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Attorneys for Respondent

BEFORE THE COMMISSION ON PRACTICE OF THE SUPREME COURT OF THE STATE OF MONTANA

IN THE MATTER OF AUSTIN MILES KNUDSEN,	)	Supreme Court Cause No. PR 23-0496
An Attorney at Law,	)	ODC File No. 21-094
Respondent.	)	**RESPONDENT'S BRIEF IN SUPPORT OF SECOND MOTION TO DISQUALIFY**

* * * * * * * * * * * * * * * * * * * *

INTRODUCTION

Respondent Attorney General Austin Knudsen respectfully requests that the Commission on Practice ("Commission") disqualify Adjudicatory Panelist Lois Menzies ("Ms. Menzies") due to her work on the Judicial Nominating Commission ("JNC"), which SB 140 and the related litigation in *Brown v. Gianforte* eliminated. Ms. Menzies's involvement violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, Article II, Section 17 of the Montana Constitution, the Montana Rules of Professional Conduct, and the Montana Code of Judicial Conduct.

On September 12, 2024, Respondent requested disclosure of the members of the upcoming Adjudicatory Panel for this matter. The Commission obliged and disclosed that the Adjudicatory Panel would consist of: "Randy Ogle (Chair), Patricia Klanke (attorney member), Substitute attorney member (TBA), Troy McGee (lay member), Lois Menzies (lay member), and Elinor Nault (lay member)."[1] See COP Email, dated September 12, 2024, attached as Ex. A. On September 30, 2024, Respondent learned that Ms. Menzies was previously employed by the JNC, worked alongside Beth McLaughlin, and likely has personal knowledge of the disputed facts.

[1] The Commission also informed Respondent that: "Per Rule 4(C) of the Montana Rules for Lawyer Disciplinary Enforcement, a substitute attorney member is required to constitute a quorum and will be appointed by the Montana Supreme Court from the attorney member area either in Area C, Area D, or Area E, as these are the areas of the three recused attorney members of the Adjudicatory Panel. The Supreme Court appoints attorney members per Rule 2(A) of the Montana Rules for Lawyer Disciplinary Enforcement." Ex. A. On September 17, 2024, the Supreme Court appointed Carey Matovich to sit by designation as the third attorney member.

The Commission must disqualify Ms. Menzies from the Adjudicatory Panel and cure all prejudice resulting from her involvement. Ms. Menzies worked for the JNC before SB 140. The JNC was housed in the Office of the Court Administrator, where Beth McLaughlin also worked, and Ms. Menzies worked alongside Beth McLaughlin. Ms. Menzies's previous employment by the JNC, professional relationship with Beth McLaughlin, and potential knowledge of facts underlying this controversy demand her disqualification from these proceedings. In other words, Ms. Menzies is so connected with the facts and issues of this proceeding that she cannot reasonably be expected to start her consideration of this case with a blank slate.

The Commission must, at minimum, disqualify Ms. Menzies from the hearing panel. *See United States v. Washington*, 157 F.3d 630, 660 (9th Cir. 1998) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.")); *see also Bullman v. State*, 2014 MT 78, ¶ 17, 374 Mont. 323, 321 P.3d 121 (holding "personal knowledge of facts that are in dispute" require disqualification) .

But there's more. If Ms. Menzies has already participated in this matter in any capacity or shared her personal knowledge of disputed facts with other panelists, Respondent's due process rights have already been violated and the Commission must vacate all proceedings. *See Mach v. Stewart*, 137 F.3d 630, 633 (9th Cir. 1998) (sharing personal knowledge related to child testimony "infected the process from the very beginning" and required conviction reversal); *United States v. Gonzalez*, 214 F.3d

1109, 1113 (9th Cir. 2000) (sharing personal knowledge related to cocaine tainted jury in cocaine trial).

Even if Ms. Menzies didn't taint the Panel with personal knowledge of disputed facts, the Commission must still purge the taint of potential bias. First, the Commission must vacate any order or decision in which she participated. *Stivers v. Pierce*, 71 F.3d 732, 748 (9th Cir. 1995) ("[W]here one member of a tribunal is actually biased, or where circumstances create the appearance that one member is biased, the proceedings violate due process."). That includes the Order denying Respondent's Motion for Summary Judgment. Second, Ms. Menzies's involvement (formal or informal) taints the participation of any of member of the Commission who participated with her in prior orders, discussions, or conferences. As a result, the Commission must disqualify those members as well.

For these reasons, Respondent respectfully requests that the Commission disqualify Ms. Menzies, disclose the extent of her prior participation in these proceedings, take all appropriate remedial action required by the Due Process Clause, and conduct a conflicts check on the remaining members of the Panel.

BACKGROUND

The relevant facts of this case—once again—bear repeating under these circumstances. In 2021, litigants challenged the constitutionality of SB 140, which changed the method for filling mid-term judicial vacancies in Montana. Relevant here, SB 140 authorized the Governor, instead of the Judicial Nominating Commission ("JNC"), to fill judicial vacancies. Opponents of that bill filed suit directly in the

Montana Supreme Court to declare it unconstitutional. *Brown v. Gianforte*, 2021 MT 149, 404 Mont. 269, 488 P.3d 548. Due to his public lobbying against SB 140, Chief Justice McGrath recused from *Brown* and selected District Court Judge Kurt Krueger to hear the case in his stead.

Not two weeks after that original action was filed, emails became public showing that Chief Justice McGrath was not the only member of Montana's judiciary who had taken a position on SB 140. In January 2021—when the Legislature was still considering SB 140—Supreme Court Administrator Beth McLaughlin emailed every Montana Supreme Court Justice and every Montana district court judge using government email accounts, asking that they "review and take a position on" SB 140. The email included a click-poll, to which many state judges responded. Even so, some judges' individual views became public when they chimed in on the long chain of "reply-alls." Many simply declared their opposition. Others offered more fulsome explanations. Still others went further, explicitly stating their view that SB 140 was unconstitutional. Judge Krueger, the Chief Justice's replacement in *Brown*, specifically offered his views: "I am also adamantly oppose [sic] this bill." Learning this, the State quickly moved to disqualify Judge Krueger and any other judicial officers who took a position on SB 140 before it was enacted. Judge Krueger recused within hours.

In early April 2021, the Montana Legislature issued two legislative subpoenas. The first was to Supreme Court Administrator McLaughlin, seeking all public records in her possession related to the SB 140 poll. When the Legislature saw that McLaughlin's response (on an extended deadline) included only two emails—along

with an apology and an explanation that she had not retained emails—Senate Judiciary Chairman Keith Regier then issued an April 8 legislative subpoena to the Director of the Department of Administration ("DOA") for McLaughlin's emails during the 2021 Legislative Session. On Friday, April 9, 2021, the Department partially complied with the subpoena, providing a 2,450-page collection of documents, including more emails related to SB 140 and other proposed legislation.

Two days later, on Sunday, April 11, 2021, Supreme Court Administrator McLaughlin filed an emergency motion with the Montana Supreme Court to quash the April 8 subpoena to DOA. That Sunday morning, the Clerk of the Montana Supreme Court, Bowen Greenwood, received a message from Justice Jim Rice. Justice Rice was the Acting Chief Justice in *Brown* because Chief Justice McGrath had recused. Justice Rice informed Mr. Greenwood that he had received a message from attorney Randy Cox, whom McLaughlin had retained to represent her. Later that Sunday, the Court temporarily quashed the April 8 legislative subpoena to DOA.

On April 12, 2021, McLaughlin filed her own lawsuit—styled *McLaughlin v. Montana State Legislature*—as an original action at the Montana Supreme Court. That original action sought to quash the Legislature's April 8 subpoena. On April 14, the Legislature not only moved to dismiss *McLaughlin* but also formed a select committee to investigate judicial document retention, judicial lobbying, and other potential judicial impropriety. On April 15, Legislative leadership issued new subpoenas—to McLaughlin and to each member of the Montana Supreme Court—ordering their appearance at an April 19 meeting of the select committee and the production of

(a) McLaughlin's computer and (b) documents related to judicial branch polls on pending legislation and to judicial lobbying. On April 16, in response to another emergency motion from McLaughlin, the Montana Supreme Court issued a combined order in McLaughlin and in the SB 140 merits challenge. That combined order quashed not only the April 8 legislative subpoena to DOA but also the second legislative subpoena to McLaughlin and the legislative subpoenas issued to the Justices the previous day.

The Legislature's decision to eliminate the JNC through SB 140, McLaughlin's subsequent lawsuit, and McLaughlin's interactions with the Montana Judiciary form the entire factual background of this disciplinary hearing. As an employee of the JNC,[2] colleague of McLaughlin, and employee of the Office of the Court Administrator, Ms. Menzies was personally affected by SB 140's elimination of the JNC, experienced the events supporting this proceeding firsthand, and has personal knowledge of facts in dispute. She cannot, consistent with due process, sit in judgment of the Attorney General's actions when she was personally affected by the underlying litigation and has unique knowledge of the disputed facts and circumstances.

LEGAL STANDARD

"[T]he requirement that proceedings which adjudicate individuals' interests in life, liberty, or property be free from bias and partiality has been 'jealously guarded.'" *Clements v. Airport Auth.*, 69 F.3d 321, 333 (9th Cir. 1995) (quoting *Marshall v. Jerrico*, 446 U.S. 238 (1980)). As such, a license to practice law may not be revoked or

[2] Respondent is unaware of whether this position was compensated or volunteer.

suspended without due process. *See, e.g.*, *Kafka v. Mont. Dep't of Fish, Wildlife & Parks*, 2008 MT 460, ¶ 39, 348 Mont. 80, 201 P.3d 8 ("[C]ourts have recognized that some licenses may contain property interests . . . protected by the due process clause."); *People v. Varallo*, 913 P.2d 1, 6 (Colo. 1996); *Huckaby v. Ala. State Bar*, 631 So. 2d 855, 857 (Ala. 1993); *Conway v. State Bar*, 767 P.2d 657, 660 (Cal. 1989); *cf. State v. VanDyke*, 2008 MT 439N, ¶ 6, 348 Mont. 372 ("[O]nce issued, a driver's license becomes a property interest that may not be suspended or revoked without the procedural due process guaranteed by the Montana and United States Constitutions.")

"At a minimum, Due Process requires a hearing before an impartial tribunal." *Clements v. Airport Auth.*, 69 F.3d 321, 333 (9th Cir. 1995). Montana's Due Process Clause, *see* MONT. CONST. art. II, § 17, similarly sets the "guiding principle of our legal system" and contemplates tenacious adherence "to the ideal that both sides of a lawsuit be guaranteed a fair trial." *Lopez v. Josephson*, 2001 MT 133, ¶ 35, 305 Mont. 446, 30 P.3d 326. Both actual bias and a high probability of bias trigger due process concerns. *See Withrow v. Larkin*, 421 U.S. 35, 46–53 (1975). This neutrality principle applies in administrative adjudications and quasi-judicial proceedings. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 n.2 (1980); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

Courts have held that the proper procedure to challenge the impartiality of the decision-maker in quasi-judicial proceedings is to request the examiner to withdraw from the case. *See, e.g.*, *Ginsburg v. Richardson*, 436 F.2d 1146, 1151 (3rd Cir. 1971); *Wells v. Apfel*, 2000 U.S. App. LEXIS 26163, at *16 (6th Cir. Oct. 12, 2000); *Idegwu*

v. Colvin, 2013 U.S. Dist. LEXIS 163393, at *41 (D. Del. Nov. 18, 2013). Where that decision-maker shared personal knowledge of disputed facts her fellow fact-finds, she "infected the process from the very beginning" and any decision must be vacated. *Stewart*, 137 F.3d at 633.

ARGUMENT

I. The Commission must disqualify Ms. Menzies because of her previous, direct involvement in this matter.

The facts and legal issues in ODC's Complaint against the Attorney General are inextricably intertwined with the Legislature's passage of SB 140, which disbanded Ms. Menzies's place of employment—the JNC. In case that self-evident conflict wasn't enough, Ms. Menzies worked alongside Beth McLaughlin—an essential witness in this proceeding. These conflicts violate Respondent's due process right to a fair and impartial hearing.

As the Washington Supreme Court makes clear, "[t]he presumption of fairness for judges likewise applies to hearing officers in attorney disciplinary proceedings," *In re Disciplinary Proceeding Against King*, 168 Wash. 2d 888, 904, 232 P.3d 1095, 1102 (2010). To overcome that presumption, "the party claiming bias must lay a specific foundation of prejudice or prejudgment, such that the probability of actual bias is too high to be constitutionally tolerable." *Id.* Alleged prejudice must be evident from the record and cannot be based on speculation or inference. *McClure*, 456 U.S. at 196. "[V]arious situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47. "A tribunal is not impartial

if it is biased with respect to the factual issues to be decided at the hearing." *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 518 (10th Cir. 1998) (quotations omitted).

For example, in *Staton v. Mayes*, 552 F.2d 908 (10th Cir.) (as amended), *cert. denied*, 434 U.S. 907 (1977), a school superintendent was dismissed by a majority vote of the school board. The members comprising the majority had made statements about the superintendent, both in public and in private, prior to any hearing on the matter. The court held that although such statements in an election campaign or between members weren't improper, "a due process principle is bent too far when such persons are then called on to sit as fact finders and to make a decision affecting the property interests and liberty interests of one's reputation and standing in his profession." *Id.* at 915. Ms. Menzies has even more direct involvement with the facts of this case than simply making public statements about it.

Ms. Menzies's employment at the JNC gives her direct personal involvement in this dispute. Ms. Menzies had a prominent role in the JNC, which included gathering public comments on judicial applicants. *See* David Sherman, *Public Comments Solicited on Applicants to Succeed Judge Pinski*, KRTV (Aug. 24, 2020), *available online at* https://www.krtv.com/news/crime-and-courts/public-comments-solicited-on-applicants-to-succeed-judge-pinski (instructing the public to send comments on judicial nominees to Lois Menzies). Ms. Menzies also worked directly with Beth McLaughlin on JNC matters. *See, e.g.*, *Agenda: Judicial Nomination Commission*, MONTANA.GOV (Aug. 11, 2020), attached as Ex. B. The underlying facts of this

proceeding implicate both the decision to disband Ms. Menzies's previous place of employment and the conduct of her colleague in that job.

The Legislature's decision to eliminate the JNC and the Attorney General's defense of the Legislature during this time form a central basis of the current proceedings. Beth McLaughlin is also a key witness for ODC, and Respondent anticipates that her testimony will be crucial to these proceedings. Ms. Menzies cannot be expected to be fair and impartial when evaluating the credibility of her coworker and considering the propriety of the Attorney General's actions defending the Legislature's decision to eliminate her job.

Although this is a quasi-judicial proceeding the Montana Code of Judicial Conduct is instructive. *See Draggin' Y Cattle Co. v. Junkermier*, 2017 MT 125, ¶ 36, 387 Mont. 430, 395 P.3d 497 ("Because disqualification proceedings are premised upon a litigant's constitutional right to a fair and impartial tribunal, we are unpersuaded by Peters's contention that a violation of the Code cannot be the basis for vacating a judge's decision."). First, "Rule 2.12 requires that a judge disqualify [her]self 'in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer . . . .'" *Bullman,* ¶ 14 (quoting Mont. Code of Jud. Conduct 2.12(A)(5)(a)); *see also Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) ("[U]nder the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case."). Rule 2.12(A)(5)(a) applies because

Ms. Menzies worked at the Commission at the center of the underlying controversy. *See Williams*, 579 U.S. at 9–10 ("the judge's 'own personal knowledge and impression' of the case, acquired through his or her role in the prosecution, may carry far more weight with the judge than the parties' arguments to the court.").

Finally, Rule 2.12 requires recusal when the judge had "direct involvement and personal knowledge of . . . a factual issue . . . material" to the case before her. *Bullman*, ¶ 17. A central question in both the alleged impropriety of the judiciary during the underlying controversy and the credibility of Beth McLaughlin implicates document retention policy and practices within the judicial branch. Ms. Menzies's previous work within the Office of the Court Administrator and previous role as the Supreme Court Administrator gives her firsthand knowledge of these practices and procedures. *See Board Members*, AMPRE, (last accessed Oct. 1, 2024), *available online at* https://www.amrpe.org/board-members/#:~:text=Lois%20Menzies,%20Secretary.%20She%20retired ("Lois [Menzies] was the Supreme Court administrator at the time of her retirement."). Ms. Menzies may not, consistent with due process, judge disputed facts of which she has personal knowledge. She cannot participate.

II. If Ms. Menzies participated in any part of these proceedings, the Commission must dismiss the Panel and vacate the hearing.

Respondent respectfully requests that the Commission disclose the extent of Ms. Menzies's involvement, if any, in this matter. If Ms. Menzies has had no involvement with this matter to date, her disqualification suffices. But if she had any other involvement—or more importantly shared personal knowledge of disputed facts—the Commission must dismiss the Panel and vacate the proceedings.

First, if Ms. Menzies participated in adjudicating Respondent's Motion for Summary Judgment, the Commission must vacate that Order. One biased member of a tribunal is sufficient to taint the entire panel and deprive a plaintiff of procedural due process. *See Stivers*, 71 F.3d at 748 ("Whether actual or apparent, bias on the part of a single member of a tribunal taints the proceedings.") ; *see also Williams*, 579 U.S. at 15 ("[I]t does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party."); *Hicks v. Watonga*, 942 F.2d 737, 748 (10th Cir. 1991) ("Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."); *Antoniu v. SEC*, 877 F.2d 721, 726 (8th Cir. 1989) (vacating commission decision and remanding for de novo reconsideration, even though biased commissioner belatedly recused himself and did not vote on final decision); *Cinderella Career & Finishing Schs., Inc. v. Fed. Trade Comm'n*, 138 425 F.2d 583, 592 (D.C. Cir. 1970) (vacating and remanding agency decision "despite the fact that former Chairman Dixon's vote was not necessary for a majority"); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767–98 (6th Cir. 1966) (agency decision must be vacated and remanded for de novo review; result "is not altered by the fact that [the biased panel member's] vote was not necessary for a majority"); *Berkshire Employees Ass'n of Berkshire Knitting Mills v. N.L.R.B.*, 121 F.2d 235, 239 (3rd Cir. 1941) ("Litigants

are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.').

Second, Ms. Menzies's involvement in any aspect of this case taints the participation of every co-panelist. The Commission must prospectively disqualify any panelist who has participated in this matter with Ms. Menzies. That's due to Ms. Menzies's personal knowledge of disputed facts, working relationship with a central witness, and the unique nature of the Commission's structure.

The U.S. Supreme Court's decision in *Williams* provides guidance. There, the Pennsylvania Supreme Court vacated a lower court decision granting postconviction relief to a prisoner. 579 U.S. at 4. One of the justices on the Pennsylvania Supreme Court had been the district attorney who gave his official approval to seek the death penalty in the prisoner's case. *Id.* The justice in question denied the prisoner's motion for recusal and participated in the decision to deny relief, which violated the Due Process Clause. *Id.* Although the Court remanded back for rehearing without the disqualified justice, it recognized that it may not be able to provide complete constitutional relief "because judges who were exposed to a disqualified judge may still be influenced by their colleague's views when they rehear the case." *Id.* at 16; *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831 (1986) (Blackmun, J., concurring) ("mere participation in the shared enterprise of appellate decisionmaking—whether or not [the improperly seated judge] ultimately wrote, or even joined, the [tribunal's]

opinion—pose[s] an unacceptable danger of subtly distorting the decisionmaking process.")

That's because "voluminous" literature has found that "judges' views are quite often influenced by the composition of the courts on which judges sit." Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 HARV. L. REV. 80, 102 n.121 (2009) (collecting citations). Adding to the risk, the private nature of court deliberations makes it impossible for the public to determine "the actual effect a biased judge had on the outcome of a particular case." *Lavoie*, 475 U.S. at 833 (Blackmun, J., concurring).

The current circumstances produce a particularly high risk of lingering bias following Ms. Menzies's disqualification. As discussed above, her knowledge of this case and of a key witness makes it nearly impossible to purge the taint of her past participation. The disqualified justice in *Williams* was merely adversarial to the defendant and had no such information.

Worse still, Ms. Menzies's knowledge of disputed facts likely requires the dismissal of the entire Panel. That's because, once a factfinder shares personal knowledge of disputed facts, she taints the entire proceeding to the point of requiring reversal of any past or future decision by that panel—even if she's disqualified. Federal courts have reversed jury verdicts for far less egregious scenarios than a factfinder's direct involvement in, and personal knowledge of, the disputed material facts.

For example, in *Mach v. Stewart*, a venireperson shared her experiences working with child victims of sexual assault during jury selection for a child sexual assault

case. 137 F.3d 630, 632 (9th Cir. 1998). The venireperson stated, during voir dire, that her experiences suggested that children never lie about sexual abuse. *Id.* at 633. Although the trial court struck this venireperson for cause and she was not empaneled on the jury, the Ninth Circuit held that her statements during voir dire violated the Defendant's right to an impartial jury. *Id.* That's because the jury's exposure to prejudicial statements made during voir dire, which were supported by personal knowledge "resulted in the swearing in of a tainted jury, and severely infected the process from the very beginning." *Id.*

Here, Ms. Menzies's personal knowledge of this case presents a far more egregious violation of due process than the venireperson in *Mach*. While the *Mach* venireperson merely extrapolated personal experiences onto a new case, Ms. Menzies would apply personal knowledge of disputed facts in the case she's asked to decide. A better analogy to *Mach* would involve—not a venireperson's statements on child sex assault cases generally—but the case at bar specifically. The *Mach* Court, no doubt, would have spilled much less ink if a venireperson shared with a jury that she had examined that alleged victim and decided on whether she had been assaulted.

Finally, the Commission's structure makes it uniquely susceptible to lingering bias because the Adjudicatory Panel is made up of three non-attorney members. The U.S. Supreme Court has recognized that even judges are at risk of bias when reconsidering their past decisions. *See Williams*, 579 U.S. at 9 ("There is, furthermore, a risk that the judge 'would be so psychologically wedded' to his or her previous position

as a prosecutor that the judge 'would consciously or unconsciously avoid the appearance of having erred or changed position.'") (quoting *Withrow*, 421 U. S. at 57).

But unlike judges who, on remand, may reconsider their prior rulings, attorneys, and laypersons in particular may not approach decision-making with a blank slate. *Cf. United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018) ("*Daubert* is meant to protect juries from being swayed by dubious scientific testimony. When the district court sits as the finder of fact, there is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself."). For example, the U.S. Supreme Court generally finds limiting instruction inadequate where a jury of laypersons would be unlikely to disregard prejudicial evidence. The touchpoint of that analysis centers on two issues. First, that the inadmissible evidence is highly probative of a fact issue a jury must decide. Second, that the information may not be considered due to some overarching policy concern related to the rules of evidence. That distinction is best illuminated by *Jackson v. Denno*, 378 U.S. 368 (1964), and *Bruton v. United* States, 391 U.S. 123 (1968). In *Jackson*, the Court found that a limiting instruction could not cure prejudice to the jury through the introduction of an involuntary confession. In that case, the Court described a limiting instruction as an "unmitigated fiction." *Id.* at 388 n.15. In *Bruton*, the Court considered a joint trial where one codefendant's confession implicated another. The Court ruled that "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of [a codefendant's] confession in this joint trial violated petitioner's right of

cross-examination secured by the Confrontation Clause of the Sixth Amendment." *Id.* at 126.

CONCLUSION

The Commission should disqualify Ms. Menzies and cure the taint of any prior participation. Otherwise, the proceedings against Attorney General Knudsen cannot satisfy due process. Ms. Menzies is now the second member of the Panel who must be disqualified from these proceedings. Respondent, therefore, respectfully asks the Commission to conduct a conflicts check on the remaining members of the Panel and any new members to ensure a fair hearing.

DATED this 2nd day of October, 2024.

Respectfully submitted,

/s/ *Christian B. Corrigan*
Christian B. Corrigan
Solicitor General
Office of the Attorney General
215 North Sanders
Helena, MT 59601
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Attorney for Respondent

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing document was served upon the persons named below, addressed as follows:

Timothy B. Strauch
c/o Office of Disciplinary Counsel
P.O. Box 1099
Helena, MT 59624-1099
tstrauch@montanaodc.org

Shelly Smith
Commission on Practice
P.O. Box 203005
Helena, MT 59620-3005
shellysmith@mt.gov

DATED this 2nd day of October, 2024.

/s/ Buffy L. Ekola
BUFFY L. EKOLA

Exhibit A

From: Smith, Shelly
To: Mark Parker
Cc: Corrigan, Christian; Larissa Sikel; Sheena Broadwater; Randall Ogle
Subject: RE: [EXTERNAL] Question on Knudsen case
Date: Thursday, September 12, 2024 11:36:11 AM

Mark,

I have provided this information to other attorneys in the past that have requested it. The Adjudicatory Panel members that will sit at the Austin Knudsen Formal hearing are as follows: Randy Ogle (Chair), Patricia Klanke (attorney member), Substitute attorney member (TBA), Troy McGee (lay member), Lois Menzies (lay member), and Elinor Nault (lay member).

Per Rule 4(C) of the Montana Rules for Lawyer Disciplinary Enforcement, a substitute attorney member is required to constitute a quorum and will be appointed by the Montana Supreme Court from the attorney member area either in Area C, Area D, or Area E, as these are the areas of the three recused attorney members of the Adjudicatory Panel. The Supreme Court appoints attorney members per Rule 2(A) of the Montana Rules for Lawyer Disciplinary Enforcement.

Upon receiving an Order issued by the Supreme Court, I will be able to provide you the name of the substitute attorney.

Shelly Smith
Office Administrator
Montana Supreme Court
Commission on Practice
P.O. Box 203005
Helena, MT 59602-3005
406-841-2976

From: Mark Parker <markdavidparker@gmail.com>
Sent: Thursday, September 12, 2024 10:57 AM
To: Smith, Shelly <shellysmith@mt.gov>
Cc: Corrigan, Christian <Christian.Corrigan@mt.gov>; Larissa Sikel <larissa@parker-law.com>; Sheena Broadwater <sbroadwater@montanaodc.org>
Subject: [EXTERNAL] Question on Knudsen case

Shelly,

You'd think I would know the answer to this question, but I do not.

Are we entitled to know the members of the adjudicatory panel in advance of the hearing?

--
Mark D. Parker
Parker, Heitz & Cosgrove
P. O. Box 7212
Billings, MT 59103
406 245-9991 office

406 698-2745 cell

Exhibit B

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Agency:
Judicial Branch (jud)
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January

Mo	Tu	We	Th	Fr	Sa	Su	
30	31	1	2	3	4	5	wk
6	7	8	9	10	11	12	wk
13	14	15	16	17	18	19	wk
20	21	22	23	24	25	26	wk
27	28	29	30	31	1	2	wk

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2020

Title	JUDICIAL NOMINATION COMMISSION
Date	2020/08/11 - 2020/08/11
Time	12:00 PM
Location	Conference Call
Contact name	Lois Menzies or Beth McLaughlin
Contact phone	(406) 841-2966
Contact email	LMenzies@mt.gov
Event type	Standard event
Event status	
Author	Kevin Cook

AGENDA

JUDICIAL NOMINATION COMMISSION
Tuesday, August 11, 2020
Conference Call
12:00 p.m.

1. Call to order – Judge John Brown, Chair

2. Review of 18th Judicial District applications and public comment

a. Andrew J. Breuner
b. Audrey Schultz Cromwell
c. Eric Norman Kitzmiller
d. Peter Bengt Ohman
e. Sheryl Wambsgans

3. Selection of applicants for interviews

4. Discussion on interview arrangements

a. Videoconferencing
b. Selection of date for interviews: August 26, 27, or 28
c. Start time for interviews

5. Review, discussion, and approval of proposed revisions to Judicial Nomination Commission rules

6. Other business

7. Adjournment

Attachment(s):

File

Agenda conference call 081120.docx

JNC rules Halverson revisions 062920 markup.docx