IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0597

STATE OF MONTANA,

Plaintiff and Appellee,

v.

VAUGHN DAVID JAMES,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, the Honorable Deborah K. Christopher, Presiding

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1. Did the trial court misapply Rule 404(b) by precluding evidence tending to prove James's accuser was motivated to testify falsely to avoid jail time for violating terms of her conditional release?

2. Did the trial court unduly curtail James's right to mount a complete defense when it denied him broad latitude to cross-examine and impeach his accuser about the leniency she received?

3. Did the chief prosecutor's conflict of interest deprive the entire Lake County Attorney Office (LCAO) of authority to prosecute James?

STATEMENT OF THE CASE

Vaughn David James appeals from the judgment of the Twentieth Judicial District Court, Lake County, following a jury verdict finding him guilty of sexual intercourse without consent (SIWOC). (D.C. Doc. 119, attached as App. A, at 1.)

The State charged James by Information of SIWOC for allegedly raping his aunt Marilyn Noel. (*See* D.C. Docs. 2, 4.) James's first trial for this offense resulted in a mistrial. (6/14/17 Tr. at 528.)

At re-trial, James, through counsel, moved in limine to admit evidence relating to Noel's pending criminal charges, specifically her noncompliance with conditions of release, to show that she had a motive to fabricate the allegation against James. (D.C. Doc. 44 at 2–3.) James argued Noel used the alleged rape as an excuse for why she violated the 24/7 drug and alcohol monitoring requirements, and thus she had a clear motivation to fabricate to avoid jail time. The State argued the pending criminal charge against Noel in Sanders County had no bearing on her character for truthfulness and would have no impeachment value to her credibility in making her accusation against James. (*See* D.C. Doc. 52 at 3.)

At the evidentiary hearing on his motion in limine, James argued Noel's pending charges were admissible reverse Rule 404(B) evidence. (5/18/17 Tr. at 21.) The State acknowledged that the "bond issue" tended to show Noel's motive to fabricate: "The other issue is the bond issue. I think that is the one that is the more interesting because it goes to motivation to fabricate." (5/18/17 Tr. at 16–17.) However, the State disavowed giving Noel special considerations for her pending charges: "There's no basis regarding the pending Lake County cases to

in any way to assume she got consideration for her victim status with our office." (5/18/17 Tr. at 16–17.)

Even though the State acknowledged the "bond issue" tended to prove Noel's motive to fabricate, the trial court excluded this proffered evidence: "I'm sure the supreme court can straighten it out." (5/18/17 Tr. at 23.)

Noel's Pending Charges

On June 9, 2016, Sanders County charged Noel by Information of several offenses: Count I, felony driving under the influence—punishable by 13 months at the Department of Corrections followed by up to five years suspended sentence, and a fine between $1,000 and $10,000; Count II, driving without a valid driver's license; and Count III, misdemeanor driving without valid insurance. (*State v. Noel*, DC-16–51 ("*Noel*"), D.C. Docs. 1, 3 at 1–2, attached as App G.) Noel had been arrested and held on $25,000 bond. On June 18, 2016, Noel was released on her own recognizance on condition that she participate in the 24/7 sobriety and drug monitoring and wear an alcohol monitoring device at her own expense. (*Noel*, Doc. 33, at 2, attached as App. D.) At Noel's January 24, 2017 omnibus hearing, her counsel acknowledged

she missed the scheduled monitoring. (App. D at 2.) The State moved to revoke her conditional release for that. (App. D at 2.) On February 7, 2017, despite Noel missing drug and alcohol monitoring, the parties filed an "unopposed motion" to not revoke her bond and to excuse her from drug and alcohol monitoring. (*Noel*, Doc. 34, at 2, attached as App. E.)

The reason Noel received lenient treatment was because her counsel persuaded the trial court Noel missed her scheduled testing in Polson because she had been traumatized after suffering a violent sexual assault the previous night at the hands of her nephew James. (CDC-2016-352: Findings of Fact, Conclusions of Law and Order, attached as App. F at 1.)

Instead of revoking Noel's release and imposing bond, the trial court "excused" her missed "scheduled blows" on account of the alleged rape, and released on her own recognizance after excusing her from daily alcohol and drug monitoring. (App. F at 1; *see also*, D.C. Doc. 54 at 4.)

The resolution to Noel's pending charges was lenient. On June 21, 2017, Noel pleaded guilty to a lesser charge of criminal endangerment

and received a five-year suspended sentence—instead of 13 months in DOC and a five-year suspended sentence statutorily required for a felony DUI. (Unopposed Motion to Amend Noel's Conditions of Release attached as App. E at 6.) For driving without a valid license, Noel was sentenced to the two days she already served. (App. E at 7.) Noel received minimal fines for her third misdemeanor. (*See* App. E at 7.)

Sentence

Following a two-day trial, the district court sentenced James, as a persistent felony offender, to 100 years to the Montana State Prison and rendered him ineligible for parole for 50 years and also designated him a level-III sexual offender. (7/5/18 Tr. at 32.)

James filed a timely appeal. (D.C. Doc. 123.)

On January 17, 2020, James, through appellate counsel Koan Mercer, successfully moved this Court to remand for an evidentiary hearing on whether LCAO should be disqualified from prosecuting James.

The trial court had filed a complaint with the Office of Disciplinary Complaints (ODC) against Steven Eschenbacher, the County Attorney. The ODC concluded Eschenbacher did not commit

any ethical violation. (3/29/21 Tr. at 75.) Following the evidentiary hearing, the district court concluded there was no legal basis for disqualifying the entire office from James's prosecution because there was no evidence Eschenbacher violated any rules of professional conduct. (App. F at 13.)

STATEMENT OF FACTS

Marilyn Noel is James's half-aunt on his father's side. (6/14/17 Tr. at 461.) Noel is just nine years James's senior. (6/14/17 Tr. at 462–63; 6/12/17 Tr. at 161.) Throughout James's teenage years into early adulthood, Noel flirted with him. (*See* 6/14/17 Tr. at 463.) There was a bit of attraction between them. (6/14/17 Tr. at 463.) The family was not close knit—James and Noel would go a year or two sometimes before seeing each other. (6/14/17 Tr. at 464.) Recently, Noel had been homeless and on September 15, 2016, James's mother Diane opened her home to Noel. (6/12/17 Tr. at 162; *see* 7/12/17 Tr. at 414–5.)

On September 17, 2016, James came to his mother's house around 2:00 a.m. after the bars closed. (6/14/17 Tr. at 464.) James had had a couple of beers—but was not drunk— and he stopped over at his mom's rather than drive home. (6/14/17 Tr. at 464.) He did not know Noel was

staying there. (6/14/17 Tr. at 464.) When James first entered, Noel jumped off the couch, ran to him, and flirtatiously called him her "good-looking" nephew as she hugged him. (6/14/17 Tr. at 464; 7/12/17 Tr. at 417.) James's visit was brief, his mother smelled alcohol on his breath, and asked him to leave. (6/14/17 Tr. at 464; 7/12/17 Tr. at 416–17 ("You don't show up at [Diane's] house with alcohol on your breath. It's a rule. Everybody knows it.").) As James started to leave, Noel whispered he should return later. (6/14/17 Tr. at 467–68.) A curious James returned around 3:30 a.m. (6/14/17 Tr. at 467-68.) Noel had stayed up watching television—waiting. (7/12/17 at 421.) The door to Diane's house was always deadbolted shut—for security reasons. (6/14/17 Tr. at 467–68.) James tapped on the window, so as not to wake his mother. (6/14/17 Tr. at 468–69.) Noel had preferred to sleep on the couch instead of the spare bedroom Diane offered. Noel let James in. (6/14/17 Tr. at 469.) James and Noel started to "conversate" in soft whispers—Diane was asleep her room with her bedroom door wide open as she always does. (6/14/17 Tr. at 469.) James massaged Noel's calves and feet, and things progressed into consensual sex that lasted 15 to 20 minutes. (6/14/17 Tr. at 469.)

Noel later alleged James *broke* into his own mother's residence without *waking Diane nor Noel up*, and forcibly had sex with Noel. Noel testified she was asleep on the couch in Diane's living room. (6/12/17 Tr. at 166.) Noel had gone to bed fully clothed, but she told the jury she did not wake up while James removed his clothes, removed her underwear, pulled her nightgown to the side, and climbed on top of her. (6/12/17 Tr. at 169–70.) She awoke naked, on her back with James naked on top of her. (*See* 6/12/17 Tr. at 169, 174.) James allegedly was inserting his finger into her vagina and "That was part of waking up to him." (*See* 6/12/17 Tr. at 169, 193.) James then allegedly pinned her down with his hands while simultaneously licking her face and breasts. (*See* 6/12/17 Tr. at 169.) James allegedly "entered" her vagina with his penis. (6/12/17 Tr. at 171–72.) For the first time on the stand, Noel said James also tried to "go down on" her—to wit, perform oral sex. (*See* 6/12/17 Tr. at 194–95.)

Later, on cross-examination, Noel admitted she had told a SANE nurse that she was not sure whether James entered her vagina with his penis. (6/12/17 Tr. at 171–72; 193.) Noel had previously told the jury James broke down his mother's door, but on cross-examination she

could not explain how the door remained intact—with no signs of forced entry. (*See* 6/12/17 Tr. at 191.)

Diane was asleep with her bedroom door wide open—Diane gets "claustrophobic" behind closed doors. (7/12/17 Tr. at 420.) Noel had told the jury she tried to scream for help, but James covered her mouth with his hands while still holding her down with his hands. (*See* 6/12/17 Tr. at 170.) Diane was sleeping next door but she did not hear any commotion or screaming during those 15 to 20 minutes. (7/12/17 Tr. at 421 ("Oh, heavens no. It was quiet as a mouse.").) Nothing was out of place in Diane's living room.

In closing, the State exploited the lack of evidence supportive of Noel's motive to fabricate to argue Noel had nothing to gain and would not have put herself through the trauma of making the accusation and testifying at trial if the accusation was not true. (*See* 7/13/17 Tr. 501–03, 510, 533–34, 537–38.)

Eschenbacher's conflict of interest

In 2011, LCAO had charged James with SIWOC. (12/7/20 Tr. at 17, 30-31.) Attorney James Lapotka, who is currently LCAO's Chief Criminal Deputy Prosecutor, prosecuted that 2011 SIWOC case.

(12/7/20 Tr. at 17, 30–31.) James's public defenders were Steve Eschenbacher and Amanda Gordon. (3/29/21 Tr. at 32.) Eschenbacher, as counsel, learned personal things about James's family, his childhood sexual abuse, and his personal flaws. (*See* 3/29/21 Tr. at 7.) The 2011 trial resulted in a mistrial by hung jury. (12/7/20 Tr. at 36; 3/29/21 Tr. at 8.) After which the alleged victim committed suicide. (12/7/20 Tr. at 44.)

Contemporaneously, the Missoula County Attorney's Office prosecuted James for an unrelated SIWOC charge. (12/7/21 Tr. at 36.) James was acquitted of that charge.

Steve Eschenbacher was elected as Lake County Attorney in 2014 and he took office in January 2015. (3/29/21 Tr. at 31.) Eschenbacher consulted with Betsy Brandborg, of the State Bar of Montana, about potential conflicts of interest when his former clients are prosecuted by LCAO. (3/29/21 Tr. at 51–52.) LCAO uses Justware as its case management system. (3/29/21 Tr. at 42; 65–66.) When Eschenbacher left the Office of the Public Defender in 2014 to become the chief prosecutor at LCAO, a conflict check procedure was initiated. (*See* 3/29/21 Tr. at 42; 65–66.)

The present SIWOC case was assigned to Deputy Lake County Attorney Brendan McQuillan who prepared and filed the charges. But the prosecution could only proceed under Chief Prosecutor Eschenbacher's authority even though he had previously represented James. (12/7/20 Tr. at 8.) Amanda Gordon, James's former co-counsel in his first, was again appointed to represent James on the 2016 SWIOC prosecution. (3/29/21 Tr. at 8–9.)

On the stand, Eschenbacher claimed he holds a favorable opinion of James and believed James was innocent of the 2011 SIWOC charges. (3/29/21 Tr. at 35, 44.) He did not recall receiving sensitive attorney-client information when he was representing James. James had maintained his innocence and provided no information inconsistent with innocence. (3/29/21 Tr. at 35–36, 70–71.) Eschenbacher was adamant he did not review any of the discovery in the present case and did not share his opinion of James with McQuillan. (3/29/21 Tr. at 37; 12/7/20 Tr. at 15.) Eschenbacher denied directing McQuillan regarding how to prosecute James or talking with McQuillan about the present prosecution or his prior defense of James. (12/7/20 Tr. at 14, 27; 3/29/21

Tr. at 44, 74). McQuillan's was supervised by James Lapotka. (12/7/20 Tr. at 21, 42.)

Despite not prosecuting the case, Eschenbacher, as county attorney, maintained an active interest in this prosecution, even going so far as to approach defense counsel Gordon to ask her whether James had accepted a plea deal. (3/29/21 Tr. at 12.) To Gordon, Eschenbacher's question raised red flags. (3/29/21 Tr. at 12.) Eschenbacher later claimed he did not know whether a plea offer existed, nor its particulars. (3/29/21 Tr. at 69.) Eschenbacher acknowledged that James Lapotka had used the phrase "Teflon Vaughn" in his presence to suggest that James was a serial rapist who always beat several SIWOC charges against him. (3/29/21 Tr. at 53.) Eschenbacher disavowed holding the same view of James. (3/29/21 Tr. at 53.) At arraignment, an LCAO prosecutor dubbed James a "serial rapist" and requested a high bond—bond was set for $250,000. Four out of the five attorneys at LCAO colloquially branded James "Teflon Vaughn" because juries always acquitted James whenever the State brought sex charges against him. (*See* 3/19/21 Tr. at 23-26; 53; 95.)

At the March 2021 evidentiary hearing, James testified that in 2011 he met with Eschenbacher on multiple occasions. (3/29/21 Tr. at 77-78.) Eschenbacher learned that James was sexually abused during his childhood. (3/29/21 Tr. at 79.) James was concerned when he realized LCAO was leading his prosecution under Eschenbacher's authority. (3/29/21 Tr. at 80.)

During the first trial, McQuillan's paralegal, Vera Johnson, consulted Eschenbacher about whether to play a DVD recording of a 911 call to the jury. (12/7/20 Tr. at 47, 50–51; 3/29/21 Tr. at 73.) Johnson initially denied any involvement, but later on cross-examination she admitted to consulting Eschenbacher about playing that DVD for the jury. (12/7/20 Tr. at 48; 50–53; 3/29/21 Tr. at 73.) Johnson's trial consultation with Eschenbacher was only brought to the trial court's attention because defense counsel overheard the prosecution discussing the DVD. (12/7/20 Tr. at 15–16.) McQuillan testified he did not remember Eschenbacher being present in the courtroom during the two trials. (12/7/20 Tr. at 21–22.) But Eschenbacher admitted he went into the courtroom once or twice to supervise McQuillan's performance. (*See* 3/29/21 Tr. at 55.)

SUMMARY OF THE ARGUMENT

James sought to put on evidence that Noel had a motive to fabricate a sexual assault claim against him to excuse her bond violations and garner a lenient sentence. Although the State readily acknowledged the bond violation evidence was relevant to Noel's potential motive to fabricate, the trial court disallowed any information about the status of her pending criminal proceedings by misapplying Rule 404(B) and precluding James from introducing this highly probative evidence at trial.

Additionally, the trial court curtailed James's opportunity to cross examine Noel regarding her motive to testify falsely against him. James was constitutionally entitled to have the jury weigh this impeachment evidence during its determination of the credibility of Noel's accusations. The error was not harmless. James's first prosecution resulted in a hung jury. At re-trial, the assessment of James's and Noel's credibility was central to this case. This was not a situation in which the State's evidence was overwhelming and conviction was inevitable.

Moreover, in his new role as elected minister of justice, James's former attorney, Steve Eschenbacher, maintained both apparent and actual control over the matter against James for which he was supposedly recused. This case involved the impermissible threat that prosecutor Eschenbacher could improperly use confidential information obtained during his prior representation of James. The Court must reverse and remand with instructions that James receive a new trial with a special prosecutor.

STANDARDS OF REVIEW

This Court exercises plenary review over issues of constitutional law. *State v. Daniels*, 2011 MT 278, ¶ 11, 362 Mont. 426, 265 P.3d 623. This Court generally reviews a district court's ruling regarding the admissibility of other crimes, wrongs, or acts for an abuse of discretion. *State v. Crider*, 2014 MT 139, ¶ 14, 375 Mont. 187, 328 P.3d 612. District courts have broad discretion to determine the admissibility of evidence. *State v. Madplume*, 2017 MT 40, ¶ 19, 386 Mont. 368, 390 P.3d 142.

To the extent an evidentiary ruling is based on a district court's interpretation of the Montana Rules of Evidence, the Court's review is *de novo*. *Madplume*, ¶ 19.

The standard of review on a motion to disqualify counsel is abuse of discretion. *Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶ 26, 303 Mont. 274, 16 P.3d 1002. "Ultimately, it is this Court's 'constitutional mandate to fashion and interpret the Rules of Professional Conduct.' A district court therefore commits reversible error if it misapplies those rules." *Krutzfeldt Ranch, LLC v. Pinnacle Bank*, 2012 MT 15, ¶ 14, 363 Mont. 366, 272 P.3d 635 (*citing In re Rules of Prof'l Conduct*, 2000 MT 110, ¶ 9, 299 Mont. 321, 2 P.3d 806.).

ARGUMENT

I. The trial court erred in excluding evidence under Rule 404(b) which tended to show James's accuser, Noel was motivated to testify falsely against him to avoid jail time for violating terms of her conditional release.

Evidence of prior bad acts is admissible under Rule 404(b) if the proponent can "clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged." *State v.*

Clifford, 2005 MT 219, ¶ 48, 328 Mont. 300, 121 P.3d 489 (*quoting and citing United States v. Himelwright*, 42 F.3d 777, 782 (3rd Cir. 1994)).

The admissibility of 'reverse 404(b)' evidence depends on a straightforward balancing of the evidence's probative value against considerations such as undue waste of time and confusion of the issues. *Clifford*, ¶ 44. That is, such evidence must be reviewed under the chain of inferences it creates to determine its admissibility. *See Clifford*, ¶¶ 50-51. The trial court permitted references to specific acts of incest in *Clifford*, although it ruled details about those specific acts were cumulative. *Clifford*, ¶ 51.

It is necessary to look at the chain of inference created by the specific acts Noel committed. Where a chain of inference leads to something irrelevant to the crime at issue–such as in *Clifford* where the individual's act of previously vandalizing a car did not create a chain of inferences he must have committed incest–that evidence is inadmissible propensity evidence. *Clifford*, ¶ 50. "The distinction between admissible and inadmissible Rule 404(b) evidence turns on the intended purpose of the evidence, not its substance." *Madplume*, ¶ 23.

Here, challenged evidence was intended for permissible purposes that do not depend upon Noel's character propensity. James clearly articulated a permissible purpose not barred by Rule 404. *See Salvagni*, ¶¶ 59-62.

A. Motive To Testify Falsely

"It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence." *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987). This Court has said: "Bias or motive of a witness to testify falsely is not a collateral issue because it bears directly on the issue of the defendant's guilt; thus, extrinsic evidence is admissible to prove that the witness has a motive to testify falsely." *State v. Gommenginger*, 242 Mont. 265, 272, 790 P.2d 455, 460 (1990) (citations omitted).

James proffered non-speculative facts establishing Noel was facing pretrial custody and felony imprisonment. James presented a coherent theory of how these facts were relevant to Noel's motive to accuse him of victimizing her—that she fabricated her accusation against James to justify why she violated the 24/7 sobriety and drug monitoring and hopefully to receive sympathetic, lenient treatment

from her prosecutor. James was constitutionally entitled to have the jury weigh this impeachment evidence when determining the credibility of Noel's accusations.

As with the witness's probation in *Davis*, James needed Noel's pretrial release violations and pending felony to show her motive to falsely accuse him. James explicitly sought to examine Noel regarding her ongoing criminal case to present jurors with an inference that Noel's legal problems created a motive for her to transform herself from defendant to victim by falsely accusing James of assaulting her. (D.C. Docs. 44 at 3, 53 at 3–4.) As in *Davis*, James repeatedly and expressly disavowed any intent to use Noel's legal problems as negative character evidence. (D.C. Docs. 44 at 4, 53 at 3; 5/18/17 Tr. at 8, 11.)

The State could not convict James of SIWOC without convincing jurors to believe Noel's accusation that she did not consent. The credibility of Noel's accusation was a close question: the first jury to hear the case was unable to agree upon a verdict. (6/14/17 Tr. 527–28.) The assessment of the credibility of the accused and of the complainant was central to the case and this is not a situation in which the State's evidence was overwhelming and conviction was inevitable. Noel's

accounts were inconsistent and evolving. (*See e.g.* 7/13/17 Tr. at 531 (The prosecution chalking up the evolving inconsistencies to her "flawed memory.").) Her central claim of having awoken inside the locked house with James on top of her could not account for how James got inside the locked house without Noel having let him in. (*See* 7/13/17 Tr. at 531; 7/12/17 Tr. at 428 (James had no key, and there were no signs of forced entry on the front door—which everyone swore had been deadbolted shut.).)

Noel's ongoing legal problems are documented facts that support a coherent, logical inference as to her motive to falsely accuse James and to maintain that false accusation through trial. James proffered concrete and unchallenged evidence that, at the time of her initial accusation, Noel had pending felony charges in both Lake and Sanders Counties, that she had been released from custody on various drug and alcohol testing conditions, that she had failed to comply with those conditions, and that she was aware, from prior experiences, that her release could be revoked for such violations. The pending case in Sanders County was a felony DUI, carrying a mandatory 13-month minimum sentence. (Noel, Doc 3 at 2, attached as App G; 5/18/17 Tr. at

4.) From the affidavit of probable cause, the felony DUI charge was supported by a solid stop, obvious signs of impairment, and blood evidence. (App. G at 2.)

The defense also proffered evidence that after accusing James, Noel went to the prosecutor in *her* Lake County case—not the prosecutor in James's case—and presented herself as a rape victim. (5/18/17 Tr. at 4.) That prosecutor, with Noel seemingly still in his office, then wrote to Noel's prosecutor in Sanders County that Noel was a rape victim. (5/18/17 Tr. at 4.) Further, when the Sanders County prosecutor did eventually move to revoke Noel's release for her pretrial violation, Noel filed a successful motion to keep herself out of custody, explicitly arguing that she missed her required sobriety and drug testing because she had been sexually assaulted. (5/18/17 Tr. at 12–13.) As a sexual abuse victim, Noel was able to continue her felony DUI prosecution and remain out of custody.[1] (5/18/17 Tr. at 3.) While the State did not offer Noel a plea agreement that specifically required her

[1] The Court can take judicial notice that Noel subsequently avoided imprisonment and a felony DUI conviction in her Sanders County case, pleaded to Criminal Endangerment and receiving an entirely suspended sentence. (*Noel*, Plea Agreement at 1, attached as App. C.)

to testify against James, her pending felony cases and pretrial release violations gave Noel reason to appear in a sympathetic and favorable light to the State and district courts and James could not tell the jury about it.

II. The trial court improperly curtailed James's broad latitude to cross-examine Noel about the leniency she sought and received in return for her testimony to impugn her credibility.

A. Applicable Law

A defendant's right to confront and cross-examine is violated when a court precludes questioning "on the witness's potential for bias or prejudice stemming from his interest in receiving leniency on other charges from the prosecuting office." *State v. Nelson*, 2002 MT 122, ¶ 17, 310 Mont. 71, 48 P.3d 739, *citing Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974) (probationer in custody with possibility of being charged has an interest in receiving leniency); *Alford v. United States*, 282 U.S. 687, 693, 51 S. Ct. 218, 220 (1931) (defendant entitled to show witness testimony may have been "affected by fear or favor growing out of detention"). A cross-examiner should be given latitude in order to attempt to impeach the credibility of a witness. *See State v. Dahms*, 252 Mont. 1, 7, 825 P.2d 1214, 1218 (1992).

Under the Sixth Amendment to the United States Constitution and Article II, Section 24, of the Montana Constitution, a defendant has the "right to confront his accusers." *State v. Colburn*, 2016 MT 41, ¶ 24, 382 Mont. 223, 366 P.3d 258 (*citing State v. MacKinnon*, 1998 MT 78, ¶ 33, 288 Mont. 329, 957 P.2d 23). The rights guaranteed to an accused citizen, including the right to confront witnesses, are fundamental rights. *State v. Parker*, 2006 MT 258, ¶ 20, 334 Mont. 129, 144 P.3d 831, *citing* Mont. Const. art. II, § 24.

The Sixth Amendment right to confront witnesses guarantees a defendant the right to demonstrate bias or motive of the State's witnesses. *Gommenginger*, 242 Mont. at 272, 790 P.2d at 460.

Similarly, a defendant has a right to "present evidence in his defense." *Colburn*, ¶ 24 (*citing State v. Johnson*, 1998 MT 107, ¶ 22, 288 Mont. 513, 958 P.2d 1182); *State v. Aguado*, 2017 MT 54, ¶ 31, 387 Mont. 1, 390 P.3d 628

In *Davis*, 415 U.S. at 320–21, the United States Supreme Court reversed Davis's burglary and grand larceny conviction because the trial court had prevented Davis from cross-examining a prosecution witness regarding the witness's juvenile delinquency record. *Davis*, 415

U.S. at 311. The witness was on juvenile probation for burglary at the time the witness identified Davis to police. *Davis*, 415 U.S. 311. Davis sought to reveal the witness's juvenile record "only as necessary to probe [the witness] for bias and prejudice and not generally to call [the witness's] good character into question." *Davis*, 415 U.S. at 311. Relying on state laws protecting the confidentiality of juvenile records, the trial court barred Davis from cross-examining the witness regarding his delinquency record. *Davis*, 415 U.S. at 310–11. The Alaska Supreme Court affirmed, holding Davis had been able to adequately question the witness about the possibility of bias or motive to fabricate without referencing the witness's juvenile probation. *Davis*, 415 U.S. at 314–15.

The United States Supreme Court disagreed. The accuracy and truthfulness of the witness's identification of Davis were central to the prosecution's case. *Davis*, 415 U.S. 317. Davis sought to use the witness's probation status to show jurors the existence of possible bias and a faulty identification. The Court noted it was not the Court's role to speculate as to whether jurors would have accepted this line of reasoning. *Davis*, 415 U.S. at 317. Rather, the Court held, "the jurors

were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness's] testimony . . . ." *Davis*, 415 U.S. at 317. The Court also explained that although the trial court had permitted Davis to ask the witness *whether* he was biased, Davis had been "unable to make a record from which to argue *why* [the witness] might have been biased." *Davis*, 415 U.S. at 318 (emphasis added). Without the delinquency information, "the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness." *Davis*, 415 U.S. at 318. The Court held that "defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Davis*, 415 U.S. at 318. The State's interest in allowing the witness "to testify free from embarrassment and with his reputation unblemished must fall before the right of [the defendant] to seek out the truth in the process of defending himself." *Davis*, 415 U.S. at 320.

In opposing the protective order, Davis's counsel made it clear that he would not introduce Green's juvenile adjudication as a general impeachment of Green's character as a truthful person but, rather, to show specifically that at the same time Green was assisting the police in identifying petitioner he was on probation for burglary. From this Davis sought to show that Green was concerned about violating his probation. Not only might Green have made a hasty and faulty identification of Davis to shift suspicion away from himself as one who robbed the Polar Bar, but Green might have been subject to undue pressure from the police and made his identifications under fear of a possible probation revocation. Davis intended to use Green's record to probe Green for bias and prejudice and not generally to call Green's good character into question. *Davis*, 415 U.S. at 311, 94 S. Ct. at 1108.

Professor Wigmore stated:

> The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

5 J. Wigmore, Evidence s 1395, p. 123 (3d ed. 1940).

This Court has likewise recognized that "an accused's right to demonstrate the bias or motive of prosecution witnesses is guaranteed by the Sixth Amendment right to confront witnesses." *Gommenginger*, 242 Mont. at 272, 790 P.2d at 460. "[T]he trial court's discretion in exercising control and excluding evidence of a witness's bias or motive to testify falsely becomes operative only after the constitutionally required threshold level of inquiry has been afforded the Defendant." *Gommenginger*, 242 Mont. at 274, 790 P.2d at 461. This Court in *Gommenginger* remanded for new trial to afford the constitutional latitude to cross-examine the testifying informant and to allow the introduction of extrinsic evidence regarding the informant's alleged habitual drug use to build a record of his motive to testify falsely subject to the usual limitations of Rules 403 and 611, M.R.Evid. *See Gommenginger*, 242 Mont. at 274–75, 790 P.2d at 461.

The "main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination," and "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Delaware*

v. Van Arsdall, 475 U.S. 673, 678-79, 106 S.Ct. 1431, 1435(1986) (*citing Davis*, 415 U.S. at 315-17, 94 S.Ct. at 1110) (emphasis omitted).

The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness's credibility is achieved by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore, Evidence s 940, p. 775 (Chadbourn rev. 1970). The United States Supreme Court has recognized that the exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *See Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400(1959). This is why it said,

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's act.

Douglas v. Alabama, 380 U.S. 415, 419, 85 S.Ct. 1074, 1077 (1965). The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as probationer, cf. *Alford*, 282 U.S. at 687, as well as Green's possible concern that he might be a suspect in the investigation. *Davis*, 415 U.S. at 317–18, 94 S.Ct. at 1111.

In *Van Arsdall*, however, the trial court prohibited *all* inquiry into the possibility that Fleetwood would be biased as a result of the State's dismissal of his pending, public drunkenness charge. By thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the United State Supreme Court held that the trial court's ruling violated Van Arsdall's rights secured by the Confrontation Clause. *Van Arsdall*, 475 U.S. at 678–79, 106 S.Ct. at 1435.

In *Alford,* the Supreme Court held that it was an abuse of discretion and prejudicial error to "cut off *in limine* all inquiry on a

subject with respect to which the defense was entitled to a reasonable cross examination." *Alford*, 282 U.S. at 694.

In *State v. Flowers*, 2018 MT 96, ¶¶ 18–23, 391 Mont. 237, 416 P.3d 180, this Court concluded that co-accused Hill's plea agreement with the State was relevant to impeach her credibility and to show her motive for testifying against Flowers. Hill was the only other occupant of the vehicle when the drugs were found. *Flowers*, ¶ 21. Her testimony implied that she had come clean for her role without receiving anything in return, and it went uncontroverted. *Flowers*, ¶ 21. Her testimony was the only direct evidence that addressed Flowers's association with the drugs and drug paraphernalia found in the truck. *Flowers*, ¶ 21. Because of the court's ruling, Flowers was unable to impeach Hill with a possible motive to testify falsely on a matter that Flowers disputed—who owned the contraband found in his vehicle. *Flowers*, ¶ 21.

The trial court could have limited the evidence to ensure its permissible use and to minimize the potential for an improper propensity inference. *Flowers*, ¶ 22. The court could, for example, have precluded reference to the specific crimes with which Hill was charged

in the August 2014 incident. *Flowers*, ¶ 22. But to prohibit any questioning to show that Hill had faced a potential 147–year sentence and got an agreement from the State for seven years with two suspended deprived Flowers of valuable impeachment evidence. *Flowers*, ¶ 22; *see State v. Cunningham*, 2018 MT 56, ¶ 26, 390 Mont. 408, 414 P.3d 289. Rule 404(b) did not bar its use.

This Court reversed for a new trial because the State could not prove the error in depriving Flowers of valuable impeachment evidence was harmless. *Flowers*, ¶ 23,

Similarly, in *Flowers*, ¶¶ 19–23, the Court remanded for a new trial to allow the defendant to impeach a witness with the witness's pending charges. The Court recognized that even though the witness's plea agreement did not require her to testify against the defendant, the witness "arguably had reason to appear in a light favorable to the prosecution" because she had not yet been sentenced. *Flowers*, ¶ 19.

B. Discussion

James was denied the opportunity to cross examine his accuser regarding her motive to testify falsely against him. James was entitled to show by cross-examination that Noel's testimony was affected by fear

or favor growing out of the handling of her bond and the disposition of her cases. *See Alford*, 282 U.S. at 693.

The trial court restricted James from making a record from which to argue that Noel might have been biased by a reduced sentence to fabricate her accusation. The limitation on Noel's cross-examination resulted in the jury viewing Noel's credibility in a vacuum. *See Gommenginger*, 242 Mont. at 272–73, 790 P.2d at 460. On the basis of the limited cross-examination of Noel, the jury might well have thought that defense counsel was speculatively lobing a baseless attack on an apparently blameless Noel. *See Davis*, 415 U.S. at 317. The prejudice was exacerbated because the State took advantage of the lack of evidence of Noel's motive to fabricate in closing to tell the jury:

> Let's talk about Marilyn [Noel]. What did Marilyn have to gain? Defense wants to claim she wants some housing, well, she wants some money; oh, she wants some attention. They can't prove any one of those individually so they're just going to throw those up there against the wall.

(7/13/17 Tr. at 501.)

The State responded to the defense attack on Noel's credibility by telling jurors that Noel had nothing to gain and would not have put herself through the trauma of making the accusation and testifying at

trial if the accusation was not true. (7/13/17 Tr. 501–03, 510, 533–34, 537–38.) Cross-examining Noel regarding her own legal problems and the corresponding benefits she received from having accused James would have rebutted the State's arguments that Noel had nothing to gain by accusing her nephew of SIWOC.

Here, the trial court cut off all inquiry on a subject with respect to which James as the defense was entitled to a reasonable cross-examination. By thus cutting off all questioning about the pending case that the State conceded was relevant to her motive to fabricate, and that a jury might reasonably have found, furnished Noel with a motive for favoring the prosecution in her testimony which violated James's rights secured by the Confrontation Clause. *See Van Arsdall*, 475 U.S. at 678–79, 106 S.Ct. at 1435. The Court must remand as it did in *Flowers*, ¶¶ 19–23, to allow James to impeach Noel to challenge the inference that the State labored so hard to impress on the jury: That Noel was not motivated by favorable treatment to favor the prosecution in her testimony.

C. Not Harmless

Precluding cross-examination of a " 'central, indeed crucial' witness to the prosecution's case is not harmless error." *Holley v. Yarborough*, 568 F.3d 1091, 1100 (9th Cir. 2009), *quoting Olden v. Kentucky*, 488 U.S. 227, 232–33 (1988). Indeed "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis*, 415 U.S. at 316. Although trial courts have discretion "to preclude repetitive and unduly harassing interrogation," "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis*, 415 U.S. at 316–17.

Throughout trial, the State insisted that Noel had not gotten favorable treatment from the State and its desired inference went uncontradicted. The State exploited the lack of evidence supportive of Noel's motive to fabricate by arguing in closing Noel had nothing to gain and would not have put herself through the trauma of making the accusation and testifying at trial if the accusation was not true. (7/13/17 Tr. 501–03, 510, 533–34, 537–38.) It later retorted: "She [Noel] was traumatized. We all watched her. Who wants to be in that

position? What reasonable person wants to expose the fact that their own nephew had sex with them, unconsensual sex with them, any form of sex. No one wants to admit that." (7/13/17 Tr. at 502.) The prosecutor took advantage of the adverse evidentiary ruling. Not only did James not get to argue she did have a reason to lie, but the prosecutor also got to argue—unrebutted—that she didn't have a reason to lie. This loaded the deck against James by unduly restricting him from adequately testing the believability of Noel through the crucible of cross-examination. The State cannot prove beyond a reasonable doubt that the error was harmless. The Court must reverse and remand for a new trial.

III. The district court erred in refusing to disqualify the entire Lake County attorney's office from the case because the acting County Attorney's disqualification from the case deprived the entire office of authority to prosecute James.

The question before this Court, however, is not whether a defendant's former attorney is disqualified from assisting in the prosecution of the defendant. Nor is the question whether Eschenbacher committed an ethical violation, as the district court assumed. The question reduces to whether Eschenbacher's conflict of

interest must be imputed to the entire prosecutor's office—a matter of first impression in Montana.

This Court adopted the reasoning of the Illinois Supreme Court that a trial court may consider attorney violations of the Rules of Professional Conduct if that misconduct results in prejudice or adversely impacts the rights of the parties in the case pending before it. *Schuff*, ¶¶ 35-36 (*citing Beale v. Edgemark Financial Corp.*, 297 Ill. App.3d 999, 232 Ill. Dec. 78, 697 N.E.2d 820, 827(1998)). One common example of where a court may consider a professional conduct rule violation is the disqualification of an attorney due to a conflict of interest. *See In re Guardianship of Mowrer*, 1999 MT 73, ¶¶ 19–20, 294 Mont. 35, ¶¶ 19–20, 979 P.2d 156, ¶¶ 19–20 (alleged conflict based on Rules 1.8 and 1.9, M.R.P.C.).

A motion to disqualify must offer sufficient proof that the continued representation of one party by the attorney or firm will prejudice or adversely impact the rights of another party in the matter pending before the court. *See Schuff*, ¶¶ 35–36. Evidence demonstrating that an attorney or firm did, in fact, violate a

professional conduct rule merely serves as additional weight that may tip the scales in favor of disqualification. *Schuff*, ¶¶ 35–36.

Model Rules of Prof'l Conduct R. (MRPC) 1.9, sets forth a lawyer's duties to former clients:

> [a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

See In re Neuhardt, 2014 MT 88, 374 Mont. 379, 321 P.3d 833.

Prosecution of a former client creates the inherent prospect of a conflict of interest. A cornerstone to our system of justice is the principal that a litigant's attorney will not take a position that is directly adverse to them. Rule 1.7 MRPC. A similar rule holds true with respect to a defendant's former attorney. An attorney who formerly represented a client may not represent an interest adverse to that client in the same or substantially related matter. Rule 1.9 MRPC.

West Virginia, interpreting identical language, provided this further explanation of the term "substantially related": a current matter is deemed to be substantially related to an earlier matter in which the lawyer acted as counsel if: 1) the current matter involved

work the lawyer performed for the former client, or 2) there is substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client unless that information has become generally known. *State Ex rel Bluestone Coal v. Mazzone*, 697 SE2d 740 (W.Va. 2010); *also see State ex rel Keenan v. Hatcher*, 557 S.E.2d 361, 367 (W.Va. 2001 (Rule 1.9 is premised not only upon an attorney's duty and loyalty to a former client, but also upon the attorney-client privilege which precludes an attorney from using or disclosing information obtained from the former client in a way that would adversely affect the former client. In order to receive the best legal advice, a client must be assured that any disclosures a client makes to their attorney will be kept in the strictest of confidences. Anything less than the strictest safeguards will irreparably erode the attorney client relationship.); *and Restatement (3rd) of the Law Governing Lawyers, Sect*. 132 (2000). Only a client, after making a knowing decision to do so, may waive the conflict of interest presented by their former attorney working against them in the same or substantially related matter. Rule 1.9 MRPC. This waiver must be made in writing. Rule 1.9 MRPC.

In Montana, a county attorney "not only directs under what conditions a criminal action [is] commenced, but from the time it begins until it ends his supervision and control is complete, limited only by such restrictions as the law imposes." *State ex rel. Fletcher v. Dist. Ct. of Nineteenth Jud. Dist. of State of Mont. In & For Cty. of Lincoln*, 260 Mont. 410, 414–15, 859 P.2d 992, 995 (1993) (internal citation omitted). It is not only incumbent upon the county attorney to determine when to prosecute a case or not, but when the facts of a case support a possible charge of more than one crime, the crime to be charged is a matter of prosecutorial discretion. *See Fletcher*, 260 Mont. at 414–15 (*citing State v. Booke*, 178 Mont. 225, 230, 583 P.2d 405, 408(1978)).

In Illinois, it has long been held reversible error for an attorney to participate in the prosecution of a former client on charges involving a matter within the scope of the earlier representation. *People v. Gerold*, 265 Ill. 448, 107 N.E. 165 (1914). Moreover, such a conflict of interest has been regarded as a per se conflict, relieving the defendant of the burden of showing that he suffered actual prejudice as a result of the conflict. *See People v. Spreitzer*, 123 Ill.2d 1, 525 N.E.2d 30 (1988).

This "rigid" rule was designed to protect against an actual conflict of interest and the appearance of such a conflict: "It is unnecessary that the prosecuting attorney be guilty of an attempt to betray confidence; it is enough if it places him in a position which leaves him open to such charge. . . . The administration of the law should be free from all temptation and suspicion, so far as human agencies are capable of accomplishing that object." *Gerold*, 265 Ill. at 479, 107 N.E. at 177. In noting the ethical obligation and professional responsibility of an attorney to guard the confidences of his client, the Illinois Supreme Court had said "it is the possible divulgence or use of information given counsel in confidence that is the evil to be guarded against." *People v. Price*, 196 Ill.App.3d 321, 324, 553 N.E.2d 760, 762 (1990).

In *Courtney*, the defendant's former trial counsel became head of the Kankakee County State's Attorney's office, the office that was prosecuting the defendant. Courtney requested the appointment of a special prosecutor in his case due to the appearance of a conflict of interest. Courtney's trial ultimately proceeded without the appointment of a special prosecutor, and the defendant was convicted. *Courtney*, 288 Ill.App.3d at 1030–31. On appeal, the reviewing court

reversed with directions that the defendant receive a new trial with a special prosecutor. *Courtney*, 288 Ill.App.3d at 1034. The reviewing court explained that, where a conflict involves the head of the State's Attorney's office, a special prosecutor should be appointed because of the " 'overriding requirement that the public must be able to maintain the right to believe in the total integrity of the Bar as a whole.' " *Courtney*, 288 Ill.App.3d at 1033 (internal citation omitted). The reviewing court also explained that " '[j]ustice and the law must rest upon the complete confidence of the thinking public and to do so they must avoid even the appearance of impropriety.' " *Courtney*, 288 Ill.App.3d at 1033 (internal citation omitted).

The appointment of a special prosecutor may also be required if it is necessary to remove the appearance of impropriety in the prosecution of a defendant. Such appearance of impropriety permeates the present case.

The Illinois Supreme Court said:

> We believe that the appointment of a special prosecutor in such a situation may be necessary in order to maintain the public's confidence in the impartiality and integrity of our criminal judicial system. Even in the absence of demonstrated prejudice to the defendant, a special

> prosecutor may be appointed if necessary to remove an appearance that the defendant is being unfairly prosecuted.

See Courtney, 288 Ill.App.3d at 1033 (requiring appointment of special prosecutor even though no demonstration of actual prejudice to defendant was shown); *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 161 n. 3, 114 S.Ct. 1419, 1438 n. 3 (1994) (Scalia, J., dissenting) ("Wise observers have long understood that the appearance of justice is as important as its reality.").

Accordingly, courts have an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear to be fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 1698 (1988). Most importantly, not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by such unregulated prosecution under the authority of a county attorney that formerly represented the defendant as a client. *See generally*, *Wheat*, 486 U.S. at 160, 108 S.Ct. at 1698; *see also*, *In re Neuhardt*, ¶ 25.

Under Arizona law, a prosecutor has a legal "duty to avoid a conflict of interest ... because his paramount duty is to the principle of

'fairness.' " *Villalpando v. Reagan*, 211 Ariz. 305, 309, 121 P.3d 172, 176 (Ct. App. 2005). If the county attorney has a conflict of interest in a case, the entire office may "have to divorce itself from the prosecution in [that] case, because even the appearance of unfairness cannot be permitted." *State v. Latigue*, 108 Ariz. 521, 502 P.2d 1340, 1342 (1972). At that point, it is "necessary that the County Attorney secure the appointment of a special prosecutor if he wishes to continue the prosecution of [that] case." *Lacey v. Maricopa Cty.*, 693 F.3d 896, 933 (9th Cir. 2012).

A prosecutor's duty to avoid a conflict of interest is prime because his paramount duty is to the principle of "fairness." In other words, his interest is not so much to prevail as to ensure that "justice shall be done." *Pool v. Superior Court*, 139 Ariz. 98, 103, 677 P.2d 261, 266 (1984) (*quoting Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629 (1935)).

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625 (1955). But our system of law has always endeavored to prevent even the

probability of unfairness. *In re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. *In re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "Every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *In re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625)*citing Tumey v. State of Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444). Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954); *see In re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625.

Nonetheless, even if there is a concern about the appropriateness of the State's Attorney's office prosecuting a case against a particular defendant, that concern must be weighed against countervailing

considerations. *See People v. Shick*, 318 Ill.App.3d 899, 907, 744 N.E.2d 858 (2001). Such countervailing considerations include (1) the burden that would be placed on the prosecutor's office if the entire prosecutor's office had to be disqualified; (2) how remote the connection is between the State's Attorney's office and the alleged conflict of interest; and (3) to what extent the public is aware of the alleged conflict of interest. *See McCall v. Devine*, 334 Ill.App.3d 192, 202–03, 777 N.E.2d 405 (2002).

In *Shick*, an attorney filed a general appearance for the defendant shortly after the defendant was arrested. Three months later, that attorney began working for the State's Attorney's office, the office that was prosecuting the defendant. The defendant subsequently filed a petition for the appointment of a special prosecutor, based on the fact that his former attorney was now working for the State's Attorney's office. The trial court denied the defendant's petition, but ordered that the attorney at issue be disqualified from participating in the prosecution of the defendant. *Shick*, 318 Ill.App.3d at 905–06. The reviewing court affirmed the trial court's decision. The reviewing court determined that, based on the circumstances of the case, the defendant's former attorney's conflict of interest was not imputed to the

entire prosecutor's office. *Shick*, 318 Ill.App.3d at 908. The reviewing court explained that disqualification of the entire office was not required where the assistant prosecutor at issue had not participated in the prosecution of his former client, had no managerial role with respect to those who did, and had sworn that he had not disclosed and would not disclose any confidential information. *Shick*, 318 Ill.App.3d at 907.

Courts across the nation have recognized that a criminal defendant's right to a fair trial is jeopardized when an attorney who has represented him, and who has been in his confidence, terminates the representation to work for the prosecution. *See generally Annotation, Disqualification of Prosecuting Attorney on Account of Relationship with Accused*, 31 A.L.R.3d 953 (1970 & Supp.1992). In addition to the danger that the defendant will suffer prejudice from the disclosure of confidential information, courts have been concerned that this situation creates an appearance of impropriety damaging to the public's esteem of the legal profession and the criminal justice system. *See, e.g., People v. Shinkle*, 51 N.Y.2d 417, 415 N.E.2d 909 (1980).

Public confidence in the criminal justice system is maintained by assuring that it operates in a fair and impartial manner. This

confidence is eroded when a prosecutor has a conflict or personal interest in the criminal case which he is handling. *Villalpando*, 211 Ariz. at 309; *see State v. Hughes*, 193 Ariz. 72, 80, 969 P.2d 1184, 1192 (1998) ("The prosecutor has an obligation to seek justice, not merely a conviction, and must refrain from using improper methods to obtain a conviction."); *State v. Rodriguez*, 192 Ariz. 58, 64 ¶ 33, 961 P.2d 1006, 1012 (1998) (A prosecutor's responsibilities extend "beyond the duty to convict defendants. Pursuant to its role of 'minister of justice,' the prosecution has a duty to see that defendants receive a fair trial.") (*citing* Ariz. R. Sup.Ct. 42, E.R. 3.8, cmt.[1] ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.")).

A prosecutor's potential access to or use of confidential information obtained through his prior representation of the defendant could undermine the fairness of the prosecution. *See, e.g., State ex rel. Romley v. Superior Court (Pearson)*, 184 Ariz. 223, 908 P.2d 37 (App.1995); *Villalpando*, 211 Ariz. at 309.

It is undisputed that Eschenbacher was James's former attorney. James signed no waiver. The court below dodged the question of the existence of conflict of interest, by concluding there was no evidence the minister of justice Eschenbacher violated any rules of professional conduct. (*See* App. F.)

Clearly Eschenbacher had a conflict of interest having represented James previously. LCAO could only prosecute James under the authority vested in Eschenbacher as the elected county attorney—the minister of justice. It was Eschenbacher who led the charge against James in a substantially similar criminal investigation that presented materially adverse interests to James as a former client. There is no claim that James gave his informed consent. *See In re Neuhardt*, ¶ 30. Chief prosecutor Eschenbacher was inadequately screened from James's prosecution. Eschenbacher maintained both apparent and actual control over routine decisions in the SIWOC matter for which he was supposedly recused. During the prosecution, Eschenbacher still made certain strategic decisions including whether to play for the jury the 911 call. Eschenbacher even went to court to supervise his assistant attorney while he prosecuted James. Eschenbacher took more than an

active interest in the prosecution. At one point he approached defense counsel to ask whether James would accept a plea deal.

The county attorney is the public prosecutor and must institute proceedings against persons reasonably suspected of public offenses. *See* Mont. Code Ann. § 7-4-2712. The prosecutorial discretion of a county attorney extends beyond charging.

This Court has stated: "from the time it begins until it ends his supervision and control is complete, limited only by such restrictions as the law imposes." *Fletcher*, 260 Mont. at 414. Recusal of the entire LCAO was required because although Eschenbacher swore he had not participated in the prosecution of his former client and also swore he did not disclose any confidential information, he nevertheless maintained a supervisory managerial role with respect to those who did. *See Shick*, 318 Ill.App.3d at 907. LCAO prosecution of James only proceeded under Eschenbacher's express or apparent authority. Eschenbacher was supposedly screened off this prosecution, yet he still effectively exerted control over McQuillan as James was prosecuted ***twice*** for the same offense. Eschenbacher's prior representation of James undermined the fairness of James's second SIWOC prosecution.

Indeed, "justice must satisfy the appearance of justice." *Offutt*, 348 U.S. at 14. Prosecuting James under Eschenbacher's authority does not appear just. The Court must reverse and remand for a prosecution with a special prosecutor.

CONCLUSION

James respectfully requests this case be reversed and remanded for a new trial under either ground.

Respectfully submitted this 25th day of October, 2021.

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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 9,996, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Moses Okeyo
MOSES OKEYO

APPENDIX

CERTIFICATE OF SERVICE

I, Moses Ouma Okeyo, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-25-2021:

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