APPLICATION FOR

DISTRICT COURT JUDGESHIP
Fifth Judicial District

A. PERSONAL INFORMATION

1. Full Name: Luke Michael Berger

   a. What name do you commonly go by? Luke

2. Birthdate: [redacted] Are you a U.S. citizen? Yes

3. Home Address: [redacted]

   Phone: [redacted]

4. Office Address: 228 Broadway, Helena, MT 59601

   Phone: 406-447-8221

5. Length of residence in Montana: Life

6. Place of residence for the last five years:

Dates	City	State
February 2010 – Present	Helena	Montana

B. EDUCATIONAL BACKGROUND

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

Name	Location	Date of Degree	Degree
Beaverhead County High School	Dillon, MT	June 2000	High School Diploma

Carroll College	Helena, MT	May 2004	Bachelor of Arts
University of Montana School of Law	Missoula, MT	May 2008	Juris Doctor

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

Dean's Leadership Award, University of Montana School of Law (2008)
Carroll College Young Alumni Award (2014)

9. Were you a member of the Law Review? If so, provide the title and citation of any article that was published and the subject area of the article.

No

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

Court or Administrative Body	Date of Admission
State Bar of Montana	October 2008
Montana Federal District Courts	July 2010

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

Lewis and Clark County Attorney's Office

County Attorney Leo Gallagher, Deputy County Attorneys Paul Stahl, Melissa Broch, Annie Peterson, Jeff Sealey, Fallon Stanton, Lisa Leckie, Stephanie Robles, Ann Penner, Jeremy Gersovitz, and Katie Jerstad

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

Employer's Name	Position	Dates
Montana Supreme Court Justices Morris, Warner, and Cotter	Law Clerk	September 2008-September 2009

City of Helena Attorney's Office	Deputy City Attorney February 2010-March 2012	
Lewis and Clark County Attorney's Office	Deputy County Attorney	March 2012-Present

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

    Upon completion of my clerkship in 2009 and with strong encouragement from then Justice (now Judge) Brian Morris, I fulfilled a life goal of backpacking across Europe. I was in Europe from September 2009 to December 2009. Upon returning to Montana, I actively sought employment in Beaverhead County, Butte-Silver Bow County, and Lewis and Clark County until I was hired by the City of Helena in February 2010.

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

    I represent Lewis and Clark County/State of Montana in District Court prosecuting felony crimes. My caseload is mostly comprised of felony DUI, domestic violence, property crimes, and crimes involving potential serious mental illness. During this past year and a half, I have worked on three deliberate homicide cases.

    I also represent the County/State in involuntary commitment proceedings.

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

    Prior to the working at the County Attorney's Office, I was the prosecutor for the City of Helena and represented the city in criminal cases in Municipal Court.

    As a law clerk at the Montana Supreme Court, I drafted opinions and memorandums involving various areas of law for Justices Morris, Warner, and Cotter.

    I have appeared numerous times at Carroll College on panels and as a guest in constitutional law and forensic psychology classes. I have also participated in trial practice at the Montana Law Enforcement Academy with the Montana Highway Patrol.

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

    Criminal and mental health law

17. Do you regularly appear in court? Yes

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

Federal court	_____%
State or local courts of record	100 %

Administrative bodies	_____%
Other	_____%

18. During the last five years, what percentage of your practice has been trial practice? 90 %

19. How frequently have you appeared in court? 25+ times per month on average.

20. How frequently have you appeared at administrative hearings?
0 times per month on average.

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

Civil	35 %
Criminal	65 %
Other	_____%

22. Have you appeared before the Montana Supreme Court within the last five years? If so, state the number and types of matters handled. Include the case caption, case citation (if any), and names, addresses and phone numbers of all opposing counsel for the five most recent cases.

I have not appeared before the Montana Supreme Court, but I have had cases that have been appealed. During the appeal process, the Montana Attorney General's Office represents the County, and I have conferred with the appellate attorneys when they request input on various issues and on their briefs before the Court.

23. State the number of jury trials that you have tried to conclusion in the last ten years. 24

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

1000+ -- I was the sole prosecutor for the City of Helena for two years and appeared in Municipal Court and Lewis and Clark County Justice Court before moving to felony prosecution at the County Attorney's Office.

During my time doing involuntary commitments, the County has averaged approximately 30-40 second hearings (commitment trials) a year.

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

State v. Jonathon Key Tucker CDC-2014-91: Contested sentencing was held on 12/4/2014 in front of the Hon. Kathy Seeley (406-447-8209). Defense counsel was Bryan Norcross: P.O. Box 4297, Helena, MT 59604 (406-443-0047)

State v. Brian Michael Tobol BDC-2014-302: Trial was held 3/2/2015-3/3/2015 in front of the Hon. Jeffrey Sherlock (retired). Defense counsel was Wendy Holton: 7 West 6th Avenue, Helena, MT 59601 (406-442-9349)

State v. Daren Russell Moog DDC-2013-333: Trial was held 6/30/2015-7/1/2015 in front of the Hon. James Reynolds (406-447-8205). Defense counsel was Nick Hyde (to my knowledge no longer practicing law in Montana) and Buddy Rutzke: 111 North Last Chance Gulch, Helena, MT 59601 (406-444-0104)

In the Matter of the Mental Health of C.K. CDI-2015-73: Trial was held on 12/3/2015 in front of the Hon. Kathy Seeley (406-447-8209). Defense counsel was Melissa Edwards-Smith: 111 North Last Chance Gulch, Helena, MT 59601 (406-444-0104)

State v. Kaleb David Taylor DDC-2015-389: Sentencing was held 2/8/2016 (currently pending revocation) in front of the Hon. James Reynolds (406-447-8205). Defense counsel was Stephen Anderson: 11 Friendship Lane, Suite 306, Montana City, MT 59634 (406-442-9700)

State v. Christie Ellen Messer DDC-2012-356: Contested sentencing on a petition to revoke was held on 3/15/2015 in front of the Hon. James Reynolds (406-447-8205). Defense counsel was Greg Beebe: 1085 Helena Avenue, Helena, MT 59601 (406-442-3625)

State v. Coleton C. Coburn ADC-2015-271(with Leo Gallagher and Melissa Broch): Contested sentencing was held on 6/23/2016 and 7/14/2016 in front of the Hon. Mike Menahan (406-447-8205). Defense counsel was Christopher Abbott: 111 North Last Chance Gulch, Helena, MT 59601 (406-444-0104) and Craig Shannon: 240 East Spruce, Missoula, MT 59802 (406-542-7500)

State v. Brodie Stinar BDC-2013-221 (Cascade County case): Contested petition hearing was held on 7/18/2016 in front of the Hon. Elizabeth Best (406-711-3950). Defense counsel was Mark A. Dunn: 615 2nd Avenue North, #3, Great Falls, MT 59401 (406-770-3200)

In the Matter of the Mental Health of R.L. CDI-2016-81: Hearing was held on 10/14/2016 in front of the Hon. Mike Menahan (406-447-8205). Defense counsel was Sadie Busch: 111 North Last Chance Gulch, Helena, MT 59601 (406-444-0104)

State v. Austin Kroll-McLaughlin ADC-2016-313 (with Leo Gallagher): Trial is set for 12/5/2016 in front of the Hon. Mike Menahan (406-447-8205). Defense counsel is Brent Flowers: 111 North Last Chance Gulch, Helena, MT (406-444-0104)

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

I have not appeared before any administrative boards or commissions.

27. If you have published any legal books or articles, other than Law Review articles, list them, giving citations, dates, and topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, state the topic, date, and group to which you spoke.

I have lectured on alcohol laws numerous times at Carroll College in both the fall and spring semesters. The group is mostly comprised of students and faculty, although community members have attended when the discussion involved laws involving off-campus parties.

I have lectured on mental health laws at Local Advisory Committee meetings, a Helena NAMI panel, and college classes. These groups ranged from elected officials to families members of those living with mental illness, as well as students.

D. PROFESSIONAL AND PUBLIC SERVICE

28. List all bar associations and legal professional societies of which you are a member. Provide the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

Montana State Bar member 2008 – present
1st Judicial District Bar member 2010 – present
Montana State Bar Board of Trustees member 2012 – present
Chair of the Montana State Bar Board of Trustees 2016 – present

29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. State the title and date of any office that you have held in each organization. If you held any offices, describe briefly your activities in the organization.

The Friendship Center, Board of Directors member 2013 – present
Lewis and Clark County Mental Health Local Advisory Committee, Board member 2013 – present
107 1st (Supporters of Major League Soccer Club Portland Timbers) 2014 – present
Montana Regional Supporters of the Portland Timbers 2015 – present

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

No

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

I believe the skills I have learned as an attorney should not be kept to myself and have tried to do the best I can to help my community through my employment and services on various boards. I developed a strong sense of community service while at Carroll College where I participated in two spring break service trips. The gratitude from the people we helped inspired me to always strive to do a little extra, which led to my year of service after college in Maryland where I worked with a volunteer program at a soup kitchen. As my skills and talents have developed with the practice of law, I've felt it necessary to assist whenever I can. My current service with The Friendship Center helps me to assist those in the community dealing with domestic violence. My position on the State Bar Board of Trustees allows me to help my profession better itself and remain a positive force in our state.

E. PROFESSIONAL CONDUCT AND ETHICS

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

    No

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

    No

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

    In 2012, I rode the light rail MAX train system in Portland one stop past the "free zone" during a "special event time period" and was assessed a fine for not having a ticket, which I paid. This was a result of honest confusion.

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

    No

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

    No

F. BUSINESS AND FINANCIAL INFORMATION

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

    No

38. If you are an officer, director, or otherwise engaged in the management of any business, provide the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.

    Not applicable

39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, identify the source and the approximate percentage of your total income it constituted over the last five years.

Not applicable

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

No

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

Yes

42. Have you filed appropriate tax returns as required by federal, state, local and other government authorities? **X** Yes _____No

If not, please explain.

43. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)? _____Yes **X** No

If yes, please explain.

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

No

G. WRITING SKILLS

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

During the course of trial practice, I respond to briefs and motions from opposing counsel. I primarily do my own research and writing, but our office has a "brief bank" containing briefs on issues commonly encountered so attorneys do not need to reinvent the wheel.

A majority of the time, case specific issues arise and additional research and writing is required to supplement standard portions of previously written briefs. The County Attorney's Office employs a summer intern who I have had help with research and writing on a few occasions over the past 5 years. In involuntary commitment hearings, I draft the proposed findings of facts and orders for the Court. I do all of my own research when it comes to advising on mental health issues since the position I am in is constantly evolving, and I am dealing with new laws and the changing landscape of mental health in the community.

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

In the course of my practice, I have drafted letters in response to legal issues from other attorneys or interested parties. I have worked on legislation proposed to the Montana Legislature. I have assisted the Attorney General's Office in administrative rule changes regarding breath testing procedures. I have assisted in the drafting of policies and procedures for The Friendship Center.

47. Attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable.

Attached is a response brief from State v. Vanover

48. What percentage of your practice for the last five years has involved research and legal writing?
25 %

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

Yes. At the Montana Supreme Court, I had access to both Westlaw and Lexis. Since leaving the Court, I have primarily used Lexis but am familiar in researching with both products.

H. MISCELLANEOUS

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

I enjoy college and high school sports and have actively followed the Dillon Beavers, Carroll College Fighting Saints, and University of Montana Grizzlies in both football and basketball since attending each school. Over the past 5 years, I have travelled to Portland to watch a Timbers Major League Soccer match each year and have become active in their support group, along with helping to form a supporters group in Montana. With the Montana Timbers, we have raised funds to support youth reading and tribal libraries after being inspired by their "Booked!" program.

My wife and I have two young sons, ages 2.5 years and 5 months, so our interests and activities are constantly evolving as they grow. We frequently visit her family ranch outside of Twin Bridges. I also enjoy bird hunting and golf and attempt to do each multiple times a year.

I am fascinated by our state's history in all aspects and enjoy discussing historical events.

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

Growing up in Dillon, I mowed lawns, shoveled sidewalks, and bagged ice. I washed dishes for approximately two years at the Blacktail Station. I also worked for a brief period of time during high school at the Dillon McDonalds.

While at Carroll College, I was employed as a front desk monitor in the dorms and also served as an assistant to the Director of Student Activities, Patrick Harris.

During the summers following my first three years at Carroll, I returned to Dillon and worked on a fish and stream survey crew for the United States Forest Service. This job took me to the headwaters of many of the streams in the Big Hole, Centennial, and Medicine Lodge valleys.

Following my senior year at Carroll, I worked for the maintenance and grounds crew at Carroll.

Between graduation from Carroll and starting law school, I volunteered for one year with an AmeriCorps program in Baltimore, Maryland. In this position I worked at one of the largest soup kitchens on the East Coast and assisted in managing the volunteer program.

During law school, I worked at the library front desk, was an assistant to Professor William Corbett, and spent two summers working at the Lewis and Clark County Attorney's Office. For my clinical experience during my third year, I worked for the Associated Students of the University of Montana Legal Services.

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

Shortly before starting with the County Attorney's Office, I worked on one pro bono family law case involving a parenting plan modification. A conflict eventually arose, and I was unable to continue my representation. I have devoted my time over the past 5 years to various boards and Carroll College (as previously mentioned). I feel it is important for attorneys to offer their expertise in any way possible, whether it is in the courtroom on pro bono cases or with their advice to others in the community when appropriate.

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

The first District Court judge I appeared in front of as an intern was Judge Jeffrey Sherlock. I knew his reputation and observed him numerous times the previous summer, so I was initially very intimidated. During my first appearance in law and motion, he asked me numerous questions, which was something he did not do to other attorneys. When I was finished, I felt like I had been beat up and did not do a good job because Judge Sherlock had asked so many questions. In speaking with the judge after, he informed me he asked those questions so I would be better prepared and so I would never omit certain details again. From then on, whenever I had an opportunity to appear before any judge, I anticipated the judge's questions and made sure to include additional details.

Appearing before Judge Sherlock taught me to be better prepared in all aspects of my cases. I learned from him that if I took additional time to research my cases in the beginning, I could make more informed decisions. If I made more thorough decisions from the beginning, my cases had a stronger base, and the process of our court system was more fluid.

This school of thought applies to all aspects of the law not just criminal or mental health law. Our system of justice is driven by human interaction and anyone who influences the system in any way should take great care in what decisions he or she makes because the ramifications can and often do affect many more people.

If I cannot honestly and thoroughly answer a question regarding an issue, theory, or outcome to myself, then I need to realize I may not be making the correct decision. Our system of justice works when all are prepared fully. Preparation is something we should all take great pride in.

This applies to the judge as well. The judge is the guardian of the system. If the judge is unable to fully understand an issue or the ramifications of his or her rulings or decisions, then a bad outcome, which could undermine our system, is possible.

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

A good District Court judge must be consistent, understanding, approachable, and firm. All who appear before a good judge should know they are not aiming at a moving target. I do not mean a judge should be immediately predictable, but those in the Court should expect a decision with concise rationale that they can understand.

The District Court deals with many parties who have never been in a courtroom before or who are unrepresented. They deserve to be treated with respect and given an opportunity to address the Court. I have found when a judge takes extra time to listen and then explain the decision, which may not be popular, the judge is better understood. A judge needs to be firm, though, and not allow the courtroom to become chaotic -- there is a fine line between being understanding and approachable and losing control. Most importantly, though, the District Court needs to be open to all.

A judge also needs to be efficient with the judge's time and the time of those appearing in the District Court. With the Fifth Judicial District serving three county courthouses and numerous other independent communities, the judge needs to be able to devote adequate time to each area. The Court needs to respectful of the time the Court devotes to all and give equal due to all the Court serves.

55. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

The duties of a District Court are to apply the facts of the case at hand to the law on the books. Without precedent, the law is a moving target and this is not fair to the parties involved. Precedent should guide the Court, but it is important for the Court to keep in mind each case is real life and has subtle nuisances that require a need for detailed analysis. This is where it is necessary to be flexible in the law.

In certain situations, there will be issues before the Court that require the Court to move away from precedent. We are an ever evolving society, and the laws we have set forth can certainly be subject to change with the times. This should not be taken lightly and used only in rare circumstances.

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

I am seeking this position for three main reasons. First I desire to use the skills and talents I have learned and honed to serve the community. I have lived my adult life using my talents to help others, and I feel I am in a great position to transition to serving the communities of the Fifth Judicial District. My career path to this point has led me to take a bigger role in serving the community.

Second, I desire to be a community leader and set a strong example for those in the communities I will serve and my own family. I am at a position in my life where my experiences to this date will lead me to have a greater understanding of the issues before the Court and be able to handle them with the respect and responsibility the issues deserve.

Third, and probably most important, I feel sense of duty to return home to the communities where my wife and I were raised and both serve and contribute to them in the same way so many people served our families when we were younger. As a District Court judge, I would be in the best position to accomplish this.

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

I am proud of the work I have done as a prosecutor in both standing up for those who have been injured or aggrieved and in using my discretion to collaborate with defense counsel to make sure justice is served. I am particularly proud of the following:

In the fall of 2014, I prosecuted a case against a defendant who had secretly videotaped his female coworkers when they used the common restroom at their work. When the camera was discovered and turned over to the police, it was determined that the defendant had been doing this for a lengthy period of time. The victims were shocked and terrified by the violation of their privacy and were affected even further when they found out that the way the law was written the crimes did not "stack" and would all be considered misdemeanors. I met with the victims numerous times, and we determined it would be best for the continuation of their healing process for both of them to appear in court at sentencing and also to work with the Attorney General's Office on a bill to change the law. I had the opportunity to appear and testify with one of the victims when the bill was heard by the Legislature in 2015 and was proud of our work when it passed. It gave me great satisfaction to work with a victim to change the law so others would not be affected as she was.

I also spent two years as the representative from the County Attorney's Office in the First Judicial District Treatment Court. This program is initially hard to adapt to as a prosecutor, but after a while, I began to see real change in defendants who simply needed more structure and people to care about them and their sobriety. Approximately two years ago, I agreed to offer a treatment court sentence to a defendant with a deplorable record. The sentencing judge even made note of the defendant's record and questioned if I knew what I was doing. Shortly after sentencing, I saw the defendant, and he offered to

shake my hand and thank me. I told him to come back and find me later and we would talk. Three weeks ago, I was present in a packed courtroom when the defendant graduated from Treatment Court. He took the time thank me in open court for giving him the chance to succeed. It is important to remember as a prosecutor that there are cases where defendants deserve additional chances.

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

Some of the cases and projects I have worked on have had outcomes or positions that did not meet the expectations of "justice" to the defendants, victims, or family members of those involved. I have always given my best effort to explain my rationale, and some decisions I have total confidence in still enter my mind when I think of the rationale from the other side. I also take into consideration I have not lived the experiences of those involved, and I may seem rude or inconsiderate because the emotion is not personal to me. I always try to explain my position but fully realize I will not and cannot please all.

59. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge applicant?

I was raised in Beaverhead County and my wife in Madison County. The Fifth Judicial District is home. We would like to raise our two sons there. As Fifth Judicial District Court Judge, I will strive to ensure that all who appear before me feel that they are given a fair shake and that their legal issues are carefully considered. My work ethic and sense of community -- instilled in me by the very community to which I hope to return as District Court Judge -- cannot be replicated and make me the best candidate to serve.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 5th Judicial District, if tendered by the Governor, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.

_____ _____

(Date) (Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by ***5:00 p.m. on Monday, October 31, 2016***.

Mail the signed original to:

Office of Court Administrator
c/o Lois Menzies
P.O. Box 203005
Helena, MT 59620-3005

Send the electronic copy to: mtsupremecourt@mt.gov

Luke M. Berger
Deputy County Attorney
Lewis and Clark County
228 Broadway
Helena, MT 59601
Attorney for Plaintiff

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

STATE OF MONTANA,	)	
Plaintiff,	)	Cause No. CDC 2014-18
-vs-	)	
TYSON ARNIC VANOVER,	)	**PLAINTIFF'S RESPONSE TO DEFENDANT'S COMBINED MOTION TO SUPPRESS AND MOTION IN LIMINE**
Defendant.	)	

COMES NOW Luke M. Berger, Deputy County Attorney for Lewis and Clark County, respectfully submits this brief in response to the defendant's combined motion to suppress and motion in limine. The State agrees in part, concurs with recommendations in other parts and disagrees with some positions set forth by the defendant. The State will address each item individually, as done by the defendant. The videos mentioned in the State's response were attached as exhibits with the Defendant's original brief.

I. Exclusion of Evidence Under M.R.Evid. 403 and 404

"A. MHP DVDs #1 and #2"

The defendant outlines six instances related to prior bad acts committed by the defendant and wishes to have those excluded. The State has no objection to this request, as a failure to do so would certainly hurt the State's case by offering grounds for a mistrial. As is standard practice the State will remove any evidence which speaks of prior bad acts in its case in chief.

“B. L&C DVD#1"

The defendant has two objections to L&C DVD#1. First, defendant objects to the inclusion of the discussion between Deputy Holmlund and Sergeant Nelson about “processing” and “running” Mr. Vanover. The state does not object to muting the audio during this portion of the video as the conversation is irrelevant.

Defendant’s second objection to L&C DVD#1 is much of it is irrelevant or cumulative and should excluded. The State will eliminate cumulative evidence in its case in chief, but has not yet determined which portions of the DVDs it intends to use. The State should not be precluded from using portions of the relevant DVD evidence in whatever form it chooses, so long as it is not cumulative. The State may choose to use different angles of cameras or different audio and should not be precluded from doing so by throwing out an entire DVD, or setting a time mark after which time the video should not be used because the defense asserts it is irrelevant. As addressed in greater detail below, there is much more to a DUI video than direct action by the defendant.

While the State agrees it should avoid as much cumulative evidence as possible it cannot specify at this time exactly which portion or which DVD it will use specifically at trial. The defense has both DVDs in its possession and the state will provide an edited copy before trial for the defense to review.

II. Motion to Suppress

The defendant wishes to suppress DVD evidence on MHP DVD#1, MHP DVD#2, and MHP DVD#3, under the premise that any evidence on the DVDs is inadmissible as defendant had been arrested and was not informed of his *Miranda* rights at the time of recording. The State objects to this motion, as many of the statements defendant makes are voluntary or do not fall

under the *Miranda* protections. Under Montana law, the *Miranda* warning is required if a defendant is (1) "in custody" and (2) subjected to an "interrogation." *State v. Munson*, 2007 MT 222, ¶21, 339 Mont. 68, 76; 169 P.3d 364, 370 (Mont. 2007). Once the Defendant was placed under arrest, handcuffed and put in the patrol car he was in custody. The State does not dispute this assertion. Defendant argues he was subject to a custodial interrogation, an assertion the State disputes. A custodial interrogation includes not only express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Munson*, at ¶25.

On MHP DVD#1, after arresting Defendant, Sgt. Nelson again asks the Defendant about what happened to his wallet and who was driving the vehicle. The State agrees not to present this portion of the DVD in its case in chief unless the defendant asserts he was not driving as a defense.

On MHP DVD#2, defendant wishes to suppress video of defendant's booking, and Sgt. Nelson's reading of the Montana implied consent form and defendant's refusal, under the argument that because he was in the custody of police, his statements and actions were part of a custodial interrogation and required *Miranda* warnings. Defendant's statements were not part of a custodial interrogation, did not require *Miranda* warnings and should be admissible.

Spontaneous utterances by a defendant, not in response to specific questions, are admissible under Montana law. *State v. Damon*, 2005 MT 218 ¶32; 328 Mont. 276, 281; 119 P.3d 1194, 1200 (Mont. 2005). No *Miranda* warnings are required before a defendant spontaneously utters incriminating information. *State v. Hurlbert*, 2009 MT 221 ¶37, 351 Mont. 316, 325; 211 P.3d 869, 876 (Mont. 2009); *State v. Zito*, 2006 MT 211 ¶22, 333 Mont. 312, 320;

143 P.3d 108, 114 (Mont. 2006). The Montana Supreme Court has cited *Miranda* when admitting into evidence voluntary statements made before the person making the statement had been warned of his rights. *State v. DePue*, 237 Mont. 428, 431; 774 P.2d 386, 389 (Mont. 1989) (*quoting Miranda v. Ariz*., 384 U.S. 436, 478; 86 S.Ct. at 1630, 16 L.Ed.2d at 726.)

> Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

In addition to defendant's statements made during booking falling outside *Miranda*, evidence showing defendant's behavior and manner of speaking is relevant, not unfairly prejudicial, and should be admissible.

The privilege against self-incrimination does not extend to real or objective evidence. *State v. Finley*, 173 Mont. 162, 166; 566 P.2d 1119, 1121 (Mont. 1977); *State v. Thompson*, 237 Mont. 384,386; 773 P.2d 722, 723 (Mont. 1989) (audio-video tape which demonstrates a defendant's performance of sobriety tests and his manner of speaking is not entitled to Fifth Amendment protection, as the tape is objective evidence rather than compelled communication or testimony); *State v. Ashworth*, 2001 ML 1714, ¶15 (Mont. Dist. 2001).

In *Finley*, the Montana Supreme Court held that videotapes demonstrating behavior, performance on sobriety tests, and manner of speaking are objective evidence and outside the protection of the Fifth Amendment to the United States Constitution and Art. II, § 25 of the Montana Constitution. *Finley*, 566 P.2d at 1121. The audio-video tape in *Finley* was introduced into evidence "not for the incriminating content of the words uttered by defendant, but as evidence helpful to the jury in understanding the testimony of the police officers and employees who observed defendant's unsteady walk and slurred speech in the police station." *Id*.

The Montana Rules of Evidence allow exclusion of relevant evidence if the "probative value is substantially outweighed by the danger of unfair prejudice." M. R. Evid. 403. Evidence is generally unfairly prejudicial when it "arouses the jury's hostility or sympathy for one side without regard to its probative value." *State v. Bieber*, 2007 MT 262, ¶ 59, 339 Mont. 309, 170 P.3d 444 (Mont 2007). A district court has discretion to balance the probative value of the evidence against its prejudicial effect, but mere prejudicial effect is not a sufficient reason to refuse admission. *State v. Huether*, 284 Mont. 259, 265; 943 P.2d 1291, 1295 (Mont. 1997), *State v. Schauf*, 2009 MT 281, ¶41; 352 Mont. 186, 196; 216 P.3d 740, 748 (Mont. 2009).

In addition, Section 61-8-401(5), MCA specifically allows admissibility of "any other competent evidence" in addition to the blood test, and the Montana Supreme Court has held that includes video of a defendant's performance on sobriety tests and manner of speaking. *Schauf*, at ¶42.

Here, the booking video would be introduced as evidence helpful to the jury in understanding the testimony of the Sgt. Nelson. The video is relevant and probative of defendant's condition and particularly of his level of intoxication. The State does not seek to admit the evidence for the content of defendant's speech, but rather for the manner of speaking. The jury will also hear evidence that defendant was just involved in a crash, and it is for the jury to weigh those factors and determine how much weight to give them. As far as any statements defendant made during the booking process, at the time defendant made the statements, he was not being interrogated. Defendant initiated conversation with Sgt. Nelson about whether other officers checked for the presence of an additional person at the scene, about where his keys were, and about whether he was driving. Sgt. Nelson does not ask defendant any questions regarding

the investigation, only about whether defendant understands the process. Video evidence of defendant's booking and any statements made during booking should be admissible.

Defendant also asks to suppress video of his refusal of the requested blood test under Montana's implied consent law. The implied consent advisory does not fall under *Miranda*, as refusal of the test is not self-incrimination and is admissible during a DUI trial. The Montana Supreme Court has held on several occasions that evidence of a defendant's refusal to submit to a blood or breath test is admissible under Section 61-8-404(2), MCA, and is not a violation of defendant's rights under the Fifth Amendment of the US Constitution or Article II §25 of the Montana Constitution. *City of Missoula v. Robertson*, 2000 MT 52, ¶40, 98 Mont. 419, 430; 998 P.2d 144, 152 (Mont. 2000); *City of Missoula v. Forest*, 236 Mont. 129, 133-34, 769 P.2d 699, 701-702 (Mont. 1989); *State v. Jackson*, 206 Mont. 338, 348, 672 P.2d 255, 260 (Mont. 1983). The portion of MHP DVD#2 showing Defendant's refusal to the requested blood test is admissible and should not be suppressed.

On MHP DVD #3, Defendant wishes to suppress video of statements he made to himself in the back of the patrol car. As discussed above, spontaneous utterances made by defendant, without prompting from law enforcement, fall outside the *Miranda* protections and are admissible. According to defendant's brief, defendant was whispering to himself. Sgt. Nelson is not asking questions or even speaking to defendant. Defendant's statements made in the back of the patrol car during transport should be admissible.

The remainder of MHP DVD#3 contains footage of Defendant's transport from the jail to the hospital and back. This is relevant to show the time of the transport, the time of the blood draw, and his general demeanor and behavior. The DVD should be admissible, with the

exception of the questions regarding defendant's wallet and who was driving, asked immediately following defendant's arrest.

III. Evidence of Horizontal Gaze Nystagmus Test and Results

The State will comply with the case law and offer proper foundation if it intends to enter this evidence at trial.

IV. Conclusion

In sum, the State agrees it will not present evidence of defendant's prior bad acts, or of Sgt. Nelson's questioning of defendant immediately following his arrest. The State also agrees it will not present cumulative evidence, but objects to the defense stating specific parameters of video use or calling evidence irrelevant without considering the many other aspects present in DUI prosecution. The State objects to the suppression of defendant's voluntary and spontaneous statements, and of defendant's refusal to take a blood test under Montana's implied consent law.

Respectfully submitted this 9th day of April, 2014.

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Luke Berger, Deputy County Attorney
Lewis and Clark County

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing response was served upon counsel for the defendant by placing a copy of the same in the US Mail addressed to defendant's counsel of record, this 9th day of April, 2014.

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