IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 17-0677

SHANNON LEIGH SWEENEY,

Petitioner,

v.

MONTANA THIRD JUDICIAL DISTRICT COURT,
HONORABLE RAY J. DAYTON, District Judge,

Respondent.

BRIEF OF THE AMICUS CURIAE MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, AND SHERRY STAEDLER, REGIONAL DEPUTY OF THE OFFICE OF THE PUBLIC DEFENDER FOR REGION 5

APPEARANCES:

PETER F. LACNY
President, MTACDL
Datsopoulos, MacDonald & Lind, P.C.
Central Square Building
201 West Main Street, Suite 201
Missoula, MT 59802
Telephone: (406) 728-0810
placny@dmllaw.com

COLIN STEPHENS
Smith & Stephens, P.C.
315 W. Pine St.
Missoula, MT 59802
(406) 721-0300
colin@smithstephens.com

NATALIE WICKLUND
Law Offices of Natalie Wicklund
2801 B St., Ste. #70
San Diego, CA 92102
(406) 813-0584
nwicklundlaw@gmail.com

ATTORNEYS FOR THE *AMICUS CURIAE*

BRIAN C. SMITH
Smith Law PLLC
PO Box 8121
Missoula, MT 59807
(406) 274-0087
brian@briancarlsmithlaw.com

ATTORNEY FOR PETITIONER

ED SHEEHY
Office of the State Public Defender
66 W. Park, Ste. 203
Butte, MT 59701
ESheehy@mt.gov

ATTORNEY FOR DEFENDANT MCCLANAHAN

HON. RAY DAYTON
District Court Judge
Third Judicial District
800 South Main St.
Anaconda, MT 59711

RESPONDENT

MICHELLE SIEVERS
Deputy County Attorney
Deer Lodge County
800 South Main
Anaconda, MT 59711
Attorney for the State
MSievers@aldc.us

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES AND OTHER AUTHORITY:

INTRODUCTION OF AMICUS CURIAE

The Montana Association of Criminal Defense Lawyers (MTACDL) is the Montana affiliate of the National Association of Criminal Defense Lawyers, a nationwide network of more than 10,000 dedicated criminal defense attorneys. MTACDL works to further educate and empower its membership, which is comprised of both agency-employed public defenders and attorneys in private practice. MTACDL's national parent organization, the National Association of Criminal Defense Lawyers (NACDL), encourages, a rational and humane criminal justice policy for America -- one that promotes fairness for all; due process for even the least among us who may be accused of wrongdoing; compassion for witnesses and victims of crime; and just punishment for the guilty. MTACDL and NACDL members train attorneys, promote the highest professional and ethical standards, and effectively defend the accused on a daily basis.

The National Association for Public Defense (NAPD) is an association of nearly 15,000 public defenders and other professionals who seek to ensure that indigent clients secure their constitutional

right to effective assistance of counsel. NAPD members are advocates in jails, courtrooms, and communities and are committed to best practices in the practical, day-to-day representation of criminal defendants. NAPD has a deep interest in the correct interpretation of laws, constitutional provisions, and ethical rules affecting the rights of criminal defendants—particularly defendants who cannot afford to hire private counsel. Since attorney-client communication is the foundation for a relationship of trust as well as effective investigation and advocacy, NAPD has a particularly strong interest in ensuring that ethical, constitutional, and evidentiary rules protecting that communication receive the most robust enforcement by courts of law.

Sherry Staedler is the Regional Deputy Manager of Region 5 of the Office of the Public Defender. Staedler, a veteran defense attorney, manages the day-to-day operations of the region, such as case and contract assignments, attorney oversight, and the region's budget. Staedler cultivates, manages, and enforces the Office of the Public Defender's statutory mandate. Everyday, Staedler ensures the proper and effective representation of hundreds of indigent clients in Butte-

Silverbow, Anaconda-Deer Lodge, Granite, Powell, Beaverhead and Madison counties.

STATEMENT OF FACTS

Shannon Sweeney is a solo practitioner in Anaconda, MT. A fifth generation Montanan, veteran of the United States Air Force, and former military advisor to a U.S. Senator, Sweeney returned to Montana after law school and a stint overseas as an international legal consultant. Sweeney joined the Office of the Public Defender (OPD) in Anaconda, MT and immersed herself in the community in which she grew up. In that role, Sweeney served as an attorney for Region 5, worked out of Anaconda, MT, and serviced city and district courts in Anaconda, Phillipsburg, Deer Lodge, and Butte. In October 2016, Sweeney left OPD to open her own practice. Sweeney focuses on local criminal defense cases, and occasionally accepts labor, personal injury, or consumer protection actions.

When OPD attorneys decide to leave public service and enter private practice, the agency requires former attorneys to wait six months before being eligible to accept contract or conflict cases from the agency. In areas of high need where attorneys are sparse such as

Region 5, regional offices may allow a former employee to take any and all active cases with them, in the form of contract cases to their new private practice.

When Sweeney opened her own law firm, OPD transferred all of Sweeney's active cases out of the agency and to Sweeney's private practice as contract cases. This case transfer included Dakota McClanahan's case for Criminal Possession with Intent to Distribute in the Third Judicial District. McClanahan had been assigned to Sweeney when she was a full-time attorney with the Office of the Public Defender. Sweeney's representation of McClanahan remained uninterrupted.

Approximately six weeks after Sweeney opened her own firm, McClanahan missed his court date for a Final Pretrial Conference and Judge Dayton issued a bench warrant. In February 2017, McClanahan was arrested and taken into custody. The State decided to charge McClanahan with bail jumping. Due to OPD's case assignment practices, his new bail jumping charges were assigned to Ed Sheehy, a OPD Region 5 full-time attorney. This resulted in Dakota McClanahan

having two attorneys: Shannon Sweeney, for Criminal Possession with Intent to Distribute; and Ed Sheehy, for Bail Jumping.

The State, the underlying case of Criminal Possession with Intent to Distribute still pending with Sweeney as counsel of record, motioned and subpoenaed Sweeney to produce documents and testimony regarding communications with her client. (Petitioner's Writ Ex. A, B, D, G.) Sweeney hired counsel and contested the subpoena. (Petitioner's Writ. Ex. F.) McClanahan and Sweeney requested a hearing each time to assert her privilege and argue their positions, but their requests were denied. (Petitioner's Writ Ex. E, H.) The Third Judicial District ordered Sweeney to testify against her client. (Petitioner's Writ Ex. H.)

Sweeney petitioned this Court for a Writ of Supervisory control seeking oversight and clarity on a number of issues including her ethical duty of confidentiality to her client, McClanahan's due process rights to counsel and against self-incrimination, and Montana's express statutory rules regarding attorney-client confidentiality and discovery of work product.

Amicus timely joins to advocate for Sweeney's petition and offer a statewide perspective on how such a judicial order may affect Montana's criminal justice system.

I. SWEENEY IS PROFESSIONALLY BOUND TO PROTECT ATTORNEY-CLIENT PRIVILEGE, ASSERT HER DUTY OF CONFIDENTIALITY, AND MAINTAIN HER DUTY OF LOYALTY.

Sweeney's case presents two distinct issues that must be recognized. The first, is the attorney-client privilege. The second is the concurrent duties of confidentiality and loyalty. The former is generally asserted in response to an official demand for information. See: Common law of evidence: 8 Wigmore on Evidence § 2290; *Upjohn Co. v. United States*, 499 U.S. 383 (1981). The latter pertains to voluntary disclosure of protected information. The duties of confidentiality and loyalty find their origins in agency law, state rules of professional conduct, and Model Rule of Professional Responsibility 1.6.

In Sweeney's case, it is clear the client continues to assert the attorney-client privilege and Sweeney continues to fulfill her duty of confidentiality to her client. In order for Sweeney to be compelled to testify, the Respondent must make a showing that exceptions to both the attorney-client privilege *and* the duty of confidentiality exist.

Neither the State in its district court pleadings, nor the Respondent in its order have made such a showing at this stage.

A. Attorney-Client Privilege

Attorney-client privilege generally protects communications between the lawyer and the client, made in confidence, for the purposes of legal representation. The privilege survives termination of the attorney-client relationship and the death of the client. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). There are limited exceptions to the privilege, the most common exceptions being waiver or what is traditionally considered the "crime-fraud" exception.

Privilege belongs to the client and can be waived. Generally, only a client can waive, although the law recognizes the lawyer may waive the privilege as an agent of the client but only within the scope of the representation. If the lawyer's agency waiver extends beyond the scope of representation, the lawyer may be liable for negligently failing to assert privilege. *See Restatement (Third) of Law Governing Lawyers*, § 78 & cmt. c.

The client can also make a limited privilege waiver by putting the lawyer's conduct or advice at issue in the litigation. *See Petition of*

Gillham, 216 Mont. 279, 704 P.2d 1019 (1985). The waiver is limited to the relevant communications. "The attorney-client privilege is waived for any relevant communication if the client asserts as to a material issue in a proceeding that . . . a lawyer's assistance was ineffective, negligent, or otherwise wrongful." *Restatement* § 80(1)(b) & cmt. c; *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003). This exception arises out of principles of fairness and a recognition that the client cannot use the privilege as both a shield and a sword. Critical to any analysis of this exception, however, is the recognition that it is ultimately the client's choice, not the lawyers. The client has a choice of either maintaining the confidentiality of the communication or litigating the claim against the lawyer's performance or advice. While the client cannot do both, the decision rests solely with the client.

If the client elects to waive the privilege, the privilege is waived only to the extent the communication between the lawyer and the client sheds some light on the validity of the client's allegations against the lawyer's performance or advice. Only Dakota McClanahan can waive attorney-client privilege. He has not done so. The communications between Sweeney and McClanahan do, and should remain, privileged.

B. Duty of Confidentiality

The duty of confidentiality is broader than attorney-client privilege and includes information relating to the lawyer's representation of the client. *See ABA Formal Op. 10-456.* It extends beyond the conclusion of the attorney's representation of the client. Model Rule 1.6, cmt. 20. The duty of confidentiality, also has exceptions; such exceptions include self-defense, prevention of financial frauds, and compliance with a court order.

The purpose of both privilege and the duty of confidentiality are to ensure a relationship of trust and confidence between the lawyer and client. *Compare* Model Rule 1.6, cmt. 1 and *Upjohn*, 449 U.S. at 389 (purpose of privilege is "to encourage full and frank communications between attorneys and their client and thereby to promote broader public interests in the observance of law and the administration of justice."). Additionally, both privilege and the duty of confidentiality attempt to balance duties to clients with duties to the court, opposing parties, and the public interest. However, the body of case law is clear that any exceptions or attempts to reduce the duty of confidentiality an attorney has to her client must be limited.

C. Duty of Loyalty

The duty of loyalty is possibly the most basic of a lawyer's duties. *Strickland v. Washington*, 466 U.S. 668, 692 (1984). The duty of loyalty requires a lawyer's undivided allegiance to the interests of the client. *Krutzfeldt Ranch, LLC v. Pinnacle Bank*, 2012 MT ¶ 31, 363 Mont. 366, 272 P.3d 635. As stated by this Court, "So inviolate is the duty of loyalty to an existing client that not even by withdrawing from the relationship can an attorney evade it." *In re Johnson*, 2004 MT 6, ¶ 16, 319 Mont. 188, 84 P.3d 637. As with privilege and the duty of confidentiality, limitations exist on the duty of loyalty and often arises in situations where a client perjures himself. *State v. Jones*, 278 Mont. 121, 128, 923 P.2d 560, 564. The duty of loyalty is a pillar of legal practice, thereby bonding a lawyer to her client in perpetuity.

D. Standing

There should be no question about Sweeney's standing to raise both her own duties of confidentiality and loyalty and her client's attorney-client privilege. "It is universally accepted that the attorney-client privilege may be raised by the attorney." *Fisher v. United States*, 425 U.S. 391, n. 8, (1976) (internal citations omitted). Similarly, Sweeney

not only has standing to assert the confidentiality, but has a duty to do so, or face possible civil liability for wrongfully disclosing client information.

II. THE THIRD JUDICIAL DISTRICT'S RULING WILL LEAD TO A STATEWIDE EROSION OF ATTORNEY-CLIENT RELATIONS AND A CRISIS OF CONFIDENCE IN DEFENSE ATTORNEYS.

Trust is the fundamental building block of any attorney-client relationship. Trust, first and foremost, determines the functionality, effectiveness, and health of an attorney-client relationship. This principle of legal practice has been entrenched in the profession's ethical standards by the duty of confidentiality and in Montana law by statute and Supreme Court rulings.

In criminal proceedings, trust between a client and counsel is essential. In these cases, attorneys advocate freedom, mitigate a client's loss of liberty or property, and may even help broker investigative cooperation with law enforcement. When an individual's life and livelihood is at stake, the legal advice received must come from a trusted source.

With court appointed counsel, a stigma persists that the attorney's loyalty lies with the courts, the prosecution, or own self-interest, not

that of the client. Marla Sandys & Heather Pruss, *Correlates of Satisfaction Among Clients of a Public Defender Agency*, 14 Ohio St. J. Crim. L. 431 (2016-17): Johnathan Casper, *Did You Have a Lawyer? No, I Had a Public Defender*, 1 Yale Rev. L. & Soc. Action, 4 (1970-71); Glen Wilkerson, *Public Defenders as Their Clients See Them*, 1 Am. J. Crim. L. 141 (1972); Petitioner's Writ at 14-15. In order to broker trust with skeptical clients, attorneys rely on the only reassurance they can give—that as an attorney she is oath and duty bound to keep the client's confidences. Mont. Code Ann. § 26-1-803, Mont. R. Prof. Cond. 1.6; Mont. R. Prof. Cond. Preamble (1), (2), (10), (13), (14), (15); Mont. R. Prof. Cond. 3.7. Customarily, attorneys explain the role of confidentiality to their clients at the outset of representation. This explanation helps establish boundaries, but also reinforces commitments to the client. Attorneys will not deceive the court, or assist in committing crime or fraud, but if they betray a client's trust and confidences outside of those exceptions, they will be professionally sanctioned and disgraced. Mont. R. Prof. Cond. 1.6; Am. Bar Assoc. Model R. Prof. Cond. 1.6; Am. Bar Assoc. Comment on R. 1.6; Mont. Bar Ethics Op. No. 050621.

The Third Judicial District's order dissolves the duty of confidentiality. The district court's order compels Sweeney to incriminate her client by revealing her communications with him. The facts of this case do not provide an ethical exception: there is no threat to community safety, no fraud, no imminent bodily harm to another. Instead, the district court allows the State to reach across the aisle, ignoring ethics, procedure, and due process, and force a counsel of record, to take the witness stand.

The cost of the district court's action is grave. The district court's order forces an attorney to be the star witness in the prosecution of her own client. The Third Judicial District's order will decimate Sweeney's practice. Sweeney practices in Anaconda, MT—a small, tight-knit community, with a high demand for skilled attorneys. Her credibility as an independent defense attorney will be destroyed. Sweeney will be perceived as disloyal to her clients and branded as untrustworthy in her community.

Compelling Sweeney to testify risks a statewide degradation in attorney-client communication. The district court taints the sanctity of attorney-client relationships by mandating, without citing a relevant

ethics exception, that this protected relationship become adversarial. The district court order perpetuates the stigma that court appointed counsel battle everyday: your court appointed attorney will turn on you and help send you to prison.

As much as defense attorneys try to mitigate absence, sometimes defendants miss court dates. Defense counsel routinely attempt to locate, arrange, advise, and sometimes even convince defendants to re-appear. This is a critical function as defense counsel, as an officer of the court, and as an advocate of justice. The Third Judicial District's ruling now encourages clients and counsel to resist from these discussions. Clients will no longer have confidence that they can speak to their attorneys freely, honestly, and confidentially about the circumstances of their missed appearances. Attorneys will be forced to ask fewer, vaguer questions and remain willfully ignorant about their client's conditions in order to shield them from investigations and compelled testimony. The Third Judicial District's order is bad for attorneys, bad for defendants, and bad for courts and judicial economy. Compelling Sweeney to testify against McClanahan risks eroding the foundational

trust required for effective counsel to operate within the adversarial system.

III. A HISTORICAL REVIEW OF BAIL JUMPING CASES DEMONSTRATES THAT SWEENEY'S TESTIMONY IS UNNECESSARY AND IMPROPER FOR THE STATE'S CASE AGAINST DEFENDANT MCCLANAHAN.

Montana's legislature defines bail jumping as an individual, "having been set at liberty by court order, with or without security, upon condition that the person will subsequently appear at a specified time and place, the person purposely fails without lawful excuse to appear at that time and place. Mont. Code Ann. § 45-7-308 (2017). For decades, Montana defendants have appealed bail jumping judgments claiming insufficient evidence for their convictions. A survey of this case laws reveals two illustrative issues: 1.) the necessary evidence for a bail jumping conviction; and 2.) the inability for an attorney to testify against a client in such a case.

A. Sweeney's testimony is unnecessary and bucks the common convention of bail jumping prosecutions.

By Montana statute, bail jumping occurs when an individual, released by the court, purposely fails to appear after being instructed to do so at a specific date and time. Mont. Code Ann. § 45-7-308. In bail

jumping cases, the fact finder decides two primary questions: whether the Defendant was released by the Court on condition of appearance; and whether the Defendant purposely failed to appear at the established time and place. Mont. Code Ann. § 45-7-308; *State v. Snaric*, 262 Mont. 62, 67, 862 P.2d 1175, 1178 (1993); Montana Model Criminal Jury Instructions No. 7-110, 7-110(a).

Historically, prosecuting attorneys present this evidence of bail jumping by the testimony of a clerk of the District Court; testimony of legal assistants; and submissions of minute entries. *State v. Kaske*, 2002 MT 106, ¶ 23-26, 309 Mont. 445, 450, 47 P.3d 824, 829; *State v. Nolan*, 2003 MT 55, ¶ 13, 314 Mont. 371, 373–74, 66 P.3d 269, 272; *State v. Wereman*, 273 Mont. 245, 250, 902 P.2d 1009, 1012 (1995). These generic witnesses can provide fact finders with sufficient evidence to prove the necessary elements of bail jumping. The testimony of a defense attorney is unnecessary to achieve conviction.

B. An attorney cannot testify against their client in a bail jumping case, because the conflict of interest renders the conviction constitutionally infirm.

Sweeney's petition presents a unique set of legal, ethical, and practical issues before this Court. While, no Montana case provides

direct precedent, this Court has previously examined a factually similar case to Sweeney and McClanahan's—*Uptain v. United States*.

In *Uptain*, the Fifth Circuit Court of Appeals overturned a bail jumping conviction, because Uptain's attorney was compelled by the government to testify against him. Despite extensive pre-trial litigation, the trial court ordered Uptain's attorney to testify as the government's sole witness for its case-in-chief. *Uptain*, 692 F.2d at 8-10. Uptain's attorney compelled testimony informed a jury that he had sent letters, spoken to Defendant Uptain on the phone, and that while he could not remember whether he gave notice to Uptain verbally it would have been his normal practice to do so. *Uptain*, 692 F.2d at 8-9. Uptain contested his conviction in a habeas petition alleging ineffective assistance of counsel, due to the prejudice endured from having his attorney testify against him. *Uptain*, 692 F.2d at 10. The Fifth Circuit strongly agreed, reversing his conviction, noting "[the attorney] *was* the government's case" and calling counsel's testimony "Undeniably, this ineffectiveness was inherently prejudicial." *Uptain*, 692 F.2d at 10 (emphasis in the original).

This Court examined the *Uptain* decision and relied upon it in the ruling in *State v. Wereman*. The Court distinguished *Wereman* from *Uptain* using a bright line—counsel's comments made on the record may be admissible, but compelled testimony is improper. In *Wereman*, Defendant Wereman alleged ineffective assistance of counsel, because his attorney told the district court, on the record, he had attempted to contact Wereman unsuccessfully and did not know where he was. *Wereman,* 273 Mont. 245, 247; 902 P.2d 1009, 1010 (1995). The State produced the clerk of court and the minute entry to prove counsel's statements made on the record. *Wereman,* 273 at 248; 902 at 1011. Wereman argued that his attorney's statement provided evidence against him, thusly breaching the duty of loyalty and constituting ineffective assistance of counsel. *Wereman*, 273 at 248-9, 902 at 1009-10.

However, the Montana Supreme Court found a distinct difference in contrasting the facts of *Wereman* to *Uptain*. This court emphasized that Uptain's attorney was the government's only witness and testified against him. *Wereman*, 273 at 250, 902 at 1012. Whereas in *Wereman*, the State called several witnesses, "counsel was not called as a witness,"

and the minute entry was sufficient and appropriate evidence. *Wereman*, 273 at 250, 902 at 1012.

This Court has already drawn two critical and important distinctions important to Sweeney's case. First, if the State's case rests solely on the testimony of the defendant's attorney, it renders the conviction constitutionally infirm. *Wereman*, 273 at 250, 902 at 1012. Second, the trial court's administrative staff and recorded minutes are available to prove a defendant's absence and recall representations made to the trial court. *Wereman*, 273 at 250, 902 at 1012. Therefore, to obtain a valid conviction, the State can, and must, present evidence of bail jumping, without the testimony of counsel. The Third Judicial District's order is incorrect in law and ignores this Court's own historical precedent.

IV. GRANTING SWEENEY'S PETITION PRESERVES THE BALANCE OF CANDOR TO THE TRIBUNAL WHILE LEAVING THE DUTY TO CONFIDENTIALITY INTACT.

Every day, trial courts are faced with defendants who fail to appear. Routinely, judges ask defense lawyers, on the record, where their clients are and if they have been in contact. This common inquiry balances both the requirement that attorneys maintain a duty of

confidentiality to their clients and candor to the courts. Mont. R. Prof. Cond. 1.6, Mont, R. Prof. Cond. 3.3.

The district court's order goes beyond this standard inquiry. Asking defense counsel why their client has failed to appear for court is a common question. The district court's order compels a counsel of record to testify against her own client as substantive evidence. This order is beyond custom, beyond candor, and beyond constitutional norms. *Wereman*, 273 at 250, 902 at 1012. This Court's distinction of custom and context vs. compelled testimony and substantive evidence, as established by *Wereman*, should be maintained. *Supra.*

In asking the whereabouts of a defendant, a court's inquiry requires a balance of context and content—candor vs. attorney-client confidentiality. The State seeks to upend the customary balance and redistribute that power to itself. In a prior motion, the State alludes that "when [McClanahan] signed his bond conditions, [he] waived the attorney-client privilege and the rule of confidentiality with regard to his compliance with his bond conditions." (Petitioner's Writ Ex. D at 3.) The Third Judicial District mentions this it its recitation of facts when granting the State's initial Motion in Limine. (Petitioner's Writ. Ex.

E.) Interestingly, the district court declines to adopt the State's insinuation of waiver in its reasoning or ruling. (Petitioner's Writ. Ex. E.)

If the district court assumed such a broad waiver, it would trigger a cascade of concerns surrounding McClanahan's constitutional rights to counsel, self-incrimination, and right to bail. Mont. Const. Art. II § 24, 25, 21, 22; U.S. Const. Amend. V, VI, and VIII. Moreover, accepting such language as a waiver would run counter to this Court's long-established precedent. Waivers of rights must be made "specifically, knowingly, and intelligently." *State v. Bird*, 2001 MT 2, ¶ 35, 308 Mont. 75, ¶ 35, 43 P.3d 266, ¶ 35; *Park v. Sixth Jud. Dist. Court*, 1998 MT 164, ¶ 36, 289 Mont. 367, ¶ 36, 961 P.2d 1267, ¶ 36 (*citing Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). "Courts should indulge every reasonable presumption against waiver, and they should not presume acquiescence in the loss of fundamental rights. *Barker v. Wingo*, 407 U.S. 514, 525-26 (1972).

As written, the district court's bond condition provides notice to defendants that the court may inquire as to their bond compliance. McClanahan's bond condition states: "Defendant's attorney may be

required by the Court to disclose information concerning the Defendant's compliance or noncompliance with the terms and conditions of this Order." (Petitioner's Writ Ex. D at 3.) This condition provides notice that the district court may make *limited* inquires as to whether he is compliant with his bond conditions. General inquiries regarding a defendant's bond compliance are common and are contextual, especially when made in regards to court appearances and contact with their lawyer. Compliance vs. non-compliance balances candor and confidentiality.

The condition goes on to advise: "As these disclosures may involve the client's right to confidentiality, the Defendant is hereby advised that: To the extent these limited disclosures may be considered attorney/client confidences protected by the attorney/client privilege, by signing this Release Order the Defendant waives his/her right to confidentiality with regard to these limited disclosures." (Petitioner's Writ Ex. D at 3.) The condition emphasizes "limited disclosures" by an attorney. (Petitioner's Writ Ex. D at 3.) Examples of such limited disclosures would include, "I spoke to my client on Thursday" or "I have not had contact with my client since his prior appearance."

McClanahan's bond condition allows for his attorney to provide honest context to the court, but does not permit wholesale disclosures of conversations, let alone, her subpoenaed testimony.

The district court's bond condition allows for context, not content. The State seeks to use this language to disrupt the fundamental balance of candor and confidentiality. The State's alluded construction of this condition, disrupts practical custom, removes power from trial courts, and allows it to pierce attorney-confidentiality at will. The State's interpretation of this boilerplate condition results in a cavalcade of violations of McClanahan's rights. This Court should ignore the State's allusion to waiver and uphold the custom that defense attorneys practice every day: candor to the tribunal and the duty of confidentiality to their clients.

V. GRANTING SWEENEY'S PETITION PRESERVES MONTANA'S LEGAL TRADITIONS AND PROFESSIONAL STANDARDS.

Montana's legal community prides itself on its collegiality. Montana lawyers, and their professional associations, maintain high standards of approachability, courtesy, and sociability. These principles

are so important to Montana lawyers that we have formalized them into our standards of practice. The Standards of Professional Courtesy show our colleagues, our clients, and the rest of the country that Montana lawyers rise above pettiness and focus on substance.

Professional courtesies mandate lawyers: "serve our community and our profession. . . not only for the benefit of the public for also for the enrichment of the system of justice." (Standards of Professional Courtesy Among Attorneys.) Montana lawyers strive to keep disputes "between the parties and not between attorneys. Effective representation does not require antagonistic behavior." (Standards of Professional Courtesy Among Attorneys.) Most importantly, "[u]nless . . . fully justified by the circumstances, we will not seek . . . disqualification of opposing counsel." (Standards of Professional Courtesy Among Attorneys.)

The State's actions, and district court's order does a disservice to these standards, threatens Sweeney's reputation, and harms her ability to earn a living through the private practice of law. Sweeney is oath, duty, and professionally bound to McClanahan. Our professional standards require lawyers to "be loyal to my client's confidence's and

secrets." Standards of Professional Courtesy to Clients. The Montana bar, the bench, and our clients require courtesy and professionalism. Forcing Sweeney to testify against her own client, without a demonstration of an ethics exception, breaches our professional courtesies and is damaging to Montana's legal profession.

VI. THE DISTRICT COURT'S ORDER RISKS STRAINING THE ALREADY OVERBURDENED RESOURCES OF THE PUBLIC DEFENDER SYSTEM.

In Montana, the defense of the accused falls to two groups: private defense attorneys and public defenders. Private defense attorneys often accept either conflict or contract assignments from the Office of the Public Defender (OPD). The vast majority of criminal defendants are represented by either a public defender employed by the Office of the Public Defender, or a private attorney on contract with the agency.

OPD is a statewide agency providing essential legal services to low-income Montanans facing a loss of liberty due to either criminal liability or civil sanctions. OPD's mission is to provide effective counsel and equal access to justice to eligible individuals. OPD consists of 11 regions across the state, including trial, conflict, and appellate

divisions. In Montana, a vast majority of criminal cases require court appointed counsel. The Office of the Public Defender operates as the primary conduit for the accused to receive representation.

Depending on a variety of factors, OPD may keep a case "in-house" or delegate cases to contract or conflict counsel. Contract counsel play a vital role in ensuring every individual accused of a crime receives proper representation. According to the Final Report of the Task Force on State Public Defender Operations, as of June 30, 2016, Region 5 had 56 registered contract counsel. Examining Public Defender Operations: Final Report of the Task Force on State Public Defender Operations, 12 (2015-16). Importantly, this number does not properly express the distribution of these lawyers. Contractors may decline to accept cases in certain courts or on certain subjects. In some areas like the Third Judicial District, where this case originates, there is a severe shortage of contract counsel.

Since 2012, OPD has shouldered a steep increase in cases. Statewide, OPD's criminal cases have increased 32% and civil dependency-neglect cases increased 53.3%. Final Task Force Report at 17. With this increased burden, OPD's number of cases, the length of

time it takes to resolve cases, and the average cost per case have all increased. Final Task Force Report at 16.

Sweeney's predicament presents many concerns for the representation of the accused. Allowing prosecutors to subpoena defense lawyers, without demonstration of an applicable exception, will add significant strain to the already overburdened public defense system. Lawyers will be forced to withdraw, representation for clients will be disrupted, and cases will take longer to resolve at the trial level. These disruptions will create additional costs and budget demands for OPD, which already operates on limited resources.

OPD and contract defense lawyers represent most criminal defendants in Montana. Their mission is to provide effective counsel for the accused and serve as dedicated officers of the courts. The Third Judicial District's order risks opening a Pandora's Box of attorney substitutions and needless litigation, creating higher costs, ballooning budgets, and negatively impacting clients, attorneys, and the courts.

CONCLUSION

Amicus curiae request this Court grant Sweeney's petition.

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Amicus Curiae Brief is printed with proportionately-spaced Century Schoolbook typeface of 14 points; is double spaced except for lengthy quotations or footnotes; and does not exceed 5,000 words, excluding the Table of Contents, the Table of Authorities, Certificate of Service, and Certificate of Compliance, as calculated by my Microsoft WORD software.