

IN THE SUPREME COURT OF THE STATE OF MONTANA  
CAUSE NO. DA 22-0522

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STATE OF MONTANA,  
Plaintiff and Appellee,  
and  
CODY JOSEPH VERNON FLESCH,  
Defendant and Appellant.

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**Appellant/Defendant's Opening Brief**

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On Appeal from the District Court of the Thirteenth Judicial District  
of the State of Montana, In and For Yellowstone County

Before the Honorable Ashley Harada  
Cause No. DC-21-0856

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## **STATEMENT OF THE ISSUES**

1. The district court erred by denying Defendant's Motion to Dismiss by finding, as a matter of law, that the Defendant was in official detention at the time Defendant attempted to leave the district court, when the Defendant had not been ordered into custody or taken into custody by any peace officer.

2. Judge Harada erred by not disqualifying herself or requesting the parties waive disqualification when she was a material witness to alleged crime, had personal knowledge of the facts in dispute, and inadvertently became part of the chain of custody for a key piece of evidence.

## **STATEMENT OF THE CASE**

On June 18, 2021, Defendant Cody Flesch ("Flesch") appeared before Judge Ashley Harada for an arraignment, in a separate matter. Flesch posted bond on the charge he was appearing for the night before and had been released from Yellowstone County Detention Center. Shortly after the hearing began, the State informed the district court that a detention order for Flesch had been issued in Powell County, Montana.

During the discussion related to the Powell County detention order and while Judge Harada had begun to set bond in the matter before her, Flesch sprang from his chair and attempted to depart the court. Deputies stopped and detained Flesch in an adjoining jury room. Whereupon, Flesch was returned to the courtroom and Judge

Harada completed the arraignment, set bond in the case before her and directed Flesch be remanded into the Yellowstone Sheriff's Office custody.

Later, Judge Harada requested a copy of the security video from the courtroom to review it and determine if changes needed to be made to court security procedures. Judge Harada did receive a DVD of the security video, but the original video was lost on the security server, leaving the only copy of the video in Judge Harada's possession.

As a result of his attempt to leave the courtroom, Flesch was charged with Attempted Escape, in violation of Montana Code Annotated §§ 45-7-306(2) and 45-4-103. Flesch filed a motion to dismiss, arguing that he was not in official detention and therefore could not be subject to an attempted escape charge, the district court denied Flesch's motion.

On January 31, 2022, Flesch was tried by jury before Judge Harada for the charge of Attempted Escape and found guilty. On July 6, 2022, Judge Harada sentenced Flesch to seven years imprisonment at Montana State Prison.

Flesch alleges that the district court erred by denying his motion to dismiss, and that Judge Harada should have disqualified herself or taken further steps to ensure consent of the parties before proceeding as the trial judge.

## **SUMMARY OF ARGUMENT**

Flesch was not subject to official detention because no peace officer had taken action to place him into detention or custody, so no charge or conviction for attempted escape can be maintained.

Judge Harada had personal knowledge of the facts at issue because she was a material witness to the charged crime and inadvertently became part of the chain of custody for key evidence in Flesch's trial. Montana Code of Judicial Conduct 2.12 requires a judge to disqualify themselves or seek consent of the parties when they have personal knowledge of disputed facts or are a material witness to issues before them. Further, when Judge Harada inadvertently became part of the chain of custody for key evidence in Flesch's trial, she should have taken steps to dispel the perception of undue influence on the admission of the evidence at issue.

Based upon these errors, this Court should reverse Flesch's conviction and return the matter to the lower court for any such further proceedings which are necessary.

## **STATEMENT OF FACTS**

On June 18, 2021, Flesch appeared in the Yellowstone District Court before Judge Harada for an arraignment hearing for a separate charge of bail jumping. Transcript of Arraignment Hearing, June 18, 2021, DC 21-856 ("Arraignment Tr."), 2:2-4. At the outset of the hearing, defense counsel informed the district court that

Flesch had bonded out of jail the day before on the bail jumping charge. *Id.* at 2:9-10. Following service of the charging documents for bail jumping, and Flesch being advised of the possible punishments and his rights as it related to the offence for which he appeared, the prosecutor informed the district court that she had “just recently received an email from the Powell County prosecutor” and that the email was titled “order for detention.” *Id.* at 7:15-17.

After much discussion regarding the Powell County Order, Judge Harada began to set bail in the bail jumping case, when Flesch sprang from his seat and attempted to leave the courtroom. *Id.* at 21:17-23:15. Flesch quickly surrendered to deputies in the adjoining jury room and Flesch was returned to the courtroom where Judge Harada finished setting bail, in the bail jumping case. *Id.* at 23:14-17.

On June 21, 2021, the State filed their Information against Flesch alleging one count of Attempted Escape (Felony), based upon Flesch’s attempt to flee Judge Harada’s courtroom. Doc. 3.00.

On September 21, 2021, Flesch filed his Motion to Dismiss arguing that he had not been placed in official detention at the time he attempted to depart the courtroom so no charge of Attempted Escape could be brought against him as a matter of law. Doc. 12. The State responded by arguing the district court had already indicated that it intended to or was going to remand Flesch into custody so therefore Flesch was subject to constructive restraint and in official detention. Doc. 21. The

district court agreed with the State and denied Flesch’s Motion to Dismiss. Doc. 31. No pretrial resolution was reached, and the matter was set for jury trial. See Doc. 23, Criminal Trial Status Form.

On February 1, 2023, following a two-day trial presided over by Judge Harada, Flesch was found guilty of Attempted Escape. See Doc. 43, Minute Entry.

On July 20, 2022, Flesch was sentenced by Judge Harada to a seven-year period of incarceration at the Montana State Prison. See Doc. 60. As part of the basis for the sentence, Judge Harada found Flesch was a danger to society and that he had created a dangerous situation by attempting to flee the courtroom, stating:

“You are a danger. I don't know how he else to put it. You came to court, you were supposed to see me on something trivial, some kind of status hearing, and the next thing I knew we had an incredibly dangerous situation unfolding.”

Transcript of Sentencing Hearing, July 20, 2022 (“Sentencing Tr.”), 17:9-13.

### **STANDARDS OF REVIEW**

The denial of a motion to dismiss in a criminal case presents a question of law which this Court reviews de novo. *State v. LeMay*, 2011 MT 323, ¶ 27, 363 Mont. 172, 266 P.3d 1278, citing *State v. Roundstone*, 2011 MT 227, ¶ 11, 362 Mont. 74, 261 P.3d 1009.

This Court reviews a judge's disqualification decision de novo, determining whether the lower court's decision not to recuse was correct under the Montana Code of Judicial Conduct. *In re Guardianship & Conservatorship of A.M.M.*, 2016

MT 213, ¶ 10, 384 Mont. 43, 380 P.3d 736, citing *State v. Dunsmore*, 2015 MT 108, ¶ 10, 378 Mont. 514, 347 P.3d 1220.

The Court should review de novo all issues in this appeal as they present questions of law.

### **ARGUMENT**

#### **I. THE DISTRICT COURT ERRED BY DENYING FLESCH'S MOTION TO DISMISS BY FINDING FLESCH WAS SUBJECT TO OFFICIAL DETENTION WHEN NO PEACE OFFICER OR OTHER LAW ENFORCEMENT AGENCY HAD PLACED HIM IN DETENTION.**

In response to Flesch's Motion to Dismiss the charge of escape because he was not in official detention, the State argued, and the district court agreed, that Flesch was subject to constructive restraint or custody pursuant to a court order. However, this is not correct because no person qualified as a peace officer had placed or attempted to place Flesch into custody in any way, meaning Flesch was not yet subjected to official detention.

The crime of Escape requires that a person be subject to official detention. Mont. Code Ann. § 45-7-306(2). In turn, "official detention" is defined as:

(a) "Official detention" means placement of a person in the legal custody of a municipality, a county, or the state as a result of:

- (i) a conviction for an offense or of having been charged with an offense;
- (ii) the actual or constructive restraint or custody of a person by a peace officer pursuant to arrest, transport, or court order;
- (iii) detention for extradition or deportation;

- (iv) placement in a community corrections facility or program;
- (v) supervision while under a supervised release program;
- (vi) participation in a county jail work program under 7-32-2225 through 7-32-2227;
- (vii) any lawful detention for the purpose of the protection of the welfare of the person detained or for the protection of society; or
- (viii) a condition of release pursuant to 46-14-304.

(b) Official detention does not include supervision of a person on probation or parole, constraint incidental to release on bail, or an unlawful arrest unless the person arrested employed physical force, a threat of physical force, or a weapon to escape.

Mont. Code Ann. § 45-7-306(1).

The district court and the State focused their analysis on § 45-7-306(1)(a)(ii) “the actual or constructive restraint or custody of a person by a peace officer pursuant to arrest, transport, or court order.” However, there is a critical statutory element that the State and district court did not consider, the actual or constructive restraint must be by “a peace officer,” courts do not have the authority to restrain or arrest, that is a power held by the executive branch not judicial. Courts have the authority to order someone to be arrested or restrained, but courts cannot complete the arrest or restraint themselves. Yet, that is the determination the district court made, that since the district court was about to order Flesch into custody that he should have understood that he was in custody.

In its Order Denying Motion to Dismiss, the district court reasoned “[T]here is no doubt from the record in the instant case that the Court made it abundantly clear to Mr. Flesch and other people in the room, including the law enforcement personnel,

that Mr. Flesch would be remanded, based upon the warrant out of Powell County. ... A reasonable person would have understood they were being remanded on a warrant out of Powell County.” Doc. 31, page 4, last paragraph. However, the district court acknowledged that law enforcement had not yet acted to enforce the pending order. See Doc. 31, page 5, second paragraph. In fact, prior to his attempt to depart the courtroom no peace officer had any interaction with Flesch. It is apparent that the district court was heading toward issuing an order to place Flesch into custody, but that order had not been issued and no peace officer had attempted to enforce that future order.

It appears that this Court has not addressed this specific issue head on but there are some cases that are instructive. In its Order Denying Motion to Dismiss (Doc. 31), the district court relied upon *State v. Martin*, 2001 MT 83, ¶ 41, 305 Mont. 123, 23 P.3d 216 to support its findings. In *Martin*, this Court upheld an escape conviction where the defendant, in the process of committing a crime, was approached by a uniformed officer who commanded the defendant to “halt” and “stop” but the defendant fled instead. at ¶ 41, 305 Mont. at 123, 23 P.3d at 216. This Court held that the officer had initiated an arrest at the time he commanded the defendant to “halt” and “stop.” *Id.* However, this Court was careful to point out that the decision was based upon the facts and circumstances of that case alone and did not stand for the proposition that "if an officer intends to arrest and restrain a person,

saying 'stop' constitutes an oral statement of arrest and restraint." *Ibid.* When read in its entirety, the Martin case does not support that the inference or suggestion of likely detention is enough to determine a defendant is in official detention. Yet, what the State argued and the district court agreed with is that Flesch should have understood the district was on the way to ordering him into custody so Flesch should have inferred that he was subject to official detention.

Additionally, in his dissent, Justice Leaphart was critical of the majority's opinion pointing out that while an oral statement can constitute an arrest without any physical restraint, the words "stop" or "halt" are simply not enough to do so, nor are they the equivalent of an officer telling someone they are under arrest. *Id.* at ¶ 72, 305 Mont. at 138, 23 P.3d at 226. Most importantly, and unlike the present case, the *Martin* case involved the actions of a peace officer, who had the authority to arrest, not a court who was on the way to issuing an order.

Moreover, at least one Montana district court has held that for the crime of escape to occur the defendant must be subject to restraint by a peace officer. *State v. Brown*, 2006 Mont. Dist. LEXIS 87 (Mont. 1<sup>st</sup> Judicial District, Lewis and Clark County, January 11, 2006). The *Brown* court reasoned "[T]he statutory definition requires the restraint or custody of the person to be by a peace officer. The phrase 'pursuant to arrest, transport, or court order' describes the means by which the peace officer has either restrained the person or has custody of the person." *Id.* In other

words, without the involvement of a peace officer there can be no escape and the statutory section “pursuant to arrest, transport, or court order” describes the peace officer’s source of authority to take that person into custody. The *Brown* court’s reasoning is sound and should be adopted by this Court.

If this Court were to accept the State’s position that an escape can be constituted anytime a court notifies a person that detention is imminent or expected, then anyone subject to a warrant who is not in custody would be guilty of escape. A warrant is a court order that informs a defendant that they are to be taken into custody at the first opportunity by any peace officer of the State, similar to the State’s argument in this case. Yet, absent other facts, it is unheard of for a person subject to a warrant to automatically be charged with escape if they do not immediately submit themselves for arrest. And to do so would vastly increase the number of people charged with escape, elevating every failure to appear to a felony escape charge.

The Court should reverse Flesch’s conviction for Attempted Escape because at the time of the acts giving rise to Flesch’s conviction, Flesch was not subject to either actual or constructive detention by a peace officer.

**II. JUDGE HARDA ERRED BY NOT RECUSING HERSELF OR SEEKING CONSENT OF THE PARTIES BECAUSE SHE HAD PERSONAL KNOWLEDGE OF DISPUTED FACTS AND WAS A MATERIAL WITNESS TO THE CASE AND INADVERTENTLY BECAME PART OF THE CHAIN OF CUSTODY FOR A KEY PIECE OF EVIDENCE**

The events giving rise to the charge of conviction in this case were witnessed by Judge Harada because they occurred in her courtroom during a proceeding she was presiding over. Additionally, the video from the courtroom was requested by Judge Harada and then later automatically deleted from the security server, leaving the only copy in Judge Harada's possession, and placing Judge Harada in the chain of custody.

This Court reviews lower court's decision not to recuse to determine if it was correct under the Montana Code of Judicial Conduct. *In re Guardianship & Conservatorship of A.M.M.*, at ¶ 10, 384 Mont. at 43, 380 P.3d at 736. In this case, Judge Harada's actions were not correct, the Montana Rules of Judicial Conduct, Rule 2.12, in relevant part, requires that:

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

...

(5) The judge:

....

(c) was a material witness concerning the matter;

Mont. Code of Jud. Conduct 2.12.

The plain language of Rule 2.12 requires disqualification when the judge has personal knowledge of disputed facts. Mont. Code of Jud. Conduct 2.12(A)(1), see

also *Bullman v. State*, 2014 MT 78, ¶ 16, 374 Mont. 323, 321 P.3d 121. “A ‘matter’ is defined as ‘[s]omething that is to be tried or proved; an allegation forming the basis of a claim or defense . . . .’ *Bullman*, at ¶ 15, quoting Black's Law Dictionary 999 (Bryan A. Garner ed., 8th ed., West 2007). A matter in controversy, therefore, includes any disputed factual allegation that is material to the resolution of a legal issue. *Bullman*, at ¶ 15.

A judge may overcome this incumbrance by disclosing in writing or on the record the basis for the potential disqualification, and may ask the parties to consider, outside the presence of the judge and court personnel, whether to waive disqualification. Mont. Code of Jud. Conduct 2.12(C). If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. *Ibid.* If the parties agree to forego disqualification, the agreement must be incorporated into the record of the proceeding. *Ibid.*

**A. Judge Harada Should Have Disqualified Herself Because She Had Personal Knowledge of Disputed Facts and was a Material Witness.**

Here, there is no doubt that Judge Harada had personal knowledge of the facts in dispute and was a material witness to the facts as issue when the case went before a jury. Judge Harada was presiding over a matter when the alleged attempted escape occurred in her courtroom, and it was that alleged attempted escape that was being tried by a jury presided over by Judge Harada. Additionally, there is no indication in

the record that Judge Harada consulted the parties regarding her potential disqualification, nor is any agreement to forego disqualification apparent in the record.

Moreover, when the disqualification is for possible bias or prejudice under Rule 2.12(A)(A), then the disqualification cannot be waived. See Rule 2.12(C). While there are no obvious signs in the record that Judge Harada displayed bias or prejudice during Flesch's jury trial, there are indications in the record that Judge Harada possibly held a bias against Flesch following the incident, such as her statements during sentencing:

“And fortunately my court reporter wasn't here that day because I think you would have taken her out on your way by. You were so intent on getting away that I barely saw you, it was so fast.

You are a danger. I don't know how he else to put it. You came to court, you were supposed to see me on something trivial, some kind of status hearing, and the next thing I knew we had an incredibly dangerous situation unfolding.”

Sentencing Tr. 17:5-13.

And Judge Harada's statements immediately following the incident:

“THE COURT: Frankly, I'm afraid to have you have a pen at this point.

THE DEFENDANT: I understand.

THE COURT: I'm afraid to take your hands out of the restraints.

THE DEFENDANT: I understand.”

Arraignment Tr. 27:4-9.

While these statements do not definitively show bias or prejudice, Judge Harada presided over the jury trial, while knowing the facts of what occurred because she was a material witness to the events, which alone gives rise to the perception of possible bias or prejudice. And importantly, Judge Harada took no steps to dispel or alleviate that perception.

Even assuming there was no bias or prejudice on behalf of Judge Harada, Flesch was not given the opportunity to consider possible disqualification, despite there being a very real concern that the presiding judge had witnessed and likely been disturbed by the events that occurred within her courtroom. This violation of the Montana Rules of Judicial Conduct alone is an error providing suitable grounds for this Court to overturn Flesch's conviction.

**B. Judge Harada Should Have Disqualified Herself as Part of the Chain of Custody for Key Evidence.**

Following the incident in her courtroom, Judge Harada requested a copy of the security video to determine if courtroom security needed to be adjusted. Day 1 Tr. 144:20-145:16. While this is a logical action by Judge Harada, the original video

“fell off” the security server by the time the State requested a copy because the server only saves video for a certain period of time. *Id.* at 146:12-14. Meaning the only copy of the video was in Judge Harada’s possession and absent Judge Harada’s request and retention of the video, it would have been unavailable to the State. *Id.* at 16-17.

This placed defense counsel in the difficult position of challenging a chain of custody that included the presiding judge. *Id.* at 22-25. Although defense counsel did concede to the admission of the video in the end, Rules 2.12(A)(5)(c) & (C) required Judge Harada to take some additional steps to ensure that the perception of possible undue influence be dispelled.

Judge Harada did not intentionally place herself in a position to act as a witness, but she acknowledged that was where she found herself, stating “[W]ell, if there’s any issue about that, you can certainly question me again.” Day 1 Tr. 147:9-11. Here again, Judge Harada had personal knowledge and involvement in the facts and evidence of those facts that were at issue before her, and again did not invite the parties to consider her possible disqualification.

While it is all but certain that Judge Harada did not mean to insert herself into the chain of custody, she ended up there and as such became a foundational witness to a key piece of the State’s evidence that would have otherwise been unavailable to the State at Flesch’s jury trial.

This Court should find that Judge Harada did not act in accordance with the Montana Rules of Judicial Conduct and should overturn Flesch's conviction.

**CONCLUSION**

Flesch's conviction should be overturned because Flesch was not in official detention at the time of the incident and should overturn Flesch's conviction based upon Judge Harada's failure to recuse herself despite having personal knowledge of disputed facts, being a material witness to the facts at issue, and becoming part of the chain of custody for key evidence.

DATED this 16th day of October 2023.

PEACE LAW GROUP, LLC

*/s/Rufus I. Peace*  
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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes, quoted, and indented material; and that the word count calculated by Microsoft Word Professional Edition is 3,780 words, excluding the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

DATED this 16th day of October 2023.

PEACE LAW GROUP, LLC

*/s/Rufus I. Peace*  
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**APPENDIX**

Judgment Appealed From, issued July 6, 2022 in Montana Thirteenth Judicial District Court, DC 21-0856, Doc. 60 .....Appendix A

Transcript of Arraignment Hearing, June 18, 2021, DC 21-0856 ..... Appendix B

Order Denying Motion to Dismiss, January 26, 2022, DC 21-0856, Doc. 31 .....Appendix C

## CERTIFICATE OF SERVICE

I, Rufus I. Peace, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-16-2023:

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