

APPLICATION FOR

**DISTRICT COURT JUDGESHIP
First Judicial District**

A. PERSONAL INFORMATION

1. Full Name: Daniel Mark Guzynski
- a. What name do you commonly go by? Dan Guzynski
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes
3. Home Address: [REDACTED]
- Phone: [REDACTED]
4. Office Address: Montana Attorney General's Office, 215 N. Sanders, Helena, MT 59620
- Phone: 406-444-2026
5. Length of residence in Montana: 18 years
6. List your place of residence for the last five years:
- | <u>Dates</u> | <u>City</u> | <u>State</u> |
|-----------------|-------------|--------------|
| 2007 to present | Helena | Montana |

B. EDUCATIONAL BACKGROUND

7. List the names and location of schools attended, beginning with high school:
- | <u>Name</u> | <u>Location</u> | <u>Date of Degree</u> | <u>Degree</u> |
|--------------------------------------|----------------------|-----------------------|---------------|
| Clawson High School | Clawson MI | 6/89 | Diploma |
| Oakland Community College | Royal Oak, MI | | |
| Lake Superior State University | Sault Ste. Marie, MI | 5/96 | B.S. |
| Alexander Blewett III School of Law, | Missoula MT | 5/00 | J.D. |

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

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.

No

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.

| <u>Court or Administrative Body</u> | <u>Date of Admission</u> |
|-------------------------------------|--------------------------|
| Montana State Courts | 2000 |

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

Assistant Attorney General for the State of Montana.

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:

| <u>Employer's Name</u> | <u>Position</u> | <u>Dates</u> |
|--|------------------------|--------------|
| Missoula County Attorney's Office 200 West Broadway St. Missoula, MT 59802 | Legal Intern | 4/99 to 5/00 |
| Mineral County Attorney's Office 300 River St. Superior, MT 59872 | Legal Intern | 5/00 to 8/00 |
| Cascade County Attorney's Office 121 4 th St. N #2a Great Falls, MT 59401 | Deputy County Attorney | 9/00 to 7/01 |

Flathead County Attorney's Office
920 S. Main St.
Kalispell, MT 59901

Deputy County Attorney 7/01 to 11/07

Montana Attorney General's Office
215 N. Sanders
Helena, MT 59620

Assistant Attorney General 11/07 to present

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

Not applicable

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.

95% of my law practice is dedicated to the practice of criminal law. I am employed as a member of the Prosecution Services Bureau, Montana Attorney General's Office. I assist local county attorneys with complex criminal cases and conflict of interest cases.

5% of my law practice is dedicated to civil matters that involve abuse and neglect proceedings, postconviction relief proceedings, revocations, asset forfeiture, and mental health commitments.

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

I have presented at various continuing legal education conferences on topics related to trial practice, providing expert testimony, preparing victims to testify in court, etc.

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

I am a member of the Montana Attorney General's Office specializing in homicide and child sexual abuse prosecution. I am a member of the Montana Attorney General's Office Child Sexual Assault Prosecution Team.

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?

6 times per month on average.

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 | _____ | 5% |
| Criminal | _____ | 95% |
| Other | _____ | 0% |

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.

No

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

25

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

3

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.

State v. Bowen, Cause No. DC-2012-4, Roosevelt County MT.

Jury trial: June 2013 Sentencing: November 13, 2013

Opposing Counsel: Ms. Cynthia Thornton , Regional Deputy Public Defenders
100-1/2 South Merrell, Suite 3, Glendive, MT 59330.
406-234-1065.

Mr. Lawrence LaFountain, Assistant Public Defender

Office of the State Public Defender, 615 2nd Ave. North
Great Falls, MT 59401. 406-770-3200.

Presiding Judge: Hon. David Cybulski, Fifteenth Judicial District Court of
Montana. 406-286-5615

State v. Aguado, Cause No. DC-12-23, Stillwater County, MT

Jury trial: September, 2013 Sentencing: May 28, 2014

Opposing counsel: Gregory Paskell, 207 North Broadway, Suite 201,
Billings, MT 59101. 406-250-6917.

Presiding Judge: Hon. Randal I. Spaulding, Fourteenth Judicial District
Court of Montana. 406-424-8360.

***State v. Guillermo Arturo Antillon Armendariz-Gomez, A.K.A. Roberto Vargas, Cause
No. DC-13-13, Richland County, MT***

Jury trial: August 13, 2013 Sentencing: December 31, 2013

Opposing counsel: Hunt W. Garner, 2650 Washington #102, Ogden, UT
84414. 801-621-2020.

Presiding Judge: Hon. Katherine M. Bidegaray, Seventh Judicial District
Court of Montana. 406-433-5939.

State v. Hamilton, Cause No. BDC-13-560, Cascade County, MT

Jury trial: October 2014 Sentencing: March 3, 2015

Opposing Counsel: Mr. Vincent Van der Hagen, Office of Public Defenders,
615 2nd Ave. N, Great Falls, MT 59401. 406-770-3212.

Presiding Judge: Hon. David Cybulski, Fifteenth Judicial District Court of
Montana. 406-286-5615.

State v. Lau, Cause No. DC-12-009, Teton County, MT.

Jury trial: January, 2015 Sentencing: February 24, 2015

Opposing counsel: Mr. Kenneth R. Olson, 417 Central Ave., Johnson
Building, Fourth Floor, Great Falls, MT 59401. 406-727-
6263.

Presiding Judge: Hon. Robert Olson, Ninth Judicial District Court of
Montana. 406-424-8360.

State v. Jaraczski, Cause No. DC-14-05, Chouteau County, MT.

Jury trial: September 8, 2015

Opposing Counsel: Ms. Jennifer E. Streano, Office of the State Public Defender, 139 N. Last Chance Gulch P.O. Box 200145, Helena, MT 59620-0145. 406-523-5164.

Mr. Robert Peterson, Attorney at Law, 111 N. Higgins, Suite 403, Missoula, MT 59802. 406-830-3436.

Presiding Judge: Hon. Greg Pinski, Eighth Judicial District Court of Montana, 406-454-6894.

State v. Campbell, Cause No. BDC-2014-234, Lewis and Clark County, MT.

Trial is scheduled to commence on November 2, 2015.

Opposing Counsel: Mr. Gregory Jackson, 320 11th Ave., Helena, MT 59601. 406-443-2140.

Mr. Chad Wright, P.O. Box 1582, Helena, MT 59624-1582. 406-495-9027.

Presiding Judge: Hon. Jeffrey M. Sherlock, First Judicial District Court of Montana. 406-447-8205.

State v. Riggin, Cause No. DC- CDC-14-392, Cascade County, MT.

Trial is scheduled to commence on January 19, 2016.

Opposing Counsel: Ms. Meghan Lulf Sutton, P.O. Box 1348, Great Falls, MT 59403-1348. 406-771-7477.

Presiding Judge: Hon. Dirk M. Sandefur, Eighth Judicial District Court of Montana, 406-771-6566.

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

I have appeared in front of the Montana Board of Pardon and Parole representing the State of Montana.

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.

Presentations I have done:

“Case Law Review”. Courts of Limited Jurisdiction Conference, 2008. The presentation was a review of recent Montana Supreme Court rulings. I also highlighted prior Montana Supreme Court cases of significant importance to Justice Court judges. The attendees were Montana Justice Court Judges.

“Child Sexual Abuse Cases-Physical Findings”. Copresented with Dr. Karen Mielke, First Step Resource Center. Montana County Attorney’s Association Conference. July 2009. I presented on introducing at trial expert testimony of physical findings and absence of physical findings in child sexual abuse cases. This presentation was made to prosecutors.

“Effective Prosecution of Child Sexual Abuse Cases”. Montana Attorney General’s Justice for Children Conference. October 25-27, 2011. The topics included a wide range of issues relating to the prosecution of child sexual abuse cases. The presentation was made to law enforcement, prosecutors, and social workers

“Presenting Ballistic Evidence in the Courtroom”. Montana County Attorney’s Association Conference. July 2013. I presented on introducing expert ballistic testimony at trial. Attendees were prosecutors.

“Discussion on Relevant Issues Surrounding Expert Witness Testimony”. Montana Sexual Offender Treatment Association (MSOTA) Conference. The topics covered a range of issues relating to the use of expert witnesses in sexual abuse cases including the sentencing phase. May 2014. The attendees were members of MSOTA.

“Prosecuting the Difficult Sexual Assault Case”. I presented on how prosecutors can effectively work with child sexual abuse victims and prepare them to testify in court. I also made a separate presentation on the use of expert witnesses in sexual abuse cases. June 2014. The presentation was made to prosecutors.

“Trying the Difficult Self Defense Case”. Montana County Attorney’s Association Conference. July 2015. The presentation focused on prosecuting cases where a defendant claims self-defense. The presentation highlighted the challenging legal and factual issues that arose in the trial *Martin Lau, State v. Lau*, Cause No. DC-12-009, Teton County, MT. The presentation was made to prosecutors.

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.

Montana Bar Association. September 2000 to 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.

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

Yes, Montana State Senate, Senate District 42, Lewis and Clark County, 2015 legislature.

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

I believe that everybody has an obligation to work toward improving the world and their community. This work can be done by working in a profession where you devote long hours to improving your community or it can be done by giving your free time to community service efforts. Thus far, I have chosen to spend my career as a public servant working as a prosecutor to bring justice to victims of crimes. This position has brought me into communities across Montana where I have worked closely with children, families, and individuals whose lives have been deeply affected by the crimes committed against them. While I may not have the time to donate to traditional volunteer work, I give my time freely to my cases and the victims I work with. Additionally, in 2013 through 2014 I ran a vigorous campaign for the Montana State Senate. My efforts to become a Montana State Senator were done for the sole purpose of improving the lives of Montanans.

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.

In 1997 during my first year of law school in Missoula, an individual sexually assaulted a female that I was with. I intervened and was assaulted by him and another individual. The police arrived and arrested myself and the individuals who assaulted me. I was charged with the misdemeanor offense of disorderly conduct. Subsequently the Missoula City Attorney's Office found that the charges were without merit. Accordingly, the Missoula City Attorney's Office dismissed the case. The charges against me were dismissed outright and were not part of any pretrial agreement.

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.

Not applicable.

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.

No.

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 No

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

I draft legal briefs on a wide range of issues, including various constitutional matters. I assist law enforcement in preparing search warrants and investigative subpoenas. I write judgments, various orders and proposed findings of facts and conclusions of law for the court. I also prepare responses to post-conviction relief petitions, which are civil in nature. My legal writing is done by me.

I conduct legal research on a variety of issues. Also, part of my job duties includes assisting local prosecutors in researching their legal matters. At times, prosecutors are in the middle of trial requesting answers to legal issues that have arisen in their trial and need an immediate response by me. My legal research is done by me.

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**.

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.

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

50 %

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.

Primarily, my interest is spending time with my family, my wife Erin and my daughters Maddie and Mary. When I am not traveling for work most of my free time is spent with my girls around the house having lots of fun doing what little girls like to do. Away from the house we enjoy, rafting, hiking and camping. I am an avid fly fisherman, so during my alone time I trout fish the rivers around Helena.

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

I have worked at a variety of jobs in my life. It may sound cliché, but my first job was in middle school as a newspaper delivery boy. While in high school, I worked in a pizzeria, ice cream shop and daycare (afterschool program). While in college, I was a resident advisor (RA). I also worked a number of years as a bartender, and a member of the ground crew for a tree removal business. During law school I worked as a waiter at

MacKenzie River Pizza in Missoula. I also worked as a paid legal intern for the Missoula County Attorney's Office. While preparing for the bar exam I worked for the Mineral County Attorney's Office as a paid legal intern. After passing the bar, I worked for the Cascade County Attorney's Office, the Flathead County Attorney's Office. I am presently working for the Montana Attorney General's Office.

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

As an Assistant Attorney General I travel though out Montana prosecuting complex criminal cases spending large periods of time away from home and family to do the public's work leaving me with little time to dedicate to pro bono work. I make these sacrifices because I believe in public service.

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

I have appeared in front of twenty-six different Montana District Court judges who have influenced the way I view our system of justice. Early on in my career, I primarily practiced in front of three Flathead County District Court judges. It was also at that time, when Flathead County had a surge in crimes due to methamphetamine use. These judges rightly demanded that there remained an individual approach to each case, deciding each one on its own merits. They served as examples on how to treat all participants involved in our justice system and were wonderful mentors to me as I grew as an attorney. It was at this time that my interest in becoming a judge began.

In 2007, I took a position as an Assistant Attorney General with the State of Montana's Prosecution Services Bureau. This position required me to appear in front of many different judges throughout the State. As I traveled the state, I realized that each judge had their own way of conducting themselves and moving their cases through the system. It became apparent to me, that the judges that treat lawyers, clients and all other participants with dignity and patience are the most successful.

These judges have shaped the way I view our justice system. They have taught me that no matter how high a judge's legal acuity may be, that the Court is a human institution that can only thrive when judges treat participants with dignity and respect.

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

Montana district court judges act with tremendous independence. The decisions rendered by a district court judge are always significant and often life-changing for the participants. Only a fraction of a district court judge's actions is reviewed by the Montana Supreme Court. Moreover, the manner in which a district court judge manages his or her caseload is largely left to the judge. For these reasons, I believe the important

qualities of a good district court judge are the ability to create an environment where all the participants are treated with respect, the ability to rule correctly and promptly on the various issues that come before the court, and the ability to decide matters fairly and impartially

Judges must also be patient with counsel and participants, allowing each party a degree of latitude in presenting their case in the manner they see most fit, yet at the same time move the proceedings with a deliberate pace toward an appropriate conclusion.

Judges must possess legal acuity and the ability to reach a prompt decision. No judge possesses all of the legal knowledge required to rule on every matter that may come before the court. Thus, it is essential that judges be committed to making correct decisions based on arguments of the parties, analysis of precedent, court rules, statutes, and constitutional principles. Judges are decision makers. The court is no place for handwringers and indecision. Judges are not advocates. Rather, judges consider the competing arguments made by advocates (attorneys) and decide which argument is correct under the law. Judges must treat all parties and their counsel equally.

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.

A district court judge is required to follow established fixed precedent that is binding upon the lower court. The rulings established by Courts may be binding upon a trial judge or may be persuasive authority. A Montana district court judge may disagree with an upper court's holding on a legal matter and in writing their opinions may express dissatisfaction with the upper courts' holdings. However district court judges are not in a position to reject established case law from the Montana Supreme Court or the United States Supreme Court. In many instances, there is not established precedent and district court judges may rely on persuasive authority to make their rulings. The role of a district court judge is not to change existing law which has already been established by binding courts but is to apply the law. Our system of justice would not function if trial judges were allowed to reject established precedent. Individuals, institutions and business interest could not function without the ability to rely on the stability that our "common law" system of justice affords us. That being said, prior binding case law may be wrong. The case law may deprive individuals or groups of dignity and equality. Also, existing case law may be detrimental to our democracy and an affront to suffrage. When this happens our appellate courts should move rapidly to reverse the course that other judges before them have taken and right the ship. However, this is not the duty of the trial court.

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

I have approached my job as a prosecutor with a strong commitment to fairness and justice. I am seeking the position of district court judge to continue to instill these values on the court and to serve the community in which I live.

Fundamentally, my work as a prosecutor is to seek and obtain justice on behalf of individual victims of crime as well as ensuring that those who perpetrate crimes are held accountable to society as a whole. In addition to these important interests, my concerns are also with the accused. Guided by personal ethics and professional responsibility, my values direct me to seek the fair treatment of the defendant. Our nation's governing principles and laws demand that I do so. Even in our adversarial legal system, prosecutors have a significant role and ethical duty to ensure that those charged with crimes are fairly treated. Albeit more directly, judges have the same responsibility to safeguard our justice system.

Justice is a core value of mine. It is because of this that I have dedicated my life to public service and want to continue with this dedication by serving as a district court judge. I often witness the application of justice in the courtroom by judges who make thoughtful rulings based on the law with an understanding of the facts. However, this is not always the case and the consequences for judges failing to correctly apply the law to facts are high – potentially resulting in a grave injustice to a party who comes before the court. The issues confronting a district court judge are broader than what I am currently charged with, but it is ruling on broader societal issues that most interest me about the position.

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

I am most proud of my work in child sexual assault prosecution. It has been an honor to work with so many children who have found the courage to walk into court and talk about the horrific things that have been done to them. I have trained on a variety of issues regarding child sexual assault prosecution and I am member of the Montana Attorney General's Office Sexual Assault Team. When I am not directly involved in the prosecution of a sexual assault case, I devote many hours to assisting local county attorneys with cases involving child sexual assault. I do this in part by reviewing investigative files, assisting with researching legal issues, developing expert testimony and trial strategy. I have had a significant role in the utilization of expert testimony in child sexual assault prosecutions in Montana. There are few things in my life that have been more satisfying to me than working with children who have been sexually abused to obtain justice. It is my belief that the experience of coming into court and standing up against their perpetrator has been transformative to many of the victims I have worked with.

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

I am member of the Commission on Sentencing. I was appointed to the Commission by Montana Attorney General, Tim Fox. The purpose of the Commission is to study Montana's sentencing practices and policies and to provide recommendations to the legislature (SB 224).

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?

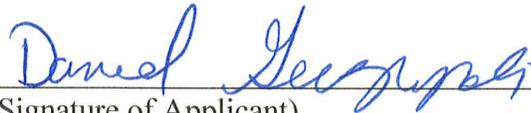
I have had approximately 35 felony jury trials. Many of these trials were lengthy and complex. I have been fortunate to have tried these cases in front of many different judges throughout Montana. My experience in trying these cases in front of these diverse judges has given me a unique insight to what it is to be a successful district court judge. I have also benefitted from working against and with lawyers from all of the State of Montana. Often lawyers practicing in their own locale are not exposed to new ideas and ways of thinking about our laws or how our courts could be run differently or more efficiently. I believe my exposure to working with various lawyers and judges has prepared me well for the position of district court judge.

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.

9-13-15

(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

required to follow the rules of evidence relating to the introduction of evidence of the victim's character.

It appears that the Defendant now is asking that the Court allow the introduction of the victim's character. The Defendant wants the jury to be precluded from hearing anything negative about the Defendant while hearing, without restriction, the alleged negative acts of the victim.

As previously stated, the general rule is that character evidence is not admissible for the purpose to show that the person acted in conformity. The two questions that need to be asked when considering whether to admit character evidence of the victim are: 1) is evidence of the victim's character admissible, *Mont. Rule 404*, and if so; 2) the "method" the Defendant is allowed to prove the victim's character (reputation and opinion vs. specific instances of conduct). *Mont. R. Evid. 405*.

The threshold question in the present case is whether character evidence is admissible. If the Court concludes that character evidence of the victim is admissible, the Court must then determine the type of character evidence that is admissible, i.e. whether it is going to allow reputation and opinion evidence or whether it is going to allow the Defendant to admit specific instances of violence by the victim.

I. General Rule Regarding Character Evidence

Montana Rule of Evidence 404(a) states, in part:

- (a) Character Evidence Generally. Evidence of a person's character or trait of character is not admissible for the purposes of proving action in conformity therewith on a particular occasion except:

....

- (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused

It is important again to note that the general rule is that character evidence is not admissible. The rule does however allow character evidence to be admitted under certain circumstances.

An important fact in the present case is that the Defendant did not know the victim, Donald Kline (Kline). The Defendant met Kline briefly, without incident. The only connection between the Defendant and Kline was that the Defendant was pursuing Kline's live-in girlfriend, Susan Pfeifer (Pfeifer). Whatever knowledge the Defendant had of Kline at the time of the shooting was given to the Defendant from Pfeifer prior to the shooting. Any information the Defendant obtained from Pfeifer regarding Kline's behavior would have been hearsay evidence (unreliable). Other than the events that transpired minutes before the shooting, the Defendant does not have any personal knowledge of the victim. Moreover, Pfeifer disputes that she said nearly all of the things the Defendant has allegedly stated were told to him by Pfeifer.

II. Character of Victim

In the present case the Defendant has alleged that he acted in self-defense. The Defendant has further alleged that once he entered the victim's home with an assault rifle, the victim charged him prior to firing his gun. Therefore, it seems reasonable that the Court may determine Kline's character for violence to be a "pertinent character" trait. However, the Defendant's propensity for destroying property is not a pertinent character trait in a self-defense case. Should the Court determine that the victim's character for physical violence is a "pertinent trait of character," pursuant to Mont. R. Evid. 404(a)(2), the Court must then decide, pursuant to Mont. Rule of Evid. 405, what methods the

Defendant can use to prove character. The Montana Rules of Evidence are strict in what methods of proof are allowed to prove the victim's character. And this makes sense, otherwise all homicide trials would turn on whether the victim was a bad person. The defense would simply attempt to introduce evidence that the killing was a community service, which seems entirely unfair when you keep in mind that the State is prohibited from introducing evidence of the Defendant's bad character.

III. Methods of Proving Character

Mont. R. Evid. 405 states the ways character evidence can be proven:

- (a) Reputation or opinion. In all cases which evidence of character or a trait of character is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
- (b) Specific instances of conduct. In cases which character or trait of character of a person is an essential element of a charge, claim or defense, or where the character of the victim relates to the reasonableness of force used by the accused in self defense, proof may also be made of specific instances of that person's conduct.

Mont. R. Evid. 405 permits character evidence to be proved in only two ways: 1) Proof by way of opinion and reputation; and 2) specific instances of conduct. These are the only two ways the Defendant may prove that the victim had character for violence.

IV. Mont. R. Evid. 405 (a) Proof of a Victim's Character by Opinion and Reputation

Mont. R. Evid. 701 limits a witness's ability to provide opinion evidence. The rule provides in part:

. . . testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) is helpful to a clear understanding of the witness' testimony or the determination of an issue.

There is no dispute that in the present case the Defendant never witnessed the victim commit an act of physical violence towards anyone. The Defendant did not know Kline. The Defendant does not have first-hand knowledge to base an opinion that Kline was violent.

Secondly, the Defendant did not know what the victim's reputation in the community was for physical violence. The Defendant has never stated that anyone ever discussed with him Kline's reputation for violence. The Defendant is not from Teton County, nor is there any evidence the Defendant was aware of any reputation the victim may have had.

Accordingly, the Defendant should be prohibited from testifying in the form of opinion or reputation to the victim's character for physical violence.

V. **Mont. R. Evid. 405(b) Proof of the Victim's Character by Specific Instances of Conduct.**

Montana Rule of Evidence 405(b) states the circumstances in which character evidence can be proven by specific instances of conduct. Mont. R. Evid. 405(b) provides:

Specific instances of conduct. In cases which character or trait of character of a person is an essential element of a charge, claim or defense, or where the character of the victim relates to the reasonableness of force used by the accused in self defense, proof may also be made of specific instances of that person's conduct.

The victim's character for violence is not an "essential element" of a justifiable use of force defense, and therefore, the introduction of specific instances of conduct is not permissible to prove character under the first prong. *Deschon v. State*, 2008 MT 380, ¶ 24, 347 Mont. 30, 197 P.3d 476. However, specific instances of conduct are permissible proof when offered in a self-defense case to show the reasonableness of force

used. Mont. R. Evid. 405(b) explicitly states that proof may also be made of “specific instances of the person’s conduct.” The evidence must be specific conduct of Kline.

In the present case, the Defendant states in his interview to law enforcement that he does not know a single time that Kline struck Pfeifer. When asked in his interview “[d]id she ever tell you that he had hit her?” Lau states:

Again, I.. it was .. yes but not SPECIFICALLY (emphasis added). She said he’s been violent with me. You know, he’s terrorizing me, he has hurt me, he didn’t say.. she didn’t say specifically he’s hit me, he’s ah, you know beating me with this or that or.. or.. or whatever specific he did, but she indicated that she had been abused by him. (See Attachment A).

According to the Defendant, Pfeifer told the Defendant that Kline had damaged numerous pieces of personal property which include a couch, trashing the house, and threatening to burn the house down. The Defendant also states that Pfeifer told him that Kline was abusive and that he terrorized her.

Rule 405 prohibits the admissibility of these prior instances of Kline’s violence against property. Rule 405 requires that the specific instances of conduct “relate[] to the reasonableness of force used” by the Defendant to shoot Kline. Had the Defendant used force other than deadly force, then Kline’s instances of violence might be relevant. However, deadly force cannot be used to defend property unless it constitutes a forcible felony. Mont. Code Ann. 45-3-104. A “forcible felony” means any felony which involves the use or threat of physical force or violence against any individual. Mont. Code Ann. 45-3-101(2). General allegations that Kline terrorized and abused Pfeifer by threatening her property do not constitute “forcible felonies,” and thus do not “relate” to the reasonableness of the Defendant’s use of deadly force. Even if the Defendant makes

the implausible claim that he relied on these prior property crimes to shoot Kline, he should not be allowed to testify to them as they are unrelated to his use of force as a matter of law and substantially more prejudicial than probative under Mont. R. Evid. 403.

Nor should the Defendant be able to rely on second-hand generalities allegedly relayed to him by Pfeifer. In the present case, proof of the victim's alleged character for physical violence is permitted by proof of specific instances of conduct of the victim. The Defendant does not have specific knowledge of Kline being physically abusive to Pfeifer. What the Defendant has are generalities of Kline's conduct given to him second-hand by Pfeifer. Allegedly, Pfeifer told the Defendant that Kline was jealous and abusive. The facts known to the Defendant are not specific instances of conduct as contemplated by the statute by are Pfeifer's opinion of Kline. Pursuant to Mont. R. Evid. 405, general second-hand (hearsay) characterizations are not admissible. The rule states "specific instances of conduct." Accordingly, any testimony should be just that and not generalities.

VI. Foundational Requirements for Introduction of Specific Conduct of Victim

The foundational requirements for a Defendant to introduce specific instances of bad conduct of the deceased could not be clearer. The Defendant must: 1) lay a foundation that he acted in self-defense; 2) prove that the Defendant was aware of specific instances of conduct of the deceased; and lastly 3) that he relied on that knowledge at the time he used the force. *State v. Montgomery*, 2005 MT 120, 327 Mont. 138, ¶ 19, 112 P.3d 1013.

After the Montana Legislature made changes to the Montana self-defense laws, the Montana Supreme Court in *State v. Daniels*, 2011 MT 278, 362 Mont. 426, 265 P.3d 623, stated:

[w]hile Mont. Code Ann. § 46-16-131 (2009) provides for shifting of the burden of proof of justifiable use of force, the Montana Rules of Evidence still apply and govern all proceedings in all courts in the State of Montana.

In *Daniels*, ¶ 27, the Montana Supreme Court also reaffirmed the Court's prior holdings in *Montgomery* regarding the foundation required to introduce character evidence by proof of specific instances of conduct. The Montana Supreme Court stated:

While the burden may shift to the State to prove the absence of justification under the Mont. Code Ann. § 46-13-131(2009), that burden does not eliminate the need to satisfy the foundational requirements for the admissibility of evidence pursuant to the Montana Rules of Evidence.

The Court explicitly stated that despite the Legislature's enactment of Mont. Code Ann. § 46-13-131(2009), the foundational requirements set forth in *Montgomery* were still good law. Specifically, the Montana Supreme Court stated:

In Contrast to Daniel's assertions that pre-HB 228 case on foundation and relevance have been overruled, the discussions in *Montgomery*, reiterated in *Deschon* and *Henson*, as to the foundation required for admission of character evidence of the victim, remain good law.

Daniels, ¶ 27.

In summary, the Defendant is permitted to introduce specific instances of physical violence that he relied on in determining the reasonableness of the level of force used, so long as he establishes at trial the proper foundation, which includes:

1. The Defendant must put self-defense at issue at the trial;
2. The Defendant must demonstrate that he had knowledge of SPECIFIC INSTANCES of physical violence (physical violence is the only pertinent character trait at issue); and
3. And lastly, the Defendant must have relied on his knowledge of the specific instances of violence when decided to shoot the Defendant.

This is the foundational requirements that must be met in court at trial prior to the introduction of any specific instances of physical violence. The foundational requirements are meant to prevent the Defendant from vilifying the victim for the sole purpose of prejudicing the State's case. However, if the Defendant meets the foundational requirements set forth in *Daniels* and *Montgomery*, the evidence becomes relevant for the single purpose of the jury evaluating the reasonableness of force used by the Defendant. The Court stated in *Daniels* (citing *Montgomery*) that:

“Evidence which is not relevant is not admissible.” M.R. Evid. 402.
Consequently, “since [the defendant] did not establish that his knowledge of the [victim's] past led him to use the level of force he employed, [the victim's] past was irrelevant and inadmissible.”

The Court ruled in *Daniels* (post-Mont. Code Ann. § 46-13-131(2009)) that the foundational requirements establish “relevancy” which of course can only be done at trial, not a pre-trial hearing.

CONCLUSION

Based on the above legal analysis, this Court should prohibit the Defendant from offering prior instances of property violence and general, second-hand opinions by Pfeifer as justifications for his use of deadly force. This evidence is irrelevant to the Defendant's use of force as a matter of law and would serve no purpose other than to vilify the victim of this crime.

Dated this 14 day of January, 2014.

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By:


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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing State's Reply to Defendant's Response to State's First Motion in Limine, Dated December 12, 2013, to be emailed and mailed, first class postage prepaid, to:

Mr. Kenneth R. Olson
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417 Central Ave.
Johnson Building, Fourth Floor
Great Falls, MT 59401

Dated: January 14, 2014

Jim Coni