY SURCHARGE WAS ILLEGAL.

A. Standards Of Review

This Court reviews criminal sentences for legality. *State v. Moore*, 2012 MT 95, ¶ 10, 365 Mont. 13, 277 P.3d 1212. This Court reviews de novo whether the sentencing court adhered to the applicable sentencing statutes. *Moore*, ¶ 10.

B. Law

A district court may require an indigent defendant to pay the cost of court-assigned counsel as part of the sentence imposed. Mont. Code Ann § 46-8-113(1). Such imposition must adhere to § 46-8-113(3). *See State v. Hirt*, 2005 MT 285, ¶ 21, 329 Mont. 267, 124 P.3d 147.

Before imposing costs under [§ 46-8-113(3)], a court must consider whether the record contains particularized, non-speculative facts that indicate the defendant has a reasonable ability to pay the assessed costs. *See State v. Madplume*, 2017 MT 40, ¶ 40, 386 Mont. 368, 390 P.3d 142. If the record lacks those facts, this Court has held that the district court should directly ask the defendant about his ability and make a record of his ability to pay. *Madplume*, ¶ 40. This Court has explained that this determination requires the district court to "scrupulously and meticulously examine the defendant's ability to pay before" costs may be imposed. *State v. Gable*, 2015 MT 200, ¶ 22, 380 Mont. 101, 354 P.3d 566.

Before imposing costs of jury trial or of court-assigned counsel, a district court "shall take into account the financial resources of the defendant, the future ability of the defendant to pay costs, and the nature of the burden that payment of costs will impose." *See State v. Reynolds*, 2017 MT 317, ¶ 20, 408 P.3d 503.

As Mont. Code Ann. § 3-1-317(1)(a) plainly states, the court IT fee is a "user surcharge" to be assessed per "user," whether a civil party or criminal defendant, regardless of the number of criminal counts or civil

claims presented. *See State v. Pope*, 2017 MT 12, ¶ 32, 386 Mont. 194, 387 P.3d 870.

C. Discussion

The court imposed the costs of jury trial of $33,390.74 and the cost of court-assigned counsel of $16,578—a total of $50,908.74. (App. A at 3.) The court determined Pinner will "probably never pay" these costs because he lacked the ability to pay. (App. B at 22.) Yet, it reasoned: "I think I can impose them and if he can't pay them, he can't pay them." (App. B at 22-25.) The court further added: "[S]o let's leave [those costs] on the books just in case [Pinner] hit[s] the lottery or Uncle Bob dies and leaves [him] a ton of money." (Sentencing at 25.) Such an imposition is illegal.

The district court imposed a "$10.00 technology fee *for each offense*," for a total of $20. It could only impose $10 for IT fee.

CONCLUSION

Pinner respectfully requests the Court to remand for a new trial. Alternatively, the Court must remand with instructions to strike: (1) the costs of jury trial of $33,930.74, (2) the cost of the defense attorney of $16,578, and (3) $10 added IT fee.

Respectfully submitted this 21st day of June 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,993, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Moses Okeyo
MOSES OKEYO

APPENDIX