IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC 94295**
	)	
ANDREW L. LEMASTERS,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF NEWTON COUNTY, MISSOURI
40TH JUDICIAL CIRCUIT
THE HONORABLE TIMOTHY W. PERIGO, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

William J. Swift, MoBar #37769
Assistant Public Defender
Attorney for Appellant
Woodrail Centre
1000 W. Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 777-9977
FAX: (573) 777-9974
william.swift@mspd.mo.gov

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JURISDICTIONAL STATEMENT

Andrew Lemasters appeals his conviction following a jury trial in the Circuit Court of Newton County, Missouri, for first degree statutory sodomy, §566.062. The Honorable TimothyW. Perigo sentenced Mr. Lemasters to thirty-one years imprisonment. After the Missouri Court of Appeals, Southern District, issued its opinion in SD 32883, this Court granted Andrew's application for transfer pursuant to Rule 83.04. This Court has jurisdiction of this appeal under Article V, Section 10, Mo. Const.

STATEMENT OF FACTS

Charges And Pretrial Matters

Andrew Lemasters was charged by complaint, and later information, with the following: (1) Count I, statutory sodomy, §566.062 of H.L. alleged to have occurred in Newton County between April 1, 2001, and November 30, 2002, by having deviate sexual intercourse with H.L. when she was less than twelve years old; and (2) Count II alleged the same acts as Count I (L.F.11,14).[1]

A bill of particulars alleged the following: (1) Count I alleged that Andrew attempted to penetrate H.L. with his penis in a bedroom at the family home in Granby, Missouri, Newton County; and (2) Count II alleged that Andrew penetrated H.L. by placing his fingers inside her in a bedroom at the family home in Granby, Missouri, Newton County (L.F.29-30).

On May 31, 2013, before trial began, counsel filed a notice of waiver of the right to jury sentencing (L.F.31).

Before closing arguments, respondent dismissed one of the two counts (Tr.421-22,429,441;L.F.44,47).

Assignment of Counsel In Trial Court

Assistant Public Defender Maleia Cheney entered her appearance on August 16, 2012 (L.F.2). Assistant Public Defender Kellie Duckering entered her

[1] The record on appeal is composed of the following: (1) Legal File (L.F.); (2) Trial transcript (Tr.); and (3) Supplemental Legal File (Supp.L.F.).

appearance on September 18, 2012 (L.F.4). A preliminary hearing was conducted on September 18, 2012 (L.F.2). On October 4, 2012, Duckering filed a motion for continuance (Supp.L.F.1-2).

On October 10, 2012, private counsel, and special contract Public Defender, William Fleischaker entered his appearance (L.F.5;Supp.L.F.5). Fleischaker was retained by the Public Defender to represent Andrew because of a Public Defender conflict (Tr.27,29;Supp.L.F.3-4). A motion to withdraw because of a Public Defender conflict, file stamped October 10, 2012, but shown as filed in the docket sheets on October 11, 2012, was filed by Assistant Public Defender Duckering (L.F.5; Supp.L.F.3-4).

Motion To Disqualify Newton County Prosecutor's Office - Pleadings And Hearing

On February 7, 2013, Fleischaker filed a motion and supporting suggestions to disqualify the Newton County Prosecutor's Office (L.F.6,15-25). In support of disqualifying the Newton County Prosecutor's Office, the pleadings highlighted that Cheney had, during September or October, 2012, left her employment with the Public Defender and went to work for the Newton County Prosecutor's Office (L.F.15-16). The pleadings urged that because Cheney had personally and substantially defended Andrew that both she and the Newton County Prosecutor's Office should be disqualified (L.F.15-25). The pleadings urged that an appearance of impropriety

existed for the Newton County Prosecutor's Office to continue to represent respondent (L.F.15-25).

The pleadings included that charges were initially filed on June 27, 2012, and at Andrew's first court appearance on July 16, 2012, he was given an application for Public Defender services (L.F.20). A letter dated August 8, 2012, was sent to Andrew at the Newton County Jail that contained Cheney's name (L.F.20).

The pleadings continued that on August 16, 2012, Cheney filed an entry of appearance (Tr.20). On August 17, 2012, Cheney sent a memo to Teresa Henry requesting that she contact Andrew's mother, while indicating Cheney intended to meet with Andrew that day (L.F.20). The memo contained directions to Henry relating to responding to questions Andrew's family had posed (L.F.20).

The pleadings set forth that on August 17, 2012, Cheney had received an e-mail from Assistant Prosecuting Attorney Kathleen Miller indicating that Miller intended to have witnesses present at a bond reduction hearing (L.F.20). On August 20, 2012, Cheney sent a memo to Investigator Patrick Knapp requesting that Knapp do a recorded interview of Andrew because during Cheney's conversation with Andrew she could not keep track of what Andrew was talking about (L.F.20). Those directions to Knapp reflected that Cheney had spoken with Andrew at the jail (L.F.20).

The pleadings continued that on August 22, 2012, Cheney sent a memo to Henry asking Henry to contact Andrew's mother to inform her that the court had

declined to reduce his bond (L.F.20-21). The memo reflected that Cheney had requested a bond reduction (L.F.20-21).

An authorization for the release of Andrew's medical records was obtained (L.F.21).

The file contained handwritten notes from an interview with Andrew which contained "information significant to Defendant's defense." (L.F.21). The file was unclear whether the notes were Cheney's notes or notes taken by someone else at Cheney's direction (L.F.21).

The file contained correspondence dated August 27, 2012, from Andrew and addressed to Cheney (L.F.21). The file contained a September 7, 2012 transfer memo with Cheney's initials indicating that a preliminary hearing was set for September 18th (L.F.21).

The pleadings urged that the Newton County Prosecutor's Office was required to be disqualified because Cheney had participated directly in Andrew's representation by interviewing him and by directing and supervising others in Andrew's representation (L.F.22-23).

On August 8, 2012, Cheney sent Andrew a letter providing legal advice about his case (Ex.A at 1). That letter advised Andrew "not to discuss your case with anyone" except counsel, even if he had already made statements (Ex.A at 1) (underline in original). The letter continued: "If anyone attempts to question you, you should advise them politely but firmly that you have an attorney and do not wish

to answer questions." (Ex.A at 1). Cheney's letter advised Andrew that he was entitled to a jury trial and may be entitled to a judge trial (Ex.A at 1). Cheney advised Andrew that he may be entitled to a change of judge or change of venue, but there were time limits and he needed to discuss any such wishes promptly (Ex.A at 1). The letter continued that "[a]ny information that you need to give to your primary attorney will be taken down and provided to that attorney." (Ex.A at 1).

On August 16, 2012, Cheney filed an entry of appearance (Ex.A at 2).

On August 17, 2012, Cheney assigned legal assistant Teresa Henry to make calls to Andrew's family (Tr.9;Ex.A at 3). The details of that request, as set forth by Cheney, were as follows:

> Please call Billie Lemasters (mom) 816 503-8021 and William Burge 417 455-6037 and notify them both I cannot speak with them about his case without his permission **and that I will see him at the jail today**. Also, tell them I cannot take him a Power of Attorney to sign for them because 1) that is civil and not criminal in nature and we cannot do it; and 2) it may or may not be in his best interests to do so and I will not advise him to sign it, as it is civil in nature (see #1). **Can you tell I'm about pissed at this stupid family already?** They will have to hire a private atty for the POA of [sic] they want it done. PS. They can't continue to collect his social security since he is in jail anyway. PPS. **They can bite me. (Please use your discretion as to the portions of this to relay!) ;)**

Thanks,
Maleia

(Ex.A at 3) (parentheticals and smiley symbol in original) (bold and underline emphasis added).

Cheney received an August 17, 2012, e-mail from Assistant Prosecutor Kathleen Miller inquiring about whether Cheney was still wanting a bond hearing (Ex.A at 9;Tr.13). Miller's e-mail included that Miller had "met with the Vic and her Mom and they will be here for the 9 am hearing." (Ex.A at 9;Tr.13-14).

Cheney indicated that she believed that she did an initial interview of Andrew on August 19th or 20th, 2012 (Tr.21-22). The initial interview would have included gathering medical history information (Tr.22). On August 20, 2012, Cheney assigned Investigator Patrick Knapp to obtain a recorded interview from Andrew for the purposes of sorting through "what might be relevant" (Ex.A at 4). In that assignment, Cheney stated that she had difficulty following Andrew's conversation because he used too many pronouns when Cheney met with Andrew (Tr.10-11;Ex.A at 4).

The docket sheets from August 21, 2012, reflect a pretrial conference was held and that bond remained the same (L.F.2). That same day a preliminary hearing was scheduled for September 18, 2012 (L.F.2). The docket sheets do not specify that Cheney was present on August 21st, but in light of her entry of appearance on August 16, 2012, the record suggests that she was (L.F.2;Ex.A at 2).

On August 22, 2012, Cheney directed Henry to call Andrew's mother to inform her that the court would not reduce bond, but they would get supporting

medical records to document his medical condition to try to reduce bond in the future (Tr.10-11;Ex.A at 5).

On August 23, 2012, Andrew signed a release of information for his personal records (Ex.A at 6).

Cheney received on August 27, 2012, a letter dated August 21, 2012, from Andrew's mother (Tr.14; Ex.A at 10). That letter supplied information regarding Andrew's medical history relating to his heart condition (Ex.A at 10). In particular, the letter reported that at a Texas children's hospital Andrew had two heart surgeries and his mother considered it "a miracle" Andrew had lived as long as he has (Ex.A at 10). The letter recounted how Andrew's childhood heart surgeon was able to redirect blood flow with his valves working backward to keep his heart functioning (Ex.A at 10). The letter also related that Andrew's mobility had been limited to him getting around in a wheelchair for some time (Ex.A at 10). At some point, Cheney read that letter (Tr.14-15).

On Cheney's last day of Public Defender employment, September 7, 2012, she did a transfer memo because the case was being reassigned to another attorney (Tr.15; Ex.A at 11). That memo included the following: "Teresa and Patrick are already working on this one. **Holy crap, good luck is all I can say**." (Ex.A at 11). (emphasis added).[2]

[2] Exhibit A does not contain pages 7-8. Cheney testified that those handwritten pages were not in her handwriting (Tr.12). When Exhibit A was offered, counsel

Cheney indicated that motions for her to withdraw from her Public Defender cases were not filed because other members of the office entered (Tr.15).

Cheney began working for the Newton County Prosecutor's Office on September 10, 2012 (Tr.16). Cheney testified that a "Chinese Wall" was created to exclude her from Public Defender cases (Tr.17-18). Cheney's prosecution cases had been limited to those where the defendants had private counsel or were acting *pro se* (Tr.18). Cheney testified that she had not participated in conversations within the prosecutor's office relating to the direction of any of her former Public Defender cases (Tr.18-19,21). Cheney testified that there were separate dockets for Public Defender cases and she had not been part of those dockets except for one occasion where she covered a nonsupport docket (Tr.18,20-21).

Cheney testified that her personal contact with Andrew was limited to one initial twenty minute interview and occasions when Andrew was in-court for scheduling court appearances (Tr.22-23). During the one interview, a theory of defense was not developed (Tr.22-24). Cheney opined that the "Chinese Wall" had been very effective in excluding her from her former clients' cases (Tr.25).

The trial court denied the motion to disqualify the Newton County Prosecutor's Office (Tr.31).

Fleischaker listed the pages included and pages 7-8 were not listed (Tr.15-16). Exhibit A was also identified as Exhibit 1 (Tr.5,15-16), this brief references the document throughout as Exhibit A.

At sentencing, the court and the assistant prosecutor, who represented respondent at trial, made a record that Cheney had no access to any files (Tr.469).

Respondent's Trial Evidence

Newton County Sheriff's officer Barnett was informed that Pam and H.L. were wanting to provide police statements (Tr.203-04). Barnett obtained statements from them on May 22, 2012 (Tr.206).

H.L. reported that her father, Andrew, had sexually molested her when she was 8-9 years old in the late Spring of 2001, at B Highway in Granby located in Newton County (Tr.204-05). In her statement, H.L. reported that Andrew had put his finger in her (Tr.207). H.L. reported that when they had lived in Mississippi and Texas similar events had occurred (Tr.204-05). H.L. reported that the abuse had continued until she was an adult (Tr.204-05).

Andrew was in Freeport, Texas when Pam and H.L. made their police statements and Barnett asked the Freeport police to locate Andrew to get a statement from him (Tr.205-06). The Freeport police did not obtain a statement from Andrew, so Barnett arranged for him to be arrested and returned to Newton County (Tr.205-06).

Pam Lemasters is Andrew's ex-wife (Tr.212-13). Pam and Andrew were married for nineteen years and had two children together, David and Aaron (Tr.213). Pam left Andrew in June, 2011, and H.L. had moved out the month before (Tr.245-47). In October, 2011, H.L. moved back in with Pam and was living with her at the

time of trial (Tr.248). H.L. is Andrew's daughter from another relationship (Tr.213-14). Pam has been involved in raising H.L. since she was three months old and raised her like she was her own (Tr.213,224).

Pam, H.L., and Andrew were living in Granby when H.L. was about nine years old (Tr.214-15). At various points in time, the family also lived in Mississippi and Texas (Tr.215-18). At the time of trial, H.L. was twenty years old (Tr.215).

On direct of Pam, respondent elicited that, for as long as Pam has known Andrew, he has been disabled because of congenital heart problems (Tr.220,222). Andrew has a pacemaker and a defibrillator (Tr.251). Andrew used a cane and a mobility chair (Tr.223). Pam testified that despite those problems she believed that Andrew was capable of working (Tr.222). Pam became disabled in 2008, because of mental health problems associated with a brain tumor (Tr.220-22,243-45).

Pam reported that Andrew physically abused H.L. hitting her with objects (Tr.228-29). Pam reported that Andrew made H.L. walk on a treadmill naked because he said H.L. needed to lose weight (Tr.241-42). Pam reported that Andrew also emotionally abused H.L. (Tr.230). Pam reported that Andrew abused their sons (Tr.239-40). Pam testified that she did not intervene or report to the authorities Andrew's behaviors because Andrew threatened her with physical harm and she feared doing so would make things worse for her and the children (Tr.229,231-32,242-43,260).

Pam reported that Andrew forced her to have sex with him in front of H.L. so that H.L. would know how to have sex (Tr.239).

H.L. testified that she was living in Granby in 2001 (Tr.281). H.L. reported that there was an incident when she was eight years old where Andrew allegedly had her get in bed with him while he was naked and had her rub lotion on his penis (Tr.283-86). H.L. reported an incident a few months later when she was nine years old where Andrew had her take her clothes off and he put his finger inside her vagina and then tried unsuccessfully to penetrate her vaginally with his penis (Tr.286-90).

H.L. reported that Andrew made her watch him and Pam have sex so that she would know how to have sex (Tr.291-92).

H.L. reported that Andrew engaged in other acts of sexual misconduct with her when they lived in Mississippi and Texas (Tr.293-97,301-02). H.L. also reported that Andrew made her run on a treadmill to lose weight and made her do that while she was naked (Tr.298).

H.L. also reported acts of physical abuse of her and Pam by Andrew (Tr.303-08,311-12). H.L. reported that when Pam tried to stop the abuse that things became worse for Pam (Tr.308). H.L. reported that everyone in their household was a target of Andrew's abuse (Tr.308).

Defense Case Evidence

In the defense opening statement, counsel highlighted in detail Andrew's congenital heart defect history and surgeries commencing at six weeks old (Tr.194-

95). That opening statement took the jury through Andrew being placed on Social Security Disability as an adult because of his heart condition (Tr.194-95).

Defense counsel initiated his questioning of Andrew focusing on his medical history, and in particular, his heart defect (Tr.355-59). Andrew recounted his history of heart problems surrounding his congenital heart defect leading up to his Social Security Disability (Tr.355-59). Andrew testified about having had to have multiple surgeries associated with defects in the various chambers of his heart (Tr.355-56). The first surgery occurred when Andrew was six weeks old (Tr.356). Andrew's heart defects limited him as a child so that he was unable to participate in physical education classes (Tr.357). As an adult, Andrew's heart problems over time caused him to become incapable of working (Tr.357-59).

H.L. is Andrew's daughter and Andrew was never married to H.L.'s mother (Tr.359). Andrew had custody of H.L. (Tr.359). H.L. was two months old when Andrew married Pam (Tr.359-60).

Andrew never had digital contact with H.L.'s vagina (Tr.362). Andrew never had H.L. touch his penis and he never touched H.L. inappropriately (Tr.364,413). Andrew did not have H.L. watch him and Pam have sex (Tr.373). Andrew recounted that the present accusations were a product of his and Pam's acrimonious divorce and he did not commit the acts alleged (Tr.394-96,400-02).

Andrew testified that he did not physically abuse Pam or H.L. (Tr.362-64,373-74,413). Andrew reported that he was the victim of Pam's violent behavior, which

included her having assaulted him with a knife (Tr.374,376). Andrew denied that he caused Pam to have two scars caused by him stabbing and shooting her (Tr.375-76).

On cross-examination, the prosecutor asked Andrew what his heart condition had to do with what he was accused of doing to his daughter (Tr.367-68). The prosecutor asked whether his heart condition had impacted his ability to have sexual intercourse and other acts of a sexual nature (Tr.370-71,383). The discussions about Andrew's ability to have sexual intercourse because of his heart condition included him testifying that he had related times of shortness of breath which had limited his ability to engage in sex (Tr.372). Andrew denied having committed alleged acts of physical abuse because his heart problems made him physically incapable (Tr.374-75). Andrew testified that because of his heart problems he had been the victim of physical abuse by Pam (Tr.374-81).

Respondent's Rebuttal

Pam testified in rebuttal that she has scars caused by Andrew having shot and stabbed her (Tr.415-17).

Closing Arguments, Verdict, And Sentencing

In closing argument, respondent urged the jury to consider that they had the opportunity to hear the testimony of Pam, H.L., and Andrew and to gauge all of their credibility (Tr.440-41).

The jury found Andrew guilty of the one count of statutory sodomy that was submitted to the jury (Tr.445;L.F.44,47,51-52).

Even though only one count of statutory sodomy was submitted to the jury, the judgment and sentence reflects that Andrew was convicted and sentenced to thirty-one years on each of two counts (L.F.51-52;Tr.471).

This appeal followed.

POINTS RELIED ON

I.

NEWTON COUNTY PROSECUTOR'S OFFICE

APPEARANCE OF IMPROPRIETY

The trial court abused its discretion in denying the motion to disqualify the Newton County Prosecutor's Office, because that ruling denied Andrew his rights to due process and a fair trial, U.S. Const. Amends. VI and XIV and Mo. Const. Art. I §§10 and 18(a), in that the trial court failed to properly apply the "appearance of impropriety" standard to disqualify the Newton County prosecutor's office when Andrew's attorney Cheney became a Newton County Assistant Prosecutor after having provided legal advice to Andrew about his case, making offensive disparaging comments about his family and his case memorialized in memoranda, directing staff to record an interview of Andrew after speaking with him, and receiving confidential medical background history about Andrew from his mother when that medical history was made prominent at trial by both parties.

State v. Ross, 829 S.W.2d 948 (Mo. banc 1992);

Anderson v. State, 402 S.W.3d 86 (Mo. banc 2013);

State ex rel. Horn v. Ray, 138 S.W.3d 729 (Mo. App., E.D.2002);

State v. Reinschmidt, 984 S.W.2d 189 (Mo. App., S.D. 1998);

U.S. Const. Amends. VI and XIV;

Mo. Const. Art. I §§10 and 18(a);

§56.110;

§27.030;

Rule 4-1.11;

Flowers, *What You See Is What You Get: Applying The Appearance Of Impropriety Standard To Prosecutors*, 63 Mo. L.Rev. 699 (1998).

II.

INCORRECT JUDGMENT

The trial court erred in entering and signing a judgment showing that Andrew was convicted of two counts of statutory sodomy in the first degree, because this violated his rights to due process of law and to a finding of guilt as to all counts by a jury, U.S. Const. Amends VI and XIV and Mo. Const. Art. I, §§10 and 18(a), in that although Andrew was initially charged with two counts, respondent dismissed one count prior to jury deliberations, and thus, the jury found Andrew guilty of only one count.

State v. Cain, 980 S.W.2d 145 (Mo.App., E.D. 1998);

Miller v. State, 974 S.W.2d 659 (Mo.App., S.D. 1998);

U.S. Const. Amends VI and XIV;

Mo. Const. Art. I, §§ 10 and 18(a);

Rule 29.12.

ARGUMENT

I.

NEWTON COUNTY PROSECUTOR'S OFFICE

APPEARANCE OF IMPROPRIETY

The trial court abused its discretion in denying the motion to disqualify the Newton County Prosecutor's Office, because that ruling denied Andrew his rights to due process and a fair trial, U.S. Const. Amends. VI and XIV and Mo. Const. Art. I §§10 and 18(a), in that the trial court failed to properly apply the "appearance of impropriety" standard to disqualify the Newton County prosecutor's office when Andrew's attorney Cheney became a Newton County Assistant Prosecutor after having provided legal advice to Andrew about his case, making offensive disparaging comments about his family and his case memorialized in memoranda, directing staff to record an interview of Andrew after speaking with him, and receiving confidential medical background history about Andrew from his mother when that medical history was made prominent at trial by both parties.

The trial court failed to properly apply the "appearance of impropriety" standard to disqualify the Newton County Prosecutor's Office when Andrew's attorney became an Assistant Newton County Prosecutor.

Standard of Review

The decision whether to disqualify a prosecuting attorney is committed to the trial court's discretion. *State v. Copeland*, 928 S.W.2d 828 (Mo. banc 1996) (overruled on grounds not relevant here as stated in *Joy v. Morrison*, 254 S.W.3d 885, 888-89 (Mo. banc 2008)).

Preservation

Counsel Fleischaker moved to disqualify the Newton County Prosecutor's Office because of Cheney having represented Andrew and her having become a Newton County Assistant Prosecutor (L.F.15-25). The motion for new trial renewed this matter (L.F.48-50). Thus, this claim was preserved.

This Court's Appearance of Impropriety Standard

In *State v. Ross*, 829 S.W.2d 948, 949 (Mo. banc 1992), part-time Clay County Assistant Prosecutor Klopfenstein filed a complaint against Ross charging him with assault. Klopfenstein was also associated with the law firm of Von Erdmannsdorff and Zimmerman. *Id.* at 949. A civil action for damages arising out of the assault was commenced against Ross who was represented by Stephen Mowry of the Von Erdmannsdorff and Zimmerman firm. *Id* at 949. Mowry obtained a confidential statement from Ross, took depositions, and talked with Ross on the phone. *Id.* at 949. Ross also met with other members of the Von Erdmannsdorff and Zimmerman firm, but never with Klopfenstein. *Id.* at 949. Ross considered Mowry to be his attorney representing him on the civil action. *Id.* at 949. Mowry also was a part-time Clay County Assistant Prosecutor. *Id.* at 949. Ross was never informed by the Von

Erdmannsdorff and Zimmerman firm that Klopfenstein and Mowry were also Clay County prosecutors. *Id.* at 949. At trial, the state was represented by Assistant Prosecutor Newberry. *Id.* at 949.

This Court in *Ross* noted that there was no evidence that anything relating to Ross' case was shared between the members of the law firm and members of the prosecuting attorney's office. *Ross*, 829 S.W.2d at 949. Klopfenstein did no work on the civil case and his only involvement in the criminal case was filing the complaint. *Id.* at 949-50. Mowry had no involvement with the criminal case. *Id.* at 949-50.

In finding the Clay County prosecutor's office should have been disqualified, this Court observed: "that the conduct of the prosecution in a criminal case involving conflicts of interest "like Caesar's wife, 'ought to be above suspicion.'" *Ross*, 829 S.W.2d at 951 (quoting *State v. Burns*, 322 S.W.2d 736, 742 (Mo. 1959)). It was for that reason this Court recognized that in evaluating when a prosecutor's office should be disqualified from a case that the standard to be applied is "the appearance of impropriety." *Ross*, 829 S.W.2d at 951. This Court went on to note that the interconnections between the prosecutor's office and the law firm representing Ross on the civil action created the appearance of impropriety that required the Clay County Prosecutor's Office have been disqualified. *Id.* at 951. This Court indicated in *Ross* that it does not require a showing of actual prejudice to a defendant. *Id.* at 952.

The *Ross* dissent argued that the Clay County prosecutor's office was not required to be disqualified because "The Rules of Professional Conduct disqualify lawyers, not law offices." *Ross*, 829 S.W.2d at 954 (Holstein, J. dissenting). The *Ross* dissent also argued against the "appearance of impropriety" standard because that was a former standard and should not apply under the newer Rules of Professional Responsibility adopted in 1986. *Id.* at 955 (Holstein, J. dissenting).

The Southern District in *State v. Reinschmidt*, 984 S.W.2d 189 (Mo. App., S.D. 1998), applied *Ross* to find an entire prosecutor's office was required to be disqualified. In *Reinschmidt*, the defendant was represented by Assistant Public Defender Bock on Greene County charges and she then joined the Greene County Prosecutor's Office. *Id.* at 190-91. The Southern District applied *Ross'* appearance of impropriety standard to find the Greene County Prosecutor's office was required to be disqualified. *Id.* at 192. The *Reinschmidt* Court's analysis included:

> "We are constitutionally bound to following the controlling decisions of the Missouri Supreme Court." *State v. Tuter*, 920 S.W.2d 111, 112 (Mo.App.1996); Mo. Const. art V, § 2 (1945). *Ross* is the controlling decision on this conflict issue, and we are therefore bound to follow it. Indeed, the potential conflict presented by Appellant's criminal defense attorney becoming affiliated with the prosecuting attorney's office creates the same suspicions and appearance of impropriety as mentioned in *Ross*.

Reinschmidt, 984 S.W.2d at 192. The *Reinschmidt* Court noted that Bock had the "opportunity to gain confidential information about his case which had the potential to aid the prosecution." *Id.* at 192. The Southern District rejected the notion that the Greene County Prosecutor's Office did not need to be disqualified because Bock submitted a sworn affidavit that she did not disclose any confidential information. *Id.* at 192.

There are strong policy reasons for why this Court should adhere to *Ross* and apply its "appearance of impropriety" inquiry. In the Court of Appeals, respondent argued that other jurisdictions had adopted *Ross*' dissent's position and the Court of Appeals should do the same and the "appearance of impropriety" should not be the governing standard. *See* Resp. Ct. App. Br. at 15-19, 21-23.

In *Offutt v. U.S.*, 348 U.S. 11, 14 (1954), the Court noted that "justice must satisfy the appearance of justice." A prosecutor does not represent an ordinary party to a controversy, but instead represents the sovereign. *Berger v. U.S.*, 295 U.S. 78, 88 (1935); *State v. Long*, 684 S.W.2d 361, 365 (Mo.App., E.D. banc 1985). As such a prosecutor's duty is not to win a case, but that justice shall be done. *Berger*, 295 U.S. at 88; *Long*, 684 S.W.2d at 365.

A trial judge is required to disqualify himself/herself not only for actual prejudice against a party, but also "when 'a reasonable person would have factual grounds to find an appearance of impropriety and doubt the impartiality of the court.'" *Anderson v. State*, 402 S.W.3d 86, 91 (Mo. banc 2013) (quoting *State v. Smulls*, 935

S.W.2d 9, 17 (Mo. banc 1996)). "Whether a fact requires recusal depends on the factual context, which gives meaning to the kind of bias that requires disqualification of a judge." *Id.* at 91. In evaluating facts in support of disqualification of a judge, this Court considers the entire record. *Id.* at 92.

In *Anderson*, this Court found that a reasonable person would have factual grounds to find an appearance of impropriety that required the trial judge to have disqualified himself. *Anderson v. State*, 402 S.W.3d at 94. A reasonable person would have factual grounds to believe the court had relied on conversations it had with the prior trial's jury's foreperson about the reasons for its verdict, even though the court expressly stated it did not consider that information in its decision. *Id.* at 94.

In *State ex rel. Wesolich v. Goeke*, 794 S.W.2d 692, 698-99 (Mo.App., E.D. 1990) the court found that there was an appearance of impropriety in the trial judge continuing to serve on the case and that judge was required to be disqualified. The *Wesolich* Court, commenting on the application of the appearance of impropriety standard, observed the following:

> **It is vital to public confidence in the legal system that decisions of the court are not only fair, but also appear fair.** Thus, whether the disqualification of a judge hinges on a statute or on a rule, we adhere to the liberal construction of that statute or rule in favor of the right to disqualify. A liberal construction is necessary if we wish to promote and maintain public confidence in the judicial system.

Wesolich, 794 S.W.2d at 695 (emphasis added).

In *State ex rel. McCulloch v. Drumm*, 984 S.W.2d 555, 556-58 (Mo.App., E.D. 1999), Judge Drumm made statements at sentencing that if he had been the finder of fact, rather than the jury, then we would not have convicted the defendant and found her not guilty by reason of mental disease or defect. After the defendant's conviction was reversed on appeal, the case was returned to Judge Drumm for retrial and Drumm granted the defendant's request for a bench trial. *Id*. at 557. The state then moved to disqualify Drumm from the bench trial because of his sentencing statements. *Id*. at 556-58. At the hearing on the motion to disqualify Drumm "testified that even though he had formed opinions on the case at that time [prior trial], he would not let his former opinions on the issue of mental disease or defect affect his judgment in the upcoming jury-waived trial." *Id*. at 557 (bracketed material added). The Court of Appeals noted that it had "no doubt" Drumm could fairly serve, but the standard for disqualification was whether a reasonable person would have factual grounds to doubt Drumm's impartiality, and therefore, he was required to be disqualified. *Id*. at 557-58.

The policy considerations that warrant application of the "appearance of impropriety" standard to judge disqualification should apply to prosecutors because "[j]ust as the judge's actions can affect perception of the system, the prosecutor's actions, as the representative of the government, influence the public's acceptance of the system as fair." Flowers, *What You See Is What You Get: Applying The*

Appearance Of Impropriety Standard To Prosecutors, 63 Mo. L.Rev. 699, 703 (1998). The underlying rationale for utilizing the appearance of impropriety standard in varying contexts in criminal cases is to both maintain the integrity and the perception of integrity in our court systems. *See Dillard v. State*, 3 A.3d 403, 411 (Ct. App. Md. 2010); *Dill v. State*, 587 S.E.2d 56, 58 (Ga. 2003).

The common thread in *Anderson*, *Wesolich*, and *Drumm*, is the concern for the public's confidence in the fairness of the court system when disqualification of a judge is sought. It would be incongruous in the disqualification of judges context to apply the "appearance of impropriety" standard, while not applying the same standard for determining when an entire prosecutor's office should be disqualified from a case. When a defendant's counsel goes to work for the same prosecuting attorney's office as has brought charges against him, it necessarily raises concerns for that defendant and the public about their confidence in the fairness of the courts. For that reason, the same standard applicable to judge disqualification ought to apply equally in determining whether to disqualify an entire prosecutor's office.

Respondent argued in the Court of Appeals that the applicable standard was no longer the "appearance of impropriety" in light of Rule 4-1.11's authorization of screening of an attorney who changed employment. *See* Resp. Ct. App. Br. at 11-12. Instead, respondent argued that the *Ross* dissent ought to be the controlling standard. *See* Resp. Ct. App. Br. at 15, 21-22. Respondent also argued that there was appropriate screening of Cheney from Andrew's case under Rule 4-1.11, and

therefore, it was unnecessary to have disqualified the Newton County Prosecutor's Office. *See* Resp. Ct. App. Br. at 23.

Courts have recognized that while the present Model Rules of Professional Conduct do not expressly contain the "appearance of impropriety' language, which was found in Canon 9 of the ABA Model Code of Professional Responsibility, that such obligation remains implicit in the Model Rules of Professional Conduct. *State v. Retzlaff*, 490 N.W.2d 750, 752 (Wisc. Ct. App. 1992); *Gomez v. Superior Court*, 717 P.2d 902, 904-05 (Ariz. 1986). Respondent's reliance on the screening mechanism provided for in Rule 4-1.11 should not be followed because the "appearance of impropriety" for situations such as Andrew's remains implicit.

In *Turbin v. Superior Court*, 797 P.2d 734, 736-38 (Az. Ct. App. 1990), the government argued that the appearance of impropriety standard should no longer be the governing standard for whether to disqualify an entire prosecutor's office for the same change in rules rationale as the *Ross* dissent and as respondent argued here in the Court of Appeals. The *Turbin* Court reasoned that prosecutions not only must be fair, but also must appear fair. *Id.* at 737-38. In doing so, *Turbin* noted that a defendant and his family will be left to question the fairness of the proceedings when his attorney leaves his case and goes to the office that is prosecuting him. *Id.* at 738. The *Turbin* Court added that even though the defendant's former attorney does not disclose anything to his or her new colleagues the defendant will never believe that. *Id.* at 738. That Cheney testified and respondent relied on evidence Cheney was

screened from Andrew's case and did not disclose confidential information about Andrew's case (Tr.17-19,21,25,469) simply does not address the appearance of impropriety concerns *Turbin* recognized.

Respondent also argued in the Court of Appeals that appointment of a special prosecutor would only be cosmetic because the Newton County Prosecutor's Office would necessarily have to communicate with the special prosecutor. *See* Resp. Ct. App. Br. at 21. While there necessarily would have to be some minimum of communication between the Newton County Prosecutor's Office and a special prosecutor, a reasonable person would not find an appearance of impropriety in such communication, but instead would be focused on the larger picture that the state was represented by a special prosecutor. The appearance to a reasonable person of appointing a special prosecutor would be the perception that the court system is one with integrity committed to fairness.

Factors that have been discussed against disqualifying an entire government office are the added cost of retaining private counsel and the loss of the expertise of its in-house counsel. *City and County of San Francisco v. Cobra Solutions Inc*., 135 P.3d 20, 28 (Ca. 2006); *State v. Pennington*, 851 P.2d 494, 499 (N.M. Ct. App. 1993). It has also been asserted that disqualification of entire government offices will have the impact of limiting mobility within the legal profession and in particular impeding prosecutors' offices from hiring the most qualified individuals. *State v. Kinkennon*, 747 N.W.2d 437, 444 (Neb. 2008); *Pennington*, 851P.2d at 499. *See* Resp. Ct. App.

Br. at 19. These arguments lack meaningful substance when the facts of *State ex rel. Horn v. Ray*, 138 S.W.3d 729 (Mo.App., E.D. 2002) are examined.

In *State ex rel. Horn v. Ray*, 138 S.W.3d 729, 730-31 (Mo. App., E.D. 2002), a former Public Defender, Bryant, who represented defendants on St. Francois County cases went to work for the St. Francois County Prosecutor's Office. The St. Francois County Prosecutor's Office **voluntarily disqualified itself from all cases where Bryant had been the attorney of record**. *Id.* at 731. Additionally, the prosecutor's office and Bryant agreed that Bryant would be disqualified from representing the state on all Public Defender cases that were pending during Bryant's Public Defender employment. *Id.* at 733. Defendant Napoli sought to disqualify the entire St. Francois County Prosecutor's Office based solely on his multiple cases having been pending while Bryant was a Public Defender, even though Bryant never worked on Napoli's case and did not acquire any confidential information. *Id.* at 730-31. The Eastern District reasoned that because Bryant never represented Napoli that the entire St. Francois County Prosecutor's Office was not required to be disqualified. *Id*. at 734-35.

The actions of the St. Francois County Prosecutor's Office in *Ray* of voluntarily disqualifying itself from all cases where the former defender was counsel of record simply illustrates that it would not have imposed an onerous burden on the Newton County Prosecutor's Office to do the same here. The *Ray* Court's ultimate disposition of the disqualification claim there has no applicability here because, unlike

in *Ray*, Cheney directly represented Andrew. Moreover, there are statutory provisions in place that facilitate the handling of cases when a prosecutor's office is disqualified. Section 56.110 empowers trial courts to appoint prosecutors when a prosecutor's office is unable to proceed because of conflicts. *See State v. Copeland*, 928 S.W.2d at 840. When this Court reversed Ross' conviction, it directed the trial court to appoint a special prosecutor under §56.110. *See Ross*, 829 S.W.2d at 952. Similarly, §27.030 authorizes the governor to appoint the Attorney General's Office to represent the state in criminal cases. Maintaining the perception of fairness in Andrew's case outweighs concerns about costs to prosecutor's offices and any generalized concerns about professional mobility. *See Ross* and *Anderson*. The Newton County Prosecutor's Office could have done the same as the St. Francois County Prosecutor's Office did in *Ray*.

Southern District's Opinion

In rejecting Andrew's claim, the Southern District adopted respondent's arguments relying on Rule 4-1.11(d) and Comment 2 to that Rule (June 20th Slip op. at 5). In arriving at that result, the Southern District relied on Cheney's testimony that once she commenced work for the Newton County Prosecutor's Office she did not participate in prosecuting any of her former Public Defender clients and did not discuss the substance of her former clients' cases with any of her Newton County prosecutor colleagues (June 20th Slip op. at 3,5-6).

In reaching its result here, the Southern District overruled its decision in *State v. Reinschmidt*, 984 S.W.2d 189 (Mo.App., S.D. 1998), because *Reinschmidt* failed to rely on Rule 4-1.11 (June 20th Slip op. at 6-7). The Southern District criticized *Reinschmidt* for applying an appearance of impropriety standard, rather than applying Rule 4-1.11 (June 20th Slip op. at 7).

Disqualifying an entire prosecutor's office under the "appearance of impropriety" standard is necessary even where it is clear that the former defense attorney did not communicate any information about her former client to her new prosecutor colleagues "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" and "to insure the faith of the people in the efficacy of the judicial system." *State v. Cooper*, 409 N.E.2d 1070, 1073 (Ohio Ct. Common Pleas 1980). In *Reinschmidt*, the Southern District took the exact view espoused in *Cooper*, rejecting the notion that because Bock gave a sworn statement that she did not disclose any confidential information that the Greene County Prosecutor's Office, that she ought to be allowed to remain on the case. *Reinschmidt*, 984 S.W.2d at 192. Moreover, in *Ross*, this Court noted that there was no evidence that anything relating to Ross' case was shared between the members of the Von Erdmannsdorff and Zimmerman law firm and members of the prosecuting attorney's office, but the Clay County Prosecutor's office was still required to be disqualified. *Ross*, 829 S.W.2d at 949.

Where screening of a former defense attorney from the former client's case is implemented, a factor in weighing the effectiveness of that screening is the size of the prosecutor's office. *People v. Davenport*, 760 N.W.2d 743, 750 (Mich. Ct. App. 2008). *See also, State v. Coulter*, 67 S.W.3d 3, 27 (Tenn. Ct. Crim. App. 2001) (discussing practice of the prosecutor's office's morning meetings to discuss cases over coffee). In a small prosecutor's office, like Newton or Ray Counties, the ability to effectively screen an attorney from her former cases is going to be lessened because of the practical limitations of lesser numbers of attorney colleagues to consult with in the physically smaller office space. *See, Davenport* and *Coulter*.

The Southern District found that *Ross*, was inapplicable here (June 20th Slip op. at 8). The Southern District's opinion found *Ross* was distinguishable because *Ross* presented a situation where there was concurrent representation of the defendant on a civil action arising from the same events constituting the criminal charges by an attorney who was also a prosecutor in the same office as was then prosecuting Ross (June 20th Slip op. at 8). This Court did not so limit *Ross*. Instead, *Ross* looked at all the facts connecting the Von Erdmannsdorff and Zimmerman law firm and the Clay County Prosecutor's Office to conclude that there was an appearance of impropriety for the Clay County Prosecutor's Office to prosecute Ross. *See Ross, supra*.

Facts Going Beyond Cheney's Change in Employment

Establishing the Appearance of Impropriety

In the Court of Appeals, respondent argued that *Reinschmidt* was distinguishable because Reinschmidt's attorney had represented him for two years, while Cheney represented Lemasters for less than one month. *See* Resp. Ct. App. Br. at 23-25. The length of representation simply is not a singular determinative factor; instead what matters here are the facts that would cause a reasonable person to conclude there was an appearance of impropriety in the Newton County Prosecutor's Office remaining on the case. *See Ross* and *Anderson*.

Facts contained in Exhibit A highlight why, under the facts of this case, there was an appearance of impropriety for the Newton County Prosecutor's Office to remain on Andrew's case.

On August 8, 2012, Cheney sent Andrew a letter providing legal advice about his case (Ex.A at 1).[3] That letter advised Andrew "not to discuss your case with anyone" except counsel, even if he had already made statements (Ex.A at 1) (underline in original). The letter continued: "If anyone attempts to question you, you should advise them politely but firmly that you have an attorney and do not wish to answer questions." (Ex.A at 1). Cheney's letter advised Andrew that he was entitled to a jury trial and may be entitled to a judge trial (Ex.A at 1). Cheney advised Andrew that he may be entitled to a change of judge or change of venue, but there

[3] While Cheney testified that the letter was an initial form letter, which a secretary had signed her name to, Cheney never asserted she had not authorized such a practice (Tr.8-9).

were time limits and he needed to discuss any such wishes promptly (Ex.A at 1). The letter continued that "[a]ny information that you need to give to your primary attorney will be taken down and provided to that attorney." (Ex.A at 1).

On August 17, 2012, Cheney assigned legal assistant Teresa Henry to make calls to Andrew's family (Tr.9;Ex.A at 3). The details of that request, as set forth by Cheney, were as follows:

> Please call Billie Lemasters (mom) 816 503-8021 and William Burge 417 455-6037 and notify them both I cannot speak with them about his case without his permission **and that I will see him at the jail today**. Also, tell them I cannot take him a Power of Attorney to sign for them because 1) that is civil and not criminal in nature and we cannot do it; and 2) it may or may not be in his best interests to do so and I will not advise him to sign it, as it is civil in nature (see #1). **Can you tell I'm about pissed at this stupid family already?** They will have to hire a private atty for the POA of [sic] they want it done. PS. They can't continue to collect his social security since he is in jail anyway. PPS. **They can bite me**. **(Please use your discretion as to the portions of this to relay!) ;)**
>
> Thanks,
> Maleia

(Ex.A at 3) (parentheticals and smiley symbol in original) (bold and underline emphasis added). That Cheney was planning to meet with Andrew the same day she assigned Henry to make calls, and then proceeded to make offensive disparaging

remarks in her assignment to Henry about Andrew's family's communications with her, only heightens the appearance of impropriety for the Newton County Prosecutor's Office having remained on the case.

Cheney indicated that she believed that she did an initial interview of Andrew on August 19th or 20th, 2012 (Tr.21-22). The initial interview would have included gathering medical history information (Tr.22). On August 20, 2012, Cheney assigned Investigator Patrick Knapp to obtain a recorded interview from Andrew for the purposes of sorting through "what might be relevant" (Ex.A at 4). In that assignment Cheney stated that she had difficulty following Andrew's conversation because he used too many pronouns, and therefore, evidenced that she had spoken with him (Tr.10-11;Ex.A at 4). Obtaining information that is "relevant" to Andrew's defense, after having spoken to him, further highlights the appearance of impropriety that existed in the Newton County Prosecutor's Office continuing on the case.

On August 22, 2012, Cheney directed Henry to call Andrew's mother to inform her that the court would not reduce bond, but they would get supporting medical records to document his medical condition to try to reduce bond in the future (Tr.10-11;Ex.A at 5).

Cheney received an e-mail from Assistant Prosecutor Kathleen Miller inquiring about whether Cheney was still wanting a bond hearing (Ex.A at 9). Miller's e-mail included that Miller had "met with the Vic and her Mom and they will be here for the 9 am hearing." (Ex.A at 9).

Cheney received on August 27, 2012, a letter dated August 21, 2012, from Andrew's mother (Tr.14; Ex.A at 10). That letter reported on information regarding Andrew's medical history relating to his heart condition (Ex.A at 10). In particular, the letter reported that at a Texas children's hospital Andrew had two heart surgeries and his mother considered it "a miracle" Andrew had lived as long as he has (Ex.A at 10). The letter recounted how Andrew's childhood heart surgeon was able to redirect blood flow with his valves working backward to keep his heart functioning (Ex.A at 10). The letter also related that Andrew's mobility had been limited to him getting around in a wheelchair (Ex.A at 10). At some point, Cheney read that letter (Tr.14-15).

On Cheney's last day of Public Defender employment, September 7, 2012, she did a transfer memo because the case was being reassigned to another attorney (Tr.15; Ex.A at 11). That memo included the following: "Teresa and Patrick are already working on this one. **Holy crap, good luck is all I can say**." (Ex.A at 11). (emphasis added).

The contents of Ex.A show involvement in Andrew's case by Cheney that created an appearance of impropriety. The length of time for which Cheney was Andrew's attorney is not a determinative factor; more relevant is what was done on Andrew's case while Cheney represented him. Cheney's offensive, disparaging commentary about Andrew's family and negative views about the substance of his

case underscore that there was an appearance of impropriety in the Newton County Prosecutor's Office remaining on the case.

The actual conduct of the trial, likewise, underscores why there was an appearance of impropriety in the Newton County Prosecutor's Office's failure to disqualify itself from Andrew's case. Respondent's questioning of Pam, the defense opening statement and the evidence elicited during both sides' questioning of Andrew at trial also demonstrate why there was an appearance of impropriety in Cheney having read the letter that Andrew's mother sent her, which discussed Andrew's heart condition history (Ex.A at 10;Tr.14-15).

On direct of Pam, respondent elicited that for as long as Pam has known Andrew he has been disabled because of congenital heart problems, he has had a pacemaker and defibrillator, and he used a cane and a mobility chair (Tr.220,222-23,251).

During defense opening statement, counsel highlighted in detail Andrew's congenital heart defect history and surgeries commencing at six weeks old (Tr.194-95). That opening statement took the jury through Andrew being placed on Social Security Disability as an adult because of his heart condition (Tr.194-95).

Defense counsel began his examination of Andrew by focusing on Andrew's medical history surrounding his congenital heart defect leading up to his Social Security disability(Tr.355-59). Andrew testified about having had to have multiple surgeries associated with defects in the various chambers of his heart (Tr.355-56).

The first surgery occurred when Andrew was six weeks old (Tr.356). Andrew's heart defects limited him as a child so that he was unable to participate in physical education classes (Tr.357). As an adult, Andrew's heart problems over time caused him to become incapable of working (Tr.357-59).

On cross-examination the prosecutor asked Andrew what his heart condition had to do with what he was accused of doing to his daughter (Tr.367-68). The prosecutor asked whether his heart condition had impacted his ability to have sexual intercourse and other acts of a sexual nature (Tr.370-71,383). The discussions about Andrew's ability to have sexual intercourse because of his heart condition included him testifying that he had related times of shortness of breath which had limited his ability to have sexual intercourse (Tr.372). Andrew denied having committed alleged acts of physical abuse because his heart problems made him physically incapable (Tr.374-75). Andrew testified that because of his heart problems he had been the victim of physical abuse by Pam (Tr.374-81).

In closing argument, respondent urged the jury to consider that they had the opportunity to hear the testimony of Pam, H.L., and Andrew and to gauge all of their credibility (Tr.440-41). Respondent devoted significant effort to discrediting Andrew through cross-examination of him about his heart history (Tr.367-68,370-72,374-81,383). That Cheney read Andrew's mother's letter discussing that heart history (Tr.14-15) underscores that there was an appearance of impropriety in the Newton

County Prosecutor's Office continuing to represent respondent when Cheney joined that office.

That both sides made Andrew's heart history such a significant subject of their questioning of him underscores the appearance of impropriety in Cheney having read Andrew's mother letter about his medical history and the Newton County Prosecutor's Office remaining on the case (Ex.A at 10;Tr.14-15). Moreover, respondent's eliciting from Pam detailed information about Andrew's heart condition history highlights further the appearance of impropriety in Cheney having read Andrew's mother's letter regarding that history and the Newton County Prosecutor's Office continuing on the case.

The Court should reverse Andrew's conviction and, as it did in *Ross*, direct the trial court to appoint a special prosecutor.

II.

INCORRECT JUDGMENT

The trial court erred in entering and signing a judgment showing that Andrew was convicted of two counts of statutory sodomy in the first degree, because this violated his rights to due process of law and to a finding of guilt as to all counts by a jury, U.S. Const. Amends VI and XIV and Mo. Const. Art. I, §§10 and 18(a), in that although Andrew was initially charged with two counts, respondent dismissed one count prior to jury deliberations, and thus, the jury found Andrew guilty of only one count.

The trial court erroneously entered a judgment and sentence on two counts of statutory sodomy, §566.062 when Andrew was convicted of only one count.

The Charging Record and Southern District Proceedings

Andrew was charged by complaint, and later information, with the following: (1) Count I, statutory sodomy, §566.062 of H.L. alleged to have occurred in Newton County between April 1, 2001 and November 30, 2002, by having deviate sexual intercourse with H.L. when she was less than twelve years old; and (2) Count II alleged the same acts as Count I (L.F.11,14).

A bill of particulars alleged the following: (1) Count I alleged that Andrew attempted to penetrate H.L. with his penis in a bedroom at the family home in Granby, Missouri, Newton County; and (2) Count II alleged that Andrew penetrated H.L. by

placing his fingers inside her in a bedroom at the family home in Granby, Missouri, Newton County (L.F.29-30).

Before closing arguments, respondent dismissed one of the two counts (Tr.421-22). The record suggests respondent dismissed Count I and proceeded on Count II only (Tr.421-22,429,441;L.F.44,47).

Andrew's prior counsel argued in the Southern District that it was unclear which count was dismissed. *See* Appellant's Ct. App. Br. at 30. Respondent's brief thought that Count II was dismissed. *See* Resp. Ct. App. Br. at 26. While there was not agreement in the Court of Appeals as to which count was dismissed, both parties agreed that one count was dismissed and that Andrew should have been sentenced on only one count. *See* Appellant's Ct. App. Br. at 28-31; Resp. Ct. App. Br. at 26-27. Likewise, both parties agreed the judgment and sentence should be corrected with a nunc pro tunc order. *See* Appellant's Ct. App. Br. at 28-31; Resp. Ct. App. Br. at 26-27. The Southern District's opinion agreed that the judgment and sentence needed to be corrected, but it did not specify which count was dismissed and which resulted in the conviction. *See, State v. Lemasters*, (Mo. App., S.D. No. 32883) June 20, 2014 slip op. at 9-10.

Instruction No. 5 required the jury find that there was "finger to genital contact" with H.L. (L.F.44). Respondent's closing argument included that H.L. testified that Andrew had put his hand inside her and that constituted first degree statutory sodomy (Tr.429,441). The bill of particulars for Count II stated that the

basis for that charge was that Andrew penetrated H.L. by placing his fingers inside her (L.F.29-30). Based on these matters, the record suggests that respondent proceeded on Count II.

A defendant cannot be convicted and sentenced for a crime with which he was not charged and did not have the opportunity to defend against. *State v. Cain*, 980 S.W.2d 145, 146 (Mo.App., E.D. 1998).

Clerical errors can be corrected by court order at any time. *See* Rule 29.12(c). Such clerical errors can be corrected by entering a nunc pro tunc order. *See Miller v. State*, 974 S.W.2d 659, 663 (Mo.App., S.D. 1998) (remanding case to correct judgment that reflected defendant was a prior and persistent offender via nunc pro tunc order when that status was not proven up).

This Court should reverse and remand for entry of a nunc pro tunc order to reflect that Andrew was convicted of only one count of first degree statutory sodomy and sentenced to thirty-one years on only one count.

CONCLUSION

For the reasons discussed in Point I, this Court should reverse and remand for a new trial at which the Newton County Prosecuting Attorney's Office is disqualified from representing the State of Missouri.

For the reasons discussed in Point II, this Court should reverse the judgment entered and remand for entry of a nunc pro tunc order that provides Andrew was convicted of one count, and not two counts, of first degree statutory sodomy and sentenced to thirty-one years.

Respectfully submitted,

/s/ William J. Swift
William J. Swift, MOBar #37769
Assistant Public Defender
Attorney for Appellant
Woodrail Centre
1000 W. Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 777-9977
FAX: (573) 777-9974
william.swift@mspd.mo.gov

CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, hereby certify to the following.

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 9,701 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in September, 2014. According to that program the brief is virus-free.

A true and correct copy of the attached brief has been served electronically using the Missouri State Courts electronic filing system this 25th day of September, 2014, on Assistant Attorney General Adam Rowley at Adam.Rowley@ago.mo.gov at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ William J. Swift
William J. Swift