

**APPLICATION FOR
DISTRICT COURT JUDGESHIP**

A. PERSONAL INFORMATION

1. Full name. Daniel Mark Guzynski
2. Birthdate. [REDACTED]
3. Current home address. [REDACTED]
4. Email address. [REDACTED]
5. Preferred phone number. [REDACTED]
6. Judicial position you are applying for. Montana 9th Judicial District
7. Date you became a U.S. citizen, if different than birthdate. Same as birthdate
8. Date you become a Montana resident. 1997

B. EDUCATIONAL BACKGROUND

9. List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received.

<u>Name</u>	<u>Location</u>	<u>Degree Date</u>	<u>Degree</u>
Clawson High School	Clawson, MI	6/89	Diploma
Oakland Community College	Royal Oak, MI		
Lake Superior State University	Sault Ste. Marie, MI	5/96	B.S.
Alexander Blewett III School of Law	Missoula, MT	5/00	J.D.

10. List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.

I was a member of the Student Senate and served as Resident Advisor while attending Lake Superior State University.

C. LEGAL AND PROFESSIONAL EXPERIENCE

11. In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or governmental agencies with which you have been affiliated, and your position. Include the dates of any periods of self-employment and the name and address of your office.

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

12. In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.

Montana State Courts	2000
Special Assistant United States Attorney (Flathead County Attorney's Office. This designation expired once I left the Flathead County Attorney's Office)	2004 -2007 (approximate dates)

13. Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., real estate, water rights, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, employment law, alternative dispute resolution, etc).

95% of my law practice is dedicated to the practice of criminal law. I am employed as Montana Attorney General's Office Prosecution Services Bureau Chief. I supervise 9 criminal prosecutors and 3 paralegals. Historically, along with my other duties, I supervised the Department of Justice Child Protection Unit that consisted of 4 dependent and neglect prosecutors. The primary function of the Prosecution Services Bureau is to assist local county attorneys with complex criminal cases and conflict of interest cases.

5% of my law practice is dedicated to civil matters that involve abuse and neglect proceedings, postconviction relief proceedings, revocations, and administrative parole hearings.

14. Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etc. (exclude bar activities or public office).

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

15. Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings.

My primary courtroom experience has been litigating complex criminal cases in nearly every district court in Montana. During the last ten years, I have tried 10 homicide jury trials, along with numerous child sexual assault trials. In total, I have had 20 felony jury trial during the last 10 years.

During the last 10 years, I have appeared numerous times in front of the Montana Board of Pardon and Parole representing the State of Montana.

16. If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.

During the last 10 years, I have not appeared in front of the Montana Supreme Court.

17. Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.

1. In 2004 while I was a Flathead Deputy County Attorney, I prepared a series of search warrants for property owned by a prominent local business leader. The warrants related to his involvement in promoting prostitution and having sexual relations with children. The

search warrants included his personal residence and two of his businesses. I prepared the search warrant applications and search warrants as I had routinely done by listing the items to be seized in the search warrant application without listing the items in the search warrant.

The search warrant was served upon the Defendant, without the search warrant application. The search was conducted with numerous pieces of exculpatory evidence being seized.

Approximately two weeks later, the United States' Supreme Court in *Groh v. Ramirez*, 540 U.S. 51 124 S. Ct. 1284 (2004), ruled that it was a violation of the 4th Amendment to only list the items to be seized in the search warrant application and not the search warrant. District Court Judge Stadler ordered a hearing on this matter. This was an extremely high-profile case with the Defendant having numerous attorneys and resources. In 2004, I was a relatively inexperienced attorney who seemed to have made a grave mistake that would have far-reaching ramifications for this case and the Kalispell community.

Most of the individuals involved in the case believed that there was little to do but concede the mistake and agree to turn the evidence back over to the Defendant. However, I was able to use the "independent source doctrine" and re seize the evidence. This doctrine provides that the "government must show that no information gained from the Fourth Amendment violations affected either (1) the law enforcement officers' decision to seek a warrant or (2) the magistrate's decision to grant it." *United States v. Saelee*, 51 F.4th 327, 119 (2022).

During the hearing, the State agreed to turn back over to the Defendant and his businesses the illegally seized items.

Prior to law enforcement returning the seized evidence, pursuant to the "independent source doctrine," I prepared three new legally valid search warrants which the Court reviewed and issued. At the Court-ordered designated time, law enforcement returned the seized evidence to the Defendant and his businesses. After the evidence was in the Defendant's position law enforcement served three new search warrants on the Defendant and re seized the evidence.

The Defendant moved to suppress the seized evidence. The District Court found that the second set of search warrants was based on an "independent source" and therefore were valid. In *State v. Dasen*, 2007 MT 87, 337 Mont. 74, 155 P.3d 1282, the Montana Supreme Court upheld the legality of the second round of search warrants under the "independent source doctrine."

After a month-long trial, the Defendant was found guilty of Promotion of Prostitution, Sexual Abuse of Children, and three counts of Felony Prostitution.

2. In November 2007, I was hired at the Montana Department of Justice Prosecution Services Bureau. Shortly after I arrived, I was assigned the case of *State v. Douglas Guill*. The case had been charged by the Sanders County Attorney approximately one year earlier. The challenge was that trial was only a few months away in March of 2008. Defense counsel was extremely experienced and had been one of my professors during law school. The County Attorney who had charged the case had done only a handful of trials.

The allegations were that the Defendant had created a cult-like environment in his family. The Defendant's wife and children lived downstairs in the basement, while the Defendant and his mistress (Nicole Guill) resided upstairs in the main living quarters. During the evening, the Defendant and Nicole would bring his daughter upstairs and rape her. The Defendant's children and his wife were extremely isolated. The Defendant's children did not attend school, nor was his daughter allowed to leave the property on a regular basis. This occurred for 14 years, until the victim escaped to Sandpoint, Idaho, at the age of 22.

Upon being assigned the case, I was tasked with preparing for a lengthy trial, which included preparing numerous witnesses to testify and litigating numerous evidentiary issues in a matter of only three months. The seminal legal issue to be decided by the District Court was the admissibility of evidence of the Defendants systematic abuse of the victim, her brother, and mother, along with evidence of the cult-like environment that was pervasive in the household. The Defendant argued that the evidence was impermissible Mont. R. Evid. 404(b) evidence. I argued that the evidence was admissible under the "same transaction rule" and Mont. R. Evid. 404(b).

At trial, the court determined that the proposed evidence was admissible, and the decision was ultimately upheld by the Montana Supreme Court in *State v. Guill*, 2010 MT 69, 355 Mont. 490, 288 P.3d 1152.

At the conclusion of a two-week trial, the jury found the Defendant guilty of all counts. The Defendant was ultimately sentenced to the Montana State Prison for 50 years without the possibility of parole. In a separate trial, where I was also lead counsel, Nicole Guill was also convicted of raping the victim.

3. In 2017, Broadwater County Sheriff Deputy Mason Moore was killed by Lloyd Barrus and his son Marshall. After the killing of Deputy Moore, law enforcement pursued the Defendant for nearly 90 miles on Interstate 90, which culminated in a shootout where Marshall Barrus was killed by law enforcement and the Defendant, Lloyd Barrus, ultimately surrendered to law enforcement.

The Defendant was charged with numerous offenses including the killing of Deputy Moore. The proceedings against the Defendant lasted for 5 years with the Defendant ultimately being sentenced in 2022 to 3 life sentences at the Montana State Prison with no possibility of parole. The case was prosecuted by the Montana Attorney General's Office and the Broadwater County Attorney's Office. I was lead counsel for the prosecution.

Early in the proceedings, the Defendant was found to be unfit to proceed to trial based on a mental disease. The psychiatrist at the Montana State Hospital believed that the Defendant could be made fit by the administration of antipsychotic medication. The Defendant refused to take medication and indicated that he would fight to the death anyone who tried to forcibly medicate him.

The primary precedent for forcibly medicating a defendant to restore fitness is the United State's Supreme Court case of *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174 (2003). The court held a 5-day hearing on whether the State could meet the *Sell* factors. Each side called world-renowned experts that were vigorously cross-examined. I was tasked with conducting the lengthy examination of the State's expert and cross examining the Defendant's expert. The testimony addressed the Defendant's diagnosed mental illness and what each expert believed the anticipated benefits and side effects of forcibly medicating the Defendant. Numerous research articles and those findings were discussed along with the Defendant's voluminous mental health records.

At the conclusion of the 5-day hearing, the district court found that the State had met its burden in establishing the *Sell* factors. The Defendant was forcibly medicated with antipsychotic medication. The Defendant's mental health dramatically improved, and he was ultimately rendered fit to proceed to trial where he was convicted.

The district court's decision to forcibly medicate the Defendant was upheld in *Barrus v. Mont. First Judicial Dist. Court*, 2020 MT 14, 398 Mont. 353, 456 P.3d 577.

18. If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information.

I have not authored any legal publications.

19. If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke.

Presentations I have done:

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

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

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

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

Discussion on Relevant Issues Surrounding Expert Witness Testimony, Montana Sexual Offender Treatment Association (MSOTA) Conference, May 2004. The topics covered a range of issues relating to the use of expert witnesses in sexual abuse cases including the sentencing phase. The attendees were members of MSOTA.

Prosecuting the Difficult Sexual Assault Case, June 2004. I presented on how prosecutors can effectively work with child sexual abuse victims and prepare them to testify in court. I also made a separate presentation on the use of expert witnesses in sexual abuse cases. The presentation was made to prosecutors.

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

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

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

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

Lloyd Barrus: A Case Study of Mental Disease and Defect in the Montana Criminal Justice System, Montana County Attorney Conference, December 2022. The presentations focused on the many challenges of prosecuting cases involving mental disease and defects, including expert testimony and *Sell* hearings. The presentation was made to prosecutors.

20. Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.

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

21. Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.

I am a member of the Montana State Bar. I am the Vice Chair of the Criminal Law section of the State Bar under the Criminal Law Chair, Colin Stephens.

22. Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received.

Not applicable.

23. If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled.

Not applicable.

24. Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a judge.

Not applicable.

D. COMMUNITY AND PUBLIC SERVICE

25. List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.

I have been a member of the Rocky Mountain Elk Foundation. Erin (wife) and I give freely to numerous charities and non-profits.

26. List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

In 2014, I unsuccessfully ran for State Senate.

In 2015, I unsuccessfully applied for appointment to the First Judicial Bar.

In 2020, I unsuccessfully applied for appointment to the First Judicial Bar.

In 2022, I unsuccessfully ran for Lewis and Clark County Attorney.

E. PROFESSIONAL CONDUCT AND ETHICS

27. 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.

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

No.

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

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

30. Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number).

No.

31. Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would 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

32. Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge.

No.

33. Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? If not, please explain.

Yes, I have timely filed all State, Federal, and local taxes.

34. Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? If so, give details.

No.

G. JUDICIAL PHILOSOPHY

35. State the reasons why you are seeking office as a district court judge.

I have approached my work as a prosecutor with a strong commitment to fairness and justice. I am seeking the position of district court judge to continue to instill these values on the court and to continue my public service to Montana.

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

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

(criminal law), but it is ruling on broader societal issues that most interest me about the position.

36. What three qualities do you believe to be most important in a good district court judge?

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

Judges must be patient with counsel and participants, allowing each party a degree of latitude in presenting their case in the manner they see most fit, yet at the same time move the proceedings with a deliberate pace toward an appropriate conclusion.

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

37. What is your philosophy regarding the interpretation and application of statutes and the Constitution?

The creation of the United States Constitution by our founding fathers is the single most important event that has enabled our democracy to endure for over 200 years. It is fundamentally important that adherence be given to the words of the U.S. Constitution. A failure to do so threatens to erode the document's foundational principles to the point it has no meaning.

In interpreting the U.S. Constitution or Montana's Constitution, if the language is clear and unambiguous, there is no need to go further than looking at the plain meaning of the words contained within the documents. Accordingly, when interpreting the Constitution, judges should not overreach to manipulate the words to obtain a certain result.

There will be occasion when the words do not provide sufficient guidance, at which time it is appropriate to look at context. For example, the U.S. Constitution does not expressly guarantee the right to a unanimous verdict in criminal trials. An examination of the words of the 6th Amendment, along with the context in which they were written, clearly establish that the founding fathers envisioned the right to a unanimous jury verdict in criminal proceedings. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

Caution should be used anytime a judge is going outside of the expressed words of the provision. If a judge does go outside the expressed language of the Constitution, it should be accomplished in the narrowest way possible. In summary, in interpreting either the U.S. Constitution or the Montana Constitution, judges should look at the plain language of the provision. If the language of the provision is ambiguous, judges should cautiously look at the context, which includes what the founders were trying to accomplish and in doing so, should do it in the narrowest way possible.

In interpreting a statute, the reviewing judge should look first look at the plain language of the statute. If the statute is clear and unambiguous, there is nothing left for the court to do. Judges should not “insert what has been omitted or to omit what has been inserted.” When a statute is ambiguous, judges should be cautious in looking at legislative intent from the legislative record. A reason why one legislator or a group of legislators decided to vote for a provision may not be why the majority voted to pass a statute. The public needs to be able to review Montana Code Annotated and know the meaning of the law, rather than be required to view the various hearings on a bill to determine legislative intent. If law as it is plainly written does not accomplish what the Legislature set out to do, then the Legislature can rewrite the law the next time it meets. If the court does look at legislative intent, the judge should decide the case in the narrowest way possible.

H. MISCELLANEOUS

38. Attach a writing sample authored entirely by you, not to exceed 20 pages. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics.
39. Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.

Austin Knudsen, Montana Attorney General, 406-444-2026

Laurie McKinnon, Montana Supreme Court Justice, former 9th Judicial District Court Judge, 406-444-5570

Jeffrey Sherlock, Retired First Judicial District Court Judge, 406-438-3393

CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true. By submitting this application I am consenting to investigation and verification of any information listed in my application and I authorize a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions I have attended, any references furnished by me, employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to my citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history to release to the Office of the Governor of Montana or its agent(s) any information, files, records, or reports requested in connection with any consideration of me as a possible nominee for appointment to judicial office.

I further understand that the submission of this application expresses my willingness to accept appointment as District Court Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

2-13-23

(Date)



(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Monday, February 13, 2023

Mail the signed original to:

Hannah Slusser
Governor's Office
P.O. Box 200801
Helena, MT 59620-0801

Send the electronic copy to: hannah.slusser@mt.gov

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

COUNSEL FOR STATE

MONTANA NINTH JUDICIAL DISTRICT COURT, TETON COUNTY

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

INTRODUCTION

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

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

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

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

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

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

I. General Rule Regarding Character Evidence

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

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

....

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

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

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

II. Character of Victim

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

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

III. Methods of Proving Character

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Foundational Requirements for Introduction of Specific Conduct of Victim

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

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

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

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

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

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

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

Daniels, ¶ 27.

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

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

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

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

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

CONCLUSION

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

Dated this 14 day of January, 2014.

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

By:


DANIEL GUZYNSKI

CERTIFICATE OF SERVICE

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

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

Dated: January 14, 2014

Lia Coni