APPLICATION FOR

DISTRICT COURT JUDGESHIP
First Judicial District

A. PERSONAL INFORMATION

1. Full Name: Melissa Culpepper Broch

   a. What name do you commonly go by? Melissa Broch

2. Birthdate: [redacted] Are you a U.S. citizen? Yes.

3. Home Address: [redacted]

   Phone: [redacted]

4. Office Address: 228 Broadway, Courthouse, Helena MT 59601

   Phone: (406) 447-8221 (main line) (406) 447-8272 (direct line)

5. Length of residence in Montana: 39 years (since August 1976)

6. List your place of residence for the last five years:

Dates	City	State
June 2005 – present	Helena	Montana

B. EDUCATIONAL BACKGROUND

7. List the names and location of schools attended, beginning with high school:

Name	Location	Date of Degree	Degree
Palmer High School	Palmer, Massachusetts	n/a	n/a
J. Frank Dobie High School	Houston, Texas	May, 1976	High School Diploma
Rocky Mountain College	Billings, Montana	n/a	n/a
Eastern Montana College	Billings, Montana	June, 1981	Bachelor of Science Business Administration Accounting Option
University of Montana	Missoula, Montana	June, 1989	Juris Doctor

8. List any scholarships, awards, honors and citations that you have received:

I received several academic scholarships while in law school and graduated with honors.

9. Were you a member of the Law Review? If so, please state the title and citation of any article that was published and the subject area of the article.

I was a member of the Public Land Law Review but did not publish an article.

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

Court or Administrative Body	Date of Admission
State Bar of Montana	October, 1989
United States District Court, District of Montana	October, 1989

11. Indicate your present employment (list professional partners or associates, if any).

Deputy County Attorney, Lewis and Clark County. The County Attorney is Leo Gallagher. Other deputies are K. Paul Stahl, Lisa Leckie, Jeff Sealey, Katie Jerstad, Jeremy Gersovitz, Luke Berger, Anne Peterson, Ann Penner and Fallon Stanton.

12. State the name, dates and addresses of all law firms with which you have been associated in practice, all governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

Employer's Name	Position	Dates
Datsopoulos, MacDonald & Lind 201 West Main, Suite 201 Missoula, Montana 59801	Legal Intern	6/1987 – 7/1989
Montana Supreme Court Room 414, Justice Building 215 North Sanders Helena, Montana 59601	Law Clerk	9/1989 – 7/1990
Montana State Auditor 840 Helena Avenue Helena, Montana 59601	Staff Attorney	7/1990 – 9/1996
Montana Attorney General's Office P.O. Box 201401 Helena, Montana 59620-1401	Assistant Attorney General	9/1996 – 5/2005
Lewis and Clark County Attorney's Office 228 Broadway, Courthouse Helena, Montana 59601	Deputy County Attorney	5/2005 - present

13. If you have not been employed continuously since the completion of your formal education, describe what you were doing.

I took one month off after completing the bar exam. Otherwise, I've been continuously employed since completing law school.

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

As a deputy county attorney my practice is comprised primarily of criminal law. My present case assignment includes child abuse cases, both physical and sexual, as well as trying major cases, including homicides and violent crimes, with the County Attorney. Criminal law comprises approximately 85 percent of my practice. The other 15 percent is civil – post-conviction relief proceedings, involuntary commitments, youth court proceedings, and some involvement in dependent and neglect cases related to my criminal cases.

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

As a legal intern with the Datsopoulos firm, my primary assignment was representing the firm's clients in family law matters and misdemeanor criminal cases.

During my clinical program with the U.S. Forest Service, I researched easement and public access issues and prepared a legal memorandum.

I represented the Securities and Insurance Departments of the State Auditor's Office in administrative and civil actions before hearings examiners and in District Court. I served as an informational witness for the State Auditor before legislative committees on issues related to the regulation of securities in Montana.

As an Assistant Attorney General in the Prosecution Services Bureau, among other duties, I taught law enforcement officers and prosecutors.

16. If you specialize in any field of law, what is your specialty?

My specialty is criminal law.

17. Do you regularly appear in court? Yes.

What percentage of your appearance in the last five years was in:

Federal court	_____%
State or local courts of record	100 %
Administrative bodies	_____%
Other	_____%

18. During the last five years, what percentage of your practice has been trial practice? 100 %

19. How frequently have you appeared in court? Almost daily.

20. How frequently have you appeared at administrative hearings?
0 times per month on average.

21. What percentage of your practice involving litigation has been:

Civil	15 %
Criminal	85 %
Other	_____%

22. Have you appeared before the Montana Supreme Court within the last five years? If so, please state the number and types of matters handled. Include the case caption, case citation (if any), and names addresses and phone numbers of all opposing counsel for the five most recent cases.

I have never appeared before the Montana Supreme Court.

23. State the number of jury trials that you have tried to conclusion in the last ten years. 70

24. State the number of non-jury trials that you have tried in the last ten years. Approximately 500.

25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Please include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, give the same information regarding opposing counsel and the nature of the matter.

1. State v. Christopher Gleed BDC-2012-223 Hon. Jeffrey Sherlock (406) 447-8205/8209
Trial: Scheduled for 10/19/2015
Opposing Counsel: Palmer Hoovestal
Hoovestal Law Firm, PLLC, P.O. Box 747
Helena MT 59624-0747
(406) 457-0970

2. State v. David Gary Burton CDC-2012-16 Hon. Kathy Seeley (406) 447-8205/8209
Trial: (Deceptive Practices, Burglary, Theft) March 2 – 6, 2015
(Burglary, Kidnapping, Sexual Intercourse without Consent) December 15 – 19, 2014
Opposing Counsel: Chad Wright
Wright Legal, P.C.
P.O. Box 1582
Helena, Montana 59624
(406) 495-9027

John Hud
Hud Law Office, P.C.
670 Ferguson, Ste. 2
Bozeman, Montana 59715
(406) 587-8989

3. State v. Lloyd Schleining BDC-2013-367 Hon. Jeffrey Sherlock (406) 447-8205/8209
Trial: December 8 – 12, 2014
Opposing Counsel: Christopher Abbott and Stephanie Robles
Office of the Public Defender
139 North Last Chance Gulch
Helena, Montana 59601
(406) 444-0104

4. State v. Christopher Phillips CDC-2014-154 Hon. Kathy Seeley (406) 447-8205/8209
Trial: 11/3 – 5/2014
Opposing Counsel: Mariah Eastman
Eastman Law Office
217 South Main Street
Three Forks, Montana 59752
(406) 285-6724

5. State v. Andrew Segura BDC-2014-59 Hon. Jeffrey Sherlock (406) 447-8205/8209
Trial: 10/20 – 23/2014
Opposing Counsel: Steve Williams
Office of the Public Defender
139 North Last Chance Gulch
Helena, Montana 59601
(406) 444-0104

6. State v. Darren Moog CDC-2014-103 Hon. Kathy Seeley (406) 447-8205/8209
Trial: 8/18 – 19/2014
Opposing Counsel: Christopher Abbott and Nick Hyde
Office of the Public Defender
139 North Last Chance Gulch
Helena, Montana 59601
(406) 444-0104

7. State v. Justin Tighe BDC-2014-152 Hon. Jeffrey Sherlock (406) 447-8205/8209
Trial: 7/28 – 31/2014
Opposing Counsel: Steve Williams
Office of the Public Defender
139 North Last Chance Gulch
Helena, Montana 59601
(406) 444-0104

8. State v. David Strachan CDC-2012-190 Hon. Kathy Seeley (406) 447-8205/8209
Trial: 6/16 – 19/2014
Opposing Counsel: Jack Morris
15 West 6th Ave
3rd Floor – Power Block Building
Helena, Montana 59601
(406) 513-1107

9. State v. Jory Hoff BDC-2013-247 Hon. Jeffrey Sherlock (406) 447-8205/8209
Trial: 2/24 – 28/2014
Opposing Counsel: Chad Wright
Wright Legal, P.C.
P.O. Box 1582
Helena, Montana 59624
(406) 495-9027

10. State v. Neil Follette ADC-2013-93 Hon. Mike Menahan (406) 447-8205/8209
Trial: 10/21 – 25/2013
Opposing Counsel: David Burleigh
Office of the Public Defender
139 North Last Chance Gulch
Helena, Montana 59601
(406) 444-01040

26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

I have not participated in any adversary proceedings before administrative boards or commissions during the last five years.

27. If you have published any legal books or articles, other than Law Review articles, please list them, giving citations, dates, and the topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, please state the date, topic and group to which you spoke.

Lectures:

Legal Update	Courts of Limited Jurisdiction	2001
Legal Update	Department of Fish, Wildlife & Parks Law Enforcement	2003
Legal Update	Montana Division of Criminal Investigation Covert Investigations Course	2004
Legal Update	Montana Narcotics Officers Association	2004 – 2005
Search and Seizure	Montana Gambling Control	2006
DUI Update	Montana County Attorney's Association	2008
General Legal	Carroll College Constitutional Law Class	2012
Various Topics	Lewis and Clark County Sheriff's Office Reserve Deputy Training	2005 - present

D. PROFESSIONAL AND PUBLIC SERVICE

28. List all bar associations and legal professional societies of which you are a member and give the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

State Bar of Montana

Criminal Jury Instruction Commission: 2010 - present

Lawyer's Fund for Client Protection: 2011 - present

29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. Please state the title and date of any office that you have held in each organization. If you held any offices, please describe briefly your activities in the organization.

Helena Open Land Management Advisory Committee – 2007 - 2013

Sunlight Meadows Townhome Association – Treasurer since 2007

Lewis and Clark County Multidisciplinary Team – 2013 - present

30. Have you ever run for or held public office? If so, please give the details.

No.

31. Please explain your philosophy of public involvement and practice of giving your time to community service.

My mom was always involved in community service and got me started volunteering back in the 1970s doing literature drops and poll watching for the League of Women Voters. Since then, I've been a volunteer counselor for the Billings Rape Task Force, tutor and treasurer for the Lewis and Clark Literacy Council, secretary for the Helena Democratic Central Committee, board member for Habitat for Humanity, member of the City of Helena Urban Wildlife Task Force and a member of the Helena Open Lands Management Advisory Committee. In my view, community service is the obligation of every citizen capable of making a contribution to his or her community.

E. PROFESSIONAL CONDUCT AND ETHICS

32. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, give the particulars.

No.

33. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, please explain.

No.

34. Have you ever been arrested or convicted of a violation of any federal law, state law, county or municipal law, regulation or ordinance? If so, please give details. Do not include traffic violations unless they also included a jail sentence.

No.

35. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, please give details.

No.

36. Is there any circumstance or event in your personal or professional life which, if brought to the attention of the Commission, the Governor or the Montana Supreme Court would affect adversely your qualifications to serve on the court for which you have applied? If so, please explain.

No.

F. BUSINESS AND FINANCIAL INFORMATION

37. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, please give details, including dates.

No.

38. If you are an officer, director, or otherwise engaged in the management of any business, please state the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.

I am the treasurer of the Sunlight Meadows Townhome Association. I would resign that position if appointed.

39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, please identify the source and the approximate percentage of your total income it constituted over the last five years.

During the last five years, I have not received any fees or compensation other than for legal services rendered to Lewis and Clark County.

40. Do you have any personal relationships, financial interests, investments or retainers that might conflict with the performance of your judicial duties or which in any manner or for any reason might embarrass you? If so, please explain.

No.

41. Have you filed appropriate tax returns as required by federal, state, local and other government authorities?

Yes.

42. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?

No.

43. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, please give details.

No.

G. WRITING SKILLS

44. In the last five years, explain the extent to which you have researched legal issues and drafted briefs. Please state if associates or others have generally performed your research and the writing of briefs.

During the last five years, my primary assignment has been to try major cases for the County Attorney's Office. This includes preparing and responding to pre-trial motions and briefs such as motions to dismiss, motions to suppress and motions *in limine* and various other motions. I prepare responses to motions to withdraw guilty pleas and petitions for post-conviction relief. These responses frequently require the preparation of extensive proposed findings of fact and conclusions of law.

45. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., please explain the type and extent of writing that you have done.

I prepare letters setting forth legal issues or proposed plea offers, plea agreements and deferred prosecution agreements.

46. Please attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable.

Please see attached.

47. What percentage of your practice for the last five years has involved research and legal writing?
25 %

48. Are you competent in the use of Westlaw and/or Lexis?

Yes.

H. MISCELLANEOUS

49. Briefly describe your hobbies and other interests and activities.

My primary hobby is whitewater rafting, particularly multi-day trips on western rivers such as the Green River, Colorado River in the Grand Canyon, the Middle Fork and Main Salmon rivers and the Rogue River in Oregon. I'm a Grizzly football season ticket holder and try to attend every home game. My parents and youngest brother live in Billings. I visit them as frequently as possible. I also spend as much time as I can with my nephews, who live in Hamilton. I enjoy cooking, gardening and reading.

50. Describe the jobs that you have held during your lifetime.

My first jobs were babysitting and housecleaning for neighbors. From there I advanced to being a shift worker and manager at Taco Bell. Next, I worked as a bookkeeping assistant for a wholesale and retail greenhouse and florist. After college, I was the central station manager and bookkeeper for Security by Kenco, a company that sold, installed and monitored burglar and fire alarms. To save money for law school, I had second and third jobs at a tax preparation firm and as a patient advocate at Yellowstone Valley Women's Clinic.

51. Please identify the nature and extent of any pro bono work that you have personally performed during the last five years.

I consider my work on the Criminal Jury Instruction Commission and the Lawyer's Fund for Client Protection as my pro bono work.

52. In the space provided, please explain how and why any event or person has influenced the way you view our system of justice.

My family lived primarily in Maryland and southern Virginia until I was 12 years old. The Civil Rights movement had a profound impact on my views of the American justice system. The schools in my mom's hometown, where we lived for three years, were not integrated until 1970 – 12 years after the U.S. Supreme Court's decision in *Brown vs. Board of Education*. Many of the children I had gone to grade school with transferred to private schools because their parents did not approve of integration. The concept of defying the highest court in the land to perpetuate antiquated and, in my view, ignorant ideas about race was astonishing and offensive to me. I came to believe our justice system serves its highest purpose not by defending the powerful, but by upholding the rights of those who have been disenfranchised or marginalized.

Other than a brief period when I aspired to be a major league baseball umpire, all I ever wanted as a career was to be a lawyer in public service. During the summer of 1973, my brothers and I were glued

to the TV watching the Watergate hearings. What had a huge impact on me was the concept that as a public servant, one may face the choice of doing what is right versus what is expedient and perhaps in one's own best interest. Watching those hearings and especially reading about Elliott Richardson who resigned rather than fire special prosecutor Archibald Cox, instilled in me the belief that it is always better to do what one knows is right, even though it is difficult and sometimes detrimental personally.

Given the above, it may not be surprising that for a long time, I thought I would be a public defender. My stint as an advocate for the Billings Rape Task Force changed my outlook. I came to understand that a prosecutor protects the rights of people to be safe and secure in their homes and persons, by holding those who commit crimes accountable for their conduct.

53. In the space provided, explain the qualities that you believe to be most important in a good district court judge.

In my view, a good district court judge will have the following qualities, although not necessarily in order of importance:

1. Good judgment.

2. Calm and professional demeanor;

3. Respectful attitude not only towards other attorneys and professionals, but also toward parties, witnesses, court staff, other support staff and members of the public;

4. Respect for the law and established precedent;

5. Excellent research skills;

6. Ability to communicate effectively both verbally and in writing;

7. Strong work ethic;

8. Ability to analyze complex issues and identify key legal issues;

9. Thorough knowledge of the rules of evidence and procedure;

10. Excellent organization skills;

11. Even temperament;

12. Ability to think on her feet.

54. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

Parties and their attorneys should be able to rely on existing precedent. A judge should not invade the province of the legislative branch of government and legislate from the bench. A judge's job is to interpret the law as written regardless of his or her personal opinion about the law in question.

The law must be flexible in order to accommodate changes in technology or societal norms. These changes arise in cases of first impression. In addressing cases of first impression, a judge must still rely on existing precedent to the extent possible.

55. In the space provided, state the reasons why you are seeking office as a district court judge.

Following in Judge Sherlock's footsteps would be quite an honor. I've practiced in his court for most of my career and have the utmost respect for him as a judge and as an individual. From my perspective, for an attorney engaging in trial practice, becoming district court judge is the apex of that trajectory.

The judges in the First Judicial District have a unique caseload because Helena is the seat of state government. Most cases of statewide importance, many involving issues of first impression in Montana, are handled by the judges in this district. Having practiced primarily in this district all of my career, I believe it is important for a judge in this district to have a strong work ethic, broad base of experience and the demeanor to handle high profile cases in a professional manner.

56. What items or events in your career have distinguished you or of which you are most proud?

Every day of my 25 years of practice as a prosecutor, I have worked to protect the most vulnerable people in our community, children and senior citizens.

57. State any pertinent information reflecting positively or adversely on you that you believe should be disclosed to the Judicial Nomination Commission.

Before attending law school, I passed all the sections of the CPA examination. I've worked extensively on campaigns for public office beginning in 1996.

58. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge candidate?

In any group, my work ethic cannot be exceeded. My background in business and accounting along with my experience representing state agencies and prosecuting a wide variety of criminal offenses give me a broad base of experience with which to approach the duties and responsibilities of a district court judge. Although my practice has been focused primarily on criminal law, for a significant portion of my career I handled white collar crime cases including complex securities products such as derivatives and collateralized mortgage obligations. I prosecuted worker's compensation fraud while at the Attorney General's Office and have served on a medical legal panel, giving me experience with medical issues and the worker's compensation system. I have extensive experience working on political campaigns. If appointed, I am prepared to run for office in 2016.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 1st Judicial District, if tendered by the Governor, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.

August 20, 2015
(Date)

(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by ***5:00 p.m. on Sunday, September 13, 2015.***

Mail the signed original to:

Lois Menzies
Office of Court Administrator
P.O. Box 203005
Helena, MT 59620-3005

Send the electronic copy to: mtsupremecourt@mt.gov

Application form approved 7/10/93
Revised 9/15/2009

MELISSA BROCH
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Helena, MT 59601
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Attorneys for State of Montana

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

STATE OF MONTANA, Plaintiff, - vs - DAVID LESLEY KOHL, Defendant.	)	Cause No. CDC-2014-62 **STATE'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

The State submits the following in response to the defendant's motion to dismiss. The defense maintains that Mont. Code Ann. § 45-5-507 as applied to him is unconstitutional for three reasons. First, he asserts the statute violates his federal and state constitutional rights to equal protection by denying him a consent defense. Second, the defendant claims the statutory prohibition on incest violates his right to privacy guaranteed by the Montana Constitution and his federal right to substantive due process. Third, he claims that as applied in the case at hand, Mont. Code Ann. § 45-5-507 violates due process because it "invites arbitrary and discriminatory enforcement."

I. THE COURT SHOULD PRESUME MONT. CODE ANN. § 45-5-507 PASSES CONSTITUTIONAL MUSTER.

Oddly, the defendant does not inform the Court of the standard of review applicable to his constitutional challenge. In *Powell v. State Compensation Insurance Fund*, 2000 MT 321, ¶ 13; 302 Mont, 518; 15 P.3d 877, the Montana Supreme Court reiterated the well-established

rule that a statute is presumed constitutional "and every intendment in its favor will be presumed, unless its unconstitutionality appears beyond a reasonable doubt." The party asserting a constitutional challenge must prove unconstitutionality beyond a reasonable doubt and any doubt must be resolved in favor of constitutionality. *Id.*

Therefore, the defendant has a burden as great as that shouldered by the State in every criminal case: he must prove Mont. Code Ann. § 45-5-507 is unconstitutional beyond a reasonable doubt, the highest burden of proof under Montana law. Any doubt as to the defendant's legal arguments must be resolved in favor of the statute's constitutionality.

II. THE DEFENDANT DOES NOT HAVE A FUNDAMENTAL CONSTITUTIONAL RIGHT TO NONCONSENSUAL INCESTUOUS SEX WITH HIS ADULT BIOLOGICAL DAUGHTER.

The defendant maintains he has a fundamental constitutional right to have sexual intercourse with whomever he pleases, including his adult daughter, in reliance on *Armstrong v. State*, 1999 MT 261; 296 Mont. 361, 989 P.2d 364 and *Gryczan v. State*, 942 P.2d 112; 283 Mont. 443 (1997). His reliance is misplaced.

"The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Article. II, § 10, Montana Constitution. The Montana Supreme Court in *Armstrong* found there was no compelling state interest in precluding women from having pre-viability abortions performed by physician's assistants thus newly enacted statutory restrictions impermissibly infringed on a woman's right to privacy under the Montana Constitution. *Armstrong*, at ¶ 75. In *Gryzcan*, the Supreme Court found that restrictions on private, sexual conduct between consenting same sex adults violated Montanan's privacy rights as guaranteed by the Montana Constitution because no compelling state interest justified the intrusion. *Id.* at 126, 456.

The defendant challenges Mont. Code Ann. § 45-5-507 as applied to him in this case. He maintains he has a privacy interest in private, consensual, incestuous sex with his adult

daughter. The problem is the defendant's situation is different than that of the respondents in *Gryzcan*. There was no dispute the sexual activity at issue in *Gryzcan* was consensual. In this case however, there is a factual dispute. The State maintains the sexual activity between the defendant and A. was non-consensual. The defendant does not make a facial challenge to the statute and he is not similarly situated to an individual who engages in consensual, incestuous sex with an adult child. As noted above, the Court should make every presumption in favor of constitutionality. For purposes of analyzing the defendant's motion to dismiss, the Court should presume A. did not consent to sex with the defendant although lack of consent is not an element of the offense nor is consent a defense in this particular case.

The Supreme Court in *Gryzcan* applied the test articulated in *Katz v. United States*, 389 U.S. 347 (1967), to determine whether the respondents had a legitimate expectation of privacy in private, sexual activity between consenting adults. First, an individual must demonstrate an actual, subjective expectation of privacy. Second, the expectation must be one that society is willing to consider reasonable. *Katz*, 389 U.S. at 361. The defendant has expressed a subjective expectation of privacy. However, his expectation regarding nonconsensual sex with his adult daughter is not one that society would consider reasonable as demonstrated by the fact the majority of states have outlawed incest.

The incest statute does not implicate the defendant's right of privacy simply because it restricts his ability to legally have sex with whomever he wants. In *Montana Cannabis Industry Assn. v. State*, 2012 MT 201, 366 Mont. 224, 286 P.3d 1161, the plaintiffs challenged the Montana Medical Marijuana Act (MMA) based on claimed violations of their fundamental rights to work and obtain medical care as guaranteed by the Montana Constitution. Article 10, § 3, *Wadsworth v. State,* 275 Mont. 287, 299, 911 P.2d 1165, 1172 (1996). The plaintiffs maintained the MMA's restriction on their ability to sell medical marijuana implicated their right to work. *Id.* at ¶ 20.

Relying on *Wiser v. State*, 2006 MT 20, 331 Mont. 28, 129 P.3d 133, the Supreme Court disagreed.

> [T]he idea that the right to pursue employment and life's other 'basic necessities' is limited by the State's police power is imbedded in the plain language of the Constitution. *Article II, Section 3* states that citizens have the right to pursue 'life's basic necessities . . . *in all lawful ways*.' *Art. II, Sec. 3, Mont. Const.*
>
> . . .
>
> The Constitution is clear. While it granted the fundamental right to pursue employment, it also circumscribed that right by subjecting it to the State's police power to protect the public health and welfare.

Id., at ¶ 24.

In granting the injunctive relief sought by the plaintiffs, the lower court held the effect of regulations on the ability to sell marijuana limited its availability thus impacting patients' rights to obtain health care. *Id.*, at ¶ 22.

> As with the right to pursue employment, the Constitution is clear that the right to seek health is circumscribed by the State's police power to protect the public's health and welfare.

Id. at ¶ 22.

Therefore, although Montanans have the right to seek medical treatment, they do not have a fundamental constitutional right "to use any drug, regardless of its legality." *Id.* at ¶ 22. Montanans also have a right to be employed, but not to engage in a particular occupation without regard to legitimate restrictions imposed by the State. Similarly, although an individual has a right to engage in sexual activity, that right is circumscribed by the State's power to protect its other citizens. For example, an individual cannot legally engage in sexual activity with someone under the age of 16 or if the individual is in certain positions of power or control over the other person. Mont. Code Ann. § 45-5-503.

> In order to determine if a constitutional right has been lost, a court must first determine which of the established levels of scrutiny is appropriately applied: strict scrutiny,

> middle-tier scrutiny or the rational basis test. *See Snetsinger v. Mont. Univ. Sys., 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445.* Legislation that implicates a fundamental constitutional right is evaluated under a strict scrutiny standard, whereby the government must show that the law is narrowly tailored to serve a compelling government interest. *Snetsinger, ¶ 17.* If a law or policy affects a right conferred by the Montana Constitution, but is not found in the Constitution's declaration of rights, we apply middle-tier scrutiny. *Snetsinger, ¶ 18.* If neither strict scrutiny nor middle-tier scrutiny apply, the rational basis test is appropriate. Pursuant to the rational basis test, the statute must be rationally related to a legitimate government interest. *Snetsinger, ¶ 19.*

Montana Cannabis Industry Assn., at ¶ 16.

As applied to the defendant, Mont. Code Ann. § 45-5-507 does not implicate a fundamental constitutional right or a right guaranteed by the Montana Constitution because the defendant does not have any right under the Montana Constitution to nonconsensual sex with his biological daughter. The appropriate level of scrutiny is therefore rational basis.

III. THE DEFENDANT IS NOT A MEMBER OF A SUSPECT CLASS NOR DOES THE LACK OF A CONSENT DEFENSE IMPLICATE A FUNDAMENTAL RIGHT OR A RIGHT GUARANTEED BY THE MONTANA CONSTITUTION.

"The basic rule of equal protection is that persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment." *Rausch v. State Compen. Ins. Fund,* 2005 MT 140, ¶ 18, 327 Mont 272, 114 P.3d 192. The defendant maintains the incest statute violates his right to equal protection because he cannot avail himself of a consent defense while a step-parent could do so. Mont. Code Ann. § 45-5-507(2) provides that "[c]onsent is a defense under this section to incest with or upon a stepson or stepdaughter, but consent is ineffective if the victim is less than 18 years old." "[T]wo groups are similarly situated if they are equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Goble v. Montana State Fund*, 2014 MT 99, ¶ 29; 374 Mont. 453; 325 P.3d 1211.

Dale Renee was sentenced to a total of 180 days in jail in two cases where his charges were reduced to misdemeanors from felonies. *State v. Renee*, 1999 MT 135, ¶ 12; 294 Mont.

527; 983 P.2d 893. Renee appealed the district court's denial of his motion for reconsideration of his sentence arguing that Mont. Code Ann. §§ 46-18-101(3)(f), 46-18-201(11), and 46-18-225 (2007) denied him of equal protection by not requiring a sentencing court to consider alternatives to incarceration when sentencing those convicted of misdemeanors. Renee argued those charged with misdemeanors and felonies were similarly situated in terms of the potential loss of liberty. *Id.* at ¶ 24.

"[T]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." *Id.* at ¶ 27.

> [W]here the legislation at issue infringes upon a fundamental right or discriminates against a suspect class, we apply strict scrutiny, the most exacting standard of review; second, where the right in question has its origin in the Montana Constitution, but is not found in the Declaration of Rights, we employ a middle-tier scrutiny; and finally, where the right at issue is neither fundamental nor warrants middle-tiered scrutiny, we review the challenge under a rational basis test.

Id. at ¶ 23.

Because the defendant's challenge is not facial but as applied, he must demonstrate he is similarly situated to a step-parent. He is not. There is no set of circumstances under which the defendant could engage in legal sexual activity with his daughter. Termination of the relationship with her mother did not terminate the parent-child relationship between the defendant and A. Even if the defendant and A.'s mother were never married, the defendant could not legally engage in sexual activity with A. because he would still be her biological father. On the other hand, what connects a step-parent to a child from a legal perspective is the step-parent's marriage to the child's parent. If the marriage had not occurred, and provided the child was an adult, the step-parent and the child could legally engage in consensual sexual activity. If the adult child's biological parent dies or divorces the step-parent, legally the relationship between the child and the step-parent is severed and the adult child and the step-

parent could legally engage in consensual sexual activity. The defendant is not similarly situated to a step-parent in that he could never legally engage in sexual activity with his daughter.

The defendant in this case has not demonstrated he is a member of a suspect class nor that he has either a fundamental right or a right guaranteed under the Montana Constitution to raise a consent defense. Therefore, if this Court determines that by failing to permit biological and adoptive parents to raise a consent defense to a charge of incest the State has created a classification system that unequally distinguishes between similarly situated groups, the appropriate level of scrutiny is rational basis.

IV. MONT. CODE ANN. § 45-5-507 IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST IN PROTECTING THE FAMILY UNIT.

Just as he failed to inform the Court of the standard of review applicable to a constitutional challenge, the defendant fails to cite to any authority setting forth the legislative intent underpinning the enactment of Mont. Code Ann. § 45-5-507. As a consequence, his multi-paragraph speculation about the rationale for the prohibition against incest can be seen as precisely that: speculation.

The Revised Code of Montana contained a prohibition against incest at R.C.M. 94-5-606. Montana adopted most of the provisions of the Model Penal Code when the criminal code was rewritten in 1973. *State v. Rothacher*, 272 Mont. 303, 308; 901 P.2d 82, 85; 52 Mont. St. Rep. 772 (1995), including Section 230.2 proscribing incest.

> A person is guilty of incest, a felony of the third degree, if he knowingly marries or cohabits or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood [or an uncle, aunt, nephew or niece of the whole blood]. "Cohabit" means to live together under the representation or appearance of being married. The relationships referred to herein include blood relationships without regard to legitimacy, and relationship of parent and child by adoption.

Model Penal Code § 230.2.

The comments to the Model Penal Code make clear the primary rationale underlying the incest provision is protection of the family unit:

> Section 230.2 confines the crime of incest to consanguineous relationships, with the exception that the relation of parent and child by adoption is added. It also limits the prohibition to ancestors, descendants, brothers, and sisters. Uncles, aunts, nieces, and nephews are included in brackets to reflect uncertainty as to whether they should be added to the categories of persons who may be liable for incest. The prohibition extends to marriage, cohabitation, and sexual intercourse. The major policy to be effected by a law of incest is the protection of the integrity of the family unit, and it is primarily for this reason that the prohibition includes marriage and cohabitation and is extended to adopted children. Affinal relations are excluded, principally because there are situations where marriage between persons who are not related by blood should be permitted.

Model Penal Code § 230.2 note on section (1962).

Montana removed aunts, uncles, nieces and nephews from inclusion in the incest statute in light of the severity of the penalty. *Criminal Law Commission Comments to Mont. Code Ann. § 45-5-507.* Subsequent to the adoption of the Model Penal Code, Montana law more narrowly defined incest than was the case prior to 1973. *Annotater's Comments to Mont. Code Ann. § 45-5-507.*

The United States Supreme Court has recognized the legitimacy of a state's interest in promoting family unity. *Michael H. v. Gerald D.*, 491 U.S. 110, (1989). Almost every state criminalizes incest to one degree or another:

> "All but three states criminalize some forms of consensual adult incest. Every state that does so criminalizes at least incest between parents and their children. All but one state that criminalizes incest also applies its laws to sex between siblings. All but six states that criminalize incest extend their laws to sex between aunts or uncles and nephews or nieces. Twenty-two states criminalize sex between stepparents and stepchildren, although some provide for a consent defense between adults. Eight states criminalize sex between first cousins, although two of those states allow the cousins to marry and have sex, if either they are old enough or if at least one of them is sterile. … The statutes also vary in how they handle adopted children." (McDonnell, *Symposium: Privacy Rights in a Post* Lawrence *World: Responses to* Lawrence v. Texas*: Is Incest Next*? (2004) 10 Cardozo Women's L.J. 337, 349, fns. omitted

People v. McEvoy, 215 Cal. App. 4th 431, 442; 154 Cal. Rptr. 3d 914, 922 (2013).

The State does not maintain it is acceptable for Montana to criminalize incest simply because other states do. The State's point is that protection of family unity is widely recognized as a legitimate state interest and criminalizing incest is rationally related to that interest. Similar challenges to incest statutes in other states based on the identical arguments made by this defendant have been unsuccessful. *See People v. Scott*, 157 Cal. App. 4th 189, 194 (Father had no constitutional right to consensual sex with 18 year old daughter. "Like other states, California has a legitimate interest in maintaining the integrity of the family unit."); *State v. Lowe*, 112 Ohio St.3d 507, 861 N.E.2d 512, 2007-Ohio-606 (2007)(Father had no constitutionally protected right to consensual sex with adult daughter); *State v. Allen M.*, 214 Wis. 2d 302; 571 N.W.2d 872 (1997)(No equal protection or due process violation to enforcement of Wisconsin incest law leading to termination of parental rights of incestuous parents.)

Criminalization of incest serves a legitimate state interest in protecting the family unit and thus satisfies the rational basis test. As applied to the defendant, the distinction between a biological parent and a step-parent furthers that goal as well. Under no circumstances could the defendant legally engage in sex with his biological daughter while a step-parent could under certain circumstances such as death of the child's parent or divorce.

V. ENFORCEMENT OF MONT. CODE ANN. § 45-5-507 DOES NOT VIOLATE THE DEFENDANTS SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE U.S. CONSTITUTION

The defendant's arguments with respect to his federal due process claims fail for the same reason his arguments that Mont. Code Ann. § 45-5-506 as applied in this case violates his right of privacy guaranteed under the Montana Constitution. The defendant has not and cannot establish any right to have nonconsensual, incestuous sex with his daughter.

> *Lawrence* also did not announce, as Muth claims it did, a fundamental right, protected by the Constitution, for adults to engage in all manner of consensual sexual conduct,

specifically in this case, incest. The Court certainly had not announced such a right prior to *Lawrence*, *see Carey v. Population Servs. Int'l*, 431 U.S. 678, 688 n. 5 & n. 17, 52 L. Ed. 2d 675, 97 S.Ct. 2010 (1977) ("The Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits statutes regulating private consensual sexual behavior among adults, and we do not purport to answer that question now.") (internal citation and punctuation omitted), and *Lawrence*, whatever its ramifications, does not, in and of itself, go so far.

Muth v. Frank, 412 F.3d 808, 817 (Defendant imprisoned for violating Wisconsin's incest statute not entitled to writ of habeas corpus in reliance on *Lawrence v. Texas*, 539 U.S. 558 (2003))

VI. AS APPLIED TO THE DEFENDANT, MONT. CODE ANN. § 45-5-507 DOES NOT INVTE ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

Once again, the State reminds the Court the defendant's due process challenge to the incest statute is not facial, it is based on the application of the statute to him. The defendant relies on *In re D.B.*, 950 N.E.2d 528 (Ohio 2011) and *In re G.T.*, 758 A.2d 301 (Vt. 2000) in support of his claim that when both the suspect and the victim may be charged with an offense, the prosecutor is granted unfettered discretion to pick what defense counsel describes as "winners and losers." In the context of the present case, no one is a "winner." The State maintains the defendant had nonconsensual sex with A. That hardly makes her a "winner." A. would no doubt prefer to have "lost" and avoided having her father have sexual intercourse with her.

The State is bound by its theory of the case – that the defendant had nonconsensual sex with A. Therefore the State could not prove all the elements of the offense of incest against A: that A. had sexual intercourse with an ancestor and that A. acted knowingly. MCJI 5-127(a) (2009). The State would be unable to prove A.'s had criminal intent. "A material element of every offense is a voluntary act, which includes an omission to perform a duty which the law imposes and which is physically capable of being performed." MCJI 1-107(2009). This case is not analogous to the underage sex cases cited by the defense. The State could not charge both