

**APPLICATION FOR
DISTRICT COURT JUDGESHIP**

A. PERSONAL INFORMATION

1. Full name. Benjamin Raymond Anciaux
2. Birthdate. [REDACTED]
3. Current home address. [REDACTED]
4. Email address. [REDACTED]
5. Preferred phone number. [REDACTED]
6. Judicial position you are applying for. District Judge – Twentieth Judicial District
7. Date you became a U.S. citizen, if different than birthdate.
8. Date you become a Montana resident. June, 1969

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.
Bigfork High School, Bigfork, Montana. May 31, 1971 - High School Diploma.
Seattle Central Community College, Seattle, Washington. No degree.
Flathead Valley Community College. June 1973 - Associates Degree
University of Montana – June 11, 1978 – Bachelor of Arts
University of Montana Law School – June 14, 1981 - Juris Doctor
10. List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.

Bigfork High – class president, graduated with high honors, offered scholarship in football to Butte Tech. Held schools track records.

University of Montana Law School – Worked at the UC providing legal advice and representation to students. Represented Defendant's at sentence review. With another law student, provided legal research services utilized by private attorneys.

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.

From 2015 to the present I am a Deputy County Attorney at the Lake County Courthouse, 106th 4th Avenue East, Polson, Montana. My duties have included prosecution of felony cases, juvenile cases, youth dependency and neglect cases, and involuntary commitment cases, among other. A Deputy County Attorney in Lake County is considered a part time position allowing private practice outside the County Attorney's Office. As a result, I have been in private practice from 1986 through the present. Since 2018 I have been the Ronan City Attorney.

My private practice has been under the name Anciaux Law Office. Originally the Office was located at the First Citizen's Bank. I later moved to 107 6th Avenue East, Polson, Montana and then to 1102 11th Avenue East, Polson, Montana.

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.

June 14, 1981 admitted to Montana Court and Bar and the Federal Court.
From 1986 until approximately 2000 admitted to the Confederated Salish and Kootenai Tribal Court. Stopped taking cases and did not renew admission.

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).

Criminal prosecution, Juvenile, Youth in Need of Care, Mental health proceedings – 65%
Prior to joining the Lake County Attorney's Office in 2015, I was a defense attorney, privately and through a contract with Lake County and then as a contract attorney with the Office of Public Defender when it was started. The percentage of time was – 65%.
City Attorney – 10%
Family Law – 5%
Bankruptcy – 5%
Wills and probate – 5%
Real property and contracts – 5%
Miscellaneous – 5%

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 began my career as a prosecutor, became a criminal defense attorney and then prosecutor again. During that entire period I was also practicing civil law. I have experience in criminal, civil, administrative, family, real estate, probate, contract and bankruptcy law. I have appeared in City, Justice, District, Montana Supreme, Federal and Tribal courts. I have been in numerous jury trials, motion and administrative hearings and bench trials.

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.

I appear twice a week in District Court for law and motion. I appear once a week in City Court. In addition, I regularly appear in trials, hearings and proceedings in District and City Court. I have appeared in Federal, Tribal, Justice and City Courts, child support administrative proceedings, wrongful termination proceedings, chairman or member of medical malpractice panels, child custody proceedings including arbitration and arbitration in criminal cases.

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.

Prior to 10 years ago, I appeared before the Montana Supreme Court. The Office of Public Defender formed in 2006. While I worked for the Office of public Defender between 2012 and 2015, appeals have been handled by the Appellate division of the Office of Public Defender. While working in the Lake County Attorney's Office from 2015 to the present, appeals are handled by the Attorney General.

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.

I and Ed Sheehy were co-counsel as the defense in a deliberate homicide case. The Defendant received the only death penalty handed down in Lake County. Even though we were unsuccessful in getting a not guilty verdict, the effort and care we put into the proceedings was extensive. The case was tried in a different county than Lake County, where it occurred. The case resulted in the death penalty being imposed. That had not happened before or after in the Twentieth Judicial District. Learning and applying the law, gathering and presenting appropriate evidence and arguing the facts and law in a death penalty case had a steep learning curve.

Through my career, I have represented more than 1,800 criminal defendants and prosecuted more than 500 others, in addition to the civil cases I have handled. Each case has had its own challenges. Every case was different even though there were similarities. After doing it for a while, the idea that you can guess the facts, back-grounds, excuses, rationale, probable outcomes and solutions creeps in. I have tried to listen to each case as though it was new. I work to see a complete picture and allow each case to change what "I know".

Recently several jail inmates in Lake County have chosen to represent themselves. In several instances that was due to a claim by the inmate that their attorney would not file motions the inmate requested they file. Prior to this, unrepresented inmates only had access to the last set of the Montana Code Annotated the jail had or what research jailers would do for them. Balancing the resources of the County with the right incarcerated people have to see the law for themselves has been interesting. Helping in some small way with getting an adequate law library set up for use by the inmates and then answering the numerous and interesting motions filed by the inmates plays to both the prosecutor and defense attorney sides of me.

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.

N/A

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.

N/A

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.

Since starting work in the Lake County Attorney's Office, I have continued to do private legal work for previous clients, friends, friends of my children and people referred to me from various sources. I do that work for reduced compensation or no compensation. I have provided legal advice concerning criminal charges, bankruptcy, family law, real property law, employment law and probate law. I have drafted wills, parenting plans and contracts and assisted in drafting small estate probate petitions and paperwork. I have assisted with administrative hearings involving child support determinations and VA claims.

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.

N/A

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

N/A

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.

N/A

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

During college, I took time off to earn some money. I worked green chain and the waste table at a lumber mill until I was injured. My foot got caught on a chain that circled through the floor to haul scrap wood from freshly sawn logs to a conveyor belt and a chipper. My leg was dragged into the floor almost to the knee. The bones were chopped like a tree at mid-calf. For what seemed like forever, I had a frame work outside my leg that pushed the pins that had been put through my bones together so my leg bones could grow together and heal. I had grafts from my other leg to replace the skin that had been scrapped off. The doctor told me I probably would not walk again. Within a few years I was playing baseball and flag football. I finished college and applied to law school. I walk without a limp. As one consequence of that experience I am not afraid of hard work or the long haul. I see problems as hills to climb. I know few things in this world are gained without sacrifice. Without the injury, I probably would not have gone to law school. I understand how a moment can change a person's life.

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 the Exalter Ruler of the Mission Valley Elks Lodge. I was Chairman of the Board of Trustees. I was the Chairman of the two State Elks Conventions held in Polson.

I coached baseball for many years. After my son was killed in an auto accident, we held numerous events and raised thousands of dollars in his name for youth baseball in Polson.

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.

I filed to be the District Judge in the Twentieth Judicial District in the last election prior to Judge Manley announcing he was going to run again. I thought he had previously indicated he would not run for reelection. When Judge Manly announced he was running for re-election, I stopped pursuing the office.

In 2016, I ran for District Judge in the Twentieth Judicial District.

In 2008 I ran for Lake County Attorney on the Republican ticket. I was defeated in the primary.

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.

In 2005, I was suspended for 60 days in Montana. A complaint was filed against me by a client with the commission on practice alleging I had not responded to her requests in a custody case. In my response to the commission, my account of my contacts with the client did not match my billing. Rather than go through a hearing, I stipulated to the suspension.

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.

No.

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.

In 2020 I did not file my state or federal income taxes on time. The returns have since been filed resulting in an approximate \$900 refund of federal income taxes and an additional approximate \$500 owed in state taxes. My wife broke her ankle 20+ years ago. Over time the pins, rods and bones in her ankle were breaking down. In 2020 she had surgery to correct the problems. Shortly after the surgery she got a MRSA infection in the incision made during the surgery. She had to go to the hospital to have emergency surgery to remove the rods and screws recently put in her leg. She was in the hospital for a week. Her doctor performed multiple surgeries to scrape the infected tissue out. After getting out of the hospital, she was seen by home health care nurse several times a week to clean the wound and change the vac system on her wound. I was tasked with attaching expensive medication to her IV on a daily basis to fight the MRSA. She had numerous appointment and consultations with her doctor and 3 other specialist in the months that followed. The bills for some of the medical procedures took months to appear. We still have not received a bill from the hospital or home health care even though we signed agreements we would be liable for the portion insurance did not cover. I delayed filing tax returns waiting for the bills. In April 2021, when I asked for an extension, I paid an extra amount of taxes to cover what I calculated would be due without considering the medical expenses. The bills were not received before the extension expired. We still have not received some bills or an indication that they were paid by insurance. I filed the returns and still have not determined if the medical expenses were deductible.

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 practiced on both sides of the criminal law, as a prosecutor and as a defense attorney. I had a similar experience in civil matters representing both plaintiffs and defendants/respondents. As a defense or civil attorney you are trying to produce a positive effect mostly for your client. That is all you can expect or accomplish in most cases. Your role as a prosecutor is not just to

make the law work for the benefit of your client or a victim, it also must work for the accused. That causes the circle of influence to widen. The effects and responsibilities grow even more for a Judge. I have worked for the public in one form or another all of my career. I have tried to make a difference in people's lives whatever position I was in. I think I possess the knowledge, experience, compassion, desire and self-awareness to make a positive difference for people who would come before me if I were a District Judge.

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

Listen with an open mind, before, during and after making a decision, whether you disagree or agree with a party's position.

Know the law and where and how to find it. A decision based upon what feels right without law to back it up, provides no stability or predictability.

Respect and fear the power of the position. The ability to effect people's lives in major ways carries with it the same level of responsibility, care and concern.

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

The role of a Judge is not to make law, it is to follow the law as it is written. If a law is not clear, the Judge's role is to interpret the law as narrowly as possible while considering the facts and individuals involved.

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.

Attached

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.

Judge Deborah Kim Christopher, (406) 883-7360, dchristopher@mt.gov

Britt Cotter – (406) 883-1159, britt@cotterlawofficepc.com

Steve Eschenbacher – (406) 883-7245, seschenbacher@lakemt.gov

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).

April 6, 2022
(Date)

Benjamin R. Quaid
(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, April 11, 2022

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

1 Lake County Attorney's Office
2 Lake County Courthouse
3 106 Fourth Avenue East
4 Polson, MT 59860
5 406-883-7245

6 MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

7 THE STATE OF MONTANA,

8 Plaintiff,

9 vs.

10 JADE EARL NEWBERRY,

11 Defendant.

Cause No. DC-18-344

STATE'S RESPONSE TO DEFENDANT'S
MOTION IN LIMINE TO EXCLUDE WITNESS
TESTIMONY

12 Comes now, BENJAMIN R. ANCIAUX, Deputy Lake County Attorney, and files this
13 Response to the Defendant's Motion In Limine to Exclude Witness Testimony.

14 In denying the defendant's Motion to Compel or Dismiss, this Court held:

15 The defendant correctly points to his Sixth amendment right to confront witness against
16 his interest. For that reason, this Court has consistently ruled that any witness not available for
17 interview to the defendant prior to the trial will be excluded from testifying at trial. The
18 defendant should expect this same policy applied to this case. Likewise, the State is reminded
19 that their efforts should reflect the seriousness of having witnesses excluded should the witness
not present themselves for interview by the defendant.

Finally, both the State and Defendant have subpoena powers. Those powers should be
exercised not to harass but for the proper reasons intended. The State is not required to produce
a witness for interview but they often do because of this Court's policy. When the defendant is
stonewalled by a witness, as seems the case here, they may exercise their subpoena power to
compel witnesses appear for interviews.

As the Court correctly points out, the State is not required to produce a witness for interview.

MCA 46-15-322 provides the matters that are subject to disclosure and production by the State. It
recites:

Disclosure by prosecution. (1) Upon request, the prosecutor shall make available to the
defendant for examination and reproduction the following material and information within the
prosecutor's possession or control:

- 1
- 2 (a) the names, addresses, and statements of all persons whom the prosecutor may call as witnesses in the case in chief;
- 3 (b) all written or oral statements of the defendant and of any person who will be tried with the defendant;
- 4 (c) all written reports or statements of experts who have personally examined the defendant or any evidence in the particular case, together with the results of physical examinations, scientific tests, experiments, or comparisons;
- 5 (d) all papers, documents, photographs, or tangible objects that the prosecutor may use at trial or that were obtained from or purportedly belong to the defendant; and
- 6 (e) all material or information that tends to mitigate or negate the defendant's guilt as to the offense charged or that would tend to reduce the defendant's potential sentence.
- 7
- 8 (2) At the same time, the prosecutor shall inform the defendant of, and make available to the defendant for examination and reproduction, any written or recorded material or information within the prosecutor's control regarding:
- 9 (a) whether there has been any electronic surveillance of any conversations to which the defendant was a party;
- 10 (b) whether an investigative subpoena has been executed in connection with the case; and
- 11 (c) whether the case has involved an informant and, if so, the informant's identity if the defendant is entitled to know either or both of these facts under Rule 502 of the Montana Rules of Evidence and 46-15-324(3).
- 12

13 The State has complied with this statute and provided Defendant with all of the recorded statements of witnesses taken by the investigating officers. In State v. Caryl, 543 P.2d 389, 394, 168 Mont. 414 (1975), the Court found:

14

15 Defendant claims prejudicial error because defense counsel was unable to interview Dianna Schnaible, the only eyewitness to the shooting of Ruby Judd and the assault on Dianna Schnaible, prior to trial.

16

17 The background of this contention is that the district court authorized expenses to defense counsel to travel to California for a pretrial interview of Dianna Schnaible and other state's witnesses. When defense counsel arrived in California on May 29, Dianna Schnaible's doctor would not permit the interview because she was in an advanced state of pregnancy with the birth of the child imminent. The state moved for continuance [168 Mont. 424] of the date set for trial because of her unavailability to testify until

18

19 Page 395

1 after her child was born. The district court granted a continuance of the trial date to July 15 at
2 which time the trial commenced. Apparently Dianna Schnaible did not arrive in Deer Lodge,
the place of trial, until about 9:00 p. m. on July 16. Defense counsel apparently attempted to
3 contact her then, but her husband would not permit them to interview her because she was
highly nervous and under a doctor's care.

4 Defense counsel moved to dismiss the first degree assault charge on this basis. Eventually
defense counsel secured a half hour interview with her during the noon hour of July 17 which
defense counsel claimed was 'wholly unsatisfactory'. Dianna Schnaible testified thereafter at
5 the trial as the last witness in the state's case-in-chief. The defense did not cross-examine her,
but requested that she not be excused from the subpoena 'in the event we wish to call her for the
6 Defendant's case'. She was never called as a witness for defendant.

7 Defendant's claim of prejudicial error must fail. We are aware of no obligation on the part
of Dianna Schnaible to allow defense counsel to interview her prior to trial short of the statute
concerning pretrial depositions of material witnesses in criminal cases, Section 95-1802,
R.C.M.1947. No attempt to take her deposition was made. Defense counsel had a copy of the
8 statement she gave following the killings and assault, together with the representation of the
county attorney to the court that he was aware of no changes. There is no showing that the state
interfered with defense counsel's attempts to secure a pretrial interview. Defense counsel
9 actually secured an interview with the witness prior to her testimony at the trial, albeit 'wholly
unsatisfactory' from their point of view. The defense did not cross-examine her at the trial, nor
did they call her as a witness in their case. There is no showing of prejudice to the defense.
(Emphasis added)

10 The Court in Caryl did not find the State violated any right of the Defendant. The concern of
11 the Court was whether the State interfered with defendant getting an interview of the witness. This
makes sense because of the provisions of MCA 46-15-330 . . . "a party or agent of a party may not
12 discourage or obstruct communication between any person and any party or otherwise obstruct a
party's investigation of the case." The State has not discouraged or obstructed the defendant's efforts
13 to interview the victims and their mother. The State has attempted to connect the defendant's counsel
with the victims and their mother. On October 16, 2018, counsel for the State discussed the case with
14 the victims' mother and informed her that the defendant, through counsel, would probably make a
request to interview the children. On December 31, 2018, defense counsel asked if the State would set
15 up interviews with the victims and their mother. On January 3, 2019 the staff at the Lake County
Attorney's Office emailed the mother of the victims trying to set the interviews up. Several more
16 attempts were made to contact the mother of the victims. On January 22, 2019, counsel for the State
17
18
19

1 again talked to the victims' mother and requested she set up an appointment through the staff to be
2 interviewed by defense counsel. When that did not occur, the staff at the Lake County Attorney's
3 Office made several more calls to the victims' mother trying to set up interviews. None of those
4 resulted in a call back from the mother.

4 Counsel for the State called the mother and left messages for her to call back after each of the
5 hearings in this matter. On April 2, 2019, the victims' mother contacted counsel for the State. When
6 asked if defense counsel had contacted her directly to set up appointments to interview her and the
7 children, she replied no. When asked if Tom Sly or any other representative of the defendant had
8 contacted her directly to set up appointments to interview her and the children, she replied no. In
9 State v. Dunn, 155 Mont. 319, 472 P.2d 288, 294, on the issue of deposing a witness, the Montana
10 Supreme Court recited:

10 Defendant next mounts an assault on the alleged denial to him of pretrial discovery so as to
11 enable him to properly prepare his defense. Specifically he cites as error the district court order
12 denying him the right to take the deposition of Dr. Richard J. Best in advance of trial.
13 Page 295

12 Dr. Best, a medical doctor in Butte and father of Kathy Best to whom defendant was
13 charged with selling a dangerous drug, was one of the state's witnesses whose name and
14 address was endorsed on the information. Defendant filed a written motion for a district court
15 order setting a time and place for taking his deposition and those of other state's witnesses
16 pursuant to section 95-1802(a)(1), R.C.M.1947. This motion was supported by an affidavit of
17 defendant's attorney that he had mailed to Dr. Best and the other state's witnesses a request that
18 they contact him 'to arrange an interview respecting their knowledge or information of the facts
19 of this matter.' The affidavit stated that 8 days later Dr. Best and three other state's witnesses
had not contacted him but that one state's witness had made an appointment with him. The
affidavit concluded that therefore defendant's[155 Mont. 330] attorney 'is led to believe * * *
each of them are apparently unwilling to provide relevant information * * *'. Defendant's
motion was argued and denied in its entirety by the district court some three weeks in advance
of trial.

17 Granting that section 95-1802[a](1) permits a defendant to take the deposition of a witness
18 unwilling to provide relevant information whose testimony is material and whose deposition is
19 necessary to prevent a failure of justice, defendant's showing here by affidavit falls far short of
establishing these essential requirements. There is no showing whatever of the necessity of
taking Dr. Best's deposition in order to prevent a failure of justice. Nor is there any indication
of either a request or demand to Dr. Best for the taking of his deposition. The only showing
made in the affidavit is a letter requesting Dr. Best to contact defendant's attorney and arrange

1 an interview to which Dr. Best had not responded 8 days later. A perfunctory request by mail to
2 a local witness asking him to contact defendant's attorney to arrange an interview falls far short
3 of establishing the witness's unwillingness to provide relevant information or give a deposition.
4 As the statutory requisites for taking Dr. Best's deposition were never established, defendant's
5 rights were not violated.

6 The motions defendant has filed in this matter recite very little about the efforts defendant has
7 made to interview the victims and their mother. The defendant's efforts should be as substantial as the
8 State's efforts.

9 Defendant provides no support for interviewing the victims and their mother beyond the
10 allegation that not to interview them would amount to ineffective assistance of counsel. Defendant
11 does not recite what particular evidence he thinks an interview would produce that would help his case.
12 Defendant claims that he should not have to depose the witnesses because that would "elicit testimony
13 that may be used against Mr. Newberry at trial . . .". Defendant does not explain how it would be any
14 different if the witnesses were interviewed instead of deposed. Defendant claims a deposition violates
15 his Fifth and Sixth amendment rights but does not articulate how. Interviewing or deposing a witness
16 by defense counsel does not violate the defendant's Fifth or Sixth amendment rights.

17 The State doing the job of the defendant's counsel could amount to a violation of the
18 defendant's right to effective assistance of counsel and thus a violation of Defendant's Sixth
19 amendment rights. The choice to interview a witness prior to trial can be a tactical decision. While the
law provides the defendant with the opportunity to interview or depose a witness prior to trial, no
statute requires it. There are valid reasons for not interviewing a witness before trial. These include
not preparing the witness for questions by asking them before trial so they can craft their answers, or
not letting the State know the defense strategy of the defendant in time to prepare rebuttal. The State
moving for a deposition of the witnesses could also be seen as the State usurping a tactical decision

1 that should be made by the defendant. The criminal justice system is adversarial. The State making
2 tactical decisions for the defendant interferes with that.

3 The effect on the victims, who are both under the age of 10, should to be taken into account.
4 When their mother was asked if she would be willing to allow an interview of her kids, she expressed
5 that concern. She also asked what additional information interviews of her children would produce.
6 The State does not know what additional information helpful to the Defendant interviews of the
7 children would produce for the defendant. Defendant has not said what that might be. Some defense
8 counsel use the interview of a victim to intimidate the victim. That could also happen unintentionally.
9 A guess by the defendant as to some imaginary benefit should be weighed against the potential of real
10 harm to the children.

11 The evidence the State needs to present in this matter includes video showing the defendant in
12 the school yard. The view is from behind the defendant at the time he exposed himself. The video
13 shows the defendant reaching to his front and children scattering. While the video is suggestive of the
14 defendant exposing himself, without the testimony of the victims, the state has insufficient evidence to
15 meet the elements of "knowingly or purposely expos(ing) the person's genitals or intimate parts". If
16 the victims and their mother are not allowed to testify, the State would ethically be required to dismiss
17 the charges against the defendant for lack of sufficient evidence.

18 MCA 46-15-329 provides:

19 If at any time during the course of the proceeding it is brought to the attention of the court that
a party has failed to comply with any of the provisions of this part or any order issued pursuant
to this part, the court may impose any sanction that it finds just under the circumstances,
including but not limited to:

- (1) ordering disclosure of the information not previously disclosed;
- (2) granting a continuance;
- (3) holding a witness, party, or counsel in contempt for an intentional violation;
- (4) precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; or
- (5) declaring a mistrial when necessary to prevent a miscarriage of justice.

1 The State has complied with any of the provisions of 46-16-322, et. Seq. so no sanction is
2 warranted. The result of the Court excluding the mother and victims from testifying would be the
3 dismissal of the charge against the Defendant. That is the most severe sanction the Court can impose.
4 That sanction would be imposed against the State even though the State has made substantial efforts to
5 arrange the interviews by the defendant with the victims and mother, without having any duty to do so.

6 The State does not own a witness, even if the witness is the victim. The State has no power
7 over a witness other than what is granted by the Court through the discovery statutes. Unlike a civil
8 case where plaintiff's attorney is required by professional ethics to advocate for the position held by
9 the victim/plaintiff, the victim is not a party in a criminal action. The State of Montana is the plaintiff
10 in a criminal action. The State can, and often does disagree with the position taken by the victim in a
11 criminal case. Many times it is an illusion that the State has more control over the victim in a criminal
12 case than the defendant. As an example, in almost every Partner or Family Member Assault case, the
13 victim recants, wants contact with the defendant, or wants the charges dismissed or the penalty
14 softened. Frequently the victim refuses to testify as a means of getting their way.

15 Defendant relies upon MCA 46-15-331 which provides:

16 Before or during trial in any judicial proceeding, a judge of the district or municipal court, upon
17 request by the prosecutor or defense counsel, may require a person to answer any question or
18 produce any evidence, even though personally incriminating, following a grant of immunity.
19 (Emphasis added)

20 Defendant argues this code section means the State must provide the witness. The commission
21 comments on this code section do not support defendant's position. According to the comments "(t)he
22 statute governs the practice of compelling testimony and provides for immunity associated with such
23 testimony." The State is not the witness. The State would not testify or be able to "answer any
24 question or produce any evidence". The victims are. This code section is directed at witnesses not the
25 State. Every Montana case referred to in the Montana Code Annotated October 2018 Annotations

1 Edition reciting this code section discusses witnesses and immunity, not the Statute creating a duty on
2 the State to produce witnesses for the defendant. The code section may be justification for forcing the
3 victim to answer questions. It does not support or require the State to produce a witness.

4 Defendant relies upon MCA 46-15-322(5) which provides:

5 Upon motion showing that the defendant has substantial need in the preparation of the case for
6 additional material or information not otherwise provided for and that the defendant is unable,
7 without undue hardship, to obtain the substantial equivalent by other means, the court, in its
8 discretion, may order any person to make it available to the defendant. The court may, upon the
9 request of any person affected by the order, vacate or modify the order if compliance would be
10 unreasonable or oppressive. The prosecutor may not be required to prepare or disclose
11 summaries of witnesses' testimony.

12 Defendant argues this code section requires the State to provide a witness for an interview by
13 the Defendant. A witness is not "material or information". The use of this subsection to require the
14 State to produce a witness contradicts the plain language of the statute. Montana Code Annotated,
15 October 2018 Annotations Edition, cites no case in which this code section was used to justify the
16 State being required to provide an interview with a witness. The cases cited discuss statements,
17 reports, accountings and all manner of written, videoed, recorded and memorialized "material or
18 information". Even if "material or information" is interpreted to mean that the State is required to
19 provide a witness interview, the code section requires the defendant to show that he "is unable, without
undue hardship, to obtain the substantial equivalent by other means". The provisions of MCA 45-15-
201 et. Seq. which govern taking depositions by defendant, provide a "substantial equivalent by other
means."

20 The State has not "discourage(d) or obstruct(ed) communication between any person and any
21 party or otherwise obstruct(ed) a party's investigation of the case" as is barred by MCA 46-15-330. No
22 statute or case requires the State to produce a witness interview for the defendant. This Court has ruled
23 the State does not have to produce a witness. The State has made substantial efforts to accommodate

1 defendant's request that it set up interviews by defendant with the victims and their mother. Defendant
2 has not shown a corresponding substantial effort. Defendant has not articulated or shown why an
3 interview is needed. Defendant has not shown that the witnesses will not talk to him, just that they
4 have not talked to him. Defendant has not shown that he "is unable, without undue hardship, to obtain
5 the substantial equivalent by other means" as required by MCA 46-15-322(5). Defendant has not
6 moved for and taken the depositions of the witnesses he claims he needs to interview prior to trial.

7 The motion of the defendant to exclude the victims and their mother should be denied. If
8 defendant insists that he get to interview the victims and their mother before trial, he could move for
9 and take their depositions. That would present the State with an opportunity to explore whether or not
10 the witnesses should be protected from the defendant and whether or not the defendant has sufficient
11 grounds to depose the victims and their mother.

12 DATED this 4th day of April, 2019.

13 
14 BENJAMIN R. ANCIAUX
15 Deputy Lake County Attorney

16 **CERTIFICATE OF SERVICE**

17 The signature above is certification that on the date above written a true and correct copy of the
18 foregoing document was served on the following individual(s) by mail, courthouse box delivery or
19 email as indicated below:

20 Dianne Rice
21 Attorney for Defendant

U.S. Mail
 Courthouse Box Delivery
 Email