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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 REPLY BRIEF

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JURISDICTION AND STATEMENT OF FACTS

The original Jurisdictional Statement and Statement of Facts are incorporated here.

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POINTS RELIED ON

I.

NEWTON COUNTY PROSECUTOR'S OFFICE

APPEARANCE OF IMPROPRIETY

The trial court abused its discretion in failing to disqualify the Newton County Prosecutor's Office when it failed to apply *Ross*' individualized case-by-case, fact specific inquiry applying the "appearance of impropriety" standard, which is not a per se disqualification rule, to determine whether a reasonable person under all the circumstances would have factual grounds to conclude there was an appearance of impropriety in that Office serving, and doubt the proceedings' fairness. The "appearance of impropriety" standard applies to judges and prosecutors, as prosecutors are quasi-judicial officers, to ensure defendants' and the public's confidence in the court system's integrity because both occupy a role of administering justice which is divorced from whether that standard applies to attorney ethics/discipline Rule 4 matters.

There was an appearance of unfairness in this Prosecutor's Office serving as a reasonable person would doubt the proceedings' fairness because Cheney made highly offensive caustic comments about Andrew's family and his case's merits memorialized in memoranda, directed staff to record an interview of Andrew after speaking with him, and received confidential medical background history highlighted at trial by both parties and Cheney's screening and non-

disclosure assurances did not offset for a reasonable person the appearance of impropriety of Cheney's other acts.

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

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

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

Mo. Const. Art. I §§10 and 18(a);

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

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ARGUMENT

I.

NEWTON COUNTY PROSECUTOR'S OFFICE

APPEARANCE OF IMPROPRIETY

The trial court abused its discretion in failing to disqualify the Newton County Prosecutor's Office when it failed to apply *Ross*' individualized case-by-case, fact specific inquiry applying the "appearance of impropriety" standard, which is not a per se disqualification rule, to determine whether a reasonable person under all the circumstances would have factual grounds to conclude there was an appearance of impropriety in that Office serving, and doubt the proceedings' fairness. The "appearance of impropriety" standard applies to judges and prosecutors, as prosecutors are quasi-judicial officers, to ensure defendants' and the public's confidence in the court system's integrity because both occupy a role of administering justice which is divorced from whether that standard applies to attorney ethics/discipline Rule 4 matters.

There was an appearance of unfairness in this Prosecutor's Office serving as a reasonable person would doubt the proceedings' fairness because Cheney made highly offensive caustic comments about Andrew's family and his case's merits memorialized in memoranda, directed staff to record an interview of Andrew after speaking with him, and received confidential medical background history highlighted at trial by both parties and Cheney's screening and non-

disclosure assurances did not offset for a reasonable person the appearance of impropriety of Cheney's other acts.

Much of respondent's brief is devoted to arguing why a majority of jurisdictions have rejected the position that there is an automatic "per se" disqualification of a prosecutor's office when counsel for a criminal defendant accepts employment with the same prosecutor's office which is prosecuting that defendant. Andrew's original brief never argued that circumstance creates a per se disqualification of the prosecutor's office. Instead, under *State v. Ross*, 829 S.W.2d 948 (Mo. banc 1992), the applicable standard is whether there is an "appearance of impropriety" that would cause a reasonable person to doubt the fairness of the proceedings under all the circumstances. The "appearance of impropriety" standard applies to judges and prosecutors alike on matters that implicate the integrity of the court system because prosecutors are quasi-judicial officers. Whether the "appearance of impropriety" standard has any relevance or continued vitality under Rule 4 attorney ethics/disciplinary matters or actions simply is not before this Court and should be reserved for a case presenting those types of issues.

Applying *Ross*' case-by-case review there was an appearance of impropriety in the Newton County Prosecutor's office continuing on the case. Cheney's case specific actions here created an appearance of impropriety that would cause a reasonable person under the circumstances to doubt the fairness of the proceedings,

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even though she was screened from Andrew's case and gave assurances that client confidences were maintained.

Maintaining The Perception of Court System Integrity Is Not Dictated By Mechanically Applying Ethical/Disciplinary Rules Applicable To Individual Attorney Discipline

Respondent argues that this Court should abandon *Ross*' appearance of impropriety standard because under the former Ethical Canons, Canon 9 required attorneys to avoid the appearance of impropriety and that standard was "removed" from present Rule 4-1.10 (Resp.Br.12-19). To support that assertion respondent relies on the 1986 version of Comments to Rule 4-1.10 that the appearance of impropriety standard was removed as too vague and question begging (Resp. Br.14).[1]

The ABA Model Code of Professional Responsibility Canon 9 was titled: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."[2]

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[1] This reply brief's Appendix contains Rule 4-1.10 and comments thereto as they appear in West's Missouri Rules of Court 1989 edition at pages 27-28.

[2] This reply brief's Appendix contains relevant portions of the ABA Model Code of Professional Responsibility. The entire document is available on the web at: americanbar_org/content/dam/aba/migrated/cpr/mrpc/mcpr_authcheckdam_pdf (underscores substituted for periods and web introductory letters omitted to prevent hyperlinking).

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Immediately after that title, was a subtitle "ETHICAL CONSIDERATIONS," which was followed by specific ethical considerations EC 9-1 - EC 9-7. These ethical considerations were then followed by a subtitle "DISCIPLINARY RULES." The Disciplinary Rules listed were DR 9-101 - DR 9-102.

DR 9-101 was captioned "Avoiding Even the Appearance of Impropriety." The conduct DR 9-101 prohibited was a lawyer: (a) accepting private employment on a matter where he had acted in a judicial capacity; (b) accepting private employment on a matter where he had substantial responsibility while a public employee; and (c) stating or implying he had the ability to improperly influence or upon irrelevant grounds any tribunal, legislative body, or public official.

DR 9-102 was captioned: "Preserving Identity of Funds and Property of a Client," and as its title indicates, was directed at the proper handling of client funds.

To support its argument respondent also relies on Restatement (Third) of the Law Governing Lawyers §5 (c) (Resp.Br.15). Initially, it should be noted that §5 of the Restatement (Third) of The Law Governing Lawyers is captioned: "§5 **Professional Discipline**"[3] (emphasis added). Section 5 has two specifically denominated sections that begin: **"A lawyer is subject to professional discipline . . . ."** (bold typeface in original). Respondent then relies on Comment c to §5 that talks about "idiosyncratic considerations" related to the appearance of

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[3] Section 5 of the Restatement (Third) of The Law Governing Lawyers is included in this reply brief's Appendix.

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impropriety standard (Resp.Br.15). Comment c's critique of the appearance of impropriety standard must be viewed in the context in which that critique was framed. Comment c commences discussing lawyer codes having generalized provisions as "general grounds for discipline." The appearance of impropriety standard is then criticized in that **disciplinary** context as "fail[ing] to give fair warning of the nature of the **charges** to a lawyer respondent" (emphasis added).

Respondent urges that the appearance of impropriety standard should not apply to prosecutors because in the Code of Judicial Conduct Rule 2-1.2 there is an express provision that judges are to avoid the appearance of impropriety whereas there is no comparable rule mandating the same for prosecutors (Resp.Br.29).

Respondent also points to Rule 2-2.8 titled: "Decorum, Demeanor, and Communication with Jurors" which governs such matters as patient, dignified, and courteous behavior by judges (Resp.Br.30-31). Respondent argues from that Rule a trial judge can be left to decide whether there is an appearance of impropriety in the actual conduct of the trial proceedings as to whether the prosecutor obtained an unfair advantage in hiring former defense counsel (Resp.Br.30-31).

This Court should reject all of respondent's Rule premised arguments because this case is not about how attorney ethical/disciplinary rules have evolved as to the appearance impropriety standard as applied to individual attorney ethical/disciplinary actions. Likewise, whether the appearance of impropriety standard is unworkable in disciplinary contexts is not what this case is about. Rather, what this case is about is

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applying the appearance of impropriety standard from *Ross* to ensure the perception of the integrity of court proceedings is maintained. That standard is applied to both judge and prosecutor disqualification - to maintain the perception of the integrity of court proceedings. *Ross* did not apply a per se disqualification rule and nowhere in the original appellant's brief has a per se disqualification been urged. Instead, what the original brief urged is that this Court apply the "appearance of impropriety" standard which not only takes into account Cheney's act of accepting employment with the Newton County Prosecutor's Office, but also specific acts of Cheney that she engaged in during her representation of Andrew and matters that happened at trial (*See* Orig.App.Br.32-39).

The Appearance of Impropriety Standard Applies Because Prosecutors Are Quasi-Judicial Officers

Whether a judge should serve on a case and whether an individual prosecutor or a prosecutor's office ought to represent the state on a case should be evaluated on a case-by-case basis applying the appearance of impropriety standard. The rationale for applying a uniform standard to judges and prosecutors is that the same policy considerations applicable to judges apply to prosecutors. Flowers, *What You See Is What You Get: Applying The Appearance Of Impropriety Standard To Prosecutors*, 63 Mo. L.Rev. 699, 703 (1998). Those considerations are:

> The prosecutor's role has been described as a quasi-judicial role. This role places the prosecutor in the position of both advocating and considering

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> procedural fairness. Just 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.

Id. at 703. *See, also, People v. Witty*, 36 P.3d 69, 73 (Colo. Ct. App. 2000) (applying the appearance of impropriety standard while relying on and citing the rationale found in Flowers, *What You See Is What You Get, supra*). The quasi-judicial role of prosecutors has been described as follows:

> The courts have longed recognized that in the trial of a criminal case the **prosecutor occupies a quasi-judicial** position and is, at once, charged with the duty to thoroughly and vigorously present the state's evidence, on the one hand, and on the other hand, conduct these duties in such a manner as will afford the defendant a fair and impartial trial. **He shares this latter responsibility with the trial court**.

State v. Stockbridge, 549 S.W.2d 648, 651 (Mo.App., K.C.D. 1977) (emphasis added). *See also*, *State v. Cooper*, 708 S.W.2d 299, 304 (Mo.App., E.D. 1986) (same). In arriving at its result in *Ross,* this Court indicated that the appearance of impropriety standard that it applied was warranted because of a prosecutor's status as a "quasi-judicial officer." *Ross*, 829 S.W.2d at 951 (citing *State v. Boyd*, 560 S.W.2d 296, 297 (Mo.App., K.C.D. 1977)).

Respondent relies on a quote that judges' conduct is more likely to impact the public's perception of the courts than are lawyers' conduct, and therefore, such impact

warrants a judicial code of ethics that is broader in scope for judges than for lawyers. (Resp.Br.30 quoting Holland, *The Code of Judicial Conduct And The Model Rules of Professional Conduct: A Comparison of Ethical Codes For Judges And Lawyers*, 2 Geo. J. Legal Ethics 725, 733 (1989)). Holland takes that position reasoning that lawyers operate on a single "functional level" whereas judges operate on two levels - "functional" and "symbolic." *Id.* at 733. Holland's article, like respondent's application of particular ethical/disciplinary rules, is directed generically at individual attorney conduct. Because prosecutors are a specialized type of lawyer, who also occupy a quasi-judicial role with obligations to the integrity of the process comparable to trial judges, the ability of both prosecutors and judges to fairly serve in any particular case should be judged by the same appearance of impropriety standard. *See Stockbridge* and Flowers, *What You See Is What You Get, supra.* What *Stockbridge* recognized is that prosecutors, as a specialized type of lawyer, like judges, operate on two levels "functional" and "symbolic," to apply Holland's terminology, *supra*, and therefore, determining whether either can serve in a case should be decided under the appearance of impropriety standard.

Even if this Court should choose to look at ethical/disciplinary rules applicable to individual attorney acts and that the appearance of impropriety no longer expressly appears there, as discussed in Andrew's original brief, Courts have found that standard is implicit in the Model Rules of Professional Conduct. *See* Orig. App. Br. at 27 relying on *State v. Retzlaff*, 490 N.W.2d 750, 752 (Wisc. Ct. App. 1992); *Gomez*

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v. Superior Court, 717 P.2d 902, 904-05 (Ariz. 1986). One Court has found that the appearance of impropriety is implicit in the Preamble to the Model Rules stating:

> While Canon 9 is not expressly adopted by the Model Rules, the principle applies because **its meaning pervades the Rules and embodies their spirit**. It is included in what the preamble to the Rules refers to as "moral and ethical considerations" that should guide lawyers, who have "special responsibility for the quality of justice." This is why the principle applies here, and not because it was part of the Code.

First American Carriers, Inc. v. Kroger Co., 787 S.W.2d 669, 672 (Ark. 1990) (emphasis added). Comparable language is found in the current Rule 4 Missouri Preamble.[4] Paragraph 1 of the current Preamble refers to lawyers "having special responsibility for the quality of justice." (*See* Repl. Br. Appendix). Under Paragraph 9 of the present Preamble "difficult issues" are to be resolved "through the exercise of sensitive professional and moral judgment." (See Repl. Br. Appendix).

Respondent complains that by applying the appearance of impropriety standard that this Court would do away with the harmless error doctrine of *Chapman v. California*, 386 U.S. 18 (1967) (Resp.Br.29). In *Ross*, this Court did not engage in harmless error analysis and reversed when it concluded that there was an appearance of impropriety in the Clay County Prosecutor's Office having prosecuted Ross. This Court did so in *Ross* for the same reasons it reversed in *Anderson v. State,* 402 S.W.3d

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[4] The current Preamble is included in the Appendix to this reply brief.

86 (Mo. banc 2013), because the failure to disqualify a judge or prosecutor goes to the perception of the integrity of the court system and its fairness. Since this Court decided *Ross*, this Court has continued to find *Chapman* harmless error and to uphold convictions. *See, e.g.*, *State v. Minner*, 256 S.W.3d 92, 96-97 (Mo. banc 2008); *State v. Fuente*, 871 S.W.2d 438, 443 (Mo. banc 1994). Adhering to *Ross*' appearance of impropriety standard is not some impediment to continuing to apply *Chapman* harmless error analysis to uphold convictions in other contexts as these decisions following *Ross* clearly demonstrate.

In *Anderson v. State*, 402 S.W.3d 86, 88 (Mo. banc 2013), this Court concluded that the 29.15 judge should have been disqualified because a reasonable person would find an appearance of impropriety in the judge's references to extra-judicial information and statements that judge had made during the 29.15 case indicating the judge had prejudged the 29.15 issues. When the judge made specific factual statements showing prejudgment of the issues, he also made statements professing his unequivocal ability to fairly decide the issues. *Id.* at 89-91.

In finding the *Anderson* judge should have disqualified himself, this Court indicated that it looked at the "factual context" taking into account "the entire record." *Anderson*, 402 S.W.3d at 91-92. This Court noted that "[i]t is presumed that a judge acts with honesty and integrity and will not preside over a hearing in which the judge cannot be impartial." *Id.* at 92. This Court found that the judge's statements made "throughout the proceedings" would cause "a reasonable person" to have factual

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grounds to doubt the judge could fairly serve and to find "an appearance of impropriety." *Id.* at 94. This Court found that disqualification was required because someone "not acquainted with the judge's record of integrity" could reasonably believe he was unable to fairly serve. *Id. at* 94. The burden to disqualify the *Anderson* judge was whether "a reasonable person would have factual grounds to find an appearance of impropriety and doubt the impartiality of the court." *Id.* at 92 (citing to *Smulls v. State*, 71 S.W.3d 138, 145 (Mo. banc 2002)). While this Court looked to Rule 2-2.11 "Recusal" of a judge for guidance as to when a judge ought to recuse, that Rule does not contain the "appearance of impropriety" standard. *Anderson*, 402 S.W.3d at 91-92.

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. When the case came back for retrial and a bench trial before Judge Drumm the state moved to disqualify him because of those prior statements. *Id.* at 556-58. At the hearing on the motion to disqualify, Judge Drumm testified that he would not allow his former opinions to impact him at a bench trial. *Id.* at 557. The Court of Appeals noted that it had "no doubt" Judge Drumm could fairly serve, but the standard for disqualification was whether a reasonable person would have factual grounds to doubt his impartiality, and therefore, he was required to be disqualified. *Id.* at 557-58.

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Respondent argues that applying the appearance of impropriety standard creates "an irrebuttable presumption" that a former defense attorney will breach her duty to her former client not to disclose attorney confidences through application of a per se disqualification rule (Resp.Br.27-28,31). Respondent asserts that such rule presumes that prosecutors would violate a mandate to screen the former defense counsel and then lie about such violation (Resp.Br.27). In both *Anderson* and *Drumm*, the judges were required to be disqualified even where each had professed his ability to fairly serve and had the presumption that judges act with honesty and intergity. The *Anderson* and *Drumm* Courts did not require disqualification because they disbelieved the judges or questioned their commitment to truthfulness, but rather they disqualified these judges because a reasonable person would have a factual grounds to find an appearance of impropriety and doubt the judges' impartiality under all the circumstances. *See Anderson v. State*, 402 S.W.3d at 91-94 and *Drumm*, 984 S.W.2d at 557-58. Certainly, if judges can be disqualified where they were acknowledged as truthfully professing their vigilance to fairness, then prosecutors ought to be able to be disqualified without imputing lying or deceit to them as respondent complains is done by applying the appearance of impropriety to situations where screening occurred. *Cf. Anderson* and *Drumm*.

Applying an appearance of impropriety standard to disqualify a prosecutor's office, when there is evidence the former defense attorney was screened, does not attribute or presume the unethical conduct respondent posits. Instead, the appearance

of impropriety considers the "factual context" taking into account "the entire record." *Anderson*, 402 S.W.3d at 91-92.

Cheney's Conduct And Trial Proceedings Themselves Establish A Reasonable Person Would Doubt The Fairness

Respondent inaccurately complains that what has been urged here is a per se disqualification rule. In fact what respondent wants is a per se rule that the screening of a former defense counsel creates a per se "irrebuttable presumption" that it is proper for a prosecutor's office to continue to prosecute a defendant whose former counsel accepted employment with that same prosecutor's office if that attorney is screened from the defendant's case and the attorney provides a sworn statement or testimony no attorney confidences were disclosed, as Cheney did (Resp.Br.27-28,31-32,36). The reason applying the appearance of impropriety standard here is so critical is that Cheney's conduct, specifically her statements in her memoranda, *infra*, coupled with the evidence presented at trial establishes there was an appearance of impropriety in the Newton County Prosecutor's Office remaining on the case.

Respondent seeks to discount the appearance of impropriety in Cheney's statements contained in Exhibit A arguing that they were "internal memoranda, not public statements" (Resp.Br.33-34). Respondent then states the following: "The only reason these statements are available is because Defendant asked that they be unsealed." (Resp.Br.34 citing to Appellant's motion to unseal Ex. A filed in this Court). Respondent continues that it is unreasonable to judge an appearance of

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impropriety on facts that are unknown to and unknowable to the public except for the memoranda having been unsealed (Resp.Br.34).

Exhibit A was discussed and admitted into evidence in open court in the circuit court. *See* Mot. To Unseal filed September 18, 2014. Prior appellate counsel had requested that the Southern District put Exhibit A under seal and that court did. *Id.* Because Exhibit A had already been made public in the trial court, undersigned counsel moved this Court to unseal it and **respondent's present counsel affirmatively consented to Exhibit A being unsealed.** *Id.* and September 19, 2014 order sustaining "consent motion." The issue here is not about how and when Cheney's casefile documents became public. Instead, the issue is whether there is an appearance of impropriety such that a reasonable person under all the circumstances would have reason to doubt the fairness of the proceedings. *See Ross* and *Anderson*. A reasonable person, and here most especially the defendant, Andrew Lemasters, knew that Cheney went to work for the same prosecutor's office that was prosecuting him after engaging in the actions that she did and would have reason to doubt the fairness of the proceedings.

Respondent's brief continues: "Defendant's argument would seem to require the disclosure of all of a prosecutor's internal memoranda so that a defendant can determine whether a prosecutor has said rude things about him so that the court can determine whether there is an appearance of impropriety." (Resp.Br.34). The memoranda constituting Exhibit A were part of Andrew's counsel's casefile and

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Cheney put them there because she authored them while she was his attorney. There is no basis in the facts of this case for respondent's complaint that somehow applying the appearance of impropriety standard will subject prosecutor files to being opened for examination to see if a prosecutor said "rude things" about a defendant (Resp.Br.34).

Respondent's brief also complains that if expressions of frustration and dislike for a defendant made in private communication create an appearance of impropriety, then prosecutors would not be able to zealously advocate for the state (Resp.Br.34). Cheney's statements here while Andrew's attorney, as they reflect upon the existence of the appearance of impropriety in the Newton County Prosecutor's Office continuing on the case, simply have no bearing on any prosecutor's ability to advocate for the state.

There was an appearance of impropriety which would cause a reasonable person to doubt the fairness of the proceedings. The **starting point, and not a per se presumption of disqualification,** was Cheney representing Andrew and then accepting employment with the Newton County Prosecutor's office. On August 8, 2012, Cheney sent Andrew a letter providing legal advice about his case. (*See* Orig.Br. at 33-34). Cheney's August 17, 2012 assignment to legal assistant Henry recited that Cheney planned to meet with Andrew "today" and continued:

> **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

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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).

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).

Cheney testified that she did an initial interview of Andrew on August 19th or 20th, 2012 (Tr.21-22). That initial interview included gathering relevant medical history information (Tr.22). Cheney received a letter from Andrew's mother reporting information relating to Andrew's heart condition, medical history and Cheney read that letter (Tr.14-15; Ex.A at 10). At trial, both sides focused on and devoted substantial energy to Andrew's history of congenital heart problems (*See* Orig.App.Br.37-39).

On Cheney's last day of Public Defender employment, she did a reassignment case memo that 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).

These actions of Cheney created an appearance of impropriety such that a reasonable person under the circumstances would have reason to doubt the fairness of

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the proceedings. *See Ross* and *Anderson*. No amount of screening of Cheney and assurances by her of non-disclosure of client confidences could undo her manner of involvement in the case preparation that occurred when it was coupled with her caustic memoranda content. Moreover, that Cheney obtained and reviewed information about Andrew's heart condition history and that heart history was made a significant subject by both sides demonstrates further there was an appearance of impropriety in the Newton County Prosecutor's Office representing the state.

Respondent argues that there was no evidence that Cheney disclosed any of the contents of Andrew's mother's letter to the state(Resp.Br.35-36). Respondent also asserts that Andrew's ex-wife and daughter, who testified he committed the alleged acts, knew about his condition, so that his condition was not secret (Resp.Br.35-36). Respondent also contends that the state did not put on evidence through its own expert to rebut his medical condition, so that respondent did not exploit knowledge of that information which could have come from Cheney (Resp.Br.35-36).

Respondent's assertions simply have no relevance to an appearance of impropriety inquiry. A reasonable person who knew that Cheney interviewed Andrew and obtained information about his heart condition from him (Tr.21-22) and who also reviewed Andrew's mother letter (Tr.14-15; Ex.A at 10) would have reason to doubt the fairness and integrity of the proceedings in light of both sides' emphasis at trial on that heart condition. (*See* Orig.App.Br.37-39). A reasonable person would have those doubts because Cheney memorialized in memoranda that she was "**about**

pissed at this stupid family" such that "**They can bite me"** (Ex.A at 3)(emphasis added). Furthermore, that Cheney's disparaging assessment of the merits of Andrew's case was "**Holy crap, good luck is all I can say**" would cause a reasonable person to doubt the fairness of the proceedings (Ex.A at 11) (emphasis added).

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

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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,

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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 4,832 words, which does not exceed twenty-five percent of the 31,000 words (7,750) allowed for an appellant's reply brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in November, 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 18th day of November, 2014, on the following: (a) 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; (b) Jason H. Lamb, Attorney for Amicus Curiae at Jason.Lamb@mops.mo.gov.; and (c) Daniel K. Knight Attorney for Amicus Curiae at dknight@boonecountymo.org.

/s/ William J. Swift
William J. Swift