

APPLICATION FOR
DISTRICT COURT JUDGESHIP
First Judicial District

A. PERSONAL INFORMATION

1. Full Name: **Barbara Claassen Harris**
- a. What name do you commonly go by? **Barb**
2. Birthdate: [REDACTED] Are you a U.S. citizen? **Yes**
3. Home Address: [REDACTED]
- Phone: [REDACTED]
4. Office Address: **Lewis & Clark County Courthouse, 228 Broadway, Helena, MT**
- Phone: **(406) 447-8212**
5. Length of residence in Montana: **51 years**
6. List your place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
August 2014 to present	Helena	Montana
Oct 1993 to August 2014	Clancy (Montana City)	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>
Capital High School	Helena, MT	June 1976	High School Diploma
Montana State University	Bozeman, MT	June 1980	B.S. in Sociology, Criminal Justice option

**University of Puget Sound Tacoma, WA
School of Law**

**Transferred to
U of M Law School**

**University of Montana Missoula, MT
School of Law**

June 1983

Juris Doctorate

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

**2002 Governor's Award for Outstanding Employee (MDOJ Medicaid Fraud Control Unit)
April 2004, May 2013 - Game Wardens' Association recognition awards**

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 Supreme Court and all other Montana Courts	6/13/83
♦ United States District Court, District of Montana	6/13/83
♦ United States Ninth Circuit Court of Appeals	6/13/93
♦ United States Supreme Court	8/7/92

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

- ♦ **Law Clerk for District Court Judge Kathy Seeley; I share the job with John Connor.**
- ♦ **Special Master for the First Judicial District Court (4 judges) in cases filed pursuant to Title 41, Chapter 3 (abuse/neglect cases).**
- ♦ **Special prosecutor for the Montana Supreme Court's Commission on Character and Fitness.**

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>
First Judicial District Court 228 Broadway Helena, MT 59601	Special Master	Mar. 2015 to present
Montana Supreme Court Commission on Character and Fitness c/o State Bar of Montana P.O. Box 577 Helena, MT 59624	Special Prosecutor	Jan. 2015 to present
First Judicial District Court Judge Kathy Seeley 228 Broadway Helena, MT 59601	Law Clerk	Apr. 2013 to present
Office of Disciplinary Counsel for the Montana Supreme Court P.O. Box 1099 Helena, MT 59624	Special Prosecutor	Apr. 2013 to Jan. 2014
Montana Department of Fish, Wildlife, and Parks P.O. Box 200701 Helena, MT 59620-0701	Legal Manual Author	Sept. 2013 to Dec. 2013
Montana Department of Justice P.O. Box 201401 Helena, MT 59620-1401	Assistant Attorney General Prosecutor for Prosecution Services Bureau	July 1996 to Apr. 2013
Montana Department of Justice P.O. Box 201401 Helena, MT 59620-1401	Assistant Attorney General Appellate attorney	Nov. 1990 to July 1996
Missoula County Attorney 200 West Broadway Missoula, MT 59802	Deputy Missoula County Attorney	Feb. 1989 to Sept. 1990
Montana Department of Justice P.O. Box 201401 Helena, MT 59620-1401	Assistant Attorney General Appellate attorney Agency Counsel	Aug. 1984 to Sept. 1988
First Judicial District Court Judge Gordon Bennett	Law Clerk	July 1984 to Aug. 1984

Montana Supreme Court
Justice John C. Sheehy
P.O. Box 203001
Helena, MT 59620-3001

Law Clerk

June 1983 to June 1984

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

In September 1988, my husband and I moved to Missoula so he could attend the University of Montana Physical Therapy Program. While looking for permanent employment, I volunteered at Montana Legal Services and completed briefs for a lawyer on a contract basis in Social Security disability cases.

In October and November 1990, my husband and I traveled before moving back to Helena.

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 law clerk, I familiarize myself with all aspects of a case and attend hearings when necessary. I use all available research tools to study the law applicable to the issues raised in the case and draft opinions and orders as requested by Judge Seeley. The cases are civil, criminal, and lower court appeals. I have been appointed a judge pro tempore in criminal cases for the purposes of initial appearances. This constitutes half of my total practice.

As a special master for all four judges in the First Judicial District, I conduct initial appearances and prehearing conferences in cases filed pursuant to Title 41, Chapters 3, MCA (abuse/neglect cases). This is a project new to the judicial district and I am working to establish procedures and practices to better serve the goal of what is in the best interest of the abused or neglected child. This work constitutes a quarter of my practice.

My work for the Commission on Character & Fitness involves a combination of regulatory law, trial practice, and appellate practice as it relates to the Commission's regulation of the admission or certification of an applicant for the practice of law. It currently constitutes a quarter of my practice.

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

CRIMINAL LAW:

♦ Litigation & Trial Work: I worked as a prosecutor for over 23 years, starting in Missoula County and then working across the state as an Assistant Attorney General (AAG) in the Montana Department of Justice (DOJ). I completed all aspects of criminal cases, including the drafting of charging documents, case negotiation, witness preparation, exhibit preparation, and trial presentation. Every new case was an opportunity for me to learn new factual scenarios and new law.

A prosecutor represents the State of Montana in criminal cases and is responsible for presenting the facts of a case to a judge and/or jury. Because the State must prove its case beyond a reasonable doubt, the practice involves a heightened responsibilities and expectations related to trial presentation. Many of the cases I handled involved complex facts, expert witnesses, and contentious legal issues. Others involved less evidence and difficult or uncooperative witnesses.

As a prosecutor for Missoula County, Montana, in 1989 and 1990, I handled drug cases, assault cases, sexual offense cases, and youth court cases. I presented in justice court and/or district court every day of the week during initial appearances, arraignments, hearings, and trials.

From November 1990 to April 2013, as an AAG, I prosecuted cases on a statewide basis for the Prosecution Services Bureau (PSB) in the Attorney General's Office. PSB Prosecutors were requested by local prosecutors because of lack of resources, lack of expertise, and/or a conflict of interest. I handled hundreds of cases, including cases involving fraud, homicide, assault, sexual intercourse without consent, elder abuse, official misconduct, and fish and game offenses. I conducted 55 trials in the 15 years prior to April 2013, in courts across the state. This trial work required coordination with local law enforcement, state investigators, local prosecutors, witnesses, and/or court personnel. I maintained a caseload while serving as a bureau chief from 2005 to 2009.

♦ **Appellate Work:** I have handled over 60 criminal appeals in the Montana Supreme Court. In most of the cases I reviewed the record created in the lower court, researched the relevant legal issues, and advocated for the State in briefs and oral argument. In the remainder, I was the prosecutor in the lower court, as well as the State's advocate in the Supreme Court. I orally argued nine cases before the Montana Supreme Court, including one in a death penalty appeal. I handled habeas corpus cases (in the Montana Supreme Court and federal district court) and postconviction cases. I handled certiorari cases in the United States Supreme Court. In 1992, I participated in a United States Supreme Court case by writing an amicus curiae brief signed by nineteen states. I traveled to Washington, D.C., and assisted with Attorney General Marc Racicot's preparation of his oral argument.

♦ **Consultation & Advice:** As both a prosecutor and appellate attorney, I reviewed cases for local prosecutors. I discussed with them specific legal issues and all aspects of prosecution, including the need for and viability of appeals to the Montana Supreme Court. I worked with local prosecutors and other assistant attorneys general to assess the applicability of the death penalty.

♦ **Teaching:** I have prepared and given presentations to attorneys, judges, law enforcement, and middle and high school students. The majority of the presentations addressed criminal law and criminal procedure, with an emphasis on search and seizure law.

As computer use became more prevalent, I taught prosecutors and law enforcement regarding digital evidence. I also taught prosecutors regarding the procedures necessary for providing discovery to defense counsel, including in electronic form.

Other topics I taught included the heightened standards of ethics to prosecutors and the unique rules regarding disclosure to the public applicable to prosecutors and law enforcement.

My specific presentations are listed below on Pages 9 - 10.

CIVIL LAW:

♦ **Contract Law:** I have written and reviewed contracts relating to many topics. For example, as a bureau chief, I wrote, reviewed, and executed contracts related to legal services provided to counties and other state agencies, interlocal agreements regarding law enforcement services, use of state vehicles, and employment. My criminal law practice involved the regular and frequent drafting of plea agreements.

♦ **Employment/Personnel Law:** I practiced employment law as PSB Bureau Chief while hiring and supervising employees. I supervised the other prosecutors in the bureau in Helena and was involved in the management of the Child Protection Unit of the PSB, which consisted of attorneys and support staff in offices in Billings and Missoula. They handled child abuse and neglect cases throughout the state and I was responsible as a supervisor for their litigation needs and obligations.

I was the conduit and connection between an attorney general, a division administrator, and the bureau attorneys. I wrote contracts and grant proposals related to employment. Starting in 2004, I was involved in a project to reclassify attorney positions in the DOJ, including drafting position documents. I worked with the Montana Department of Administration, as well as a private consulting firm, regarding classification of positions.

♦ **Litigation & Trial Work:** The first trial I conducted was a nonjury trial while I was agency counsel for the DOJ Motor Vehicle Division; the case was a civil driver license case. As an AAG, I also handled simple civil litigation collateral to criminal matters (e.g., forfeiture proceedings, requests for confidential criminal justice information).

♦ **Appellate Work:** I have handled over 10 civil appeals in the Montana Supreme Court. These cases included child abuse and neglect cases, civil commitment cases, and postconviction cases.

♦ **Administrative Law:** While an AAG, I reviewed proposed administrative rules relating to a variety of topics, including motor vehicle regulation, law enforcement, and human resources.

♦ **Research & Writing:** I drafted Attorney General opinions (published and unpublished) on various topics including property law, open government, and statutory construction. The opinions were requested by public officials. I did exhaustive research regarding the legal issues involved, solicited input from affected parties, and worked with the Attorney General to finalize the opinions. The formal opinions were published and considered persuasive authority as to issues not addressed in court opinions.

My current work for Judge Seeley primarily involves research and writing in civil negligence cases, administrative reviews, and contract cases. The cases vary as to the number of issues and the factual scenarios, but all require research regarding civil procedure and substantive civil law.

♦ **Legislation:** I have written legislation and/or presented testimony in sessions of the Montana Legislature since 1997. The subject matter of the bills included Medicaid fraud,

criminal law, and criminal procedure. I provided assistance to attorneys general, supervisors, county attorneys, and legislators during sessions and interim studies. From 2009 through the 2011 legislative session, I worked as a member of the Title 87 [MCA] Working Group, drafting a recodification bill regarding a portion of that Title.

♦ **Oversight/Negotiation/Mediation:** Based on the authority of the Attorney General to supervise county attorneys, I handled complaints regarding local prosecutors. The complaints often required information gathering regarding topics including criminal procedure, intergovernmental relations, and conflicts of interest. In all cases, communication was made with the county attorney and a response was written to the complaining person or persons. Some situations required direction or oversight by the Attorney General, implemented by a supervisor or attorney in the PSB. More often, the situation required the explanation of governmental law to a citizen.

In my criminal practice, I regularly negotiated cases, with consideration of all aspects of a case, including the parties' respective positions, the need for justice, and the resources necessary to complete the case in an efficient manner.

As a bureau chief, I was involved in informal mediation involving local prosecutors and other elected officials. In March 2015, I attended a 3-day mediation course in conjunction with my special master duties.

♦ **Regulatory Law:** I was a special prosecutor for the Montana Supreme Court's Office of Disciplinary Counsel in two disciplinary actions involving attorneys. I am currently handling two matters before the Montana Supreme Court's Commission on Character and Fitness.

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

While a prosecutor for Missoula County and the DOJ (a total of over 23 years), I specialized in criminal law and procedure.

Now, as a special master for the First Judicial District, I specialize in child abuse and neglect cases.

17. Do you regularly appear in court?

Until April 2013, I appeared in court regularly.

As a Special Master, I conduct initial appearances for the four district court judges in child abuse and neglect case. I have also conducted initial appearances in criminal cases.

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

Federal court	<u>0</u>	%
State or local courts of record	<u>98</u>	%
Administrative bodies	<u>2</u>	%
Other	<u>0</u>	%

18. During the last five years, what percentage of your practice has been trial practice? **90% prior to April 2013.**
19. How frequently have you appeared in court? **15 times per month on average while a prosecutor. The appearances consisted of all types of hearings and trials.**
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	<u>3</u>	%
Criminal	<u>97</u>	%
Other	<u> </u>	%

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.

1. *State v. Madsen*, DA 13-0057, 2013 MT 281, 372 Mont. 102, 317 P.3d 806; Al Avignone & Lisa A. Banick, 3825 Valley Commons Drive, Suite 6, Bozeman, MT, 59718, (406)586-8330;
2. *State v. Torgerson*, DA 10-0639, 2011 MT 171, 361 Mont. 225, 257 P.3d 373; Maxwell G. Battle, Jr., P.O. Box 11421, Bozeman, MT 59719; (406)890-0851; David Stufft, P.O. Bo 2559, Kalispell, MT, 59903; (406)752-4107;
3. *State v. Norman*, DA 09-0235, 2010 MT 253, 358 Mont. 252, 244 P.3d 737; Johnna Baffa, P.O. Box 7575, Missoula, MT, 59807, (406)543-6577.

23. State the number of jury trials that you have tried to conclusion in the last ten years. **24**

24. State the number of non-jury trials that you have tried in the last ten years. **2**

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.

Over the last two years, I have not litigated cases. However, in my current job, I produce draft opinions regarding all aspects of civil and criminal litigation.

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

2013-14: As a special prosecutor, I handled two matters for the Office of Professional Discipline for the Montana Supreme Court. My services were needed because of a conflict of interest and I handled the matters on a pro bono basis.

I am currently handling two matters before the Montana Supreme Court's Commission on Character and Fitness as a special prosecutor.

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.

Publication: "Montana Department of Fish, Wildlife, and Parks Legal Manual, 2013-2014"; the manual covers statutory law and case law relevant to all aspects of enforcing crimes involving Montana's wildlife.

Lectures:

April 10, 2014	Commonly Missed Rules and the Fabled Motion for Reconsideration	Annual Bench-Bar CLE
2002 - 2013	Annual Legal Update	FWP Enforcement Bureau
July 15, 2011	Evidence in Fish & Game cases	Montana County Attorneys Summer Training
Dec. 2, 2009	New FWP Practices	Montana County Attorneys Winter Training
Oct. 10, 2008	Prosecution Ethics	Montana City Attorneys Association Legal Seminar
July 9, 2008	Ethical Considerations for Prosecutors	Montana County Attorneys Summer Training
Nov. 29, 2007	Montana Internet Prosecution Service	Montana County Attorneys Winter Training
June 29, 2007	Media Relations Issues & Ethical Considerations for Prosecutors	Montana County Attorneys Summer Training
Apr. 20, 2007	Internet Safety for Middle-Schoolers	Montana City School
Apr. 25, 2007 Apr. 19, 2006 Nov. 17-18, 2005 Nov. 2004	Basic & Regional Training for Prosecutors	Montana Department of Justice PSB Training

Nov. 2006, 2002, & 1998	Criminal Law & Procedure	Montana Supreme Court Courts of Limited Jurisdiction Certification Training
Aug. 3, 2005	General Criminal Law for Investigators	Montana Department of Justice PSB Training
July 2005	Legal & Practical Considerations in Cases Involving Computers	Montana County Attorneys Summer Training
Jan. 2005	Search Warrants in Cases Involving Computers	DOJ PSB Training for Montana Law Enforcement Academy
July 19, 2002	Search Warrants & Other Investigative Tools in Cases Involving Electronic Evidence	Montana County Attorneys Summer Training
Apr. 2002	LECC Cybercrimes Conference	U.S. Attorney & Law Enforcement Coordinating Council Training
2009 - 2014 Annually 2 classes in 1 day	Search & Seizure Primer	Helena High School CSI/Biology classes

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 member since 1983

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.

Montana Wilderness Association council member since June 2014.

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.

I recognize a responsibility to be involved in my communities when I can and as I can. My communities include my family, professional groups, recreational groups, and social groups. With regard to all of these, I have participated and worked to attain constructive results, including education, problem solving, and fun. Over the years, I have helped at school, coached soccer teams, led cub scout dens, engaged young children in activities at church, helped with high school class reunions, helped with high school tennis tournaments, and been a part of discussions regarding our wildlands.

I believe we all are a part of our government; our government is not something we can distance ourselves from by noting differences or shortcomings, without helping to change what we think is not working. I consider my work for many years as a prosecutor as service to this concept. Although I could have pursued a higher-paying career in the private sector, I chose to work for moderate wages in the criminal justice system and for governmental agencies. Using my innate interest in the criminal justice system, I learned what would make it effective and efficient. I paid particular attention to the need for fair, diligent, and ethical prosecution.

The pro bono work I've done over the years has been with the intent to assist persons who would not otherwise have representation and to maintain the integrity of our legal system.

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.

I was hired by the Montana Department of Fish, Wildlife, and Parks as a temporary employee September through December of 2013 to write a legal manual. Otherwise, I have not engaged in another occupation, business, or profession other than the practice of law.

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.

As a council member of the Montana Wilderness Association, I have been involved in its nonprofit endeavors to protect Montana's wilderness heritage and wildlands. I would resign this position immediately if appointed as district court judge.

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.

The compensation I received for writing the MFWP legal manual constituted approximately 13% of my income for the year 2013.

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? X Yes No

If not, please explain.

42. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?
 Yes X 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 currently spend most of my time as a law clerk reviewing case facts and pleadings, researching legal issues, and drafting opinions.

I spend a portion of my time as a special master researching legal issues relative to abuse and neglect cases.

While working as a prosecutor, I researched legal issues for myself and other prosecutors across the state. I wrote the briefs filed in my cases, as I did with all my pleadings. Infrequently, I would use portions of a coworker's brief with his or her permission. Prior to a teaching presentation, I researched the topics and issues involved in the presentation.

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.

As noted above, I currently spend most of my time as a law clerk reviewing case facts and pleadings, researching legal issues, and drafting opinions.

In 2013, I wrote a 151-page legal manual covering the statutory and case law relevant to the criminal prosecution of violations of Mont. Code Ann. Title 87.

In the last five years, I also drafted forms, legislation, legislative testimony, and memoranda to supervisors involving case updates and administrative practices. As a prosecutor, I wrote charging documents, motions, and briefs in all of the cases I filed. In the cases that were appealed to the Montana Supreme Court, I wrote the appeal briefs.

For all my teaching presentations, I wrote PowerPoint slides.

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?

While a prosecutor, approximately 25% of my time was spent researching and writing. As a law clerk, 95% of my time is spent researching and writing. I spend approximately 30% of my special master time researching child abuse and neglect issues.

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

I am competent in both Westlaw and Lexis. I used Westlaw at the MDOJ for over 20 years and now use Lexis at the district court.

H. MISCELLANEOUS

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

I enjoy many outdoor activities, including hiking, biking, tennis, gardening, and skiing. I also enjoy cooking and a variety of artistic endeavors. I am a member of St. Paul's United Methodist Church.

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

As a high school and college student, I held jobs in medical clinics, a pharmacy, and a law office. I also helped my brother irrigate alfalfa fields, put up alfalfa crops, and tear down dilapidated ranch structures.

My legal career has, without preplanning on my part, formed a loop. Immediately after law school, I clerked for Montana Supreme Court Justice John C. Sheehy and briefly for District Court Judge Gordon Bennett. I accepted a position as an Assistant Attorney General (AAG) in 1984. I was agency counsel and researched and drafted attorney general's opinions. Most of my time was spent writing appellate briefs in criminal cases on behalf of the State.

It was during my early experiences as a law clerk for a Montana Supreme Court Justice and as an appellate lawyer for the State that I learned the importance of the case record considered by an appellate court. If a fact is not established in an exhibit (allowed as evidence by the trial court) or by testimony captured in a transcript, it is not an established fact for consideration by the court. Similarly, if a legal argument was not presented, in many cases, it will not be allowed on appeal.

I held my first AAG job for 4 years. I then moved to Missoula, where my husband attended the University of Montana. I volunteered at Montana Legal Services and wrote briefs for an attorney seeking Social Security disability for clients. I was then hired by Missoula County Attorney Dusty Deschamps as a deputy county attorney. As low attorney on the ladder, I appeared in the two justice courts and the four district courts daily as directed. It was in this job that I learned the daily realities of the county court systems and the players involved. I enjoyed the interactions with prosecutors, defense attorneys, witnesses, and courts. While I handled all types of cases during the initial stages of prosecution, I tried mostly drug cases, youth court cases, and assault cases.

I returned to the Attorney General's Office in 1990. When I returned to appellate work, I also requested trial work. I realized in Missoula that I wanted to create case records, not just review them. Using the skills I initially acquired in Missoula, I handled cases throughout the state. I developed a solid understanding of the dynamics of the local law enforcement and court systems. The job required that I be consummately professional while dealing with a defendant well-known in the community or a case with facts evoking emotional responses in the community. I took seriously the task of the Attorney General's Office to assist local communities.

As Bureau Chief of the PSB, I used my knowledge of the various jurisdictions of the state, experience as a prosecutor, and knowledge of the DOJ to assist and oversee other prosecutors both

at the DOJ and in the offices of local prosecutors. I assisted with changes within the state salary structure, contemplating the bigger picture for both supervisors and employees. I began to teach courses to law enforcement and courts.

After working for six attorneys general, it was time for me to make a change. When offered a position with the local district court, I saw it as an opportunity to learn more about civil law. As a law clerk now, I see the entire legal system with the background and backdrop of all my years in practice. It is a unique perspective for a law clerk, but useful to the district court work. And it is this larger, complete picture that would enhance in multiple ways my ability to be a good district court judge.

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

- ♦ **April 2013 - Present: I review of *pro se* dissolution and parenting plan forms filed in Judge Seeley's court.**
- ♦ **2013-14: I handled two matters for the Office of Professional Discipline for the Montana Supreme Court, as a special prosecutor.**
- ♦ **2010-11: I handled a matter for Montana Legal Services Association; client had claim of mold in his residence.**

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

For the many years that I was an Assistant Attorney General, I viewed our system of justice from the perspective of a prosecutor. As such, I represented the people of the State of Montana and advocated for the State's position.

As a district court law clerk since April 2013, I have come to appreciate more fully the position and perspective of a court. My practice of exhaustive research and consideration of statutes and case law has not changed. But substantively, advocacy for a client or position is no longer the focus of my legal analysis. I consider the overarching concerns and the responsibility of a court to address all legal issues in an unbiased, clear, and concise manner. While I recognized this responsibility to some degree when I was a law clerk at the beginning of my career, I now use my years of experience to propose better resolution of the procedural and substantive issues presented by the court's cases. Working as a special master in child abuse and neglect cases is also allowing me to employ the same legal analysis, for the laudable, yet often difficult goal of achieving what is best for a child.

I have also seen the procedures necessary to run a district court, including the scheduling of hearings and trials. I realize that the district court judge must be ever vigilant regarding the prioritization and efficient handling of cases.

So, while I took my current job to make a change in my professional life, working for Judge Seeley has led me to a more complete consideration of our court system. I have internalized the process necessary to consider all sides of an issue, which necessarily affects my view of the justice system.

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

In the course of my practice, I have spent much time in district court and have appeared before numerous district court judges. I have learned that the job requires the ability to clearly and concisely communicate in both written and verbal legal presentations. The pretrial and non-trial issues, as well as the immediate issues in hearings and trials, are best handled with consistency and clear reasoning.

The qualities relevant to handling simultaneous consideration of many cases, such as energy and patience, are necessary. An ability to apply prior experience as an advocate go a long way to efficiently managing a court.

Finally, the system breaks down when a judge does not have a temperament that includes honesty, professionalism, thoughtfulness, and decisiveness. Those qualities are the underpinnings of an unbiased and impartial legal system.

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.

The statutes passed legislatively and rules promulgated by agencies provide standards of conduct for our society. Court opinions apply such law to particular facts, with consideration of relevant history. By reference to these laws and opinions, members of society (including parties in a lawsuit) should be able to discern the outcome of most situations. And they deserve consistent application of the law so they know how to tailor their behavior; that is, they should be able to rely on prior cases setting precedent.

When a case involves new law or unusual facts, a court must apply the components or elements of the law set out in precedent to the extent possible. Beyond that, a court must decide issues according to the standards of legislative intent, public policy considerations, and equity. This resulting flexibility is necessary in our changing society. A court can usually establish new rules without unnecessary damage to useful precedent.

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

My legal practice has provided lengthy trial experience and a wealth of substantive legal knowledge in many areas. My current position allows me to see all aspects of the job of a district court judge. I consider it a logical step for me to use my knowledge and depth and breadth of experience to handle cases as a judge. I am confident I have the experience, qualities, energy, and temperament to do the job as people in this judicial district expect and deserve.

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

While an appellate attorney, I was assigned certain cases because I had worked hard and gained the trust of my supervisors. These cases included a death penalty appeal and work on an amicus

brief in a case before the United States Supreme Court. The latter included attending the oral argument before the United States Supreme Court at counsel table.

I distinguished myself as a prosecutor through many years of handling cases that were not easily presented. For example, fraud cases often involve a wealth of documentary evidence. It is important for the prosecutor to present this evidence in a clear and logical way to maintain jury interest and understanding of the relevant facts. And some sex offenses involve scenarios and witnesses who are hard to present at trial because of a relationship between the persons involved and the effect of the offense. In such cases, I learned that it was not whether you "won" at trial; the relevant questions were whether the State had the evidence to prove the elements of the crime and, when it did, how to present it at trial. If the feedback I received from jurors, judges, law enforcement, and opposing counsel was accurate, I presented the cases clearly and persuasively.

The conditions under which I worked as a PSB prosecutor are also notable, given the travel across the state, often without cocounsel or paralegal support. While some people in the jurisdiction to which I traveled were helpful and appreciative, it was a challenge for some to be so. When they viewed me as an outsider or had some opposition to the prosecution I was handling, they were withdrawn and unhelpful. I handled many contentious matters in a calm, professional way.

I am also proud of my lectures on various aspects of criminal law and procedure, ethics, and digital evidence. I hope that as a result of my teaching or training, others benefited in their professional endeavors.

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

There is no pertinent information reflecting adversely on me. The information reflecting positively is set out in response to the other questions in this application.

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?

This application describes the many years I have energetically devoted to the practice of law. I have not been limited in the types of law I've practiced; I have not visited the same issues, in the same office or courthouse, before the same judge for years. A broad perspective is attained through work across the state of Montana. And there is a very deep perspective that results from handling cases from the beginning, through trial presentation, and through appeal. I have these perspectives. While other attorneys may have done some of the things I have done, I have done them for long periods of time and in the course of handling many cases. I have also worked within our government and learned management skills. I see how those skills can facilitate the management of cases.

While I am not sure who will be seeking this position, I know the First Judicial District could not find a person more willing and able to handle the challenges presented daily in this job than me. Given my desire for new legal challenges and my appreciation of the people who make the system work, I believe the legal community would be best served by my appointment.

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.

8-21-15

(Date)

Barbara C. Harris

(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

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 13-0057

STATE OF MONTANA,

Plaintiff and Appellant,

v.

THOMAS LENARD MADSEN,

Defendant and Appellee.

BRIEF OF APPELLANT

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable Holly B. Brown, Presiding

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ATTORNEYS FOR DEFENDANT
AND APPELLEE

ATTORNEYS FOR PLAINTIFF
AND APPELLANT

STATEMENT OF THE ISSUE

Did the district court properly dismiss the charge of mistreatment of a prisoner, finding that the juvenile physically restrained in a law enforcement interview room was not a prisoner to whom Mont. Code Ann. § 45-5-204 applies?

STATEMENT OF THE CASE AND FACTS

An Information was filed in March 2011, in the Eighteenth Judicial District Court, Gallatin County, charging Appellee Thomas Lenard Madsen (Madsen) with Mistreatment of a Prisoner. (D.C. Doc. 7, 27, 29.)¹ An omnibus hearing was held May 17, 2011; trial was set for November 30, 2011. On November 17, 2011, Madsen filed his waiver of speedy trial and substituted his counsel for new counsel on November 21, 2011. (D.C. Doc. 27, 29.) Almost 11 months later, on February 2, 2012, Madsen's new counsel moved to disqualify the Gallatin County Attorney as attorney for the State, claiming a conflict of interest. The motion was granted in an order dated June 8, 2012; the order also dismissed the case without prejudice. (D.C. Doc. 7, 27, 29.)

On September 5, 2012, the State (now represented by an assistant attorney general) filed an Information charging the offense of Mistreatment of a Prisoner

¹The case was assigned Cause Number DC-16-2011-51. (D.C. Doc. 3.)

(charged with alternative theories).² The Information referred to the same incident, which occurred on February 9, 2011. (D.C. Doc. 3.)

On February 9, 2011, K.J., a juvenile, had been detained by law enforcement authorities in the Gallatin County Law & Justice Center. She was detained pending a court hearing and held in an interview room equipped with a small desk. (Tr. at 5.) A video camera captured some of what was happening in the room. (D.C. Doc. 1, 3; 1/10/13 Hr'g Exs. 1, 2.)

Starting at 10:23:01 on February 9, 2011, the video camera captured the following: K.J. (who was 17 years old at the time) gets up from the floor and walks toward the door to the interview room. She is wearing a restraint belt consisting of a belt at waist level and metal cuffs around her wrists and attached to the belt. The light in the room goes off, then on, and K.J. faces the door and has a conversation with Madsen, who is working as a Gallatin County Sheriff's Deputy. An argument takes place, with K.J. expressing her desire to turn the lights off, lie down, and sleep, and Madsen telling her to sit down and not turn the lights off. Madsen states: "You turn the light off, you're gonna find yourself in a whole world of hurt, girl." When K.J. persists with wanting the light off, he states: "Go ahead and keep trying . . . pushing yourself around and you're gonna find out what

²The case was assigned a different number: Cause Number DC-16-2012-168. Thereafter, Madsen claimed that the case was the same for purposes of substitution of judge and speedy trial. (D.C. Docs. 7, 27.)

a world of hurt really is.” When K.J. asks him “[l]ike what?” and again refuses to sit down, Madsen quickly enters the room. Using his hand around the front part of her neck, he pushes K.J. until she has her back against the opposite wall. Her head bangs against the wall. Madsen shouts at K.J. with his head very near hers, demanding that she sit down; he tells her it’s the last time he will tell her to sit down. At that moment, Sgt. Colt Schumacher enters the room and reaches between Madsen and K.J. Madsen steps back. Shortly thereafter, as K.J. sits at the desk, the videotape shows the leg chains attached to both of her legs. (D.C. Doc., 1, 3, 43; 1/10/13 Hr’g Exs. 1, 2.)

In an interview conducted February 9, 2011, by Montana Division of Criminal Investigation Agent Phil Matteson, K.J. reported that Madsen’s actions in grabbing her neck made it so that she couldn’t breathe and made her feel “panicked” and “angry.” She stated that the top part of her left ear hurt. She reported that she is 5’7” tall and weighs 130 pounds. (D.C. Doc. 3.)

In an interview conducted February 9, 2011, by Agent Matteson, Schumacher reported that immediately after the incident, Madsen looked upset and made a statement indicating that he couldn’t deal with K.J. any more. (D.C. Doc. 3.)

In an interview conducted February 9, 2011, by Agent Matteson, Madsen admitted that he was observing K.J. as needed during her detention, that she was restrained with a belly belt and handcuffed in front, and that during the argument

regarding the lights and whether K.J. should sit down, he was thinking of a prior incident with K.J. when she had tried to strike him. But he stated that he was not afraid of or threatened by K.J. He admitted that he intended to scare her so that she would comply with his directions. He admitted that his acts were forceful and not of the type he had been trained to use to achieve compliance. Madsen reported his height at 6'1" and his weight as 205 pounds. (D.C. Doc. 3.)

Madsen filed "Defendant's Motion to Dismiss and Brief in Support on the grounds K.J. was not a 'prisoner' under 45-5-204, MCA" on December 17, 2012. (D.C. Doc. 33.) The State's response was filed January 3, 2013, and included a request for a hearing on the motion as it related to a finding as a matter of law (as opposed to the argument that the charging documents were faulty). At the end of a hearing on January 10, 2013, regarding Madsen's motion to dismiss for lack of speedy trial, the State confirmed its request for a hearing. The court stated that it would take the request under advisement. (Tr. at 4-7.) Later that day, the district court signed its "Order on Defendant's Motion to Dismiss on the Grounds K.J. Was Not a 'Prisoner' Under 45-5-204, MCA." (D.C. Doc. 45, attached hereto as Appellant's Ex. 1.)

In its opinion, the district court went well beyond the relief requested by Madsen. Instead of simply declaring K.J. not a "prisoner," or entitled to the protections of Mont. Code Ann. § 45-5-204, the court stated:

Based on the historical evolution of § 45-5-204, MCA, from its predecessor statutes; the Compiler's Comments relating to the statute; and a review of the Montana Legislature's use of the word "prisoner" in other provisions of the MCA, the Court concludes that the Legislature intended the word "prisoner" as used in § 45-5-204, MCA, to mean an individual who is serving a sentence at the State prison or another State facility as the result of a conviction.

(Ex. 1 at 11.) The district court then concluded that because K.J. was a youth and would not be convicted of a crime as a matter of law, the State's charging documents failed to allege probable cause that a violation of Mont. Code Ann. § 45-5-204 had occurred. The case was dismissed.

SUMMARY OF THE ARGUMENT

The dismissal of this case by the district court was legally flawed. The district court did not rely on the plain meaning of the statutory language of Mont. Code Ann. § 45-5-204. Rather, the district court construed the statute by referencing various other statutes, speculating as to other words the Montana Legislature could have used, and presuming what the Montana Legislature was aware of in enacting the statute. Going well beyond the relief requested, the district court held that Mont. Code Ann. § 45-5-204 applied only to individuals serving a sentence at the State prison or another State facility as the result of a conviction.

The application of Mont. Code Ann. § 45-5-204 to the facts of this case requires none of the practices used by the district court. The statute is clear and

unambiguous and applies to any person not free, but a prisoner, and who has suffered any of the three acts described in Mont. Code Ann. § 45-5-204(1) at the hands of someone responsible for that person's care or custody. The statute clearly applied to the facts in this case, i.e., a 17-year-old detained at the Gallatin County Law & Justice Center pending a court hearing, with a restraint belt with wrist cuffs, and leg restraints.

The word "prisoner" is of common usage, with plain meaning of someone deprived of liberty, regardless of the person's legal status or adjudication. Even if this Court determines that the language of Mont. Code Ann. § 45-5-204 is ambiguous, the district court's methods of gleaning legislative intent are incorrect and its conclusions relevant thereto are unsupportable.

Relying on its erroneous conclusions regarding the statute, the district court also found that the State's charging documents failed to allege facts sufficient to establish probable cause. Montana Code Annotated § 45-5-204 applies to the facts at hand and the charging documents were sufficient. A jury or other factfinder should consider the factual issues presented by the case.

STANDARD OF REVIEW

The district court's dismissal of this case should be reviewed *de novo* as a question of law. *State v. Dugan*, 2013 MT 38, ¶ 13, 369 Mont. 39, ___ P.3d ___.

ARGUMENT

I. THE LANGUAGE OF THE STATUTE REQUIRES NO FURTHER INQUIRY THAN APPLICATION OF THE PLAIN MEANING OF THE WORD “PRISONER.”

In his motion to dismiss, Madsen claimed that the victim in this case, K.J., was not a prisoner pursuant to Mont. Code Ann. § 45-5-204. That statute provides:

45-5-204. Mistreating prisoners. (1) A person commits the offense of mistreating prisoners if, being responsible for the care or custody of a prisoner, the person purposely or knowingly:

- (a) assaults or otherwise injures a prisoner;
- (b) intimidates, threatens, endangers, or withholds reasonable necessities from the prisoner with the purpose to obtain a confession from the prisoner or for any other purpose; or
- (c) violates any civil right of a prisoner.

(2) A person convicted of the offense of mistreating prisoners shall be removed from office or employment and shall be imprisoned in the state prison for a term not to exceed 10 years or be fined an amount not to exceed \$50,000, or both.

The district court reviewed the arguments of the parties and concluded that “the intent of the Legislature in using the word ‘prisoner’ in § 45-5-204, MCA, cannot be ascertained from the language of the statute itself and, therefore, it is appropriate to look to other sources in construing the statute.” (Ex. 1 at 6.) The court then reviewed use of the word “prisoner” in other Montana statutes. The court concluded that the Montana Legislature could have used a word other than “prisoner” and presumed that “the Montana Legislature is aware of the multiple different terms which can be applied to a person whose physical liberty has been restrained in some way by law enforcement.” (Ex. 1 at 7, 9.) Citing Criminal

Law Commission comments, the court also concluded that there was legislative “intent to limit the application of the resulting statute.” (Ex. 1 at 11.)

The district court construed Mont. Code Ann. § 45-5-204 by referring to other statutes, speculating as to other words available to the Montana Legislature, and presuming what knowledge the Montana Legislature had at the time of enactment of the statute. Such actions by the court violate the rule of statutory construction that requires that nothing is to be inserted in or omitted from a statute. Mont. Code Ann. § 1-2-101. *State v. Booth*, 2012 MT 40, ¶ 11, 364 Mont. 190, 272 P.3d 89; *State v. Stiffarm*, 2011 MT 9, ¶ 12, 359 Mont. 116, 250 P.3d 300.

The district court’s actions were unnecessary, given that the word “prisoner” is of common usage and readily understandable. This Court recently found that the language of Mont. Code Ann. § 45-8-213 includes language that

the terms “obscene, lewd, or profane” are of common usage and readily understandable by a reasonable person of average intelligence. The fact that these terms are not defined in the statute does not render it void for vagueness. The subject statute clearly provides law enforcement with the requisite minimal guidelines for its enforcement.

Dugan, ¶ 72. In *Dugan*, this Court ordered that the prosecution for violation of the statute was to continue, based on this Court’s finding that the statute was not unconstitutional. *Dugan*, ¶¶ 1, 73.

Similarly, this Court has consistently held that the word “protracted” is a term of common usage, capable of comprehension and understanding by a person of average intelligence. In so finding, the Court stated:

It is well-established that in construing a statute, we look to the intention of the legislators. *Section 1-2-102, MCA*. We have held on several occasions that the intention of the Legislature is first determined from the plain meaning of the words used, and if interpretation of the statute can be so determined, we may not go further and apply any other means of interpretation. *See Dunphy v. Anaconda Co.* (1968), 151 Mont. 76, 79-81, 438 P.2d 660, 662, and cases cited therein.

The Legislature need not define every term it employs when constructing a statute. If a term is one of common usage and is readily understood, it is presumed that a reasonable person of average intelligence can comprehend it. *State v. Nye* (1997), 283 Mont. 505, 513, 943 P.2d 96, 102 (citations omitted). The failure to include exhaustive definitions will not automatically render a statute overly vague, so long as the meaning of the statute is clear and provides a defendant with adequate notice of what conduct is proscribed. *Nye*, 283 Mont. at 513, 943 P.2d at 101-02.

State v. Trull, 2006 MT 119, ¶¶ 32-33, 332 Mont. 233, 136 P.3d 551. *See also State v. Grant*, 2011 MT 81, ¶ 14, 360 Mont. 127, 252 P.3d 193; *State v. Ankeny*, 2010 MT 224, ¶ 21, 358 Mont. 32, 243 P.3d 391; *Wing v. State*, 2007 MT 72, ¶ 12, 336 Mont. 423, 155 P.3d 1224 (“We presume that a person of average intelligence can comprehend a term of common usage contained in a statute.”).

The word “prisoner” is of common usage and there is nothing in the statute or in law that precludes application of Mont. Code Ann. § 45-5-204 to the facts of this case. Black’s Law Dictionary 1194 (6th ed. 1990) defines “prisoner” as “One