

APPLICATION FOR

**DISTRICT COURT JUDGESHIP
First Judicial District**

A. PERSONAL INFORMATION

1. Full Name: Daniel Mark Guzynski
 - a. What name do you commonly go by? Dan Guzynski
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes
3. Home Address: [REDACTED]
Phone: [REDACTED]
4. Office Address: Montana Attorney General's Office, 215 N. Sanders, Helena, MT 59601
Phone: (406) 444-2026
5. Length of residence in Montana: 23 Years
6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
2007 to present	Helena	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>
Clawson High School	Clawson, MI	6/89	Diploma
Oakland Community College	Royal Oak, MI		
Lake Superior State University Sault Ste.	Marie, MI	5/96	B.S.
Alexander Blewett III School of Law	Missoula, MT	5/00	J.D.

8. List any scholarships, awards, honors and citations that you have received:
9. Were you a member of the Law Review? If so, 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 State Courts	2000

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

Montana Attorney General's Office, Prosecutions Services Bureau Chief

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>
Missoula County Attorney's Office 200 West Broadway St. Missoula, MT 59802	Legal Intern	4/99 to 5/00
Mineral County Attorney's Office 300 River St. Superior, MT 59872	Legal Intern	5/00 to 8/00
Cascade County Attorney's Office 121 4 th St. N. #2a Great Falls, MT 59401	Deputy County Attorney	9/00 to 7/01
Flathead county Attorney's Office 920 S. Main St. Kalispell, MT 59901	Deputy County Attorney	7/01 to 11/07
Montana Attorney General's Office 215 N. Sanders Helena, MT 59601	Assistant Attorney General	11/07 to 2/18

Employer's Name (cont.)

Position

Dates

Montana Attorney General's Office
215 N. Sanders
Helena, MT 59601

Prosecution Services Bureau Chief 2/18 to present

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.

Ninety-five percent of my law practice is dedicated to the practice of criminal law. I am employed as Montana Attorney General's Office Prosecution Services Bureau Chief. I supervise the attorneys and support staff of the Prosecution Services Bureau, and the child protection unit. The primary function of the Prosecution Services Bureau is to assist local county attorneys with complex criminal cases and conflict of interest cases.

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

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

I have presented at various continuing legal education conferences on topics related to trial practice, prosecuting child sexual assault cases, providing expert testimony, and preparing victims to testify in court.

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

I specialize in prosecuting violent crimes with a focus on the prosecution of homicide and child sexual abuse cases. Prior to becoming Prosecution Services Bureau Chief, I was a member of the Montana Attorney General's Office Child Sexual Assault Prosecution Team.

17. Do you regularly appear in court?

Yes.

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

Federal court	_____	%
State or local courts of record	100	%
Administrative bodies	_____	%
Other	_____	%

18. During the last five years, what percentage of your practice has been trial practice?
100%
19. How frequently have you appeared in court?
Six times per month on average.
20. How frequently have you appeared at administrative hearings?
I appear at Parole Board and Sentence Review Hearings an average of four times per year.
21. What percentage of your practice involving litigation has been:
- | | |
|----------|-----|
| Civil | 5% |
| Criminal | 95% |
| Other | 0% |
22. Have you appeared before the Montana Supreme Court within the last five years? If so, state the number and types of matters handled. Include the case caption, case citation (if any), and names, addresses and phone numbers of all opposing counsel for the five most recent cases.
No.
23. State the number of jury trials that you have tried to conclusion in the last ten years.
18
24. State the number of non-jury trials that you have tried in the last ten years.
1
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.

State v. Cruz, Cause No. DC-17-06, Twelfth Judicial District Court, Liberty County, MT.

Jury Trial: May 2018

Sentencing: August 1, 2018

Opposing Counsel: Kaydee Snipes Ruiz (Hon.), Twelfth Judicial District Court
315 4th Street, Havre, MT 59501 (At the time of trial was with
the Office of Public Defender). 406-265-5481

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

State v. Jeffords, Cause No. DC-17-07, Twelfth Judicial District Court, Liberty County, MT.

Jury Trial: June 2018 Sentencing: August 15, 2018

Opposing Counsel: Mr. Lawrence Lafountain, Assistant Public Defender Office of the
State Public Defender, 615 2nd Ave. North Great Falls, MT 59401.
406-770-3200.

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

State v. Barrus, First Judicial District Court, Cause No. CDC-17-15, Broadwater County, MT.

Sell Hearing-Forced medication of antipsychotic drugs to render fit to proceed (5-day hearing):
December 2018

Trial is set for spring of 2021.

Opposing Counsel: Greg Jackson, 310 11th Avenue, Helena, MT 59601. 406-443-2140. Craig
Shannon, Attorney at Law, 240 East Spruce Street, Missoula, MT 59802. 406-
542-7500.

Presiding Judge: Hon. Kathy Seeley, First Judicial District Court of Montana.
406-447-8209.

State v. LaForge, Sixth Judicial District, Cause No. DC-18-01, Sweet Grass County.

Jury Trial: January 2019 (case settled after it commenced)

Opposing Counsel: Mariah Eastman, 217 S. Main St., Three Forks, MT 59752.
406-285-6724.

Presiding Judge: Hon. Brenda Gilbert, Sixth Judicial District Court of Montana. 406-222-4130.

Norquay v. State, Twelfth Judicial District Court, Cause No. DV-12-093, Hill County, MT.

Postconviction Relief Hearing (4 days): January 2020

Opposing Counsel: Phyllis Quatman, 600 8th St. E., Whitefish, MT 59937. 406-863-2385

Presiding Judge: Hon. Yvonne Laird, P.O. Box 470, Malta, MT 59538. 406-654-1062.

State v. Strommen, Cause No. DC-2018-32, Valley County, MT.

Jury Trial: July 2020

Sentencing: Set for Fall 2020

Opposing Counsel: Jason Holden and Katie Ranta, Faure Holden Attorneys at Law, P.C.
P.O. Box 1314 Central Avenue, Great Falls, MT 59401. 406-452- 6500.

Presiding Judge: Hon. John Larson, Fourth Judicial District Court of Montana.
406-258-4773

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

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

27. If you have published any legal books or articles, other than Law Review articles, 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.

Lectures/Presentations:

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

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

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

Presenting Ballistic Evidence in the Courtroom. Montana County Attorney's Association Conference, July 2013. I presented on introducing expert ballistic testimony at trial. The attendees were prosecutors.

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

Prosecuting the Difficult Sexual Assault Case. This training was conducted in several locations around the state to county prosecutors, June 2014. I presented on how prosecutors can effectively work with child sexual abuse victims and prepare them to testify in court. I also made a separate presentation on the use of expert witnesses in sexual abuse cases.

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

Direct Examination of Dr. Vanino (State v. Pinner). Montana County Attorney's Association Conference, July 2017. I jointly presented with Dr. Sheri Vanino and another Assistant Attorney General. The presentation related to the general use of expert testimony in adult rape cases and a case study of the trial of Charles Pinner, which I prosecuted. The presentation was made to prosecutors.

Evidence 101 for Prosecutors. Montana Attorney General's Office Prosecutor Boot Camp Training, January 2019. The presentation focused on general principles governing Montana Rules of Evidence with a focus on hearsay, introducing evidence, and presenting expert testimony. The presentation was made to prosecutors.

Cross Examination Lecture. Montana Attorney General's Office Prosecutor Boot Camp Training, January 2019. The presentation focused on how to cross examine witnesses which included legal principals related to cross examination.

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.

Montana Bar Association, September 2000 to present.

29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. 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.

Member of Rocky Mountain Elk Foundation (RMEF)

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

Yes. I was candidate for the Montana State Senate, Senate District 42, Lewis and Clark County, 2015 Legislature.

In 2015, I was an applicant for the appointment of Judge Jeffrey Sherlock's vacancy. I was one of several attorneys nominated by the Judicial Nomination Commission and was subsequently interviewed by Governor Bullock.

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

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

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.

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

35. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, 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.

Not applicable.

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)?

Not applicable.

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

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

I draft legal briefs on a wide range of issues, including various constitutional matters. I assist law enforcement in preparing search warrants and investigative subpoenas. I draft judgments, various orders, and proposed findings of facts and conclusions of law for the court. I also prepare responses to postconviction relief petitions, which are civil in nature. I draft all legal writings that I submit.

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

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.

Not applicable.

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. The writing sample should be as recent as possible.

Please see attached.

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

50%

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

Yes.

H. MISCELLANEOUS

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

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

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

I have worked at a variety of jobs in my life. My first job was in middle school as a newspaper delivery boy. While in high school, I worked in a pizzeria, ice cream shop, and daycare (afterschool program). While in college, I was a resident advisor (RA). I also worked several years as a bartender, and a member of the ground crew for a tree removal business. During law school, I worked as a waiter at MacKenzie River Pizza in Missoula. I also worked as a paid legal intern for the Missoula County Attorney's Office. While preparing for the bar exam, I worked for the Mineral County Attorney's Office as a paid legal intern. After passing the bar, I worked for the Cascade County Attorney's Office, and the Flathead County Attorney's Office as an Assistant County Attorney. I am presently working for the Montana Attorney General's Office as an Assistant Attorney General and Prosecution Services Bureau Chief.

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

As an Assistant Attorney General, I travel throughout Montana prosecuting complex criminal cases while spending large periods of time away from home and family to serve the public. This leaves me with little time to dedicate to pro bono work. I make these sacrifices because I believe in public service.

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

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

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

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

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

Montana district court judges act with tremendous independence. The decisions rendered by a district court judge are always significant and often life-changing for the participants. Only a fraction of a district court judge's actions is reviewed by the Montana Supreme Court. Moreover, the way a district court judge manages his or her caseload is largely left to the judge. For these reasons, I believe the important qualities of a good district court judge are the ability to create an environment where all the participants are treated with respect, the ability to rule correctly and promptly on the various issues that come before the court, and the ability to decide matters fairly and impartially.

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

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

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 is required to follow established fixed precedent that is binding upon the lower court. The rulings established by courts may be binding upon a trial judge or may be persuasive authority. A Montana district court judge may disagree with a higher court's holding on a legal matter and in writing their opinions may express dissatisfaction with the upper courts' holdings. However, district court judges do not have the discretion to reject established case law from the Montana Supreme Court or the United States Supreme Court. In many instances, there is not established precedent and district court judges may rely on persuasive authority to make their rulings. The role of a district court judge is not to change existing law which has already been established by binding courts, but is to apply the law. Our system of justice would not function if trial judges could reject established precedent. Individuals, institutions, and business interest could not function without the ability to rely on the stability that our "common law" system of justice affords us. Prior binding case law may be wrong. The case law may deprive individuals or groups of dignity and equality. Also, existing case law may be detrimental to our democracy and an affront

to suffrage. When this happens, our appellate courts should move rapidly to reverse the course that other judges before them have taken. However, this is not the duty of the trial court.

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

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

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

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

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

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

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

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

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?

I have tried approximately 41 felony jury trials. Many of these trials were lengthy and complex. During the last 20 years I have had the benefit of spending hundreds of hours in a court room observing all aspects of district court proceedings. I have done this with my eyes wide open watching how the myriad of issues that arise play out in the court room. I have watched and I have learned.

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

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 1st Judicial District, if tendered by the Governor, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.

8-16-20

(Date)

Daniel Giesbrecht

(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, August 27, 2020.

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

DANIEL GUZYNSKI
OLE OLSON
Assistant Attorneys General
Special Deputy Teton County Attorneys
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026

COUNSEL FOR STATE

MONTANA NINTH JUDICIAL DISTRICT COURT, TETON COUNTY

STATE OF MONTANA, Plaintiff, v. MARTIN LAU, Defendant.	Cause No. DC-12-009 STATE'S REPLY TO DEFENDANT'S RESPONSE TO STATE'S FIRST MOTION IN LIMINE, DATED DECEMBER 12, 2013
------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------

INTRODUCTION

Daniel Guzynski, Assistant Attorney General for the State of Montana and Special Deputy County Attorney for Teton County, respectfully submits the State's Reply to Defendant's Response to State's Motion in Limine, Dated December 12, 2013.

The State understands that the Defendant wishes to vilify the victim in front of the jury. However, there are rules of evidence that control the Defendant's ability to introduce victim character evidence in self-defense cases. In the present case, the Court has previously ruled, pursuant to Mont. R. Evid. 404(b), that the State is prohibited from introducing evidence of the Defendant's character. The State did not object to that ruling because the Court's ruling preventing the State from introducing the Defendant's character is what the rules of evidence demanded. Likewise, the Defendant should be

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

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

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

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

I. General Rule Regarding Character Evidence

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

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

....

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

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

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

II. Character of Victim

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

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

III. Methods of Proving Character

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Foundational Requirements for Introduction of Specific Conduct of Victim

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

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

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

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

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

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

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

Daniels, ¶ 27.

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

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

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

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

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

CONCLUSION

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

Dated this 14 day of January, 2014.

DANIEL GUZYNSKI
OLE OLSON
Assistant Attorneys General
Special Deputy County Attorneys
for Teton County

By:


DANIEL GUZYNSKI

CERTIFICATE OF SERVICE

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

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

Dated: January 14, 2014

Lia Coni