STATE OF IDAHO)
County of KOOTENAI)ss
FILED April 26, 2021
AT 2:00 O'clock P.M
CLERK, DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,
Plaintiff,
vs.
ELIZABETH BRITIANY KEYES,
DOB: 09/19/1997
SSN: XXX-XX-0376
IDOC: 139483
Defendant.

Case No. **CR28-20-5762**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO DISQUALIFY FOR CAUSE PURSUANT TO I.C.R. 25(b)(4)

I. INTRODUCTION AND PROCEDURAL HISTORY.

On February 18, 2021, defendant Elizabeth Britiany Keyes (Keyes) pled guilty to the two felony charges in the Amended Information: Count I, Murder in the Second Degree, and Count II, Concealment of Evidence. On that same day, this Court scheduled sentencing for Keyes on April 27, 2021, and this Court ordered a presentence report be prepared.

On April 20, 2021, Anne Taylor, attorney for Keyes, filed a four-page Motion to Disqualify. The body of that motion and memorandum states such motion is made by Keyes pursuant to I.C.R. 25(b)(4). Mot. to Disqualify 1. Attached to the motion is an Affidavit of Anne C. Taylor. At no point in that four-page motion/memorandum does counsel for Keyes request a hearing. Subsequent to the filing of that motion, counsel for Keyes did not obtain a hearing date from the Clerk of Court and notice a hearing on behalf of the moving party. Keyes not requesting a hearing on her motion to disqualify

plays havoc with a half-day sentencing hearing scheduled to occur only eight days after Keyes filed her motion to disqualify. The rule itself and Idaho appellate case law make it quite clear that once a motion to disqualify is filed, the Court must address that motion before it can take any other action. Idaho Criminal Rule 25(e) states, "On the filing of a motion for disqualification, the presiding judge has no authority to act further in the action except to grant or deny the motion for disqualification." The Idaho Supreme Court has held this language means exactly what it says. *State v. Larios*, 129 Idaho 631, 633, 931 P.2d 625, 627 (1997). Idaho Criminal Rule 25(c) requires two things pertaining to a motion to disqualify for cause. First, the motion must be supported by an affidavit. Second, a hearing must be conducted by the Court before the Court can rule on such a motion. That subsection reads:

> **(c) Motion for Disqualification.** A disqualification for cause must be made by a motion to disqualify accompanied by an affidavit of the party or that party's attorney stating distinctly the grounds on which disqualification is based and the facts relied on in support of the motion. The motion for disqualification for cause may be made at any time. The presiding judge sought to be disqualified must grant or deny the motion for disqualification on notice and hearing in the manner prescribed by these Rules for motions.

Because Keyes, the moving party, did not request a hearing or file a notice of hearing, the Court *sua sponte* scheduled the hearing on Keyes' Motion to Disqualify for Tuesday, April 26, 2021, the day before Keyes' sentencing hearing. Again, that half-day sentencing hearing has been scheduled for the past two and one-half months. Due to this Court's trial schedule and then-existing motions schedule, this was the soonest such motion could be scheduled after the April 20, 2021, date Keyes chose to file her motion to disqualify.

On April 22, 2021, the plaintiff filed its Response to Motion to Disqualify. The Court has read all briefing submitted by the parties.

Counsel for both parties appeared at the April 26, 2021, hearing. At the conclusion of that hearing, the Court denied Keyes' Motion to Disqualify. This Memorandum Decision and Order Denying Defendant's Motion to Disqualify for Cause Pursuant to I.C.R. 25 (b)(4) sets forth the basis for that decision.

II. ANALYSIS.

A. The Facts.

Keyes seeks to disqualify this Court for presiding over her sentencing hearing for the crimes of Murder in the Second Degree and Destruction or Alteration of Evidence. The criminal rule under which Keyes has made that motion is Idaho Criminal Rule 25(b)(4). Mot. to Disqualify 1-4. Idaho Criminal Rule 25(b)(4) reads:

> **(b) Disqualification for Cause.** Any party to an action may disqualify a judge from presiding in any action on any of the following grounds: (4) that the judge is biased or prejudiced for or against any party or that party's case.

The basis for Keyes' motion is this Court's statements and decisions in a variety of other criminal cases in which Keyes' counsel and other Deputy Public Defenders have filed a Motion to Disqualify the Kootenai County Prosecuting Attorney's Office. Keyes claims:

> This motion is made pursuant to Idaho Criminal Rule 25(b)(4), and with consideration of Judicial Cannon [sic] 2, specifically, Rules 2.2 and 2.11. This motion is accompanied by the Affidavit of Anne C. Taylor.
>
> Elizabeth Keyes entered guilty pleas to two counts in the *Amended information* and is set for Sentencing April 27, 2021. Since the time of entry of plea, the presiding judge stated, on the Record, he plans to file a bar complaint against Counsel for Ms. Keyes; these statements were made in at least three separate instances. Ms. Keyes respectfully requests the Court recuse itself form presiding over this case.
>
> The basis of this motion is to protect Ms. Keyes from judicial bias; Judge Mitchell has bias or prejudice against Ms. Keyes' case due to bias or prejudice against her counsel. Counsel for Ms. Keyes was first advised March 31, 2021 by Judge Mitchell of his intention to file a bar complaint against her. The judge made this statement again to Counsel April 5, 2021 and Counsel is aware the judge stated again on the Record in a separate case April 6, 2021. At this time, Counsel has received [sic] not received written documentation of a bar complaint from the Idaho State Bar Foundation, but the motion for Ms. Keyes cannot wait.

Mot. to Disqualify 1-2. Attached to Keyes' Motion to Disqualify is the Affidavit of Anne C. Taylor. The pertinent portions of that Affidavit which support the above claims of Keyes are as follows:

> 4. On March 31, 2021 I was in court before Judge Mitchell on a separate matter and was advised I would be reported to the Idaho State Bar.
> 5. On April 5, 2021 I appeared for a continued hearing from March 31, 2021 in front of Judge Mitchell. At the conclusion of the hearing Judge Mitchell stated he would be filing a bar complaint against me and several other members of my office.
> 6. On April 6, 2021 in a separate hearing, but on the record Judge Mitchell stated his intent to file a bar complaint against several attorneys from the Public Defender's Office and named each attorney; myself included.

Affidavit of Anne C. Taylor 1-2, ¶¶ 4-6.

The statement that, "Counsel for Ms. Keyes was first advised March 31, 2021 by Judge Mitchell of his intention to file a bar complaint against her", is false. It is unfortunate that counsel for Keyes made such false statement under oath.

Counsel for Keyes' statement in her motion that, "The judge made this statement again to Counsel April 5, 2021" is partially true and partially false. On April 5, 2021, this Court informed counsel for Keyes that the Court intended to file a bar complaint against her, but this was the first time that statement had been made by this Court, thus counsel for Keyes' use of the word "again" is false. The claim made by counsel for Keyes attributed to April 6, 2021, is true.

In any event, this Court has made the statement that it intended to file a complaint with bar counsel regarding the filing of several Motions to Disqualify the Kootenai County Prosecuting Attorney's Office in a variety of cases. Those motions being filed by Deputy Public Defenders whom counsel for Keyes supervises, and one such motion was filed by counsel for Keyes.

As mentioned above, counsel for Keyes' claim as to what occurred on March 31,

2021, (that this Court stated its intention to file a bar complaint) is false. The Court should explain why that is so. This Court has read the minutes of the March 31, 2021, hearing in *State v. Eisenhart*, CR2017 5838, the only hearing in which counsel for Keyes was involved before this Court on March 31, 2021. The minutes do not mention any such statement nor do they mention the subject (of a Motion to Disqualify the Kootenai County Prosecuting Attorney's Office) being broached. Realizing the court minutes are not a verbatim account of the proceeding, the Court then listened to the entire proceeding in *Eisenhart* held on March 31, 2021. While the 20-minute hearing was rather lengthy for a motion to continue, the Court actually spoke very little. The hearing was predominantly Jed Whitaker and Anne Taylor going back and forth about why they agreed the hearing on Eisenhart's Motion to Disqualify the Kootenai County Prosecuting Attorney's Office should be continued so that counsel for the plaintiff could explore new estoppel arguments. Since both Whitaker and Taylor agreed the hearing should be continued, *and because Jodi Eisenhart was not present,* the Court granted the motion to continue and rescheduled the hearing on Eisenhart's Motion to Disqualify the Kootenai County Prosecuting Attorney's Office for April 5, 2021.

Thus, counsel for Keyes has made a false statement in her Motion to Disqualify the Court for cause in Keyes' case, and a false statement under oath in her affidavit. The statements which are true (that on April 5, 2021, this Court stated its intention to file a bar complaint against Anne Taylor, and that on the next day this Court listed the attorneys this Court intended to file such bar complaints against), is incomplete. The fact that this Court made such a statement must be viewed in full context. Much of this memorandum opinion sets forth that "context". It is important to understand *to whom* (who else besides counsel for Keyes) the Court made that statement in other cases, *when* the Court made those statements and *why* the Court made those statements to these various attorneys

and why the Court made that singular statement on April 5, 2021, to counsel for Keyes.

Counsel for Keyes has chosen not to favor the Court or counsel for the plaintiff with the case names and case numbers where these hearings occurred. This defect was noted by counsel for the plaintiff as well. Resp. to Mot. to Disqualify Pursuant to I.C.R. 25(b)(4), 3.

Prior to making the statement (that this Court intended to file a bar complaint) to counsel for Keyes on April 5, 2021, nearly two weeks before, on March 24, 2021, statements were made by this Court to a different attorney in counsel for Keyes' office, Deputy Public Defender Patricia Taylor in *State v. Lehenbauer,* CR28-20-20176. In that case, on March 3, 2021, Patricia Taylor filed a Motion to Disqualify the Kootenai County Prosecuting Attorney's Office. Patricia Taylor signed that pleading on March 1, 2021. On March 10, 2021, Patricia Taylor filed a Notice of Hearing, scheduling such Motion to Disqualify the Kootenai County Prosecuting Attorney's Office for March 22, 2021. That hearing had to be continued and oral argument on Lehenbauer's Motion to Disqualify the Kootenai County Prosecuting Attorney's Office was held just prior to her March 24, 2021, sentencing hearing. On March 24, 2021, Patricia Taylor asked that her Motion to Disqualify the Kootenai County Prosecuting Attorney's Office be vacated. Patricia Taylor stated to the Court, "We can vacate the hearing on that Motion to DQ PA's office. Unless the court wants to proceed today." Court Minutes 2:26:47. This Court made it clear to Patricia Taylor that her Motion to Disqualify the Kootenai County Prosecuting Attorney's Officer *had* to be heard before sentencing of her client Lehenbauer could take place, based on this Court's reading of *State v. Severson*, 147 Idaho 694, 213 P.3d 414 (2008), a case which was cited by counsel for Lehenbauer in her Motion to Disqualify the Kootenai County Prosecuting Attorney's Office. *Id.* at 2:27:13. This Court then expressed its frustration over the fact that the cases cited by counsel for Lehenbauer

(*Severson* and *State v. Cherry*, 139 Idaho 579, 83 P.3d 123 (Ct. App. 2004)) hold that the defendant has the burden to prove an actual conflict and that the defendant had the burden of proving actual prejudice, yet the defendant in *Lehenbauer* had no evidence of such. *Id.* at 2:31:24 – 2:35:30. At that March 24, 2021, hearing in *Lehenbauer*, this Court did not tell Patricia Taylor that a bar complaint would be filed. That is because, after reading *Severson* and *Cherry* in preparation for that hearing, the Court was primarily focused on what had to be proven by Patricia Taylor on behalf of the moving party, and the lack of evidence presented at that March 24, 2021, hearing in *Lehenbauer*. This Court felt at the time, and still does, that just because the moving party has no evidence to sustain its burden on a motion, that fact alone is, in all likelihood, not a reason to file a bar complaint upon an attorney. It was not until after the *Lehenbauer* hearing, when this Court was preparing for the several March 31, 2021, hearings on Motions to Disqualify the Kootenai County Prosecuting Attorney's Office scheduled in *Vanrossum*, (Kootenai County case No. CR2017 2102, CR2016 18630 and CR28-21-1583) *Towner* (Kootenai County case No. CR28-18-12846 and CR28-20-18022), *Eisenhart* (Kootenai County Case No. CR2017 5838), and *Schroeder* (Kootenai County Case No. CR28-20-3331), that this Court focused on not only what had to be proven, but also, what had to be asked of the defendant in each case, the defendant being the party who was making the motion to disqualify the Kootenai County Prosecuting Attorney's Office in each case.

Before any of these proceedings began on March 31, 2021, the Court was aware, from having conducted the *Lehenbauer* hearing eight days before, that the defendants and their attorneys in each of these cases four cases, likely had no evidence to prove actual conflict and likely had no evidence to prove actual prejudice to the client. The Court knew from reading *Severson* that it had to have a hearing on the Motion to Disqualify the Kootenai County Prosecuting Attorney's Office in each case before it could

turn its attention to other matters pending in those cases. There were matters pending in six different cases. In *Vanrossum*, there were three cases scheduled on March 31, 2021. Two cases were scheduled for evidentiary hearings on probation violations and one case was scheduled for an arraignment. In *Eisenhart*, defendant's Motion to Terminate Probation had been filed and needed to be heard. In *Schroeder* and in *Towner,* a jurisdictional review hearing would need to be scheduled.

The three *Vanrossum* cases were scheduled for the morning, the rest of the cases were scheduled for the afternoon of March 31, 2021. In all these cases, *Vanrossum, Towner*, *Eisenhart*, and *Schroeder* (in that order) there were scheduled Motions to Disqualify the Kootenai County Prosecuting Attorney's Office. The *Eisenhart* case was handled by counsel for Keyes' attorney.

In two of the three *Vanrossum* cases, those matter were scheduled for an evidentiary hearing on a probation violation. Vanrossum was represented by Deputy Public Defender Claire Freund. Before the evidentiary hearing in those two *Vanrossum* cases could take place, the Court stated the defendant's Motion to Disqualify the Kootenai County Prosecuting Attorney's Office had to be heard first, and Ms. Freund agreed. But when this Court asked Ms. Freund if she had any evidence, she said she had no evidence. She stated she would only be making a record as to when Ms. Drews went from her office (the Public Defender's Office) to the Kootenai County Prosecuting Attorney's Office. Court Minutes at 11:44:01 a.m. The Court then pointed out the *Severson* case, and asked in light of that case why she was not putting on the testimony of any witness. Ms. Freund responded, "This is how our office has been handling this motion for the last few weeks." *Id.* 11:44:58 a.m. Steve Vanrossum was present via Zoom at the Kootenai County Jail. It was clear from that hearing that up until the time that hearing started on March 31, 2021, Vanrossum had no idea his attorney had filed these

Motions to Disqualify the Kootenai County Prosecuting Attorney's Office in two probation violation cases. *Id.* at 12:01:14. Ms. Freund made it clear that she was asking the Court to find that the Idaho Supreme Court's decision in *Cherry* misapplied the Idaho Rules of Professional Conduct and should be accorded no weight. *Id.* at 11:57:39. The Court Minutes read:

> [Judge Mitchell] I do find that it is the plaintiff's burden to prove actual conflict and the plaintiff has completely failed in that regard. There is no proof of any actual conflict. Since there's not proof of actual conflict, there's also no proof of actual prejudice. The defendant has tried to raise the appearance of impropriety which *Cherry* specifically doesn't allow, citing *Gibson* and *Merrifield* as already read into the record. There is no evidence in the defendant's motion. Essentially, the defendant is asking this Court to speculate as to a conflict based solely on the timing of Ms. Drews leaving. You signed the motion, requested a hearing and that is what we are doing now. Case law makes it quite clear that it is your burden and I can't engage in speculation and can't make a decision on an appearance of impropriety. There is nothing that would support making a finding that you met your burden. Plus, the motion to DQ the entire KCPA office as a whole that is asked for on page 3 is absolutely untenable given the complete lack of evidence and absolute failure to sustain your burden of proof. What is troubling to me is this motion was filed March 1st and now it is March 31st and Mr. Van Rossum just found out he was bringing this motion today. In that month, there is nothing keeping the defendant from taking Mr. McHugh's [elected Kootenai County Prosecuting Attorney] deposition or Ms. Drews' deposition to find out if there is any actual conflict. All you've done is stand up and say there's a conflict here. Your office has done that in at least 10 cases assigned to me and I don't know how many before other Judges. I am assuming that there was the same lack of evidence in those matters as well.
> [Claire Freund] To my knowledge, no Judge has granted the motion. I have not tried to take Mr. McHugh's or Ms. Drews' depositions and I don't think anyone in my office has.
> [Judge Mitchell] I don't know how you can meet your burden w/o doing that. It seems you didn't have any evidence when you filed this motion on March 1st and you don't have any evidence today. I will not disregard State vs. Cherry. Even if I did and said that the PD's office is a firm, I find the Idaho rule of professional conduct has [not] been violated. Defendant did not meet his burden, motion is denied in all 3 cases, Ms. Freund to prepare an order. We have 4 similar motions this afternoon starting at 4pm so if counsel would tell your offices that we will probably be here until 7-8 at night b/c I am finding that Severson mandates that I have to have a hearing once the motion is filed and if I don't have a hearing and make findings then any conviction of your client could be overturned and any action taken from now on could result in reversing any decisions I made. Even if you came in and

> asked me to vacate this hearing, I have to have a hearing, I have to have evidence and I have to make a finding. It's going to take a while to get through all of these.

Id. at 11:58:06 - 12:07:16. Forty minutes after beginning the hearing on defendant's Motion to Disqualify the Kootenai County Prosecuting Attorney's Office, the Court, now during the noon hour, was ready to begin Vanrossum's probation violation evidentiary hearing. The Court has listened to the digital recording of that hearing. At no point did the Court state that it was going to file a bar complaint against Freund. While the Court was frustrated with the motion itself, the Court calmly and thoughtfully explained its reasons for denying the motion. The Court was not inclined to file any bar complaint against Claire Freund because to her credit, she understood at the outset of that hearing that there had to be a hearing on the Motion to Disqualify the Kootenai County Prosecuting Attorney's Office, which would certainly indicate that perhaps she had read the *Severson* case she had cited in her brief. She also had her client present (though he needed to be there anyway for his probation violation evidentiary hearing).

Later that afternoon, the Court first heard the two *Towner* cases. Adrien Fox was the Deputy Public Defender representing Towner. Towner was not present. When the Court asked Adrien Fox why his client was not present, Adrien Fox told this Court:

> [Adrien Fox] I received additional information from Mr. Poorman [Deputy Prosecuting Attorney] which shows compliance with Idaho rules of professional conduct and was going to revoke motion so did not have my client appear. He is in IDOC. I was not planning on calling my client as a witness. My client knows that we filed this motion, he is not aware that we were moving to withdraw the motion. He was sent a notice of hearing. I am comfortable proceeding w/o my client here based on the additional materials I received from the State.
> [Judge Mitchell] My reading of State vs. Severson is that I can't allow you to withdraw the motion, I have to have a hearing. You can handle that hearing any way you want, but my reading of that case is that the moment the motion is filed, I have to run it to ground and decide it.

Court Minutes 3:38:28. Then, the following occurred:

> [Judge Mitchell] I am going to review my notes on Severson quickly. According to Severson, Mr. Towner should be able to voice his concerns about the continued representation by the KCPA, is your client waiving that right?
> [Adrien Fox] I did not speak with him specifically about that this afternoon.
> [Judge Mitchell] So are you waiving that on behalf of your client?
> [Adrien Fox] I think I would at this time.
> [Judge Mitchell] Reads from Severson 147 Idaho at 703.
> [Adrien Fox] I understand that. Perhaps out of an abundance of caution, if we reset this I will contact IDOC and make sure he understands his right. I had not read Severson before.
> [Judge Mitchell] You cited it in your motion. Let's do that. I assume that there will be future events that I will have to decide in this case and I would rather not have those reversed. We have made a record today.
> * * *
> [Judge Mitchell] Take back my acceptance of your client's waiver of right to give input so all options are still available for a future hearing. Ask to reset sometime soon so we're not left w/ this on a future day to finish this up.
> [Adrien Fox] I will send correspondence to IDOC.

Id. at 3:28:28 – 3:50:47.

Next, the Court heard the Motion to Disqualify the Kootenai County Prosecuting Attorney's Office in *Eisenhart*. Counsel for Keyes was Eisenhart's attorney, but Eisenhart was not present. Accordingly, the Court continued that hearing until April 5, 2021. This Court told Keyes' counsel, "There are so many of these motions and I am very reluctant to move any of them and I need to deal w/these so I'm going to do that. So we will hear at 2pm on Monday the 5th." Court Minutes 4:25:21. Again, counsel for Keyes writes in her Motion to Disqualify, "Counsel for Ms. Keyes was first advised March 31, 2021 by Judge Mitchell of his intention to file a bar complaint against her." Mot. to Disqualify 2. As mentioned above, the Court has listened to the digital recording of that entire hearing, and that simply did not happen on March 31, 2021, as to Anne Taylor, counsel for Keyes.

Finally, on March 31, 2021, this Court took up *Schroeder*. Schroeder was represented at the hearing by Deputy Public Defender Adrien Fox, but the Motion to Disqualify the Kootenai County Public Defender's Office was signed by Deputy Public Defender Ben Onosko on March 3, 2021, and filed by Onosko on that same date.

Schroeder was in prison on a retained jurisdiction and not present via Zoom. The Court asked Fox if he was ready to proceed. According to the Court minutes, Fox responded:

> [Adrien Fox] I am not seeing that coordination had occurred w/ CAPP, Mr. Schroeder is at IDOC, I don't see that CAPP got the Zoom information. Short answer would be no. Mr. Onosko sent a letter/notice of hearing sent March 9th to Mr. Schroeder at the CAPP facility re: this motion. There has been communication between the two, but nothing I can see specifically discussing this motion. The last conversation was 03/24/2021. Understanding the Court's concerns raised today and a full reading of Severson re: testimony, I don't have any indication either way about Mr. Schroeder's preference in that regard. I have no indication from Mr. Onosko in relation to that so I am uncomfortable waiving anything myself. I have to notice Towner back up.

Court Minutes 4:28:31. Tristan Poorman, Deputy Prosecuting Attorney did not object to Fox's motion to continue made on behalf of Schroeder, stating (per the Court Minutes):

> I think Mr. Schroeder needs to be here. This is the 3rd one of these motions I've heard today and I think it's important to figure out Mr. Schroeder's knowledge as it relates to the filing of this motion. I think that is very important.

Id. at 4:33:51. The Court then stated:

> [Judge Mitchell] With great reluctance I will continue this matter. This is ridiculous. The PD's office is paralyzing the courts by their conduct and that can't be allowed and I don't know what the proper response by me is. I don't know if I turn in a bar complaint to every single deputy that brings these motions. We can't go forward until we hear these motions and the PD's office isn't even making any attempt to read the case cited in the briefings and understand what I am charged with considering. The PD's office is not even making an effort to have their clients present at these hearings. I can't go forward, I am wasting time to prepare for and hear these cases and you folks are not ready. Mr. Fox, you will have to find a time to hear both Towner and Schroeder at the same time and it has to be at least an hour long. You have to coordinate it with IDOC and Madam Clerk by next Thu with that hour hearing in both cases. I am going to decide this motion in these two cases. You either have to have the defendants available or have a waiver by your clients in writing that they don't want to participate in this hearing. I can't accept a withdrawal of the motion, I have to have to hear it under State vs. Severson.
> [Mr. Fox] I understand. Court is directing that no later than next Thu, the Court wants an hour each in both of these cases with either defendants available from IDOC or a written waiver of their appearance.
> [Judge Mitchell] Correct. Prefer to have them available. You look at State vs. Severson and I think I'm treading on thin ice taking a waiver. Motion to

> continue granted. I am going to require that be pinned down by end of business tomorrow, hearing has to take place by end of business next Thu. A lot of coordinating to do, but I am not going to allow the KCPD to basically cripple this Court. What other Judges do is their business, but I won't let you cripple me.

Id. at 4:34:11 – 4:38:53. The Court continued the hearing on Schroeder's Motion to Disqualify the Kootenai County Prosecuting Attorney's Office to April 7, 2021. It is quite clear that the Court is getting to the point of filing a bar complaint at this time.

The next day, on April 1, 2021, the Court heard the defendant's Motion to Disqualify the Kootenai County Prosecuting Attorney's Office in *State v. Parker* CR28-20-9079. The Motion to Disqualify the Kootenai County Prosecuting Attorney's Office was signed by Deputy Public Defender Ed Lawlor on March 3, 2021, and filed with the Court on that same date. In that case, on April 1, 2021, Ailene Parker was in custody with the Idaho Department of Corrections (in prison) and waiting for her jurisdictional review hearing. Parker could not regain her freedom and be placed on probation until that jurisdictional review hearing took place. On April 1, 2021, Parker appeared via Zoom from the IDOC facility SICI, where she was living. She was present because her jurisdictional review hearing was scheduled for 1:30 p.m. on April 1, 2021. Parker was represented by Ed Lawlor, a member of the Kootenai County Public Defender's Office. On March 3, 2021, Lawlor had filed a Motion to Disqualify the Kootenai County Prosecuting Attorney's Office in *Parker.* At no time prior to the April 1, 2021, jurisdictional review hearing had Lawlor noticed up a hearing on his Motion to Disqualify the Kootenai County Prosecuting Attorney's Office. At the April 1, 2021, hearing on Parker's jurisdictional review, the Court stated that it would take up Parker's Motion to Disqualify the Kootenai County Prosecuting Attorney's Office. Lawlor stated, "I would vacate that motion." Court Minutes, 1:37:31. The Court stated "No you won't, because it's not allowed. You are going to have to go forward on this motion." *Id.* at 1:37:39. Lawlor

informed the Court he had no witnesses. *Id.* 1:38:03. To which the Court responded, "I think you are going to have to call your client as a witness. If you don't, I will." *Id.* at 1:38:06. Lawlor called Parker as a witness. On direct examination, the court minutes show Parker testified:

> I am aware of an attorney Casey Drews. She was my attorney. I am aware she now works for the prosecutor's office. I don't understand your question. I don't feel prejudiced from her working in their office.

Id. at 1:40:32. On cross-examination, Parker testified, "I don't think there is a conflict with this case. I don't really know what's going on." *Id.* at 1:41:48. The Court then asked some questions, something it can and is required to do under *Severson*:

> [Judge Mitchell] I have questions, because I don't think DA has addressed what is required. I understand your confusion. When did you become aware that your attorney had filed this motion?
> [Ailene Parker] This is my first time finding out. No one contacted me, no one contacted me regarding a conflict of interest.
> [Judge Mitchell] Your attorney claims there is a conflict of interest. Do you have any evidence that there is a conflict?
> [Ailene Parker] No. I don't have any feelings regarding her leaving for the PA's office. I feel like I should have been notified about what was going on. I have not spoken from anybody from the PD's office, nobody talked to me about this report [her Addendum to Presentence Report, the only pertinent document at a jurisdictional review hearing].

Id. at 1:42:12 – 1:45:10. Lawlor then asked his client some questions, to which she responded:

> [Ailene Parker] I did not receive a letter asking me to contact you regarding this hearing. The only thing I have received is the copies of my sentencing. Back in November, I was in Pocatello at the time.
> * * *
> [Ed Lawlor] I do have a copy of a letter dated March 22nd, sent to the parole release center asking Def to call our office and schedule an appointment.
> [Judge Mitchell] How does a letter from a week ago is relevant to the conflict of interest questions?
> [Ed Lawlor] We are not able to call down and talk to our clients. Typically case managers will tell them they need to call us. Def didn't make an effort to contact our office.
> [Judge Mitchell] There is nothing from your office advising her of a possible conflict of interest. What evidence do you have?

[Ed Lawlor] Ms. Drews did represent her, think that creates the question of a conflict. Once we put the question in play, the PA should have filed an affidavit.
[Judge Mitchell] What evidence did you submit with your motion on March 3rd?
[Ed Lawlor] We did not submit any evidence.
[Judge Mitchell] You have the burden of proving an actual conflict. What evidence do you have in your motion to prove an actual conflict?
[Ed Lawlor] I am not aware of any in this case at the moment. The evidence is Ms. Drews in the PA's office. I thought that was sufficient. I feel this was a tactical decision. I was going to ask the court to vacate it.
[Stan Mortensen, Deputy Prosecuting Attorney] Ask the court to consider the affidavit submitted.
[Ed Lawlor] Submit, no argument.
[Stan Mortensen] I don't think DA has met their burden, ask the court to deny the motion.
[Ed Lawlor] Noting further.
[Judge Mitchell] Deny DF's motion to DQ PA's office from this case. This is one of the most absurd things I've ever heard. I will file a bar complaint against you for making a motion without any evidence, where you cite a case that you haven't even read, and making a motion without notifying your client.

Id. at 1:48:48 - 2:01:59. The Court then turned its attention to Ailene Parker's jurisdictional review hearing, the first question always being if the defendant has had the opportunity to read the Addendum to Presentence Report. Ailene Parker responded "I have not read the report." Lawlor stated, "I request a break-out room with Def for a few minutes." That request was granted. Id. at 2:01:59 - 2:02:45. The Court placed Lawlor and his client in a breakout room and came back to Parker's case about an hour later. The Court had for the first time made it clear that it intended to file a bar complaint against this deputy public defender.

Lawlor's failure to notice up his Motion to Disqualify the Kootenai County Prosecuting Attorney's Office at an earlier date (some time other than the hearing on the jurisdictional review hearing itself), is that it interferes with the Court' docket, it places a hardship on various Idaho Department of Correction personnel in various IDOC facilities, and their inmates (the Public Defender's clients), Deputy Prosecuting Attorneys and

Lawlor's own colleagues...other Deputy Public Defenders. On April 1, 2021, this Court had seventeen different cases involving jurisdictional reviews. There were eleven different defendants in those seventeen cases, and those eleven defendants were located at various IDOC facilities. *Parker* was the first case. Because the Court had to spend over 20 minutes to hear Lawlor's Motion to Disqualify the Kootenai County Prosecuting Attorney's Office in that case, all the other Deputy Public Defenders and their clients, as well as IDOC personnel, were all equally delayed only because Lawlor failed to request an earlier hearing on the motion he filed.

Five days later, on April 5, 2021, this Court heard the hearing in *Eisenhart* which had been continued from March 31, 2021. Keyes' counsel represented Eisenhart at both hearings. This April 4, 2021, hearing, as set forth in the Court Minutes, is as follows.

> Calls case – [Judge Mitchell] Anne Taylor present from the defendant via Zoom. Jed Whitaker for the State via Zoom. Motion to disqualify KCPA in all further proceedings in this case.
> [Anne Taylor] I thought Ms. Eisenhart would appear by telephone.
> [Judge Mitchell] Able to contact defendant telephonically. Motion to disqualify KCPA Office. I have read quite a bit of material and case law. Reviews documents read in preparation for this hearing. I didn't feel I could proceed to the Motion to Terminate Probation without Ms. Eisenhart present and until after dealt with deft's motion to DQ. I have read St. vs. Severson 147ID694. St. Vs. Dursonof 210wl.
> [Anne Taylor] No additional evidence. We are satisfied that State is in compliance. I'm not going to call my client.
> [Judge Mitchell] I have a duty to inquire as to St. vs. Severson 147id694. I'm going to call Ms. Eisenhart and ask questions. Swears in defendant. [Judge directs deft.]
> [Eisenhart] I know why we are here today. Wasn't aware that a Motion to DQ KCPA until 3/31/21. I wasn't made aware that Ms. Drews withdrew in Feb 2021. I'm not aware of any conflict I know that my old PD was very professional with me. No concerns about KCPA remaining on this case even though they have hired Ms. Drews.
> [Anne Taylor] No cross.
> [Jed Whitaker] No cross.
> [Judge Mitchell] That's all the evidence court has.
> [Anne Taylor] No evidence
> [Jed Whitaker] No evidence.
> [Anne Taylor] At this time with affd of Mr. Mchugh and 2 affidavits of Ms. Drews, PD's office is satisfied. No objection to court denying the Motion to

DQ.
[Judge Mitchell] I've been very up front with defense attorneys', motion was made in 3 other cases with no evidence of actual conflict. Brief was filed in every case and they were all the same. Those 3 counsel hadn't read St. vs. Severson. When you signed the motion to DQ KCPA on 3/2/21, what evidence to you had.
[Anne Taylor] I filed the motion to DQ because affid wasn't given to me as to Rule 1.11. Strategic and time was of the essence type of motion. On day we came to hearing, thought court would rule against the PD's office. No PD actual evidence of conflict, but not standard 1.11. I didn't prepare motion, read it and went thru it and authorized. Combination of a Motrin that was here when John Adams was here and a combination of
2 other attorneys.
[Jed Whitaker] No additional argument.
[Judge Mitchell] Court should either deny based upon the affidavits filed. Page of 3 of defense brief that there is a conflict. Should've said that if there was a PA conflict. Page 423 of Severson. Ms. Taylor is the PD for Ko. Co. and client states there is no conflict. Ask court to find no conflict. Court needed to conduct this hearing.
[Anne Taylor] Nothing in response.
[Judge Mitchell] Denying deft's Motion to DQ KCPA office in this case. Initial brief of 3/3/21 clearly claims there is a conflict. There is no evidence to support this claim. There is no evidence by deft moving party that there is an actual conflict. I feel I needed to have a hearing and will in remaining 10 cases. My reading from Severson doesn't just allow the motion to be withdrawn. I do find that because deft thru her attorney on 3/25/21, filed motion to terminate probation while motion to DQ was pending. Find judicial estopple. Mr. Whitaker to prepare an order. Not going to hear motion to terminate probation and needs to be determined on a different day.
[Anne Taylor] Nothing further.
[Judge Mitchell] Denied on the facts as to the conflict. Deft is judicially estopped from pursuing that motion. That doesn't cause Ms. Eisenhart to not bring her motion to terminate probation at a later time. I'm going do same with you as to the rest of deputies. It has cause me at least 25 hrs up to this point and I'm not even half way thru these motions. I feel bad turning these people into the bar. Client was never contacted, Severson wasn't read prior to these motion. Unfortunate day for this county.

Court Minutes 2:08:54 – 2:42:10. The Court has listened to this entire hearing and notes some statements which are missing from the Court Minutes. First, counsel for Keyes admits she did not discuss the Motion to Disqualify the Kootenai County Prosecuting Attorney's Office by Eisenhart prior to filing the motion. Second, counsel for Keyes stated she did not write the Motion to Disqualify the Kootenai County Prosecuting Attorney's

Office, but that "I read it, I went through it, and authorized it." Third, she stated she had not read Severson at the time of the Motion to Disqualify the Kootenai County Prosecuting Attorney's Office, but that she had read it within 90 days before.

The following day, on April 6, 2021, statements (regarding intent to file a bar complaint) were made by this Court to a different attorney in counsel for Keyes' office, Deputy Public Defender Jeanne Howe in *State v. McCollough*, CR28-19-7958. In *McCollough*, Howe signed the Motion to Disqualify the Kootenai County Prosecuting Attorney's Office on March 1, 2021, and filed it on that same date. More than two weeks later, on March 23, 2021, Howe finally got around to filing a Notice of Hearing, scheduling her Motion to Disqualify Kootenai County Prosecuting Attorney's Office for April 6, 2021. McCollough was in custody at the Shoshone County jail, but appeared by Zoom. Per the Court Minutes, the following transpired:

> [Judge Mitchell] Here on motion to DQ KCPA. Read motion to DQ filed 03/01/2021. March 4th brief in opposition, I read that. Notice of hearing filed by Ms. Howe on 03/23/2021. I have read State vs. Severson 147 ID 694 and State vs. Cherry.
> [Jeanne Howe] Ask Court to take evidence State provided re: affidavit signed by Ms.Drews and filed in State's brief in opposition. Ask to take judicial notice of that as evidence. That is all the evidence I have.
> [Judge Mitchell] I have read that affidavit.
> [Jeanne Howe] No other evidence.
> [Judge Mitchell] I have questions for your client.
> [Jeanne Howe] Depends on the questions.
> [Judge Mitchell] Do you understand what this motion is?.
> [McCollough] Yes. To go from an atty to PA seemed unfair if everything wasn't in place, that's how that was explained to me. I became aware of this motion several weeks ago, I don't know if it was on March lst, I just got the notice here, the notice of hearing. It was a week or 2 ago.
> [Judge Mitchell] Motion was filed on 03/01/2021, over a month ago, did you know about it at that time?
> [McCollough] I did not know it was filed at that time. The PD's office made me aware of the motion. I want everything to be fair. I have never been part of these proceedings before. It was explained to me that she was my atty then she went to the PA and she had access to the computers and they didn't want her to use information she got as my atty at the PA's office.
> [Judge Mitchell] State vs. Severson requires me to ask if you have any concerns about the fact that Ms. Drews is now over at the KCPA.

[McCollough] Yes, I have concerns. She knows my file and I don't feel it'd be fair to defend me and then turn around and possibly prosecute me. I do not know if she is involved in my prosecution. I feel like she should've maybe finished the job she started, we could have completed what was here and not just left it on the table.
[Jeanne Howe] No questions.
[Donna Gardner (Deputy Prosecuting Attorney)] Questions defendant.
[McCollough] She knew my file b/c she was my atty and now she's on the other side. My first thought was that she would take information from my file w/ her over to the PA. I don't have evidence, it is just concern. I've never been in this situation before. I have not seen the State's response and affidavit, but Ms. Howe read some of them to me. There were things filed in other cases but not filed in this one.
[Donna Gardner] No other questions.
[Jeanne Howe] Questions.
[McCollough] I am concerned about the knowledge Ms. Drews has in her mind, I had those concerns after you read me the affidavit, I have those concerns now.
[Judge Mitchell] When did you tell your client about the motion?
[Jeanne Howe] I have to check my file. I believe he had notice on 03/22/2021. I filed the motion on March 1st. I read Severson years ago, but not at the time that I filed the motion.
[Judge Mitchell] That's all the questions I have.
[Donna Gardner] No additional evidence.
[Jeanne Howe] This motion was filed to protect Mr. McCullough's right to conflict free counsel, based on the rules of professional conduct. When there is a concern raised re: conflict of interest, there are requirements under Rule 1.11 laid out clearly. Reviews 1.11(a). As I'm sure the Court can see, I have argument in my brief that the language in this tends to apply to representing an agency but it applies in this matter as well. My concern in this case is that based on Idaho Rules of Professional Conduct that this needed to be taken care of as soon as possible. The evidence introduced by the State today is re: Ms. Drews' affidavit. The rule requires a timely screening, the Court is aware of that information based on the filings. If defense hadn't filed this motion, bar counsel wasn't consulted until May 2nd. We then received the affidavit in this case, it is the only affidavit filed in this case. I have an affidavit from Mr. McHugh and a subsequent affidavit from Ms. Drews in other cases. At this time, I don't believe there has been appropriate protection put into place and I am concerned about my client and the public's faith in the system as well. This isn't directed at Ms. Drews choice of job. I don't think timely screening happened. Other affidavits filed in other cases were not filed in this case. This is an issue that needs to be raised before the Court. The Court wouldn't have any other way to know this exists and it is something important for all officers of the court and judiciary. Ask to grant DQ. If not inclined to DQ motion, I ask for an order precluding Ms. Drews having contact w/ any other attys in the PA's office re: Mr. McCullough's case. This isn't regular business for someone like Mr. McCullough, it can cause trust issues between client and atty due to abandonment. I think it is in my client's best interest that this

issue be addressed. Under Rules of Professional Conduct, I ask that the screening be more definitive or DQ due for failure to make timely screening. [Donna Gardner] The affidavit of Ms. Drews we submitted, she was immediately cut off of the PD's office including computers, files, etc on Feb 17th. She started at KCPA on March 1st. She made several steps, contacted Brad Andrews at Idaho Bar Counsel to discuss professional rules that Ms. would apply. She then notified Mr. McHugh of the situation and Gardner asked Ms. Taylor for a list of her cases at the PD and that list was provided here with cautions made that there was to be no communication w/ Ms. Drews re: the cases she was involved in before. That is appropriate screening and providing protection of conflicts.
[Jeanne Howe] What is unfortunate is that the Court doesn't have other filings showing the timeline and they don't fall under timely screening and that is my biggest concern. I want to make sure Mr. McCullough has assurances that he doesn't have a situation where he has an individual with information is being divulged. He needs assurances that there will be conflict free counsel.
[Judge Mitchell] Deny motion to DQ entire KCPA in Mr. McCullough's case. The defendant and his counsel have not met their burden, they have to prove actual conflict. My job isn't to give Mr. McCullough assurances or not, my job is to determine whether the defendant has met the burden of proof of actual conflict. Ms. Howe to provide an order, consistent w/ other cases, I have had cases before Ms. Taylor, Mr. Fox, Ms. Freund. I will be filing a bar complaint against each attorney for filing a motion w/o discussing it w/ your client at the time of filing. You have done a little bit better in giving him 1-2 weeks notice. Filed a motion w/o reading Severson. Filed a motion w/o any evidence of any actual conflict and did not provide any evidence of actual conflict today. There has never been any evidence of actual conflict. Ms. Drews' affidavit would provide assurances for your client, but that is not what I am here for. Even if that affidavit was not filed, there is no reason I could grant your motion.

Court Minutes 4:00:39 - 4:29:58. After a half an hour, the deck had been cleared to proceed with McCollough's probation violation at a later day.

The next day, on April 7, 2021, statements (regarding intent to file a bar complaint) were made by this Court to a different attorney in counsel for Keyes' office, deputy public defender Adrien Fox in *State v. Towner,* CR28-18-12846 and CR28-20-18022, and to Adrien Fox in *State v. Schroeder*, CR28-20-3331. First was *Towner.* The following occurred per the Court Minutes:

[Adrien Fox] No evidence to present. Ask the court to take judicial notice of the timing and the three affidavits from KCPA.
[Judge Mitchell] Reviews file.

[Adrien Fox] I am happy to call him as a witness. It might be more efficient for me to represent the timeline. Ms. Drews filed the notice of appearance on 11/18/20, she worked the case in both matters, accepted KCPA employment on 2/15/21, notice of acceptance to PD's Office on 2/17/21. The case was assigned to me on 2/22. Motion to DQ KCPA was filed 3/1, same day she started. Notice of hearing sent out 3/9, Motion and Opposition filed 3/11. Phone call to defendant 3/17. 3/31 we had the motion and the affidavits were proved. 4/2 phone call with defendant. No additional testimony at this time. I notified him that the motion was being filed in the notice of hearing on 3/9. It was sent to him at IDOC. I don't think it's necessary to call him as a witness.
[Judge Mitchell] I feel the need to ask him questions under the State v Stevenson [*Severson*]. [swears in defendant].
[Greg Towner] I did get notice of this motion. I got a letter yesterday. I heard of it for the first time on Monday. There was a letter for the court date sent from the PD's Office about the KCPA being disqualified. I got it earlier than Monday. Almost a month ago sounds right. I don't have any concerns about Ms. Drews being hired by KCPA.
[Adrien Fox] The ID Rules of Professional Conduct, reviews. 1.11 is relevant because 1.10 doesn't apply if timely screened and written notice is given to the government agency to determine compliance. At the time of the filing of the motion, there was a prima facia that there was a DA conflict and the state hadn't complied with 1.11b. The motion was filed to protect the right to conflict free counsel. We have discussed the motion and has been advised of the affidavits and the KCPA has complied with 1.11. He has no objection to the KCPA continuing on the case.
[Judge Mitchell] I don't see how you reached a prima facia case on March 1. Your burden under Steverson [*Severson*] is to proof [prove] an actual conflict, not an allegation.
[Adrien Fox] I guess going from PD to PA in the same case is a direct conflict for Mr. Towner. That appeared with Ms. Drews beginning on 3/1 and recognizing that a way for imputation is to comply with 1.11b and that hadn't occurred yet. There is not a conflict beyond what I said. I believe there is actual conflict but the affidavits have cleared it. At this time with compliance with 1.11b, no conflict.
[Tristan Poorman (Deputy Prosecuting Attorney)] Nothing from the state. Admitted our exhibits on Wednesday last week.
[Adrien Fox] Those were admitted by stipulation.
[Judge Mitchell] I find that there is no actual conflict. I made my record in an earlier case with Mr. Fox - I have a duty to report the actions of defense counsel to the bar. I find that on 3/1, there was no conflict and there hasn't been conflict. At the time he made the motion, he hadn't read Steverson [*Severson*], which I find problematic. When he made the motion, there was no communication with the defendant, he did eventually but not for consent to file and for those reasons, I will be making a bar complaint. The motion is denied. KCPA will still be on the case. Mr. Fox will be your attorney moving forward. Mr. Fox to prepare an order.

Court Minutes 10:43:53 – 10:56:00. In *Schroeder*, the following occurred per the Court

Minutes:

> [Judge Mitchell] Motion was filed on 3/3. I have read that motion and the brief. I have read the state's opposition. I have read the Notice of Filing of Corrected Affidavits and the two affidavits from KCPA. We have a hearing on 3/31 but I didn't feel that I could proceed without the defendant being present. I understand he is in the custody of IDOC.
> [Adrien Fox] Ask to take judicial notice of specific documents and I will provide a timeline of events. Ms. Drews filed a Notice of assignment change on11/9, she represented him on 2017 misdemeanors, worked this case until 2/15, notice provided 2/17, Mr. Onosko assigned 2/26. Motion to DQ was filed 3/3, Ms. Drews started at KCPA 3/1. Notice of hearing sent out 3/9, phone call with def on 3/24, Motion and Opposition to Motion for DQ 3/30, 3/31 held the motion, 4/2 phone appt with defendant and assignment change to me, 4/5 corrected case captions filed. No testimony.
> [Judge Mitchell] I feel that I need to ask him some questions. [Swears in Defendant.]
> [Schroeder] I did have a conversation with Mr. Onosko. I am having a lot of mental issues and I don't know what this is about. He told me about Ms. Drews going to the KCPA. I thought it was before my birthday but it was around the 24th. DOB is 3/19. I'm not worried about her going to the KCPA. I don't have any evidence that there is a conflict with her going to KCPA.
> [Adrien Fox] No questions.
> [Tristan Poorman] No questions.
> [Adrien Fox] Professional Rules, reviews. 1.11 is relevant because 1.10 doesn't apply if they are screened timely and written notice is filed with government agency to determine compliance. At the time of filing of the motion on 3/3, it didn't look like the state was in compliance. Motion was filed to protect right to conflict free counsel and time was of the essence. Defendant understands the right and given the affidavits, 1.11b is complied with at this time and no objection to KCPA appearing on the case. No evidence of conflict beyond the conflict that would arise with 1.09 and 1.10 but that is cured with 1.11b compliance.
> [Tristan Poorman (Deputy Prosecuting Attorney)] Submit on corrected affidavits.
> [Judge Mitchell] Denying the motion. I don't have any evidence of if Mr. Onosko read Stevenson [*Severson*] before filing the motion. I'm not going to turn him into the bar - I need to be consistent and turn him in with the others. There was no actual conflict when the motion was filed.

Court Minutes 11:56:19 – 12:05:51. Listening to the digital recording shows that the Court stated that the Court was not going make a bar complaint against Onosko as there was no indication one way or another whether he had read *Severson* before filing his motion, but that the Court would review his other actions to be consistent with other bar complaints being made.

By setting forth what happened in the above cases chronologically, and what attorneys were involved on those dates in those cases, the Court is making several points to Keyes and her attorney regarding her Motion to Disqualify she filed on April 20, 2021.

First, counsel for Keyes has lied about the Court making the statement that the Court would file a bar complaint against counsel for Keyes on March 31, 2021.

Second, the statement made by this Court to counsel for Keyes **only on April 5, 2021**, regarding this Court's intention to file a bar complaint against her are not unique to counsel for Keyes. That statement (the Court's intention to file a bar complaint) was not even made first to counsel for Keyes. The Court first made the statement to Ed Lawlor, Deputy Public Defender on April 1, 2021. After making the statement to counsel for Keyes on April 5, 2021, the same statement was made by this Court for the exact same reason, to Jeanne Howe and Adrien Fox on April 6, 2021. It is difficult to understand how counsel for Keyes can make the claim, "Judge Mitchell has bias or prejudice against Ms. Keyes' case due to bias or prejudice against her counsel" (Mot. to Disqualify Pursuant to I.C.R. 25(b)(4), 2), when the same statements were made to a different attorney **six days before** they were made to counsel for Keyes, and were made three times in three different cases **subsequent** to two different attorneys. Two things should be glaringly obvious. Primarily, it should be obvious to anyone that **it is the conduct of the attorney** that is at issue in each case, not whether this Court has any bias or prejudice against that attorney because of the conduct in which they have engaged. Secondarily, counsel for Keyes is in no way being singled out. Counsel for Keyes made the same decision in *Eisenhart* that her colleagues made in other cases. If a bar complaint is filed, it will be against all those attorneys who engaged in similar, nay identical, conduct. Counsel for Keyes has not been singled out in any way by this Court. What is undeniably true is that this Court has been completely consistent with all these attorneys in all these cases.

There is no bias against counsel for Keyes which can be demonstrated by counsel for Keyes when at all times this Court has treated all the other attorneys exactly the same.

Third, the next thing that must be discussed is what caused the Court to make the statements to all these various attorneys that a bar complaint would be forthcoming. At one time, all the various defendants in these various cases were represented by a deputy public defender named Casey Drews. Drews was employed as a Deputy Public Defender when she was hired by the Kootenai County Prosecuting Attorney in mid-February 2021. In all these various cases, the exact same Motion to Disqualify Kootenai County Prosecuting Attorney's Office was filed, all at about the same time, between March 1, 2021, and March 3, 2021. The motions in each case are word for word identical (except for the defendant's name in each case). From Anne Taylor's statements in Eisenhart on April 5, 2021, the motion was resurrected from the days of her predecessor, John Adams. It was a canned motion/memorandum that was dusted off, modified and the exact same motion was filed by various attorneys who either did not read the motion/memorandum before signing it, or at least admittedly did not read the cases referenced therein. That identical motion filed in each case itself contains some briefing, and one of the cases cited in that briefing is *State v. Severson*, 147 Idaho 694, 213 P.3d 414 (2008). In preparation for the first such hearing, in *State v. Lehenbauer*, CR28-20-20176, held March 24, 2021, this Court actually read *Severson* as well as the other cases that were cited by Patricia Taylor in her motion which she filed in *Lehenbauer*. On January 25, 2021, this Court took a guilty plea in *Lehenbauer* and scheduled that case for sentencing on March 24, 2021. The next time this Court had occasion to review the *Lehenbauer* file was a few days before March 24, 2021. Upon that review, the Court noticed the attorney for defendant Lehenbauer had on March 10, 2021, filed a notice of hearing on the defendant's Motion to Disqualify the Kootenai County Prosecuting

Attorney's Office, which motion had been filed in that case on March 3, 2021. The Court also noticed that counsel for the plaintiff had filed a Brief in Opposition to Defendant's Motion to Disqualify the Kootenai County Prosecuting Attorney's Office. It was during that preparation for Lehenbauer's sentencing that this Court read such motion and, in turn, read *Severson*. This Court's reading of *Severson* caused this Court to conclude this Court could not proceed to sentence Lehenbauer until this Court had dealt with the motion filed by the Deputy Public Defender, Patricia Taylor, her Motion to Disqualify the Kootenai County Prosecuting Attorney's Office. But it wasn't until the wave of other motions hit that the Court again read *Severson* more closely. Upon re-reading *Severson* this Court concluded *Severson* not only mandates that the hearing on the Motion to Disqualify the Kootenai County Prosecuting Attorney's Office had to take place before any other action could be taken by the Court in any case, but also, the defendant must be not only be present, but also testify. And, *Severson* requires the Court to make inquiry of the defendant if defense counsel fails in that regard.

> Here, because Severson objected to the conflict of interest at trial, the court had an affirmative duty to inquire into the potential conflict. If the trial court failed to conduct an adequate inquiry, Severson's conviction must be reversed regardless of whether the conflict adversely affected his lawyer's performance.

147 Idaho at 704, 215 P.3d at 424.

> The court held a hearing on the record and gave both sides the opportunity to address the potential conflict. Although the court did not ask the specific questions Severson now claims were necessary, Severson was given the opportunity to draw the trial court's attention to his specific concerns, but failed to do so.

147 Idaho at 705, 215 P.3d at 425. Because the defendant must testify, *Severson* at least implicitly mandates that the defendant actually know the motion is being filed and he or she must know the date and time of the hearing which is required to be conducted. It is these deficiencies by the attorneys in a) not asking the client whether a motion should

be made, b) and not telling the client immediately upon filing the motion that the motion has in fact been filed, and c) the hearing date and time for the motion, which are especially concerning to this Court. This is more concerning, as will be explained shortly, given the fact that this type of conduct has been occurring with the Kootenai County Public Defender's office for at least seventeen years. At the hearing on any motion to disqualify the prosecuting attorney, *Severson* mandates that if the defendant's attorney does not inquire of the defendant, the court must make that inquiry. If the court fails to do those things and there was an actual conflict with the defendant's former attorney going to the prosecuting attorney's office, **the defendant's conviction can be set aside** (147 Idaho at 704, 215 P.3d at 424), and *Severson* makes it clear that it will be the Court's fault if that happens. There is no way any rational judge could take these motions lightly.

Finally, Keyes needs to be aware, as counsel for Keyes is certainly aware, that this practice of at least some in the Kootenai County Public Defender's Office, of keeping their clients in the dark has been happening for a long time with certain deputies and with Keyes' counsel in particular. This Court feels it is important to point this fact out to Keyes, to let Keyes know that this Court has been dealing with this issue for a long time, essentially since 2004. Keyes should know that this is not a new problem that cropped up on the eve of her sentencing hearing. The problem with certain deputies in the Kootenai County Public Defender's office not involving their client in the decision as to whether or not to file a Motion to Disqualify the Kootenai County Prosecuting Attorney in their case, is the same problem with certain deputies in the Kootenai County Public Defender's Office not involving their client in the decision as to whether or not to file a motion to disqualify a judge without cause under I.C.R. 25(a). The practice of not involving the client in these decisions is unfortunately, not an isolated event in the Office of the Kootenai County Public Defender, and that has been the case for the last seventeen years.

Not letting the client know the attorney is making a Motion to Disqualify the Kootenai County Prosecuting Attorney in that client's case is not justified, as Deputy Public Defender Lawlor claimed above, because it is a "tactical decision." *Severson* makes that clear. If a hearing must be held and the client must testify at that hearing, the client needs to know the motion is being filed and when the hearing will be held.

Keeping the client in the dark was the subject of this Court's August 7, 2007, letter to John Adams, the Kootenai County Public Defender at the time. That letter is attached as Exhibit A to this Memorandum Decision and Order Denying Defendant's Motion for Cause Pursuant to I.C.R. 25(b)(4). It is relevant as it pertains to counsel for Keyes and to Lawlor, mentioned above in the *Parker* case. Over the course of three or four years, from 2004 until the August 7, 2007, letter was written, both of those attorneys filed motions as a matter of course every single time the undersigned was assigned as the district judge in any given case. There is certainly nothing wrong with a blanket disqualification as long as the attorney engaged their client in the decision as to whether to file such a motion to disqualify or not. The client, the person accused of a crime, should have some say in whether a motion to disqualify any judge should be made. Those attorneys were not doing so nearly fourteen years ago, as that letter makes clear. Back to the issue of the various Motions to Disqualify the Kootenai County Prosecuting Attorney's Office.

It must be kept in mind that the language of I.C.R. 25(b)(4) pertains only to the client, and the client's case, not the attorney. The rule reads, "Any party to an action may disqualify a judge from presiding in any action on any of the following grounds: (4) that the judge is biased or prejudiced for or against any party or that party's case." The rule does not read, "an attorney may disqualify a judge in any action if that judge is biased or prejudiced for or against a party's attorney." Certainly, a judge could be so biased toward an attorney that such bias could affect that attorney's client's case, and

that is likely counsel for Keyes' implicit argument. That is one of the reasons why the Court has gone to such great lengths to point out that the *basis* of Keyes' Motion to Disqualify, which is this Court's actions taken on various Motions to Disqualify the Kootenai County Prosecuting Attorney's Office in other cases, does not single out Keyes' counsel any differently than those who have engaged in the same conduct.

While it is disappointing for any judge to watch an attorney fall short of their professional responsibilities, the judge's observing that and then reporting that, does not create, cause or result in bias or prejudice within that judge of that attorney's client's case. That is far too tenuous. Indeed, the judge's act of reporting what has been observed of counsel, is mandated of this Court. In other words, this Court has no choice but to report it. Accordingly, by that requirement, the act of reporting, cannot be bias or prejudice even as to the attorney. But I.C.R. 25(b)(4) requires the bias or prejudice to be by this Court toward Keyes, and there simply is no such bias or prejudice toward Keyes. Nor is there any bias or prejudice toward counsel for Keyes simply because this Court has stated it will file a bar complaint against counsel for Keyes, and others, in different cases than Keyes' case. The Motions to Disqualify the Kootenai County Prosecuting Attorney's Office in these various other cases do not have anything to do with Keyes' case.

This Court's rulings on the Motions to Disqualify the Kootenai County Prosecuting Attorney's Office revolves around the following deficiencies of that counsel. Each deficiency amounts to unprofessional conduct and collectively the deficiencies certainly unprofessional conduct. Those deficiencies are:

1) each attorney filed the motion without telling the client first. In many cases they never told the client up to and including the hearing on the motion.

2) each motion was filed without any proof as to an actual conflict of interest. An "actual

conflict of interest" is what must be proven under *Severson* and *Cherry*, and "actual conflict of interest" is what was claimed in every single Motion To Disqualify Kootenai County Prosecuting Attorney in every one of these cases at page three: "The grounds for this Motion are that the Prosecuting Attorney has a conflict of interest in representing the State herein based on recent employment of an attorney that was previously employed to defend _____ from this criminal charge." At oral argument, several attorneys pointed to the Idaho Rules of Professional Responsibility as allowing them to file the motion, or as Lawlor stated, "Once we put the question in play, the PA [Prosecuting Attorney] should have filed an affidavit." This is not a game. The motion made is to disqualify the entire prosecuting attorney's office in each of these cases. That is a serious remedy. The Idaho Rules of Professional Responsibility do not control *what each of those attorneys will have to prove with admissible evidence at the hearing* on their motion (which must be held under *Severson*) and that is *they have to prover there is an actual conflict.* Idaho Rule of Professional Conduct 1.11 discusses the fact that Casey Drews had to be "timely screened" from participation in any matter. Keyes' counsel feels an affidavit was not prepared in time. Mot. to Disqualify the Kootenai County Prosecuting Attorney's Office 5-6. If any of these Deputy Public Defenders or counsel for Keyes truly felt that Drews was not "timely screened", or that an affidavit was slow in arriving as of March 1, 2021, or March 2, 2021, or March 3, 2021, when they signed and filed their Motions to Disqualify the Kootenai County Prosecuting Attorney's Office in these various cases, then the appropriate action would have been for these Deputy Public Defenders' superior, Keyes' counsel, and Barry McHugh **to have a discussion** and for each side to address any concerns they had and come to a solution. Instead of a five minute discussion between superiors, these various Deputy Public Defenders and Keyes' counsel chose to clog the courts by filing motions based upon no evidence, and not even

an understanding that they would have to have a hearing, a hearing that would necessarily involve their client.

3) when the Court asked each counsel if they had read *Severson*, which each counsel had cited in their canned briefs, whether they had read *Severson*, those who were asked said they had not (credit for honesty), except counsel for Keyes who said she had read it some time ago. As a result, none of them knew that the Court had to conduct a hearing, all but one of them tried to vacate the hearing, and when the Court informed them it could not allow that to happen, none of them knew their client had to be present and thus, the client had to know about the motion and the hearing, and none of them knew what is was they had to prove at the hearing.

Again, Keyes needs to know that this Court not only **feels** that it should report unprofessional conduct, this court **knows** it is compelled to report unprofessional conduct under the Idaho Code of Judicial Conduct. That is what is required under the Idaho Code of Judicial Conduct. Keyes needs to know this Court feels it has no choice but to make that report. The fact that this Court has done so on multiple occasions should help convince Keyes that this Court has no bias or prejudice even toward her attorney, let alone Keyes. The current Canon 2, Rule 2.15 "Responding to Judicial and Lawyer Misconduct", (B) makes reporting mandatory when the judge has "knowledge that a lawyer *has committed* a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects **shall** inform the appropriate authority." (bold added). The word "shall" takes it out of the judge's discretion and makes reporting mandatory. A step down is when a judge has information indicating a *substantial likelihood* of a violation of the Rules of Professional Conduct. In that case, a bar complaint is not mandatory, but some action is mandatory, and a bar complaint is certainly an approved action. Subsection (D)

reads, "A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action." Comment No. 1 to that rule reads: "Taking action to address known misconduct is a judge's obligation." Comment No. 2 reads:

> A judge who does not have actual knowledge that another judge or a lawyer may have committed misconduct, but receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action under paragraphs (C) and (D). Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code, communicating with a supervising judge, or other agency or body. Similarly, actions to be taken in response to information that a layer has committed a violation of the Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body.

This Court at this time certainly has "information" indicating "a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct." Reference the three-fold list above. The Rules of Professional Conduct which are or could be involved are: 1.0(e) "Informed Consent"; 1.1 "Competence"; 1.2(a) "Scope of Representation", "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued"; 1.3 "Diligence", "A lawyer shall act with reasonable diligence and promptness in representing a client"; 1.4 "Communication"; 3.1 "Meritorious Claims and Contentions"; 3.2 "Expediting Litigation"; 3.3 "Candor Toward the Tribunal"; 3.4 "Fairness to Opposing Party and Counsel"; 3.5(d) "engage in conduct intended to disrupt a tribunal"; 4.1 "Truthfulness in Statements to Others"; 5.1 "Responsibilities of Partners, Managers, and Supervisory Lawyers"; 5.2 "Responsibilities of a Subordinate Lawyer"; and 8.4 "Misconduct".

Because the Court has "information" indicating "a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct", this Court "shall

take appropriate action." This Court has determined the appropriate action is a bar complaint. Given the three-fold derogation of their professional duties described above, this Court has determined a bar complaint is appropriate. Another reason for a bar complaint is the pervasive nature of these Motions to Disqualify the Kootenai County Prosecuting Attorney's Office and the magnitude of the problem created. The various judges in Kootenai County have been confronted with several motions, none of which should have been made, but each of which had to be heard. This Court will file such bar complaints when the Court has time to prepare such.

This concludes the factual analysis of Keyes' Motion to Disqualify. Attached to this Memorandum Decision and Order as Exhibit B are the Court Minutes of the various hearings on the various Motions to Disqualify the Kootenai County Prosecuting Attorney's Office, in chronological order.

B. The Law.

The Court has read each of the cases cited by counsel for the plaintiff, and finds such correctly states the applicable law:

> However, "a judge may not be disqualified for prejudice unless it is shown that the prejudice is directed against the party and is of such nature and character as would render it improbable" that the party would receive a fair hearing. *State v. Dunlap*, 155 Idaho 345, 390, 313 P.3d 1, 46 (2013) (quoting *Pizzuto v. State*, 134 Idaho 793, 799, 10 P.3d 742, 748 (2000)).
>
> "Whether a judge's involvement in a case reaches a point where disqualification from
> further participation in a defendant's case becomes necessary is left to the sound discretion of the judge himself." *Sivak v. State*, 112 Idaho 197, 206, 731 P.2d 192, 201 (1986). Thus, the standard on appeal is whether the court abused its discretion. *State v. Wood*, 132 Idaho 88, 95, 967 P.2d 702, 709 (1998).
>
> As a rule, courts follow the presumption that judges act with impartiality even when exposed to potentially prejudicial information. *State v. Shackelford*, 155 Idaho 454, 459, 314 P.3d 136, 141 (2013). "That judges are capable of disregarding that which should be disregarded is a well accepted precept in our judicial system." *Sivak*, 112 Idaho at 205, 731 P.2d at 200 (citations omitted). "The fact that a trial court makes rulings that a party does not like is not, in and of itself, evidence of impermissible bias."

> *State v. Griffeth*, 144 Idaho 356, 361, 161 P.3d 675, 680 (Ct. App. 2007). In fact, "[a] disqualifying prejudice cannot be deduced from adverse rulings by a judge, whether they are right or wrong." *Id.* (citations omitted). There must be some showing of "an impairment of the presiding judge's ability to properly perform the legal analysis required." *State v. Browning*, 121 Idaho 239, 244, 824 P.2d 170, 175 (Ct. App. 1992).

Response to Motion to Disqualify Pursuant to I.C.R. 25(b)(4), 1-2. Additionally, this Court has read the following cases.

In *Liebelt v. Liebelt*, 125 Idaho 302, 870 P.2d 9 (Ct. App. 1994), the Idaho Court of Appeals held:

> Kenneth also contends that the magistrate was biased or prejudiced against him personally and should have recused himself "for cause" under I.R.C.P. 40(d)(2). The denial of a motion to disqualify for cause is reviewed under an abuse of discretion standard. *Bell v. Bell,* 122 Idaho 520, 835 P.2d 1331 (Ct.App.1992). Kenneth argues that the magistrate exceeded the boundaries of his discretion by failing to find, under the applicable legal standard, that he was biased and prejudiced. *See* I.R.C.P. 40(d)(2)(A)(4). Kenneth maintains that bias is clearly demonstrated by the record of the trial proceedings in which the magistrate issued a contempt order and awarded attorney fees against him. In considering Kenneth's argument, we observe that a judge is not disqualified from hearing the case on the ground that he has made adverse rulings in the case. *Bell,* 122 Idaho at 530, 835 P.2d at 1341. Bias, in order to be a ground for disqualification, must stem from the judge forming an opinion on the merits of the case on some basis other than what has been learned from presiding over the case. *See e.g., United States v. Grinnell Corp.,* 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *Rosen v. Sugarman,* 357 F.2d 794 (2nd Cir.1966).

125 Idaho at 305-06, 870 P.2d at 12-13. The argument is not even being made by Keyes that this Court has formed an opinion on the merits of Keyes' case on some basis other than what has been learned from presiding over her case. That is really the standard for a motion to disqualify a judge for cause. If, as *Liebelt* instructs, a judge cannot be disqualified from a case due to making adverse rulings 1) *against a party* 2) *in that same case*, then adverse rulings 1) *against counsel* 2) *in other cases* is even more tenuous.

In *Samuel v. Hepworth, Nungester & Lezamiz*, 134 Idaho 84, 996 P.2d 303 (2000), the Idaho Supreme Court reiterated, "Adverse rulings, by themselves, do not demonstrate

disqualifying bias." 134 Idaho at 88, 996 P.2d at 307, citing Bell, 122 Idaho 520, 530, 835 P.2d 1331, 1341 (Ct. App. 1992). "To be disqualifying, the alleged bias 'must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'" *Id.* citing *Desfosses v. Desfosses*, 120 Idaho 27, 29, 813 P.2d 366, 368 (Ct. App. 1991) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 Led.2d 778, 793 (1966). The Idaho Supreme Court also held, "A judge's participation in prior legal proceedings involving related parties or issues is not grounds for disqualification for bias." *Id.* citing *Roselle v. Heirs and Devisees of Grover*, 117 Idaho 530, 534, 789 P.2d 526, 530 (Ct. App. 1990). The Idaho Supreme Court found, "The Samuels' 'vague and factually unsubstantiated allegations are wholly insufficient,' *Hays v. Craven*, 131 Idaho 761, 763, 963 P.2d 1198, 1200 (Ct. App. 1998), to demonstrate any disqualifying bias on Judge Michaud's part." *Id.* That is exactly what has been presented in Keyes' motion and Anne Taylor's affidavit: "vague and factually unsubstantiated allegations." This Court agrees with counsel for plaintiff's assessment of such:

> In her affidavit, Ms. Taylor makes various assertions such as being an adult, practicing law for a period of time and representing Ms. Keyes, claims that are not at issue. Affidavit of Anne Taylor, p. 1, #1-3. She also swears that the Court has informed her that her conduct and that of other attorneys in various cases was unethical and would be reported to the bar in the future. Affidavit of Anne Taylor, p. 1-2, #4-8. Ms. Taylor then claims that she "is aware of bias against the Public Defender's Officer that has been ongoing for months." Affidavit of Anne Taylor, p. 2. #9. The statement is conclusory. It sets forth no facts from which one could actually, independently make any sort of finding whatsoever, especially one of bias. Ms. Taylor additionally swears that "[c]ounsel is aware of negative statements, on the record, in several cases dating back to September 2020." Ms. Taylor fails to list the case numbers and additionally, fails to link whatever negative statements to bias. It is just as completely possible that the negative comments were completely justified and deserving and do not serve as a basis to draw a Court bias conclusion.
>
> Ms. Taylor swears that two bar complaints filed against the Public Defender's Office have been unsubstantiated. Affidavit of Anne Taylor, p. 2, #10. Again, she fails to give case numbers, the actual bar complaint and

> the actual outcome found by the fact-finder in these complaints. She again makes an overbroad accusation that lists no details and provides no evidence by which one can independently come to their own conclusion.
>
> Finally, Ms. Taylor sets forth her own belief that there is bias and prejudice by the Court against her client, other clients, the Public Defender's Office as a whole and the attorneys employed at said office. Affidavit of Anne Taylor, p. 2. #11. This claim is not surprising given the previous conclusory allegations contained within the affidavit. As with the previous allegations, there are no facts contained within for one to draw their own conclusion. Furthermore, a subjective opinion in these circumstances is completely valueless, other than to draw attention to the fact that this Motion has no merit at all. Stated in another fashion, one's personal expressions of aggrievement have no place in determining whether there exists bias on the part of the Court.

Response to Motion to Disqualify Pursuant to I.C.R. 25(b)(4), 2-3. Claims of bias must be based on facts, and Keyes has not stated any such facts. Additionally, it is not clear what is meant by the word "unsubstantiated" in the phrase, "Counsel is aware of at least two bar complaints filed by Judge Mitchell, against members of the Public Defender's Office that have resulted in unsubstantiated findings." Affidavit of Anne Taylor, p. 2, ¶10. If by the word "unsubstantiated", Anne Taylor means that no disciplinary action was taken by the Idaho State Bar Association, this Court would likely ("likely" is used because again, counsel for Keyes has chosen not to include any citations or case names or names of complainant names, thus, not only are counsel for Keyes' claims unsubstantiated, this Court is at a disadvantage to respond) agree, as this Court can think of no case where an attorney has been disbarred due to this Court's filing a bar complaint. However, this Court cannot recall any response back to this Court by the Idaho State Bar Association on any bar complaint made by this Court where the word "unsubstantiated" was used by Bar Counsel.

A judge who had presided over a previous capital murder case was found not to be disqualified in a subsequent different capital murder case involving the same defendant. In *State v. Reid*, 213 S.W.3d 792 (Tenn. 2007), the Supreme Court of

Tennessee held:

> A trial judge is not disqualified because that judge has previously presided over legal proceedings involving the same defendant. *See State v. Hines,* 919 S.W.2d 573, 578 (Tenn.1995) (" 'A judge is in no way disqualified because he tried and made certain findings in previous litigation.' " (quoting *King v. State,* 216 Tenn. 215, 391 S.W.2d 637, 642 (1965))). Moreover, "[p]rior knowledge of facts about the case is not sufficient in and of itself to require disqualification." *Alley,* 882 S.W.2d at 822.

213 S.W.3d at 815.

> An adverse ruling does not necessarily indicate bias or prejudice. *Alley,* 882 S.W.2d at 821. Moreover, comments reflecting "insensitivity and lack of sympathy on the part of the judge" are insufficient to establish impartiality unless they are pervasive and accompanied by prejudicial conduct. *Id.* at 822.

213 S.W.3d at 816.

The Supreme Court of Illinois in *People v. Vance*, 390 N.E.2d 867, 170, 76 Ill.2d 171, 178 (Ill. 1979) held:

> It is clear that ordinarily the fact that a judge has ruled adversely to a defendant in either a civil or a criminal case does not disqualify that judge from sitting in subsequent civil or criminal cases in which the same person is a party. (Annot., 21 A.L.R.3d 1369 (1968); 48 C.J.S. Judges s 82 (1947); People v. Jones (1971), 48 Ill.2d 410, 413, 270 N.E.2d 409; Merkie v. People (1959), 15 Ill.2d 539, 546, 155 N.E.2d 581; People v. Pinchott (1977), 55 Ill.App.3d 601, 602, 13 Ill.Dec. 267, 370 N.E.2d 1294.) The appellate court has repeatedly indicated that the burden of establishing actual prejudice rests on the defendant, and the trial court need not justify retaining the case (People v. Nickols (1976), 41 Ill.App.3d 974, 979, 354 N.E.2d 474, and cases there cited), and this court has said that the trial judge is ordinarily in the best position to determine whether he has been prejudiced (People v. Polk (1973), 55 Ill.2d 327, 336, 303 N.E.2d 137).

A good synopsis of the federal law on the subject is found in *Cole v. Loews, Inc.* 76 F.Supp. 872, 875-76 (S.D.Cal.Cent.Div. 1948):

> The first and most important limitation came when the courts held that the bias and prejudice which disqualifies a judge is not some nebulous belief that he may have some preconceived ideas about a piece of litigation, but meant personal bias and prejudice or a bent or leaning against a litigant or in favor of another which, regardless of the merits of a cause, would make it impossible for him to judge the case dispassionately.

In an early case on the subject, Ex parte American Steel Barrel Co., 230 U.S. 35, 33 S.Ct. 1007, 1010, 57 L.Ed. 1379, the Supreme Court said:

> 'The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term.' (Italics added)

In Wilkes v. United States, 9 Cir., 1935, 80 F.2d 285, 289, which arose in this District, it was sought to disqualify the late Judge George Cosgrove, on allegations that he was biased or prejudiced in a criminal case because in a civil case involving the same matters, he had made adverse rulings to the particular litigant. The Court followed the same criterion promulgated by the Supreme Court in the case just cited and said:

> 'To satisfy the requirements of Section 21, the facts stated in the affidavit 'must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.' Berger v. United States, 255 U.S. 22, 23, 41 S.Ct. 230, 233, 65 L.Ed. 481. The affidavit must 'assert facts from which a sane and reasonable mind may fairly infer bias or prejudice.' Keown v. Hughes, 1 Cir., 265 F. 572, 577. These facts 'should be set out with at least that particularity one would expect to find in a bill of particulars filed by a pleader in an action at law to supplement and explain the general statements of a formal pleading.' Morse v. Lewis, 4 Cir., 54 F.2d 10-7, 1032.
>
> 'The affidavit in this case states that the affiant believes that Judge Cosgrove has a personal bias and prejudice against the defendants and in favor of the government, by reason of which the defendants cannot have a fair and impartial trial before him. As reasons for this belief, the affidavit states that civil actions relating to some of the matters involved in this criminal case were brought against some of the defendants in the criminal case in the same court where the criminal case is pending; that in these civil cases there were allegations charging the defendants with having committed certain wrongful acts; and that the court in the civil cases made certain rulings abverse to the defendants, some of which rulings were made by Judge Cosgrove. These matters cannot be said to disclose personal bias or prejudice within the meaning of section 21 of the Judicial Code. Sacramento Suburban Fruit Lands Co. v. Tatham, 9

> Cir., 40 F.2d 894. See also, Berger v. United States, supra, 255 U.S. 22, page 31, 41 S.Ct. 230, 65 L.Ed. 481; Ex parte American Steel Barrel Co., 230 U.S. 35, 43, 33 S.Ct. 1007, 57 L.Ed. 1379.'

Interpreting its rule regarding disqualification for cause, which similar to Idaho's, the Wyoming Supreme Court in *DeLoge v. State*, 156 P.3d 1004, 1008 (Wyo. 2007) held:

> This rule "does not confer upon appellant the right to disqualify successive judges until he finds one that will grant his motions." *Story v. State,* 788 P.2d 617, 621 (Wyo.1990). Rather, the "rule requires that [the] appellant state facts that would convince a reasonable person with knowledge of all the facts that the judge harbors a personal bias or prejudice against appellant." *Id.* The denial of a motion for disqualification of a judge for cause is reviewed under the abuse of discretion standard. *See, e.g., Byrne v. Nezhat,* 261 F.3d 1075, 1100 (11th Cir.2001).
>
> After holding an evidentiary hearing on the matter, and after taking the case under advisement for review of the entire record, the circuit court judge, sitting by assignment, found that Mr. DeLoge failed to establish judicial bias or prejudice. The court stated that "[o]ther than the fact that rulings in the case were largely adverse to him, Mr. De[L]oge points out no fact, nor has he articulated in argument, that the rulings of the District Court somehow show bias or prejudice against him." We agree.
>
> To demonstrate judicial bias, or prejudice, an appellant must show more than the fact that the trial court ruled against him, correctly or incorrectly, on a particular matter. *Brown v. Avery,* 850 P.2d 612, 616–617 (Wyo.1993). We have previously explained that
>
> > [b]ias is a leaning of the mind or an inclination toward one person over another. The bias which is a ground for disqualification of a judge must be personal, and it must be such a condition of the mind which sways judgment and renders the judge unable to exercise his functions impartially in a given case or which is inconsistent with a state of mind fully open to the conviction which evidence might produce.
>
> *Hopkinson v. State,* 679 P.2d 1008, 1031 (Wyo.1984) (quotation marks omitted). Judicial prejudice involves a prejudgment or the forming of an opinion without sufficient knowledge or examination. *Reichert v. State,* 2006 WY 62, ¶ 37, 134 P.3d 268, 278 (Wyo.2006).

More recently, the Wyoming Supreme Court considered a case brought by Cynthia Hill, Wyoming Superintendent of Public Instruction, who sought to disqualify a judge for cause:

> Ms. Hill supported her motion to disqualify with an 18-page affidavit detailing Judge Campbell's rulings that were adverse to her in her SF104 challenge. The affidavit calls out particular aspects of his rulings with which she disagreed, and states her personal interpretations and characterizations of those rulings. It further cites Ms. Hill's perception and assumption that public disagreement with Judge Campbell's ruling must

necessarily have resulted in development of a personal bias against her.

Having reviewed Ms. Hill's affidavit, we cannot say that the denial of her motion exceeded the bounds of reason. Our precedent is clear that adverse rulings do not alone support a motion to disqualify for cause.

> To demonstrate judicial bias, or prejudice, an appellant must show more than the fact that the trial court ruled against him, correctly or incorrectly, on a particular matter. *Brown v. Avery*, 850 P.2d 612, 616-617 (Wyo. 1993). We have previously explained that
>
> > [b]ias is a leaning of the mind or an inclination toward one person over another. The bias which is a ground for disqualification of a judge must be personal, and it must be such a condition of the mind which sways judgment and renders the judge unable to exercise his functions impartially in a given case or which is inconsistent with a state of mind fully open to the conviction which evidence might produce.
>
> *Hopkinson v. State*, 679 P.2d 1008, 1031 (Wyo. 1984) (quotation marks omitted). Judicial prejudice involves a prejudgment or the forming of an opinion without sufficient knowledge or examination. *Reichert v. State*, 2006 WY 62, ¶ 37, 134 P.3d 268, 278 (Wyo. 2006).

DeLoge v. State, 2007 WY 71, ¶ 12, 156 P.3d 1004, 1008 (Wyo. 2007).

Aside from Judge Campbell's rulings against her SF104 claims, Ms. Hill's affidavit offers only commentary and characterizations of Judge Campbell's rulings and speculation concerning his feelings about adverse publicity. This is not an offer of evidence that is meaningfully different from simply offering the adverse rulings themselves, and Ms. Hill's affidavit is otherwise devoid of actual evidence of bias. We thus find no abuse of discretion in the district court's denial of Ms. Hill's motion to disqualify.

Hill v. Stubson, 420 P.3d 732, 745 (Wyo. 2018).

The above noted cases are instructive. Essentially Anne Taylor's affidavit in the present case suffers from the same deficiencies as these reported cases. Counsel for Keyes has provided conclusory allegations but no actual evidence of bias. Additionally, Anne Taylor's affidavit in the present case is even more tenuous, as Keyes herself has not adopted the same concerns, and I.C.R. 25(d) pertains to the party, not the attorney.

IT IS ORDERED that the Motion to Disqualify pursuant to I.C.R. 25(b)(4) filed by Keyes on April 20, 2021, is DENIED.

DATED this 26th day of April, 2021.

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 26th day of April, 2021 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – Anne Taylor pdtax@kcgov.us.
Prosecuting Attorney – Art Verharen kcpaicourt@kcgov.us

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____
Deputy

JOHN T. MITCHELL
DISTRICT JUDGE
First Judicial District
State of Idaho

Julie Foland
Court Reporter

Jeanne Clausen
Clerk/Secretary

Jennifer Fegert
Law Clerk

Resident Chambers
Kootenai County Justice Building
324 West Garden Avenue
P. O. Box 9000
Coeur d'Alene, Idaho 83816-9000
Telephone
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Facsimile
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August 7, 2007

John Adams
Kootenai County Public Defender
P. O. Box 9000
Coeur d'Alene, ID 83816

Dear Mr. Adams:

While blanket disqualification by one of the Kootenai County Public Defenders has been occurring since Idaho Criminal Rule was reinstated in July 2004, recently it came to my attention that there may be an ethical problem with such blanket disqualifications. The purpose of this letter is to point out that concern to you as the supervising attorney of those involved attorneys. I am not at this time writing to the individual attorneys. So that I can fulfill my ethical obligations, I am asking you to tell me when you have discussed this matter with these attorneys.

Judges have a duty to point out any ethical problems they see with attorneys. Idaho Code of Judicial Conduct Cannon 3D reads:

> Disciplinary Responsibilities: Judges are encouraged to bring instances of unprofessional conduct by judges or lawyers to their attention in order to provide them opportunities to correct their errors without disciplinary proceedings; but the judges should file reports thereof with the Commission of the Idaho State Bar or with the Judicial Council, as appropriate, when no such remedial action is promptly undertaken, or if the violations are flagrant or repeated.

At the present time, we are dealing with the first half of this Cannon.

In order to follow the Idaho Rules of Professional Conduct and Idaho Rules of Criminal Procedure, it would appear that a lawyer in making the decision to disqualify a district judge or magistrate, should make that decision only after informed consent by his client, the defendant in a criminal action. IRPC 1.4, 2.1. Idaho Criminal Rule 25 states that the "...the **parties** shall each have the right to one disqualification without cause of the judge or magistrate..." The right to disqualify does not inure to the benefit of the attorney, but rather the party, the defendant in a criminal action.

Ever since ICR 25 was reinstated, Chief Deputy Public Defender Brad Chapman has disqualified me every single time a case has been assigned to him. More recently, your employees and Deputy Public Defenders Staci Anderson, Anne Taylor and Ed Lawlor have disqualified me every single time a case has been assigned to them. This is without

Exhibit "A"

exception. In other words, I have not a single case assigned to me in the last several months by those three, and not one single case assigned in the last three years in which Mr. Chapman has participated. This blanket use of the right to disqualify gives me pause to think that no communication with the client regarding the decision of whether or not to disqualify without cause is occurring, and that the decision to disqualify is being made solely by the attorney.

There is another reason to believe that no communication is being had with the client regarding whether to disqualify without cause. On several occasions it has been related to me by several of the magistrate judges, that following the conclusion of a preliminary hearing or following waiver of a preliminary hearing, when the magistrate judge announces the case will be assigned to "Judge Mitchell", immediate comments such as: "No it won't", "That will never last", "We'll take care of that", "We'll take care of him", have been made by some of these public defenders. Aside from the statement itself being unprofessional, the timing of the statement shows no communication with the client is made and no consent is asked for. Those statements have been made immediately after the announcement of the assigned judge, without any communication let alone consent of the client.

On other occasions magistrates have noticed a brief discussion between the attorney and the client after the announcement that "Judge Mitchell" has been assigned. If a discussion is taking place, a secondary issue is raised. That is, is the disqualification being suggested by the attorney for reasons personal to the attorney, or is the disqualification being made in the client's best interest? Since what has developed is a tradition of blanket disqualifications, without exception, it is difficult to see how all these disqualifications would be in the client's best interest.

So that I can fulfill my obligation under Cannon 3D, I must "provide them opportunities to correct their errors without disciplinary proceedings". It may be that there is a legitimate reason why there is no ethical transgression with the blanket disqualifications. I am relying on you to communicate these concerns to the attorneys you supervise, and am relying on you to indicate either: 1) any reason(s) why there is no ethical transgression (ie., how the Idaho Rules of Professional Conduct and Idaho Rules of Criminal Procedure are being met under the present situation) or 2) if you agree there has been a past transgression, what will be the "correction" or "remedial action" referred to in Idaho Code of Judicial Conduct 3D.

Thank you for your attention to this.

Very truly yours,

John T. Mitchell

District Judge

cc: John P. Luster, Administrative District Judge
Karlene Behringer, Trial Court Administrator

Description	CR 28-20-20176 Lehenbauer, Anna 20210324 Sentencing Judge Mitchell Court Reporter Julie Foland Clerk Jeanne Clausen		
Date	3/24/2021	Location	1K-CRT9

Time	Speaker	Note
02:25:29 PM	J	Calls case - Patricia Taylor present for the defendant. State represented by Bryant Bushling.
02:26:47 PM	PD	We can vacate the hearing for Motion to DQ PA's office. Unless court wants to proceed today?
02:27:13 PM	J	We will proceed with that motion today. Review documents read in preparation for the Motion.
02:27:57 PM	PD	Biggest concern about motion because there is a gap in time. Ms. Drews began working with KCPA, but we didn't receive a list of cases until later. Or office hasn't been assured that Ms. Drews hasn't communicated with the PA about this case. Accepted employment with KCPA on 2/15/21. Drews didn't tell out supervisor until 2/17/21. Haven't been enough evidence shown by KCPA in a timely matter.
02:30:40 PM	PA	Ms. Drews' affidavit is completely clear that she didn't get into the KCPA computers.
02:31:24 PM	J	Denies motion. State vs. Dambrell. Got to prove prejudice, and today there is no prejudice. No details about cause of concerns. No proof of contamination. There never has been. I've read Cherry. I'm not going to disregard a decision of Idaho Supreme Court. You can't just state a claim you have to prove it. Deft plead guilty 1/26/21. Took job at KCPA on 2/15/21. Motion to DQ was filed on 3/2/21. Sentencing set for today. What could've transpired 3 weeks after deft plead guilty. All cases cited by moving party actual prejudice needs to be prove. Frustrating to see this. Ms. Taylor to prepare an order.
02:35:30 PM	J	Back on the record.
02:39:19 PM	J	Deft is now present. PSI has been filed.
02:39:30 PM	Deft	I have read the report and discussed with my attorney.
02:40:00 PM	PD	Reviews corrections to the PSI.

02:43:57 PM	Deft	Agrees with corrections.
02:44:04 PM	PA	No corrections or witnesses.
02:44:13 PM	PD	No evidence or witnesses.
02:44:55 PM	PA	Given her past and fact that she really hasn't taken full responsibility for her actions. Recommending a retained jurisdiction 2 plus 3.
02:48:22 PM	PD	Recommending probation. Drug testing thru Good Samaritan. I only received the February testing results. Didn't receive the test results from March.
02:49:22 PM	Deft	I have been tested 3 times in March. The Good Samaritan program is tough. It's drastically changed my life.
02:50:28 PM	J	When would you be done living at GS?
02:50:38 PM	Deft	I would grad inpatient 5/24 and 6 months for the outpatient program.
02:53:17 PM	J	Possession of a controlled substance, meth - 2 fixed 3 indeterminate. Suspended and place on 3 years supervised probation. ISP $97 for testing. $285.50 cc. 35 days CTS. Go directly to probation and parole. 42 days to appeal. Poss para - $157.50 cc. 35 days CTS. 180 days jail. 2 years unsupervised probation with same terms as the felony.
02:56:29 PM	J	Felony terms and conditions of probation - $650 in reimbursements. Start making monthly payments on this amount. Fulltime employment or education. SA or mental health counseling. Weekly random UA testing. No substance to alter UA. Submit to searches of person or property. No alcohol, bars, liquor stores or taverns. No one in household can possess alcohol. 300 hrs CS by 3/31/2023. Waives extradition. Submit to polygraph upon request. $75/mo COS. 90 days UJT. Parenting skills class by 12/31/2021. SA evaluation that recommends level 3 treatment, complete GS and this includes IOP. If GS doesn't have a level 3 accrediting, you will need to get treatment else where. You have to file proof from accredited program. Starting 5/25/21 90/90 daily support group meetings. No opiate or narcotic pain meds. Notify health care providers of this.
03:02:15 PM	Deft	No questions and accepts terms and conditions.
03:02:26 PM	PA	No questions.

03:02:30 PM	PD	No questions.
03:02:35 PM	J	You haven't taken responsibility for your actions. If not able to do well in the next 3 years, you will at least do a retained jurisdiction. Statements in your PSI are disturbing.
03:04:05 PM	End	

Description	CR28-21-1853 Van Rossum, Steve 20210331 District Court Arraignment CR-2017-2102 Van Rossum, Steve 20210331 Probation Violation Evidentiary CR-2016-15630 Van Rossum, Steve 20210331 Probation Violation Evidentiary Judge John T. Mitchell Clerk Alena Clark No Court Reporter		
Date	3/31/2021	**Location**	1K-CRT8

Time	Speaker	Note
11:31:27 AM	Judge Mitchell	Calls case. Defendant present in custody with Claire Freund-Marceau. Tristan Poorman for State. All parties via Zoom.
11:32:58 AM	Judge Mitchell	We are without a court reporter today. We are streaming this on YouTube to maybe shorten some hearings in the future.
11:34:14 AM	Judge Mitchell	To be able to hear the various motions, I need to proceed on the motion to DQ KCPA first.
11:35:02 AM	Ms. Freund-Marceau	Agree that have to hear motion to DQ first.
11:35:12 AM	Judge Mitchell	I have read motion to DQ filed 03/01/2021 with briefing, read State vs. Cherry and State vs. Severson. Also read the other cases cited in your memo. There is a brief in opposition of motion to DQ filed 03/24/2021 which I have read. Attached to the plaintiff's motion in opposition are affidavit of Barry McHugh, affidavit of Casey Drews. There's a supplemental affidavit of Casey Drews. I have read all of those. I note that in the new case there is no motion to DQ KCPA, is that intentional.
11:37:33 AM	Ms. Freund-Marceau	That is intentional, my office wasn't appointed until after Ms. Drews started employment w/ KCPA and did not have any access to this case.
11:38:00 AM	Judge Mitchell	Wouldn't the conflict still exist? You're asking for KCPA in entirety be excluded from representing the plaintiff in the two old cases. What would stop a conflict form occurring in the new case?
11:38:34 AM	Ms. Freund-Marceau	She wasn't aware of this case before she left, that is my reasoning.
11:38:48 AM	Judge Mitchell	I will proceed as if the motion was filed in the newer case as well, I have difficulty understanding why there wouldn't be a motion in that case. Any witnesses to testify today?

Exhibit "B"

11:39:26 AM	Ms. Freund-Marceau	No testimony or evidence.
11:39:35 AM	Judge Mitchell	I think State vs Severson raises a whole lot of issues.
11:39:48 AM	Ms. Freund-Marceau	I have read that case. I argue that we don't bear the burden of proof of showing actual harm. I believe that I have to prove that Ms. Drews had contact w/ Mr. Van Rossum, learned things regarding him and his cases and not DQ'ing the KCPA by her moving over there would prejudice Mr. Van Rossum and his cases.
11:41:06 AM	Judge Mitchell	Do you have to prove actual conflict?
11:41:16 AM	Ms. Freund-Marceau	I think I do.
11:41:19 AM	Judge Mitchell	I think Cherry and Severson make that very clear. What about prejudice?
11:41:32 AM	Ms. Freund-Marceau	Yes.
11:41:34 AM	Judge Mitchell	I don't know about that.
11:41:41 AM	Ms. Freund-Marceau	I have read both Cherry and Severson when we first filed these motions.
11:42:01 AM	Judge Mitchell	My review of those cases shows under Severson at 147 ID 703, the defendant need not show prejudice in order to get relief. Cherry 139 ID 579 at 584 says you have to show prejudice, reviews. That cites to Gibson, 106 ID 54 at 58, and Merrifield, 109 ID 11 at 14. I am treating the quote from Severson as not being accurate, even though Cherry is the older case. I think it is pretty clear you have to show actual prejudice. That is what I find you need to prove today.
11:44:01 AM	Ms. Freund-Marceau	No witnesses, just a record to make. I will be making a record based off of our office's records about when Ms. Drews went to the KCPA.
11:44:49 AM	Judge Mitchell	Why wouldn't that be by testimony of someone?
11:44:58 AM	Ms. Freund-Marceau	This is how our office has been handling this motion for the last few weeks.

11:45:12 AM	Judge Mitchell	You have the burden of proof, it has to be based on some sort of evidence.
11:45:23 AM	Ms. Freund-Marceau	Correct.
11:45:25 AM	Judge Mitchell	I'm curious how we proceed w/o any evidence. Severson makes clear that your client can testify, does he want to testify?
11:46:17 AM	Ms. Freund-Marceau	Mr. Van Rossum can and is willing to testify for this motion. I can call him as a witness right now.
11:46:38 AM	Judge Mitchell	Swears defendant.
11:46:45 AM	Defendant	Swears.
11:46:48 AM	Ms. Freund-Marceau	DX.
11:46:52 AM	Defendant	States and spells name. I am represented by KCPD, Claire Freund is my current atty. I had Casey Drews and Zach Jones and Amanda Montalvo as my attys before. Casey Drews was most recently before you. She was my atty since MHC in 2017-2019. In MHC I saw Ms. Drews in court every Thu, spoke to her a couple of times during court. I discussed my case about what was going to happen to me. I gave her personal information re: MH diagnoses, living situation, probation status. I have been in custody 69 days, I was arrested on Jan 21st. PD's office was appointed after I was arrested, Casey Drews was assigned to my case. I was charged w/ PCS, destroying evidence, petit theft and 2 PVs. Ms. Drews was not appointed on all the cases, she was appointed to my PVs. We talked about those cases. I expected her to keep information private and confidential. I last spoke w/ Ms. Drews back in February.
11:50:38 AM	Defendant	I spoke w/ her twice between when I got arrested and when she left the PD's office. She did not visit me at jail. She talked to my wife, they emailed regularly, I expected those communications to be kept confidential. You became my atty of record in the beginning of March.
11:51:31 AM	Mr. Poorman	No CX.
11:51:35 AM	Judge Mitchell	Reviews Severson 147 ID 704. Do you want me to inquire of Mr. Van Rossum, or do you want to inquire?

11:52:06 AM	Ms. Freund-Marceau	I will allow you to make that inquiry.
11:52:15 AM	Defendant	I understand that Ms. Drews is now working for the KCPA. I was made aware she went to KCPA today. I am concerned she could use information against me to prosecute me. I don't have distrust w/ Ms. Drews being hired away. I don't have other concerns about Ms. Drews being hired away.
11:53:40 AM	Judge Mitchell	I don't think I have any other questions.
11:53:49 AM	Ms. Freund-Marceau	No re-DX. No other witnesses.
11:54:05 AM	Mr. Poorman	No witnesses. Ask to take notice of affidavits you already mentioned from Mr. McHugh and Ms. Drews, as well as attachments.
11:54:45 AM	Ms. Freund-Marceau	No objection, I have received those documents and reviewed them.
11:54:56 AM	Judge Mitchell	I have read those and will consider them as evidence, they are admissible.
11:55:37 AM	Ms. Freund-Marceau	I rest on Mr. Van Rossum's testimony and our briefs. I would note in the State's response and brief in objection to our motion to DQ KCPA, the rules of professional conduct are intended to prevent harm. They say Rule 1.11 applies b/c Ms. Drews is a government employee but that doesn't apply b/c it only applies to attorneys representing government entities, not attorneys that are employed by an agency. If the Court does not find a conflict, ask that the Court order no communication between Ms. Drews and the handling PAs.
11:57:27 AM	Judge Mitchell	Your application of the rule you want is not what the ISC said in Cherry.
11:57:39 AM	Ms. Freund-Marceau	Correct. I would argue that the ISC misapplied the rule in Cherry. No other argument.
11:58:01 AM	Mr. Poorman	Submit on brief.
11:58:06 AM	Judge Mitchell	I do find that it is the plaintiff's burden to prove actual conflict and the plaintiff has completely failed in that regard. There is no proof of any actual conflict. Since there's not proof of actual conflict, there's also no proof of actual prejudice. The defendant has tried to raise the appearance of impropriety which Cherry specifically doesn't allow, citing Gibson and Merrifield as already read into the record. There is

		no evidence in the defendant's motion. Essentially, the defendant is asking this Court to speculate as to a conflict based solely on the timing of Ms. Drews leaving. You signed the motion, requested a hearing and that is what we are doing now. Case law makes it quite clear that it is your burden and I can't engage in speculation and can't make a decision on an appearance of impropriety. There is nothing that would support making a finding that you met your burden.
12:01:14 PM	Judge Mitchell	Plus, the motion to DQ the entire KCPA office as a whole that is asked for on page 3 is absolutely untenable given the complete lack of evidence and absolute failure to sustain your burden of proof. What is troubling to me is this motion was filed March 1st and now it is March 31st and Mr. Van Rossum just found out he was bringing this motion today. In that month, there is nothing keeping the defendant from taking Mr. McHugh's deposition or Ms. Drews' deposition to find out if there is any actual conflict. All you've done is stand up and say there's a conflict here. Your office has done that in at least 10 cases assigned to me and I don't know how many before other Judges. I am assuming that there was the same lack of evidence in those matters as well.
12:03:28 PM	Ms. Freund-Marceau	To my knowledge, no Judge has granted the motion. I have not tried to take Mr. McHugh's or Ms. Drews' depositions and I don't think anyone in my office has.
12:03:54 PM	Judge Mitchell	I don't know how you can meet your burden w/o doing that. It seems you didn't have any evidence when you filed this motion on March 1st and you don't have any evidence today. I will not disregard State vs. Cherry. Even if I did and said that the PD's office is a firm, I find the Idaho rule of professional conduct has been violated. Defendant did not meet his burden, motion is denied in all 3 cases, Ms. Freund to prepare an order. We have 4 similar motions this afternoon starting at 4pm so if counsel would tell your offices that we will probably be here until 7-8 at night b/c I am finding that Severson mandates that I have to have a hearing once the motion is filed and if I don't have a hearing and make findings then any conviction of your client could be overturned and any action taken from now on could result in reversing any decisions I made. Even if you came in and asked me to vacate this hearing, I have to have a hearing, I have to have evidence and I have to make a finding. It's going to take a while to get through all of these.
12:07:16 PM	Judge Mitchell	In the newer case, is there any resolution.
12:07:23 PM	Ms. Freund-Marceau	There has been a resolution, however Mr. Van Rossum now wants to enter NG on the new charge and go forward w/ evidentiary in the older cases.

12:07:51 PM	Judge Mitchell	CR28-21-1853: Information filed.
12:08:19 PM	Ms. Freund-Marceau	I have a copy I am showing Mr. Van Rossum.
12:08:28 PM	Defendant	I am pretty sure I reviewed that document before. Middle name is Nathan. Name spelled correctly on Information.
12:09:39 PM	Ms. Freund-Marceau	I am trying to locate the Information in our file.
12:10:18 PM	Defendant	I have seen the Information before. Name is spelled correctly other than not having Nathan after Henry. DOB and SSN are accurate. Not under the influence of alcohol/drugs. Have MH issues that could interfere w/ ability to think clearly. I understand what's going on, but there's other things going on in my head at the same time. That is usually the case. I will let you know when the other things going on in my head become so I can't understand you. That has not happened yet. I didn't complete freshman year of HS. Most part no trouble w/ English language. Waive reading of Information.
12:12:44 PM	Judge Mitchell	Reviews charges/possible penalties: PCS meth, poss para.
12:13:15 PM	Defendant	Understand.
12:13:24 PM	Judge Mitchell	Reviews consecutive sentencing.
12:13:31 PM	Defendant	Understand. Understand could be sentenced consecutively to sentences in older cases.
12:13:58 PM	Judge Mitchell	Gives non-citizen warning.
12:14:10 PM	Defendant	Understand. Do not need more time w/ Ms. Freund. Pleads NOT GUILTY to PCS meth and poss para.
12:14:49 PM	Mr. Poorman	2 days to try.
12:14:57 PM	Ms. Freund-Marceau	Agree.
12:15:01 PM	Judge Mitchell	I am going to set for 2 day trial in April calendar. Trial 04/19/2021 at 9am and PTC 04/14/2021 at 2pm. I will find out today when jury selection is going to be, it might be the 16th or 19th.

12:15:55 PM	Judge Mitchell	Next here for evidentiary hearing on the two older cases. I was given a DVD/CD in both cases today, it looks like it is from the plaintiff, there appears to be an incident report, and the DVD is videos from body cam and surveillance. I have not looked at that.
12:17:04 PM	Mr. Poorman	Would like to continue evidentiary. I spoke w/ Ms. Freund and Mr. Van Rossum was going to enter some admissions. Based on representation that we had a global resolution, I did not subpoena any witnesses.
12:18:01 PM	Judge Mitchell	What I have access to in the file, there's nothing filed after March 16th and no addendum to report of violation.
12:18:18 PM	Mr. Poorman	It should have been filed 02/18/2021 but I will email to you and Ms. Freund.
12:18:36 PM	Ms. Freund-Marceau	I am in receipt of addendum and I have gone over that w/ Mr. Van Rossum.
12:18:47 PM	Judge Mitchell	My apologies, I was looking in the new case. There is an addendum dated 02/16/2021, filed 02/18/2021 which has allegation 2.
12:20:00 PM	Defendant	I have read that document. I understand accusation there.
12:20:14 PM	Judge Mitchell	Reviews plea options for allegation and right to evidentiary hearing.
12:20:48 PM	Defendant	Understand. Understand won't be evidentiary if I admit. Do not need more time w/ atty. DENY allegation 2 in 02/16/2021 PV addendum.
12:21:36 PM	Ms. Freund-Marceau	I have no objection to motion to continue given the late change of mind by Mr. Van Rossum.
12:22:04 PM	Mr. Poorman	Will not call Ms. Rose as witness at evidentiary.
12:22:14 PM	Judge Mitchell	Motion granted, will move evidentiary hearing to 04/28/2021 at 11am.
12:23:09 PM	Mr. Poorman	Nothing further.
12:23:14 PM	Ms. Freund-Marceau	We filed a motion for bond reduction.
12:23:23 PM	Judge Mitchell	I won't hear that today b/c it's 12:23pm and we have a busy day, it will have to be heard at a later date.
12:23:39 PM	END	

Description	CR-2017-5838 Eisenhart, Jodi 20210331 Motion to Disqualify Kootenai County Prosecutor's Office Judge John T. Mitchell Clerk Alena Clark No Court Reporter		
Date	3/31/2021	**Location**	1K-CRT8

Time	Speaker	Note
4:13:10 PM	Judge Mitchell	Calls case. Defendant not present. Anne Taylor for defense. Jed Whitaker for State. All parties via Zoom.
4:13:41 PM	Judge Mitchell	Here on defense's motion to DQ KCPA.
4:13:55 PM	Mr. Whitaker	Asking to continue and will make a record.
4:14:23 PM	Judge Mitchell	There is a motion filed by Ms. Taylor dated 03/03/2021, I have read that. I read the brief filed by the plaintiff in opposition filed 03/10/2021. There is a 2nd brief in opposition filed 03/11/2021 and I read that. The last time I looked in the file this wasn't there but it is now, brief in opposition filed 03/24/2021. I have taken the view that I cannot not decide this motion so great reluctance to continue.
4:16:03 PM	Mr. Whitaker	This all came together yesterday and this morning when I your hearing w/ Ms. Freund on the motion to DQ the office. Under the Severson case, I think there may be an issue w/ KCPD having committed potential ethical violations - I want carefully say that, I am not accusing Ms. Taylor of anything. Or they are judicially estopped from raising this as an issue, the conflict issue. During the course of Ms. Eisenhart's case - and really every case I have had with the PD's office for the most part, and I think this is true with most of my office - they have continued to negotiate cases after they filed motion to DQ. If you look at Severson and read it in light with Dursunov which is 2010 Westlaw case that talks about judicial estoppel and how a party can't take inconsistent positions or they can be judicially estopped and that gets all the way up to McKay vs. Owens, 130 ID 148. I think this needs to be briefed further. As soon as I ended up taking a look at this issue, I called Ms. Taylor and let her know this was on the way and gave her the names of the cases I was looking at. There is a decent argument that PD's office is judicially estopped raising the conflict issue or at least that is an issue that the State would like to explore. In this case, the motion filed states that there is a conflict. I was going to essentially agree to a dismissal but that is a negotiation that I cannot be doing with Ms.

		Taylor since that motion was filed. Because there's been negotiation in so many cases where the PD's filed these motions - I think in every case Ms. Drews touched - there is a decent judicial estoppel argument based on the brief reading that I've done that they cannot now raise this motion because they're essentially estopped from doing it by taking inconsistent positions. In other words, you have a conflict, but if you're going to dismiss this case then I will withdraw my motion. Or even taking cases and still negotiating it until we get to a motion to DQ on them, that has happened in other cases. Then we have the motion
4:21:21 PM	Ms. Taylor	Our position is that the Court can decide the conflict issue and whether the PA's office should stay on board or not. Once that is decided, we can move either move forward w/ the probation termination motion, or if the Court decides that the PA's office shouldn't be involved in the case then it will have to be continued to get another PA on board..
4:21:57 PM	Judge Mitchell	The motion to terminate probation was filed but hasn't been noticed up for hearing. I am not worried about that. I do want to make clear that Severson says I can't decide the probation motion or any other motion until I decide the DQ motion. I can do Monday afternoon at 2pm, there's nothing I can do on Thu or Wed. Monday it is.
4:24:30 PM	Mr. Whitaker	I will try to get our brief out to Ms. Taylor tomorrow.
4:24:38 PM	Ms. Taylor	I ask that we set this out the following week. If I get the brief sometime tomorrow, that is not sufficient time if I need to respond to it. I have reached out to bar counsel after my conversation w/ Mr. Whitaker, and I would like the benefit of bar counsel's advice on this issue as well.
4:25:08 PM	Mr. Whitaker	I would like it before Judge Peterson's order takes impact which could be a ton of work for our office and we're coming back in trials. I can get the brief to Ms. Taylor tomorrow and I ask to keep the date on the 5th.
4:25:21 PM	Judge Mitchell	I'm going to leave it set on the 5th and we will do something on the 5th. If I have to decide this on the merits, which Severson tells me I have to do, that's what we're going to do. If there is a legal argument as to why that motion should not be granted, I can hear that as well. But I am going to get through at least the factual and legal issues on Monday. If there is additional legal argument under estoppel theories, that is fine, I can take those up at a later time or at the same time. There are so many of these motions and I am very reluctant to move any of them and I need to deal w/ these so I'm going to do that. So we will hear at 2pm on Monday the 5th.

4:26:34 PM	Mr. Whitaker	Nothing further. Someone else may argue for me as I have JT on the 6th and I think we pick a jury, but we will have someone there. Dursunov, 2010 Westlaw 9585664, at page 3, that deals with the judicial estoppel element and goes into the McCoy case and the one we've been talking about.
4:27:23 PM	Judge Mitchell	I can read those two cases.
4:27:26 PM	Ms. Taylor	Nothing further.
4:27:29 PM	END	

Description	CR 28-20-9079 Parker, Ailene 20210401 Jurisdictional Review Hearing Judge Mitchell Clerk Tiffany Burton No Court Reporter		
Date	4/1/2021	**Location**	1K-CRT8

Time	Speaker	Note
01:35:16 PM	Judge Mitchell	Calls case; Def present in custody, DA Mr. Lawlor, PA Mr. Mortensen
01:35:49 PM	Def	I have read the report.
01:36:10 PM	J	There is a motion to DQ the PA's office in this file. We are going to have to have a hearing on that. I have not read the motion in this case, but appears to be identical to others I have seen in other cases.
01:37:31 PM	DA	I would vacate that motion.
01:37:39 PM	J	No you won't, because it's not allowed. You are going to have to go forward on this motion.
01:38:03 PM	DA	No witnesses.
01:38:06 PM	J	I think you are going to have to call your client as a witness. If you don't, I will.
01:39:33 PM	DA	I call Ms. Parker as a witness.
01:39:51 PM	J	Swears.
01:40:28 PM	DA	Direct.
01:40:32 PM	Def	I am aware of an attorney Casey Drews. She was my attorney. I am aware she now works for the prosecutor's office. I don't understand your question. I don't feel prejudiced from her working in their office.
01:41:45 PM	PA	Cross.
01:41:48 PM	Def	I don't think there is a conflict with this case. I don't really know what's going on.

01:42:12 PM	J	I have questions, because I don't think DA has addressed what is required. I understand your confusion. When did you become aware that your attorney had filed this motion?
01:42:43 PM	Def	This is my first time finding out. No one contacted me, no one contacted me regarding a conflict of interest.
01:44:38 PM	J	Your attorney claims there is a conflict of interest. Do you have any evidence that there is a conflict?
01:45:10 PM	Def	No. I don't have any feelings regarding her leaving for the PA's office. I feel like I should have been notified about what was going on. I have not spoken from anybody from the PD's office, nobody talked to me about this report.
01:48:45 PM	DA	Redirect.
01:48:48 PM	Def	I did not receive a letter asking me to contact you regarding this hearing. The only thing I have received is the copies of my sentencing. Back in November, I was in Pocatello at the time.
01:49:49 PM	PA	Nothing to add.
01:50:06 PM	DA	I do have a copy of a letter dated March 22nd, sent to the parole release center asking Def to call our office and schedule an appointment.
01:51:00 PM	J	How does a letter from a week ago is relevant to the conflict of interest questions.
01:51:14 PM	DA	We are not able to call down and talk to your clients. Typically case managers will tell them they need to call us. Def didn't make an effort to contact our office.
01:52:36 PM	J	There is nothing from your office advising her of a possible conflict of interest. What evidence do you have?
01:52:53 PM	DA	Ms. Drews did represent her, think that creates the question of a conflict. Once we put the question in play, the PA should have filed an affidavit.
01:54:05 PM	J	What evidence did you submit with you motion on March 3rd?
01:54:17 PM	DA	We did not submit any evidence.
01:54:54 PM	J	You have the burden of proving an actual conflict. What evidence do you have in your motion to prove an actual conflict?

01:55:20 PM	DA	I am not aware of any in this case at the moment. The evidence is Ms. Drews in the PA's office. I thought that was sufficient. I feel this was a tactical decision. I was going to ask the court to vacate it.
01:58:47 PM	PA	Ask the court to consider the affidavit submitted.
01:59:06 PM	DA	Submit, no argument.
01:59:12 PM	PA	I don't think DA has met their burden, ask the court to deny the motion.
01:59:24 PM	DA	Noting further.
01:59:28 PM	J	Deny DF's motion to DQ PA's office from this case. This is one of the most absurd things I've ever heard. I will file a bar complaint against you for making a motion without any evidence, where you cite a case that you haven't even read, and making a motion without notifying your client.
02:01:59 PM	Def	I have not read the report.
02:02:45 PM	DA	I request a break-out room with Def for a few minutes
02:03:27 PM		PASS.
02:52:04 PM	J	Recalls.
02:52:09 PM	Def	I have read the report, discussed with my attorney. I have completed those programs.
02:52:41 PM	PA	Recommending probation.
02:52:44 PM	DA	Agree with recommendations. One written warning for not wearing a mask. Has approve housing in Billings, MT. Has employment, supportive family. Will get serviced thought Indian Health Services.
02:53:35 PM	Def	Thank you for sending me on this rider, I didn't realize I needed it.
02:54:10 PM	J	You did a really good job. Reviews terms and condition of probation. 3 years supervised probation. Have a sponsor by May 1st. Get a MH eval no later than May 15h, must include assessment for past trauma. You've been though a lot a young age, need to heal and process the best you can so you stay sober for th long run.

03:02:23 PM	Def	Understand conditions. I do have my GED.
03:02:35 PM	End	

Description	CR 2017-5838 Eisenhart, Jodi 20210405 Motion Judge Mitchell Court Reporter None Clerk Jeanne Clausen		
Date	4/5/2021	**Location**	1K-CRT8

Time	Speaker	Note
02:08:54 PM	J	Calls case - Anne Taylor present from the defendant via Zoom. Jed Whitaker for the State via Zoom. Motion to disqualify KCPA in all further proceedings in this case.
02:11:00 PM	PD	I thought Ms. Eisenhart would appear by telephone.
02:13:12 PM	J	Able to contact defendant telephonically. Motion to disqualify KCPA Office. I have read quite a bit of material and case law. Reviews documents read in preparation for this hearing. I didn't feel I could proceed to the Motion to Terminate Probation without Ms. Eisenhart present and until after dealt with deft's motion to DQ. I have read 130ID138. St. vs. Severson 147ID694. St. Vs. Dursonof 210wl.
02:19:27 PM	PD	No additional evidence. We are satisfied that State is in compliance. I'm not going to call my client.
02:19:59 PM	J	I have a duty to inquire as to St. vs. Severson 147id694. I'm going to call Ms. Eisenhart and ask questions. Swears in defendant.
02:20:56 PM	J	Directs deft.
02:21:08 PM	Deft	I know why we are here today. Wasn't aware that a Motion to DQ KCPA until 3/31/21. I wasn't made aware that Ms. Drews withdrew in Feb 2021. I'm not aware of any conflict I know that my old PD was very professional with me. No concerns about KCPA remaining on this case even though they have hired Ms. Drews.
02:26:13 PM	PD	No cross.
02:26:16 PM	PA	No cross.
02:26:21 PM	J	That's all the evidence court has.
02:26:28 PM	PD	No evidence
02:26:32 PM	PA	No evidence.

02:26:38 PM	PD	At this time with affd of Mr. Mchugh and 2 affidavits of Ms. Drews, PD's office is satisfied. No objection to court denying the Motion to DQ.
02:27:26 PM	J	I've been very up front with defense attorneys', motion was made in 3 other cases with no evidence of actual conflict. Brief was filed in every case and they were all the same. Those 3 counsel hadn't read St. vs. Severson. When you signed the motion to DQ KCPA on 3/2/21, what evidence to you had.
02:29:42 PM	PD	I filed the motion to DQ because affid wasn't given to me as to Rule 1.11. Strategic and time was of the essence type of motion. On day we came to hearing, thought court would rule against the PD's office. No actual evidence of conflict, but not standard 1.11. I didn't prepare motion, read it and went thru it and authorized. Combination of a Motrin that was here when John Adams was here and a combination of 2 other attorneys.
02:33:11 PM	PD	No additional argument.
02:33:19 PM	PA	Court should either deny based upon the affidavits filed. Page of 3 of defense brief that there is a conflict. Should've said that if there was a conflict. Page 423 of Severson. Ms. Taylor is the PD for Ko. Co. and client states there is no conflict. Ask court to find no conflict. Court needed to conduct this hearing.
02:36:26 PM	PD	Nothing in response.
02:36:31 PM	J	Denying deft's Motion to DQ KCPA office in this case. Initial brief of 3/3/21 clearly claims there is a conflict. There is no evidence to support this claim. There is no evidence by deft moving party that there is an actual conflict. I feel I needed to have a hearing and will in remaining 10 cases. My reading from Severson doesn't just allow the motion to be withdrawn. I do find that because deft thru her attorney on 3/25/21, filed motion to terminate probation while motion to DQ was pending. Find judicial estopple. Mr. Whitaker to prepare an order. Not going to hear motion to terminate probation and needs to be determined on a different day.
02:41:52 PM	PA	Nothing further.
02:42:10 PM	J	Denied on the facts as to the conflict. Deft is judicially estopped from pursuing that motion. That doesn't cause Ms. Eisenhart to not bring her motion to terminate probation at a later time. I'm going do same with you as to the rest of deputies. It has cause me at least 25 hrs up to this point and I'm not even half way thru these motions. I feel bad turning these people into the bar. Client was never contacted, Severson wasn't read prior to these motion. Unfortunate day for this county.

02:45:02 PM	End	

Description	CR28-19-7958 McCullough, Cappuccino 20210406 Motion to Disqualify Kootenai County Prosecutor's Office Judge John T. Mitchell Clerk Alena Clark No Court Reporter		
Date	4/6/2021	**Location**	1K-CRT10

Time	Speaker	Note
03:59:54 PM	Judge Mitchell	Calls case. Defendant present in custody in Shoshone County. Jeanne Howe for defense. Donna Gardner for State. All parties via Zoom.
04:00:39 PM	Judge Mitchell	Here on motion to DQ KCPA. Read motion to DQ filed 03/01/2021. March 4th brief in opposition, I read that. Notice of hearing filed by Ms. Howe on 03/23/2021. I have read State vs. Severson 147 ID 694 and State vs. Cherry.
04:02:28 PM	Ms. Howe	Ask Court to take evidence State provided re: affidavit signed by Ms. Drews and filed in State's brief in opposition. Ask to take judicial notice of that as evidence. That is all the evidence I have.
04:03:00 PM	Judge Mitchell	I have read that affidavit.
04:03:04 PM	Ms. Howe	No other evidence.
04:03:08 PM	Judge Mitchell	I have questions for your client.
04:03:19 PM	Ms. Howe	Depends on the questions.
04:03:25 PM	Judge Mitchell	Do you understand what this motion is?
04:03:31 PM	Defendant	Yes. To go from an atty to PA seemed unfair if everything wasn't in place, that's how that was explained to me. I became aware of this motion several weeks ago, I don't know if it was on March 1st, I just got the notice here, the notice of hearing. It was a week or 2 ago.
04:04:41 PM	Judge Mitchell	Motion was filed on 03/01/2021, over a month ago, did you know about it at that time?
04:04:50 PM	Defendant	I did not know it was filed at that time. The PD's office made me aware of the motion. I want everything to be fair. I have never been part of these proceedings before. It was explained to me that she was my atty then she went to the PA and she had access to the computers

		and they didn't want her to use information she got as my atty at the PA's office.
04:06:16 PM	Judge Mitchell	State vs. Severson requires me to ask if you have any concerns about the fact that Ms. Drews is now over at the KCPA.
04:06:35 PM	Defendant	Yes, I have concerns. She knows my file and I don't feel it'd be fair to defend me and then turn around and possibly prosecute me. I do not know if she is involved in my prosecution. I feel like she should've maybe finished the job she started, we could have completed what was here and not just left it on the table.
04:07:47 PM	Ms. Howe	No questions.
04:07:58 PM	Ms. Gardner	Questions defendant.
04:08:05 PM	Defendant	She knew my file b/c she was my atty and now she's on the other side. My first thought was that she would take information from my file w/ her over to the PA. I don't have evidence, it is just concern. I've never been in this situation before. I have not seen the State's response and affidavit, but Ms. Howe read some of them to me. There were things filed in other cases but not filed in this one.
04:09:28 PM	Ms. Gardner	No other questions.
04:09:35 PM	Ms. Howe	Questions.
04:09:42 PM	Defendant	I am concerned about the knowledge Ms. Drews has in her mind, I had those concerns after you read me the affidavit, I have those concerns now.
04:10:21 PM	Judge Mitchell	When did you tell your client about the motion?
04:10:26 PM	Ms. Howe	I have to check my file.
04:11:37 PM	Ms. Howe	I believe he had notice on 03/22/2021. I filed the motion on March 1st. I read Severson years ago, but not at the time that I filed the motion.
04:12:10 PM	Judge Mitchell	That's all the questions I have.
04:12:23 PM	Ms. Gardner	No additional evidence.
04:12:29 PM	Ms. Howe	This motion was filed to protect Mr. McCullough's right to conflict free counsel, based on the rules of professional conduct. When there

		is a concern raised re: conflict of interest, there are requirements under Rule 1.11 laid out clearly. Reviews 1.11(a). As I'm sure the Court can see, I have argument in my brief that the language in this tends to apply to representing an agency but it applies in this matter as well. My concern in this case is that based on Idaho Rules of Professional Conduct that this needed to be taken care of as soon as possible. The evidence introduced by the State today is re: Ms. Drews' affidavit. The rule requires a timely screening, the Court is aware of that information based on the filings. If defense hadn't filed this motion, bar counsel wasn't consulted until May 2nd. We then received the affidavit in this case, it is the only affidavit filed in this case. I have an affidavit from Mr. McHugh and a subsequent affidavit from Ms. Drews in other cases. At this time, I don't believe there has been appropriate protection put into place and I am concerned about my client and the public's faith in the system as well. This isn't directed at Ms. Drews choice of job. I don't think timely screening happened. Other affidavits filed in other cases were not filed in this case. This is an issue that needs to be raised before the Court. The Court wouldn't have any other way to know this exists and it is something important for all officers of the court and judiciary. Ask to grant DQ. If not inclined to DQ motion, I ask for an order precluding Ms. Drews having contact w/ any other attys in the PA's office re: Mr. McCullough's case. This isn't regular business for someone like Mr. McCullough, it can cause trust issues between client and atty due to abandonment. I think it is in my client's best interest that this issue be addressed. Under Rules of Professional Conduct, I ask that the screening be more definitive or DQ due for failure to make timely screening.
04:20:24 PM	Ms. Gardner	The affidavit of Ms. Drews we submitted, she was immediately cut off of the PD's office including computers, files, etc on Feb 17th. She started at KCPA on March 1st. She made several steps, contacted Brad Andrews at Idaho Bar Counsel to discuss professional rules that would apply. She then notified Mr. McHugh of the situation and asked Ms. Taylor for a list of her cases at the PD and that list was provided here with cautions made that there was to be no communication w/ Ms. Drews re: the cases she was involved in before. That is appropriate screening and providing protection of conflicts.
04:22:23 PM	Ms. Howe	What is unfortunate is that the Court doesn't ave other filings showing the timeline and they don't fall under timely screening and that is my biggest concern. I want to make sure Mr. McCullough has assurances that he doesn't have a situation where he has an individual with information is being divulged. He needs assurances that there will be conflict free counsel.

04:23:54 PM	Judge Mitchell	Deny motion to DQ entire KCPA in Mr. McCullough's case. The defendant and his counsel have not met their burden, they have to prove actual conflict. My job isn't to give Mr. McCullough assurances or not, my job is to determine whether the defendant has met the burden of proof of actual conflict. Ms. Howe to provide an order, consistent w/ other cases, I have had cases before Ms. Taylor, Mr. Fox, Ms. Freund. I will be filing a bar complaint against each attorney for filing a motion w/o discussing it w/ your client at the time of filing. You have done a little bit better in giving him 1-2 weeks notice. Filed a motion w/o reading Severson. Filed a motion w/o any evidence of any actual conflict and did not provide any evidence of actual conflict today. There has never been any evidence of actual conflict. Ms. Drews' affidavit would provide assurances for your client, but that is not what I am here for. Even if that affidavit was not filed, there is no reason I could grant your motion.
04:27:20 PM	Ms. Gardner	Nothing further.
04:27:23 PM	Ms. Howe	Nothing further.
04:27:34 PM	Judge Mitchell	We are still in limbo, I saw that my warrant was served on Mr. McCullough back in December. My filed shows that Mr. McCullough would not be transported until Shoshone County matter is dealt with. When will the Shoshone County matter be taken care of?
04:28:48 PM	Ms. Howe	I don't know, there isn't a date. I have been in touch w/ his counsel and the PA, hopefully we can get more information after this decision today.
04:29:13 PM	Judge Mitchell	Set for PVAD and we could take up the hearing by Zoom and not have you transported. May 4th, 2:30pm for admit/deny hearing.
04:29:58 PM	END	

Description	CR28-18-12846 Towner, Gregory 20210407 Motion to DQ KCPA CR28-20-18022 Towner, Gregory 20210407 Motion to DQ KCPA Judge Mitchell Court Reporter: None Clerk: Kat Hayden		
Date	4/7/2021	**Location**	1K-CRT10

Time	Speaker	Note
10:40:42 AM	Judge Mitchell	Calls case Defendant present in-custody DA present - Adrien Fox PA present - Tristan Poorman All parties present via Zoom
10:41:12 AM	DA	No evidence to present. Ask the court to take judicial notice of the timing and the three affidavits from KCPA.
10:42:04 AM	Judge Mitchell	Reviews file.
10:43:53 AM	DA	I am happy to call him as a witness. It might be more efficient for me to represent the timeline.
10:44:25 AM		Ms. Drews filed the notice of appearance on 11/18/20, she worked the case in both matters, accepted KCPA employment on 2/15/21, notice of acceptance to PD's Office on 2/17/21. The case was assigned to me on 2/22. Motion to DQ KCPA was filed 3/1, same day she started. Notice of hearing sent out 3/9, Moiton and Opposition filed 3/11. Phone call to defendant 3/17. 3/31 we had the motion and the affidavits were proved. 4/2 phone call with defendant. No additional testimony at this time.
10:45:54 AM		I notified him that the motion was being filed in the notice of hearing on 3/9. It was sent to him at IDOC.
10:46:21 AM		I don't think it's necessary to call him as a witness.
10:46:35 AM	Judge Mitchell	I feel the need to ask him questions under the State v Stevenson. Swears in defendant.
10:47:09 AM	Def	Swears.
10:47:21 AM		I did get notice of this motion. I got a letter yesterday. I heard of it for the first time on Monday. There was a letter for the court date sent from the PD's Office about the KCPA being disqualified. I got it

		earlier than Monday. Almost a month ago sounds right. I don't have any concerns with Ms. Drews being hired by KCPA.
10:49:21 AM	DA	No questions.
10:49:25 AM	PA	No questions.
10:49:30 AM	DA	The ID Rules of Professional Conduct, reviews. 1.11 is relevant because 1.10 doesn't apply if timely screened and written notice is given to the government agency to determine compliance. At the time of the filing of the motion, there was a prima facia that there was a conflict and the state hadn't complied with 1.11b. The motion was filed to protect the right to conflict free counsel. We have discussed the motion and has been advised of the affidavits and the KCPA has complied with 1.11. He has no objection to the KCPA continuing on the case.
10:51:24 AM	Judge Mitchell	I don't see how you reached a prima facia case on March 1. Your burden under Stevenson is to proof an actual conflict, not an allegation.
10:51:47 AM	DA	I guess going from PD to PA in the same case is a direct conflict for Mr. Towner. That appeared with Ms. Drews beginning on 3/1 and recognizing that a way for imputation is to comply with 1.11b and that hadn't occured yet.
10:52:36 AM		There is not a conflict beyond what I said. I believe there is actual conflict but the affidavits have cleared it.
10:53:12 AM		At this time with compliance with 1.11b, no conflict.
10:53:23 AM	PA	Nothing from the state. Admitted our exhibits on Wednesday last week.
10:53:42 AM	DA	Those were admitted by stipulation.
10:53:49 AM	Judge Mitchell	I find that there is no actual conflict. I made my reocrd in an earlier case with Mr. Fox - I have a duty to report the actions of defense counsel to the bar.
10:54:24 AM		I find that on 3/1, there was no conflict and there hasn't been conflict. At the time he made the motion, he hadn't read Stevenson, which I find problematic. When he made the motion, there was no communication with the defendant, he did eventually but not for consent to file and for those reasons, I will be making a bar complaint. The motion is denied.

10:55:41 AM		KCPA will still be on the case. Mr. Fox will be your attorney moving forward.
10:56:00 AM		Mr. Fox to prepare an order.
10:56:13 AM	END	

Description	CR28-20-3331 Schroeder, Austin 20210407 Motion to DQ KCPA Judge Mitchell Court Reporter: None Clerk: Kat Hayden		
Date	4/7/2021	**Location**	1K-CRT10

Time	Speaker	Note
10:56:18 AM	Judge Mitchell	Calls case Defendant present in-custody DA present - Adrien Fox PA present - Tristan Poorman All parties present via Zoom
10:57:12 AM	DA	He might be at ISCI.
10:57:44 AM		On 4/2, the notice was sent. I have Mr. Allen's direct line.
10:58:01 AM	Judge Mitchell	With the way I read Stevenson, I can't proceed without him.
11:01:16 AM		PASS
11:20:59 AM		RECALLS
11:21:06 AM	Def	This may be IDOC.
11:22:24 AM	Judge Mitchell	We have an 11:30 matter. We can interupt that one to take up this one.
11:23:19 AM		Gives out court room number.
11:23:37 AM		PASS
11:55:28 AM		RECALLS - defendant present.
11:56:59 AM		Motion was filed on 3/3. I have read that motion and the brief. I have read the state's opposition. I have read the Notice of Filing of Corrected Affidavits and the two affidavits from KCPA.

11:58:18 AM		We have a hearing on 3/31 but I didn't feel that I could proceed without the defendant being present. I understand he is in the custody of IDOC.
11:59:00 AM	DA	Ask to take judicial notice of specific documents and I will provide a timeline of events.
11:59:13 AM		Ms. Drews filed a Notice of assignment change on11/9, she represented him on 2017 misdemeanors, worked this case until 2/15, notice provided 2/17, Mr. Onosko assigned 2/26. Motion to DQ was filed 3/3, Ms. Drews started at KCPA 3/1. Notice of hearing sent out 3/9, phone call with def on 3/24, Motion and Opposition to Motion for DQ 3/30, 3/31 held the motion, 4/2 phone appt with defendant and assignment change to me, 4/5 corrected case captions filed. No testimony.
12:00:36 PM	Judge Mitchell	I feel that I need to ask him some questions.
12:00:56 PM		Swears in Defendant.
12:01:02 PM	Def	Swears.
12:01:14 PM		I did have a conversation with Mr. Onosko. I am having a lot of mental issues and I don't know what this is about. He told me about Ms. Drews going to the KCPA. I thought it was before my birthday but it was around the 24th. DOB is 3/19. I'm not worried about her going to the KCPA. I don't have any evidence that there is a conflict with her going to KCPA.
12:02:53 PM	DA	No questions.
12:02:58 PM	PA	No questions.
12:03:34 PM	DA	Professional Rules, reviews. 1.11 is relevant because 1.10 doesn't apply if they are screened timely and written notice is filed with government agency to determine compliance. At the time of filing of the motion on 3/3, it didn't look like the state was in compliance. Motion was filed to protect right to conflict free counsel and time was of the essence. Defendant understands the right and given the affidavits, 1.11b is complied with at this time and no objection to KCPA appearing on the case.
12:05:28 PM		No evidence of conflict beyond the conflict that would arise with 1.09 and 1.10 but that is cured with 1.11b compliance.
12:05:49 PM	PA	Submit on corrected affidavits.

12:05:51 PM	Judge Mitchell	Denying the motion. I don't have any evidence of if Mr. Onosko read Stevenson before filing the motion. I'm not going to turn him into the bar - I need to be consistent and turn him in with the others. There was no actual conflict when the motion was filed.
12:06:54 PM	END	

Description	CR 2017-5838 Eisenhart, Jodi 20210405 Motion Judge Mitchell Court Reporter None Clerk Jeanne Clausen		
Date	4/5/2021	**Location**	1K-CRT8

Time	Speaker	Note
02:08:54 PM	J	Calls case - Anne Taylor present from the defendant via Zoom. Jed Whitaker for the State via Zoom. Motion to disqualify KCPA in all further proceedings in this case.
02:11:00 PM	PD	I thought Ms. Eisenhart would appear by telephone.
02:13:12 PM	J	Able to contact defendant telephonically. Motion to disqualify KCPA Office. I have read quite a bit of material and case law. Reviews documents read in preparation for this hearing. I didn't feel I could proceed to the Motion to Terminate Probation without Ms. Eisenhart present and until after dealt with deft's motion to DQ. I have read 130ID138. St. vs. Severson 147ID694. St. Vs. Dursonof 210wl.
02:19:27 PM	PD	No additional evidence. We are satisfied that State is in compliance. I'm not going to call my client.
02:19:59 PM	J	I have a duty to inquire as to St. vs. Severson 147id694. I'm going to call Ms. Eisenhart and ask questions. Swears in defendant.
02:20:56 PM	J	Directs deft.
02:21:08 PM	Deft	I know why we are here today. Wasn't aware that a Motion to DQ KCPA until 3/31/21. I wasn't made aware that Ms. Drews withdrew in Feb 2021. I'm not aware of any conflict I know that my old PD was very professional with me. No concerns about KCPA remaining on this case even though they have hired Ms. Drews.
02:26:13 PM	PD	No cross.
02:26:16 PM	PA	No cross.
02:26:21 PM	J	That's all the evidence court has.
02:26:28 PM	PD	No evidence
02:26:32 PM	PA	No evidence.

02:26:38 PM	PD	At this time with affd of Mr. Mchugh and 2 affidavits of Ms. Drews, PD's office is satisfied. No objection to court denying the Motion to DQ.
02:27:26 PM	J	I've been very up front with defense attorneys', motion was made in 3 other cases with no evidence of actual conflict. Brief was filed in every case and they were all the same. Those 3 counsel hadn't read St. vs. Severson. When you signed the motion to DQ KCPA on 3/2/21, what evidence to you had.
02:29:42 PM	PD	I filed the motion to DQ because affid wasn't given to me as to Rule 1.11. Strategic and time was of the essence type of motion. On day we came to hearing, thought court would rule against the PD's office. No actual evidence of conflict, but not standard 1.11. I didn't prepare motion, read it and went thru it and authorized. Combination of a Motrin that was here when John Adams was here and a combination of 2 other attorneys.
02:33:11 PM	PD	No additional argument.
02:33:19 PM	PA	Court should either deny based upon the affidavits filed. Page of 3 of defense brief that there is a conflict. Should've said that if there was a conflict. Page 423 of Severson. Ms. Taylor is the PD for Ko. Co. and client states there is no conflict. Ask court to find no conflict. Court needed to conduct this hearing.
02:36:26 PM	PD	Nothing in response.
02:36:31 PM	J	Denying deft's Motion to DQ KCPA office in this case. Initial brief of 3/3/21 clearly claims there is a conflict. There is no evidence to support this claim. There is no evidence by deft moving party that there is an actual conflict. I feel I needed to have a hearing and will in remaining 10 cases. My reading from Severson doesn't just allow the motion to be withdrawn. I do find that because deft thru her attorney on 3/25/21, filed motion to terminate probation while motion to DQ was pending. Find judicial estopple. Mr. Whitaker to prepare an order. Not going to hear motion to terminate probation and needs to be determined on a different day.
02:41:52 PM	PA	Nothing further.
02:42:10 PM	J	Denied on the facts as to the conflict. Deft is judicially estopped from pursuing that motion. That doesn't cause Ms. Eisenhart to not bring her motion to terminate probation at a later time. I'm going do same with you as to the rest of deputies. It has cause me at least 25 hrs up to this point and I'm not even half way thru these motions. I feel bad turning these people into the bar. Client was never contacted, Severson wasn't read prior to these motion. Unfortunate day for this county.

02:45:02 PM	End	

Description	CR-2017-5838 Eisenhart, Jodi 20210331 Motion to Disqualify Kootenai County Prosecutor's Office Judge John T. Mitchell Clerk Alena Clark No Court Reporter		
Date	3/31/2021	**Location**	1K-CRT8

Time	Speaker	Note
4:13:10 PM	Judge Mitchell	Calls case. Defendant not present. Anne Taylor for defense. Jed Whitaker for State. All parties via Zoom.
4:13:41 PM	Judge Mitchell	Here on defense's motion to DQ KCPA.
4:13:55 PM	Mr. Whitaker	Asking to continue and will make a record.
4:14:23 PM	Judge Mitchell	There is a motion filed by Ms. Taylor dated 03/03/2021, I have read that. I read the brief filed by the plaintiff in opposition filed 03/10/2021. There is a 2nd brief in opposition filed 03/11/2021 and I read that. The last time I looked in the file this wasn't there but it is now, brief in opposition filed 03/24/2021. I have taken the view that I cannot not decide this motion so great reluctance to continue.
4:16:03 PM	Mr. Whitaker	This all came together yesterday and this morning when I your hearing w/ Ms. Freund on the motion to DQ the office. Under the Severson case, I think there may be an issue w/ KCPD having committed potential ethical violations - I want carefully say that, I am not accusing Ms. Taylor of anything. Or they are judicially estopped from raising this as an issue, the conflict issue. During the course of Ms. Eisenhart's case - and really every case I have had with the PD's office for the most part, and I think this is true with most of my office - they have continued to negotiate cases after they filed motion to DQ. If you look at Severson and read it in light with Dursunov which is 2010 Westlaw case that talks about judicial estoppel and how a party can't take inconsistent positions or they can be judicially estopped and that gets all the way up to McKay vs. Owens, 130 ID 148. I think this needs to be briefed further. As soon as I ended up taking a look at this issue, I called Ms. Taylor and let her know this was on the way and gave her the names of the cases I was looking at. There is a decent argument that PD's office is judicially estopped raising the conflict issue or at least that is an issue that the State would like to explore. In this case, the motion filed states that there is a conflict. I was going to essentially agree to a dismissal but that is a negotiation that I cannot be doing with Ms.

		Taylor since that motion was filed. Because there's been negotiation in so many cases where the PD's filed these motions - I think in every case Ms. Drews touched - there is a decent judicial estoppel argument based on the brief reading that I've done that they cannot now raise this motion because they're essentially estopped from doing it by taking inconsistent positions. In other words, you have a conflict, but if you're going to dismiss this case then I will withdraw my motion. Or even taking cases and still negotiating it until we get to a motion to DQ on them, that has happened in other cases. Then we have the motion
4:21:21 PM	Ms. Taylor	Our position is that the Court can decide the conflict issue and whether the PA's office should stay on board or not. Once that is decided, we can move either move forward w/ the probation termination motion, or if the Court decides that the PA's office shouldn't be involved in the case then it will have to be continued to get another PA on board..
4:21:57 PM	Judge Mitchell	The motion to terminate probation was filed but hasn't been noticed up for hearing. I am not worried about that. I do want to make clear that Severson says I can't decide the probation motion or any other motion until I decide the DQ motion. I can do Monday afternoon at 2pm, there's nothing I can do on Thu or Wed. Monday it is.
4:24:30 PM	Mr. Whitaker	I will try to get our brief out to Ms. Taylor tomorrow.
4:24:38 PM	Ms. Taylor	I ask that we set this out the following week. If I get the brief sometime tomorrow, that is not sufficient time if I need to respond to it. I have reached out to bar counsel after my conversation w/ Mr. Whitaker, and I would like the benefit of bar counsel's advice on this issue as well.
4:25:08 PM	Mr. Whitaker	I would like it before Judge Peterson's order takes impact which could be a ton of work for our office and we're coming back in trials. I can get the brief to Ms. Taylor tomorrow and I ask to keep the date on the 5th.
4:25:21 PM	Judge Mitchell	I'm going to leave it set on the 5th and we will do something on the 5th. If I have to decide this on the merits, which Severson tells me I have to do, that's what we're going to do. If there is a legal argument as to why that motion should not be granted, I can hear that as well. But I am going to get through at least the factual and legal issues on Monday. If there is additional legal argument under estoppel theories, that is fine, I can take those up at a later time or at the same time. There are so many of these motions and I am very reluctant to move any of them and I need to deal w/ these so I'm going to do that. So we will hear at 2pm on Monday the 5th.

4:26:34 PM	Mr. Whitaker	Nothing further. Someone else may argue for me as I have JT on the 6th and I think we pick a jury, but we will have someone there. Dursunov, 2010 Westlaw 9585664, at page 3, that deals with the judicial estoppel element and goes into the McCoy case and the one we've been talking about.
4:27:23 PM	Judge Mitchell	I can read those two cases.
4:27:26 PM	Ms. Taylor	Nothing further.
4:27:29 PM	END	