

APPLICATION FOR

**DISTRICT COURT JUDGESHIP
Fourth Judicial District**

A. PERSONAL INFORMATION

1. Full Name: **Larry Dean Mansch**
 - a. What name do you commonly go by? **Larry**
2. Birthdate: [REDACTED] Are you a U.S. citizen? **Yes**
3. Home Address: [REDACTED] Phone: [REDACTED]
4. Office Address: **Montana Innocence Project P.O. Box 7607 Missoula, MT 59801**
Phone: **(406) 243-6698**
5. Length of residence in Montana: **37 years**
6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
October 1987 - present	Missoula	Montana

B. EDUCATIONAL BACKGROUND

7. List the names and location of schools attended beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
Slayton High School	Slayton, MN	1976	HS Diploma
Hamline University	St. Paul, MN	1980	Bachelor of Arts
Creighton University	Omaha, NE	1983	Juris Doctor
Judge Advocate General School, Univ. of Virginia	Charlottesville, VA	2001	Army Officer Basic Course
Judge Advocate General School, Univ. of Virginia	Charlottesville, VA	2003	Army Officer Advanced Course

Command and General Staff College	Fort Carson, CO	2004	CGSC Diploma
University of Montana	Missoula, MT	2006	M.Ed.
University of Montana	Missoula, MT	_____	Ph.D (pending)

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

I was a National Honor Society student in high school, and earned ten varsity letters in four different sports, including all conference and all region recognition. I received numerous academic scholarships as part of my financial aid award at Hamline University. I was twice named to the Dean's List, and I earned six varsity athletic letters, three each in basketball and baseball. During my military career, I was awarded the Distinguished Service Medal, the Army Commendation Medal (2), and the Meritorious Service Medal, among others.

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.

I was not a member of the Law Review.

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>Admission</u>
Montana State District Courts	1984
Montana State Supreme Court	1984
United States Federal District Court	1984
Tribal Court, Confederated Salish and Kootenai Tribe	1990
United States Army Court of Military Review	1991
United States Supreme Court	1994

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

I am presently Legal and Clinic Director/Senior Counsel at the Montana Innocence Project in Missoula. Caiti Carpenter is also an attorney with MTIP.

12. State the name, dates and addresses of law firms with which you have been associated in practice, governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
Montana Innocence Project	Legal and Clinic Director	2008-present

Mansch & McLaverty, PLLP	Managing Partner	2000-2004
Judge Advocate General, MTARNG	Attorney	1991-2011
Missoula County Public Defender	Senior Attorney	1985-1999
7th Judicial District Public Defender	Attorney	1984-1985
7th Judicial District, Hon. R.C. McDonough	Law Clerk	1983-1984
Montana Taxpayers Association	Law Clerk	1983
Montana Department of State Lands	Law Clerk	1982

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

I have been continuously employed since completing law school in 1983.

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

As senior counsel for the Montana Innocence Project, I am responsible for supervising investigation, case development, and litigation efforts on behalf of the organization. I coordinate legal strategies with staff attorneys, investigators, the executive director, the Board of Director's litigation screening committee, and all *pro bono* volunteer attorneys. I also coordinate our organization's CLE program, and have spoken at bar association meetings and conferences across the state. As clinic director, I supervise third-year law school students working for credit, as well as volunteer students within our clinic. The nature of post-conviction proceedings is civil in nature, although prosecutions are grounded in criminal law. My practice is thus equally divided between civil and criminal law.

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

I have twenty years of experience as a Montana Public Defender. I was one of the original attorneys in Missoula, which was the first full-time Public Defender office in Montana. I eventually was named Senior Attorney, and represented hundreds of clients, adults and juveniles, charged with crimes (both felonies and misdemeanors). I also served as Guardian ad Litem in Dependent and Neglect cases, and represented those alleged to be seriously mentally ill. I was managing partner for a private law firm for five years, with offices in both Missoula and Hamilton. Our firm practiced in the areas of criminal defense, family law, personal injury, and probate law.

I served for twenty years as a Judge Advocate General with the Montana Army National Guard, retiring in 2011 with the rank of Lt. Colonel. As a JAG, my areas of practice included Claims, Contracts, Operations Law, Line of Duty, Environmental Law, and Military Justice, among others. I prepared hundreds of Wills and Powers of Attorneys for soldiers deploying overseas. I served as regional Trial Defense Services coordinator, and represented dozens of soldiers who faced administrative discharge and separation from the service. During overseas tours of duty in Germany and Panama, I worked closely with Command, Trial Defense Services, and Legal Services.

Since 2016, I have taught Criminal Adjudication, Criminal Justice Systems, and Wrongful Convictions courses at the University of Montana. I teach courses on the History of American

Jurisprudence for UM's Osher Lifelong Learning Institute (MOLLI). I have also taught legal courses for the Missoula Community Legal Program and the Missoula Continuing Education Program.

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

I specialize in criminal law, civil post-conviction law, military law, and appellate practice.

17. Do you regularly appear in court? **Yes.**

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

Federal court	<u>15</u>	%
State or local courts of record	<u>80</u>	%
Administrative bodies	<u>5</u>	%
Other		%

18. During the last five years, what percentage of your practice has been trial practice? 10 %

19. How frequently have you appeared in court? 1-2 times per month on average.

20. How frequently have you appeared at administrative hearings?

I have occasionally appeared in front of the Montana Parole Board.

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

Civil	<u>50</u>	%
Criminal	<u>50</u>	%
Other		%

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.

Marble v. State of Montana, 2015 MT 242, 355 P.3d 742, 289 Mont. 366.

This was an appeal by the Montana Innocence Project of the district court's ruling in a post-conviction relief action. The case was remanded by the Supreme Court, and the charge was dismissed.

Opposing counsel

**Timothy Fox, Tammy K. Plubell
Montana Attorney General
215 N. Sanders**

**Helena, MT 59601
(406) 444-2016**

**Kirsten Pabst
Missoula County Attorney
200 W. Broadway
Missoula, MT 59801
(406) 721-5700.**

***Wilkes v. State of Montana*, 2015 MT 243, 366 P.3d 755, 380 Mont. 388.**

This was an appeal of the district court's ruling in a post-conviction relief action. Upon remand from the Supreme Court, the matter is set for trial in August 2019.

Opposing counsel

**Timothy Fox, Pamela P. Collins
Montana Attorney General
215 N. Sanders
Helena, MT 59601
(406) 444-2016**

**Kirsten Pabst, Suzy Boylan, Brian Lowney
Missoula County Attorney
200 W. Broadway
Missoula, MT 59801
(406) 721-5700**

***Garding v. State of Montana*, DA 19-0226**

This is an appeal of the district court's ruling in a post-conviction relief action. The charge is vehicular homicide.

Opposing counsel

**Timothy Fox
Montana Attorney General
215 N. Sanders
Helena, MT 59601
(406) 444-2016**

**Kirsten Pabst, Jennifer Clark
Missoula County Attorney
200 W. Broadway**

**Missoula, MT 59801
(406) 721-5700.**

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

I have not tried any cases to conclusion in the last ten years. As a longtime public defender, I have tried dozens of cases over the course of my career.

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

I have not tried any non-jury trials in the last ten years.

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 of Montana v. Robert James Wilkes, DC 09-181 (Missoula County)

The defendant in this case was convicted of homicide in 2009. The Montana Innocence Project filed a petition for post-conviction relief. Upon remand from the Montana Supreme Court, the conviction was overturned by the district court. This case will proceed to trial in August 2019. My co-counsel is Tobias J. Cook and Colin M. Stephens.

Opposing counsel

**Brian Lowney
Deputy Missoula County Attorney
200 W. Broadway
Missoula, MT 59801
(406) 721-5700**

Presiding Judge

**Hon. Leslie Halligan
Missoula County Courthouse
200 W. Broadway
Missoula, MT 59801
(406) 258-4771**

Katie Irene Garding v. State of Montana, DA 19-0226 (Missoula County)

This is an appeal of the district court's ruling in a post-conviction relief action. My co-counsel is Tobias J. Cook and Colin M. Stephens.

Opposing counsel

**Timothy Fox
Montana Attorney General
215 N. Sanders
Helena, MT 59601
(406) 444-2016**

**Jennifer Clark
Deputy Missoula County Attorney
Missoula County Courthouse
200 W. Broadway
Missoula, MT 59801
(406) 721-5700**

Presiding Judge

**Hon. John W. Larson
(406) 258-4473**

United States of America v. Bill Tyrone James Descharm Watson (06-45-GF-BMM)

This is a pending Federal post-conviction relief case centered on DNA testing. The defendant was convicted of attempted sexual intercourse without consent. My co-counsel is Tobias J. Cook and Wendy Holton.

Opposing counsel

**Timothy A. Tartarka
Assistant United States Attorney
2601 Second Avenue North, Unit 3200
Billings, MT 59106
(406) 657-6101**

Presiding Judge

**Hon. Brian M. Morris
(406) 454-7800**

State of Montana v. Richard Burkhart, ADC-01-493 (Cascade County)

The defendant was convicted of deliberate homicide in 2002. The defendant was exonerated based upon newly discovered evidence of innocence. After the district court judge overturned the

conviction, the State of Montana declined to re-try the case and dismissed the charge. My co-counsel was Tobias J. Cook.

Opposing counsel

**Joshua A. Racki
Cascade County Attorney
121 4th Street North
Great Falls, MT 59401
(406) 454-6915**

Presiding Judge

**Hon. John A. Kutzman.
(406) 454-6811**

Freddie Jo Lawrence and Paul Kenneth Jenkins v. State of Montana, No. CDC-94-215 (Lewis and Clark County)

The defendants were convicted of deliberate homicide in companion cases in 1994. The Montana Innocence Project secured the defendants' exoneration based upon newly discovered evidence of innocence. After the district court judge overturned the conviction, the State of Montana declined to re-try the case and dismissed the charges. My co-counsel was Tobias J. Cook, Larry Jent, and Thad Adkins

Opposing counsel

**Catherine Truman, Mary Cochenour
Assistant Attorney General
P.O. Box 201401
Helena, MT 59620-1401**

Presiding Judge

**Hon. Kathy Seeley
(406) 447-820**

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

As part of representing Innocence Project clients in post-conviction proceedings, I have appeared in front of Montana's Parole Board on at least three occasions in the last five years.

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.

I co-authored a business law textbook, *The Legal Environment of Business* (Abbott Publishing, 2001), with Professors Chris A. Carr (California Polytechnic University); Denny D. Eshee, Jr. (Mississippi State University); Jerry L. Furniss (University of Montana); Pearson Liddell, Jr. (Mississippi State University); and Jack K. Morton (University of Montana).

I have presented at numerous CLE programs, seminars, and bar association groups including:

2/26/2015	Tribal Defenders Open House, Pablo
4/30/2016	Truth and Justice Film Series: The Syndrome
5/3/2016	Holistic Representation
9/30/2016	Browning Symposium 2016
10/4/2016	<i>Brady v. Maryland</i>: An Innocence Perspective, Helena
10/5/2016	An Innocent Man: The Kirk Bloodsworth Story
10/26/2016	The Syndrome: Film & Discussion
4/4/2017	Ethics for Criminal Defense Lawyers
9/19/2017	Truth and Justice Film Series
10/17/2017	Truth and Justice Film Series
11/1/2017	Montana Innocence Project on <i>Brady</i> Developments, Billings
1/16/2018	Wrongful Convictions Film and Panel Discussion
1/23/2018	Wrongful Convictions/MT Innocence Project Film Series
2/20/2018	Wrongful Convictions Film and Panel Discussion
2/27/2018	Tribal Defenders Open House, Pablo
3/20/2018	Wrongful Convictions Film and Panel Discussion
4/4/2018	Wrongful Convictions Series, Pt.1: Anatomy of Wrongful Convictions
5/3/2018	Wrongful Convictions Series, Pt.2: DNA: A Potential Game Changer
6/7/2018	Wrongful Convictions Series, Pt.3: False Confessions, Mistaken Eyewitnesses, etc.
10/18/2018	Montana District Court Judges Convention, Butte
9/14/2018	MTACDL & OPD Criminal Defense Gridiron CLE, Helena

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.

I am a member of the Montana Bar Association, the Western Montana Bar Association, the National Association of Criminal Defense Lawyers (all since 1985), and the Montana Association of Criminal Defense Lawyers (since 2015).

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.

I served on Montana's Public Defender Commission in 2015 and 2016, and worked on issues ranging from funding to accessibility, in order to improve our state's indigent services

program. I am currently President of UM's Louise Burke Center for Holistic Representation. This client-centered, interdisciplinary approach to representation addresses issues that bring people into the criminal justice system (e.g. poverty, chemical dependency), as well as the collateral consequences to criminal charges.

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

I have never run for or held public office.

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

Public involvement and dedication to community service is the best way to ensure a productive, fulfilling, and meaningful life. I believe that we are all blessed with unique skills and talents, and it is our responsibility to utilize those talents to the best of our ability. The practice of law is uniquely situated, for it provides a wealth of opportunities to serve – to represent the poor and disadvantaged, for example; to work to resolve disputes in good faith whether through mediation, compromise, or litigation; and to train the next generation of professionals who will carry on based on the foundation we set forth. The legal profession has the duty to make our communities better places to live. My family life, involvement in education and athletics, and of course the many opportunities the legal education has provided, are all reflections of my philosophy of public involvement.

E. PROFESSIONAL CONDUCT AND ETHICS

32. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.

No.

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

No.

34. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

No.

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

No.

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

No.

F. BUSINESS AND FINANCIAL INFORMATION

37. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, provide the details, including dates.

I have served as an Adjunct Professor at the University of Montana since 2016, and as a MOLLI instructor since 2015. I taught Social Studies for the Missoula Public School System for one year (2002-2003), and for Missoula Catholic Schools for ten years (2003-20013). I was an officer in the Montana Army National Guard from 1991-2011.

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.

N/A

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.

As an Adjunct Professor and MOLLI instructor at UM, I receive compensation for the courses I teach each semester. The approximate percentage of my total income is 10%. I also receive royalties for book sales. The approximate percentage of total income is 3%.

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

No.

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

Yes.

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

If not, please explain.

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

If yes, please explain.

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

No.

G. WRITING SKILLS

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

Because the bulk of my work at the Montana Innocence Project is appellate-based, I conduct extensive legal research and writing: petitions for post-conviction relief, pleadings, motions, briefs, findings and conclusions, etc. I do much of the work myself. On occasion, I utilize third-year law clinic students to assist. I also work with *pro bono* volunteer attorneys on various writing projects. I conduct final edits before filing any and all documents.

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

I have drafted numerous Wills and Powers of Attorney for friends, family, and associates over the years.

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.

48. What percentage of your practice for the last five years has involved research and legal writing?
80 %

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

I am competent in Westlaw.

H. MISCELLANEOUS

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

I have loved living in Missoula for the past 34 years. My family has been, and is, the center of my life. My wife Kim, a Missoula native, earned her B.S., CPA, and MBA degrees from UM. Until her passing earlier this year, she served as Executive Director for Partnership Health Center. Kim was passionate about providing quality health care to all people regardless of income or station in life – the same way I believe in equal justice for all. Together Kim and I raised four children: Bethany, Lincoln, Abigail, and Madison. I coached all of them from Little League and YMCA sports through high school athletics. All earned undergraduate degrees and beyond, all competed in athletics through college, and all now enjoy fruitful lives and successful careers. In my spare time, I enjoy following sports, floating the river, hiking around Yellowstone Park, photography, and reading (usually history and biography). In addition to previously serving on governing boards of the Public Defender Commission, American Legion baseball, and Immanuel Lutheran Church, I presently serve as President of UM's Louise Burke Center for Holistic Representation.

I also love to research and write, and have had five books published. My most recent book, *Martin Luther: The Life and Lessons*, co-written with Dr. Curtis Peters, takes a fresh look at the man who started the Protestant Reformation. *Abraham Lincoln, President-Elect* was the first book featured at the Abraham Lincoln Presidential Library and Museum in Springfield, Illinois, and *Abraham Lincoln*, ghostwritten for Sen. George McGovern, was the top seller in Times Books' *American Presidents* series. *Rube Marquard: The Life and Times of a Baseball Hall of Famer*, was a finalist for the Seymour Medal, awarded annually to the nation's best baseball book. The *Legal Environment of Business*, co-written with other UM faculty members, is used in universities and business colleges around the country. While a doctoral student at UM, I wrote *Abraham Lincoln and the Dakota War in Academic and Popular Literature*, published by the James Madison University Historical Review. Since 2016, this article has been downloaded over 600 times by scholars and historians.

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

My parents were hard workers and instilled in my siblings and me a strong work ethic. In high school, I was custodian for our church and worked every night at my father's movie theatre. During my college years, I worked at the university food service and for the security program. During the summers, in addition to working at the theatre, I managed the town country club, worked for the community education office, and coached American Legion baseball. In law school, I worked at the law library, stacking shelves and assisting with student research between classes and on weekends.

I began working in the law during my law school summers. In 1982 I worked for the Montana Department of State Lands, researching legal issues and drafting memoranda for the agency's attorneys regarding state leases, grazing rights, oil and gas claims, and reclamation issues. In 1983, I worked at the Montana Taxpayers Association. I worked on education equalization and funding issues, and although still a student, I was granted permission to present an oral argument before the Montana Supreme Court in a case involving West Yellowstone's hotel bed tax. I was gratified that the Court adopted some of the precise language of my argument in its decision. *Montana Innkeepers Association v. City of Billings*, 206 Mont. 425, 671 P.2d (1983). In addition to working fulltime that summer, I also studied on my own for the bar exam.

In September of 1983, I began working as law clerk for the Hon. Russell C. McDonough of the 7th Judicial District, which then encompassed Dawson, Richland, Wibaux, and McCone

counties. In addition to performing legal research on a wide variety of cases involving civil and criminal law, I drafted Findings and Conclusions, Orders, and Opinions for Judge McDonough. I also observed many hearings, trials, and other proceedings, and watched and learned about how the legal system works – and how a good Judge goes about his or her duties.

I became Richland County's public defender in 1984, and took appointments throughout Eastern Montana. I also worked as an associate for Kathleen Fritsch, P.C., and gained experience in family law and civil litigation. I honed my skills as a trial attorney and came to love courtroom work. In November 1985, Missoula County became the first county in Montana to establish a fulltime Public Defender office, and I was hired as one of five attorneys. I worked at this office for 13 years, rising to Senior Attorney status, representing hundreds of clients and taking many cases to trial. I also appealed many decisions to the Montana Supreme Court.

In 1991, I was commissioned an officer in the Montana Army National Guard and placed with the Office of Judge Advocate General. I completed both the Army's basic and advanced courses, and then graduated from Command and General Staff College. Over the next twenty years, I worked in Claims, Operations, Contracts, and other areas of practice. I served as Regional Trial Defense Services Coordinator and represented many soldiers facing separation and discharge. I was fortunate to complete brief tours of duty in Germany and Panama. My military experience reinforced my belief in discipline, dedication, and service. I retired in 2011 with the rank of Lt. Colonel.

In 2000, I left the Missoula Public Defender office and entered private practice. Our office grew to include five attorneys with offices in Missoula and Hamilton. I practiced criminal defense, as well as family law, probate, and personal injury.

In 2006, I was awarded a Master's in Education from the University of Montana. I spent ten years teaching Social Studies, first at Hellgate Middle School, and then for Missoula Catholic Schools. I taught courses in American History, Civics, World History, Mathematics, Economics, Theology, Physical Education, and Geography. I also designed a course entitled History of American Law, which evolved into the Street Law program. In addition to many other duties, both inside and outside of the classroom, I coached basketball for six years and was part of a state championship in 2006.

In 2008, I joined the brand-new Montana Innocence Project as staff attorney, then a part-time position. The project grew rapidly, and I became full-time Legal and Clinic Director in 2015. I oversee all aspects of case investigation and litigation, and supervise third-year law students for their clinic experience. Over the last decade our project has reviewed over 800 cases. I also design and present CLE programs across the state.

I began working as an Adjunct Professor for UM's Sociology/Criminology department in 2016. I teach courses in Criminal Adjudication, Criminal Justice Systems, and Wrongful Convictions. On three occasions, students have selected me as their most outstanding professor, and I have been honored to be recognized at Grizzly games. For the last four years I have also served as an instructor for UM's Osher Lifelong Learning Institute (MOLLI). My most recent courses include a jurisprudence class called Great American Trials; next year will be the third installment in this series.

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

In addition to offering legal services to family and friends (the preparation of Wills and Powers of Attorney), I served on Montana's Public Defender Commission from 2016 to 2017. The Commission was disbanded in 2018 as part of a restructuring of the state OPD.

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

The Honorable Russell C. McDonough served as my mentor and role model in Montana's legal community. I was fortunate to serve as Judge McDonough's first law clerk in Glendive from 1983 to 1984. As we travelled around Eastern Montana, I closely observed how he handled himself in and out of the courtroom. It quickly became obvious why Judge (later Justice) McDonough commanded such respect from attorneys and litigants. He presided with dignity and compassion. He was patient and fair. He treated every case before him as the most important case on the docket or under consideration. Judge McDonough was always prepared, and he taught me that there is no substitute for hard work. He made tough decisions, always based on the facts and the law. He did not allow personal opinion or prejudice to enter into his decisions. I learned from Judge McDonough, a World War II fighter pilot and true hero, that the law is an honorable profession, meant for honorable men and women. Throughout my career, I have believed that lawyers have an obligation to uphold that honor every single day.

Some ten or twelve years ago, I was fortunate enough to meet Senator George McGovern. I ghost-wrote a biography of Abraham Lincoln for him, and as we worked together we became close friends. Many people remember McGovern as the man who lost to Richard Nixon in the 1968 presidential race, but there was much more to the man. Like Judge McDonough, he was a highly decorated fighter pilot. In the 1950s and 60s he was a very influential Senator who never forgot that he served the people who elected him. He labored to enact legislation that mandated fair prices for farmers and ranchers. He was most supportive of social justice issues. He fought hunger on the world stage until the end of his life. Sen. McGovern never lost sight of average, everyday people, and he believed government ought to ensure that the system works for them. We talked many times about the importance of the legal system, and how it was essential that everyone have a voice. He believed, as I do, that fundamental fairness and the opportunity to be heard must be the very core and fabric of our legal system.

From a historical perspective, I have always admired the way that Abraham Lincoln practiced law. He was at his happiest when he was out among the people on the Illinois circuit, seeking justice for his clients. He sometimes served as prosecutor and sometimes as defense counsel; because his skills were so admired, on occasion he was asked to serve as judge. No matter the role, he gave his very best because he believed in the system, and he believed a lawyer's duty was to work for justice on behalf of his clients. Like Judge McDonough and Senator McGovern, Lincoln believed that the law was an honorable profession, and those of us who work in the law are obligated to improve it whenever and wherever we can.

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

I believe that a good district court judge must consistently exhibit certain qualities. If selected to serve, I will bring the following qualities, ideals, and beliefs to the bench:

I will serve with fairness and compassion, and with a commitment to the administration of justice.

I will conduct my court with honor and dignity.

I will treat counsel and clients, and all those who appear in court, with respect – for the individuals, the positions they hold, and the arguments they make.

I will treat each and every case with patience and impartiality.

I will reserve judgment until all evidence is received and duly considered.

I will conscientiously apply controlling law to the facts presented.

I will deliver timely and reasoned decisions.

I will serve with a well-grounded sense of humility, with a deep appreciation for the gravity of the position and the importance of the office.

I will serve my profession, my community, and the good people who put their faith in me, to the absolute best of my abilities.

*

I am mindful of the words of Socrates, who summarized the essential moral philosophy of a judge this way: “*Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.*”

*

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.

The principle of legal precedent is an important one, for it leads to stability and consistency – the efficiency that courts can utilize, and the certainty that litigants are entitled to rely upon. Precedent must be followed when mandated by superior courts, and when the facts and issues in dispute are identical (or substantially similar). While judges often have wide amounts of discretion in many areas, that discretion cannot ordinarily overrule binding precedent.

That said, facts, issues, and disputes between the parties are often unique, and it may not be clear that the precise issue has been decided on prior occasions by superior courts. Flexibility in the law, then, provides for a careful analysis of the issue, a studious examination of precedent – whether binding or merely persuasive – and always with an eye toward a fair and just result.

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

I am motivated by a desire to serve. I learned at a very young age that we all have the responsibility to utilize our skills, talents, and gifts to better our community. I have been fortunate to practice law in this state, and this city, for 35 years. Good judges realize that the law evolves just as our society evolves. Within that context, judges must preside in courtrooms where complaints and disputes can be fairly heard and impartially decided.

I am motivated to bring my experience, my talents, and my work ethic to the office of district court judge. I have the energy to work hard, the temperament to preside with fairness, firmness, and compassion, and the desire to serve the community. My work as judge will reflect my belief in justice, equality, and dedication to upholding the rule of law. I am committed to serve the bar, the litigants, my community, and my state, with distinction and integrity.

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

I am most proud of two items or events in my legal career. First, I am proud to have served some twenty years as a Public Defender. It is hard and often thankless work. Public Defenders as a rule are overworked and underpaid and have limited resources. They fight against long odds every day. They work not for headlines or compensation but because they believe in our (imperfect) criminal justice system. Public Defenders are committed to the idea that every person deserves quality representation. They do not choose their clients but they are dedicated to serve them nonetheless. I have known many, many fine attorneys over the years, and I put Public Defenders on the same level as any. I don't believe there can be a higher call for any lawyer, and am proud to be one of them.

Second, as Legal Director of the Montana Innocence Project, I am proud to have secured the exonerations of six wrongfully convicted individuals, all in the last three years. Together these six people served nearly 100 years for crimes they did not commit. Each exoneration has been the result of teamwork, dedication, persistence, and the relentless efforts of our staff, student volunteers, investigators, and talented *pro bono* attorneys. Our organization has been recognized for our work not only in Montana, but nationwide. Dr. Greg Hampikian, who is one of the world's foremost DNA experts, recently called our project "the nation's best." For these very pleasant accolades, nothing matches the feeling of escorting a truly innocent person out of the prison grounds, and witnessing that person experience, once again, the taste of freedom. I am humbled and thankful for the opportunity to lead our project these last ten years.

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

I am proud to have earned the support and endorsement of many attorneys, veterans, community and civic leaders, legislators, colleagues and friends.

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?

There certainly will be highly qualified people who apply for the position of district court judge. I have confidence that any or all would make fine judges. I am also confident, however, that my experiences in the courtroom, my military service, and my academic credentials provide a unique and valuable combination of attributes. I also believe my work ethic, temperament, and value system will serve me well in the years to come. Life offers both challenges and opportunities. It is up to each of us to meet what comes our way with passion, dedication, and purpose. We have an obligation to utilize our talents, whatever they may be, to better our communities. If selected to serve as Missoula's next district court judge, I am committed to bring my value system, life experiences, and lessons learned to work every day.

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 Montana Code of Judicial Conduct, if appointed.

May 22, 2019

(Date)

Larry D. Menzies

(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, May 30, 2019.

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

(The following writing sample is taken from the Memorandum in Support of Petition for Post-conviction Relief, *Robert James Wilkes, Jr. v. State of Montana*, Cause No. DV-11-923 (Missoula County). The Petition was granted and Wilkes' conviction was overturned.)

*

Post-Conviction Procedures

1. Ineffective Assistance of Counsel

The right to effective assistance of counsel is guaranteed by the Due Process Clause of the Fourteenth Amendment, the Sixth Amendment of the United States Constitution, and Article II, Section 24 of the Montana Constitution. *Hartinger v. State*, 2007 MT 141, 337 Mont. 432, 162 P.3d 95, citing *Sellner v. State*, 2004 MT 205, 322 Mont. 310, 95 P.3d 708. A criminal defendant who brings an ineffective assistance of counsel claim bears the burden of proving that: (1) his counsel's representation fell below the objective standard of reasonableness; and (2) his counsel's failure was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *State v. Jefferson*, 2003 MT 90, 315 Mont. 146, 69 P.3d 641.

2. New evidence

When a claim to post-conviction relief is based on recent discovery of new evidence, it presents an exception to the general rule that a petition for post-conviction relief must be filed within one year of the date the conviction becomes final. MCA 46-21-102(1). If the claim alleges new evidence that would demonstrate the petitioner did not engage in the conduct leading to his conviction, the petition may be filed within one year of the date the petitioner

“discovers, or reasonably should have discovered, the existence of the evidence...” MCA 46-21-102(2).

In evaluating whether the petitioner is entitled to post-conviction relief, the Court employs a five-part test. *State v. Clark*, 125 P.3d 1099 (2005); *Crosby v. State*, 2006 MT 155 (2006). Under the test, the Court does not rule on the ultimate veracity of the new evidence, but rather evaluates the new evidence in terms of whether or not a new trial which included this evidence “would have the *reasonable probability* of resulting in a different outcome.” *Crosby* at ¶ 21.

To prevail on a motion for a new trial (extended to petitions for post-conviction relief by *State v. Crosby*, 2006 MT 155) grounded on newly discovered evidence, the defendant must satisfy a five-part test:

- (1) The evidence must have been discovered since the defendant’s trial;
- (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant’s part;
- (3) the evidence must be material to the issues at trial;
- (4) the evidence must be neither cumulative or impeaching; and
- (5) the evidence must indicate that a new trial has a reasonable probability of resulting in a new outcome. *Crosby*, at ¶ 19 quoting *Clark*, at ¶ 34.

Argument

1. Ineffective Assistance of Counsel

a. Failure to Adequately Prepare and Present at Trial

A defendant claiming ineffective assistance of counsel is first required to establish that counsel's performance was deficient. *Swan v. State*, 331 MT. 188, 130 P.3d 606 (2006). A defendant seeking to establish that counsel's performance was deficient must show that counsel's challenged actions stem from ignorance or neglect, rather than from professional deliberation. If deficient performance is established, the defendant must then establish that the deficient performance prejudiced the defendant. According to *Strickland*, counsel has a duty either "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*

Montana courts acknowledge that defense counsel has a duty to investigate and interview witnesses who may have knowledge of the case and counsel's complete failure to do so constitutes deficient performance. *State v. Denny*, 262 Mont. 248, 252-253. The Court in *Denny* stated, "The complete failure to investigate potentially corroborating witnesses . . . can hardly be considered a tactical decision." Counsel has a duty to either conduct reasonable investigations or make a reasonable decision that particular investigations are unnecessary.

Other jurisdictions agree. In a Missouri case, the state Court of Appeals applied a test to determine if, under the first prong of *Strickland*, a defense attorney's "failure to locate and present an expert witness" establishes deficient performance. *Gennetten v. State*, 96, S.W. 3d 143, 148 (2003). The test requires that the petitioner show that "such experts existed at the time of trial, that they could have been located through reasonable investigation, and that the

testimony of these witnesses would have benefitted movant's defense." *Id.* More recently, see *In re Hill*, 129 Cal. Rptr. 3d 856 (Cal. Ct. App. 2011). (Counsel ineffective in lewd acts against minor case for failing to obtain forensic examination photos and failing to secure medical expert testimony to contradict state's expert).

In the case at hand, Defense counsel's failures constitute ineffective assistance of counsel in the following ways:

- Failure to investigate, discover and secure expert medical witnesses who would have, through their own expert testimony, countered the expert testimony offered by the State; (*Buley Affidavit #14, Exhibit A.*)
- Failure to place before the jury evidence regarding the debate raging within the medical community about the validity of SBS; *Id.*
- Failure to discover and offer reasonable medical alternatives for the illness/symptoms exhibited by *Id.*

For at least the last decade, a debate has raged in the medical community regarding the validity of SBS and the so-called "triad of symptoms." Today, there is general agreement that child abuse was historically under-recognized and that abuse can produce subdural hemorrhage, retinal hemorrhage and brain damage—the "triad" of medical findings that has traditionally been used to confirm shaking or other forms of abuse. There is also general agreement that violently shaking a baby is unacceptable and could cause serious injury or even death. At the

same time, there is now widespread, if not universal, agreement that the presence of the triad alone - or its individual components - is not enough to diagnose abuse.¹

In the Robert Wilkes trial, only one side of this debate was presented to the jury, contrary to the adversarial process. As the attached Affidavits make clear, effective cross examination of these witnesses was not conducted. Defense counsel did not introduce evidence to attack or counter the opinions of the State's experts. Defense counsel did not call expert medical witnesses, who were available at the time of trial, and who could have testified for the defense. These defense witnesses would have bolstered Wilkes' own testimony that he did not purposely shake, drop, or harm [redacted] These witnesses would have made it unnecessary for counsel to argue at closing that Wilkes may have negligently committed such an act or acts, a position which was contrary to the Defendant's own testimony of absolute innocence.

A balanced view of the SBS debate could and should have been presented to the jury. Explanations for [redacted]'s symptoms could and should have been presented to the jury. Defense counsel failed to investigate, prepare, and present this critical information, which was readily available, and these failures constituted deficient performance which prejudiced Wilkes' defense under the *Strickland* standard. At a new trial, the elimination of defense counsel's errors combined with the new evidence set forth herein would result in a different outcome, namely, acquittal.

¹ Source: Findley, Barnes, Moran, Squier, *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right*, University of Wisconsin Law School, Legal Studies Research Paper Series Paper No. 1195, 2012. Also see Tuerkheimer, *The Next*

In his Affidavit, defense counsel Scott Spencer stated that at the time _____ was injured, his co-counsel in this case was representing Robert Wilkes in another matter. When

_____’s condition worsened, defense counsel was brought onto the case in anticipation of charges being filed. After conferring with Ed Sheehy, the regional director for the Office of the Public Defenders (OPD), defense counsel hired Dr. Tom Bennett, forensic pathologist, to consult on the case. *Affidavit of Scott Spencer* ¶ 2, Oct. 12, 2011.

According to defense counsel’s Affidavit, “Dr. Bennett is a pathologist who is sometimes employed by the State for conducting autopsies in potential criminal cases. Dr. Bennett is also conversant in child abuse cases, and has some level of expertise on child abuse. Dr. Bennett is frequently hired by OPD attorneys both as a consultant and as a witness at trial.” *Id.* at ¶ 3. According to defense counsel, while Gabriel was still alive, Dr. Bennett went to Spokane to review _____’s medical records and CT scans. Defense counsel is not completely sure whether Dr. Bennett ever actually examined _____. *Id.* at ¶ 4. Dr. Bennett consulted with defense counsel, stating that _____ suffered “a non-accidental rotational type injury” and it was “virtually impossible for _____ to have drunk a bottle of formula after the injury incurred; thus, _____ was injured after drinking the bottle at the babysitter’s residence.” Dr. Bennett did not examine _____ after the child’s death and did not again consult with defense counsel, according to the Affidavit. *Id.* at ¶ 5. Thus it appears that the one expert consulted by defense counsel, a forensic pathologist who specializes in conducting autopsies on deceased persons,

Innocence Project: Shaken Baby Syndrome and the Criminal Courts, Washington University Law Review, v. 87, No. 1, 2009. And see

never even reviewed the Medical Examiner's Pathology Report prepared by Dr. Aiken; nor did he independently review any part of the autopsy of . It is inexcusable that defense counsel could let this happen as he prepared to defend his client on a homicide charge.

Other than the State's witnesses, defense counsel did not consult with any other experts regarding Wilkes' case. Defense counsel claims that this was because the State's witnesses came to the same conclusions as Dr. Bennett. In his Affidavit, defense counsel stated, "If there was a different line of attack on the medical testimony I was not able to find it." *Id.* at ¶ 27. In other words, with or without the assistance of his sole expert, defense counsel failed to become educated about the ongoing SBS medical debate.

MTIP contacted Ed Sheehy, then regional Deputy Public Defender, and inquired about the decision to involve Dr. Bennett in the case. Specifically, MTIP asked,

"I am writing to ask if your recollection squares with Scott's. If so, please advise; if not, please explain any differences. Further, how was the decision made to contact and hire Dr. Bennett? How often have his services in child abuse cases been utilized by OPD, to your knowledge? Did you consider level of expertise, experience, reputation, cost, proximity, and availability when making this decision? Any other factors? As much information as you can provide us will be useful and appreciated." *Letter to Ed Sheehy, July 31, 2012.*

Mr. Sheehy, by letter dated August 7, 2012 responded as follows:

"In answer to your letter of July 31, 2012, my recollection of the Wilkes case is consistent with what Scott Spencer has said,

In regard to your other questions, I was the one who made the decision as the then regional Deputy Public Defender to hire Dr. Tom Bennett. Principally, this was done because he could immediately travel to Spokane, Wash. where the child who was then still alive was hospitalized. As a medical doctor, he could review the records and talk to the treating physicians. After his return from Spokane, he had a conference call with Susan and Scott-and

Affidavits of Dr. Stephens, et al, attached.

with me for part of the call. I don't know whether Dr. Bennett had at that time been involved in any child abuse cases for the OPD. However, I knew he had done a number of such cases for the State of Montana, other state prosecutions and defense, and a number of such civil cases- both plaintiff and defendant. I had a copy of his CV at the time but do not have it now. All of the matters you asked about were part of the decision to hire him but the most important was that he could get to Spokane immediately and give us an initial impression before the child died." *Letter to MTIP, August 7, 2012.*

MTIP has discovered that in this case trial defense counsel did not even obtain a copy of [redacted]'s death certificate, which lists the cause of death as "Undetermined." The certificate was not in the State's file, nor was it in the defense copies that MTIP received. This critical document was easily discoverable; MTIP received a copy of the certificate from Dr. Sally Aiken simply by requesting one.

Under *Strickland* and the cases set forth above defense counsel's failure to investigate demonstrates the deficiency in his performance. Defense counsel, by his own admission, spoke to just one expert, Dr. Tom Bennett, who simply corroborated the State's theory of the case. This fact was corroborated by his supervisor, regional Deputy Public Defender Ed Sheehy. This lone attempt to secure an expert is shockingly deficient considering the complex medical issues the case presented, and the large and varied number of medical experts the State planned to call as witnesses. Physicians specialize in different areas within their discipline. At a minimum, trial defense counsel should have contacted a pediatrician; a forensic pathologist; an ophthalmologist; a pediatric neurologist; and a pediatric neuro-radiologist, to counter the State's witnesses. The failure to do so is inexcusable, ineffectual, and prejudicial.

Defense counsel states that he discussed the case with the State's witnesses and conducted some internet research on the case. *Id.* at ¶¶ 9-10. His efforts, however, did not produce any information about the ongoing debate regarding the "triad" of symptoms and its relationship to SBS. This information would have been absolutely critical to the Defendant's case. This information was easily available and discoverable prior to trial. For example, some simple, basic research would have led counsel to law review articles such as the following (all available prior to trial in this matter), and all of which point out the particulars of the debate; that is, how "accepted" medical perceptions regarding SBS have been and are being regularly debated and challenged, both in academia and in courtrooms around the world:

- Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash. L. Rev. 1 (2009). (The author, Professor Deborah Tuerkheimer of the DePaul School of Law, wrote that "Shaken Baby Syndrome (SBS) is, in essence, a medical diagnosis of murder, one based solely on the presence of a diagnostic triad: retinal bleeding, bleeding in the protective layer of the brain, and brain swelling.") See also:
- Gena, *Shaken Baby Syndrome: Medical Uncertainty Casts Doubt on Convictions*, 2007 WIS. L. REV. 701;
- Uscinski, *Shaken Baby Syndrome: An Odyssey*, 46 Neurol Med Chir. 57 (2006);
- Lyons, *Shaken Baby Syndrome: A Questionable Scientific Syndrome and a Dangerous Legal Concept* 2003 Utah L. Rev. 1109. ("New scientific research has cast doubt on the forensic significance of this triad, thereby undermining the foundations of thousands of SBS convictions... For many years now, attorneys have been willing to prosecute, and juries have been willing to convict, people whose only clearly established mistake was caring for a baby that died. Considering the confused state of the medical evidence surrounding SBS, especially since it appears that shaking cannot harm a baby in the manner that has been described for the last thirty years, we should return to the standard proposed in 1962 (166). That is, people should not be accused of child abuse on the basis of subdural hematoma and retinal hemorrhaging alone. Courts should admit, under Daubert, that evidence showing that the two classic medical signs used to show that a child had been deliberately shaken to the point of injury or death (subdural hematoma and retinal hemorrhaging in a child) is insufficient proof that a crime has been committed.")