

APPLICATION FOR

**DISTRICT COURT JUDGESHIP
Fifth Judicial District**

A. PERSONAL INFORMATION

1. Full Name: **Jed Clayton Fitch**
 - a. What name do you commonly go by? **Jed**
2. Birthdate: [REDACTED] Are you a U.S. citizen? **Yes**
3. Home Address: [REDACTED]
Phone: [REDACTED]
4. Office Address: **2 S. Pacific #2, Dillon, Montana 59725**
Phone: **406-683-3730**
5. Length of residence in Montana: **As a student, since 1996. Official resident since 1999 (17 years)**
6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
May 2008 – present	Dillon	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>
Salmon River H.S.	Riggins, Idaho	June 1992	Diploma
U.S. Coast Guard Academy	New London, Connecticut	attended 1992-93	n/a
College of Idaho	Caldwell, Idaho	June 1996	B.A., <i>cum laude</i>
University of Montana, School of Law	Missoula, Montana	May 1999	J.D.
Naval Justice School	Newport, Rhode Island	June 2002	Basic Law Course

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

Corpus Juris Secundum, High "A" in Criminal Law (1st Semester) and Criminal Procedure (2nd semester), University of Montana School of Law.

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.

I was not a member of the Law Review.

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>
State Bar of Montana	September 27, 1999
United States District Court, District of Montana	November 10, 1999

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

Beaverhead County Attorney. Michael J. Gee is employed as my deputy.

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>
Moulton, Bellingham, Longo & Mather	Associate	Sept. 1999 – January 2000
Solo practice – Bozeman Municipal Court	Attorney/Public Defender	January 2000 – May 2000
Montana 18th Judicial District Judge Thomas A. Olson Judge Mark Guenther	Law Clerk	May 2000 – May 2001
United States Marine Corps	Officer/Judge Advocate	June 2001 – January 2005
Montana Trial Lawyers Assn.	Session Lobbyist	January 2005 – May 2005
Unemployed	n/a	May 2005 – August 2005
Thueson Law Office	Associate	August 2005 – June 2006
Solo practice – Butte, Montana	Attorney	June 2006 – March 2007
Senator Jon Tester	Staffer/Veteran Liaison	March 2007 – June 2007
Custer County Attorney's Office	Deputy	June 2007 – May 2008
Beaverhead County Attorney's Office	County Attorney	May 2008 - present

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

I was unemployed during the summer of 2005. This followed a four year hitch in the Marine Corps, including a five month deployment to Al Anbar Province, Iraq, in the spring and summer of 2004. I then moved straight on to lobbying the Legislative session of 2005, and then found myself without work for the immediate future. While searching for a new position, I took the opportunity to hike and camp around Montana, including a 10 day hike through the Bob Marshall Wilderness, from Highway 200 at Rogers Pass, to Highway 2 at Marias Pass, a distance of approximately 175 miles.

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.

My practice is essentially two-fold. On one hand, my courtroom practice is almost exclusively criminal law and family services cases. On the other, as County Attorney of a medium sized county, I am the legal adviser to the full panoply of county offices.

I regularly appear in court, from arraignment through trial in felony criminal proceedings. I conduct probation revocation hearings. I represent the State as Petitioner in mental commitments. I have in the past handled Youth Court proceedings, Justice Court proceedings, and a smattering of civil matters for the County. I have regularly represented the Dept. of Family Services in Dependent & Neglect cases, up through and including termination of parental rights.

I advise the Clerk & Recorder concerning deed and recording, regularly, and occasionally provide the C & R with advice concerning elections, as well. I attend meetings of, and advise, the County Commission. I am often asked to address road and easement questions for the County. I assist the County Planner, the GIS coordinator, the Sanitarian, Treasurer, and other county offices with a variety of questions.

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

I have taught several courses since being admitted to the Bar. In the fall of 1999, I taught General Studies 101 at Montana State in Bozeman. While stationed at Marine Corps Base Camp Pendleton, Calif., I taught a Business Law course for Embry-Riddle Aeronautical University, at their on-base campus, in 2003. In the fall of 2015, I taught a senior level course, American Constitutional Law, as an adjunct professor for the University of Montana – Western, here in Dillon.

I served as a Judge Advocate, assigned to the Third Battalion, Seventh Marine Regiment, in Al Qaim, Iraq. I advised the Commander on Law of War and Rules of Engagement issues. I developed cases against insurgents for prosecution in Baghdad and oversaw transfer of those individuals to higher level custody. I conducted investigations for the Command under the JAG Manual. I worked with the Civil Affairs Group, within the Battalion, on such projects as a police training academy, building police stations, developing a local bar association, starting a garbage collection service, and establishing a secure passage to the border check point. I investigated and paid claims to Iraqi citizens injured or damaged by U.S. operations.

During the Legislative Session of 2005, I worked for the Montana Trial Lawyers Association as a Lobbyist, and focused primarily on workers compensation issues.

In the Spring of 2007, I worked for newly elected Senator Jon Tester, as a Veteran liaison, focusing on issues concerning the Veterans Administration, and other veteran related issues.

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

Over the last ten (10) years, the bulk of my practice has been criminal prosecution, and I would submit that this area of the law is my most developed, and could be called my specialty.

17. Do you regularly appear in court? **Yes.**

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

Federal court	<u>0</u>	%
State or local courts of record	<u>75</u>	%
Administrative bodies	<u>1</u>	%
Other	<u>24</u>	% (Justice Court, non-record)

18. During the last five years, what percentage of your practice has been trial practice? **80%**

19. How frequently have you appeared in court? **20-25 hearings** 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>10</u>	%
Criminal	<u>90</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.

I have not personally appeared before the Montana Supreme Court. However, cases that I prosecuted have been appealed to the Supreme Court, and in each instance the Office of the Attorney General has represented the State on appeal. I appear as counsel of record in all of these cases, and have provided the captions of those cases within the past five years.

State v. Banks, 369 P.3d 355, 383 Mont. 546 (2016). Defendant appealed District Court’s denial of motion to suppress. Affirmed.

State v. Barrett, 358 P.3d 921, 381 Mont. 299 (2015). Case was tried by my then deputy Emma Mediak. I worked on the sentencing with my current deputy Mike Gee. Defendant appealed a finding that, although Idaho had labeled his third DUI a second offense, the current offense was his fourth offense. Affirmed.

State v. McGrath, unpublished 2015 MT 214N, 2015 WL 4611391 (2015). Case was prosecuted in Justice Court by my then deputy Emma Mediak. Defendant appealed to District Court, which

again denied motion to suppress, concerning an MIP. Defendant appealed to Montana Supreme Court. Affirmed.

State v. Redlich, 321 P.3d 82, 374 Mont. 135 (2014). Defendant appealed multiple convictions for assault with a weapon. Affirmed.

State v. Burwell, 313 P.3d 119, 372 Mont. 401 (2013). Case was tried by my then deputy Evan Moppert. Supreme Court found that additional testimony was required to prove that the substance in question was in fact marijuana. Reversed.

State v. Bekemans, 293 P.3d, 368 Mont. 235 (2013). Defendant appealed conviction for criminal endangerment. Affirmed. Reversed by the Supreme Court on the issue of District Court's placing sentencing conditions on a DOC sentence.

State v. Alchem, 318 P.3d 174, 373 Mont. 443 (2013). Defendant appealed conviction for failure to register. Affirmed.

State v. Young, 289 P.3d 110, 366 Mont. 527 (2012). Defendant appealed finding that previous Idaho DUIs were sufficiently similar to Montana DUI, making this a fourth offense. Affirmed.

State v. Butler, unpublished. 2012 MT 278N, 2012 WL 6018727. My then deputy Evan Moppert handled this case, and obtained a conviction for hunting without a license. I handled a revocation in Justice Court, which was appealed to District Court and affirmed there, and appealed yet again. Montana Supreme Court then affirmed. United States Supreme Court denied *certiorari*.

State v. Oram, unpublished. 2012 MT 182N, 2012 WL 3582574. Defendant appealed denial, without prejudice, of his postconviction relief petition for failure to verify. Affirmed.

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

15 District Court jury trials. Approximately 4 Justice Court trials.

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

Approximately 6 Justice Court bench trials.

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.

I prosecuted the following cases in Beaverhead County, obtaining a conviction in each case, in the past two years:

State v. Lerman, DC-14-3605, July 16-17, 2015, Hon. Katherine M. Bidegarary, phone 433-5939. Defense Counsel, Ed Sheehy, 44 W. Park, Butte, MT 59701, phone 496-6380.

State v. Hansen, DC-3618, October 22-23, 2015, Hon. Loren Tucker, phone 683-3745. Defense Counsel, Kaylan Minor, PO Box 1047, Dillon, MT 59725, phone 240-8356.

State v. Cantrell, DC-14-3596, January 25-29, 2016, Hon. Loren Tucker, phone 683-3745. Defense Counsel Christopher Petaja, 13 S. Willson, Ste. 3, Bozeman, MT 59715, phone 570-0440; and John Hud, 670 S. Ferguson Ave, Bozeman, MT 59718, phone 587-8989.

State v. Johnson, DC-16-3691, Oct 20-21, 2016, Hon. Loren Tucker, phone 683-3745. Defense Counsel Mariah Eastman, 217 S. Main Street, Three Forks, MT 59752, phone 285-6724.

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

I have conducted one Coroner's Inquest in the past five years, which is analogous to an administrative hearing. It involved a situation where a deputy fired fatal shots during a traffic stop when the decedent brandished a rifle. The Coroner's Jury returned a finding of no criminal act.

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 wrote an article regarding employee drug testing in 1999, which I believe was electronically published in a regional law journal. However, I am unable to locate any reference to it on-line, and do not have a hard copy of it in my possession.

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 since 1999.

Fifth Judicial District Bar Association, member since 2008.

Montana County Attorneys Association, Board Member since 2011, Treasurer since 2015

Fight Crime, Invest in Kids, member since 2008.

Gaming Advisory Council, apptd. by A.G. Bullock in 2011, and re-apptd. by A.G. Fox in 2014

Criminal Jury Instructions Comm., appointed by Montana Supreme Court, member since 2011

Montana Coal Board, appointed by Governor Bullock, 2016.

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.

**Dillon Jaycees, member since 2009. President 2011, and PRCA Rodeo Committee Chair 2012.
Veterans of Foreign Wars, member since 2004.
American Legion, member since 2005. Post #20, Dillon, member of Burial Detail Firing Squad.
Benevolent Protective Order of Elks, Dillon Lodge #1554, member since 2008.
Dillon Cubs American Legion Baseball, Board Member since 2014.**

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

I was appointed Beaverhead County Attorney in May, 2008. I was retained by the voters in the November election that same year, to complete my predecessor's term. I was then elected to a four year term in 2010, and re-elected in 2014. I ran as an Independent.

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

I am a strong proponent of public service, and giving back to the community. As the Jaycee Creed finishes, "service to humanity is the best work of life." My parents imbued in me the idea of service to others, from a young age, with the words, "give of yourself, so that others may succeed." All of my life, I have found ways to be involved in community events, programs, and looked for ways to help solve problems. Community service, in some ways, is the most selfish thing one can do – because the intrinsic personal reward one receives is immeasurable. In Dillon, the Jaycees has been an excellent vehicle for me to serve. I have helped with the Rodeo, as noted above, but also with the Little Skiers program, the Easter Egg hunt, the Demolition Derby, and a variety of other events and programs.

Donation of one's time is the most important way to contribute, in my opinion. However, in cases such as 4-H, where my children are not yet old enough to participate, I support financially by buying animals at the Beaverhead County Fair 4-H Stock Sale. Looking at my wall of photographs of 4-H kids and their animals, since 2008, I have purchased 8 lambs and 4 hogs. To my mind, this support of kids who are working toward a goal, and achieving success, helps launch them into a life of service and really brings public service full circle.

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.

As described above, I served in the Marine Corps, from 2001 to 2005, which was not exclusively the practice of law. In addition to several months of training to be a basically qualified rifle platoon commander, I served for several months as a Company Commander, H&S Company, HQSPT Battalion, MCB Camp Pendleton. I briefly worked for Senator Tester, as a Veteran liaison, which was not necessarily the practice of law, in the Spring of 2007.

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 not involved in the operation of any business.

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.

As mentioned above, I taught a course as an adjunct professor, over a 2 ½ week Block for UM-Western in 2015. I was paid approximately \$1,500. This amounted to approximately 1.5 % of my income for that year.

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 generally researched and written my own legal briefs. However, I have employed four deputy prosecutors, who were relatively new, or brand new, to the practice of law, and two summer interns, during my time as County Attorney. Part of my philosophy in this regard has been to hire new lawyers, and give them an opportunity to grow into the practice. As such, I have had them research and draft a few items for me, as they progressed from learning the basics, to handling their own misdemeanor and then felony cases.

Mainly, I have done my own research (using Westlaw, our only “law library” available in Dillon) and writing. Having worked as a law clerk for two different District Court Judges, it is my policy to write as succinctly as possible, citing the rule, and applying it to the case at hand as briefly as I am able.

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 a non-exhaustive list, the following are several examples of other types of legal writing I have undertaken in the past five years: I have drafted several resolutions and ordinances for the County Commission. I have drafted letters to landowners concerning road easements and other road issues. I have drafted deeds for property transferred by the County. I have researched and written what amounts to a title search for properties that were formerly rural schools, to determine current ownership.

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 to Defendant’s Motion *in Limine*, from State v. Lerman, DC-15-3605.

48. What percentage of your practice for the last five years has involved research and legal writing?
50 % **(Half of my work trial work is in the courtroom, the other half is preparing for the courtroom).**
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.

Throughout my life, I have enjoyed hiking and camping. As my children (age 7 and 2) grow, I hope to share the outdoor experience with them. This summer we camped at Upper Miner Lake near Jackson, Montana, and camped on my folks ranch near Grangeville, Idaho, for a few days. I also hiked with both kids to Deerhead Lake, near Dillon, and I climbed Baldy Mountain with my oldest child.

I engaged in athletics throughout my youth, and have become a sports fan as an adult. I have at times been a serious runner, and have completed 2 marathons. I enjoy attending March Madness basketball games, watching high school and college sports in Dillon, and try to attend at least one Griz game every year. I am a rodeo fan too, and regularly attend rodeos like the Bucking Horse Sale in Miles City, the Montana Circuit Finals in Great Falls, Montana’s Biggest Weekend in Dillon, and my hometown rodeo in Riggins, Idaho. I plan to attend the Pendleton Roundup in the future.

I am an avid reader. Lately I have been focusing on American Presidents, and have finished an excellent biography of Abraham Lincoln by Doris Kearns Goodwin, and the “Theodore Rex” series of books about Teddy Roosevelt by Edmund Morris. On the lighter side, I have read nearly every John Grisham novel and have lately taken up the “Longmire” series of detective stories by Craig Johnson.

Finally, I like animals, and firmly believe that having children take responsibility for the care and feeding of animals is instrumental in their upbringing. To that end, we have a dog, a pet goat, and a sheep. If I am able to move onto a little bigger place, I plan to have a small cattle herd. I believe in the phrase, “the best thing raised on a ranch, is a kid.”

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

In high school I worked as an after school lambing hand and pen cleaner during the lambing season. I worked as a gas station attendant including pumping full-serve gas, tire repair, brake jobs, and oil changes. I also worked on a haying crew, stacking hay by hand, and drove a combine for the barley and wheat harvest.

In college, I worked each summer as a logger, mostly working on the landing of a cat-skidding crew, running a chain saw, limbing and cutting logs to length. During the school year, I worked as a school bus driver, a basketball referee, a baseball umpire, a janitor, and was a Resident Assistant for two years.

During law school, I paid my rent by working as a bar bouncer.

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

As a full time county attorney, I have not had the ability to take on *pro bono* clients, although I have often provided friendly advice to people with simple non-criminal legal questions that did not involve my office. I have also donated my free time to charitable causes, such as the Jaycees. Further, I have donated time to speak to the UM-Western football team about the issue of sexual assault, and have guest lectured numerous times for UM-Western’s Human Sexuality course on sex laws and crimes in Montana. I firmly believe that *pro bono* work is important, both to the person who receives the legal assistance, and also to the lawyer who gives it.

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 went to law school with the idea that I could be like Abraham Lincoln. I still aspire to that aim. When I first clerked for Judge Tom Olson, I was struck by the fact that he would move from one case, say involving two *pro se* people fighting over who got the silverware in a divorce, to a multi-million dollar land case out of Big Sky, and give both cases his equally intense time and energy. I saw that, when done properly, all people could indeed have their day in court, and their chance to be heard.

I had the great fortune to appear in front of the Honorable Gary Day, in Custer County. His influence on me as a person and as an attorney, in that one year, was remarkable, and spoke to his abilities as a jurist and a human being. Judge Day’s humility and self deprecating sense of humor put people at ease in his courtroom. He was able, with a light touch, to control the courtroom, and yet uphold the guarantee contained in Article II, Section 16, of the Montana Constitution.

As I moved through my legal career, I came to see my work, both as an associate attorney and then as a deputy prosecutor and county attorney, as a means to hold people accountable. Bearing in mind and refraining from what Friedrich Nietzsche warned of, “distrust all in whom the impulse to punish is strong,” I view my prosecutor role as a shield to protect a victim, and brandish the sword of justice to that same end.

The Marine Corps utilized the basic premise, “keep it simple stupid.” Often, that was implemented by the term “stay in your lane.” I think that applies to justice as well. A prosecutor, in order to maintain justice, must prosecute the law without passion or prejudice, and must not be afraid to take a case to trial. A defense attorney must zealously advocate for his or her client, and hold the State to its proof, but also find the best outcome for a client short of trial, as the circumstances dictate. A judge must fairly and evenly referee this adversarial contest, so that justice may be properly meted out. Each element must, if justice is to be achieved, strive to do its best to hold up its corner of this triangle. They must “stay in their lane,” and by doing so, together achieve justice.

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 maintain decorum in the Courtroom, so that each party has an equal and fair opportunity to be heard. The easily resolved cases do not come to Court – they settle. A judge must understand that the cases before him are incredibly important to the litigants. It may be the only time in their entire life that a person comes before the Court. And if he or she walks away thinking they did not get to have their say, then regardless of the outcome, they will feel poorly treated. Conversely, even if the decision goes against them, if they had their say, then most can live with the decision. Respect, and simple courtesy, to lawyers and litigants goes a long way toward upholding the objectives of our system of justice.

Time is money. Litigation costs a lot of time and money. The value of a judge’s timely decision cannot be overstated. Even if the decision is adverse to a party, it is made, and they may either opt to live with it, or appeal. Both options are better than indecisively waiting, figuratively straddling a fence, for a Court to decide.

A courtroom is often an intimidating place. A balance must be struck by the judge, between maintaining decorum, as I spoke of, and creating an atmosphere where attorneys, and litigants, feel they have the ability to fairly make their points and argue their case. A judge must remember

that while he or she is charged with making a decision, it is the attorneys who are charged with presenting the case. Again, staying in your lane is important.

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.

***Stare decisis* is one of the oldest and most important concepts in the law. A court's reliance on precedent, over time, allows both litigants, and those that hope to avoid litigation, to know how a case will likely be decided. It also provides confidence in the system of justice as a whole, in that the concept of the law is more important than whom it might effect. In other words, with *stare decisis*, citizens may be confident that the rule of law is being upheld in their courts, and not the rule of fame, or money, or power.**

Of course, times change. Technology changes. While right and wrong do not change, our understanding of them does. The Dred Scott case was precedent. It was wrong, and took a Civil War to fix. Plessy v. Ferguson was precedent. It was wrong, and took nearly sixty years and a civil rights movement to change. These cases remind us that the law, the courts, and human beings are not sacrosanct. The human condition is prone to error. That is the very basis of the scientific method, testing an hypotheses for error. Bearing that in mind, one must not sacrifice all reason, knowledge, discovery, and observation on the altar of *stare decisis*.

At the District Court, on a precedent level, it is important to remember that a judge is often deciding the facts, for an appeal to the Supreme Court. Changing the Supreme Court's precedent should be left to them.

Establishing a precedent, say, in how parenting decisions will be made by a District Court has certain advantages. It lessens the number of cases that come before it, because attorneys begin to advise their clients on what they expect a judge to decide. But it risks missing the nuance of each case and controversy. This goes full circle back to my original statement in Question 54, a good judge must allow parties to be fairly and completely heard. Therein lies the rationale, and the test, of the Judge's proper balancing of precedent versus flexibility.

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

Since I first clerked for a District Judge, I aspired to the position. I aspired to have the knowledge, discretion, experience, judgment, seasoning, and understanding which the job requires. As a Judge Advocate in the Marine Corps, I sat as a hearing officer for several Summary Court Martial cases (the lowest level court martial), where I was judge, jury, and counsel all at once. That showed me the weight of the burden placed on a judge, to decide the fate of others, and to try my best to view the matter from the perspective of the accused.

Over my 17 years as an attorney, I have been on all sides of the table: criminal defense, prosecutor, civil plaintiff and defendant, family law, personal injury, mental health, criminal law, insurance defense, and property. I have seen how laws are made and how they are enforced. I have gained the experience of the courtroom necessary to preside as judge. I have gained an

understanding of the system of law and justice, as well as the human condition. I have grown as a person, and am more patient with people and their foibles. Raising two children has taught me about patience, frustration, the importance of good parenting, and made me aware that I am just getting started in understanding this facet of life. I have seen enough cases to know the difference between a person who did something bad, and a bad person. My judgment has been tried and tested many times, and improved accordingly. My discretion, both in maintaining confidences, and in determining the best course of action, has been honed.

Before this opening and appointment process was announced, I had already made the determination that in 2018, I would run for District Judge instead of re-election to a fourth term as County Attorney. I am committed to serving the people of Beaverhead, Madison, and Jefferson Counties as their District Court Judge in the 5th Judicial District. I view this opening as an opportunity to make that transition earlier than anticipated.

Regardless of the outcome of this appointment process, I plan to run for this position in 2018.

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

I am most proud of my service in the Marine Corps, which I suspect is obvious from my answers above. I deployed to Iraq shortly after the photographs from Abu Ghraib Prison were made public. It was a difficult time, and I was charged with overseeing a small detainee facility which the Marines had inherited from the Army. It was investigated, as was every detainee facility in Iraq, as part of an overall effort to fix the problems that had occurred. I was proud of the work the Marines had done to improve the facility, both in its treatment of inmates, and in establishing sound processes to determine who should be detained in the first place. I worked very hard, in conjunction with the Command, to ensure that our interrogations resulted in valuable, actionable information, without violating the Geneva Convention. When one realizes that most detainees were inadvertently rounded up, and were soon going to be released, it became obvious that treating them well would improve their view of us, and save Marines lives.

The second item of which I am very proud, is my work obtaining justice for victims of crime. In one of my first trials as County Attorney for Beaverhead County, I prosecuted a case of sexual intercourse without consent against a man, whose victim was the mother of his children, although they had been separated for some time. She was reluctant to go to trial, and I told her that while I could not make any promises about the outcome, I firmly believed that standing up for herself and telling the jury what had happened to her would be empowering. It was not until after the jury returned a conviction, that I gained a real understanding of what it means to be a victim of rape. She thanked me, and specifically thanked me for making sure she wasn't seen as "that girl" who claimed rape and nobody believed her. Her words gave me an understanding of the difficulty of coming forward, the fear, and the reality that, in spite of the best efforts of the judicial system, she truly felt like she was on trial, not the defendant.

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

As a prosecutor, I have certainly made enemies. Friends and family of the accused, do not always see the rationale behind the prosecutor's decisions and actions. As an elected official, and adviser to other elected officials, I have been faced with making decisions where, regardless, someone or some group will be unhappy. I have always strived to be fair, accurate, and decisive. Nonetheless, I am sure that some people remain dissatisfied with my efforts.

On the other hand, I have many times shaken hands with the defendant and his or her family at the close of a case. Beyond that, I have been approached, sometimes years after a case, by a defendant who thanked me for my work. Often, these former defendants have told me, the conviction and the resulting punishment and treatment they received were the impetus for the change they needed to move on from a life that was leading them nowhere.

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?

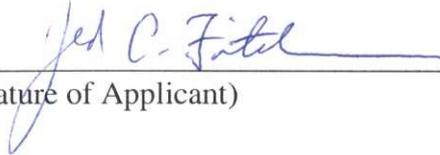
At the risk of sounding arrogant, I believe that I am the most qualified candidate for this appointment, of anyone whom I am currently aware, that might be applying. I intend to run for election, and serve as long as I am able as District Court Judge.

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.

October 26, 2016

(Date)



(Signature of Applicant)

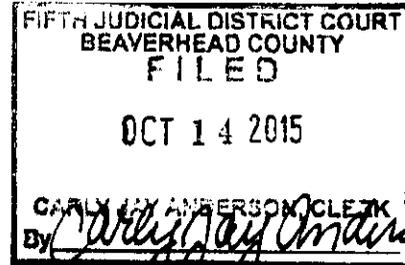
A signed original **and** an electronic copy of your application and writing sample must be submitted by **5:00 p.m. on Monday, October 31, 2016.**

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

1 JED C. FITCH
2 BEAVERHEAD COUNTY ATTORNEY
3 Beaverhead County Courthouse
4 2 South Pacific Street, CL #2
5 Dillon MT 59725
6 Telephone: (406) 683-3730



7 **MONTANA FIFTH JUDICIAL DISTRICT COURT, BEAVERHEAD COUNTY**
8 *****

9 THE STATE OF MONTANA,) Cause No. DC-15-3605
10)
11 Plaintiff,) STATE'S RESPONSE TO DEFENDANT'S
12) MOTION *IN LIMINE* FOR SENTENCING
13) HEARING
14)
15 v.)
16)
17 **Randall Lerman,**)
18)
19 Defendant.)
20)

21 Comes now, Jed C. Fitch, Beaverhead County Attorney, for and on
22 behalf of the State of Montana, and files this Response to Defendant's
23 Motion *in Limine* for Sentencing Hearing.

24 **Case Setting**

25 Defendant was convicted at a jury trial on July 17, 2015. The
26 Defendant was released from custody pending sentencing, and both a
27 Pre-Sentence Investigation (PSI) and a Psychosexual Evaluation was
28 ordered by the Court. At the time of the filing of Defendant's
current Motion, neither of those had been completed.

Argument

Defendant's brief is premature. The PSI has not been completed.
Once that is done, both parties will receive copies which will likely
include statements from the potential witnesses that the Defendant is
currently concerned about. Thus, contrary to the claim of the

1 defendant, the only information about these prospective witnesses will
2 not be in the undersigned's notes, but will be included in the court
3 ordered PSI. This is standard procedure. Persons concerned with the
4 sentencing of an individual, be they victims, family of victims,
5 additional victims, concerned members of the public, or family of the
6 defendant, or the defendant himself, all turn in their statements to
7 the PSI writer. Defendant claims that this will be a sentencing by
8 ambush. That would only be true if the Defendant did not read the PSI
9 or take steps to prepare for sentencing. At the same time, the
10 Defendant then seeks to have any statement they do make to the PSI
11 writer stricken, in advance, from the PSI. Hardly an ambush.

12 Further, there is a process by which items included in a PSI may
13 be removed by a Court. "The right to due process, however, requires a
14 sentencing court to provide the defendant with an opportunity to
15 explain, argue, and rebut any information that may lead to a
16 deprivation of life or liberty." State v. Roedel, 339 Mont. 489, ¶
17 65, citing State v. Winkle, 2002 MT 312, ¶14. Thus, once the PSI is
18 provided to the Defendant, he must be given the opportunity described
19 in Roedel. To allow the Defendant, in advance, to screen out
20 statements of additional victims would be improper.

21 The State feels compelled to address the Defendant's use of the
22 undersigned's emails as attachments to his brief. The PSI is a
23 document, which by Court order is sealed in the file. The additional
24 victims who make written statements to the PSI writer do so under the
25 advisement that the PSI is sealed. As a matter of courtesy, and at
26 the request of Defense Counsel, the undersigned provided a list of the
27 names of additional patients who were victimized. Then this email was
28 simply attached as an exhibit to the brief. That is improper. The
very people he seeks to prevent from providing a statement to the PSI
writer, or even testifying, he exposes to the public by attaching the
email. Now, fortunately, the document has been sealed. But the point
remains, it was improper to file it at all.

1 Naturally, persons who were victimized by Mr. Lerman contacted my
2 office after reading about the trial in the media. All persons who
3 contacted this office were directed to the PSI writer, as is done in
4 all cases. I suspect the PSI will reveal to the State additional
5 letters of support from people supporting the Defendant. That is
6 normal. It is not an ambush.

7 Defendant cites State v. Hill, 350 Mont. 296, as the only case
8 law he can locate which directly relates to this issue, and argues
9 that *Hill* supports his position. He is wrong on both counts. *Hill*
10 directly rebuts Defendant's argument. And there are additional cases
11 which relate to this issue, which also rebut Defendant's argument. As
12 previously cited, *Roedel* and *Winkle* relate to this case. Further,
13 *Hill*, *Roedel*, and *Winkle* internally cite additional cases which relate
14 to this matter, including State v. Ferguson ,2005 Mont. 343, and State
15 v. Osborn 170 Mont. 480.

16 In his reliance upon *Hill*, Defendant cites ¶ 32 for the
17 proposition that psychosexual evaluations are the only place that
18 other victims should be considered for the purpose of sentencing. If
19 defendant had read the proceeding ¶ 31, he might have seen this
20 language:

21 [t]he Statutes provide, and our cases firmly establish,
22 that a sentencing court may consider any relevant evidence
23 relating to the character of the defendant, his history,
24 his mental and physical condition, and the broad spectrum
25 of incidents making up his background. This includes other
26 acts, even those which are dismissed pursuant to a plea
27 bargain agreement.

28 Hill at ¶31.

29 This case, unlike *Hill*, did not involve a plea agreement. Thus,
30 there were no charges to dismiss as part of such a plea. But even if
31 there had been, *Hill* tells us that those persons, so affected, would
32 still be able to testify at the sentencing. If that is the case, then
33 certainly where the additional victim were not part of any plea
34 agreement, then their testimony about the broad spectrum of

1 Defendant's actions are certainly relevant. In any event, "[t]he
2 rules of evidence do not control in sentencing hearings." State v.
3 Ferguson, 2005 MT 343 at ¶ 109.

4 This evidence should be admitted because it relates to
5 Defendant's past conduct, history, and potential to re-offend. All of
6 these play directly into the Correctional and Sentencing policy of the
7 State of Montana. "[T]o punish each offender commensurate with the
8 nature and degree of harm caused by the offense and to hold an
9 offender accountable" §46-18-101(2)(a). "[T]o protect the public ...
10 by incarcerating violent offenders and serious repeat offenders" §46-
11 18-101(2)(b). Further, to implement those policies, "[s]entencing
12 practices must include punishing violent and serious repeat offenders
13 with incarceration" §46-18-101(3)(e).

14 If, after the PSI report is presented to the Court and parties,
15 the Defendant objects to what is contained therein, a process has been
16 laid out by the Montana Supreme Court. "When a criminal defendant
17 contests matters in a presentence report, the defendant has an
18 affirmative duty to present evidence establishing inaccuracies."
19 *Winkle* at ¶ 19.

20 Since no PSI is yet on file, there is nothing, under *Winkle*, for
21 the defendant to rebut or to point out the inaccuracies thereof.
22 Again, that is because Defendant's motion is premature.

23 Closing

24 Defendant's Motion *in limine* should be DENIED. It is premature,
25 and not supported by the law in any event. Nothing has been withheld
26 from Defendant, and he still retains ample time to prepare for
27 sentencing. No date has yet been set for sentencing, and thus there
28 is no harm.

Further, the witnesses mentioned by the Defendant, which may or
may not have filed statements with the PSI writer, and may or may not
yet be called to testify, should be allowed both. Their experiences

1 and testimony, whether or not charged as a crime, are relevant to the
2 sentencing decision of the Defendant.

3 WHEREFORE, the State prays that this Court DENY the motion of the
4 Defendant, and that once a PSI is submitted, that a date for
5 sentencing be set which affords time to prepare, and accommodates the
6 schedules of the various persons involved.

7
8 Respectfully submitted this 14th day of October, 2015.

9
10 
11 Jed C. Fitch
12 Beaverhead County Attorney

13 **CERTIFICATE OF SERVICE**

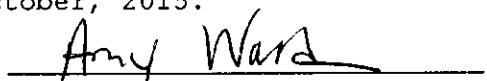
14 This to certify that an exact and true () copy of the foregoing
15 was placed in the outgoing office mail () and e-mail ():

16 Ed Sheehy & Jody Smith
17 66 West Park, Suite 203
18 Butte, MT 59725

19 Hon. Katherine M. Bidegaray
20 7th Judicial District
21 300 12th Ave. NW Ste.2
22 Sidney, MT 59270

23 Kelly M. Ihde
24 Judicial Assistant
25 KIhde@mt.gov

26 DATED this 14 day of October, 2015.

27 
28 Amy Ward, Legal Secretary