

APPLICATION FOR

DISTRICT COURT JUDGESHIP
4th Judicial District

A. PERSONAL INFORMATION

1. Full Name: Lisa B. Kauffman
- a. What name do you commonly go by? Lisa
2. Birthdate: [REDACTED] Are you a U.S. citizen? yes
3. Home Address: 1234 S 5th St. West
Missoula, Montana 59801 Phone: [REDACTED]
4. Office Address: Same
- Phone: 406-544-1903 (cell)
5. Length of residence in Montana: 22 years
6. List your place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
<u>1996 - present</u>	<u>Missoula</u>	<u>Montana</u>
_____	_____	_____
_____	_____	_____

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>
Homewood- Flossmoor	Flossmoor, IL	1978	General
Western Ill. University	Macomb, IL	1982	Criminal Justice
The John Marshall Law University	Chicago, IL	1985	Law (J.D)
University of Montana	Missoula, MT	2005	Education (M.ED)
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

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

- Certified Child Welfare Law Specialist - "CWLS"
- Awards - Teaching illiterate Adults to read
- Licensed Therapeutic Foster Home (lic. expired)
- Contract Attorney of the year (2014)

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>
<u>Montana Supreme, lower courts</u>	<u>1994</u>
<u>Federal District Court of Montana</u>	<u>1997</u>
_____	_____
_____	_____
_____	_____

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

Solo Criminal Defense practice - primarily
represent the indigent per contract with the
office of the State Public Defenders.

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>
<u>Lisa B. Kauffman</u>	<u>Sole Practitioner</u>	<u>1995-present</u>
<u>Cook County State's Attorneys</u>	<u>Prosecutor</u>	<u>1987-1993</u>
<u>Judicial Clerk, (Waukegan)</u>	<u>Staff Attorney</u>	<u>1985-1987</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____

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

1985-1987- Internship Cook County State's Attorneys
2000-2003 - Obtained Master's Degree and
Stayed home with new baby

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.

Criminal Defense - 75 % (including Appellate work)
Child Welfare - 25 %

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

Family Law, Labor Law, Personal injury,
Medical malpractice

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

Criminal Defense
Child Abuse + Neglect

17. Do you regularly appear in court? yes

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

Federal court	<u>5</u> %
State or local courts of record	<u>95</u> %
Administrative bodies	<u> </u> %
Other	<u> </u> %

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

19. How frequently have you appeared in court? 20-30 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>25</u> %
Criminal	<u>75</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.

NO, except for Appellate Defender work

23. State the number of jury trials that you have tried to conclusion in the last ten years. 20+

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.

please see attached (next page)

Question 25

Jury trials

1. State of Montana v Markus Kaarma- Deliberate Homicide
Missoula Deputy County Attorney Jen Clark and Missoula
Assistant Deputy County Attorney Andrew Paul
200 W. Broadway, Missoula Mt 59802, 258-4737
DC-14-252- **Judge Edward McLean** - 258-4771
December 1, 2014-December 18, 2014
2. State v Timothy Schwartz- Sexual Intercourse without Consent
Missoula Deputy County Attorney Jen Clark
200 W. Broadway, Missoula Mt 59802, 258-4737
DC-14-125- **Judge John Larson**, 258-4773
November 3, 2014- November 5, 2014
3. State v Chad Briggs- Sexual Abuse of a Child
Missoula Deputy County Attorney Jen Clark
200 W. Broadway, Missoula Mt 59802, 258-4737
DC- 14-5 **Judge Edward McLean** 258-4771
September 9, 2014-September 11, 2014

4. I appear weekly before:

Judge Karen Townsend- 258-4774
Judge Dusty Deschamps- 258-4772
Judge John Larson- 258-4774
Judge Ed McLean- 258-4771

5. I appear often before:

Judge Jeffrey Langton- 375-6780
Judge James Hayes- 375-6780

Adversary Counsel / Primacy cases last two years

USA v. Tony Bronson, CR-13-30 (Federal)
Judge Donald Molloy- 542-7260
AUSA Cyndee Peterson, 542-8851
Child Pornography Enterprise

State v Clifton Oliver DC-12-7
Judge Townsend - 258-4774
Missoula County Deputy County Attorney Jason Marks
200 W. Broadway, Missoula M, 59802 258-4737
Promoting prostitution, tampering with a witness

State v Don Rogers DC-11-180
Judge Robert G. Olson, 424-8360
Missoula Deputy County Attorney Jason Marks
200 W. Broadway, Missoula, Mt 59802 258-4737
Sexual Intercourse w/o Consent, Aggravated Assault,

State v William Bean- DC-13-72
Judge Langton - 375-6780
Ravalli County Attorney William Fulbright 375-6750
205 Bedford St., Hamilton, Mt. 59840
Sexual Intercourse without Consent

State v Joseph Lawrence DC-12-127
Judge Haynes - 375-6780
Ravalli County Attorney William Fulbright 375-6750
205 Bedford Hamilton, Mt. 59840
Possession of child pornography, Sexual Assault/child

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, 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.

- Bi-Annual (3) hour presentation to Missoula CASA (Court Appointed Special Advocates) re: "Representing Parents in Child Abuse and Neglect Cases". (2010-1013).
- Presented (1) hour seminar on "Ethics in Representing Children". (11/14/12, OPD, CLE # 16235)
- Guest Lecturer on "Child Advocacy" – University of Montana Law School
- Published two book reviews in "The Champion", a national magazine by the National Association of Criminal defense Attorneys. (attached).

D. PROFESSIONAL AND PUBLIC SERVICE

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

Montana Association of Criminal Defense Attorneys
Montana Bar Association
American Bar Association
National Association of Counsel for Children
National Council of Juvenile + Family Court Judges

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.

Missoula International School - Board member - 2006-2009

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

NO

E. PROFESSIONAL CONDUCT AND ETHICS

31. 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

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

YES - (overturned on Appeal)

Kauffman v Twenty First Judicial District (attached)

33. 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

34. 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

35. 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

36. 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.

Started, owned and operated a used sporting
goods store, "Re:Sports" - Missoula, 1994-1996

37. 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

38. 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.

I cook every summer for the National Coalition
Building Institute at their summer camp for
young leaders - I receive \$300- every August.

39. 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

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

If not, please explain.

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

If yes, please explain.

42. 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

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

I teach my daughter and try to lead by example that 20% of her (our) time goes to community service, and if we are too busy, then 20% of our income is donated.

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 do all my own research and writing. I have submitted dozens (100's?) of legal motions, memorandums, point briefs, FOF's/COL's (findings of fact, conclusions of law), and Appeals.

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.

My research and writing is extensive.

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?
30 %

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

Lexis

H. MISCELLANEOUS

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

- Hiking with my dogs in the Mountains
- Raising my daughter
- Dancing / Performing in Community Theater Productions
- Reading
- Eating Chocolate
- Watching Netflix

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

Waitress, Bartender, training Bartenders, Scuba Instructor, retail sales, 911 dispatcher, Business Owner, Camp Cook, Dance Instructor, House Cleaner, and Organizer.

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

The nature of my work for the public good involves daily opportunities for Pro Bono service. I regularly drive my clients to appointments, buy them food and clothes, answer their multitude of legal questions regarding facets of their lives not related to my appointment. I willingly give time towards helping them ascertain medical, psychological and other resources.

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

Truman Capote and my work as a young prosecutor.

Truman Capote wrote In Cold Blood, a book I read at age 15 which had a tremendous impact on my career path. How can two young men, with seemingly ordinary upbringings walk into a stranger's home and execute four people for money? The question of how our community and justice system deals with such anti-social and abhorrent behavior has intrigued me for years. My decision at age 16 to become a police officer was firm and I studied Criminal Justice in college waiting to be 21 to apply. At age 20, I completed the Los Angeles Police Department's examination and had to wait for a position as they only tested every five years. Contemporaneously, I applied for law school and was admitted. Subsequent to finishing law school, I became a prosecutor.

Through those years of having the power to charge people with crimes, fighting for victim's rights and successfully convicting hundreds of criminals, my views of the justice system were formed. It became apparent the courtroom was the great equalizer and I knew then I wanted to be a Judge someday. After years as a prosecutor in Juvenile court, I realized it was too easy to send kids to jail, and I saw a need for them to have better representation. This commitment has developed into a passion for advocating for the accused, which I have done for 20 years.

My view of the justice system, formed by advocacy on both sides of the fence, is that a good Judge is paramount in making our system of justice fair and accessible for everyone.

53. Explain the qualities that you believe to be most important in a good district court Judge.

In the USA, we enjoy a relatively non-corrupt judiciary. This is a direct consequence of our constitutional mandate that our judiciary remain independent. Judges are not to be influenced by political alliances, campaign contributors and personal relationships. Judicial independence is imperative.

Smart judges can apply facts to the law and have satisfactory performance. Wisdom, different than intelligence, is the capacity to discern relationships, ability to understand what others may not know and knowledge gained by life experience. A good judge has wisdom.

Compassion is a consciousness of other's distress. A compassionate Judge understands suffering and that their decisions effect people in profound ways. A Judge that can masterfully navigate through murky moral distinctions is always mindful of the human component. A good Judge must be compassionate while delivering justice.

Having practiced before dozens of Judges in two states, several Counties and Federal Court, I have learned to appreciate what makes a good Judge: independence, wisdom and compassion.

54. How should a court reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

The goal of the judicial process is to provide impartial justice to all litigants. The idea of justice is not only to establish a reliable body of precedent but to have flexibility when necessary. The practical reality is Judges must call the fouls and shots in a diverse and complex world. Blind adherence to any ideology without discretion to make decisions ignores the subtleties of sorting through human behaviors.

An appropriate balance between establishing a body of precedent and flexibility in the law is in the scales of justice. On the one hand Judges must follow established legal rules to truly protect people from arbitrary power. On the other hand, Judges must have discretion and the inherent power to right the wrongs of bad laws or unfair application of existing laws.

Judges must follow established law so justice is predictable and reliable. (*Stare decisis*) Judges also must be accountable to the people. In essence, a Judge should do both; maintain a body of precedent while being flexible to create real justice, which is the democratic ideal.

55. Why are you seeking office as a District Court Judge?

The judiciary needs balance and someone with experience on both sides can better serve the people of the community while dispensing justice.

I have been frustrated by the prevalence of former prosecutors appointed to or elected to the bench. Although a good prosecutor should embrace the tension between individual rights and community safety; they can often disregard what rights are guaranteed by the Constitution. A prosecutor can easily fall prey to a black and white view of the world, and such a lens can impact their ability to be fair on the bench.

Given the current climate of our Governor trying to return Montana elections to the people, the decision to select a candidate for judicial appointment is an opportunity to further the Governor's clear intentions to "break the "21st Century version of the 'Copper Collar'".

In my work with abused children, the poor and the marginalized, my support stems from the people I represent; not the personal and business relationships with politicians or other lawyers.

In order for our system of justice to not collapse, people have to buy into it, believe in its fairness, swiftness, and equal treatment. I have devoted my life to advocating for people in an adversarial process, and I am ready to be the umpire.

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

Winning the Contract Attorney of the Year award in 2014 from the State Public Defender's office. In an arena of well over 250 private attorneys who contract with the Public Defender's office, I was selected because I accept any kind of case; generally the clients that many are not willing to represent. Working with challenging clients, with significant impairments and limitations can be depleting and rewarding. I take great pride in defending the undefendable.

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

Zealous advocacy is often bandied about in legal circles; but, in practice, it is often met with resistance or derision. My role as an advocate for the accused is not often popular. My commitment to champion the underdog and sometimes the nefarious has been unapologetic, and has often been met with controversy. I see this as a positive and succinctly stated by Martin Luther King, Jr., "Injustice anywhere is a threat to justice everywhere."

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?

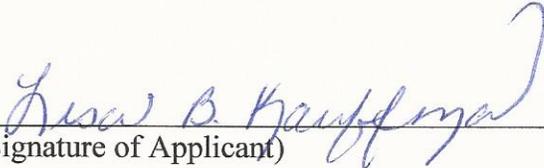
Twenty two years ago, I chose to make Montana my home and to raise my family here. I have spent the most rewarding years of my professional and personal life practicing law in Montana. My heart is here and I feel it is time to give something back in return.

I. CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 4th 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 Canons of Judicial Ethics, if appointed.

2/13/15

(Date)


(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by **5:00 p.m. on Thursday, February 19, 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



8 of 12 DOCUMENTS

LISA B. KAUFMAN, Esq., Relator, v. MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY, THE HONORABLE JEFFREY LANGTON, Presiding Judge, Respondent.

No. 98-277

SUPREME COURT OF MONTANA

1998 MT 239; 291 Mont. 122; 966 P.2d 715; 1998 Mont. LEXIS 221; 55 Mont. St. Rep. 1001

June 16, 1998, Submitted
September 29, 1998, Decided

DISPOSITION: Judgment of District Court reversed.

COUNSEL: For Relator: Lisa B. Kauffman, Pro se, Attorney at Law, Missoula, Montana.

For Respondent: The Honorable Jeffrey Langton, Pro se, District Court Judge, Hamilton, Montana.

JUDGES: Justice Jim Regnier delivered the opinion of the Court. We Concur: J. A. Turnage, Chief Justice, Karla M. Gray, James C. Nelson, Terry N. Trieweiler, William E. Hunt, Sr., W. William Leaphart, Justices.

OPINION BY: Jim Regnier

OPINION

[**124] [***716] ORIGINAL PROCEEDING

Justice Jim Regnier delivered the opinion of the Court.

[*P1] On April 15, 1998, District Court Judge Jeffery H. Langton of the

Twenty-First Judicial District in Ravalli County, found petitioner, Lisa B. Kauffman, Esq., in contempt of court. Judge Langton ordered Kauffman to serve twenty-four hours in the Ravalli County Jail and fined her the sum of \$ 500.

[*P2] Kauffman immediately filed a petition for writ of certiorari with this Court, and on April 16, 1998, we stayed the execution of the contempt order and set forth a briefing schedule. After briefs were submitted, on May 14, 1998, this Court dismissed the petition on procedural grounds without prejudice. Kauffman then refiled her petition and, after another procedural challenge by Judge Langton, we decided to address the petition on the merits.

[*P3] We now consider Kauffman's application for writ of certiorari and, at the request of Judge Langton, consider his response filed in Case No. 98-200 as his response in this action. We grant the petition for a writ of certiorari and reverse.

[*P4] The issues on appeal are:

[*P5] 1. Did the District Court have jurisdiction to issue the contempt order?

[*P6] 2. Is there substantial evidence to support the contempt order?

[*P7] Because our resolution of Issue One is dispositive, we decline to address Issue Two.

[**125] FACTUAL BACKGROUND

[*P8] In October 1997, Lisa B. Kauffman, Esq., applied for a scholarship to attend a legal seminar to be held in Puerto Rico commencing on February 4, 1998. The next month, on November 14, 1997, Judge Langton appointed Kauffman to represent a mother in a proceeding to terminate the mother's parental rights. Shortly thereafter Judge Langton set the matter for hearing on February 9 and 10, 1998.

[*P9] Kauffman made contact with the father's counsel in December 1997, seeking information about the whereabouts of the mother. Kauffman then left for a three-week vacation to Chicago, returning on January 6, 1998. Upon her return, she learned that she had been granted the scholarship for the seminar in Puerto Rico. Kauffman then focused on a criminal jury trial scheduled for January 12, 1998.

[*P10] Upon completion of the jury trial, Kauffman began to address her obligations in the court appointment. On January 27, 1998, Kauffman spoke with attorney Michael Hayes who was representing the State in the termination proceeding. He gave Kauffman [***717] information he had regarding the mother at that time. Also on January 27, 1998, Kauffman called Bobbi Baker, the social worker involved, and Patricia Sanders, the guardian ad litem. Baker provided the information she had regarding the mother and, later that day, contacted Kauffman and gave her the mother's new

telephone number.

[*P11] Kauffman's initial contact with her client occurred on January 29, 1998. Also on that date Kauffman filed a motion to continue. The motion recited that up until that date Kauffman had attempted, without success, to locate her client. The District Court denied the motion.

[*P12] Kauffman next contacted attorney Kirk Krutilla to substitute for her so she could attend the Puerto Rico conference. Krutilla obtained Kauffman's file on the matter on February 2, 1998. Kauffman departed for Puerto Rico on February 2, 1998, without notice to the court or formally seeking a substitution of counsel. The termination proceeding commenced as scheduled on February 9, 1998, with Krutilla representing the mother.

[*P13] Apparently disturbed by Kauffman's actions in connection with the proceeding, on March 27, 1998, by certified letter, Judge Langton directed Kauffman to appear pursuant to a contempt citation for hearing. Judge Langton also directed other parties to the proceeding to file affidavits concerning Kauffman's representation of the mother.

[*P14] [**126] Judge Langton held a contempt hearing and determined that Kauffman's version of the events conflicted with that of other witnesses who provided testimony. Specifically, Judge Langton found that Kauffman's testimony that she had advised the mother about the substitution of counsel on January 29, 1998, and that she had already contacted Krutilla about taking over the case, conflicted with Krutilla's billing statement and testimony at the hearing. Judge Langton further noted that Kauffman's testimony conflicted with documents which she filed regarding the dates when she received a contact number for her client, when she first spoke with her client, and

1998 MT 239, *P14; 291 Mont. 122, **126;
966 P.2d 715, ***717; 1998 Mont. LEXIS 221

when she filed her motion to continue. Judge Langton also noted that a significant time elapsed between the date she affirmatively knew of her scheduling conflict and the date she filed her motion to continue.

[*P15] Judge Langton found that Kauffman's actions were in direct violation of his order in which he appointed her to represent the mother in the termination proceedings. Judge Langton further found that Kauffman failed to display reasonable diligence and promptness in her representation of her client in violation of Rules 1.3 and 3.2 of the Rules of Professional Conduct, and made misleading statements to the District Court in violation of Rule 3.3. Finally, Judge Langton found that Kauffman engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(c) and (d). As a result of these infractions, Judge Langton determined that Kauffman was in direct contempt of court as provided by § 3-1-501, MCA.

DISCUSSION

[*P16] Our established standard for review of contempt orders, pursuant to a writ of certiorari, is first to determine whether the court which found contempt acted within its jurisdiction and, second, to determine whether there is evidence to support the finding of contempt. See *Matter of Graveley* (1980), 188 Mont. 546, 555, 614 P.2d 1033, 1038-39.

[*P17] Kauffman first argues that Judge Langton did not have jurisdiction to issue the contempt order. Kauffman correctly points out that if the court's purpose is to punish the contemnor for a specific act done and to vindicate the authority of the court, the contempt is criminal. See *Gompers v. Bucks Stove & Range Co.* (1911), 221 U.S. 418, 441, 31 S. Ct. 492, 498, 55 L. Ed. 797, 806. This is in contrast to a

sanction which attempts to force the violator's compliance with a court order, which is civil contempt. It is the ability to end the imprisonment [**127] that is the distinguishing factor and why it is often said that in a civil contempt case one carries the keys to the jailhouse in his own pocket. See *Gompers*, 221 U.S. at 442, 31 S. Ct. at 498, 55 L. Ed. at 806. Kauffman maintains that since her conduct can only be [***718] characterized as criminal contempt, Judge Langton was without jurisdiction to sanction her to jail without being prosecuted under Montana's criminal contempt statute, § 45-7-309, MCA.

[*P18] Judge Langton responds that he was within his jurisdiction to issue the order without proceeding under the criminal contempt statute. He points out that summary punishment of direct contempt is a traditional and essential power of the court and is provided for by statute. Sections 3-1-511 and -519, MCA. Judge Langton provided Kauffman an opportunity for allocution which is required in direct contempt proceedings. See *Malee v. District Court* (1996), 275 Mont. 72, 911 P.2d 831.

[*P19] Kauffman raises another jurisdictional argument. She contends that Judge Langton was without jurisdiction to preside over charges which can only be described as indirect contempt. Direct contempt is an open insult committed in the presence of the court, whereas an indirect contempt is an act done not in the presence of the court, but at a distance that tends to belittle or degrade the court. See *Malee*, 275 Mont. at 75-76, 911 P.2d at 832-33. The distinction is critical to a determination of the proper procedures which the court must follow.

[*P20] Kauffman argues that her conduct, which Judge Langton deemed to be contemptuous, was indirect or constructive. She argues that because she never appeared before Judge

Langton until her order to show cause hearing, the matter is an indirect or constructive contempt. Kauffman further argues that for indirect contempt, the proper procedures which must be followed are spelled out in § 3-1-512, MCA, and that Judge Langton acted without authority when he required her to appear before him by certified letter. Therefore, she urges that the matter be dismissed for lack of jurisdiction.

[*P21] Judge Langton states that the contempt in this particular case was direct. Section 3-1-511, MCA. According to Judge Langton, the direct contempt included oral statements made to the court, and written documents filed with the court, both of which the Judge personally observed. He argues his authority for the direct contempt is found in § 3-1-501(c), (d), and (e), MCA. He states that as District Judge he may summarily punish for direct contempt and, in this case, he was within his jurisdiction to do so.

[*P22] Finally, Kauffman argues that should we address the merits of the contempt order, there was insufficient evidence to support it. Kauffman maintains that under § 3-1-501, MCA, Judge Langton apparently proceeded under subsection (c) or (e). She argues that there was a one-sentence minute entry which appointed her to represent her client in this case, and there were no orders compelling her personal appearance at any hearings. She further asserts that she secured alternative counsel for her appointed client in the event that her motion to continue was denied. She also points out that under § 37-61-403, MCA, an attorney in an action may be changed at any time by filing a substitution with the client's consent in the minutes with the clerk. She notes that her client had no objection to the substitution.

[*P23] Judge Langton responds that Kauffman's affidavit filed on

February 9, 1998, is irreconcilable in several regards to other statements made by Kauffman, including information she provided in her statement of fees, letters to the District Court, and her motion for continuance. He argues that this is further exacerbated by her oral testimony given at the contempt hearing. Judge Langton points out that her affidavit represents that she had diligently tried to locate the client; however, at the hearing it was established, through the witnesses and her own testimony, that she did not attempt to locate her client until two weeks before the scheduled hearing. In summary, Judge Langton argues that this was clearly direct contempt and that he sentenced her within his jurisdiction and authority as allowed by the statutes.

[*P24] We conclude that Kauffman's conduct may have satisfied the elements of § 3-1-501, MCA, and, therefore, that it is within Judge Langton's jurisdiction, pursuant to § 3-1-519, MCA, to issue the contempt order in question. However, as we more fully explain below, certain contempt proceedings pursuant to § 3-1-501, MCA, must provide for more due process protection for the contemnor than is provided in a summary contempt proceeding. Summary contempt proceedings must only be used in instances in which the contemptuous conduct requires immediate action in order to vindicate the authority of the court.

[*P25] As we stated above, the distinction between direct and constructive contempt is critical when determining the due process afforded to the contemnor. Actually, the alleged conduct in question in [*129] this proceeding is probably best described as a mixture of both direct and indirect. However, Judge Langton was certainly justified, based on our case law, to characterize the alleged conduct in this instance as direct contempt. Direct contempt

1998 MT 239, *P25; 291 Mont. 122, **129;
966 P.2d 715, ***719; 1998 Mont. LEXIS 221

includes acts or statements made in open court or within the purview of the presiding judge. See *Malee*, 275 Mont. at 76, 911 P.2d at 834. We have previously expanded the definition of direct contempt to include the filing of pleadings placed before the court. See *Malee*, 275 Mont. at 76, 911 P.2d at 834. In the case before him, Judge Langton based his contempt order on written documents placed with the court, as well as oral testimony at the contempt hearing.

[*P26] Regardless of how we classify the conduct at issue, this Court has always been vigilant to insure that due process is properly accorded to the person charged. We have held that in constructive or indirect contempt proceedings, the following due process requirements must be followed:

That one charged with contempt of court be advised of the charges against him, have reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation.

Malee, 275 Mont. at 76, 911 P.2d at 833 (citing *In re Oliver* (1948), 333 U.S. 257, 275, 68 S. Ct. 499, 508, 92 L. Ed. 682, 695). Additionally, we have held that a court must follow the affidavit or statement of facts procedure set forth in § 3-1-512, MCA.

[*P27] In cases of direct contempt, on the other hand, we have not afforded full due process. We have held that although a contemnor is not entitled to the full due process of notice of charges, opportunity to be heard, and an opportunity to present his or her case in front of an unbiased tribunal, he or she is entitled to a right of allocution or

an opportunity to be heard. See *Malee*, 275 Mont. at 76, 911 P.2d at 833. Pursuant to § 3-1-511, MCA, direct contempt may be summarily punished; however, according to our reasoning in *Malee*, in all summary contempt proceedings "the contemnor must be granted an opportunity to explain or excuse himself. Such opportunity allows the individual to potentially purge himself or show no contempt was intended." *Malee*, 275 Mont. at 78, 911 P.2d at 834 (citing *State ex rel. Smith v. District Court* (1984), 210 Mont. 344, 347, 677 P.2d 589, 591). Therefore, we held that in summary contempt proceedings the contemnor does not have a right to a "full-blown" trial of his or her [*130] contempt charges, but does have a right to notice and at least a brief opportunity to defend or explain his or her actions. *Malee*, 275 Mont. at 78-80, 911 P.2d at 835. This we have described as a right of allocution. See *Malee*, 275 Mont. at 78-79, 911 P.2d at 835.

[*P28] Because this Court has expanded the definition of direct contempt from being only that misconduct which occurs in open court, to language found in pleadings, we have created a category of direct contempt that does not necessarily require urgent and immediate action in order to preserve and restore order, dignity, and the authority of the court. See *Malee*, 275 Mont. 72, 911 P.2d 831. Urgency considerations generally do not exist in this species of direct contempt. The need to sacrifice due process concerns for the practical need to maintain an orderly court is not present. Therefore, although we affirm this expansion of our definition of direct contempt, we believe it is necessary to clarify the situations in which direct contempt may give rise to summary contempt proceedings, and the situations in which direct contempt must be addressed by proceedings that respect the full due process rights of the accused.

1998 MT 239, *P28; 291 Mont. 122, **130;
966 P.2d 715, ***719; 1998 Mont. LEXIS 221

[*P29] In *Pounders v. Watson* (1997), 521 U.S. 982, 117 S. Ct. 2359, 2361, 138 L. Ed. 2d [***720] 976, 982, the United States Supreme Court addressed the summary contempt exception to the normal due process requirements of a hearing, counsel, and the opportunity to call witnesses. It pointed out that summary contempt "includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." *Pounders*, 117 S. Ct. at 2361, 138 L. Ed. 2d at 982 (quoting *In re Oliver* (1948), 333 U.S. 257, 275, 68 S. Ct. 499, 509, 92 L. Ed. 682, 695) (emphasis added). The Supreme Court has stressed the importance of confining summary contempt orders to only that misconduct which requires immediate action to protect the judicial institution itself. See *Harris v. United States* (1965), 382 U.S. 162, 167, 86 S. Ct. 352, 356, 15 L. Ed. 2d 240, 243-44. This usually occurs in proceedings in the courtroom during which the "affront to the court's dignity is more widely observed, justifying summary vindication." *Pounders*, 117 S. Ct. at 2362, 138 L. Ed. 2d at 982. A limitation of summary contempt proceedings to instances in which the misconduct threatens the court's immediate ability to conduct its proceedings is in line with the policy [**131] consideration that contempt power is subject to abuse, and "only 'the least possible power adequate to the end proposed' should be used in contempt cases." *Young v. United States ex rel. Vuitton et Fils S.A.* (1987), 481 U.S. 787, 801, 107 S. Ct. 2124, 2134, 95 L. Ed. 2d 740, 754.

[*P30] The importance of the due process limitation on the authority of a court to issue a summary contempt

order was aptly recognized by Justice Frankfurter in his dissenting opinion in *Sacher v. United States* (1952), 343 U.S. 1, 72 S. Ct. 451, 96 L. Ed. 717:

Summary punishment of contempt is concededly an exception to the requirements of Due Process. Necessity dictates the departure. Necessity must bound its limits. In this case the course of events to the very end of the trial shows that summary measures were not necessary to enable the trial to go on. Departure from established judicial practice, which makes it unfitting for a judge who is personally involved to sit in his own case, was therefore unwarranted. . . .

This, then, was not a situation in which, even though a judge was personally involved as the target of the contemptuous conduct, peremptory action against contemnor was necessary to maintain order and to salvage the proceedings. Where such action is necessary for the decorous continuance of a pending trial, disposition by another judge of a charge of contempt is impracticable. Interruption for a hearing before a separate judge would disrupt the trial and thus achieve the illicit purpose of a contemnor.

Sacher, 343 U.S. at 36-37, 39, 72 S. Ct. at 468, 469-470, 96 L. Ed. at 737 (Frankfurter, J., dissenting). We recognized these limits to a court's summary contempt power in *Lilienthal v. District Court* (1982), 200 Mont. 236, 650 P.2d 779, in which we held:

Unless the act

1998 MT 239, *P30; 291 Mont. 122, **131;
966 P.2d 715, ***720; 1998 Mont. LEXIS 221

constituting contempt occurs in open court where immediate punishment is necessary to prevent demoralization of the court's authority, due process requires:

". . . that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation." *In Re Green* (1962), 359 [sic] [369] U.S. 689, 691-92, 82 S. Ct. 1114, 1116, 8 L. Ed. 2d 198, 200; *Re Oliver* (1948), 333 U.S. 257, 275, 68 S. Ct. 499, 508, 92 L. Ed. 682, 695.

Lilenthal, 200 Mont. at 242, 650 P.2d at 782 (emphasis added).

[*P31] [**132] With these considerations in mind, we conclude that regardless of the type of contempt committed, direct or indirect, a court's primary consideration before subjecting a contemnor to summary contempt proceedings, must be whether immediate corrective steps are necessary to restore order, maintain dignity and authority of the court, and to prevent delay. Otherwise, a contemnor [***721] is entitled to the full due process hearing traditionally associated with indirect contempt, a finding, in instances in which criminal punishment is a consequence, that the evidence establishes the contemnor's guilt beyond a reasonable doubt, and a hearing in front of an unbiased court other than that in which the misconduct occurred. See *In re Murchison* (1955), 349 U.S. 133, 136-39, 75 S. Ct. 623, 625-27, 99 L.

Ed. 942, 946-48; *State ex rel. Tague v. District Court et al.* (1935), 100 Mont. 383, 388, 47 P.2d 649, 651.

[*P32] Accordingly, we conclude that a district court may subject a contemnor to summary contempt proceedings in those circumstances in which the misconduct threatens the court's immediate ability to conduct its proceedings and instant action is necessary. We further recognize that the trial judge must and does have the inherent authority and power to address and summarily punish such conduct. Certainly our decision in this case should not be viewed to diminish this traditional authority. Pursuant to our decision in *Malee*, the contemnor in a summary contempt proceeding maintains his or her right of allocution.

[*P33] In cases in which it is not necessary for a court to take instant action, however, a contemnor is entitled to full due process. This includes a hearing before a neutral judge, during which the contemnor is advised of the charges against him or her, has a reasonable opportunity to meet them by way of defense or explanation, has the right to be represented by counsel, has a chance to testify and call other witnesses on his behalf, and, in instances in which criminal punishment is a consequence, a finding of guilt beyond a reasonable doubt.

[*P34] The facts of this case bring the immediacy requirement of summary contempt into clear focus. Here the underlying hearing at which Kauffman failed to appear had already transpired with substitute counsel. Likewise, the District Court did not determine that Kauffman had filed the alleged misleading documents until after the hearing. That being the case, there was no urgency or immediacy to the question of whether Kauffman's conduct was contemptuous. The [**133] matter could be handled, as it was, in a subsequent and

separate hearing involving the issue of contempt.

[*P35] We conclude that because Kauffman's conduct in this case allegedly constitutes contempt that did not necessitate immediate action, a summary contempt proceeding by the same judge was not necessary and violated Kauffman's due process rights. We remand this case for a hearing in front of a different judge in a manner consistent with this opinion.

[*P36] The judgment of the District Court is reversed.

/S/ Jim Regnier

Justice

We Concur:

/s/ J. A. Turnage

/s/ Karla M. Gray

/s/ James C. Nelson

/s/ Terry N. Trieweiler

/s/ William E. Hunt, Sr.

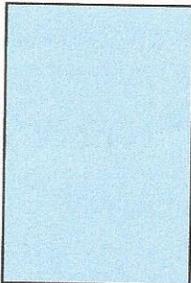
/s/ W. William Leaphart

BOOK REVIEW

Mistrial

An Inside Look at How the Criminal Justice System Works ... And Sometimes Doesn't

By Mark Geragos and Pat Harris
Gotham (2013)
Reviewed by Lisa B. Kauffman



The criminal justice system is like an alcoholic who refuses treatment, say attorneys Mark Geragos and Pat Harris in *Mistrial*. While the common belief is that the United States has the best criminal

justice system in the world, there are problems that need to be fixed. Beginning with anecdotal stories, the authors entertain and educate the reader with their insider secrets and commentary from high-profile cases. They revisit the O.J. Simpson fiasco, the Susan MacDougal defiance, the Scott Peterson injustice, Michael Jackson, Gary Condit, Chris Brown, and other just-as-important-not-so-famous clients they have represented. That's just the beginning.

The authors then move on to dissect individual players and their roles in the justice system. Why do prosecutors have absolute immunity from grandstanding and cheating to win convictions? When did defense attorneys become so apologetic about what they do? Why do cops lie? Why can't jurors nullify a bad case? Who are the angry blond women and when did lawyering get traded out for entertainment? These questions and many others are answered with humor, grace, and insights gained from representing the accused for many decades.

Geragos followed in his father's famous footsteps into the law, albeit with a brief attempt at being a concert promoter. When Geragos was a young law student, he lost what turned out to be an \$84 million gig because his father would not co-sign on the loan. Divinity school was another possible career path, but

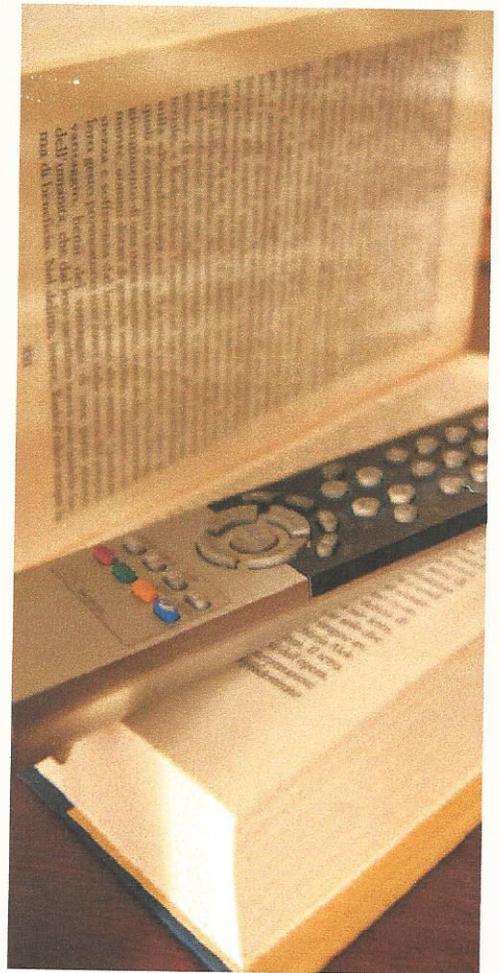
someone talked him out of it. His Armenian ancestry, "branded into his DNA," led him to fight against all odds.

Harris was a public defender in Nashville, Tenn., who became engaged to Susan McDougal. When she was thrown in an L.A. jail, he moved there to work on her defense. Harris learned that McDougal had hired a lawyer he never heard of, and so Harris marched into the lawyer's office to fire him. Of course, Geragos was the lawyer, and they became friends and co-workers in their successful defense of McDougal in her David and Goliath stand against Kenneth Starr and the Office of the Independent Counsel.

Mistrial reminds readers of some well-known statistics: In 1980, the prison population in the United States was approximately 500,000. Today, it stands at over two million. The United States has less than five percent of the world's population yet 25 percent of the world's reported prisoners. Through DNA testing, 325 convicted people have been deemed innocent and released from prison after serving lengthy sentences for crimes they never committed. In 30 percent of those cases, they had confessed to the crime. In 75 percent of those cases, faulty eyewitness identification was a factor.

Winding down, the authors suggest 10 ideas that can be implemented to fix the many cracks in the criminal justice system. A few of the ideas are novel: professional juries, judges playing a role in plea bargaining, and jury nullification as a legal option for jurors. Some of their top 10 suggestions have been implemented in many places: less draconian sentencing for drug offenders, the double blind procedure for eyewitness identifications, and post-conviction DNA analysis.

I asked my friend Joe Banda, who has spent 32 years as a Special Agent for both the Department of Justice and the Air Force Office of Special Investigations, to read *Mistrial* too. He found the book entertaining, but he had some reservations. Joe noted that the authors went to great lengths to make the point that they are exceptional defense attorneys, while at the same time denigrating a justice system that has served them well for the past



30 years. He was disappointed that the authors failed to discuss the lack of impartiality of the grand jury system. Joe enjoyed *Mistrial*, but he does not recommend it for aspiring criminal defense attorneys: "This would be akin to reading a biography of Ty Cobb and then announcing that I now know what I have to do to hit .400 in the major leagues."

Criminal defense attorneys often become emotionally depleted and beaten up as they fight against the power of the government in their relentless commitment to liberty and fairness. It is refreshing and meaningful to read about shared obstacles. Kudos to Mark Geragos and Pat Harris for writing the book defense lawyers think they should write, if only they kept better notes. ■

About the Reviewer

Lisa B. Kauffman has been defending the accused for 25 years. She lives in Missoula, Mont.

The opinions expressed in reviews are those of the reviewers and do not necessarily reflect the opinion of NACDL.

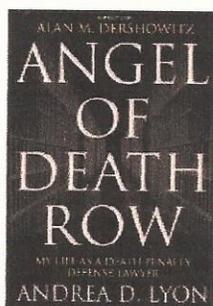
BOOK REVIEWS

Angel of Death Row My Life as a Death Penalty Defense Lawyer

By **Andrea D. Lyon**

Kaplan Publishing (2010)

Reviewed by **Lisa B. Kauffman**



In 1979, Andrea Lyon was a 26-year-old, 6-foot tall, long-haired newbie to the Homicide Task Force at the Cook County Public Defender's Office in Chicago. What began as a comfortable secular Jewish upbringing in Evanston, Ill., morphed into decades of defending the most marginalized and tragic among us. In over 130 homicide cases, she has defended 30 potential capital cases, defending 19 through the penalty phase. She won all 19. In a white male-dominated office representing the mostly black, male and poor, Andrea Lyon tore through Chicago's criminal courts with high heels, passion, and humor. For 11 years she fought to keep clients off death row.

In 1990, she founded the Illinois Capital Resource Center, where all her clients were on death row. At that time, 160 inmates in Illinois were condemned to die. By the year 2000, George Ryan, who was governor at the time, made international news when he imposed a moratorium on executions, pending a study by the State. His announcement followed the exoneration of 13 men who had been condemned to die primarily due to faulty evidence, jailhouse snitches, and victims who recanted.

The book concludes with a triumph over despair as one of Lyon's clients who spent 16 years in prison, including more than 13 years on death row, is fully pardoned by Ryan (along with three other men) on Jan. 10, 2003.

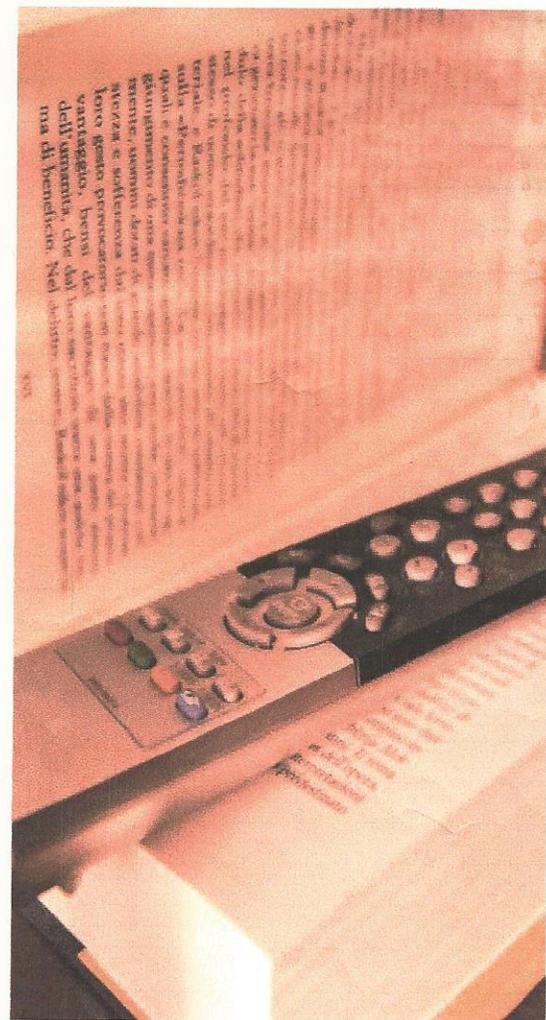
Angel of Death Row is Lyon's 260-

page memoir surveying the highs and lows of defending and befriending accused killers. Currently, she is the Clinical Professor of Law and Associate Dean for Clinical Programs at DePaul University School of Law in Chicago, where she founded the Center of Justice in Capital Cases.

Throughout the ups and downs, Lyon ingratiates and endears herself to a cast of characters while slogging her way through a labyrinth of dirty jails, courthouse corruption, and prosecutorial intolerance. The constant thread is Lyon's commitment to understanding her clients and working hard to find out "why" they did what they did. In her unstoppable wave to find redemption anywhere, she inspires all of us who defend the accused. Each client has capacity to change and is somebody's mother, father, husband, or wife. More a product of poverty and mental illness than evil incarnate, all clients have a story to tell and Lyon is their ghost writer.

Unafraid to confront racism in jury selection, prosecutorial gamesmanship, and misogynist judges, Lyon remains centered and focused on winning. Yet she is practical and reflective on what battles to fight for a client's best outcome. Lyon illustrates with specific examples why we have to "dog our records" (object to everything), and how post-conviction work can really make a difference. She confronts her own biases head on, musing over why a woman would stay with a violent man for so many years until she becomes fed up and kills him. In an effort to find meaning in all she does, Lyon honestly draws parallels to her own poor judgment in intimate relationships.

One particular ethical challenge is familiar to all of us: the abused clients with no self-esteem that want to give up. Do we know what is best for them or do we follow their requests even if they want to die? In one chapter, titled "Whose Case Is It Anyway?," Lyon refuses to be the one to "deliver the poison" (p. 229) and insists on giving hope to a mother found guilty of killing her child. This client was bent



on getting the chair because she "got no reason to live no way." Lyon refuses to "help the State murder" the mother — and is fired. As expected, Lyon will not be silent. Sometime later, when the matter comes before the governor on a clemency request (through Amnesty International), Lyon writes a letter to Illinois Gov. Jim Edgar. Ten years after this mother's sentence was commuted, she wrote Lyon to share the news of her college graduation with a scribbled note: "You knew. Thank you."

For seasoned criminal defense lawyers, wrapped in the cynicism and demoralization of time in this arena, Lyon constantly challenges us to connect emotionally with our clients and jurors as we kick butt. Non-lawyers will find this book user-friendly and a great insight into why we "represent those people."

About the Reviewer

Lisa B. Kauffman is an attorney in Missoula, Montana.

The opinions expressed in reviews are those of the reviewers and do not necessarily reflect the opinion of NACDL.

National Association of Counsel for Children

CERTIFICATE OF LEGAL SPECIALIZATION

The NACC Hereby Certifies

Lisa Beth Kauffman

as a

CHILD WELFARE LAW SPECIALIST

Having Satisfied the Specialty Certification Requirements of the
National Association of Counsel for Children and the American Bar Association.

[Signature]

NACC Executive Director



11/19/2013

Date Certified

Lisa B. Kauffman
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**MONTANA FOURTH JUDICIAL DISTRICT, MISSOULA
COUNTY**

STATE OF MONTANA)	Cause No. DC-13-74
)	
Plaintiff)	Dept.4
)	
Vs)	MOTION TO EXCLUDE
)	PRIOR BAD ACTS
CLIFTON OLIVER)	
)	
Defendant)	

Comes now the defendant, , and hereby moves to exclude any evidence of prior bad acts pursuant to M.R.E 404(b), and in support states as follows:

I. RELEVENT FACTS

1. Per the Omnibus form, the State intends to introduce evidence of other crimes, wrongs or acts pursuant to Rule 404, MRE.

2. Counsel for defendant moves to exclude any evidence of prior bad acts, crimes or wrongs under 404(b), including any and all transactional evidence.

II. LAW

On December 14, 2010, the Montana Supreme Court modified the “modified Just rule” regarding Notice requirements of prior bad acts by the State. (See State v 18th Judicial District, 2010 MT 263; 358 Mont. 325; 246 P.3d 415; 2010 Mont. LEXIS 426). In essence, the Court overruled the prior law under both State v. Just, 184 Mont. 262, 602 P.2d 957 (1979), and State v. Matt, 249 Mont. 136, 814 P.2d 52 (1991).

The court held that the requirement as to evidence of other crimes, wrongs, or acts was simply to disclose the evidence; the prosecutor was not also required at the outset to explain why the evidence was admissible. Rather, it was up to the defendant to identify any of the State's evidence that she believed should be excluded as irrelevant, unfairly prejudicial, relevant only for an improper propensity inference, or inadmissible under some other rule, and to explain why the evidence should be excluded. (State v 18th Judicial District citing Edward J. Imwinkelried, Uncharged

Misconduct Evidence vol. 1, § 2:19, 103-05 (rev. ed., West 1998) (discussing Federal Rule of Evidence 404(b)); United States v. Crowder, 141 F.3d 1202, 1206, 329 U.S. App. D.C. 418 (D.C. Cir. 1998) (same)).

Although the Court relaxed the State's duty to identify and justify the use of prior bad acts evidence, prior to any objections by a defendant, THE ESSENCE OF THE RULE REMAINS UNCHANGED; (emphasis added) that is:

“To prohibit using evidence of other crimes, wrongs, or acts to prove the defendant's subjective character, disposition, or propensity: e.g., that he is inclined to wrongdoing in general, or that he tends to commit a particular type of wrongdoing, in order to show conduct in conformity with that character on a particular occasion.”

Essentially, Mont. R. Evid. 404(b) disallows the inference from bad act to bad person to guilty person. The rule is available to a defendant who believes that certain prosecutorial evidence will lead the jury to draw this improper inference, and the defendant is free to raise that objection and request that the evidence be excluded

under Rule 404(b). (State v 18th Judicial Dist., citing: Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence vol. 1, § 4:28, 746 (3d ed., Thomson/West 2007).

What has also not changed is that “an accused has the right to prepare a defense to a criminal charge”. State v. Couture, 2010 MT 201, P 77, 357 Mont. 398, 240 P.3d 987. And, to that end, the accused must be given notice of the charge itself. See State v. Goodenough, 2010 MT 247, P 20, 358 Mont. 219, 245 P.3d 14. Furthermore, included in the right to prepare a defense, the accused must have reasonable notice of the evidence the State intends to introduce at trial.

In short, the Montana Supreme Court only lifted the “extra” notice requirement previously mandated in Just and Matt, as follows: “Where the prosecution discloses in the charging documents or through discovery the evidence it may introduce at trial, no practical purpose is served by requiring the prosecution to provide an additional, separate notice dedicated to extrinsic evidence.” (State v 18th Judicial District).

It may be relevant to remember the facts of State v 18th judicial district, when the case was first charged and tried in the district

court as State v Anderson. The defendant Anderson was accused of murdering her child. The State wanted to introduce all sorts of extrinsic evidence, primarily from a parallel DN matter regarding other acts of abuse, neglect, violence, etc. alleged against the defendant mother. The District Court excluded evidence and the State took the matter up on a Writ of Supervisory Control.

The High Court spent time analyzing the appropriateness of admitting all sorts of extrinsic evidence to show motive, lack of mistake and intent. The High Court emphasized that Anderson had sufficient notice by virtue of the State's Affidavit for probable cause as well as the State's two Just notices.

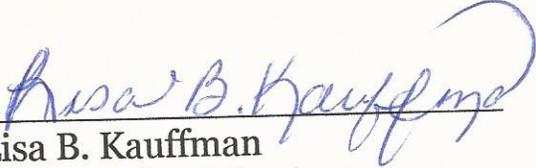
Our case at bar is strikingly different. The State has not disclosed any evidence related to a parallel DN matter, so there is no discovery to sift through and determine what may or may not be relevant 404(b) evidence.

A final cautionary note by the Montana Supreme Court in State v 18th Judicial District states, in part, "It will remain for the trial judge to determine what evidence is admissible, and for what purposes, based on the objections, motions, and arguments made and to

provide this Court with a sufficient rationale for appellate review of its decision.”

WHEREFORE, defendant respectfully requests this Honorable Court to exclude any and all evidence of prior bad acts as undisclosed, irrelevant and inadmissible at trial.

Dated this day 14th day of November, 2013



Lisa B. Kauffman
Attorney for defendant