

APPLICATION FOR

DISTRICT COURT JUDGESHIP
Fourth Judicial District

A. PERSONAL INFORMATION

1. Full Name: Michael Joseph Sherwood
 - a. What name do you commonly go by? Michael or Mike
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes
3. Home Address:
[REDACTED]

4. Office Address:

401 N. Washington Street
P.O. Box 8358
Missoula, Montana 59807
Phone: (406) 721-2729

5. Length of residence in Montana:

68 years

6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
2013 to 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>
Loyola High School	Missoula, Montana	05/29/69	Diploma
Northwestern University	Evanston, Illinois	06/15/74	B.S. Chem. Eng.
University of Montana School of Law	Missoula, Montana	06/12/77	Juris Doctor

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

- I received a full tuition scholarship for each of four years to attend Loyola High School.
- I was salutatorian of my graduating high school class.
- I was selected as editor of my high school yearbook.
- I was selected as co-editor of my high school newspaper.
- I was selected Montana Boys State representative.
- I received a full tuition, room and board scholarship to attend Northwestern University.
- In law school I received the American Jurisprudence Awards for Agency & Partnership and for Legal Writing IV.
- In law school, I was selected as a member of the National Moot Court Team.
- In 1988, the Montana Trial Lawyers Association named me TRIAL

LAWYER OF THE YEAR.

- In 1990, I was presented with an award in recognition for my years of serving as the coach of the University of Montana MTLA Trial Team.
- In 2000, the Montana Association of Criminal Defense Lawyers named me CRIMINAL DEFENSE LAWYER OF THE YEAR.
- In 2013, the Montana Public Defender Commission and the Staff of the Office of the State Public Defender presented me with an award for my service as a MEMBER OF THE FIRST MONTANA PUBLIC DEFENDER COMMISSION, upon which I served for six years, originally as a member and ultimately as Chairman.
- AV rating by Martindale-Hubbell.

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.

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>
State Courts of Montana	06/07/77
Federal Courts of Montana	06/13/77
United States Ninth Circuit Court of Appeals	03/20/85
Confederated Salish & Kootenai Tribal Court	06/01/91
United State Supreme Court	09/03/04

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

Since being sworn in, I have always been and am currently in private practice. Currently I am the President and sole owner of Michael J. Sherwood, P.C.

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:

In chronological order I have been an employee of or associated with the following:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
State of Montana ¹	Intern	06/75 to 08/75
City of Missoula ²	Intern	05/01/76 to 06/01/77
Hood & Sherwood ³	Partner	6/15/77 to 07/01/81
Michael J. Sherwood Attorney-at-Law	Sole Practitioner	07/02/81 to 08/31/82 and 10/03/88 to 12/31/00
Sherwood & Englund ⁴	Partner	09/01/82 to 10/02/88
Michael J. Sherwood, P.C. ⁵	President	01/01/01 to Present

¹While in Law School, I worked as a summer intern for the Montana Department of State Lands resolving an alluvion dispute on the Yellowstone River.

²While in law school, I prosecuted criminal cases for the City Attorney's Office.

³My partner was Randi Hood, Esq. Although private practitioners we contracted with Missoula County to represent one-fourth (1/4) of all individuals entitled to representation at public defense. This included adults charged with crimes, juveniles alleged to be delinquent, juveniles entitled to legal representation in guardianship proceedings, respondents in guardianship and insanity commitment hearings and individuals who were parties to dependent and neglect hearings.

⁴Karl J. Englund, Esq. was my partner.

⁵In 2006, Sarah J. Rhoades, Esq. joined me as an my associate.

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-eight percent of my practice is limited to the defense of citizens accused of committing federal and state felony offenses.
- In the last year, two percent of my practice was dedicated to the following:
 - I have represented two individuals seeking to dismiss Temporary Orders of Protection.
 - I have represented an attorney who was a respondent in an Office of Disciplinary Counsel proceeding.

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

Other fields of practice:

- I have represented clients in civil cases including claims for damages for breach of contract, consumer fraud, violations of the Montana Fair Trade Practices Act, medical malpractice and personal injury.
- I have represented a few clients in marital dissolution proceedings.
- I have served as an expert witness for lawyers accused of malpractice.
- I have represented clients who were either buying or selling businesses, especially businesses which held liquor licenses.
- I have represented clients seeking to contest orders of protection.

Teaching:

I coached the University of Montana School of Law MTLA trial team from 1984 to 1990.

I taught or co-taught a White Collar Crime course at the University of Montana School of Law from 1997 to 2001.

Lobbying:

From 1991 through 1993 I served as a lobbyist for the Montana Trial Lawyers Association before the Montana State Legislature.

Service on Commissions:

State Bar of Montana Criminal Procedure Commission

In the late 1980's and early 1990's I served on this commission tasked with redrafting the Montana Criminal Procedure Code. After completing our task, the commission submitted its proposed draft to the Montana Legislature for enactment.

The Montana Appellate Defender Commission

In 2000, I was appointed to serve on this commission tasked with various duties related to the State Appellate Defender including drafting standards of performance for appellate and trial lawyers. I served until 2006 when the commission was merged with the Public Defender Commission.

The Montana Public Defender Commission

In 2006, I was appointed to serve as an original member of this commission when the Montana Legislature established the Office of the State Public Defender. This commission was tasked with creating and overseeing standards of performance and procedure for State Public Defender, addressing the state wide budget and financing for the organization, and overseeing the creation and management of the Office of the State Public Defender. I served for a full six-year term, the last of which I served as

Chair.

Liaison with the American Bar Association

While on the Montana Public Defender Commission, I also served as liaison between the Commission and the American Bar Association Standing Committee for Legal Aid and Indigent Defense (SCLAID).

Service as Judge *Pro Tem*

I have served approximately thirty times as Municipal Court Judge *Pro Tem* and Justice of the Peace *Pro Tem*, filling in for lower court judges whose schedules took them away from the bench. I presided over arraignments, trials, temporary order of protection hearings, changes of pleas and sentencing.

United States Criminal Justice Act Panel

I served for more than twenty years as a Criminal Justice Act panel attorney. I accepted criminal defense appointments from a United States District Court, agreeing to represent indigent defendants at a reduced hourly rate.

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

Felony Criminal Defense in State and Federal Courts.

17. Do you regularly appear in court?

Yes.

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

Federal court	25%
State or local courts of record	74%
Administrative bodies	1 %
Other	0 %

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

Ninety-nine percent.

19. How frequently have you appeared in court?

Currently, four times per month on average.

20. How frequently have you appeared at administrative hearings?

Twice in the last year.

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

Civil	7 %
Criminal	92%
Other	1 %

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.

I have appeared once before the Montana Supreme Court in the last five years:

The matter, *State of Montana v. Jason Terronez*, Cause No. DA 16-0611, was an appeal by the State unsuccessfully challenging a District Court's order granting a motion to withdraw a plea of guilty entered when Mr. Terronez was represented by former counsel. Opposing counsel was Tammy K. Plubell, Esq., Assistant Attorney General, 215 North Sanders, P.O. Box 201401, Helena, Montana 59620-1401. Phone: (406) 444-2026.

I am also currently appearing before the United States Ninth Circuit Court of Appeals:

The matter, *United States v. Ernest Jablonsky dba Montana Big Game Pursuits*, Cause No. 18-30136, is an appeal from a conditional plea of guilty to a Lacey Act (Interstate Transportation of Illegally Taken Wildlife) offense. Oral argument is set in August. Opposing counsel is Mark Steger Smith, Esq., Assistant U.S. Attorney District of Montana, U.S. Courthouse,

2601 Second Avenue North Suite 3200, Billings, Montana 59101. Phone: (406) 247-4667.

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

Three criminal.

One civil.

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

One.

25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, provide the same information regarding opposing counsel and the nature of the matter.

(1) *State of Montana v. Delbert Lee Bennett*; Cause No: DC-18-13 (Sanders County)

Trial dates: April 22-23, 2019

Adversary Counsel:

Sanders County Attorney Naomi R. Leisz
Deputy Sanders County Attorney Kim Field
1111 West Main
P.O. Box 519
Thompson Falls, MT 59873
(406) 827-6903

Presiding Judge:

Hon. James A. Manley
District Court Judge
(406) 883-7250

(2) *State of Montana v. Leland Hyslop*; Cause No. DC-18-211 (Missoula County)

Trial dates: Dismissed on March 19, 2019

Adversary Counsel:

Anna C. Conley
Deputy Missoula County Attorney
Missoula County Courthouse
Missoula, Montana 59802
(406) 258-4737

Presiding Judge:

Hon. Leslie Halligan
District Court Judge
(406) 258-4771

(3) *State of Montana v. Terra F. Pesanti*, Cause No. DC-18-84 (Silver Bow County)

Date of Trial: Yet to be scheduled

Adversary Counsel:

Deputy Butte-Silver Bow County Attorney Samm Cox
Butte-Silver Bow Courthouse
155 West Granite Street
Butte, MT 59701
(406) 497-6230

Presiding Judge:

Hon. Ed McLean
District Court Judge
(406) 880-1336

(4) *State of Montana v. Zakary Scalise*, Cause No. DC 2018-14 (Mineral County)

Date of Trial: yet to be scheduled

Adversary Counsel:

Ellen Donohue
Mineral County Attorney
Debra A. Jackson
Deputy County Attorney
300 River Street
P.O. Box 339
Superior, Montana 59872
(406) 822-3535

Presiding Judge:

Hon. John W. Larson
District Court Judge
(406) 258-4773

(5) *United States of America v. Ernest Jablonsky, d/b/a MONTANA BIG GAME PURSUITS*; Cause No. 17-17-H-CCL (Helena Division of the Montana United States District Court)

Trial dates: Defendant entered a conditional plea of guilty on March 13, 2018. Matter is on appeal with oral argument set in August 2019.

Adversary Counsel:

Assistant United States Attorney Mark Smith
Assistant United States Attorney Jeffrey K. Starnes
U.S. Attorney's Office
James F. Battin U.S. Courthouse
2601 Second Ave. North, Suite 3200
Billings, MT 59101
(406) 657-6101

Presiding Judge:

Hon. Charles C. Lovell
Senior United States District Court Judge

(406) 441-1350

(6) *State of Montana v. Michael P. Ricci*; Cause No. DC-16-305 (Missoula County)

Trial Dates: April 13-14, 2017

Adversary Counsel:

Deputy Missoula County Attorney Karla Painter
Missoula County Attorney
200 West Broadway
Missoula, Montana 59802
(406) 258-4737

Presiding Judge:

Hon. Leslie Halligan
District Court Judge
(406) 258-4771

(7) *State of Montana v. Jason Michael Terronez*; DC 15-18 (Fergus County)

Dates of Trial: Pending (I have withdrawn as Counsel of Record)

Adversary Counsel:

Assistant Attorney General Daniel Guzynski
Assistant Attorney General Mary Cochenour
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

Fergus County Attorney Kent Sipe
Deputy Fergus County Attorney Jean Adams
801 West Broadway
Lewistown, Montana 59457
(406) 535-8127

Presiding Judge:

Hon. Randal I. Spaulding
District Court Judge
(406) 323-1701

(8) *United States of America v. George Manlove*; CR 15-40-M-DLC (Missoula Division of the Montana United States District Court)

Trial dates: January 17 to February 4, 2017

Adversary Counsel:

Assistant U.S. Attorney W. Adam Duerk
Assistant U.S. Attorney Zeno B. Baucus
U.S. Attorney's Office
105 East Pine Street, Second Floor
Missoula, Montana 59802
(406) 542-8851

Presiding Judge:

Hon. Dana L. Christensen
U.S. District Court Judge
(406) 829-7140

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

In 2018 I represented an attorney who was a respondent in an Office of Disciplinary Counsel proceeding.

In 2018 I served as the chairperson of a Montana Medical Legal Panel proceeding.

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 have published no such books or articles.

I have presented on the following topics:

<u>Topic</u>	<u>Date</u>	<u>Group</u>
Cross-examination of a Forensic Pathologist	October 2007	State Public Defenders
Defending an Internet Pornography Charge	October 2004	Kansas Federal Defenders
Federal Jurisdiction	October 2003	Montana Association of Criminal Defense Lawyers
Discovery in Criminal Cases	November 2001 & February 2002	Montana Association of Criminal Defense Lawyers
We're From the Government and We Just Have a Few Questions, and a Subpoena	January 1998	Montana State Bar
Discovery in Federal Criminal Cases	March 1996	Montana Trial Lawyers Association
Discovery for Paralegals	February 1998	Montana Association of Professional Paralegals
Jury Selection	March 1998	Montana Association of Criminal Defense Lawyers

Criminal Jurisdiction in Indian Country	July 1995	State Bar of Montana
Examination of the Child Witness: a Criminal Defense Perspective	Sept. 1994	State Bar of Montana
Criminal Procedure in Tribal Courts	May 1992 to May 1995	Tribal Judges of Montana and Wyoming
Points of Particular Interest to Criminal Defense Lawyers in the New Criminal Procedure Code	May 1992	State Bar of Montana
Impacts of Federal Law and Forfeiture Statutes on the Defense of State Cases	April 1992	State Bar of Montana
Sentencing Advocacy	May 1991	UM Law School Students
1989 Tort Update	Sept. 1989	State Bar of Montana
The Exclusionary Rule and its Application to Lower Courts	May 1985	Montana Magistrates Association
Panel Discussion on the Future of the Exclusionary Rule in Montana	May 1984	State Bar of Montana
Cross Examination of Expert Witnesses	May 1983	State Bar of Montana
The Insanity Defense in Montana	1982	UM Law School

For several years, I spoke semi-annually to a Criminology Class at Hellgate High School, Missoula, Montana regarding the role of the criminal defense attorney in the justice

system. On one occasion I made a similar presentation to a UM sociology class.

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.

<u>Association or Society</u>	<u>Dates</u>
● State Bar of Montana (Member of the Criminal Defense Section)	1977 to present 1985 to present
● The National Association of Criminal Defense Lawyers	1979 to present
● Western Montana Bar Association	1992 to present
● Montana Association of Criminal Defense Lawyers Lifetime member First President from 1996 to 1998	1996 to present
● Montana Trial Lawyers Association	1988 to 2016
● The Federal Bar Association	2005 to 2018

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 have been associated with St. Anthony's Troop 60 of the Boy Scouts of America since 1984. I served in an official capacity as Troop Committee Person for decades until approximately four years ago. I teach scouts

archery and canoeing and continue to participate in at least one outing per year.

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

I have not run for or held public office.

In 2005, I unsuccessfully applied for appointment as the United States Federal Magistrate for the Missoula Division of the Montana Federal Court.

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

Prior to his appointment to United States Supreme Court, Louis D. Brandeis once stated:

Some men buy diamonds and rare works of art, others delight in automobiles and yachts. My luxury is to invest my surplus efforts, beyond that required for the proper support of my family, to the pleasure of taking up a problem and solving, or helping to solve it, for the people without receiving any compensation.

Justice Brandeis stated my philosophy far more eloquently than I can.

With respect to public involvement, ours is a service profession. I have been pleased to devote decades of my time to serving on three important public justice commissions, to educate judges and my legal colleagues, and to instruct law students in the hope of bettering the legal system and the plight of those the social/ judicial system serves.

With respect to community service, I have devoted my time to Boy Scouts and instructing children in the art of Tae Kwon Do for nearly two decades. I have also been there when friends and neighbors needed help.

I consider myself all the wealthier for doing so. I've savored the time I spent.

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.

When my father died unexpectedly in 1981 he had just begun a business – a nightclub. I helped my mother develop and operate that business without compensation until she sold it in 1988. I worked at the business three nights per week. I had no official managerial position, but did have a marginal

ownership interest for tax purposes.

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.

I have received no such fees or compensation of any kind.

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.

I own 27% of an office building occupied solely by lawyers. If appointed, I would immediately convey my interest to a blind trust with directions to let out the space which my firm currently occupies until such time as the trustee can sell my portion of the building for a reasonable price.

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.

43. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?

No.

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

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 researched all legal issues and drafted all my briefs.

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 a few transactional documents *pro bono* for family members.

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.

Please find attached an excerpt from a brief which I recently filed in the Ninth Circuit Court of Appeals.

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

Forty percent.

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

Yes, I am competent in the use of both.

H. MISCELLANEOUS

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

I have a small woodworking shop in my garage in which I have constructed furnishings and fixtures for my home and cabin.

For more than three decades I have owned Golden Retrievers. For that reason most of my recreational interests involve walking, hiking and cross-country skiing with my dog.

I once canoed extensively (even with my dogs) and continue to do so on a lesser scale today – especially when I have the opportunity to canoe the Smith River.

In the 1980's I became associated with BSA Troop 60, the troop in which I was a scout. I participated in activities weekly. I continue to be involved on a less frequent basis.

From the ages of approximately thirty-one through fifty-one, I participated in Tae Kwon Do as a member of the University of Montana Tae Kwon Do Club. I attended classes three times per week and taught children three times per week. Since then I have occasionally served as a referee for Missoula tournaments as needed.

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

I am the second of nine children whose ages span more than twenty years. Mine was a middle class family. So, I began working outside the home early in life.

When I was eleven, my parents moved to a home next to a small farm owned by my great-uncle Alec. I became his farm boy. I moved irrigation pipe for the alfalfa crop; milked cows; fed livestock; slaughtered and butchered cows, sheep and pigs; bucked and stacked hay bales; constructed fences, gates and an addition on the barn and, along with my siblings, maintained a vegetable garden. I did this until Alec passed away when I was seventeen.

When I was twelve, my father enrolled me in Modern Business School where I

learned typing and secretarial skills. I then assisted him each night after school in performing his second job as the paid secretary of a fraternal organization until he resigned his position when I was fourteen.

When I was fourteen, my parents bought Worden's Market, a small grocery store in downtown, Missoula, Montana. I worked as the stockboy/clerk until I left for college.

When I was eighteen, I hired out with the Northern Pacific Railroad. I worked in train service as brakeman/switchman. I worked during summers and during Christmas and spring breaks. In January of 1974, I returned home and worked full time until starting law school. I continued to work part-time until the end of my second year in law school.

When in college, I worked for two years as a member of a board crew in my fraternity. I bussed tables and washed dishes.

While in law school, I worked one summer for the Montana Department of State Lands.

During the last fourteen months of law school I worked under the auspices of the Student Practice Rule as a prosecutor for the City of Missoula.

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

In contrast to my years of serving on commissions and teaching, in the last five years I have performed my *pro bono* work for one client at a time. Last year, I performed more than one hundred hours of work for individuals whom I felt were being unjustly accused, but could not afford to pay me in full or at all for my services. I felt that their cases demanded more attention than a public defender could provide.

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

Event:

Prior to attending college in the Chicago, Illinois area, I had lived my entire life in Missoula, Montana. When I moved to Chicago I was exposed to a real diversity of race, nationality, religion and thought. While there, I came not only to accept but to embrace that world of diversity. Additionally, I was in Chicago shortly after the Grant Park riots, during many anti-war protests and at the time of the Kent State shootings. Those experiences and others gave rise to my personal quest to advocate for social justice. When I returned home to attend law school, I was a different person.

Persons:

United States Supreme Court Justice Louis D. Brandeis. I first took notice of Justice Brandeis when I read *The Right to Privacy*, 4 Harvard L.R. 193 (Dec. 15, 1890) which he co-authored. The legal concepts he discussed in that article went on to influence his decisions when he was appointed to serve on the United States Supreme Court in 1916. After his retirement at the age of 83, his decisions served as a cornerstone for landmark decisions regarding privacy such as *Griswold v. Connecticut* and *Roe v. Wade*. As I mentioned above, Justice Brandeis has also served as my model for his dedication to public and community service.

United States Supreme Court Justice William O. Douglas. My fascination with Justice Douglas began in law school when I read his decision in *Papachristou v. City of Jacksonville*, declaring a city vagrancy ordinance to be overly broad and, therefore, unconstitutional. Justice Douglas took great pains to explain that throughout his life he had engaged in the various types of conduct which the city had defined as criminal vagrancy. His reference to himself as a “common night walker” is especially compelling. Like Justice Brandeis, Justice Douglas wrote multiple decisions championing social justice and the right to privacy, including his concurring opinion in *Roe v. Wade*. He also frequently championed a citizen’s right to due process as he did in his concurring opinion in *Bailey v. Richards*, striking down President Truman’s infamous Loyalty Order for lack of due process. He wrote: “This is a government of *laws*, not *men*. ”

Carlos Castaneda. Reading this author served as my introduction into the concept of reality by consensus. When I arrived at law school I had come from a world of science and engineering and a religious upbringing based upon dogmatic tenets. It was only upon reading *Tales of Power* that I began to realize that in a courtroom $2+2 = 4$ only when twelve jurors agree.

Sun Tsu. Sun Tsu is the purported author of *The Art of War*, one of the earliest books devoted to the aspects of warfare, strategy and tactics. I read this book as a prerequisite to testing for my Tae Kwon Do black belt. I quickly realized that the teachings applied to what I did as an advocate for citizens accused of crime. The book serves as my guide when preparing to defend each client.

Franz Kafka. This author wrote *The Trial*, an iconic piece of literature related to the stress, anxiety, frustration and fear experienced by a party who undergoes protracted litigation. Reading this book has made me ever cognizant of the plight of my clients.

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

In a word: "Fair." Various pundits have opined that a judge must have patience, open-mindedness, courtesy, tact, courage, punctuality, firmness, understanding, compassion, humility, common sense, a strong work ethic and intellect. There is one quality, however, which encompasses all of the foregoing. A judge must be fair.

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.

It goes without saying that a district court is duty bound to follow the mandatory legal precedent established by the United States Supreme Court and the Montana Supreme Court. This mandate assures certainty and predictability in the legal system.

If the issue before a district court is one which has not been addressed by either of the foregoing tribunals, then a court should attempt to determine whether the issue has been resolved by other courts whose precedent is persuasive. If the persuasive authorities have reached conflicting decisions, it would be incumbent upon a court to review the authorities relied upon and the analysis conducted by those courts which have reached conflicting views and determine which is the most rational.

On the other hand, undoubtedly there is a need for flexibility in the law. If the issue is truly a matter of first impression or the facts of the case before a district court are distinguishable from the facts addressed in any case which serves as

mandatory or persuasive authority, then a district court must establish its independent body of precedent because the specific facts of the case and the court's best judgment as to the dictates of the law require such action.

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

There are two answers to that question:

First, why am I applying? In short, because I have the competence and work ethic to be an excellent district court judge and I would enjoy serving in that capacity. If appointed, I would strive to do superior work in an arena that I have come to love – the judicial system.

The first time that I appeared in Missoula Municipal Court as a legal intern, I recall glowing with excitement. I was intrigued while watching the Judge and Defense Attorney play out their roles. I was eager to perform my role as prosecutor to the very best of my ability. Since then, I served as prosecutor in approximately twenty jury trials and as defense counsel or plaintiff's counsel in approximately seventy more. I've appeared in eighteen different county courtrooms and every Montana federal courtroom. My initial excitement has never waned.

Since being admitted to the practice of law, I have done my very best to perform my role as defense counsel. I am, by nature, a caretaker. So, I've greatly enjoyed the opportunity to represent hundreds of individuals accused with the commission of a crime and helping them solve their problems. I would greatly enjoy channeling my energy into tackling the problems facing the judiciary today, especially delay in the civil arena and recidivism in the criminal arena.

Finally, I want to be a judge because I've been away from serving the general public for a while now and wish to return.

Second, why now? The time is right. Rule 1.16 of the Montana Rules of Professional Responsibility mandates that a lawyer refrain from withdrawing as counsel when to do so will prejudice her or his client. I take that ethical responsibility very seriously. My clients retain me because they want me to represent them. They do not consider me to be fungible. So, while there have been multiple judicial vacancies in the past, I have previously applied only once.

In 2005, I felt comfortable applying to be a federal magistrate because, if appointed, I would not need to withdraw from representing any client at the time. As of today, I've recently resolved multiple cases and have no pending case which will need my attention after August 31, 2019.

Additionally, I am at a time in my life when I don't need to devote my efforts to the support of my family. I can focus my efforts on my work much more easily now than I would have been able to do even as recently as ten years ago.

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

1. I am proud of the legal results I have obtained for my clients in both civil and criminal cases.
2. Even more important, I am proud of my criminal clients' low recidivism rate. Various studies have produced statistics showing a wide range of recidivism rates for felony offenders placed on probation. The numbers generated by more reliable studies range from twenty-five to forty-five percent. For offenders released from prison, those numbers double. To my knowledge, less than three percent of my clients have ever been charged with another offense after being sentenced. Very often, criminal conduct is the product of a chronic underlying problem. Those problems include alcoholism, drug addiction, mental illness (especially bipolar disorder), post-traumatic stress disorder for soldiers who served in active duty and low self esteem (especially women who have been sexually abused when young). At other times, the underlying problem is situational. Those situations include recent divorce, loss of a loved one or loss of a job. Whatever the case, I'm proud of the fact that I have been able to have a positive influence on the lives of my clients by finding qualified counselors of all kinds and convincing my clients to seek counseling. The most satisfying part of my career has been watching nearly every one of my clients who, when faced the crisis of being charged with a felony offense, have used that crisis to effect a positive change in their lives. For ninety-seven percent of my clients their lives were more productive and fulfilling a year after arriving at my office .
3. Finally, I am proud of my record of voluntary service for the betterment of

my profession and the community in which I was born. I've mentioned my record above. I need not iterate it here.

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

My commitment to be the very best judge that I can be for as long as I can.

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?

It would be presumptuous of me to tell the Judicial Nomination Commission or Governor Bullock that I am the best district court judge applicant. That decision is in their respective hands. I can, however, state why I might be considered the best candidate. First, my sixty-eight years as a resident of my home town have allowed me to stay abreast of the evolving ethos of the people I would serve. Second, with age comes wisdom. I would be more competent today to apply knowledge, experience, understanding, common sense and insight than I would have been in my earlier years. Third, my nearly forty-two years as a practicing attorney have allowed me not only to gain a wealth and breadth of experience, but have allowed me to become an increasingly proficient researcher and writer. I recently attended a CLE sponsored by the D.C. bar and taught by former members of the editorial staffs of New York and Washington, D.C. newspapers. The insights of those journalists into how to best write a brief has already had a marked impact on the quality of my writing.

CERTIFICATE OF APPLICANT

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

5-9-19

(Date)

Mark J. Sherwood

(Signature of Applicant)

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

An excerpt from Appellant's opening brief in United States v. Ernest Jablonsky dba Montana Big Game Pursuits, Cause No. 18-30136, an appeal based upon a conditional plea of guilty pending before the Ninth Circuit Court of Appeals

* * *

IV. STATEMENT OF THE CASE

A. Procedural History.

Count II of the Indictment alleged only that Jablonsky "knowingly engaged in conduct involving the illegal sale and purchase, the offer to sell and purchase, and intent to sell and purchase, wildlife with a market value of greater than \$350, in that he knowingly sold mountain lions by selling a guided hunt for mountain lions to JEFFREY PERLEWITZ in an area where he was not legally entitled to provide such services, all in violation of 16 U.S.C. § 3372(a)(1), § 3372(c), § 3373(d)(1)(B), and 18 U.S.C. § 2."

Jablonsky moved to dismiss Count II because it failed to allege an essential element of a Lacey Act trafficking offense: that Jablonsky had sold his outfitting services to Perlewitz knowing that a lion killed by Perlewitz was illegally taken. ER p.123. Jablonsky explained that if properly challenged prior to trial, a count's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal. ER pp. 111-113.

Jablonsky then explained why the plain language of 16 U.S.C. §§ 3372(a)(1), 3372(c)(1), 3371(d) and 3373(d) when read conjunctively, requires Count II to allege that Jablonsky sold outfitting services to Perlewitz knowing that a mountain lion killed by Perlewitz was illegally taken. ER pp. 114-122. Next, Jablonsky explained that the Federal regulation invoked in Count II did not make it illegal for Perlewitz to kill a mountain lion merely because Jablonsky lacked the appropriate permit to outfit Perlewitz. ER pp. 114-122.

The Government erroneously argued that when reviewing the sufficiency of a count a Court must merely read a count “as a whole to include facts which are necessarily implied and are construed according to common sense.” ER pp. 82-83. The Government then argued that Jablonsky’s failure to obtain the appropriate permit somehow meant that Perlewitz’s lion was illegally taken. ER pp. 80-98.

The District Court denied Jablonsky’s motion to dismiss Count II. ER pp. 47-65. At ER pp. 62-63, the District Court summarized its reasoning as follows:

Defendant’s argument that the United States lacks the authority to enact a law which would prohibit the sale or purchase of a mountain lion hunt on USFS land is frivolous. Defendant also argues that the USFS special permit regulation, 36 C.F.R. § 251.51 (sic), is unrelated to “Perlewitz’s killing, possession or transportation of his lion.” (ECF No. 21 at 11.) That is too narrow a view of the statutory prohibition on transporting, selling, or purchasing wildlife taken, possessed, transported, or sold “in violation of any law, treaty, or regulation of the United States” 16 U.S.C. 3372(a)(1). Of course it is relevant

to the legality of the hunt if the outfitter lacks the necessary hunting permits.

Subsequently, the parties resolved this case by plea agreement pursuant to which Jablonsky agreed to plead guilty to Count II, but reserved his right to appeal the District Court's denial of his motion to dismiss Count II. ER pp. 36-46. The District Court accepted the Plea Agreement. ER pp. 11-12.

* * *

IX. ARGUMENT

A. The District Court committed reversible structural error when it adopted the wrong standard of review in denying Jablonsky's pre-trial challenge to the validity of Count II.

There is a fundamental difference between a motion to dismiss a civil complaint for a failure to state a claim and a motion to dismiss a criminal count for failure to allege an offense. *M.L.B. v. S.L.J.*, 519 U.S. 102, 140 (1996). In contrast to the "notice pleading" requirements in the civil arena, an indictment invokes express constitutional protections, including a citizen's Fifth Amendment right to be prosecuted by grand jury indictment. *Id.*

At common law, the function of the grand jury was to stand between the prosecutor and the accused. *Hail v. Hinkel*, 201 U.S. 43, 59 (1906). "Incorporated into the Fifth Amendment by the Founders, there is every reason to believe that

our constitutional grand jury was intended to operate substantially like its English progenitor." *Costello v. United States*, 350 U.S. 359, 362 (1956). *See also:* *Russell v. United States*, 369 U.S. 749 (1962). Accordingly, when a prosecutor fails to obtain grand jury findings regarding each essential element of an offense, an indictment is fatally defective. *United States v. Carll*, 105 U.S. at 613. That is to say: in order to constitute a valid criminal count, a count must allege specific facts which, if proven, would constitute a violation of the law the defendant is charged with violating. *United States v. Gimbel*, 830 F.2d 621, 624 (7th Cir. 1987). The foregoing authorities form the basis for Fed. R. Crim. P. 7(c)(1) which requires that an indictment provide a "plain, concise and definite" statement of the essential facts constituting the offense charged.

Thus, "if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense, as is the case here, is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment." *United States v. Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005) (per curiam), *cert. denied*, 549 U.S. 1174 (2007). *See also* *United States v. Panarella*, 277 F.3d 678, 685 (3d Cir. 2002).

This test for the validity of a count when challenged prior to trial is more stringent than the test to be applied when the validity of an indictment is not

attacked until after a verdict. See, *Hagner v. United States*, 285 U.S. 427, 431-34 (1932). In *Hagner*, the Court held that when a count is challenged post-verdict, it is sufficient if it: (1) incorporates the elements of the offense charged and fairly informs a defendant of the charge against which he must defend and (2) enables him to plead an acquittal or conviction in a bar of future prosecutions for the same offense. *Id.* at 431. This Court has followed the *Hagner* ruling. *United States v. Pheaster*, 544 F.2d 353, 360 (9th Cir. 1976). Those rulings, however, have no application here because Jablonsky challenged the defective Count II prior to trial.

Thus, the District Court erroneously ruled that Count II need only be “(1) read as a whole; (2) read to include facts which are necessarily implied; and (3) construed according to common sense,” citing *United States v. Blinder*, 10 F.3d 1468, 1471 (9th Cir. 1993). That standard was initially adopted by this Court in *McKinney v. United States*, 172 F.2d 781, 782, (9th Cir. 1949). *McKinney* involved an appeal in which, unlike here, the defendant challenged the sufficiency of the indictment only after the verdict. *Id.*

B. The District Court committed reversible error when it held that Count II was sufficiently charged even though it failed to allege that Jablonsky knew he was violating the law.

In pertinent part, 16 U.S.C. § 3373(d)(1)(B) provides that a person may be punished for violation of the Lacey Act only when “a person knowingly engages

in conduct that involves the sale of wildlife, knowing that the . . . wildlife . . . was taken . . . or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation.” (Emphasis added). This Court has interpreted the foregoing language to mean that in order to prove that a citizen violated a trafficking provision of the Lacey Act, the Government must prove that the person knowingly violated some predicate law or regulation. *United States v. Leveque*, 283 F.3d 1098, 1106 (9th Cir. 2002).

Here, Count II alleges that Jablonsky “knowingly engaged in conduct . . .” And then goes on to allege that Jablonsky “knowingly sold mountain lions by selling a guided hunt . . .” But it fails to specifically allege that Jablonsky knowingly outfitted “in an area where he was not legally entitled to provide such services.” Accordingly, even if we assume that a knowing violation of 36 C.F.R. § 251.50 could serve as a predicate offense for a Lacey Act violation, the District Court erred when it denied Jablonsky’s motion to dismiss.

C. The District Court committed reversible structural error when it denied Jablonsky’s motion to dismiss, holding that “it is relevant to the legality of the hunt if the outfitter lacks the necessary hunting permits.”

The District Court erred when it held that “it is relevant to the legality of the hunt if the outfitter lacks the necessary permits.” A fact is relevant if: (a) it has

any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. Fed. R. Evid. 401. As explained below, Jablonsky's failure to purchase the proper permit prior to assisting Perlewitz when Perlewitz killed his lion has no "tendency to make" it "more or less probable" that Perlewitz's lion was illegally killed.

An allegation of a Lacey Act trafficking offense premised upon commercial outfitting, requires the application of four separate subsections of the Act. First, 16 U.S.C. § 3372(a)(1), in pertinent part, makes it a crime to transport, sell, receive, acquire, or purchase any wildlife taken . . . in violation of a federal law or regulation. Second, 16 U.S.C. § 3371(d), defines the terms "law" and "regulation" to mean a law or regulation which regulates the taking, possession transportation, or sale of wildlife. Third, 16 U.S.C. § 3372(c) defines the term "sale" to include the sale of outfitting service for "the illegal taking, acquiring, receiving, transporting, or possessing" of wildlife. As this Court has explained, the foregoing language makes it clear that "[a] violation of Section 3372(c) does not involve a 'sale' of game in the traditional sense; rather, under section 3372(c) the commodity being 'sold' is the opportunity to **illegally hunt** game with the assistance of a guide." *United States v. Atkinson*, 966 F.2d 1270, 1273 (9th Cir. 1992) (emphasis added). Fourth, 16 U.S.C. § 3373(d)(1)(B) comes into play

because it authorizes the imposition of a criminal penalty only when an outfitter knows that the wildlife was taken in violation of the law.

When read together, the foregoing sections require that in order to sufficiently charge Jablonsky with a Lacey Act trafficking offense, Count II would need to allege that Jablonsky sold his outfitting services to Perlewitz knowing that Perlewitz would take the opportunity to illegally kill a mountain lion. Here, however, Count II does not allege that Perlewitz's mountain lion was killed in violation of a Federal or Montana law. Application of the following five rules of statutory construction mandates the foregoing conclusion.

First, when interpreting a criminal statute to determine what it means, courts must look first to the plain language of the statute. *United States v. Weitzenhoff*, 35 F.3d 1275, 1283 (9th Cir. 1994). Thus, a court should seek to "give effect to the plain, common sense meaning of the enactment without resorting to an interpretation that defies common sense." *United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1051 (9th Cir. 2003) (internal quotation marks omitted). The language of the four applicable subsections cited above is unambiguous. In the context of the facts alleged in this case, therefore, Count II must allege that Jablonsky outfitted Perlewitz knowing that Perlewitz's lion was illegally killed.

Second, when the language is plain, a Court may not insert words and

phrases into or delete words and phrases from a statute. *United States v. Temple*, 105 U.S. 97, 99-100 (1881). Here, the District Court erroneously did both. The Court effectively inserted the word "illegally" into the language of 16 U.S.C. § 3372(c)(1) and struck the word "illegal" from the language of 16 U.S.C. § 3372(c)(1)(A). The Court then erroneously inserted the word "a hunt" into that section and struck from it "guiding, outfitting, or other services." Thus, the Court incorrectly interpreted that subsection to read:

- (c) Sale and purchase of guiding and outfitting services and invalid licenses and permits.
 - (1) Sale. It is deemed to be a sale of . . . wildlife in violation of this Act [16 USCS §§ 3371 et seq.] for a person for money or other consideration to **illegally** offer or provide
 - (A) ~~a hunt guiding, outfitting, or other services, . . . for the illegal~~ legal taking, acquiring, receiving, transporting, or possessing of . . . wildlife.

Third, this Court has consistently rejected interpretations that would render a statutory provision surplusage or a nullity. *County of Santa Cruz v. Cervantes (In re Cervantes)*, 219 F.3d 955, 961 (9th Cir. 2000). Here, the District Court's ruling treated the language of 16 U.S.C. 3372(c) as surplusage when it failed to require Count II to allege that a lion had been illegally killed while being assisted by Jablonsky. Additionally, the District Court's interpretation nullified the

language found in another subsection, 16 U.S.C. 3373(d)(1)(B). This latter subsection provides that a person may be punished for violating a trafficking provision of the Act only when the person sells wildlife “knowing that the . . . wildlife . . . were taken, possessed, transported or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation” Of course, Count II fails to allege: (1) that Perlewitz’s lion was “taken, possessed, or transported” in violation of the law or (2) that Jablonsky “sold” the lion by providing outfitter services knowing that Perlewitz’s lion was illegally killed.

Fourth, the plain language of the statute is to be ignored only when a literal interpretation of the statute would thwart the purpose of the statutory scheme found in the legislative history and lead to an absurd result. *County of Santa Cruz v. Cervantes (In re Cervantes)*, 219 F.3d 955, 960 (9th Cir. 2000). Here, the plain language of the statute is entirely consistent with the Lacey Act legislative history.

In *United States v. McNab*, 324 F.3d 1266 (11th Cir. 2003), the Court noted that the Lacey Act was introduced by Representative John F. Lacey in 1900. H.R. Rep. No. 97-276, at p. 7 (1981). Prior to enactment, Representative Lacey asserted that a federal law was necessary to outlaw the interstate traffic in **wildlife illegally taken** from their state of origin. (Emphasis added). *Id.*

* * *