

APPLICATION FOR

**DISTRICT COURT JUDGESHIP  
Fifth Judicial District**

**A. PERSONAL INFORMATION**

1. Full Name: Victor Nicholas Bunitsky, Jr.
2. What name do you commonly go by? Victor or Vic

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

3. Home Address: [REDACTED]

Phone: [REDACTED]

4. Office Address: 101 E. Cover Street, P.O. Box 77, Virginia City, MT 59755

Phone: 406-843-5432

5. Length of residence in Montana: Five (5) years
6. Place of residence for the last five years:

Dates

City

State

March, 2011

Virginia City

Montana

## B. EDUCATIONAL BACKGROUND

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

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
P.S DuPont H. S.	Wilmington, DE	June 1965	H.S. diploma
University of Delaware	Newark, DE	June 1972	B.A.
Widener University	Wilmington, DE	June 1976	J.D.

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

Wilmington Teenager of the Year 1965  
Pyle Scholarship 1965

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.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
Pennsylvania Supreme Court	May, 1978
Nevada Supreme Court	December, 1987
Idaho Supreme Court	December, 2004
Montana Supreme Court	December, 2000
U.S. Court of Military Appeals for the Armed Forces	September, 1978
U.S. Court of Appeals – 9 <sup>th</sup> Circuit	December 1987
Supreme Court of the United States of America	April, 1996

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

September 1993 to present – Self-employed – practice of law, civil and criminal  
December 2011 to present – Town Attorney for the Town of Virginia City

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:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
David Allen & Associates Las Vegas, NV	Associate Attorney	3/91 – 7/93
Apple & Bunitsky Las Vegas, NV	Partner – General practice	9/89 – 3/91
United Productions, Inc. Las Vegas, NV	Vice President & General counsel	3/89 – 9/89
Keefer, O'Reilly & Ferrario Las Vegas, NV	Associate Attorney	5/87 – 9/89
City of Philadelphia	Assistant District Attorney	7/82 – 5/87
United States Air Force Las Vegas, NV	Assistant Staff Judge Advocate Chief of Military Justice Area Defense Counsel	8/78 – 6/82

Tribal Courts in Nevada and Idaho

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

N/A

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.

Criminal defense – 90%

Civil matters – Plaintiff's counsel & Domestic representation – 10%

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

Associate adjunct professor Embrey Riddle Aeronautical University 1980 – 1999

Instructing in Aviation law and insurance at undergraduate level; Labor Relations and Collective Bargaining at graduate level

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

N/A

17. Do you regularly appear in court? Yes

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

Federal court	<u>2</u>	%
State or local courts of record	<u>75</u>	%
Administrative bodies	<u>          </u>	%
Other	<u>23</u>	%

18. During the last five years, what percentage of your practice has been trial practice? 95%

19. How frequently have you appeared in court? 20 -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	<u>20</u>	%
Criminal	<u>80</u>	%
Other	<u>          </u>	%

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.

*Ronald Saxon v. Phyllis Saxon*, No. DV-11-0434. I was counsel for appellee Phyllis Saxon. Ronald Saxon was pro se. No known address. My client prevailed.

*Laura Wendlandt v. Michael Johnson*, No. DA-11-0620. I was counsel for appellee Wendlandt. Appellant Johnson was represented by Sol & Wolfe, 101 E. Broadway, #300, Missoula, MT 59802. (406) 728-4727. My client prevailed in all but one minor issue.

23. State the number of jury trials that you have tried to conclusion in the last ten years. Approx 25

24. State the number of non-jury trials that you have tried in the last ten years. Approx 50 (Civil and Crim)

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.

Multiple Civil Cases (DN Matters)

Judge Tucker in all three counties of the Fifth District

Judge Tucker (406) 683-3745 Opposing counsel: Montana Attorney General, Child Protection Unit,  
Missoula and Billings, MT (406) 329-1564

Judge Newman in Second District (406) 497-6420

Opposing counsel: Ross Richardson, 116 W. Granite, Butte, MT 59701 (406) 723-3219

Multiple Criminal Matters

In public defense work, “primary” is a relative term. As OPD contract/conflict appointed counsel during the last two years, I have appeared in, and closed, dozens of criminal matters over the last two years, with each client understandably believing his case to be a “primary” case. I appear before Judge Tucker, Judge Newman, Judge Krueger (406) 497-6410, Judge Dayton (406) 563-4044, Judge Townsend (406) 258-4774, Judge John Brown (406) 582-2150, Judge Salvagni (406) 582-2140, and Judge Langton (406) 375-6784. In those criminal matters, the respective County Attorneys and their deputies would be my opposing counsel.

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

I have represented clients before the Department of Motor Vehicles in Nevada and Idaho, and before administrative law judges for social security cases. I have also handled 100s of administrative cases in the Air Force, both as the government’s representative and the members’. I also served as an administrative judge when so assigned.

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.

**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.

I am a member of the bars for the states in which I am admitted to practice. When I was active in the American Bar Association until approximately 1987, I was a member of the Innocence Project.

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.

Since February 2016, I have been Trustee for the B.P.O.E.(Elks), Lodge # 390, Virginia City, Montana.

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

I was a mayoral candidate in Idaho Falls, ID in 2000 and for County prosecutor in 2002.

I ran for Madison County Montana Justice of the Peace in 2014.

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

I promised God and myself that upon admission to the bar, I would assist those who needed legal counsel and assistance but were financially unable to retain counsel. My faith has kept me anchored during my life, and I believe I have a duty to assist those less fortunate. I have not hesitated to answer the call for assistance when the request has been made or I see a need. I believe attorneys should be willing to help those in need, and give back to the communities in which we reside.

### **E. PROFESSIONAL CONDUCT AND ETHICS**

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

No

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

No

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

No

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

No

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

No

## F. BUSINESS AND FINANCIAL INFORMATION

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

I was a partner in an Italian delicatessen in Idaho Falls, ID 2000 to 2004.

My wife owned a restaurant, bar, convenience store, RV park facility in Elko, NV, 2006 – 2011. I assisted her as cook and bartender, as well as being the business' attorney.

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.

I am the Town Attorney for the Town of Virginia City, and would resign if appointed district judge.

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.

N/A

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?  Yes  No

If not, please explain.

N/A

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

If yes, please explain.

N/A

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.

I have always enjoyed legal research, and the thrill of finding a case on point. I have trained my legal assistant to research as, while I am traveling to and from court in different cities, it saves me time. I can then read the cases, determine which I believe are relevant and begin writing. For some cases I have found it more convenient to dictate to my assistant while I read pertinent case law.

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.

N/A

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.

48. What percentage of your practice for the last five years has involved research and legal writing?  
100 %

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

Yes.

## H. MISCELLANEOUS

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

I am an avid reader, and possess a wonderful and varied library. I work out as time and work allow.

My wife and I lost a son two years ago, so we are more conscientious about the importance of interacting with our remaining six children. We also have fifteen grandchildren with whom we enjoy traveling and exposing to the wonders of our great country. My family is my hobby and interest.

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

I have been employed since I was a teenager. I also worked full time to support my family while attending college and law school. I have worked in a butcher shop, repossessed cars, sold insurance, worked in a hospital and worked in two liquor stores. I began my career in the criminal justice system 46 years ago when I became a police officer (I grew up in a cop family); I was a state and federal prosecutor and spent 10 years on the bench in Nevada.

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

My pro bono work has primarily been in the area of Family Law. On average, I represent four to five such cases per year in divorce/custody proceedings; one probate/estate case per year; and one to two misdemeanor criminal matters per year. I give legal advice to many individuals who call or visit me without a case being filed.

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

I am a second generation American. At the knees of my emigrant grandparents, I heard the horror stories of what happens in countries that don't have a system of justice like ours. Growing up, surrounded by the law and justice system, in a lower income home in the inner city, with two brothers and two sisters, and patrolling the inner city riot area as a cop, I learned the value and necessity of demonstrating a fair, just and equitable application of the law to everyone. I applied this belief as a cop, prosecutor and judge, always remembering where I came from, and that others were not so favorably placed or knowledgeable. My father (a cop) and my best friend's father, a judge (later to become Chief Justice of the Delaware Supreme Court) were influential role models concerning the justice system and the treatment of individuals brought therein. They instilled in me a love and respect for the law and the justice system. After 46 years in the system I have appeared before many judges. I have adopted the positive traits and courtroom demeanor from those I believed were most judicial and fair, to emulate when I was on the bench. So, I had many mentors going back many years.

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

Simple as it may sound, a good judge needs to listen to all sides. It may surprise you to know how many judges think they know where an argument or case is going and have started to formulate a ruling before the party has finished. A judge must be a referee, be impartial, and must not care who prevails. A judge must understand that everyone in the room has a duty to perform, and must give each the opportunity to perform it. I have seen too many judges who are prosecutors wearing a robe but sitting at a different table. I believe in applying the law and the Constitution (state and federal) to the facts. I believe in the Constitutions and have sworn an oath many times to support and defend them. I meant it each time. I believe those oaths must be taken seriously. Judges are not intended to and should not legislate from the bench. They don't come to the bench as experts in all areas of the law. He or she must be humble enough to recognize that the parties and attorneys who appear before them can teach them through argument and briefs. They must be prepared to research, read and analyze cases and briefs, and be sufficiently open-minded to change their opinion when mandated by facts and law. They must be brave enough to stand by their conclusions, even when the end result isn't popular. A judge should never worry about whether the ruling will help or hurt them in the next election. A judge should be a humble servant of the law in service to the people. When all the right qualities are present, it's possible to do both.

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.

I am the eternal optimist. I have always known there is the letter of the law and there is the spirit of the law. Our common-law system has been built on precedent. So, when precedent is obvious, apparent and firm, judges are obligated to apply the law pursuant to the precedent. However, times come when the case, or part of the case, may fall into a gray area. It is at such times when the spirit of the law may become more predominant. While judges must not legislate from the bench, this is the time where the spirit of the law must come to the forefront. Common sense is a must in order to distinguish the two.

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

Since I was a cop, I have believed I could make a difference, even if in a small way. I believe in the justice system. I have sat in every chair in the room except that of an accused criminal. Since entering the system, I have heard from all sides that we are no longer a system of "justice." I believe we are, but that we need judges with practical experience, knowledge, common sense, and the right temperament. I have heard from those who appeared before me in Nevada that even if they lost, they felt they got their day in court, were treated fairly, with professionalism and courtesy. I believe I have these qualities.

When my children had all left the nest, I chose to move here to this historical corner of Montana. I want to give back by bringing my years of experience to this position.

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

My legal work has primarily been adversarial litigation. My favorite case was handling the adoption of two of my grandchildren in Idaho. Everybody won. Everybody was happy.

I am most proud when I am humbled at being voted the favorite professor every year; or at receiving a Christmas card from a former criminal client who is now out of prison and a successful single dad of six children; or letters thanking me for the advice or assistance I gave; or when a home-baked loaf of bread or pie shows up on my doorstep as "payment" from a grateful client. When my clients find themselves on the right path in their lives, I am proud and grateful for the opportunity to serve.

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

When I served on the bench in Nevada, I received a great deal of positive feedback from my fellow judges, the attorneys, and the parties that appeared before me.

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 believe I am the most qualified candidate as I have served in every position in the room, including as a judge. I have also never forgotten where I come from nor do I think this is just another day at work or just a pile of cases and folders. Real people living real lives with real problems appear in our courts every day. I take that seriously. No one should feel that hope is to be abandoned at the courthouse doors, or that their case/situation is unimportant. I believe in the Constitution, and in my oaths to uphold and defend it. Being a judge means being the person I want to be appearing before as an attorney. I have done it and would be honored to be selected to do it again in the Montana, Fifth District.

## CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 5<sup>th</sup> 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.

OCTOBER 30, 2016

(Date)

Victor N. Buntsky

(Signature of Applicant)

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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](mailto:mtsupremecourt@mt.gov)**

1 VICTOR N. BUNITSKY, ESQ.  
Montana Bar No. 5273  
P.O. Box 77  
2 Virginia City, Montana 59755  
Telephone: (406) 843-5432  
3 Facsimile: (406) 843-5433  
Attorney for Defendant  
4  
5

6 **IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT**  
7 **OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF DEER LODGE**  
8

9 STATE OF MONTANA,  
10 Plaintiff,  
11 vs.  
12 ROBERT PIERCE,  
13 Defendant.

CASE NO. DC-12-29

**MOTION TO COMPEL  
DISCOVERY RESPONSE**

14  
15 COMES NOW Defendant, ROBERT PIERCE, in the above-entitled matter, by and  
16 through his attorney, Victor N. Bunitsky, Esq., and hereby moves this Court to Compel Plaintiff  
17 to respond to Defendant's Request for Discovery – more specifically, a response to Request 1 of  
18 Defendant's First Request for Discovery, filed August 29, 2012.

19 This motion is based upon the documents on file in the case herein, the Points and  
20 Authorities submitted herewith, and the Exhibits attached hereto.

21 DATED this 29<sup>th</sup> day of October, 2012.

22 LAW OFFICE OF VICTOR N. BUNITSKY

23  
24 VICTOR N. BUNITSKY, ESQ.  
Montana Bar No. 5273  
P.O. Box 77  
Virginia City, Montana 59755  
(406) 843-5432  
Attorney for Defendant

25 *Law Office of*  
26 **Victor N. Bunitsky**  
P.O. Box 77  
27 Virginia City, MT  
59755  
28 (406) 843-5432

1 **I. STATEMENT OF FACTS**

2 On the 22<sup>nd</sup> day of August, 2012 the Defendant made his Initial Appearance in the  
3 District Court. On the 29<sup>th</sup> day of August, 2012 the Defendant served Plaintiff with his First  
4 Request for Discovery, and filed same with the clerk of court. The Defendant has received two  
5 discovery responses since that date, neither of which has included the requested item – a copy of  
6 the State’s open file policy, or an assertion that the State will not be utilizing an “open file  
7 policy” to satisfy its statutory and constitutional duty to disclose evidence to the defense.

8 **II. LEGAL AUTHORITY**

9 The United States Constitution, Article 5, provides in pertinent part as follows:

10 The Congress . . . shall propose Amendments to this Constitution  
11 . . . which . . . shall be valid to all Intents and Purposes, as part of  
12 this Constitution . . .

13 The United States Constitution, Amendment Four, provides as follows:

14 The right of the people to be secure in their persons, houses,  
15 papers, and effects, against unreasonable searches and seizures,  
16 shall not be violated, and no Warrants shall issue, but upon  
17 probable cause, supported by Oath or affirmation, and particularly  
18 describing the place to be searched, and the persons or things to be  
19 seized.

20 The United States Constitution, Amendment Five, provides in pertinent part as follows:

21 No person shall be held to answer for a capital, or otherwise  
22 infamous crime, unless on a presentment or indictment of a Grand  
23 Jury . . . nor shall any person be deprived of life, liberty, or  
24 property, without due process of law . . .

25 The United States Constitution, Amendment Six, provides in pertinent part as follows:

26 In all criminal prosecutions, the accused shall enjoy the right to a  
27 speedy and public trial, . . . and to be informed of the nature and  
28 cause of the accusation; to be confronted with the witnesses against  
him; to have compulsory process for obtaining witnesses in his  
favor, and to have the Assistance of Counsel for his defence.

The United States Constitution, Amendment Eight, provides as follows:

Excessive bail shall not be required, nor excessive fines imposed,  
nor cruel and unusual punishments inflicted.

The United States Constitution, Amendment Nine, provides as follows:

The enumeration in the Constitution, of certain rights, shall not be  
construed to deny or disparage others retained by the people.

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1 The United States Constitution, Amendment Fourteen, provides in pertinent part as  
2 follows:

3 No State shall make or enforce any law which shall abridge the  
4 privileges or immunities of citizens of the United States; nor shall  
5 any State deprive any person of life, liberty, or property, without  
6 due process of law; nor deny to any person within its jurisdiction  
7 the equal protection of the laws.

8  
9 The Montana Constitution, Article II, Section 4, provides in pertinent part as follows:  
10 The dignity of the human being is inviolable. No person shall be  
11 denied the equal protection of the laws.

12  
13 The Montana Constitution, Article II, Section 11, provides as follows:  
14 The people shall be secure in their persons, papers, homes and  
15 effects from unreasonable searches and seizures. No warrant to  
16 search any place, or seize any person or thing shall issue without  
17 describing the place to be searched or the person or thing to be  
18 seized, or without probable cause, supported by oath or affirmation  
19 reduced to writing.

20 The Montana Constitution, Article II, Section 17, provides as follows:  
21 No person shall be deprived of life, liberty, or property without due  
22 process of law.

23 The Montana Constitution, Article II, Section 22, provides as follows:  
24 Excessive bail shall not be required, or excessive fines imposed, or  
25 cruel and unusual punishments inflicted.

26 The Montana Constitution, Article II, Section 24, provides in pertinent part as follows:  
27 In all criminal prosecutions the accused shall have the right to . . .  
28 demand the nature and cause of the accusation; to meet the  
witnesses against him face to face; to have process to compel the  
attendance of witnesses in his behalf, and a speedy public trial by  
an impartial jury of the county or district in which the offense is  
alleged to have been committed . . .

The Montana Code, MCA § 46-15-322, provides in pertinent part as follows:

- (1) Upon request, the prosecutor shall make available to the defendant . . .
- (2) At the same time, the prosecutor shall inform the defendant of, and make available to the defendant . . .

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- (4) The prosecutor's obligation of disclosure extends to material and information in the possession or control of members of the prosecutor's staff and of any other persons who have participated in the investigation or evaluation of the case.
- (5) Upon motion showing that the defendant has substantial need in the preparation of the case for additional material or information not otherwise provided for and that the defendant is unable, without undue hardship, to obtain the substantial equivalent by other means, the court, in its discretion, may order any person to make it available to the defendant.

The Montana Code, MCA § 46-15-327, provides as follows:

If at any time after a disclosure has been made any party discovers additional information or material that would be subject to disclosure had it been known at the time of disclosure, the party shall promptly notify all other parties of the existence of the additional information or material and make an appropriate disclosure.

The Montana Code, MCA § 46-16-106, provides as follows:

After plea, the defendant shall be entitled to a reasonable time to prepare for trial.

**III. ARGUMENT**

It is no small coincidence that so many provisions intended to protect the rights of the accused are contained within our Constitutions and statutes. Within the original Constitution itself, it is set forth that each and every Amendment that follows becomes a part of the Constitution, for all intents and purposes. The passing of one does not negate or lessen the force of another. Statutes are passed to provide greater specificity on the application of the Amendments. Case law follows which provides even greater specificity for the application of the Constitutional and statutory rights of the accused.

Before a criminal prosecution commences, and as it proceeds, constitutional rights attach: the requirement of a finding of probable cause that the accused has committed a criminal offense; the requirement that the accused know the nature and cause of the accusation; the requirement that the criminal trial be speedy; the requirement that the accused be afforded substantive and procedural due process; the requirement that cruel punishments not be inflicted; and the requirement that the accused be entitled to an equal application of the laws. The

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1 Constitutions are not a menu from a restaurant. The accused is entitled to the full protection of  
2 each right simultaneous to the others. He is not required to choose between them.

3 In the case at bar, the Defendant requested a copy of the State’s “open file policy,” if it  
4 intended to utilize this policy to satisfy statutory and constitutional disclosure requirements. The  
5 defense affirms the State has provided a great deal of discovery in this case, although at the time  
6 of this filing, it is known that it has not all been received. To date, a response has not been  
7 received on whether an “open file policy” will be relied upon by the State. The issue is acute.

8 The case at bar is proceeding with the assistance of multiple agencies from various  
9 jurisdictions. Each county attorney makes its own determination on whether it will utilize an  
10 “open file policy” to satisfy disclosure requirements. Each county in Montana appears to be  
11 utilizing a different policy. The undersigned recently learned from the Deer Lodge County  
12 Attorney that they do not utilize an open file policy in this county. The County’s Attorney  
13 asserted that if the defense believed there was something not yet provided, it need only ask. This  
14 “policy” was later clarified to include the requirement that defense requests for discovery not be  
15 made known to the Court. The instant case is being prosecuted in Deer Lodge County, but by a  
16 different agency than the Deer Lodge County Attorney. It is the defense’s understanding the  
17 Montana’s Attorney General, acting as the prosecutor in the instant case, does utilize an open file  
18 policy. Confirmation of this has been requested, as have the specifics of the agency’s policy.

19 The specifics are relevant. In reviewing the discovery, it is learned that other agencies  
20 are involved, agencies whose prosecutors possibly operate on different open file policies. In  
21 some jurisdictions, the investigating officer turns over the entire contents of the case file to the  
22 prosecutor. In others, only those documents which are requested by the prosecutor are sent to the  
23 county attorney’s file, while the remaining documents are held in the investigative office. In  
24 these cases, some investigative offices have been instructed by the county’s attorney to cooperate  
25 with the defense if asked, others have not. Also, in these investigative offices, the file may be  
with the lead investigator, in others it may be in a central records department, and in others there  
may be multiple files with multiple individuals.

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1 In the case at bar, particularly given the magnitude of discovery provided to date, the  
2 specifics of the open file policy being utilized by the State must be disclosed. The direction of a  
3 case can turn on a single document or even a single sentence by a witness. The defense must  
4 know at the onset of a case if it is expected to seek out each person who has participated in the  
5 case and review their file and compare it to what has been disclosed by the prosecutor. The  
6 defense must know at the onset of the case whether these people will disclose discoverable  
7 information received after the file review of their own initiative, or whether the State expects the  
8 defense to periodically return to these individuals to review their files for additional evidence.

9 Open file policies, in the undersigned's experience, are intended to satisfy *Brady*  
10 requirements. However, much more is required of the prosecutor than the disclosure of *Brady*  
11 material. Our Constitutions and statutes require the defense be provided not just exculpatory  
12 information, but also information the State intends to introduce at trial, and information which  
13 provides the basis (the nature and cause) of the accusation.

14 Further, since *Brady* was decided 49 years ago, it has been expanded by other landmark  
15 rulings such as *Agurs*, *Giglio*, *Bagley*, *Kyles*, and *Banks*.<sup>1</sup> *Brady* set forth that exculpatory  
16 information must be disclosed. *Agurs* set forth that impeachment material must be provided, and  
17 that all *Brady* material must be disclosed, even if not requested by the defense. *Giglio* and  
18 *Bagley* set forth that incentives given to witnesses must be disclosed. *Kyles* set forth that the  
19 prosecutor has a duty to learn of *Brady* material, and to assure it makes its way out of the  
20 investigative files and into the prosecutor's file.

21 Despite repeated and consistent holdings that prosecutorial disclosure is mandatory,  
22 violations continue. In deciding *Banks*, the Defendant submits the holding applies not just to  
23 *Brady* material, but to all disclosure:

24 A rule thus declaring "prosecutor may hide, defendant must seek,"  
25 is not tenable in a system constitutionally bound to accord  
defendants due process. "Ordinarily we presume that public

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27 <sup>1</sup> *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1994 (1963); *U.S. v. Agurs*, 427  
28 U.S. 97, 96 S. Ct. 2392 (1976); *Giglio v. U.S.*, 405 U.S. 150, 92 S. Ct. 763  
((1972); *U.S. v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375 (1985); *Kyles v.*  
*Whitley*, 514 U.S. 419, 115 S. Ct. 1555 (1995); *Banks v. Dretke*, 540 U.S. 668,  
124 S. Ct. 1256 (2004)

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officials have properly discharged their official duties.” We have several times under-scored the “special role played by the American prosecutor in the search for truth in criminal trials.” Courts, litigants, and juries properly anticipate that “obligations to refrain from improper methods to secure a conviction...plainly resting upon the prosecuting attorney, will be faithfully observed.” Prosecutors’ dishonest conduct or unwarranted concealment should attract no judicial approbation.

The Defendant does not propose the State is acting improperly or dishonestly. He simply requests the State promptly advise him by what rules this prosecution will proceed. The failure to do so does not simply result in deprivations of his constitutional rights to speedy trial and due process.

Speedy trials, or prompt resolutions of criminal cases, are not just for the accused, but for the protection of society as well. There is a two-fold aim in prosecutorial conduct as it relates to disclosure. *Guilt shall not escape or innocence suffer.*<sup>2</sup> When discovery is delayed, not only is the accused denied his constitutional rights to due process and speedy trial, society suffers as well. Failure to resolve guilt leaves the community uncertain how to associate with the accused and his family. Victims remain without closure or restitution for their damages. Court dockets become congested. Detention centers become filled beyond their capacity to adequately care for those who cannot make bail. Public defenders cry out for additional taxpayer funds to relieve them of excessive case loads. Discovery violations send cases back to the appellate courts, with the accused being housed and represented at taxpayer expense. The monumental cost is borne by law-abiding, taxpaying citizens. All the above problems would be easily resolved by prompt and full disclosure of discoverable information.

Black’s Law Dictionary, 8<sup>th</sup> Edition, defines “policy” as:

- 1) The general principles by which a government is guided in its management of public affairs;
- 2) A document containing a contract of insurance.

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<sup>2</sup> *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629 (1935)

1 The Defendant would submit both definitions apply, and that both definitions require  
2 written specification of the provisions. The principles of the policy may be general, but they  
3 must be specific enough to provide the “insurance” that the accused will receive a fair trial. The  
4 contract is the bargain between the prosecutor and the people. At the will and expense of the  
5 people, the prosecutor will insure fair trials and equal protection and application of the law.

6 “The United States Attorney is the representative not of an ordinary party  
7 to a controversy but of a sovereignty whose obligation to govern  
8 impartially is as compelling as its obligation to govern at all; and whose  
9 interest, therefore, in a criminal prosecution is not that it shall win a case,  
10 but that justice shall be done. As such, he is in a peculiar and very definite  
11 sense the servant of the law, the twofold aim of which is that guilt shall  
12 not escape or innocence suffer. He may prosecute with earnestness and  
13 vigor -- indeed, he should do so. But, while he may strike hard blows, he  
14 is not at liberty to strike foul ones. It is as much his duty to refrain from  
15 improper methods calculated to produce a wrongful conviction as it is to  
16 use every legitimate means to bring about a just one.” *Berger v. United  
17 States*, 295 U.S. 78, 55 S. Ct. 629 (1935)

13 Again, the defense does not assert the prosecution is acting improperly. However, the  
14 case is complex, with reams of discoverable information. The defense is entitled to know the  
15 procedures and policies under which the State will proceed. This would include any intent to  
16 proceed with the understanding that the State is utilizing an open file policy to meet its discovery  
17 mandates. Discovery statutes do not require the production of what does not exist, however, to  
18 foreclose an argument before it starts, the defense submits the State must not be permitted to  
19 argue that the “policy” exists, but does not exist for purposes of disclosure or production.

20 “But it will first be necessary to define what is meant by a Constitution. It  
21 is not sufficient that we adopt the word; we must fix also a standard  
22 signification to it. A constitution is not a thing in name only, but in fact.  
23 It has not an ideal, but a real existence; and wherever it cannot be  
24 produced in visible form, there is none.” Thomas Paine, *The Rights of  
25 Man*, (1791), a treatise in defense of our principles of freedom.

24 The same standard applies to an “open file policy.” If it cannot be produced in visible  
25 form, there is none. Ironically, Paine was referring to our Constitution, the ultimate legal  
26 authority underlying the basis of the instant motion.

27 The defense must be timely notified of the specifics of the discovery process the State  
28 intends to utilize. Will the State adopt the procedures of this jurisdiction and proceed without an

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1 open file policy? Do they concur with this jurisdiction’s position that discovery requests should  
2 not be made known to the Court through the filing of requests for same? Or will the State  
3 disclose via an open file policy? What are the specifics of that policy? When, has and/or will the  
4 State notify the individuals of the various agencies, who have participated in the investigation of  
5 this case, of the specifics of this prosecutor’s discovery policy?

6 The case cannot proceed in an orderly and speedy fashion without the defense being  
7 notified of this prosecutor’s intentions regarding disclosure.

8 “It is vain to give the accused a day in court, with no opportunity to  
9 prepare for it, or to guarantee him counsel without giving the latter any  
10 opportunity to acquaint himself with the facts or law of the case.” *Powell*  
11 *v. Alabama*, 53 S. Ct. 55, 287 U.S. 45 (1932) citing *Commonwealth v.*  
12 *O’Keefe*, 298 Pa. 169, 173.

13 The U.S. Supreme Court has gone on to say in *Strickler v. Greene*, 527 U.S. 263, 119  
14 S.Ct. 1936 (1999):

15 “We certainly do not criticize the prosecution's use of the open file policy.  
16 We recognize that this practice may increase the efficiency and the  
17 fairness of the criminal process. We merely note that, if a prosecutor  
18 asserts that he complies with Brady through an open file policy, defense  
19 counsel may reasonably rely on *that* file to contain all materials the State  
20 is constitutionally obligated to disclose under Brady. (emphasis added)

21 In combination with Montana’s Constitution and statutes, which are designed to provide  
22 greater protections to the people of Montana than does the Federal Constitution, the defense is  
23 entitled to a timely disclosure of the State’s intentions regarding discovery. For the benefit of the  
24 accused, as well as the taxpayers, this issue must be decided without further delay.

25 Referring back to Black’s Law Dictionary on the definition of “policy,” the third  
26 definition is a “lottery.” The Defendant submits the discovery process should not be operated  
27 under a policy that bears any resemblance to a lottery. The discovery process is not a shell game,  
28 where the Defendant, for a price, guesses which shell (file) has the prize (discovery documents),  
and loses by mere virtue of an incorrect guess.

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**IV. CONCLUSION**

In light of the above, the Defendant respectfully requests this Court compel the State to respond without further delay to the Defendant's Request for Discovery as it relates to an open file policy, and in all other aspects during these proceedings.

DATED this 29<sup>th</sup> day of October, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was served upon Plaintiff by mailing a true and accurate copy to the persons at the address noted hereinbelow:

Daniel Guzynski, Esq.  
Mary Cochenour, Esq.  
Assistant Attorneys General  
P.O. Box 201401  
Helena, MT 59620-1401

DATED this 29<sup>th</sup> day of October, 2012.

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