

APPLICATION FOR

**DISTRICT COURT JUDGESHIP
First Judicial District**

A. PERSONAL INFORMATION

1. Full Name: Edmund F. Sheehy, Jr.
 - a. What name do you commonly go by? Ed
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes
3. Home Address: [REDACTED]
[REDACTED]
4. Office Address: Butte Office of State Public Defender, 66 West Park, Ste. 203, Butte, MT 59701
Phone: (406) 496-6680
5. Length of residence in Montana: Approximately 57 years
6. List your place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
10/14/14 to date (Work week)	Butte	MT
1990 to date	Missoula	MT

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>
Gonzaga University School of Law,	Spokane, WA.	May, 1978	JD, Cum Laude
Carroll College,	Helena, MT	May, 1974	BA, Political Science, Cum laude
Pendleton High School	Pendleton, OR	June 1970	High School

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

George L. Bousliman Professionalism Award, State Bar of Montana, 2007
Team award, Excellence in Performance, OPD 11 Regional Deputy Public Defenders, 2007
Qualified, since 2001, to represent Indigent Defendants, in Montana, in Death Penalty Cases
Last semester of law school, selected by former Supreme Court Justice, Frank Haswell, and Gonzaga Law School to be his law clerk. I received 10 credits and was also paid.
October, 1977, received permission to take the Nontana Bar Exam, early. Passed but could not be admitted until graduated

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	6/5/1978
U. S. District Court for Montana	5/14/1980
Ninth Circuit Court of Appeals	5/22/1987
U. S. Supreme Court	5/23/1984
U. S. Court of Claims	8/6/1985
U. S. Court of Appeals for the Federal Circuit	6/27/1986
U. S. Tax Court	2/17/1984

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

Assistant Public Defender, Region 5 of Montana State Office of Public Defender (OPD),
Stationed in Butte, MT

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>
OPD , Region 5 (Office address was 49 N. Main, Butte, until 8/10/15, now: 66 West Park, Ste 203, Butte)	Asst. Public Defender	10/14/14 to date
OPD , Training Office (Full-time until 7/1/2012, then half-time until 10/13/14)	Asst. Public Defender	11/1/11 to 10/14/14
OPD, Major Crimes Unit	Asst. Public	10/1/10 to 11/1/11
OPD Regional Deputy Public Defender (From 5/06 until 10/14/14, my address was 610 Woody, Missoula, MT)	Region 2	5/2006 until 10/1/10
Cannon & Sheehy	Partner in 2 lawyer firm	1/2/80 until 6/30/06
Cannon & Gillespie (From 1/2/ 79 until 6/30/06, main office address was 2031 11 th Ave., Helena, MT. From 1/2/80, until firm dissolution, we had an office in Browning, MT and from 1/2/90 until dissolution, we had an office in Missoula, MT)	Associate, 3 lawyer firm	1/2/79 until 1/2/80
Law Clerk, Montana Supreme Court, Justice Haswell, calendar year, 1978		
Legal Intern, University Legal Assistance, Gonzaga School of Law, Spokane, WA. , 5/77 until 1/2/78		

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

As discussed above, I did work in a half-time position for OPD, from 7/1/12 until 10/13/14

This began, due to my being a candidate for election to the Montana Supreme Court. After losing the election, I did pro bono work for family & friends, on civil & criminal matters until obtaining the current full-time job, I now have

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.

Currently, almost 95% of my practice is public defender defense. These are criminal (misdemeanor & felonies); juvenile proceedings; dependent & neglect cases; & other cases I am assigned. The other 5% is pro bono work for family & friends on driver license matters; advice on Dissolutions; advice to attorneys on ODC complaints; & mentoring new attorneys

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

I lobbied the legislature, for various trade groups, in 1979, 1981, & 1983. In private practice, I handled criminal & civil cases (both in state & federal court); was a contractor, with DOC, from 1997 until 2005, assisting male & female inmates file post conviction cases, appeals, etc.; I handled civil trials (both to the court & juries); did any appeals for clients (federal & state cases); did family law; handled licensing cases before state agencies; wrote wills; and mediated civil cases.

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

If I specialize, it is trying cases in the courtroom of every type & kind.

17. Do you regularly appear in court? Yes

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

Federal court	<u>2</u>	%
State or local courts of record	<u>94</u>	%
Administrative bodies	<u>2</u>	%
Other	<u>2</u>	%

18. During the last five years, what percentage of your practice has been trial practice? 90 %

19. How frequently have you appeared in court? Since 10/14/14, at least 25 times per month on average.

20. How frequently have you appeared at administrative hearings?

None, lately ___ times per month on average.

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

Civil	<u>5</u>	%
Criminal	<u>90</u>	%
Other	<u>5</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.

In answering this question, I have attached the Closed Case Docket Sheet from the Clerk of the Montana Supreme Court. This shows the cases I have been involved in & opposing counsel, if any. These cases have all been original proceedings to the Court. I will describe each hereafter:

- 1) Nababowski was a petition for supervisory control, where Sentence Reviw, as a matter of equity, ruled that my client could either pay the \$800 public dfender fee or do 80 hours of community service. I argued this was illegal. Writ denied. No opposing counsel appeared.
- 2) Case was given a 5 year sentence for felony DUI, when he never had gone through WATCH. This was a writ of habeas corpus, arguing an illegal sentence. Case cannot read or write and That is why I did the writ, which Sentence Review authorized me to do. Opposing counsel, Assistant Attorney General Robert Lishman, Justice Building, 2nd Floor, Helena, MT, Phone (406) 444-2026, agreed with my position. Case sentence was set aside and he was resentenced to 13 months.
- 3) Reeves and Lucas was a challenge to Sentence Review's decision to have clients, located outside MSP or MWP, appear for Sentence Review by VisionNet rather than being transported to their hearings. Reeves and Lucas wanted to appear in person. The writ was denied, without a response from the Attorney General, when the Court concluded that, unlike original sentencings, there is no statute prohibited audio/visual appearances.
- 4) Dickson was a woman, who had a 5 year deferred sentence revoked and was given a 10 year DOC commitment. C. Mark Fowler, Assistant Attorney General, Justice Building, 2nd Floor, was opposing counsel, (406) 444-2026, who argued such a sentence was legal as the the 5 year limit, on DOC commitments, did not apply to revocations. The Court agreed and writ denied. (After this, Sentence Review heard her case and reduced the commitment to 5 years)
- 5) Reese was a complicated case involving whether his original sentence had expired and another sentence should have already commenced. Collen Ambrose, Chief Legal Counsel, 5 S. Last Chance Gulch, Helena, (406) 444-9894, was opposing counsel. Based on her response, writ was denied.

23. State the number of jury trials that you have tried to conclusion in the last ten years. At least 40, sate & federal.

24. State the number of non-jury trials that you have tried in the last ten years. At least 30.
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.

With my running for the Supreme Court, from November 2011, until October 14, 2014, my trial work was very limited. In that time period, other than 1 case described below, I handled all the OPD Sentence Review Hearings at MSP & MWP. In doing those, I supervised , at least 2 legal interns, from Law school admitted under the Student Practice Rule.

On August 28,2013, I did the jury trial for City of Missoula,v. Aaron Pesanti,CR-13-175, misdemeanor assault.

The presiding judge was Municipal Court Judge Sam Warren, (406)552-6178

Opposing counsel was Andrew Scott, Deputy City Attorney, 435 Ryman, Missoula, MT.

Phone number: (406)552-6020

On November 19 , 2014, I tried City of Butte v. Bradley Cain, TK-14-1463, a first offense, driving under the influence.

The presiding judge was Butte City Court Judge, Glen Granger, (406)497-6365

Opposing counsel was Butte-Silver Bow, Chief Deputy County Attorney, Samm Cox.

Butte Silver Bow Courthouse, 155 W. Granite, Butte, MT. Phone: (406) 497-6234

Recently, on July 16 & 17, 2015, I tried State v. Lerman, Beaverhead Co. Cause No. DC-14-3605, a felony sexual intercourse without consent case.

The presiding judge was District Court Judge, Katherine Bidegaray, (406) 433-5939

Opposing counsel was Jed Fitch, Beaverhead County Attorney, 2 S. Pacific St., Dillon, MT

Phone no.: (406) 683-3730

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

With my employment with OPD, I have not been involved in any adversary proceedings, before boards or commissions in the last 5 years. Prior to the last 5 years, I was involved in a number of adversarial proceedings before boards or commissions, such as the Commission on Practice and almost every state licensing board.

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.

I have not published any legal books or articles. I have put together what is currently, on the OPD Brief a document setting forth all I know on Felony Sentencing in Montana.

I have spoken at OPD Trainings, which are for CLE credit, on such matters as sentence review (10/13); assessing public defender fees (10/08); sentencing (7/12); OPD training for OPD contract in Glasgow, MT; and, have spoken on death penalty practice , on OPD training for the same in 2013, as well as to the Mt. Association of Criminal Defense Lawyers, (3/06).

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.

Member State Bar of Montana, 6/78 to date
Member National Association of Criminal Defense Lawyers, 1995 to date
Member Montana Association of Criminal Defense Lawyers, from inception to date

I have not held any office in these professional organizations

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.

None

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

I ran for the Montana Supreme Court, in 2012. I won the primary but lost in the general

In 1987 or 1988, I ran for the Helena School Board, finishing 3rd, and only 2 were elected

In 1986, I sought election, in Helena to the Montana State Senate. Won the primary and lost in the general

In 1974, I ran for the Montana House, won the primary and was defeated by Betty Babcock, in general

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

My philosophy is that, to the extent a judge can ethically do these things, they should be done as much as time allows. The one thing a judge can do is to educate the public on our judicial system. This can be done by having community forums, where questions can be asked, but cases before the judge, or other judges in the district, are not discussed; and, best yet, bring school students, high school, or Carroll College in to court, to watch a case, with discussion thereafter

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.

None that I'm aware of

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.

No

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? 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 No

If yes, please explain.

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.

Both in private practice, and after coming to work for OPD, I am the one who writes the briefs, and researches the same, on issues I find viable. I also, in private practice, in both federal and state court, researched the same and wrote the briefs on appeal. My secretaries would format them because, as you can tell from this application, my computer skills are limited.

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.

On a pro bono basis, I have drafted wills; all types of power of attorneys; various contracts; and, documents people have asked me to do

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.

Attached is such a document. It was formatted by a legal intern

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

Now, at least 30 %

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

I am not competent in either as I still read the actual cases. However, I could quickly learn to use either. I just have not had the time to do so. I do read every opinion, issued by the Montana Supreme Court (civil or criminal), and their Daily Orders when I come to work in the morning

H. MISCELLANEOUS

49. Briefly describe your hobbies and other interests and activities.
My hobbies are walking which I try to do, and actually do almost every day. I usually walk a mile to 2 miles. I also like to watch sports on TV and do some book reading, but not a lot.
50. Describe the jobs that you have held during your lifetime.
I have practiced law for almost 38 years. Other than that, after college, I was a Reading Clerk, in the Montana House, and then for the summer of 1975 and 1976, I worked for the Montana Highway Department, measuring pile, for bridges for I-15 and I-90, around Butte, MT. In 1973, I worked for the Montana Legislature and worked, my senior year of college, as an administrative assistant for a nursing home, in Clancy. During my sophomore year of college, I worked part-time for a clothing store in Helena. In high school, I worked part-time stocking shelves for an S & H Green Stamp store.
51. Please identify the nature and extent of any pro bono work that you have personally performed during the last five years.
In the past five years, on a pro bono basis, 1/2015 - 7/2015 I represented a young man, before DMV, who was being required to have a retest of driving skills, by obtaining the information from DMV, on the basis for this and giving advice as to how to proceed. He was able to keep his license. In 2013 and 2014, I was giving assistance to a friend of one of my son's on how to put together a pro se parenting plan, for his 2 year old daughter, but never appeared in court, with him. In 2014, I reviewed and modified a lease for my church, when they leased part of their building to Head Start. In 2013, I helped a family friend resolve a sexual assault charge, without his ever being formally charged in court. Over the last 5 years, I have pro bono, drafted wills, contracts, etc. for family and friends
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 been influenced the way I view our justice system by several people and events in my life. Our system of justice must be open and fair to everyone. I learned this, early on in my career, when Judge Sherlock's predecessor, the Hon. Gordon Bennett, put me on, without my knowledge until a client walked in my office telling me I was to be his public defender, on the Public Defender list in Helena. From 1980 on, I have been involved in the criminal justice system, as both a public defender and private attorney. I quickly realized, doing this work, that there are people, accused of a criminal acts, that need the best attorneys money can't buy. I used this approach, in my private practice, as I would not charge people a large fee to hire me. Instead, I charged lower fees than other lawyers and ended up, having to complete a case, while no longer being paid, due to the fact that the person needed help. The same was true, in my civil work, as I probably never charged a client what I should have simply because they came to me and hired me as they felt I was a good lawyer.

There are several events which have also influenced my view of the justice system. They include my setting aside my personal view, on the death penalty, and arguing, as I did, in 2006, that David Dawson had the right to ask Montana to execute him. It was difficult for me to do that but he was entitled, under the law, after 20 plus years of challenging his conviction and sentence, to do this. This is what a lawyer is supposed to do is to serve the wishes of their client if allowed to do so legally, which I was.

Our justice system is designed to help people resolve their issues as best it can and to do so fairly, honestly and reasonably. I believe this is the best system in the world for doing this.

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

A good district court judge is a person who will listen to both lawyers and pro se litigants, in cases brought before him or her. They should also treat every person, regardless of who they are, with utmost respect. They should not try the case, they have in front of them, for the parties but should let them do it as long as time is not being wasted. The judge should have knowledge of the law that applies to case they are hearing but the parties should do the research and present the law to the judge as he or she should not be doing the research for the parties. A good district court judge, in jury trials, should have limited arguments outside the presence of the jury as the members of the jury give up their own jobs, etc. to be in court, serving their civic duty. A good district court judge should always recognize that the Montana Supreme Court could reverse a decision made and should not take any such reversals personally, nor ever publicly say, the higher Court was wrong. Finally, a good judge is a person who sets aside their personal beliefs to decide matters; should act to promote the integrity, independence, and impartiality of the judicial system; should work with other judges in the district they are serving in; and, most important act competently and diligently on matters presented to them.

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, in deciding any issues before him or her, should first look to any precedent on the issue to be decided unless the matter they are presented is one of first impression. In those cases, a court must look for cases from other state, or the federal courts, that have addressed the issue and follow the most appropriate decisions. However, if the facts of a case, before the court, are clearly distinguishable from existing precedent, the trial court must be able to decide the case on the basis it is distinguishable from existing precedent. On the other hand, if a body of precedent dictates an appropriate decision, in a and the precedent, is not distinguishable, then the court must follow it.

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

I am seeking this position, in the First Judicial District, for several reasons. To begin with, I spent almost 28 years, with my main office, in Helena, MT. This means that most of my civil work, of all kinds, was performed in Lewis & Clark and Broadwater Counties. Likewise, most of my criminal defense work was in these 2 counties. It is because of that experience I am seeking this position, in particular.

In those 28 years, most of my work, jury trials, or bench matters, were before the Hon. Gordon Bennett, Judge Sherlock's predecessor, and the Hon. Jeffrey Sherlock. I have always believed these two individuals exhibited the qualities of a good district court judge, I described above. I can only hope, if I have the privilege of being nominated and appointed, I could be at least partially a good of judge as they both have been and are.

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

In answering this question, there are several things which I believe distinguish me and of which I am the most proud. First, would be my being honored, by the State Bar, for my professionalism, in 2006, when I had to argue for David Dawson's right to ask that his legal challenges, to his death sentences, all be dismissed and he be put to death. I am the only person who knows why he wanted this to happen and I believe it is still privileged information. This was a difficult argument for me to make as I am personally opposed to capital punishment.

I am also most proud of my work, from 1989 until 2004, in representing, my father and a class of federal retirees and military retirees, who through my work, obtained state tax refunds for the 5 years prior to the settlement, when the state did not equally tax state, or local government retirees. We lost at every stage of this proceeding until the U. S. Supreme Court granted a petition for certiorari, which I wrote, reversing the prior decision of the Montana Supreme Court, holding the taxation to be legal. When this happened, the State of Montana came to my clients to settle the dispute, which we did.

The biggest thing though that distinguishes me, and makes me the most proud, is the respect I have from my fellow members of the Bar, and the judiciary, for my integrity, my professionalism (at all times) and my extensive knowledge of the law. This is the biggest thing, other than my wife, children and grandchild, of which I am the most proud.

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

The thing which reflects most positively, on me, is the respect I have across this state, as stated above. Possibly, the only thing that is adverse, in my applying for this particular judgeship, is that I do not currently reside in the First Judicial District. However, if appointed, I could easily move back to Helena, which is where I lived, most of the time, from 1970 (when I started school at Carroll) and until

May 2006, which is when I began working for OPD. While I have owned a house, in Missoula, from March of 1990, to date, much like my current working situation, I lived in Helena during the work week.

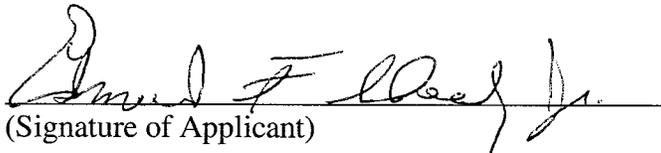
58. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge candidate?

The biggest thing I see, from looking at the other applicant's applications, which differentiates me, and makes me the best candidate, is my over 37 years of practicing law, as a courtroom lawyer in both the civil and criminal law. Additionally, my experience, in handling trials, is almost statewide. All of this has resulted in my knowing the substantive law; the procedural rules; and, the Rules of Evidence. Additionally, I think I am the only applicant who has any prior major political experience.

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.

9/9/15
(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

[FAQs](#) [Instructions](#)

State of Montana Office of the Clerk of the Supreme Court

**ED SMITH
CLERK**

PUBLIC VIEW DOCKET

Case Results

42 case(s) were found with your search criteria.

CASE NUMBER	ABBREVIATED TITLE	CASE ATTORNEYS
Sort	Sort	Sort
OP 14-0598	Nabakowski v. Sentence Review Division	Edmund F. Sheehy, Timothy Charles Fox
OP 14-0527	Case v. Kirkegard	Robert Lishman, Edmund F. Sheehy, Timothy Charles Fox
OP 13-0737	Reeves and Lucas v. Sentence Review Division	Edmund F. Sheehy, Timothy Charles Fox
OP 13-0707	Dickson v. Daly	Edmund F. Sheehy, Colleen Elizabeth Ambrose, C. Mark Fowler, Timothy Charles Fox
OP 13-0678	Reese v. Kirkegard	Edmund F. Sheehy, Colleen Elizabeth Ambrose, Timothy Charles Fox
OP 13-0390	Thornton v. Hoffman	Kathryn Fey Schulz, Edmund F. Sheehy, Colleen Elizabeth Ambrose, Timothy Charles Fox
OP 13-0386	Wallace v. Batista	Edmund F. Sheehy, Colleen Elizabeth Ambrose, C. Mark Fowler, Timothy Charles Fox
OP 12-0020	Flagen & Drugan v. Sentence Review	Robert L. Zimmerman, Mark W. Mattioli, Edmund F. Sheehy, Ann Marie McKittrick, Steve Bullock
OP 11-0455	Miller v. Eleventh Judicial District Court	Noel K. Larrivee, Nicole Elise Ducheneaux, Edward J. Corrigan, Edmund F. Sheehy, Steve Bullock
OP 10-0331	State Public Defender v. Bailey	Edmund F. Sheehy

1 Edmund F. Sheehy, Jr.
2 Attorney at Law
3 Office of the State Public Defender
4 610 Woody
5 Missoula, MT 59802
6 (406) 523-5169
7 esheehy@mt.gov

8 MONTANA THIRTEENTH JUDICIAL DISTRICT, YELLOWSTONE COUNTY

9 STATE OF MONTANA,
10 Plaintiff,

11 vs.

12 DOUGLAS J. WALLACE,
13 Defendant.

) Cause No. DC-12-211
) Judge Ingrid Gustafson

) **MOTION AND MEMORANDUM TO**
) **SET ASIDE TRANSFER ORDER FROM**
) **YOUTH COURT TO DISTRICT COURT**

14 Defendant, Douglas J. Wallace is hereby moving this Court to set aside the Order entered
15 in Yellowstone Cause No. DJ 08-142, on or about January 19, 2012, wherein the Court, due to
16 defendant having reached the age of eighteen (18), transferred supervision of him to Adult
17 Probation and Parole, until the age of twenty-three (23). As will be argued below, this transfer
18 was illegal, under 41-5-208, MCA, and application of this statute to petitioner is an
19 unconstitutional application of law.

20
21 **FACTUAL BACKGROUND**

22 In 2010, petitioner had several delinquency petitions filed against him. As a result of
23 admissions by defendant and a jury verdict on one petition, defendant, while under the age of
24 eighteen (18), was found to have committed Count I, criminal trespass to vehicle, a
25 misdemeanor; Count II, disorderly conduct, a misdemeanor; Count III, theft, a misdemeanor; and
26 Count IV, disorderly conduct, a misdemeanor. On or about January 6, 2011, this Court held a
27 Dispositional Hearing and, pursuant to 41-5-1513, MCA, found defendant a delinquent youth
28 and found him a suitable person to be committed to the custody of the Department of Corrections

1 until the age of eighteen (18) or sooner released. Defendant was seventeen (17) years old at the
2 time. The State, on or about March 2, 2011, filed a petition to revoke this suspended sentence.

3 On September 6, 2011, defendant admitted the violations in the petition to revoke. On
4 that same day, the Court revoked the earlier suspended commitment and reinstated it from
5 September 6, 2011 and ending March 6, 2012. On or about October 17, 2011, the State filed a
6 Petition to Transfer Supervision to Adult Probation and Parole under Section 41-5-208, MCA.
7 On or about January 19, 2012, this Court issued the Transfer Order. Thereafter, when Adult
8 Probation and Parole filed Reports of Violation under their supervision, this Court on or about
9 August 24, 2012, ordered the suspended commitment to the Department of Corrections revoked
10 and sentenced the defendant to the Department of Corrections on each count concurrently until
11 the age of twenty-three (23).

12 As a result, defendant ended up in a number of Department of Corrections facilities until
13 on or about June 25, 2013 the Montana Supreme Court, by stipulation of the parties, ordered
14 defendant brought back to Yellowstone County Detention Center. Douglas J. Wallace v. Mike
15 Batista, Director of the Department of Corrections, Montana Supreme Court Cause No. OP 13-
16 0386. Defendant then appeared before this Court on July, 16, 2013. This Court set a hearing date
17 and a briefing schedule. Defendant is hereby submitting his initial brief.

18 19 **ARGUMENT THIS COURT'S TRANSFER ORDER WAS ILLEGAL**

20 While this case commenced as a Youth Court case, it became an adult case when this
21 Court transferred it to the District Court. This transfer order was then a sentencing order. *State v.*
22 *Andersen-Conway*, 2007 MT 281, ¶17, 339 Mont. 439, 171 P.3d 678. With regard to a sentence,
23 the Montana Supreme Court has held that a district court's sentencing authority is defined by
24 statute and an order that strays beyond the bounds of statutory authority is illegal. *State v. Burch*,
25 2008 MT 118, ¶ 12, 342 Mont. 499, 182 P. 3d 66; *State v. Hicks*, 2006 MT 71, ¶ 41, 331 Mont.
26 471, 133 P.3d 206. Here, the court's authority is first defined by Section 41-5-208(1), MCA . It
27 provides in pertinent part as follows:

28 "After adjudication of a case that was not transferred to district court under 41-5-
206 and that was not prosecuted as an extended jurisdiction juvenile prosecution

1 under part 16 of this chapter, the court may, on the youth's motion or the motion
2 of the county attorney, transfer jurisdiction to the district court and order transfer
3 of supervisory responsibility from juvenile probation services to adult probation
4 services. ...”

5 While a transfer to district court is discretionary with the youth court, when it is done
6 supervisory responsibility is transferred to Adult Probation and Parole Services of the
7 Department of Corrections (hereafter “Department”). In this case, since defendant was solely
8 adjudicated to have committed misdemeanors, the Department had no statutory authority to
9 supervise him. Section 46-23-1004, MCA, in pertinent part provides as follows: “The department
10 is responsible for any investigation or supervision requested by the board (Board of Pardons and
11 Paroles) or the courts for felony offenders . . .” (Parenthetical material added).

12 Under the plain language of this statute, this Court could not even request the department
13 to supervise defendant as he was not and is not a felony offender. Prior to May 1, 2001, the
14 language about “felony offenders” was not in this statute. It was added by Section 3, Chapter
15 493, Laws of Montana, 2001. Prior to that, this prohibition on supervising misdemeanor
16 offenders was not in this statute.

17 If the State argues that Section 46-23-1004, MCA need not be considered when a transfer
18 request is made under Section 41-5-208, such an argument would be contrary to the rules of
19 statutory construction. The Montana Supreme Court has long held that, when more than one
20 statute applies to a situation, a court must construe the statutes as to give effect to them all.
21 *Skinner Enterprises, Inc. v. Board of Health*, 286 Mont. 256, 271-72, 950 P2d 733 (1997). The
22 only way effect can be given to both Sections 41-5-208 and 46-23-1004, MCA, is to say that a
23 youth offender found to have committed only misdemeanors may not be transferred to district
24 court. While the department did supervise the defendant for approximately seven (7) months
25 before his suspended commitment was revoked, they did so contrary to statute and the
26 department's own Standard Operation Procedures of the Probation and Parole Bureau. Procedure
27 No. P&P 10-1, under Section III, Procedures, subsection A, Purpose, states as follows: “The
28 Bureau provides supervision of convicted adult felons.” There then is no authority for Adult

1 Probation and Parole to supervise a misdemeanor offender and this Court's transfer order is
2 illegal as it was and is not authorized by statute.

3 The rules of statutory construction require this Court to give great deference and respect
4 to the interpretation of a statute by the agency charged with its administration. *Winchell v. Dept.*
5 *of Natural Resources and Conservation*, 1999 MT 11, 293 Mont. 89,972 P2d 1132; *Montana*
6 *Contractors Assn., Inc. v Dept. of Highways*, 220 Mont. 392, 715 P2d 815 (1986). While the
7 department did supervise defendant for seven (7) months, it did so due to this Court's Transfer
8 Order. However, as shown by the department's policy, quoted above, this Court should have
9 given great deference and respect to the department's policy.

10 The transfer of supervisory responsibility over defendant, who had only committed
11 misdemeanors, strayed beyond the statutory limits of 41-5-208, MCA and is illegal. This Court
12 must set aside that order, dismiss this case, with the above cause number, and, close defendant's
13 juvenile proceeding as he is over the age of eighteen (18).

14
15 **THE INTENT OF THE LEGISLATURE IS CONTROLLING WHEN CONSTRUING**
16 **SECTION 41-5-208, MCA**

17 The Court has held that the intent of the legislature is controlling when construing a
18 statute. *State v. Goebel*, 2001 MT 73, ¶ 17, 305 Mont. 53, 31 P 3d 335; *State v. Hubbard*, 200
19 Mont. 106, 111, 649 P 2d 1331 (1982). If the intent of the statute cannot be determined from the
20 plain words thereof, a court can examine the legislative history of this statute. *State ex rel*
21 *Missoulian v. Twenty-First Judicial District Court*, 281 Mont. 285, 292, 933 P 2d 829 (1997).
22 Here, the state may argue the statute is ambiguous and if it does, the legislative history shows the
23 transfer for a period of four (4) years and nine (9) months is illegal and contrary to legislative
24 intent.

25 The last time the Montana legislature addressed Section 41-5-208, MCA was in 1999.
26 They then deleted "Part 11" from the statute and replaced it with "Part 16." This was part of the
27 reenactment of the Extended Jurisdiction Prosecution Act, Chapter 537, Laws of Montana 1999.
28 This Chapter contained a number of "WHEREAS" in the "PREAMBLE." The pertinent
WHEREAS (Exhibit a hereto) as to Section 41-5-208, MCA, was the last, which read as follows:

1 “WHEREAS, limiting section 41-5-208, MCA, supervision transfers after the
2 youth reaches the age of 18 to additional community corrections programs of the
3 Department of Corrections subject to the same adult sentence limit on supervision
4 will also allow juveniles to complete their sentences, to be held accountable, and
5 to avoid an adult conviction, without violating equal protection”

6 In the instant case, since 1999 if supervision could be transferred on misdemeanor
7 offense, the longest sentence of supervision this Court should have imposed was one (1) year and
8 twenty (20) days, which would be the statutory maximum for the misdemeanors defendant was
9 convicted of. Defendant, based on the legislative history, could not be placed on supervision (if
10 he could for misdemeanors) more than the foregoing time period.

11 By the time of the hearing in this matter, defendant will have served over one (1) year
12 and twenty (20) days. He should then be released from custody and his supervision discharged.

13
14 **AS APPLIED TO DEFENDANT, THIS COURT’S TRANSFER ORDER VIOLATES HIS**
15 **CONSTITUTIONAL RIGHT TO EQUAL PROTECTION**

16 With defendant being transferred to district court and placed on adult supervision for four
17 (4) years and nine (9) months , his constitutional right to equal protection under the laws under
18 Article II, Section 4 of the Montana Constitution has been violated. Article II, Section 4,
19 provides , in pertinent part: “... No person shall be denied equal protection of the law. ...”

20 The basic premise of equal protection is that persons similarly situated with respect to a
21 legitimate governmental purpose of law must receive like treatment. *In the Matter of S.M.K.-*
22 *S.H.*, 2012 MT 281, ¶ 26, 367 Mont. 176, 290 P3d 718. In *S.M.K.-S.H.*, an equal protection
23 argument was made on behalf of the youth, who had not yet turned eighteen (18). The Court
24 rejected the argument finding that the youth was not similarly situated to an adult being
25 sentenced to probation for the same offense. *S.M.K. supra*, ¶¶ 27- 31.

26 Here, when defendant was being transferred, he was no longer a “youth” but an “adult.”
27 As noted, in *S.M.K.*, *supra*, ¶ 26, the first step in an equal protection analysis is to identify the
28 classes involved and whether they are similarly situated. At the time of the transfer hearing, the
classes are individuals first prosecuted under the Youth Court Act who are now adults and adults

1 first prosecuted in state court for misdemeanors. They are similarly situated, when the time for a
2 transfer hearing arises. This is because defendant, unlike the youth in *S.M.K.*, supra, ¶ 30, was
3 being sentenced as an adult. Defendant, here, is like the individuals *In the Matter of S.L.M.*, 287
4 Mont. 23, 32-33, 951 P.2d 1365 (1997). In *S.L. M.*, the Court found the then Extended Juvenile
5 Prosecution Act to have violated equal protection because both classes, as here, are composed of
6 people who have committed the same act and who are sentenced as adults. *Matter of S.L.M.*,
7 supra, 32-33.

8 Here, the sentence this Court first imposed of four (4) years and nine (9) months to the
9 Department of Corrections, when compared to an adult, being sentenced for the same four (4)
10 misdemeanors would, worst case scenario, receive a maximum sentence of one (1) year and
11 twenty (20) days. Under the circumstances of this case, the length of defendant's commitment to
12 the Department of Corrections violates Article II, Section 4 of the Montana Constitution, his
13 right of equal protection. The transfer to age twenty-three (23), at a minimum, should be reduced
14 to one (1) year and twenty (20) days, with the same being determined to be discharged. As in
15 *S.L.M.*, defendant is being subjected to a grossly disparate sentence compared to other adults
16 sentenced for similar misdemeanors.

17
18 **DEFENDANT'S SENTENCE VIOLATES ARTICLE II, SECTION 22 OF THE**
19 **MONTANA CONSTITUTION**

20 Article II, Section 22 of the Montana Constitution provides, in pertinent part, as follows:
21 "Excessive bail shall not be required, ..., or cruel and unusual punishments inflicted"
22 In Douglas J. Wallace, Mike Batista, Montana Supreme Court Cause No. OP 13-0386, the Court,
23 in its Order issued, on June 7, 2013, said: "This Court is unaware of any circumstances under
24 which incarceration in prison is legally permissible for misdemeanor convictions." The
25 defendant can find no case law which says that such a scenario is "legally permissible." This
26 Court's revocation order of August 24, 2012, committed defendant to the department until age
27 twenty-three (23). As a result, defendant has been at MASc; the START Program; the Treasure
28 State Correctional Facility; Montana State Prison; and, finally Crossroads Correctional Center in

1 Shelby, Montana. None of these programs and facilities are designed to house misdemeanor
2 offenders.

3 The Montana Supreme Court has held that a sentence which is within the statutory
4 guidelines for an offense does not constitute a violation of the ban on cruel and unusual
5 punishment. *State v. DeSalvo*, 273 Mont. 343, 903 P2d 202 (1995); *State v. Dahms*, 252 Mont.
6 1, 825 P2d 1214 (1992). Here, the sentence imposed under 41-5-208, MCA, transfer to the
7 district court and supervision by adult probation services, for four (4) years and nine (9) months,
8 was not within the statutory guidelines for the misdemeanors defendant was adjudicated to have
9 committed. As such, the transfer order violates the ban on cruel and unusual punishment and
10 the revocation order which led to his incarceration in prison, violates the ban on cruel and
11 unusual punishment.

12 This Court should hold that both orders constitute cruel and unusual punishment, set them
13 aside; and, order defendant's immediate release.

15 CONCLUSION

16 For all of the reasons set out herein, or for any one of them, this Court should set aside
17 the transfer order; dismiss this proceeding; close defendant's Youth Court Case, Yellowstone
18 County Cause No. DJ 08-142; and, order defendant's immediate release from the Yellowstone
19 County Detention Facility.

20
21 DATED this 13th day of August, 2013

22
23 By:

Edmund F. Sheehy, Jr.
Assistant Public Defender
Attorney for the Defendant

1
2
3 **Certificate of Service**

4 I, Edmund F. Sheehy, Jr. do hereby state that I caused a true and accurate copy of this
5 Motion to Set Aside Transfer Order , to be emailed, hand delivered and/or mailed to the
6 following individuals:

7 C. Mark Fowler
8 Assistant Attorney General
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13 Christopher A. Morris
14 Deputy Yellowstone County Attorney
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18
19 Colleen Ambrose
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21 Department Of Corrections
22 P.O. Box 201301
23 Helena, Mt. 59620-1301
24

25 Dated this 13th day of August, 2013.
26
27

28 By: _____
Edmund F. Sheehy, Jr.

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