

APPLICATION FOR

**DISTRICT COURT JUDGESHIP
Fifth 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] Phone: [REDACTED]
4. Office Address: 66 W. Park St., Suite 203, Butte, MT 59701
Phone: (406) 496-6680
5. Length of residence in Montana: All but 6 1/2 years, from age 11 until 17 1/2 years old
6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
10/14/14 (Only during the work week, Sunday evening until late Friday)	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>
Pendleton High School	Pendleton, Oregon	1970	High School
Carroll College	Helena, MT	1974	B.A. Political Science (Cum Laude)
Gonzaga University School Of Law	Spokane, WA	1978	J. D. (Cum Laude)
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

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

2007, I received the George Bousliman Professionalism Award for my representation of David Dawson, who wanted all his appeals dismissed, so Montana could execute him. Just prior to the execution, I had to argue, in court, that he had the right to die.
 In the fall of 1977, while just starting my 3rd year of law school, the Montana Supreme Court gave me permission to sit for the October, 1977, Montana Bar Exam. I passed but could not be admitted until I graduated from law school.

9. Were you a member of the Law Review? If so, provide 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	6/78
U.S. District Court of Montana	5/80
Ninth Circuit Court of Appeals	5/87
U. S. Supreme Court	5/84
U. S. Court of Claims	8/85
U. S. Court of Appeals, Federal Circuit	6/86
U. S. Tax Court	2/84

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

Asst. Public Defender, Montana State Office of Public Defender, Region 5. This Region includes Madison & Beaverhead Counties of the Fifth Judicial District. I work with 7 other attorneys. They are: Sherry Staedler; Deirdre Caughlan; Walter Hennessey; Catherine Rickett; Steve Hackett; Andrew Vigeland; Russell Micheals; and, Shannon Sweeney

12. State the name, dates and addresses of law firms with which you have been associated in practice, 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>
Montana Office of Public Defender, Training Office	Asst. P.D.	11/1/11 to 10/14/14
Montana Office of Public Defender, Major Crimes Unit	Asst. P.D.	10/1/10 to 11/1/11
Mt. Office of Pub. Defender, Region 2	Reg. Deputy P. D.	5/2006 to 10/1/10
Cannon & Sheehy	Partner	1/2/80 to 6/30/06
Cannon & Gillespie	Associate	1/2/79 to 1/2/80
Montana Supreme Court	Law Clerk	1978
Gonzaga University Legal Assistance	Legal Intern	5/77 to 1/2/78

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

Not applicable

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

Since 2006, when OPD was created, 95% of my practice is assisting low income individuals charged with crime(felonies & misdemeanors); I also do juvenile cases; dependent & neglect cases; some writs of habeas corpus to the Montana Supreme Court; and, handle commitment hearings. At the same time, mentor other attorneys working for OPD; and, have handled Commission on Practice matters. The other 5% is giving advice on family law matters to friends & family; handling driver license issues for friends & family; and, drafting wills, powers of attorney, etc.

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

I lobbied the legislature, in 1979, 1981 & 1983, representing various trade groups. I did this with my former partner, Ross Cannon. In private practice, I handled contested case hearings with licensing boards & state agencies. From 1997 until 2005, I assisted male & female inmates file post-conviction petitions; pro se appeals; civil rights actions, etc

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

Trying civil & criminal cases before all courts.

17. Do you regularly appear in court? Yes

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

Federal court	<u>1</u>	%
State or local courts of record	<u>97</u>	%
Administrative bodies	<u>1</u>	%
Other	<u>1</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? 25 to 30 times per month on average.

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

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

Civil	<u>5</u>	%
Criminal	<u>95</u>	%
Other	<u>5</u>	%

22. Have you appeared before the Montana Supreme Court within the last five years? If so, 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

All of the cases I have handled, before the Montana Supreme Court, in the last 5 years are Original Proceedings, namely: petitions for habeas corpus, or writs of supervisory control. They are:

- 1) Stewart v. Kirkegard, OP 16-0396, writ of habeas corpus , challenging validity of an interstate detainer from Virginia for an inmate incarcerated at MSP. Opposing counsel: Colleen Ambrose, Chief Legal Counsel, Dept. of Corrections, 5 S. Last Chance Gulch, Helena, MT 59620. Phone: (406)444-9894.
- 2) Nabakowski v. Sentence Review Division, OP 14-0598 petition for supervisory control over Review Division increase of sentence. Opposong party: Hon Brad Newman , Chairman of SRD, 155 W. Granite St., Butte, MT 59701. Phone: (406) 497-6420.
- 3) Case v. Kirkegard, OP 14-0527, writ of habeas corpus challenging legality of 5 year DOC sentence for felony DUI, when he had never done WATCh. Opposing counsel: Robert Lishman, Asst. Attorney General, Justice Building, Helena, MT 59620. Phone: (406) 444-2026.
- 4) Reeves and Lucas v. Sentence Review Division , OP13-0737, writ of supervisory control, challenging the procedure whereby inmate, appearing for Sentence Review, from outside MSP, had to appear by VisionNet. Court denied petition so no opposing counsel.
- 5) Dickson v. Daly, OP 13-0707, writ of habeas corpus challenging a 10 year DOC commitment upon revocation of a deferred sentence. Opposing counsel: C. Mark Fowler, Chief, Appellate Division, Attorney General's Office, Justice Building, Helena, MT 59620. Phone: (406) 444-2026.

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

24. State the number of non-jury trials that you have tried in the last ten years. With DN & commitments, 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. Include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, provide the same information regarding opposing counsel and the nature of the matter.

- 1) State v. Tony Sawyer, Second Judicial District, Silver Bow County, DC-15-210. Client charged with Count I, Deliberate Homicide; Count II, Attempted Deliberate Homicide; and, Count III, Attempted Deliberate Homicide. Trial was from 9/12 through & including 9/19/16. Presiding Judge: Hon. Brad Newman. Phone (406) 497-6420 Opposing counsel: County Attorney Eileen Joyce, Deputy Co. Atty. Ann Shea, and, Deputy Co. , Mike Clague, Butte Silver Bow Courthouse, 155 W. Granite, Butte, MT 59701 Phone (406) 497-6230.
- 2) State v. Nikole Gerleman, Second Judicial District, Silver Bow County, DC-15-149, Client

charged with Felony DUI. Trial dates: 3/21/16 and 3/22/16. Presiding Judge: Hon. Brad Newman. Phone: (406) 497-6420. Opposing counsel: Kelli Fivey Deputy Co. Attorney Co. Attorney. Address: County Attorney Office, Butte-Silver Bow Courthouse, 155 West Granite St., Butte, MT 59701. Phone: (406) 497-6230.

- 3) State v. Lucas Lewis, Fifth Judicial District, Madison County Cause No. DC-29-2015-5. multiple count sex offense case. Jury trial: 3/7/16 through 3/10/16. Presiding Judge: Hon. Loren Tucker. Phone: (406) 683-3745. Opposing counsel: Chris Christensen, Madison County Attorney, P.O. Box 73, Virginia City, MT. Phone: (406) 843-4233.
- 4) State v. Lerman, Fifth Judicial District, Beaverhead County Cause No. DC-14-3605. SIWOC Charge, Jury Trial: 7/16 & 7/17/15. Presiding Judge: Hon. Katherine Bidegaray, (406) 433-5939. Opposing counsel. Jed Fitch, Beaverhead County Attorney, 2 S. Pacific St. Dillon, MT 59725. Phone (406) 683-3730.

I also have litigated dependent & neglect case (TLC hearings and Terminations. These cases are all in Silver Bow County, before the Hon. Brad Newman. Phone: (406) 497-6420. Opposing counsel are: Mark Vucurovich or Ross Richardson, 116 W. Granite St., Butte, MT 59701 Phone: (406) 723-3219.

I also have litigated mental commitment cases in front of both Second Judicial District Judges.

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

None

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

From 2006 through 2014, I lectured, on various criminal subjects, sentence review and legislative topics to contract and full-time public defenders, in Montana

D. PROFESSIONAL AND PUBLIC SERVICE

28. List all bar associations and legal professional societies of which you are a member. Provide 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, 6/1978 to date

Member, National Association of Criminal Defense Lawyers, 1995 to date

Member, Montana Association of Criminal Defense Lawyers, from inception to date

Former member, Montana Trial Lawyers, 1995 until 2005

Never an officer of any of these

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

None

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

I have never been elected to public office. However, I have run several times. In 2012, I ran for a position on the Montana Supreme Court and was defeated by Justice McKinnon. In 1986, I ran for the Montana State Senate, in Helena, and was defeated. In 1974, I ran for The Montana House of Representatives, and was defeated in the general election

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

I believe that to the extent a judge may do so, under the Code of Judicial Conduct, a judge should be involved in his community and in doing community service

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, provide the details.

No

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

No

34. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the 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, provide the details.

No

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

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, provide the details, including dates.

No

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

Not applicable

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

None

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

No

41. If appointed by the Governor, are you prepared to disclose the information required under 2-2-106, MCA (i.e., the name, address and type of your business; any present or past employer from which you currently receive benefits; any business or professional entity or trust in which you hold an interest; any entity in which you are an officer or director; and any real property, other than a personal residence, in which you hold an interest)?

Yes

42. Have you filed appropriate tax returns as required by federal, state, local and other government authorities? Yes No

If not, please explain.

43. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)? Yes No

If yes, please explain.

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

No

G. WRITING SKILLS

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

In all the cases I handle, I do my own research on legal issues & write my own briefs or memorandums. I do have other attorneys, who work in the office, look at the law for me to assist in formulating legal arguments. I may or may not follow their input as the final briefs filed are my own work.

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

I have, on a pro bono basis, drafted wills, contracts, powers of attorneys, medical power of attorneys, etc

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

48. What percentage of your practice for the last five years has involved research and legal writing?
At least 30 %, if not more.

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

I generally do not use Westlaw or Lexis. I could be trained in Lexis. I rely on the even year annotations to the statutes and read every opinion issued by the Court, every week. I also look at their Daily Orders every day, if not several times a day.

H. MISCELLANEOUS

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

My hobbies are: doing a lot of walking; occasional reading of books; reading all Montana newspapers on-line, during the work week; watching sports on television, when I can; and, while not a hobby, spending my time off, with my family.

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

Prior to becoming an attorney, I worked, in the summers before & between my 1st and 2nd year of law school for then Montana Department of Highways as a bridge inspector, where I stood beneath a pile driver, measuring pile as it was driven into the ground for I-15 & 90, around Butte, MT. In 1975, I also worked, in the Montana House of Representatives, as a Reading Clerk, from January through April. In college, I worked at a nursing home, in Clancy, as an administrative assistant; as a salesperson at Globe Clothing, in Helena; and, worked as an employee of the Montana Legislature, as well as being a legislative intern for a legislator and for the Montana University System

52. Identify the nature and extent of any pro bono work that you have personally performed during the last five years.

Due to my work as a full-time Public Defender, the pro bono work I have done is: writing wills & contracts for family and friends; giving legal advice to people on custody matters; dissolution cases; and, on criminal matters, particularly traffic cases. I also assisted a young man, in getting his driving privilege, continued, by helping him with DMV, when they were questioning, whether he could do to medication he was on, still drive.

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

Probably, the biggest thing that has influenced the way I view our system of justice is my going into my 35th year, working either as a part-time or full-time public defender. The clients I have represented, and continue to represent, need the best attorney they can get to protect them, when falsely accused of something (such as Lucas Lewis, who I represented on the sex case in Madison County); for those rightfully accused to try to help them, get rehabilitated, by getting the best deal possible, such that they can become a law abiding member of society; helping parents regain custody of their children, in dependent & neglect proceedings; and, helping people, with mental health issues, get the help they need. I became a public defender, in 1982, when former District Court Judge Gordon Bennett, put me on the panel in Lewis & Clark County, as he felt I could do all the above. He greatly influenced my view of our system by doing that. My representation of David Dawson, in 2005 and 2006, also influenced me, in that, as judges must do, I, as an attorney, had to set aside my personal beliefs on the death penalty, and, argue, in a Helena courtroom, against former judge Gordon Bennett; my uncle former Justice, John Sheehy; and, the Montana Association of Criminal Defense Lawyers, when they were trying to stop his requested execution. It was very tough to do but I had to represent my client, regardless of how I personally felt.

Our system of justice is designed for people, who have legal issues, to resolve them fairly, honestly and reasonably. I believe we have the greatest system in the world for doing just that.

54. 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 one who will give, every party who appears, in front of them, a fair and impartial hearing, on whatever the issue is that they want heard. This means the parties; their lawyers; and, particularly the number of pro se litigants, we have today, must be treated with the greatest amount of civility, and patience, the judge can muster. In my view, this requires the judge to not be distracted by whatever personal, family, etc., matters that are going on in her or his life. The judge must also be a very good listener to what is being presented either in testimony or legal argument. Particularly, in hearing legal arguments, the judge must have read all the briefs submitted, prior to coming into court.

In jury trials, either civil or criminal, the judge must give all parties, the time they need to present their cases. This, to me, means a judge, if need be, must be willing to move matters, on his or her calendar, in order to finish the trial.

I think a judge, when matters are deemed submitted to him, or her, must do their very best to get a written decision out as soon as is feasibly possible.

Finally, a judge, as best he or she can must be on time for when matters are scheduled, be they jury matters or court matters.

55. 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 issue, before him or her, should first look to any precedent on the issue to be decided unless the matter is one of first impression, or the precedent is clearly distinguishable, based on the facts of the matter presented. If a body of precedent dictates an appropriate decision, and the same is not distinguishable, under the facts of the case, the precedent must be followed.

On matters of first impression, a trial court must follow Montana's rules of statutory construction, if it is a matter of applying a statute, by following the plain language of the statute. If it is a question of law, where there is no Montana precedent, a trial court can look to the case law, from other states, or federal courts, enter a decision that is fair, reasonable and just.

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

In June of 2017, I will have been a practicing attorney for 39 years. In that time, I have handled all kinds of legal matters. I have then a great knowledge of the law and am a very hard worker on getting things done. I believe my knowledge of the law; my ability to work hard; and, my many years of courtroom experience, both in state & federal court, across this state, would be of great service to the citizens of the Fifth Judicial District.

I have always enjoyed, working in the Montana justice system. I believe my peers have a great deal of respect for my knowledge of the law; my civility in the courtroom; my professionalism in the courtroom; and, my professional ethical behavior. I think this type of conduct would be of benefit to the public, in the Fifth Judicial District

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

The thing I am most proud of is the respect and admiration I have from attorneys, and judges, across this state, who respect my knowledge of the law (case law and statutory); my professionalism, in & out of court; and, my ethical performance of my job. I am also proud of having received the Bousilman award for my work on David Dawson.

The most important thing, however, is the respect and pride, my wife Donna, of almost 39 years, has for the work I do & have done. Likewise, my 2 adult sons are very proud of their Father and his work as a lawyer.

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

It is obvious, from this application that I am not currently a resident of the Fifth Judicial District. If nominated and appointed, I would very quickly find a place to live, in the district. As for the positive, I believe my professional experience, handling all types of legal matters, would be of great benefit to the bar, working in the Fifth Judicial District and the citizens thereof.

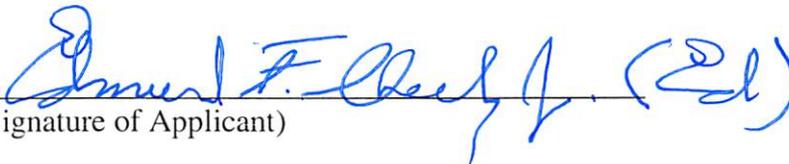
59. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge applicant?

What I think differentiates me, from any potential applicants, is that in my almost 39 years of practice, I have tried, both before juries, and the court, cases, in every county in the Fifth Judicial District.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 5th 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.

October 30th, 2016
(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 Monday, October 31, 2016.

Mail the signed original to:

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

Send the electronic copy to: mtsupremecourt@mt.gov

OFFICE OF THE STATE PUBLIC DEFENDER.
Butte Division
Ed Sheehy
Catherine Rickett
66 West Park Street, Ste. 203
Butte, Montana 59701
(406) 496-6680

Attorneys for Defendant

MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY

STATE OF MONTANA,)	
)	Cause No. DC-15-210
Plaintiff,)	
vs.)	REPLY MEMORANDUM TO STATE'S
)	RESPONSE ON DEFENDANT'S
TONY DWAYDE SAWYER,)	NOTICE OF INTENT TO USE PRIOR
)	CRIMES, WRONGS, OR ACTS BY
Defendant.)	ALLEGED VICTIMS AND NOTICE OF
)	INTENT TO USE EVIDENCE UNDER
)	TRANSACTION RULE

On or about April 14, 2016, defendant, Tony Dwayne Sawyer, filed a notice of intent to use prior crimes, wrongs or acts by the alleged victims and notice of intent to use evidence under the transaction rule. The state responded, on or about May 9, 2016, when the defense, received a copy of their response, objecting to such evidence. This Court should deny their objections.

REPLY ARGUMENT

**SAWYER'S DEFENSE IS NOT HEARSAY, NOT IRRELEVANT CHARACTER
EVIDENCE, OR INADMISSABLE**

To begin with, the Sate asserts that there are "few facts before the Court" due to defendant's waiver of preliminary hearing and stipulation to probable cause. Defendant, however, on page 2 of his notice, stated that the State is fully aware of the evidence defendant

wants to present as it was given to investigating officers when they interviewed him on November 12, 2015. Defendant was simply saying the State has this information.

Before this response, the State has never moved in limine to keep out any of defendant's statements on that day and their response is not such a motion. The State, under the holding of *State v. District Court of 18th Jud. Dist.*, 2010 MT 263, 358 Mont. 325, 246 P.3d 415, should have been moving in limine to keep this evidence out. Defendant put them on notice of this matter in order so the parties would have a fair trial, which is the same reason defendant exercised his statutory right to waive a preliminary hearing, in that statements in an affidavit for leave to file would have jeopardized his right to a fair trial. Despite the now controlling law enunciated in the *18th Jud. Dist. Ct.* case, the State is arguing that Rule 404(b), Mont. R. Evid., is a rule of admissibility, (Pages 6 and 7 of State's Brief) which the Court stated it is not. *18th Jud. Dist. Ct.*, supra, Paragraph 47. As held, in that case, the point of Rule 404(b) is to preclude juries from finding conformity of bad character. Additionally, in this case, Rule 404(c) comes into play because it specifically provides that evidence of a person's character is admissible in cases in which their character is an essential element of a defense.

As for the facts the State is concerned about, defendant, with this memorandum is attaching a DVD of his interview on November 12, 2015, for this Court to conduct an in camera review. The Court will then know what the issue raised here is about without all the defendant's statements being laid out in a pretrial motion so the press knows what has been stated by defendant. Thus jeopardizing the defendant's right, as well as the State's, to a trial by a fair and impartial jury. The same reason for which defendant waived a preliminary exam.

The State then argues that, under *State v. Montana Ninth Jud. Dist. Court*, 2014 MT 188, Paragraph 8, 375 Mont. 488, 329 P.3d 603, where justifiable use of force has been put at issue,

evidence of the character of the victim (which in this case the victims are S.D., H.S and J.P), knowledge of a victim's character, is limited to what the defendant knew at the time of the shooting and this knowledge is what led to the use of force. In his statement, the defendant said he believed the 3 individuals he shot at, on Fish Creek Road intended to kill him. This was based on what he had seen and/or heard from S.D., while in jail, in Texas, with him; and, then what he saw going on, after arriving in Montana in November of 2015, before the shootings. This is what led him to his use of force.

The difference between this case and *Ninth Jud. Dist. Court* supra, are numerous. First, in that case, the defendant's statement was from a written statement, where he was accompanied by his attorney, and, given approximately four months after the shooting. *Id. Paragraphs 3 through 4*. The statement here was approximately 9 days after the shooting and Sawyer had given a substantially similar statement to detectives, in Idaho Falls, Idaho on November 4th. Second, the defendant, in the *Ninth Dist. Court* case, was relying upon what he was told by a Susan Pfeifer. *Id*, Paragraphs 3 through 5. This was hearsay as noted by the Court. Paragraph 9. Here, the statements by Sawyer are his own personal knowledge, not statements from other persons to him. Finally, as noted, in *Ninth Judicial District Court*, at Paragraph 9, any hearsay statements, given to Sawyer from another person, concerning S.D., H.S. and J.P. can be potentially offered to show the resulting effect on his state of mind Rule 803(3), M.R. Evid. Additionally, as again pointed out, in that case, Sawyer's statement to Detective Jurenic can be offered by the State as an admission by a party opponent, which is an exception to the hearsay rules. See: Rule 801 (2) (A)and (B), M. R. Evid.

The State must be aware that, if they offer, any part of Sawyer's statement, in Idaho, or in Butte, pursuant to Rule 106(a)(1) M.R. Evid., the defendant can insist that the entire statement be

presented to the jury and defendant will so insist. In the State's brief, they have not said they do not intend to present either of Sawyer's statements, in Idaho or Montana, to the jury and once they present any part of it, Rule 106(a), (1), M.R. Evid., becomes applicable and defendant will insist the jury is entitled to hear all of it under this rule.

The State finally argues, without any case law to support their argument, that Sawyer intends to put on his statement during the state's case and as such it is hearsay and inadmissible. The law does not support their argument. As argued above, the decision in *Ninth Judicial District Court, supra* at Paragraph 9, allows for this statement to be presented by the State as an admission of a party opponent and, under the state of mind exception to the hearsay rule. Sawyer does not have to take the stand to get his statement in.

The leading case, on foundation for a defendant's statement, in a justifiable use of force case, after the 2009 changes in the statutes on the same, is *State v. Daniels*, 2011 MT 278, 362 Mont. 426, 265 P.3d 623. Thereafter, in *State v. R.S.A. Paragraph 36*, 2015 MT 202, 380 Mont. 118, 357, P.3d 899, the Court specifically held that it did not say, in *Daniels*, that it is impossible for a defendant to lay a foundation for a defense of justifiable use of force without testifying but, in *Daniels*, the defendant had not done so. Here, upon the Court's viewing the videotape of Sawyer's interview of November 12, 2015, the Court can determine whether a proper foundation is established with the same.

For all the reasons set out above, this Court should reject the arguments raised by the State in their response.

**SAWYER'S STATEMENT IS ALSO ADMISSIBLE UNDER THE SAME
TRANSACTION RULE**

Sawyer, in his initial brief, also argued that his statement under the same transaction rule. Section 26-1-103, MCA. This rule, as argued by Sawyer, allows admission of evidence of acts that are inextricably or inseparably linked to and are explanatory of the offense. *State v. Stout*, 2010 MT 137, Paragraph 38, 356 Mont. 458 P.3d 37. Sawyer also pointed out that this "rule" also can be used by a defendant, in trial. *State v. Henson*, 2010 MT 136, 356 Mont. 458, 235 P.3d 1274. In response, the State argues that they do not know what evidence Sawyer is referring to, "other than to assume" that Sawyer relied on what was allegedly said to him by S.D, and other, in the hours leading up to the shootings, which led to his so acting. The State is correct but they should not be assuming the same as this is clear from Sawyer's statements. The State then argues alleged "facts", which are not in the record. Their "facts" are a jury argument about whether Sawyer's use of force was justified. However, they then argue that this Court should have the opportunity to carefully weigh the probative value of the evidence against its "attenuated relevance." Defendant is giving the Court the opportunity to do that by providing Sawyer's November 12th statement to the Court, for its review. The State could have done that also.

In *Henson*, *supra*, Paragraph 27, the alleged same transaction evidence was excluded as defendant could not establish she knew of the evidence, when she used force against the decedent. On Page 3 of his motion, and in the taped interview, Sawyer set forth what he knew at the time of the shootings. The State has not argued that any of the information provided by Sawyer, concerning the events on November 3rd, is not inextricably linked or inseparably linked to the shootings that night, which has been held to be the only basis to exclude such evidence.

State v Lacey, 2010 MT 6, Paragraphs 31 and 32, 355 Mont. 31, 227, P.3d 1247. Since the State has not established as was done in *Lacey*, that Sawyer's statements, about what occurred, on November 3, 2015, are not inextricably or inseparably linked to the shootings, this Court should allow the admission of all of his taped interviews, pursuant to Section 26-1-103, MCA.

CONCLUSION

For all the reasons given herein and in Sawyer's initial motion, this Court should allow either the other crimes evidence or same transaction evidence, at trial.

RESPECTFULLY submitted this _____ day of May 2016.

ED SHEEHY
Assistant Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of _____ 2016, a true and correct copy of the foregoing documents were delivered to the following party by the following means:

Eileen Joyce
Butte-Silver Bow County Attorney
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155 West Granite Street
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[] U.S. Mail, postage pre-paid
[] Hand Delivered
[] Facsimile
[] Courthouse Drop Box
[] Other _____

By: _____