APPLICATION FOR

DISTRICT COURT JUDGESHIP

A. PERSONAL INFORMATION

1. Full name. **Edward Eric Zink**

2. Birthdate. [redacted]

3. Current home address. [redacted]

4. Email address. [redacted]

5. Preferred phone number. [redacted]

6. Judicial position you are applying for: 13th Judicial District, Departments 9 and 10 (your application will be considered for either Department; you do not need to submit a separate application for each department).

7. Date you became a U.S. citizen, if different than birthdate. **Same.**

8. Date you become a Montana resident. **Summer 1975**

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.

Name	Location	Date	Degree
Skyview High School	**Billings, MT**	**1988**	**Diploma**
University of Montana	**Missoula, MT**	**1993**	**B.A., Journalism**
University of Montana	**Missoula, MT**	**1998**	**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.

- **James H. Kilbourne Award, Best Appellate Brief and Oral Argument**
- **School of Law Scholarship for Excellence in Legal Writing I, II, and III**

- **Watkins Scholar, Davidson Honors College at University of Montana**

- **Mortar Board National College Honor Society, Chapter President**

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.

Yellowstone County Attorney's Office **217 N. 27th Street, Room 701** **Billings, MT 59107**	**Chief of Criminal Litigation**	**2024-present**
Yellowstone County Attorney's Office **217 N. 27th Street, Room 701** **Billings, MT 59107**	**Deputy Chief County Attorney**	**2014-2024**
Yellowstone County Attorney's Office **217 N. 27th Street, Room 701** **Billings, MT 59107**	**Senior Deputy County Attorney**	**2005-2014**
United States Attorney's Office **District of Montana** **2601 2nd Avenue N.** **Billings, MT 59101**	**Special Assistant United States Attorney**	**2002-2014**
Yellowstone County Attorney's Office **217 N. 27th Street, Room 701** **Billings, MT 59107**	**Deputy County Attorney**	**1999-2004**
Hon. Russell C. Fagg, District Judge **13th Judicial District** **217 N. 27th Street, Room 508** **Billings, MT 59107**	**Law Clerk**	**1998-1999**
Missoula County Attorney's Office **Missoula County Courthouse** **200 W. Broadway** **Missoula, MT 59802**	**Head Legal Intern**	**1997-1998**

University of Montana **Office of General Counsel, David Aronofsky** **Main Hall** **Missoula, MT 59812**	**Legal Intern**	**1996-1997**
Stacey & Funyak Law Firm **100 North 27th Street, Suite 700** **Billings, MT 59101**	**Intern**	**1996**

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.

Court or Administrative Body	**Admission**
Ninth Circuit Court of Appeals	**June 7, 2006**
United States District Court, District of Montana	**November 15, 2002**
State Bar of Montana	**September 28, 1998**

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).

For the last ten plus years, I have been a supervisor and managing attorney for the Yellowstone County Attorney's Office, the busiest prosecutor's office in the state. I am currently the Chief of Criminal Litigation and I supervise around 20 attorneys in the criminal division and assist in the handling of the most complicated cases in the office. My focus is on trial work, training, mentoring, litigation support and trial assistance. I have personally handled a significant percentage of homicide prosecutions within the office for more than a decade. I am also the primary prosecutor tasked with reviewing fatal use of force incidents by civilians to determine whether a crime has been committed or the actions were legally justified. I generate detailed written legal memoranda to document my analysis and conclusions when these events are deemed non-criminal. I believe that exoneration of innocent people is critically important in these cases for closure. My daily work also involves ongoing consultation on cases handled by others. I also regularly consult on complex litigation and cases with prosecutors across the state. I am routinely in district court for all variety of proceedings.

I have extensive jury trial experience spanning more than 25 years, and have successfully tried numerous complex felony cases in both state and federal district courts. In the last ten years, I have successfully tried numerous deliberate homicide jury trials. These have been multi-day and

even multi-week jury trials, involving complex legal issues and factual complications. I have handled numerous additional homicide cases that resolved without need for trial.

I have extensive experience in postconviction relief, the civil proceeding that may follow the conclusion of any direct appeals to the Montana Supreme Court. My general workload is 95% criminal and 5% civil. I have also handled more than 20 officer-involved shooting investigations that are mandated by Montana law—about half of them within the last 10 years. These involve complex and large investigations and are intended to serve the public interest. They culminate in quasi-judicial proceedings conducted publicly in front of juries.

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).

Since 2001, I have testified at the Montana legislature or consulted with legislators on various pending legislation and policy discussions that would impact the criminal law, including DUI, theft, and firearms-related issues.

For about 25 years, I have formally and informally trained and spoken with law enforcement officers on a wide variety of topics, including early career instruction for younger officers and criminal law for reserve deputies. I have frequently spoken on officer-safety and officer-shooting incidents, ethics in law enforcement, officer credibility in the profession, and integrity issues. I also have the privilege to participate in smaller meetings—often one-on-one—that focus on the mental well-being of first responders who have endured traumatic incidents. I have instructed at multiple local agencies and at statewide associations, including the Montana Violent Crime Investigators Association. Since 2002, I have had the privilege of training at statewide conferences for prosecutors on a wide variety of topics, including ethical considerations that arise in cases and *Brady/Giglio* matters. I have also instructed at conferences for courts of limited jurisdiction.

I presented at the *Project Safe Neighborhoods* (PSN) National Conference in 2004. I was the first local prosecutor assigned in Montana for implementation of the PSN national gun violence initiative. I discussed the details of the Montana initiative and taught best practices to assist others in starting similar programs in their home jurisdictions.

I have participated as a panel member in several Montana Medical Legal malpractice screening proceedings. These screening panels are required under the provisions of the Montana Medical Legal Panel Act, set out at § 27-6-101, Mont. Code Annotated. The panels are comprised of licensed Montana health care providers and attorneys. The panels are tasked with screening potential medical malpractice cases against health care providers to ensure there is at least a reasonable inference of malpractice before the cases may be filed in court. The proceedings involve the presentation of complex testimony and evidence, often including expert testimony, and deliberations by the panel members to make a determination whether the case may proceed.

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.

During the last ten years, my practice has been exclusively in State courts.

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.

I have not appeared before the Montana Supreme Court in the last ten years as the Montana Attorney General's Office represents the State of Montana in criminal appeals. I have been State's counsel at the trial level on numerous appellate cases during my career.

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. One of the most important cases I handled involved the November 1998 homicide of Miranda Fenner. She was only 18 years-old and was murdered while working in a video rental store in Laurel, Montana. The case captured the attention of the small tightknit community due to the senseless nature and randomness of the violence. Despite a thorough and persistent investigation, the case went unsolved for almost 20 years. There were no witnesses to the crime and the evidence was sparse.

   The case received ongoing and significant public attention, with coverage from local, statewide, and national media over the years. It became a common occurrence for people to come forward and attempt to implicate others, who they claimed had "confessed" this murder to them. Detectives listened to their claims and each time, they found discrepancies between the stories and the actual evidence. Due to the notoriety of the case, and the passage of time, several facts about it creeped into the public domain and it became harder for detectives to evaluate statements they received. Over the course of the next 15 plus years, detectives interviewed hundreds of people and traveled around the country following leads. The scope of the investigation was massive, with hundreds of witnesses interviewed and thousands of pages and documents generated.

   A breakthrough in the case came in March 2017 when Zachary O'Neil walked into the Yellowstone County Detention Facility and said that he wanted to confess to Miranda's murder. He provided a short statement and the information was immediately sent to detectives working the case. They met with Mr. O'Neil and took a methodical statement from him. They realized O'Neill provided several key details about the crime scene that had never been released publicly. At the end of the statement regarding Fenner's murder, O'Neil said he had raped another woman and he provided some details, including timing and location. The detectives collected a DNA sample and sent it for analysis. The results showed that O'Neil's DNA matched another cold

case from the Fall of 1998–a violent rape and attack in west Billings. O'Neil also confessed to the rape of another woman, since deceased, and this case too was corroborated.

From this point, the County Attorney and I met with detectives, discussed the case at length and made a plan to move forward carefully. I was tasked with a thorough review of this investigation and to make a charging decision. It was imperative that we were right and that the case could be proven. Due to the volume of the investigation, this was a massive undertaking. In January 2019, I filed charges for Attempted Deliberate Homicide and Sexual Intercourse Without Consent for the victim in the Fall 1998 Billings cold case. In July 2019, I charged O'Neil with Deliberate Homicide for the death of Miranda Fenner. In August 2019, O'Neil was sentenced to three concurrent life terms in prison following his pleas of guilty to all charged offenses.

In my career, over the last 25 plus years, I have worked on many of the highest-profile cases in the office and have learned to function underneath that pressure and the scrutiny. The job requires diligence, a willingness to do the hard work, and the ability to act decisively under pressure.

2. One of the most difficult cases I worked was the homicide of Shane Nez Perce, which occurred when a male fired multiple shots from an alley into a crowd of people standing in the parking lot outside of Lee's Saloon in April 2019. The unknown shooter fled from the scene and was driven away by at getaway car waiting at the end of the alley. The investigation yielded two suspects—one as a shooter, one as a getaway driver.

   As their supervisor, I initially assisted the assigned prosecutors at various points during the case. I only became directly involved much later when I stepped in as part of a team of replacement counsel for the final months of pretrial litigation and the jury trial for the defendant charged with the shooting. Jury trial was held in May 2023, four years after the shooting. The defendant was represented by highly capable counsel and pretrial litigation was both complicated and voluminous. The District Court was tasked with ruling on many pretrial issues. Further complicating the case was the involvement of the co-defendant.

   In the last weeks leading up to trial, I began a careful review of the evidence, with a focus on the video surveillance footage of the events leading up to the shooting and the aftermath. The indoor footage was clear and provided clear images of both suspects, but the outdoor video evidence was of mixed quality. It depicted the general movements of the participants, and one could see what was happening. But it was not of high enough quality to readily identify the shooter. The defense in general asserted that the wrong person was charged with firing the shots. Moreover, defense counsel raised significant challenges to the credibility of the eyewitnesses at the scene. One night shortly before the trial began, I discovered a critical detail in the video evidence. The defendant wore a gold watch on his left wrist and the footage depicted a momentary but distinctive reflective glint off it when he moved in the dark alleyway, just moments before the same figure was seen firing shots into the crowd. The jury convicted the defendant after an exhaustive presentation of the video evidence in the case. I note this conviction is presently on appeal to the Montana Supreme Court.

I believe that cases turn on small details and these critical details are found from disciplined work. The work of a judge must be similarly thorough.

3. One of the most complex cases I have worked on was a homicide that occurred in April 2005, involving two assailants, only one weapon, and multiple victims. The facts and evidence made the case extremely difficult to charge and prove. The event occurred in the middle of the night, in a darkened alleyway behind the St. Vincent de Paul Thrift store, just south of Montana Avenue and adjacent to railroad tracks. Two similarly-aged and similar-appearing young men entered into the alley from the street and engaged in a series of quick-succession knife attacks on multiple transients who were resting or sleeping in the alleyway. The two men used only one knife that they handed back and forth. The first attack, by the first man, commenced when he was handed a knife from his friend. He slashed and cut the first victim during a robbery attempt. The first attacker then turned to his friend and handed him back the knife. He said, "Show me what you're made of." The second male took back the knife, walked several feet further into the alley, and fatally stabbed another man in the makeshift bed where he slept. The two men began walking back out of the alley toward the street where they encountered the first victim, as he staggered and attempted to get away. A third man who witnessed everything to this point was nearby and one or both of the assailants turned their attention on him. The two men decided not to attack him and instead fled before police came. They disappeared into the night. The witnesses were other transients that were in varying stages of sleep and intoxication in the alleyway. Despite the challenges, Rusty Russell and Brandon Spotted Wolf were identified as the two suspects in the attacks. The difficulty faced in this case was how to properly charge and hold each person accountable for their role. We decided to employ a felony-murder theory, to hold each defendant properly accountable and to prevent either defendant from avoiding accountability by pointing the finger at the other. Most of the witnesses refused to cooperate. The third male, who himself was almost a victim, had mental health challenges that complicated his testimony. Shortly before trial, Mr. Spotted Wolf elected to plead guilty and he testified against Mr. Russell without any promised benefit. This was unforeseen until it happened. The case lasted nearly a decade from pretrial briefing, through a jury trial, post-trial litigation before sentencing, then a direct appeal and lengthy civil postconviction proceedings and another appeal. Our charging theory was challenged at every stage but upheld. Both attackers were convicted of deliberate homicide.

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.

NA

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.

- Investigative Procedures & Charging Borderline Cases
  Montana County Attorney's Association Summer CLE July 9, 2024

- Coroner's Inquests—Best Practices Updated for OIS cases
  Montana County Attorney's Association Summer CLE July 9, 2022

- Law Enforcement *Brady/Giglio* Issues
  Montana County Attorney's Association Winter CLE December 2, 2016

- OIS: Best Practices from Incident to Inquest
  Montana County Attorney's Association Summer CLE July 9, 2015

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.

I routinely speak and teach classes with church groups and civilians on matters of law, including the legal principles of self-defense and use of force. Although I reported some of the hours between 2020 and 2025 for these sessions, I was unable to confirm the exact number of hours from the State Bar of Montana at the time of this submission.

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.

Member, Yellowstone Area Bar Association 1999-present.

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

NA

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.

NA

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

Aside from the legal role as an attorney, I have leaned into the counselor aspect of the profession for advice and conversation that is not about strictly legal matters. In my daily work, I routinely encounter people who have suffered through traumatic events. This includes victims, witnesses, law enforcement and other first responders. I have noted the effects of Post Traumatic Stress on all of these people. I have also seen it those who work within the criminal justice system, and experience secondary traumatic exposure, including prosecutors, defense counsel, judges, court personnel, and others whose practice regularly exposes them to injury and harm to people. The legal profession would do well to recognize this harm and be sensitive to how court processes affect persons suffering from traumatic events. We know the effects are detrimental to mental

and emotional wellbeing and also may cause physical health problems. Long-term dangers include high rates of divorce, substance abuse, loss of career and even suicide.

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 an active volunteer at Harvest Church for over 20 years and volunteered in various areas as needed. I began working with our church Security Team as a member several years ago. I became Operations Manager of the team in 2019. In this role, I oversaw the day-to-day functioning of the team, worked directly with church leadership to address situations as they developed, and assisted the Team Director as needed. In early 2021, I became the Team Director. In this role, I oversaw all aspects of the team, including weekly operations, training, and policy development with church leadership. I stepped down as Director in December 2024 due to the time commitment and pressing family priorities. Our son had only a few months' time with us before inducting in June 2025 to the United States Naval Academy in Annapolis, MD.

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 applied for appointment for District Court Judge in the 13th Judicial District in 2014. I was not appointed.

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.

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.

Yes. My wife and I started a small at-home business named OffDuty 406, which is a small lifestyle brand that makes decals and apparel. The business has not been profitable and remains essentially a hobby. I would intend to continue the affiliation and anticipate no reasonable likelihood of any conflict.

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.

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 believe the judge to be the pinnacle of service in the law and I want to be a part of that service. I have dedicated my professional career to public service as a prosecutor and I have enjoyed the privilege of serving my hometown every day. Judges, especially at the district court level, have

the ability to influence the quality of life, ensure public safety, and promote a sense that the law applies equally and fairly to all. I want the opportunity to be a part of this high calling.

I believe I am ready to step into this role after a long career of working in courtrooms with people of all perspectives and treating them reasonably and with respect. "Justice" is often a hard concept to define or pin down, but to me it means working toward the right result for the right reasons. I believe a judge must be intellectually honest, fair-minded, and impartial. Critically, a good judge must be ready to put in hard work and make hard decisions. These are traits I have demonstrated throughout my career.

Our citizens deserve fair, thoughtful, and evenhanded application of the laws. The community must have confidence in the process, belief in the integrity of the judiciary, and faith that outcomes and decisions are based in the law and driven by facts. Citizens are also entitled to have their most important legal affairs resolved quickly and without undue delay. That has been increasingly difficult because the courts in the 13th Judicial District are by far the busiest in the State, and we desperately need help to ease the stressors to the system. With the needed addition of two more District Court judges here, this opportunity to serve in a different way presented itself. I am applying because I believe now, more than ever, experienced attorneys who can step in and do this difficult job are absolutely essential to maintaining the smooth functioning of our courts. I would bring extensive and grounded experience to the bench and am ready to take on this role of service.

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

The best judges are respectful to everyone who appears in their court, and they promote a sense of fairness and confidence in the proceedings. They work hard, they are prepared, and they display discernment in their actions and decisions. Finally, the best judges let the facts and law drive outcomes, not personal beliefs about how a case should resolve.

I have had the privilege of appearing before many different judges, both State and Federal, throughout my career. The judges who stand out have one thing in common and that is the decency by which they treat people in their courtrooms. The best judge should be disciplined, polite, and respectful, mindful that the people in the courtroom are probably dealing with the most important thing happening in their lives. They should conduct themselves with a high degree of judicial decorum, showing no favor to one side over the other. They should aspire to treat everyone equally. Judges should be willing to listen and to let the lawyers make their case and advise the court on the law. They should be careful to seek out and take in both sides of an argument before making a ruling. On this point, this encourages the highest level of practice from attorneys.

I believe a judge must be a diligent worker. I have worked in this courthouse on a daily basis for over 25 years and I intimately understand the functioning of our district courts and the challenges we face. Judges in this district have a daunting caseload and this has real negative consequences on the people who are waiting in the court system without timely resolution of their cases. Being

ready to meet this challenge requires time and hard work. The best judges do the hard work behind the scenes and come to court prepared to address the matter at hand and to make the correct decision. Judges should be ready with focused questions for the parties, so the real issues in dispute are dealt with thoroughly. A judge must also know the rules of evidence and procedure and be capable of making the correct rulings quickly. I believe the rules should be enforced evenly, predictably, and consistently. When they are, everything about the court runs smoother, from docket management to fewer cases languishing without forward progress. I think this skillset comes naturally to those judges who have extensive experience practicing in trial courts. I have this extensive trial court experience, honed for over 25 years.

Finally, stated very simply, judges must let facts and law drive their decisions, not personal beliefs about how an issue or case should resolve. This maintains predictability and stability in the law. To get to this result, judges should be reasonable in their approach to a case and willing to let the evidence guide the way. Throughout my career, I have always tried to listen carefully to the other side's perspective. My mantra is to follow the evidence where it goes. As I often say to juries, facts are stubborn things. Judges must heed them too.

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

My philosophy is to honor the text as written and to give weight to the statutes as they are enacted and Constitutional provisions as they are ratified. The role of the judge is to enforce and safeguard the Constitution and the laws that conform to it. To accomplish this practically, a judge ought to focus on the words of the Constitution and statutes as they are written. If they are clear, the judge should go no further. If they are not clear, then the judge should make a careful attempt to discern the meaning of the words using defined rules of construction. The district court judge should be cautious to avoid torturing words to reach an outcome. I also believe the district court judge should act narrowly and should be limited to the issues raised by the parties. A judge's rulings must be clearly explained and thorough.

I would be guided in this by my core belief in the separation of powers of the three branches and respect for their distinctive roles. I would not legislate from the bench—policy is best decided by the legislature, after considered public input and debate. Whether I might agree with that policy is irrelevant. It is the Constitutionality that matters and I would rule accordingly. In that vein, I believe that the executive branch is bound to implement and enforce the policy decisions of the people, as expressed by the legislature. This puts guardrails on what the executive may do and on what law enforcement may do. I have worked within these important limitations for my career. My ethical standards always governed my actions as I worked to enforce Montana statutes. I take those standards seriously. The executive must operate within the boundaries of the Constitution and lawful statutes.

As a judge, I would also be limited by my respect for both branches and their roles, and interpret the plain meaning of the text. I believe district court judges in particular should pay careful attention to established precedent and give it weight. I believe that predictability of outcomes and certainty in the law promote respect for the law.

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.

Hon. Rod Souza
District Judge, Thirteenth Judicial District
Yellowstone County Courthouse
217 N. 27th St.
Billings, MT 59107
(406) 256-2922

Hon. Mary Jane Knisely
District Judge, Thirteenth Judicial District
Yellowstone County Courthouse
217 N. 27th St.
Billings, MT 59107
(406) 867-2500

Scott D. Twito
Yellowstone County Attorney
Yellowstone County Courthouse
217 N. 27th St., Room 701
Billings, MT 59107
(406) 256-2870

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).

August 22, 2025 /S/ Ed Zink

(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 Tuesday, August 26, 2025.***

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

Ed Zink
DEPUTY YELLOWSTONE COUNTY ATTORNEY
P.O. Box 35025
Room 701, Courthouse
Billings, Montana 59107
Telephone: (406) 256-2870
Attorney for Plaintiff

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

RUSTY LEE-RAY RUSSELL, Petitioner, vs. THE STATE OF MONTANA, Respondent.	Cause No. DV 10-0480 Judge Ingrid Gustafson **STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED ORDER DENYING POST CONVICTION RELIEF**

INTRODUCTION

On March 19, 2014, the Court conducted an evidentiary hearing on the Petitioner's *Amended Original Petition for Post Conviction Relief*. Based on the prior filings, exhibits, court record and testimony at hearings, the Court makes the following findings of fact and conclusions of law, generally grouped by issue area.

FINDINGS OF FACT

CHARGES and PROCEDURAL BACKGROUND

1. On May 5, 2005, RUSTY LEE-RAY RUSSELL, the Petitioner here, was charged with Count I: Deliberate Homicide, Count II: Attempted Deliberate Homicide by Accountability, and Count III: Robbery by Accountability. *See Information*, State's Exhibit A. The State filed an *Amended Information* on April 14, 2006, changing

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Count II to Aggravated Assault and adding Count IV: Aggravated Assault by Accountability.

See Amended Information, State's Exhibit B.

2. Trial by jury commenced on May 1, 2006, and the jury found Petitioner guilty on all four counts on May 9, 2006. On October 16, 2006, this Court sentenced the Petitioner to eighty years in prison, with ten suspended, for Count I. The Court sentenced the Petitioner to ten years on each remaining count, to run concurrently with each other, but consecutive to Count I. *See Judgment,* State's Exhibit C.
3. The Petitioner filed a notice of appeal on November 8, 2006. *See Notice of Appeal*, State's Exhibit D. The Montana Supreme Court decided the matter on December 15, 2008. *State v. Rusty Russell*, 2008 MT 417, 347 Mont. 301, 198 P.3d 271.
4. The Petitioner did not subsequently petition the United States Supreme Court for a *writ of certiorari.*
5. The Petitioner was required to file any petition for postconviction relief by March 15, 2010. A petition for postconviction relief was filed on the Petitioner's behalf on March 18, 2010. *See* C.R. 1. The Court has previously recognized Petitioner's original petition was filed on March 18, 2010. *Order Staying Proceedings*, at 1. However, Russell himself later tried to file his own unverified *pro se* petition and he expressly disavowed the other petition filed on his behalf. C.R. 7, *Petitioner's Motion for Additional Time to Amend Original Petition.* This competing Petition was merely lodged and never actually filed.
6. The Yellowstone County District Court Case Register Report reflects that the petition was not filed until March 18, 2010. The filing stamp on the petition itself also indicates that it was filed on March 18, 2010.
7. The Court stayed all proceedings by order on May 28, 2010. *See Order Staying*

Proceedings and Setting Status Hearing. The Court conducted a hearing on the issues on July 7, 2010 and allowed the Petitioner and his then-counsel an opportunity to decide how best to proceed. An Amended Petition was filed on Russell's behalf on October 12, 2010. *See* C.R. 17. Russell again decided this was not in his best interests and he requested the court allow him the option of amending his petition again, but this time on his own. The Court set out this procedural history in its Order dated February 16, 2011. Since, the Petitioner filed his *Amended Original Petition*, at issue now.

PETITIONER'S CLAIMS OF INEFFECTIVE ASSISTANCE

8. Petitioner asserts ineffective assistance of trial counsel Penelope Strong for several reasons, including failure to interview certain witnesses, not raising an alibi defense, and for not challenging the charging decision or making a motion to dismiss the State's case after the State rested.

9. The Court finds that the Petitioner had no valid alibi defense. This was plainly evident to the Court from the presentation of the evidence presented at trial and the documents attached to the varying filings in this matter. Strong properly pursued a defense of general denial. She properly concluded an alibi defense was precluded by the evidence, including his admission to being at the scene. *Transcript of Hearing* "HT" at p. 41, ll. 12-25.

10. The Court finds no factual basis in Petitioner's allegations that Strong was ineffective for failure to call certain witnesses at trial. Strong either did call the listed witnesses or Petitioner asserts the witnesses would have been useful to establish an alibi. As discussed, other facts precluded an alibi defense, including the Petitioner's admission to being present. Strong is a trial attorney with significant experience, including the defense of homicide cases.

PETITIONER'S CHALLENGE TO THE FELONY-MURDER CHARGE

11. The Petitioner has challenged trial counsel's effectiveness for her failure to challenge the felony-murder charge. However, the evidence and his trial counsel's analysis of such correctly show that the felony-murder count was properly charged and sufficiently proved because the attack on Wallin and the killing of Gewanski were causally connected and inextricably linked. The totality of the evidence and the statements of witnesses support the conclusion that but for the knife assault on Dale Wallin, the Petitioner would not have committed the homicide of Mr. Gewanski.

12. Brandon Spotted Wolf initiated the violence and it was his challenge to the Petitioner that caused the further violence to Mr. Gewanski.

13. As part of her representation of the Petitioner, Strong visited the crime scene, examined the evidence, observed the testimony at trial and readily understood the State's assertion that the assault on Wallin started the incident that included the death of Mr. Gewanski. Strong summarized the case when she said: [T]he State has specifically alleged, if you look at Count I, that by committing the aggravated assault on Mr. Wallin, and the providing [of] the knife and the exhorting by Brandon Spotted Wolf of our client to stab Mr. Gewanski, that thereby there is an act of felony murder, or reasonable and natural consequence of the assault on Mr. Wallin. Tr. at 1223-24. Strong understood the charge correctly. Further, Strong's testimony at the evidentiary hearing makes it clear that she researched application of the felony murder rule. HT at p. 21, l. 25. Strong kept this in mind when making a motion to dismiss based on failure to make out a *prima facie* case on the felony murder charge, including proof of all elements therein. HT at p. 25, ll. 18-19; p. 48, ll. 1-18.

14. The area in question is a small area and the events were committed close in time and space. At jury trial, detectives and officers testified about the small crime scene and the jury saw numerous photographs and diagrams. The entire crime scene from Wallin's

dock to the pad where Petitioner killed Gewanski was only about 30- 40 feet long. *See Diagram and photographs of crime scene,* State's Exhibits L, M, N.

15. Attorney Kelleher adopted Spotted Wolf's summary of the events as stated in his presentence report as an accurate version of what took place. HT at pp. 145-146, read verbatim from State's Ex. O. "Rusty pulled out a knife and gave it to me. I slapped Dale Wallin in the face and demanded money. I gave the knife back to Rusty and said, 'Show me what you're made of.â Rusty walked a few steps to another sleeping transient named John Gewanski. Rusty stabbed Mr. Gewanski several times in the chest and killed him." Kelleher visited the scene multiple times and he testified the area where Dale Wallin had a bed and the area where John Gewanski was sleeping "are just a couple of paces, three or four, at the most five paces apart." HT at p. 146, ll. 6-12.

16. The attorneys for co-Defendant Brandon Spotted Wolf were well aware of the nature of the events and became convinced over the course of their defense that the State had charged their client correctly, legally and with an accurate understanding of the way events transpired. *See Affidavit of Fred Snodgrass,* State's Exhibit H; *Affidavit of Robert Kelleher, Jr.*, State's Exhibit I. This led them to negotiate a plea agreement for homicide by accountability for Spotted Wolf, because the actions of the two men were connected. HT at p. 136, ll. 8-14.

17. The Petitioner also challenges the effectiveness of appellate counsel Shannon McDonald for her failure to raise a challenge to the sufficiency of the proof on his felony-murder deliberate homicide conviction.

18. Petitioner's first appellate counsel, Shannon McDonald, raised three issues on appeal, including the successful issue of whether the predicate offense merged into the deliberate homicide count. McDonald testified she had months to review the case file, select arguments for appeal and to make them. HT at p. 100, ll. 4-17. McDonald has

since had opportunity to review all aspects of the case, including the opinion of the Supreme Court from the appeal. HT at p. 98, ll. 16-19. McDonald also was able to review the argument raised now by Petitioner. McDonald does not agree with his current position and has never believed there was a defect in the State's proof regarding the felony-murder rule. McDonald's analysis of the trial evidence precluded the conclusion that the aggravated assault of Dale Wallin and the homicide of John Gewanski were separate transactions. HT at p. 99, ll. 5-20. To the contrary. she concluded from the evidence that the events were inextricably tied together and that the homicide would not have occurred at all but for the predicate felony actions of Brandon Spotted Wolf. HT at pp. 99-100.

19. Trial counsel for the State, Mark Murphy, agreed in his assessment of the analysis of the felony-murder rule in that the homicide occurred because of the aggravated assault by Spotted Wolf. Murphy summarized that the trial evidence showed the homicide flowed from the predicate event, namely the aggravated assault of Dale Wallin. He testified "the initial assault with the knife caused everything that happened after that." HTatap. 133, ll. 7-8.

MISCELLANEOUS CHALLENGES

20. Petitioner's allegations of prosecutorial misconduct are unfounded. The Court finds Brandon Spotted Wolf's various affidavits filed in support of the various petitions to be incredible. The affidavits are inconsistent with one another and cannot be readily reconciled. One affidavit states the Petitioner was not present. Another states the Petitioner was present, but nominally involved. These two statements are inapposite and cannot be reconciled. Further, Attorney Kelleher directly contradicted the veracity of Spotted Wolf's affidavits and the Court finds the testimony of Kelleher to be credible. Kelleher testified that his client never advised him of any meetings with law

enforcement or members of the prosecutorial team, other than the contacts documented in the discovery. Kelleher stated he had no reason to believe any inappropriate contact occurred in this matter. The Court finds Petitioner's claims on this issue unfounded and without merit.

21. Similarly, the Court finds the other unsupported allegations of Spotted Wolf's affidavit incredible. No officer interviewed Spotted Wolf after he asserted his right to counsel. HT at p. 108, ll. 6-11; pp. 139-140. Spotted Wolf was not threatened with the death penalty and it was not even given serious consideration. HT at p. 108, ll. 12-17; and at pp. 114, ll. 15-21; pp. 143-144. Nor could the death penalty have been threatened at the time now alleged by Spotted Wolf and the Petitioner given the expiration of the notice timeframe. HT at pp. 108-109. Spotted Wolf did not receive a plea offer in exchange for fabricated testimony against the Petitioner. HT atpp. 109-112. Rather, Spotted Wolf's plea was proposed to the State by his own counsel. HT at p. 114, ll. 3-11and pp. 137-139. Further, Spotted Wolf was not taken into a prosecutor's office for a secret meeting as to testimony which also included threatened retaliation for non-cooperation. HT at p. 13, ll. 5-20; pp. 115-116; pp. 138-139.

22. Petitioner complains Strong was ineffective for not making certain objections, but he has not identified this issue from within the record with any particularity. This claim is without merit.

23. The plea agreement filed in Spotted Wolf's case speaks for itself. Further, his attorney made clear that his testimony at Petitioner's trial was not bargained for. HT at p. 137, ll. 3-16.

24. The Petitioner also claims that Strong failed to position the case for plea negotiations and was unprepared for trial. This was directly contradicted by Strong, who testified the Petitioner rejected a proposed plea agreement and he made the decision to proceed

to trial. HT at pp. 43-44. Strong further testified she had adequate time and resources to prepare the Petitioner's case for trial. HT at p. 44, ll. 18-25. Strong additionally testified that her defense investigator had "excellent abilities" and she was confident in his abilities to accomplish whatever tasks she had for him. HT at p. 34, ll. 5-13. The Court finds Strong's testimony credible.

CONCLUSIONS OF LAW

1. The Court properly has jurisdiction over this matter.
2. If the Court has made any conclusions of law in the above findings of fact, they are hereby adopted as conclusions of law.
3. The *Amended Original Petition* is untimely and procedurally barred. A petition for postconviction relief must be filed within one year of the date the conviction becomes final. §46-21-102, MCA. After an appeal is decided by the Montana Supreme Court, a defendant must petition the United States Supreme Court for a *writ of certiorari* within 90 days. Rule 13, Rules of the United States Supreme Court. This period begins running from the date of entry of the judgment or order. *Raugust v. State*, 2003 MT 367, ¶¶14-15, 319 Mont. 97, 82 P.3d 890. If no appeal is taken to the United States Supreme Court, the petitioner must file his petition for postconviction relief within one year and 90 days from the entry of the judgment or order from the Montana Supreme Court. §46-21-102(1)(b), MCA. The only exception to this rigid deadline is for a claim of newly discovered evidence. § 46-21-102(2), MCA.
4. In this case, the original petition made no claim alleging newly discovered evidence. Therefore, that exception to the one-year time bar is inapplicable. When a petitioner moves to toll the time bar on equitable grounds, the District Court must determine whether "the failure to toll on equitable grounds would work 'a clear miscarriage of justice, one so obvious that the imposition of the time bar would compromise the

integrity of the judicial process." *State v. Davis,* 2008 MT 226, ¶26, 344 Mont. 300, 187 P.3d 654 (quoting *State v. Redcrow,* 1999 MT 95, ¶34, 294 Mont. 252, 980 P.2d 622). "Waiver of the time bar is only justified by a clear miscarriage of justice, one so obvious that the judgment is rendered a complete nullity." *Redcrow,* 1999 MT 95, ¶34 (internal quotations omitted)a "Fundamental miscarriage of justice" is a showing of actual innocence. *Redcrow,* 1999 MT 95 ¶33. Allegations of ineffective assistance of counsel *do not* establish actual innocence. *Id.*

5. That a petitioner is incarcerated and has no access to legal assistance does not toll the filing deadline. *State v. Wells,* 2001 MT 55, 304 Mont. 329, 21 P.3d 610.
6. Application of the time bar in this case does not constitute a clear miscarriage of justice.
7. The *Original Petition* filed on March 18, 2010 is procedurally barred as untimely and therefore the *Amended Original Petition* is dismissed on this independent basis. There can be no amendment to an untimely petition. Further, the *Original Petition* was unsigned by the Petitioner, unverified by him and lacked sufficient evidentiary basis to move forward as required undera§ 46-21-104 (1)(c), MCA. For this reason, even if Petitioner were granted latitude on timing, what was purportedly filed was too deficient to move forward.
8. Postconviction relief is not a constitutionally based remedy. Rather, it is a statutory remedy created by the Legislature, embodied ina§§ 46-21-101 through 203, MCA. "A person requesting post-conviction relief has the burden to show, by a preponderance of the evidence, that the facts justify relief.a" *Griffin v. State,* 2003 MT 267, ¶ 10, 317 Mont. 457, 77 P.3d 545.
9. "Following its review of the responsive pleading, the court may dismiss the petition as a matter of law for failure to state a claim for relief or it may proceed to determine the

issue." § 46-2d-201(1)(a), MCA. A district court may dismiss a petition for postconviction relief based solely upon the files and records of the case. *Griffin*, 2003 MT 267, ¶ 12.

10. The petition must properly identify the proceeding in which the petitioner was convicted, provide the date of the final judgment, and clearly set forth the violations complained of. Additionally, the petitioner must identify other proceedings that the petitioner may have taken to secure relief. Most importantly, the petition must identify all the facts supporting grounds for relief and have attached affidavits, records or other evidence to establish existence of the facts. § 46-21-104 (1)(c), MCA. "A petition for postconviction relief must be based on more than mere conclusory allegations. It must identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts." *Ellenberg v. Chase,* 2004 MT 66, ¶12, 320 Mont. 315, 87 P.3d 473.

11. Mere allegations do not constitute the "evidence" contemplated by §46-21-104(1)(c). *State v. Finley*, 2002 MT 288, ¶ 9, 312 Mont. 493, 59 P.3d 1132, *citing State v. Sullivan*, 285 Mont. 235, 948 P.2d 215 (1997), *Eiler v. State*, 254 Mont. 39, 833 P.2d 1124 (1992).

12. A claim of ineffective assistance of counsel must be grounded on facts in the record and not merely on conclusory allegations. *Finley*, ¶ 9, citing *Kills On Top v. State*, 279 Mont. 384, 928 P.2d 182 (1996). The liberal construction applied to most civil pleadings is inconsistent with the statute governing postconviction petitions. *Herman*, ¶ 44. The Court procedurally bars postconviction petitions that failed to comply with the "simple procedural threshold" requirements of Mont. Code Ann.a§ 46-21-104(1). *Finley*, ¶ 13. Further, post-conviction relief is not a substitute for direct appeal review. *See*, e.g., *Hardin v. State*, 2006 MT 272, ¶a16, 334, Mont. 204, 146 P.3d 746. Only

a person without an adequate remedy of appeal is entitled to relief through a petition for postconviction relief. § 46-21-101a MCA.

13. All record based claims must be raised on direct appeal. § 46-21-105, MCA; *State v. Whitlow*, 2001 MT 208, 306 Mont. 339, 33 P.3d 877. Postconviction claims are reserved for non-record based claims. § 46-21-105, MCA; *State v. White*, 2001 MT 149, 306 Mont. 58, 30 P.3d 340.

14. This statutory bar is jurisdictional. *State v. Osborne*, 2005 MT 264, 329 Mont. 95, 124 P.3d 1085. The plain language of these statutes establish "that the courts lack any authority to consider (hear and entertain) or decide (determine) legal and factual issues that could reasonably have been raised on direct appeal if an adequate remedy of appeal was available to the petitioner." *Osborne*, ¶ 14.

15. This procedural bar also applies to issues which were not properly preserved at the trial level for the direct appeal. *State v. Baker*, 272 Mont. 273, 901 P.2d 54, 58 (1995), citing *State v. Gorder*, 243 Mont. 333, 792 P.2d 370 (1990).

16. Petitions that do not meet the pleading requirements of §§ 46-21-104(1) and (2) may be dismissed *sua sponte* or upon a motion to dismiss for failure to state a claim. *See e.g. Finley*, 2002 MT 288, 312 Mont. 493, 59 P.3d 1132 (unsupported allegations of ineffective assistance and no supporting affidavit subjected petition to summary dismissal); *State v. Sullivan*, 285 Mont. 235, 948 P.3d 215 (1997) (petitioner's failure to attach affidavits, records, or other evidence to support his claim warranted dismissal); *State v. Hanson,* 1999 MT 226a¶22-24, 296 Mont. 82, 988 P.2d 299 (petition did not comply with the statutory pleading requirements and was subject to dismissal, even though the petition was verified).

17. In his *Original Petition*, the Court concludes that Petitioner made mere conclusory allegations, attaching nothing to support the claim of ineffective assistance of counsel.

Not even a supporting affidavit was attached.

18. Here the Petitioner's failure to comply with§ 46-21-104(1)(c) is an independent and alternative basis for which the court dismisses the Petition.

PETITIONER'S CLAIMS OF INEFFECTIVE ASSISTANCE

19. Ineffective assistance claims are analyzed under the two prongs of *Strickland v. Washington*, 466 U.S. 668 (1984). The petitioner must demonstrate both (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different.â' *Riggs v. State*, 2011 MT 239, ¶ 9, 362 Mont. 140, 264 P.3d 693. If a Petitioner fails to establish one prong, the other prong need not be addressed. *Id*. To establish deficient performance, the Petitioner must show that, considering all the circumstances, counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Id.* at ¶ 10, citing *Whitlow v. State*, 2008 MT 140, 343 Mont. 90, 183 P.3d 861. In scrutinizing a lawyer's performance, the reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and make every effort to eliminate the distorting effects of hindsight. *Riggs*, ¶ 10, citing *Whitlow*, ¶el5, *State v. Gunderson,* 2010 MT 166, ¶ 66, 357 Mont. 142, 237 P.3d 74.

20. An attorney is not ineffective because another attorney would handle a case differently. *Riggs*, ¶ 10, citing *Strickland.* There are countless ways to provide effective assistance, and even the best criminal attorneys will not defend a case the same way. *Id.* Counsel's actions are properly based on informed strategic choices made by the defendant and on information supplied by the defendant. What investigation decisions are reasonable depends critically on such information. When the facts that support a certain potential line of defense are generally known to counsel because of what the

defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. When a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not be later challenged as unreasonable. *Strickland*, 466 U.S. at 691a

21. The Petitioner's claim that trial counsel Strong was ineffective for her alleged failure to interview witnesses is without merit. "A claim of failure to interview a witness may sound impressive in the abstract, but it cannot establish ineffective assistance when the person's account is otherwise fairly known to defense counsel." *State v. Thomas*, 285 Mont. 112, at 119, 946 P.2d 140, 144 (1997), citing *United States v. Decoster*, 624 F.2d 196, 209 (DaC. Cir. 1976). As discussed above, that is the Court's conclusion.

22. In much of his petition, Petitioner makes mere conclusory statements without showing the result would have been different. Further, Petitioner is either wrong in his assertions or it is obvious his theories were contradicted by the overall testimony presented to the jury. "A petition for postconviction relief must be based on more than mere conclusory allegations. It must identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts." *Ellenberg*, *supra*, ¶12.

23. The Court concludes that Strong was not ineffective for not pursuing an alibi defense. As the Court has found, such a defense was precluded by the evidence.

24. The Court concludes that Petitioner's cursory, unsupported claim that his statements were improperly used against him is without merit. This is a record-based claim that is improper for postconviction relief. *Osborne*, *supra*, ¶14.

25. The Court concludes that Petitioner's claim that some evidence was improperly admitted is without merit. As above, this is a mere conclusory allegation and it is record-based. It

may not be raised now. *Osborne*, ¶14.

26. The Court concludes the Petitioner's assertion that his decision not to testify was used against him at trial is without merit. The record definitively shows the Petitioner is factually wrong. This is a record-based claim that is improper for postconviction relief. *Osborne*, *supra*, ¶14.

27. Consequently, the Court concludes that the record shows that Strong's performance met the objective standard of reasonableness, particularly given her pre-trial investigation and trial strategy.

28. The Court independently and alternatively also finds and concludes from the record that even if Strong's performance did not meet the objective standard of reasonableness, there was not a reasonable probability that but for counsel's errors the result of the proceeding would have been different.

DNA EVIDENCE CLAIMS

29. The Court concludes there was no ineffective assistance by Strong at trial relative to the DNA evidence presentation. The Court finds that the record supports Strong performance meets the objective standard of reasonableness relative to the DNA evidence presentation.

30. Further, the Court independently and alternatively also concludes that Petitioner failed to meet the second *Strickland* prong. Both the State and the defense covered this ground thoroughly. Through cross-examination and closing argument, Strong effectively identified the relative weakness of the DNA evidence. The Petitioner cannot establish that a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different." *Riggs*, *supra*, 2011 MT 239,e¶ 9, 362 Mont. 140, 264 P.3d 693. The DNA evidence was only one piece of overwhelming evidence that placed the Petitioner at the scene. Because the jury could have convicted him for the

homicide on an accountability theory as well as by his direct action, the DNA evidence was not by itself dispositive as there was no testimony to support the notion he was not present.

31. Therefore, the Court concludes that even if Strong's performance relative to the DNA evidence did not meet the objective standard of reasonableness, there was not a reasonable probability that but for counsel's errors the result of the proceeding would have been different.

PETITIONER'S CHALLENGE TO THE FELONY-MURDER CHARGE

32. The Court concludes there was no defect in the charging nor the sufficiency of the proof in the Petitioner's case. The Court further concludes the Petitioner has not established that either trial counsel or appellate counsel was ineffective in this regard.

33. There must be a causal connection between the underlying felony and the death to satisfy the felony-murder rule. *State ex. rel. Murphy v. McKinnon*, 171 Mont. 120, 127, 556 P.2d 906, 910 (1976). In *Murphy*, the court said:

> For the felony-murder rule to apply, it is necessary that the homicide be a natural and probable consequence of the commission or attempt to commit the felony; that the homicide be so closely connected with such other crime as to be within the *res gestae* thereof; or the natural or necessary result of the unlawful act; or that it be one of the causes. * * *
>
> Something more than a mere coincidence of time and place between the wrongful act and the death is necessary. It must appear that there was such actual legal relation between the killing and the crime committed or attempted that the killing can be said to have occurred as a part of the perpetration of the crime, or in furtherance of an attempt or purpose to commit it.

Murphy, 171 Mont. at 126-27, 556 P.2d at 910 (quoting Wharton's Criminal Law and Procedure, vol. 1, § 252, at 543). As discussed in *State v. Turner*, 265 Mont. 337, 877 P.2d 978 (1994), "Montana law defines a causal relationship as the cause of a result if without the conduct the result would not have happened. § 45-2-201, MCA." *Turner*, 265 Mont. at 348, 877 P.2d at 985.

34. The Court concludes as a matter of law the homicide occurred because of—and flowed from—the predicate aggravated assault on Dale Wallin. The Petitioner and Spotted Wolf acted together. The Petitioner supplied the weapon, but Spotted Wolf supplied the violence—the initial aggravated assault of Wallin—that acted as the trigger for the ultimate violence meted by the Petitioner. Stated another way, once Spotted Wolf took the knife from Petitioner and commenced his assault on Wallin, Mr. Gewanski's life was over. What started as two men hassling transients for their liquor changed dramatically when Spotted Wolf escalated the situation with his attack on Wallin. In the midst of that sudden violence, his challenge to the Petitioner caused the Petitioner to act, with terrible consequence.

35. Assuming *arguendo* that the predicate aggravated assault against Dale Wallin was completed when Spotted Wolf handed over the knife, it does not break the causal connection of these offenses. The bloodletting of the assault and Spotted Wolf's challenge directly caused the homicide. That the homicide occurred *because of the aggravated assault* and was causally connected to that violence cannot be seriously questioned. "For the felony-murder rule to apply, it is necessary that the homicide be a natural and probable consequence of the commission or attempt to commit the felony; that the homicide be so closely connected with such other crime as to be within the *res gestae* thereof; or the natural or necessary result of the unlawful act; **or that it be one of the causes.**" *Murphy*, supra, 171 Mont. at 126-27, 556 P.2d at 910 (emphasis added).

36. Rusty Russell killed John Gewanski in furtherance of the initial aggravated assault when Spotted Wolf momentarily ceased the attack on Wallin, handed over the knife and issued his challenge. Strong correctly understood the importance of the challenge in the chain of events. "[I] think regardless of what word was used, I do recall the specific facts because this was key, that there was a back and forth between the two men. And whether you call

it exhorting, and then there was this comment, 'Let's see what you're made of,' which you could infer was an exhorting or, if you will, stronger than a counseling to harm someone with a knife." HT at p. 50, ll. 3-11. The Petitioner then acted immediately in furtherance of that initial aggravated assault by further escalating the violence against another victim. There was no break in time or space; these events took place within feet of one another, a fact the Supreme Court already recognized. *Russell, supra*, 2008 MT 417 at ¶a41.

37. This satisfies Montana's felony-murder statute that requires the death occur "in the course of the forcible felony or flight thereafter." § 45-5-102(1)(b), MCA. The homicide occurred because of Spotted Wolf's aggravated assault.

38. Therefore, the Court concludes that first appellate counsel, Shannon McDonald, was not ineffective for not raising an issue regarding the sufficiency of the evidence as it relates to the felony-murder rule.

39. McDonald's interpretation of the evidence was an entirely reasonable one and the Court finds her testimony credible. She, like trial counsel who viewed the scene, concluded the homicide and the assault were inextricably intertwined. She also reasonably concluded the homicide would not have occurred but for the starting or predicate felony, namely Spotted Wolf's assault on Wallin. To date, McDonald is not persuaded by the notion the predicate felony and the killing were separated by some break in place or time. She testified her analysis was that the initial assault and the homicide were inextricably tied together and the homicide would not have happened but for the aggravated assault.

40. The Court finds that the record supports McDonald's performance meets the objective standard of reasonableness relative to her analysis of the felony-murder rule and its viability on appeal.

41. The Court also independently and alternatively finds that even if McDonald's analysis of the felony-murder rule and its viability on appeal did not meet the objective standard of reasonableness, there was not a reasonable probability that but for counsel's errors the result of the proceeding would have been different.

42. The Court concludes that subsequent appellant counsel Mercer's argument that he would have proceeded differently is not enough. The Court is not persuaded the result would have changed had that argument been advanced. As stated above, McDonald still adheres to her analysis of the case evidence and facts and persists in her reasonable belief that Mr. Mercer is wrong in his argument. In scrutinizing a lawyer's performance, the reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and make every effort to eliminate the distorting effects of hindsight. *Riggs*, ¶ 10, citing *Whitlow*, ¶ 15, *State v. Gunderson,* 2010 MT 166, ¶ 66, 357 Mont. 142, 237 P.3d 74.

43. An attorney is not ineffective because another attorney would handle a case differently. *Riggs*, ¶ 10, citing *Strickland.* There are countless ways to provide effective assistance, and even the best criminal attorneys will not defend a case the same way. *Id.* As discussed in detail above, the Court concludes McDonald's analysis is better grounded in the facts of this case.

44. The Petitioner's transferred-intent felony-murder argument is a new argument raised for the first time at the evidentiary hearing, HT at p. 9, ll. 3-17, never having been mentioned let alone briefed in his *Amended Original Petition*. For this reason it is dismissed. Independently and alternatively, for the reasons set out above, it also fails on the merits.

CUMULATIVE ERROR ARGUMENT

45. The Court concludes there was no cumulative error present in this case and denies Petitioner's remaining claims that he raised in this area. The petitioner's cumulative

error claim is nothing more than a cursory allegation, insufficient under *Ellenberg*. Regardless, the cumulative error doctrine is not applicable when error has not been shown. *Kills On Top v. State*, 200 MT 340, ¶ 35. Further, even if there is some error, the determination of cumulative error is not merely a determination of whether such occurred, but whether the Petitioner has been harmed (as opposed to harmless error). *Id.*, at ¶ 18. In the instant case, there is nothing more than a cursory allegation without any analysis. It is not the Court's duty to develop vague allegations or argument.

46. The Court finally concludes that no other alleged error in the Petitioner's *Amended Original Petition* has been sufficiently proven.

PROPOSED ORDER

Pursuant to the Court's findings of fact and conclusions of law as set forth above, the Court DENIES the *Amended Original Petition* for postconviction relief.

DATED thisa 5th day of June 2014.

Ed Zink
Deputy Yellowstone County Attorney

CERTIFICATE OF SERVICE
Yellowstone County Attorney's Office

This is to certify that a true and accurate copy of the foregoing document was picked up by courier, hand delivered, or sent by U.S. Mail, postage paid, this 5th day of June 2014 to:

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