No. SC94295

In the Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

ANDREW L. LEMASTERS,

Appellant.

Appeal from Newton County Circuit Court
Fortieth Judicial Circuit
The Honorable Timothy W. Perigo, Judge

RESPONDENT'S SUBSTITUTE BRIEF

CHRIS KOSTER
Attorney General

ADAM ROWLEY
Assistant Attorney General
Missouri Bar No. 64125

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Adam.Rowley@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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STATEMENT OF FACTS

Appellant (Defendant) appeals a Newton County Circuit Court judgment convicting him of first-degree statutory sodomy for which he was sentenced to 31 years' imprisonment.

Defendant was charged in an information with two identical counts of first-degree statutory sodomy, § 566.062, RSMo 2000. (L.F. 14). The State moved to dismiss one count of the indictment before the case was submitted to the jury. (Tr. 421). Defendant was tried by a jury, with the Honorable Timothy W. Perigo, presiding. (Tr. 33). The trial court imposed a sentence of 31 years' imprisonment. (Tr. 471).

Defendant does not contest the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence at trial showed:

Victim, Defendant's daughter, was born in 1992. (Tr. 278). Defendant sexually abused her throughout her life. (Tr. 314). For a time, Defendant sexually abused Victim twice a month. (Tr. 326).

In the spring of 2001, when Victim was 8 or 9 years old, Defendant called Victim into his bedroom and told her to get on the bed. (Tr. 282). Defendant told Victim to get some lotion from beside the bed and rub it on his penis. (Tr. 284-85). Defendant told Victim not to be scared and that it was natural. (Tr. 284). Defendant told Victim not to tell her mother. (Tr. 286).

A few months later, Defendant called Victim into his room again. (Tr. 287). Defendant told Victim to take her clothes off and get on the bed. (Tr. 287-88). Defendant got on top of Victim and put his fingers in her vagina. (Tr. 288-89). He tried to put his penis in her vagina, but "he couldn't get it to work. . . ." (Tr. 289-90).

At around this time, Defendant brought his wife and Victim into the bedroom so he could show Victim how to have sex. (Tr. 239, 291-92). He forced his wife to have sexual intercourse with him while Victim watched. (Tr. 239-41). Defendant's wife had intercourse with him because Defendant physically abused her. (Tr. 240). Defendant cut her, stabbed her, shot her in the leg, ran her over with a car, and beat her with various objects. (Tr. 262, 306). Defendant had threatened to kill his wife and her family, or take her children and run off. (Tr. 242).

When Victim was 12 or 13 years old, she fell on her vaginal area. (Tr. 294). She asked Defendant's wife to look at her injury, but Defendant insisted on looking at and touching her vaginal area. (Tr. 294-95).

When Victim was in 8th grade, Defendant brought Victim into his bedroom and locked the door. (Tr. 242). He told his wife he had Victim walk on the treadmill without any clothes on because she needed to lose weight. (Tr. 242). Defendant used this time alone with Victim to sexually abuse her. (Tr. 299).

In addition to this sexual abuse, Defendant also physically abused Victim.

> [Defendant] would hit [Victim] with – if there was a stick behind him, he would hit her with it. If there was just something, a toy, or whatever, he would hit her with it. He would hit her with a belt. He would even – he would get to the point where he would even make her take her pants off and spanked her on her bare bottom.

(Tr. 228). These beatings would leave bruises. (Tr. 229).

When Victim was 18, she came home with a friend. (Tr. 246, 302). Defendant hit Victim with his cane. (Tr. 304). Victim left and began living with her friend. (Tr. 304).

Defendant testified in his own defense. (Tr. 354). He denied ever striking, stabbing, or shooting his wife. (Tr. 263). He stated he did spank Victim, including with a belt, but denied hitting her in any other way. (Tr. 364). He denied ever telling Victim to touch his penis or touching Victim "inappropriately." (Tr. 364).

Defendant testified that he "was the abused one in the marriage, not" his wife. (Tr. 374). Defendant stated his wife might have a scar on her arm because she was "coming after me with [a knife], and cutting herself on her arm." (Tr. 374).

Defendant's wife was called as a rebuttal witness, who testified that she had scars on her arms and legs where Defendant stabbed and shot her. (Tr. 416-17).

The jury found Defendant guilty of first-degree statutory sodomy. (Tr. 445, L.F. 49).

ARGUMENT

I (Disqualification of the Newton County Prosecutor's Office). The trial court did not abuse its discretion in failing to disqualify the Newton County Prosecutor's Office because Defendant's former public defender was properly screened from Defendant's prosecution.

Defendant argues that his former attorney's employment at the prosecutor's office created an appearance of impropriety which required the entire office to be disqualified. (Defendant's Brf. at 16). In *State v. Ross*, 829 S.W.2d 948 (Mo. banc 1992), this Court continued to apply the apperance of impropriety standard, despite having removed it from the Rules of Professional Conduct because it was vague and unworkable. A *per se* rule requiring the disqualification of an entire prosecutor's office based on an appearance of impropriety has been rejected by 28 of the 29 states to have considered the issue. This Court should apply a rule which allows a prosecutor's office to continue with a case when the conflicted attorney has been properly screened.

A. Facts regarding this claim.

Attorney Cheney worked at the public defender's office and was assigned to represent Defendant. (Tr. 8). Cheney entered her appearance in the case on August 16. (Tr. 16). Cheney left the public defender's office on

September 7 and began working at the prosecuting attorney's office on September 10. (Tr. 8).

Defendant filed a motion to disqualify the entire prosecuting attorney's office. (L.F. 15-16). Defendant argued that Cheney's conflict in the case should be imputed to the entire office. (L.F. 17-24).

Cheney testified at a hearing on Defendant's motion. (Tr. 7). Cheney stated she was screened from any case she worked on while at the public defender's office. (Tr. 17-18). Cheney stated, "I have not participated in any conversations having to do with the direction of the prosecution of any of my former cases." (Tr. 18). Cheney was instructed, "not to have any conversations or be privy to any conversations with former clients." (Tr. 20).

Cheney stated that while she was at the public defender's office, her secretary sent the initial letter to Defendant on her behalf when she represented him. (Tr. 8-9). Cheney did an intake interview with Defendant which lasted 15 or 20 minutes. (Tr. 22-23). Cheney asked Defendant for his basic information, including his criminal history and medical history. (Tr. 22). Defendant wanted Cheney to obtain certain medical records. (Tr. 23). They did not discuss a possible defense. (Tr. 24). This was the only "attorney-client" conversation Cheney had with Defendant. (Tr. 23).

Cheney did not participate in a bond reduction hearing where witnesses were called, although she may have attended a hearing where the

prosecutor paraphrased the victim's testimony. (Tr. 14). Cheney did not interview any witnesses involved in this case. (Tr. 27).

The trial judge denied Defendant's motion without comment. (Tr. 31).

B. Standard of review.

"The decision to disqualify the prosecuting attorney and appoint another attorney to prosecute a criminal case lies within the sound discretion of the trial court." *State v. Copeland*, 928 S.W.2d 828, 840 (Mo. banc 1996). An abuse of discretion occurs when the court's ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Fassero*, 256 S.W.3d 109, 115 (Mo. banc 2008).

C. This Court removed the appearance of impropriety standard from the ethical rules.

Canon 9 of the Ethical Canons required attorneys to "avoid even the appearance of professional impropriety." Supreme Court Rule 4, Ethical Canon 9 (1972). Because this standard was so vague, courts applied it inconsistently. For example, the Fifth Circuit held that although the rule itself implied that there need not be "proof of actual wrong doing," they held that "there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur." *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976). This possibility had to be weighed against

"the social interests which will be served by a lawyer's continued participation in a particular case." *Id*.

In contrast, the Second Circuit held that the "appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases." *Board of Ed. of the City of New York v. Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979).

There was also disagreement among courts on whether an entire prosecuting attorney's office should be disqualified when one of the prosecutors not assigned to a defendant's case previously represented that defendant. *Compare Young v. State*, 465 A.2d 1149, 1155 (Md. 1983) (holding that "the mere appearance of impropriety is not of itself sufficient to warrant disqualification of an entire State's Attorney's office"); *with State v. Chambers*, 524 P.2d 999, 1004 (N.M. App. 1974) (holding that the ethical rules required that an entire prosecutor's office be disqualified), *overruled by State v. Pennington*, 851 P.2d 494, 499 (N.M. App. 1993).

Missouri courts applied a broad reading of the appearance of impropriety standard. In *State v. Croka*, 646 S.W.2d 389, 392 (Mo. App. W.D. 1983), the defendant was represented for over two months by an attorney who then joined the prosecuting attorney's office. The defendant moved to disqualify the entire prosecuting attorney's office. *Id*. Although the trial court denied the request, the prosecuting attorney's office soon recused itself. *Id*. A

witness later said during a deposition that she had spoken with the prosecuting attorney about being deposed and he told her what to expect. *Id*. The appellate court stated that the prosecuting attorney's office was disqualified from prosecuting the defendant's case because it had hired his former counsel. *Id*. at 393. "This disqualification does not result from information acquired and used to [the defendant]'s detriment, but because [the prosecutor]'s office was placed in a position where continued involvement would create an appearance of impropriety." *Id*.

Recognizing the problems with this standard, this Court removed the appearance of impropriety standard from the ethical rules in 1986. Supreme Court Rule 4-1.10, Comment (1986). The commentary from the ABA, which this Court adopted, stated that the "appearance of impropriety" was too vague and "disqualification would become little more than a question of the subjective judgment by the former client." *Id*. The lack of a definition of the appearance of impropriety was "question-begging". *Id*.

This problem was apparent when the standard was used to impute disqualification. "[T]he problem of imputed disqualification cannot be properly resolved … by the very concept of appearance of impropriety." *Id*. "A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification." *Id*.

The appearance of impropriety standard was removed from the Rules because it "creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent and that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it." *Restatement (Third) of the Law Governing Lawyers*, § 5 (c) (2000).

Under the current Rules, a lawyer serving as a public employee shall not:

> participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter….

Rule 4-1.11(d).[1] The comment to this rule states that "Rule 4-1.11(d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers." Rule 4-1.11, Comment 2.

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[1] Citations to the Rules are to the Supreme Court Rules (2012) unless otherwise noted.

Although the Rules will impute a conflict of interest in private firms, there is no imputation of a conflict in a government agency. *Compare* Rule 4-1.10 ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so. . . .") *with* Rule 4-1.11, Comment 2. The Rules caution that "[i]f the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel." Rule 4-1.9, Comment 4.

In this way, the Rules recognize the difference between attorneys in a private firm and those in a government agency.

> The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice. The important difference in the adversary posture of the government lawyer is recognized by Canon 7: the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by a client. The channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rules through the action of associates.

United States v. Caggiano, 660 F.2d 184, 191 (6th Cir. 1981) (*quoting* Formal Opinion 342, 62 A.B.A.J. 517 (1976) of ABA Committee on Professional Ethics).

Defendant argues that although the Rules "do not expressly contain the 'appearance of impropriety' language … such obligation remains implicit in the [Rules]." (Defendant's Brf. at 27). This is not a case where there were simply cosmetic changes to the language or layout of the rules. The appearance of impropriety language was specifically and intentionally removed. Applying a Rule that has been removed because it is vague and "question-begging" would subvert the purpose of changing the Rules.

In *Blair v. Armontrout*, 916 F.2d 1310, 1333 (8th Cir. 1990), the Eighth Circuit found that the district court erred when it disqualified the entire Missouri Attorney General's Office from prosecuting an appeal because one lawyer within the office had been associated with the case when he was a public defender. *Id.* The court relied on the fact that the United States District Court for the Western District of Missouri "had adopted the Missouri Code of Professional Responsibility," which stated that the disqualification

rules do not apply to government agencies. *Id*. This was a correct application of Missouri law.[2]

Despite rejecting the appearance of impropriety standard in the Rules, this Court continued to apply it in disqualification cases. In *State v. Ross*, 829 S.W.2d 948, 949-50 (Mo. banc 1992), two part-time assistant prosecuting attorneys represented the defendant in a civil case that rose out of the same facts as the defendant's criminal case, although the attorneys were not directly involved in the criminal case. The criminal and civil cases proceeded at roughly the same time. *Id*. at 949. The defendant first found out that his civil attorneys worked at the prosecuting attorney's office during jury selection. *Id*. The defendant claimed that the knowledge that they worked at the prosecuting attorney's office "chilled" him from testifying. *Id*. at 950. Relying on cases which predated the adoption of the new Rules, this Court found that the conflict of these attorneys required the entire prosecuting attorney's office to be disqualified, because it created an appearance of impropriety. *Id*. at 952. This Court found that there was "no evidence of steps

[2] The Missouri Supreme Court attempted to distinguish this case in *State v. Ross*, 829 S.W.2d 948, 951 n.3 (Mo. banc 1992), by stating that *Blair* relied on an interpretation of federal law. But the *Blair* opinion states that the court was relying on the Missouri Rules of Professional Conduct.

taken to insulate the actual prosecutor from the conflict." *Id.* at 952. Defendant's allegation "that he was 'chilled' from testifying by the potential conflict" was "sufficient to justify reversal. . . ." *Id.*

This Court held that proper screening requires: (1) proper communication so that each office can screen potential conflicts and ensure that no attorney receives proceeds from the civil representation; (2) informing potential clients of the attorney's relationship with the prosecuting attorney's office; and (3) obtaining a signed waiver in conflict cases, pursuant to Rule 4-1.7. *Id.* at 952.

D. A *per se* rule requiring an entire prosecuting attorney's office to be disqualified based on an appearance of impropriety is unnecessarily burdensome.

Defendant asks this Court to apply a *per se* rule of disqualification of an entire prosecutor's office "even where it is clear that the former defense attorney did not communicate any information about her former client to her new prosecutor colleagues …." (Defendant's Brf. at 31). This rule has been rejected by 28 of the 29 following jurisdictions to have considered the issue:

- *State v. Eighth Jud. Dist. Ct.*, 321 P.3d 882, 886 (Nev. 2014) (overruled prior cases and held that appearance of impropriety is too ambiguous to require disqualification);

- *State v. Addison*, 89 A.3d 1214, 1221 (N.H. 2014) (disqualification not required because of effective screening);
- *State v. Richardson*, 17 N.E.3d 644 (Ohio App. 3d Dist. 2014) (mere appearance of impropriety is insufficient to require the recusal of an entire prosecutor's office);
- *State v. McClellan*, 216 P.3d 956, 960-61 (Utah 2009) ("presumption of impermissibly shared confidences" can be rebutted by evidence of an effective screening of former defense attorney);
- *State v. Kinkennon*, 747 N.W.2d 437, 443 (Neb. 2008) ("The prosecuting office need not be disqualified from prosecuting the defendant if the attorney who had a prior relationship with the defendant is effectively isolated from any participation or discussion of matters concerning which the attorney is disqualified.");
- *People v. Davenport*, 760 N.W.2d 743 (Mich. App. 2008) (effective screening of former defense attorney rebutted presumption of prejudice);
- *Spaccia v. Superior Court*, 146 Cal.Rptr.3d 742, 754 (Cal. App. 4th 2012) ("An entire prosecutor's office should not be recused unless it is necessary to assure a fair trial. The showing of a conflict

necessary to justify so drastic a remedy must be especially persuasive.");

- *Hart v. State*, 62 P.3d 566, 573 (Wyo. 2003) ("[W]e see no reason . . . to employ a rule that presumes that [the former defense attorney] shared confidential information with the prosecuting attorney's office);
- *People v. Shick*, 744 N.E.2d 858 (Ill. App. 3d 2001) (no per se disqualification of entire office because former counsel was screened and testified that he did not disclose any information);
- *State v. Coulter*, 67 S.W.3d 3, 32 (Tenn. Crim. App. 2001) (the State's screening policy "forestalled any actual or apparent impropriety"), *abrogated on other grounds by State v. Merriman*, 410 S.W.3d 779, 793 (Tenn. 2013);
- *In re R.B.*, 583 N.W.2d 839, 842 (S.D. 1998) (disqualification not required because of effective screening);
- *Lux v. Commonwealth*, 484 S.E.2d 145 (Va. Ct. App. 1997) (state has the burden of proving former defense attorney has been walled off from defendant's case);
- *People v. English*, 665 N.E.2d 1056, 1058 (N.Y. 1996) ("To warrant vacatur of the conviction … defendant must establish actual prejudice or substantial risk of an abused confidence");

- *State ex rel. Romley v. Superior Court*, 908 P.2d 37, 43-44 (Ariz. App. Div. 1 1995) (screening of conflicted attorney removed any appearance of impropriety);
- *State ex rel. Tyler v. MacQueen*, 447 S.E.2d 289, 290 (W.Va. 1994) (former defendant's attorney's conflict is not imputed to the entire office);
- *State v. Pennington*, 851 P.2d 494, 499 (N.M. App. 1993) (overturned prior case which required disqualification of entire prosecutor's office);
- *State v. Crandell*, 604 So. 2d 123, 128 (La. Ct. App. 1992) (former defendant's attorney's conflict is not imputed to the entire office);
- *State v. Dambrell*, 817 P.2d 646 (Idaho 1991) (defendant must show actual prejudice for prosecuting attorney's office to be disqualified);
- *Aldridge v. State*, 583 So.2d 203, 205 (Miss. 1991) (prosecuting attorney's office need not be disqualified if it proves the former defense attorney did not participate in the case, divulged no confidential information, and notified the other party of the potential conflict of interest);

- *State v. Camacho*, 406 S.E.2d 868 (N.C. 1991) (only the attorney who had received confidential information should be disqualified from prosecuting);
- *Frazier v. State*, 362 S.E.2d 351 (Ga. 1987) (rules of professional conduct require screening of conflicted attorney, not disqualification of entire prosecutor's office);
- *State v. McKibben*, 722 P.2d 518, 525 (Kan. 1986) (court should "look at the circumstances of the particular case to determine whether confidences have been breached resulting in prejudice to the defendant, and whether the defendant's former attorney participated in any way in prosecuting the defendant");
- *State v. Fitzpatrick*, 464 So.2d 1185, 1188 (Fla. 1985) (disqualification not required where record showed that former counsel did not participate in prosecution);
- *Young v. State*, 465 A.2d 1149, 1155 (Md. 1983) (trial court must inquire whether the defendant's former counsel actually "participated in the prosecution of the case or divulged any confidential information to any other prosecutor");
- *State v. Tippecanoe County Court*, 432 N.E.2d 1377, 1379 (Ind. 1982) ("Where a lawyer who has represented a criminal defendant on prior occasions is one of the deputy prosecutors,

disqualification of the entire office is not necessarily appropriate. Individual rather than vicarious disqualification may be the appropriate action, depending upon the specific facts involved.");

- *Commonwealth v. Miller*, 422 A.2d 525, 529 (Pa. Super. Ct. 1980) ("[I]ndividual rather than vicarious disqualification is the general rule" when a defense attorney joins the prosecuting attorney's office);
- *State v. Cline*, 405 A.2d 1192, 1207 (R.I. 1979) (appointment of special prosecutor only "provides a purported remedy which is more cosmetic than substantial" because of necessary communication between prosecuting office and special prosecutor);
- *Upton v. State*, 516 S.W.2d 904 (Ark. 1974) (holding that the steps taken to ensure confidential relationship was sufficient to ensure a fair trial).

But see Whitaker v. Commonwealth, 895 S.W.2d 953, 956 (Ky. 1995) (disqualification of entire prosecutor's office required when former defense

attorney "engaged in a substantial and personal participation in the defendant's case. . . .").[3]

Defendant cites to a trial court decision from Ohio for the proposition that an appearance of impropriety is sufficient to require the disqualification of an entire prosecutor's office. (Defendant's Brf. at 31, *citing State v. Cooper*, 409 N.E.2d 1070, 1073 (Ohio Ct. Common Pleas 1980)). Since that decision, Ohio appellate courts have since held that an appearance of impropriety, without more, will not disqualify an entire office. *See State v. Richardson*, 17 N.E.3d 644 (Ohio App. 3d Dist. 2014) ("[T]he mere appearance of impropriety in a government office is not sufficient, in and of itself, to warrant disqualification of the entire office because the relationship between attorneys in a government office is different from those in private firms, as are the objectives that they seek, i.e., 'just results rather than the result desired by a client.' ").

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[3] Colorado courts have held that entire offices may be disqualified in similar circumstances to this case, but have done so in reliance on a unique statute and not on an implicit appearance of impropriety rule. *See People v. Loper*, 241 P.3d 543, 547 (Colo. 2010); *People v. Perez*, 201 P.3d 1220, 1230-31 (Colo. 2009).

Defendant relies on *Turbin v. Superior Court*, 797 P.2d 745 (Az. Ct. App. 1990) for the proposition that the screening procedures used in this case "d[id] not address the appearance of impropriety concerns" caused by Cheney's employment at the prosecutor's office. Subsequent decisions from Arizona courts subsequently decided that screening procedures can be effective, and that disqualification is not required in every case. *State ex rel. Romley v. Superior Court*, 908 P.2d 37, 43-44 (Ariz. App. Div. 1, 1995).

This court should follow the majority rule and allow a conflicted assistant prosecuting attorney to be screened. A *per se* rule that imputes a conflict to the entire prosecuting attorney's office "would unnecessarily limit mobility in the legal profession and inhibit the ability of prosecuting attorney's offices to hire the best possible employees. . . ." *State v. Kinkennon*, 747 N.W.2d 437, 443 (Neb. 2008).

Defendant states that the arguments of diminished mobility and additional costs of a special prosecutor "lack meaningful substance" because a prosecutor's office previously recused itself from all of a newly hired prosecutor's former clients' cases in *State ex rel. Horn v. Ray*, 138 S.W.3d 729 (Mo. App. E.D. 2002). (Defendant's Brf. at 29-30). The fact that one prosecutor's office was willing to incur the extremely high costs mass recusal for the sake of hiring one particular attorney does not mean that it was not

an onerous burden, or that the burden should be codified for all Missouri prosecutors by rule.

No reason exists to adopt an irrebuttable presumption that a former defense attorney will breach her duty to her former client. Such a rule would presume "that prosecutors would violate a clear mandate (that the disqualified employee be isolated from all involvement in the prosecution) and then lie about such violation." *State v. Pennington*, 851 P.2d 494, 499 (N.M. App. 1993).

> One obvious problem with the presumptive approach is that presumptions generally are employed in situations where, in common experience, the presumed fact generally or naturally can be expected to follow if the predicate fact is shown to exist, yet we are aware of no empirical or other evidence suggesting that members of the bar are typically or frequently inclined to disregard their ethical obligations when they switch employment.

State v. Addison, 89 A.3d 1214, 1220 (N.H. 2014) (internal citations omitted).

> This court should not be
>
> so cynical in its view of prosecutors to conclude that, where an assistant prosecutor does not participate in the prosecution of his former client, has no managerial role with respect to those who do, and has sworn that he has not disclosed, and will not disclose, any

> confidential information, the danger that he will nevertheless ignore his ethical obligations is so great that the entire prosecutor's office must be disqualified.

People v. Shick, 744 N.E.2d 858, 908 (Ill. App. 3d 2001).

Although a *per se* disqualification rule may be well meaning, it is unlikely to provide any more protection to Defendant than the screening policy used in this case. When a special prosecutor is appointed, there is, necessarily, some communication between the prosecuting attorney's office and the special prosecutor. *State v. Cline*, 405 A.2d 1192, 1207 (R.I. 1979). Even when a special prosecutor is appointed, the court must rely on the former defense attorney to not violate her continuing duty of confidentiality to her former client. In this way, the appointment of a special prosecutor in this case would be "a purported remedy which is more cosmetic than substantial." *Id*.

Defendant does not dispute that this is a cosmetic remedy, but argues that it, nonetheless, would give the appearance "that the court system is one with integrity committed to fairness." (Defendant's Brf. 28). If all that is required to give an appearance of fairness is for the State to take some action, then screening is an appropriate remedy to any appearance of impropriety. Just as with appointing a special prosecutor, screening demonstrates that the prosecutor is committed to a fair trial.

E. A mere appearance of impropriety is an insufficient basis for vacating a conviction.

Vacating a fairly obtained conviction based on an apparent, but not actual, impropriety is inconsistent with Missouri and federal case law. Any constitutional violation, however harmless, could give an appearance of impropriety. Yet "[n]ot all constitutional errors require reversal." *State v. Storey*, 986 S.W.2d 462, 466 (Mo. banc 1999). *See also Chapman v. California*, 386 U.S. 18 (1967) (holding that harmless constitutional violations do not require a conviction to be vacated). If an actual, but harmless, constitutional violation does not require reversal, it cannot be said that an apparent, but not actual, impropriety does. Any constitutional violation could appear improper. Applying an appearance of impropriety standard would vitiate this Court's harmless error doctrine.

Defendant argues that this Court should apply the same appearance of impropriety that is applied to judges, arguing that it would be "incongruous" to apply the standard to judges and not to prosecutor's offices. (Defendant's Brf. at 26). The difference is that judges are required to avoid the appearance of impropriety under the Code of Judicial Conduct and prosecutors are not. Rule 2-1.2. Defendant, in effect, argues that the prosecutors in this case have violated a rule that is not in the Rules.

The ethical rules for attorneys are different from those for judges because they have fundamentally different roles in the legal system. While "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate," Rule 4-3.8, Comment 1, "[j]udges are the embodiment of the judicial system and as such their conduct, even extra-judicial conduct, is much more likely to effect the public's perception of the judicial system [than a lawyer's]. For this reason a code of ethics for judges must be much broader in its scope than one for lawyers." Brain 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). In contrast to the other branches of government, the judiciary uniquely relies on public support for its power. "Possessed of neither the purse nor the sword, it depends primarily on the willingness of members of society to follow its mandates." Irving R. Kaufinan, *Lions and Jackals: The Function of a Code of Judicial Ethics*, 35 LAW & CONTEMP. PROBS. 3, 5 (1970).

There is a line between proper and improper conduct for both judges and attorneys. Both attorneys and judges are expected to be patient, dignified and courteous; however, only judges are required to do so by their ethical rules. *See* Rule 2-2.8. When an attorney crosses the line of propriety, there is an impartial arbiter, a judge, who can intervene to maintain the dignity of the proceeding. There is not a second judge to immediately intervene when a

trial judge crosses that line. Instead, they have the Code of Judicial Conduct with prophylactic guidelines to ensure that they will not come close to the line of propriety.

In this case, and in cases like it, the trial judge can readily determine whether there has been actual impropriety to the detriment of the defendant. The trial judge can monitor the prosecutor through the proceedings and determine whether she has obtained an unfair advantage by hiring a former defense attorney. Applying purely prophylactic rules, such as the *per se* rule of disqualification with an irrebuttable presumption of prejudice, is unnecessary where a judge can determine whether the prosecutor has actually acted improperly.

F. There was no appearance of impropriety in this case.

A reasonable person would not have a factual ground to find an appearance of impropriety in this case. The State properly screened Cheney from Defendant's case. (Tr. 17-20). She testified, under oath, that she was not involved in his prosecution and that she did not disclose any information related to the case to the prosecutor. (Tr. 17-18). A reasonable person would find that these procedures were sufficient to ensure that Defendant had a fair trial.

None of the screening procedures described in *Ross* are applicable in this case. First, Cheney is employed only by the prosecuting attorney's office,

so no additional communication is required. Second, there are no proceeds to apportion to Cheney. Third, the prosecuting attorney's office is necessarily aware of Cheney's potential conflict and no additional information could be given to Cheney's current employer. Fourth, Rule 4-1.7 applies to conflicts with current clients, not former clients. Rule 4.1-11 is the proper rule for former conflicts by government attorneys. Applying any of the screening procedures described in *Ross*, rather than those prescribed in Rule 4-1.11, is inappropriate.

Unlike in *Ross*, the State properly screened Cheney from Defendant's case. (Tr. 17-20). Defendant argues that because the prosecutor's office in this case was small, "the ability to effectively screen an attorney from her former cases is going to be lessened …." (Defendant's Brf. at 32). Whether or not this is true in the abstract, it was not true in this case. Cheney testified that she did not have any conversations with the other prosecutors about her former clients. (Tr. 17-18). Defendant has not alleged, much less proven, that any such conversations did take place.

The attorney in *Ross* took depositions as the defendant's attorney, spoke with the defendant numerous times, and worked on the defendant's case up to one week before trial. *Ross*, 829 S.W.2d at 949. Cheney represented Defendant for less than a month and did comparatively little work on Defendant's case. (Tr. 8, 16). This brief representation does not

trigger the same appearance of impropriety as in *Ross*. In *Ross*, one of the attorneys "t[ook] a confidential statement about the very facts of the case." *Ross*, 829 S.W.2d at 949. Cheney testified that she did not discuss potential defenses in her only meeting with Defendant. (Tr. 23). They discussed obtaining more records and investigating Defendant's relationship with others involved in the case. (Tr. 23). No reasonable person, fully informed of the facts, would conclude that it was improper for the prosecuting attorney's office to prosecute Defendant.

Defendant argues that there was an appearance of impropriety based on Cheney's statements regarding Defendant and his family while she represented him, and the Cheney's knowledge of Defendant's health problems. (Defendant's Brf. at 33-39). No reasonable person, fully informed of the facts, could believe that either of these things would deprive Defendant of a fair trial.

While she represented Defendant, Cheney wrote internal memoranda in which she said that she was "pissed at [Defendant's] stupid family" and she wished the attorney taking over the case "good luck." (Ex. A). Defendant argues that the "offensive and disparaging commentary about [Defendant]'s family and negative views about the substance of his case underscore" the appearance of impropriety. (Defendant's Brf. at 36-37).

First, these were internal memoranda, not public statements. The only reason these statements are available is because Defendant asked that they be unsealed. (Defendant's Motion to Unseal Exhibit A). It is unreasonable to judge an appearance of impropriety on facts that are unknown to, and unknowable by, the public. 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.

Second, this reflects why having a vague standard, like an appearance of impropriety, is unworkable. If merely expressing frustration and dislike for a defendant in a private communication creates an appearance of impropriety, then prosecutors would be unable to zealously advocate for the State's position. *See State v. Johnson*, 220 S.W.3d 377, 388 (Mo. App. E.D. 2007) (stating that prosecutors have an ethical duty to zealously represent their client). When a defendant is a danger to the community who needs to be detained pending trial, the prosecutor must be able to say so, and say so forcefully, without fear that his statements regarding the defendant's violent nature would cause him and his entire office to be disqualified from prosecuting the defendant.

Defendant's mother wrote Cheney a letter in which she said that Defendant had two heart surgeries and that "he has always been a miracle

being alive this long." (Ex. A at 10). She then described the way in which the surgeries redirected blood flow in Defendant's heart. (Ex. A at 10). At trial, defense counsel gave a biography of Defendant, which included the fact that he had heart surgery as an infant and that his heart condition caused him to be disabled. (Tr. 194-95). Defendant gave a detailed description of his medical history on direction examination. (Tr. 355-58). Apparently confused by Defendant's testimony, the prosecutor asked on cross-examination, "what in the world does your heart condition have to do with what you did to your daughter?" (Tr. 367). Defendant said it did not have anything to do with the proceedings. (Tr. 368). He later said that his heart condition caused a shortness of breath, so that he "physically didn't feeling like" having intercourse with his wife, although his son was conceived during this time. (Tr. 371-72).

Defendant argues that because there was a brief mention of a heart surgery in the letter and discussions about Defendant's heart condition at trial, that this "underscores" the appearance of impropriety. (Defendant's Brf. at 38-39). There is no appearance of impropriety. First, Defendant does not allege, and there is no evidence in the record, that Cheney disclosed anything contained in the letter to the prosecutor. Second, Defendant's medical history was not a secret. Defendant testified that his wife and Victim knew about his heart condition. (Tr. 368). Third, the State did not submit evidence, call an

expert witness to rebut Defendant's medical claims, or in any way exploit a potential prior knowledge of Defendant's medical condition. A reasonable, fully-informed observer would not think that Cheney's knowledge that Defendant had heart surgery deprived Defendant of a fair trial.

The current Rules of Professional Conduct do not impute conflicts to the entire prosecuting attorney's office. Rule 4-1.10. They specifically contemplate screening conflicted government attorneys. Rule 4-1.11, Comment 2. Cheney was properly screened from Defendant's case, as described in Rule 4-1.0(k). Therefore, the trial court did not abuse its discretion in denying Defendant's motion to disqualify the prosecuting attorney's office.

Even if this Court were to apply the repealed appearance of impropriety standard, a reasonable, fully-informed observer would not believe it was improper for the prosecuting attorney's office to prosecute Defendant. Cheney was properly screened and testified she did not disclose any confidential information.

Defendant's conviction should be affirmed.

II (Error in Written Judgment).

The written judgment contains a clerical error, stating that the jury had convicted Defendant of Count I when in fact the State had

dismissed Count I. This Court should correct this error *nunc pro tunc*.

A. Facts regarding this claim

The State originally charged Defendant with two identical counts of first-degree statutory sodomy. (L.F. 14). Count I was dismissed before the case was submitted to the jury. (Tr. 421). The jury returned a verdict only on a single count. (L.F. 47). Defendant pointed out to the court at sentencing that the sentencing assessment report erroneously stated Defendant was convicted on two counts. (Tr. 452). The written judgment erroneously stated Defendant was convicted of two counts of first-degree statutory sodomy. (L.F. 51).

B. The written judgment should be corrected by a *nunc pro tunc* order.

If the trial record contains "a basis to support an amendment to the judgment and the trial court's intentions regarding the defendant's sentence are clear from the record, such mistakes can be corrected by a *nunc pro tunc* order, which is used to make the record conform to what was actually done." *State v. Carroll*, 207 S.W.3d 140, 142 (Mo. App. E.D. 2006).

Here, the record clearly indicates that the jury convicted Defendant of Count II and that the State dismissed Count I. This Court should, accordingly, enter an order *nunc pro tunc* correcting the trial court's

judgment to reflect these facts. *See State v. Allison*, 326 S.W.3d 81, 94-95 (Mo. App. W.D. 2010) (written judgment which stated Defendant was convicted of dismissed count corrected *nunc pro tunc*).

CONCLUSION

Defendant's conviction should be affirmed. Defendant's written judgment should be corrected *nunc pro tunc* to remove the conviction for Count I.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Adam Rowley
ADAM ROWLEY
Assistant Attorney General
Missouri Bar No. 64125

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 7,279 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on this 3rd day of November, 2014, to:

William J. Swift
1000 West Nifong
Building 7, Suite 100
Columbia, MO 65203

/s/ Adam Rowley
ADAM ROWLEY
Assistant Attorney General
Missouri Bar No. 64125
P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEY FOR RESPONDENT
STATE OF MISSOURI