

APPLICATION FOR

**DISTRICT COURT JUDGESHIP
Sixteenth Judicial District**

A. PERSONAL INFORMATION

1. Full Name: Nickolas Clarke Murnion

a. What name do you commonly go by? Nick Murnion

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

3. Home Address: [REDACTED] Phone: [REDACTED]
[REDACTED]

4. Office Address: 501 Court Square #20, Glasgow, MT 59230; Phone: 406-228-6287

5. Length of residence in Montana: Lifetime

6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
2013 - present	Glasgow	Montana
2009 - 2013	Fort Peck	Montana
1980 - 2009	Jordan	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>
Garfield County High School	Jordan, Montana	1971	Graduate
Montana State University	Bozeman, Montana	1975	BS-Government
University of Montana	Missoula, Montana	1978	Juris Doctor

8. List any scholarships, awards, honors and citations that you have received:
- 1996 “Local Professionalism” award presented by Montana Bar Association.
 - “Larry Broadbent Criminal Justice Award” presented by the Northwest Coalition against Malicious Harassment on October 19, 1996
 - 1998 Profile In Courage award recipient, John F. Kennedy Library, Boston, MA
<http://www.jfklibrary.org/Education+and+Public+Programs/Profile+in+Courage+Award/Award+Recipients/>
 - 2000 Griffin Bell Courageous Advocacy Award recipient, American College of Trial Lawyers, Washington, D.C.
<http://www.actl.com/Content/NavigationMenu/AboutUs/AwardsandCompetitions/CourageousAdvocacy/default.htm>
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>
State Bar of Montana	6/12/78
United States District Court	6/12/78

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

Full time county attorney for Valley County; One deputy county attorney – Dylan Jensen.

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>
Valley County	County Attorney	8/17/09-present
Garfield County	County Attorney (Part- time)	1/1/79-8/14/09
Private practice	Sole practitioner	7/1/78-8/14/09
Bunke, Carlson, Corbin, Dunn, Hegel, and Murnion, P.C.	Partner(6 months)	1980

Custer County Attorney-Keith D. Haker	Legal intern	1977
Montana Stockgrower's Association	Legislative intern	1975

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

I have been continuously employed since law school.

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.

Full time prosecutor and legal representative for Valley County consisting of:

- 50% - Criminal prosecution
- 25% - Dependent & Neglect
- 5%- Mental commitments
- 5% - Youth court
- 15% - Advising county commissioners and county boards

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

From 1978 – 2009, part-time general practice consisting of following:

- | | |
|--------------------------------------|---------------------------------------|
| 10% - Civil trial | 30% - Wills, estate planning, probate |
| 10% - Collections | 15% - Real Estate - Commercial |
| 10% - Commercial & general corporate | 5% - Real Estate - Residential |
| 20% - Family law | |

Other areas of practice include some bankruptcy, limited personal injury, title search, administrative law- wage claim hearings, unemployment insurance appeals, child custody disputes, dissolution of marriage, boundary disputes and jury trials involving will contests and agricultural lease disputes;

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

Criminal prosecution including prosecution of extremist groups and during the last 6 years – drug prosecutions.

17. Do you regularly appear in court? During the past 6 years I have had extensive appearances in court.

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

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

Other _____%

18. During the last five years, what percentage of your practice has been trial practice? 40%

19. How frequently have you appeared in court? 12 days (30-40 cases) per month on average.

20. How frequently have you appeared at administrative hearings? 1 time in past 5 years.

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

Civil	40%
Criminal	60%
Other	___%

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

The following are Montana Supreme Court cases in which I appeared as a party but whose appeals were handled by the Montana Attorney General:

<u>Case Caption</u>	<u>Case Citation</u>	<u>Opposing Counsel</u>
State v. Travis Wayne Tweten	2015 MT 319N	Jennifer A. Hurley Assistant Appellant Defender 555 Fuller Ave Helena, MT 59620-0147 406-444-9505
State v. Daniel Raymond Vegge	2015 MT 224N	Carl B. Jensen, Jr 410 Central Ave, Suite 506B Great Falls, MT 59401 406-761-0613
State v. Dawn Marie Jensen	2013 MT 353N	Nicholas Domitrovich Office of the Appellate Defender 139 N. Last Chance Gulch Helena, MT 59620-0145 406-444-9505
State v. Kristin Elizabeth Kelm	2013 MT 115	Brad W. Fjeldheim O'Toole Law Firm 209 N Main St Plentywood, MT 59254 406-785-1630

State v. Dwain Edward Weaver	2012 MT 277N	Mary L. Zemyan P.O. Box 1094 Wolf Point, MT 59201-1094 406-653-2505
State v. Robert Arthur Wing	2012 MT 176	Johhna K. Baffa Van de Wetering Baffa, P.C. P.O. Box 7575 Missoula, MT 59807-7575
State v. Jimmy Steven Booth Jr.	2012 MT 40	Joseph P. Howard P.O. Box 268 Great Falls, MT 59403 406-570-2317
State v. Matthew Scott Bustle	2010 MT 68	Colin M. Stephens Smith & Stephens, P.C. 325 W Pine St Missoula, MT 59802 406-721-0300

23. State the number of jury trials that you have tried to conclusion in the last ten years. 23
24. State the number of non-jury trials that you have tried in the last ten years. 15
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.

<u>Adverse Counsel</u>	<u>Case Caption</u>	<u>Date of Trial</u>	<u>Presiding Judge</u>
Frank A. Picos P.O. Box 773 Glasgow, MT 59230	State v Travis Wayne Tweten Valley County Cause No. DC-2012-11 Burglary, Theft (2 cts), Criminal Mischief (3 cts), Criminal Trespass Property, Fleeing or Eluding Peace Officer, Driving While Suspended, Reckless Driving	11/6/2013 Jury trial	Hon. John McKeon 406-654-1062
Frank A. Picos P.O. Box 773 Glasgow, MT 59230 406-690-1199	State v. Gerald W. Weisbeck Valley Co. Justice Court No. TK-13-773 PFMA (2 cts)	1/28/14 Jury trial	Hon. James H. Wixson 406-228-6271
Carl B. Jensen, Jr. 410 Central Avenue Suite 506B Great Falls, MT 59401 406-761-0613	State v. Daniel Raymond Vegge Valley County DC-13-07 DUI Per Se (4 th)	5/7/14 Jury Trial	Hon. John McKeon 406-654-1062

Frank A. Piosos P.O. Box 773 Glasgow, MT 59230 406-690-1199	State v. Gavin Theodore Bigleggins Valley County DC-14-09 Sexual Intercourse Without Consent	10/29/14 Jury trial	Hon. John McKeon 406-228-6271
Pro Se	State v. John E. Wright Broadwater Co. Justice Ct No. TK-14-79 Operating Motor Vehicle Without Valid Driver's License	11/5/14 Bench Trial	Hon. Gary A. Olsen 406-266-4730
Jeremy S. Yellin 419 4th Avenue, Suite A P.O. Box 564 Havre, MT 59501 406-265-3303	State v. Johnny George Hofer Valley Co. Justice Court No. TK-14-606 DUI	4/8/15 Jury Trial	Hon. Christina Hillman 406-228-6271
Pro Se	State v. Terrance Lee Brauner Valley Co. Justice Court No. TK-15-33 Theft of Services	6/5/15 Bench Trial	Hon. Christina Hillman 406-228-6271
Jeremy S. Yellin 419 4th Avenue, Suite A P.O. Box 564 Havre, MT 59501 406-265-3303	State v. Johnny George Hofer Valley Co. Cause No. DC-2015-6 DUI (Appeal from Justice Court)	7/30/15 Jury Trial	Hon. John McKeon 406-654-1062
Karen M. Alley 109 2 nd Street West Havre, MT 59501 406-265-2199	State v. Mary Ann Reese Sutton Criminal Production Dangerous Drugs, Crim. Poss. Dang. Drugs, Crim. Poss. Drug Para., Disorder Conduct, Resisting Arrest	8/6/15 Jury Trial	Hon. John McKeon 406-654-1062

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

One proceeding in 2012 before Board of Environmental Review (Case No. BER 2012-06 SW) involving the appeal by Valley County Refuse District of a fine levied on Valley County landfill by Montana Department of Environmental Quality.

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.

Presenter of seminars on how to deal with common law courts and the militia movement:

- Montana LECC Summer Conference, Big Sky, Montana , August 9,1994
- Montana County Attorneys Association, Billings, Montana, Dec. 9, 1994
- Idaho LECC, Boise, Idaho, March, 1995
- Wyoming LECC, Jackson, Wyoming, June, 1995
- Montana Justices of the Peace annual meeting, Bozeman, Montana, July, 1995,

- The Institute for Peace Studies at Rocky Mountain College, Billings, Montana - “The Enemy Within-Civil Disorder in American Politics”, October 5, 1995
- California State Sheriff’s Association - “The militia movement in California”, Nov. 8, 1995
- Wyoming Conference of Special Court Judges - May 14-16,1996, Thermopolis, Wyo.
- Japan-America Student Conference, Aug. 6, 1996, Rocky Mountain College, Billings, MT
- Utah Department of Corrections Ass., Salt Lake City, Utah, October 1,1996,
- U. of M. Law School, Browning Law Symposium, Missoula, Montana, Oct. 4, 1996
- Testified before the House Subcommittee on Crime - “Nature and Threat of Violent Anti-Government Groups in America”, November 2, 1995, Washington, DC
- Annual conference of the International Association of Chiefs of Police, Phoenix, AZ, Oct, 1996, Workshop-”Militias and extremist groups: Perspectives for Small and Rural Law Enforcement Agencies”
- National Center for State Courts, State Justice Institute, Scottsdale, AZ, Feb., 1997, “Dealing with Common Law Courts”
- Institute for Intergovernmental Research, Domestic Terrorism Training, faculty-1997
- American College of Trial Lawyers Association, “Thomas Jefferson/Rule of Law” Seminar, Tulsa, Okla., June 6-8, 1997
- Montana Education Association annual meeting, Billings, Mt., October 16, 1997;
- Montana Association of Counties annual meeting, Billings, Mt., February 13, 1998;
- Western States Livestock Investigators annual meeting, Reno, NV, March 12, 1998;
- Idaho Prosecuting Attorneys Association annual meeting, February 4, 1999;
- Traveled throughout U.S. from 1996 - 1998 as seminar presenter for the Institute for Intergovernmental Research, Domestic Terrorism Training; IIR does specialized training for law enforcement on how to deal with domestic terrorism;
- Presentation to Kalispell community regarding extremist groups, May, 2002
- Blankenbaker Lecture, University of Montana School of Law, May 1, 2003.
- American Judges Association midyear meeting, Billings, MT, May 16, 2003.
- National District Attorneys Association – Prosecution of Drug cases, Las Vegas, NV, 9/10/2012, Presenter: Narcotics issues in Rural Areas; The Difficulties of Undercover Testimony.

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 Bar Association, (1978-present) (CLE Commission (2008-2013)
 American Bar Association (1979 - present)
 National District Attorney’s Association (1979-present)
 Montana County Attorney’s Association (1979-present) (Past president 1991-1992)

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.

Montana Gaming Advisory Council (2003-2010)
Montana Board of Crime Control (2007-2015)
Glasgow Treatment Court Team (2014-2015)

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

I held the office of Garfield County Attorney from 1979 to 2009 when I resigned to take the position with Valley County. I have held the office of Valley County Attorney since 2009 and have run for election twice.

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

My philosophy has always been to give time to community service in each of the communities I have served. I have given presentations on legal related matters to increase public awareness. I have been involved with chambers of commerce and worked on projects to improve economic opportunities. I was involved with Mid-Rivers Telephone Cooperative for 27 years as a director and our goal was to bring the newest technologies to rural areas. I have served on a health center board and have an understanding of the challenges faced by rural hospitals.

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.

No.

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

N/A

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.

No.

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

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

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 written many briefs on various criminal prosecution issues without any assistance from others. I have completed by own research using Westlaw as a primary resource. I have drafted the briefs using Word Perfect. The primary motions and briefs that I have written and researched involve suppression motions in drug and DUI cases. Other areas of research and brief writing include search warrants, confessions, traffic stops, warrants for recording devices, mental state issues, fitness to proceed issues and criminal jury instruction issues.

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.

I have drafted petitions and orders in Dependent and Neglect cases including Temporary Investigative Authority, Temporary Legal Custody, Permanent Legal Custody, Termination of Parental Rights, and Orders of Guardianship. I have also drafted similar documents in cases under the Indian Child Welfare Act. In criminal matters I have drafted sentencing orders in District Court and Justice Court proceedings. I have drafted criminal charging documents including the Motion and Affidavit for Leave to File Information and the Information in each felony case. I have drafted petitions and orders of commitment in involuntary mental commitments and developmentally disabled commitments. In Youth Court proceedings I have drafted petitions and disposition orders. I have issued opinions as a county attorney.

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?
50 %

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

I used Lexis when I worked as the Garfield County Attorney and for the past 6 years I have used Westlaw and now Westlaw Next for most of my legal research. I have also used WordPerfect for the past 6 years and Word for the previous 24 years. I am also comfortable using Excel for spreadsheets involving financial calculations such as child support guidelines and financial balance sheets. I also have used video conferencing software such as Skype, Go to Meeting and Face Time in cases where it was difficult to get a Defendant to make an appearance because they lived out of state.

H. MISCELLANEOUS

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

My main interest the past 3 years are my two grandchildren who live in Cohagen, Montana. I am also involved in the parish life at St. Raphael's Catholic Church and I am active in the Glasgow Council of the Knights of Columbus. I also enjoy pontooning on Fort Peck Lake, snowmobiling, and golfing.

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

I grew up on the family ranch located 20 miles northwest of Jordan. My childhood was spent engaged in general ranch work. I ran for Garfield County Attorney while I was still in law school in 1978. I prevailed in the primary election in June of 1978 and I was sworn into the bar shortly thereafter. I held this position until August 27, 2009 when I applied for the full time Valley County Attorney position in Glasgow, Montana. The only other jobs I have ever had include a legal internship with the Custer County Attorney's office (Keith Haker), Miles City, Montana in the summer of 1977 and a legislative internship with the Montana Stockgrower's Association, Helena, Montana, during the 1975 legislature.

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 provided any pro bono work because under Montana law I cannot have a private civil practice. However, I have engaged in public speaking events concerning criminal trends in Valley County and during the past year I have met on a regular basis with others in the community to prepare a grant for a drug and DUI treatment court in Valley County. In October of this year we received the good news that the grant was approved and we expect to start the treatment court in January of 2016.

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

The first event was the jury verdict in the O.J. Simpson case. It seemed to be at odds with the evidence in the case and involved a celebrity being tried on television. I do not think it was a just verdict and the victims of the brutal murders were forgotten. However it was a verdict by a duly empaneled jury and must be respected. Our system should first and foremost do justice.

The second event was the Freeman/Militia movement in 1994-1996. These groups that recruit members by feeding on hate and who believe that they can form their own governments outside of our system gave me a new appreciation for the rule of law and the benefits of a democratically elected form of representative government. It also instilled in me the need for a justice system that can deal with the crimes that these groups commit in a timely fashion. This includes the presiding judges in the many trials which were held for members of these groups who must be able to protect the constitutional rights of the accused while at the same time maintaining order in the court room and preventing intimidation of jurors who are sitting on the cases. My involvement as one who was threatened by the groups also gave me greater understanding for victims of crimes and how lonely and isolated they can feel. It also required that I deal with the pressure of continuing my duties as the elected prosecutor in the county in which the group was making their threats. One by-product is that I got a really intense experience of dealing with a lot of media in a short period of time. My position concerning these types of extremist groups is that they have a right to their beliefs as long as it does not interfere with the rights of fellow citizens and as long as it respects the rule of law. We are a nation of law and not of men who think their

interpretations of the constitution are the only correct ones and who inflict their beliefs on the rest of society in a very dictatorial and sometimes violent manner.

The third event was a recent conversation with a fellow lawyer who had been involved in intensive litigation and who was impressed by the benefits we have in Montana of a truly independent judiciary. I had always taken for granted the integrity of the District Judges who I had appeared before in the past 37 years and I had not thought that independence was an issue. It gave me a greater appreciation of the judiciary in Montana and their contribution to the rule of law.

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

The most important qualities are integrity, impartiality, competence, common sense and the ability to get the job done in a timely fashion. A District Judge also has to be a good listener and be able to let both sides present their arguments and represent their clients as effectively as possible. However, it also means that the proceedings have to be moved along if things are getting bogged down. A primary duty is simply being able to schedule cases and keep the docket moving so that all cases can be heard and judgment issued. Cases should not drag on for years if there is any way to prevent it. Attorneys should be encouraged to keep their cases going. I also think alternative dispute resolution processes are important whether they involve mediation or other methods to promote settlement rather than proceeding to trial. I always remember the kind words of Judge Coate who previously presided as a District Judge in Forsyth in a child custody proceeding. He told the parties that we should think about a possible resolution outside of trial because if he rendered a judgment it was likely that neither party would be happy. I also support alternative sentences in criminal cases which involve treatment of the underlying addictions which cause 80% of crimes in Montana rather than incarceration or in addition to incarceration. One alternative are drug and alcohol treatment courts for those individuals who truly want to change their lives.

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.

As a District Judge the primary focus will be the application of the law as provided by the Montana Legislature and as interpreted in cases before the Montana Supreme Court, federal courts and the U.S. Supreme Court. Any flexibility by a District Judge would have to be only found within the discretion as set forth in the body of that law. I am very much against a District Judge inventing law in areas which are clearly provided for in statute and case law even if the District Judge personally disagreed with the law. I believe in the democratic system in which the legislature passes the law, the judiciary interprets it and the District Court applies it.

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

I seek the office of District Judge because I think I could make a difference in the lives of those who would come before the court. The first and foremost goal is justice for all whether it be in a criminal case involving victims of violence or a child custody case involving emotionally distraught parents who want to fight about every issue. As an attorney for the past 37 years I have always focused on solutions to the many serious problems that I have dealt with. The law can be part of the solution and in some

cases the only choice is a trial to resolve difficult issues which sometimes involve difficult parties. I also have many connections to the counties to be served by the Forsyth district judge. I know the people in the area and I think I have an understanding of their circumstances. On a personal level I would be closer to my daughter and my grandchildren..

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

The most impressive event was receiving the 1998 Profile in Courage Award in Boston, Massachusetts at the John F. Kennedy Library in May of 1998 and being able to meet Senator Edward Kennedy, Senator Alan Simpson, Caroline Kennedy, and John Kennedy Jr. This award is given to those in government service who have made contributions to our country and I believe there are thousands of government servants who qualify for this award every year.

I also was honored to receive the Griffin Bell Courageous Advocacy Award on October 28, 2000 in Washington D.C. from the American College of Trial Lawyers who represent the best and most ethical trial attorneys in the United States, Canada and Great Britain and which organization you cannot become a member of unless you are invited. (For the record I received the award but I am not a member). I was honored to observe a panel consisting of the Honorable William H. Rehnquist, Chief Justice of the United States, the Rt. Honourable Beverley McLachlin, Chief Justice of Canada, Supreme Court of Canada, Ottawa, Ontario, and the Rt. Honourable the Lord Woolf of Barnes, the Lord Chief Justice of England and Wales, Royal Courts of Justice, London, England. That evening my wife and I were seated at a banquet table with Supreme Court Justice Anthony Kennedy and his wife at the National Building Museum.

I was also very honored to receive the 1996 Local Professionalism Award from the Montana State Bar Association because I was nominated by Judge Gary Day who I still admire for his service as a District Judge.

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

None that I can think of.

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?

My practice for the past 37 years has been primarily a solo one without much assistance from others. For the thirty years I practiced in Garfield County, I was the only attorney in the county. I am used to making decisions on cases on my own and I think that a District Judge would have to do the same thing. I have also had to take positions and defend them when they are politically unpopular. I have a history of not backing down under pressure. I have the experience in private practice for the 30 years I was in Garfield County which involved many different kinds of cases but little specialization. The past 6 years I have been more specialized as a full time county attorney in Valley County and have been able to handle an ever increasing case load and a fairly busy jury trial schedule. I know that some of the more time consuming cases involve dependent and neglect actions which have increased state wide. I have personally handled many of these cases the last 6 years many of which involve the Indian Child Welfare

Act. I also would embrace the use of technology wherever it could help with the administration of justice. I ended my private practice 6 years ago and I would be in a position to be able to assume the duties within a relatively short time if I was selected.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 16th 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.

11-24-2015

(Date)

Richard Clark Morrison

(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 Wednesday, December 2, 2015.

Mail the signed original to:

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

Send the electronic copy to: mtsupremecourt@mt.gov

OFFICE CLERK OF DISTRICT COURT
VALLEY COUNTY
FILED

SEP 08 2015

SHELLEY BRYAN

1 NICKOLAS C. MURNION
Valley County Attorney
2 501 Court Square, #20
Glasgow, Montana 59230
3 (406)228-6286
Attorney for State of Montana
4
5
6
7

8 MONTANA SEVENTEENTH JUDICIAL DISTRICT COURT, VALLEY COUNTY
9

10 STATE OF MONTANA,

11 Plaintiff,

12 v.

13 BRIAN JAMES WIESE,

14 Defendant.
15

Cause No. DC-2015-9

HON. JOHN C. McKeon

STATE'S BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION TO
SUPPRESS EVIDENCE AND
STATEMENTS

16 Comes now, NICKOLAS C. MURNION, Valley County Attorney, and
17 hereby files this brief in opposition to Defendant's Motion to
18 Suppress Evidence and Statements.
19

20 STATEMENT OF FACTS

21 At 12:15 a.m. on May 18, 2015, Agent Reed Mesman of the Tri-
22 Agency Drug Task Force, was notified by Undersheriff Vernon Buerkle
23 of a 911 report of a possibly mentally disturbed man walking around
24 with a .22 rifle in Opheim, Valley County, Montana. The man was
25 reported as the Defendant, Brian James Wiese (Brian), and was looking
26 for people around the grain bins and buildings that were not actually
27 there. Agent Mesman responded to Opheim to assist Sheriff Meier and
28 Undersheriff Buerkle.

1 Agent Mesman arrived at 21 Main Street in Opheim at 1:22 p.m.
2 This address was a machine shop that was owned by Vince Renner.
3 Agent Mesman met with Undersheriff Buerkle who was talking with Brian
4 Wiese outside the shop near some parked semi-trailers at this time.
5 By this time Undersheriff Buerkle and Sheriff Meier had made the
6 determination that they were going to detain Brian in order to
7 transport him to the Frances Mahon Deaconess Hospital for a mental
8 health evaluation due to him seeing people that were not there and
9 looking for these people with a loaded .22 rifle. (It should also
10 be noted that Brian had called Valley County 911 Dispatch at 02:49
11 a.m. earlier that same morning and reported four people being outside
12 his trailer that were trying to break into his pickup.) Agent Mesman
13 assisted in searching and detaining Brian. During this time, Agent
14 Mesman asked Brian when he had last used methamphetamine. Brian
15 stated that he had not used methamphetamine. Agent Mesman then asked
16 Brian when he last used marijuana. Brian replied that he had used
17 marijuana approximately a week ago. From his training and experience
18 with drug users, Brian's actions and seeing people that were not
19 there, and from previous information he had received from Law
20 Enforcement in Phillips and Daniels County, Agent Mesman suspected
21 Brian of being high from possible methamphetamine use. Brian was
22 then transported to the Frances Mahon Deaconess Hospital, Glasgow,
23 Montana, by Sheriff Meier.

24 Agent Mesman then spoke with Vince Renner. Vince stated that
25 Brian has been working as a farmhand for him since this spring and
26 has been a good employee thus far. Vince stated that he owns the
27 shop where they were talking, located at 21 Main Street in Opheim,
28 Montana. Vince stated that he did not want Brian back on his

1 property and he would no longer be employed with him any longer
2 because of Brian's actions with the .22 rifle today. Vince stated
3 that he didn't want Brian's pickup on his property as well. Vince
4 pointed out a 1999 black Chevrolet pickup with the license plate:
5 GTCHA SM, which was parked in front of his shop that was located on
6 his property and belonged to Brian Wiese. Undersheriff Buerkle had
7 already known that the pickup belonged to Brian Wiese from
8 information received from Valley County Dispatch. Agent Mesman told
9 Vince that he would move the pickup to Brian's residence for him.
10 Brian's residence was approximately a quarter (1/4) mile away from
11 Vince's shop. Undersheriff Buerkle had already seized a loaded .22
12 rifle from the front seat of the 1999 black Chevrolet pickup which
13 was the rifle that was being carried around by Brian and the reason
14 for the 911 phone call. The pickup was unlocked with windows rolled
15 down and the keys in the ignition.

16 Agent Mesman then got into the 1999 black Chevrolet pickup,
17 started it up, and drove it to the residence of Brian Wiese, located
18 at 216 Railroad Avenue in Opheim, Montana. During this time, Agent
19 Mesman observed an orange prescription (Rx) pill container in
20 driver's side door compartment in plain view. From sitting in the
21 driver's seat, Agent Mesman could see, what he recognized from his
22 training and experience, to be shards of methamphetamine inside the
23 Rx container. The Rx container had no label.

24 Agent Mesman informed Undersheriff Vernon Buerkle of what he had
25 observed. Agent Mesman then seized the pickup, which he had now
26 parked at Brian's residence, until he could apply for a search
27 warrant. Agent Mesman then called and had Doug Cook from Glen's
28 Wrecking come to Opheim and transport the pickup to Glasgow.

1 Shortly after 3:00 p.m., the wrecker arrived and the pickup was
2 loaded onto the wrecker. Agent Mesman secured the pickup in the
3 secure storage area and also placed evidence tape on the pickup's
4 openings. Agent Mesman also took photographs of the secured pickup
5 in the storage facility. During this entire time, from the vehicle
6 seizure, transport, and the securing at the storage facility, Agent
7 Mesman had been in observation of the 1999 black Chevrolet pickup.

8 Later that afternoon and evening, Agent Mesman applied for and
9 received a search warrant from Justice of the Peace Christina Hillman
10 of the Valley County Justice Court for the 1999 black Chevrolet
11 pickup.

12 At 10:18 p.m. Agent Mesman, along with Agent Shane Rice and
13 Deputy Joseph Tihlarik, executed the search warrant on the 1999 black
14 Chevrolet pickup. As a result of the search the following items were
15 seized:

- 16 a. An orange prescription pill bottle containing shards of
- 17 suspected methamphetamine;
- 18 b. A partially smoked suspected marijuana joint;

19 After completing the search, Agent Mesman went back to the
20 office and processed the evidence. The suspected methamphetamine
21 weighed 0.2 grams. The shards tested positive for methamphetamine
22 with a field drug test kit. The suspected marijuana joint was not
23 weighed because it was a trace amount. The material contained inside
24 the joint tested positive for THC (marijuana) with a field drug test
25 kit.

26 On May 19, 2015, Agent Mesman interviewed the Defendant, Brian
27 James Wiese, at 11:04 a.m. in the interview room of the Valley County
28 Detention Center. Detention Officer Darrel Beckner had previously

1 informed Agent Mesman that Brian had requested to speak with him.
2 Agent Mesman began the interview by reading Brian a Statement and
3 Waiver of Rights form. Brian agreed to speak with Agent Mesman and
4 signed both the Statement and Waiver of Rights form. During the
5 interview, Brian admitted to smoking marijuana about every day when
6 he had it and also admitted that he intravenously injected
7 methamphetamine. Brian stated that he had last injected
8 methamphetamine that morning, (May 18, 2015). Brian stated that he
9 had a quarter (1/4) gram of methamphetamine in a prescription pill
10 bottle in his pickup. Brian stated that he had originally purchased
11 a half (1/2) gram from an unknown male individual at a bar in Grenora,
12 North Dakota. Brian stated that he had used approximately half of
13 the methamphetamine that he originally had purchased and what was
14 found in his pickup was all that he had left. Brian stated that he
15 thought he also had a "dart" or a hypodermic needle/syringe in his
16 pickup as well.

17 ARGUMENT

18 A. OFFICER'S OBSERVATION OF METH EVIDENCE IN DEFENDANT'S
19 VEHICLE WAS PERMISSIBLE UNDER PLAIN VIEW DOCTRINE

20 There are three criteria for determining whether law
21 enforcement's seizure of evidence is valid under the plain view
22 doctrine: (1) whether the officer was lawfully present on person's
23 property; (2) the item must be in plain view and its incriminating
24 character is immediately apparent; (3) the officer has a lawful right
25 of access to the property. *State v. Doyle*, 1998 MT 195, ¶ 11, 290
26 Mont.287, 963 P.2d 1255. In this case the Defendant was in the
27 custody of the Valley County Sheriff's office after brandishing a
28 firearm around the Renner shop in pursuit of non-existent

1 individuals. The Defendant's vehicle was in front of the Renner shop
2 on his property with the windows rolled down and the keys in the
3 ignition. Undersheriff Buerkle had removed a loaded .22 rifle from
4 the vehicle. Renner requested that the vehicle be removed from his
5 property because of fear of the Defendant. He also terminated the
6 Defendant's employment immediately after the incident. The Valley
7 County Sheriff's office has a policy of securing vehicles after
8 taking the driver in custody. In order to secure the vehicle it had
9 to be moved from the Renner property after Renner stated he did not
10 want it on his property. Securing the pickup thus required Chief
11 Deputy Mesman to enter the pickup, start it, and transport it to
12 Defendant's residence which was approximately 1/4th of a mile from
13 Renner's shop. In the course of driving the vehicle to the shop,
14 Chief Deputy Mesman observed an orange prescription (Rx) pill
15 container in the driver's side door compartment in plain view. From
16 sitting in the driver's seat, Agent Mesman could see, what he
17 recognized from his training and experience, to be shards of
18 methamphetamine inside the Rx container. Chief Deputy Mesman did not
19 seize the RX container at that time but applied for and received a
20 search warrant later. The issues in this case are remarkably similar
21 to those raised in *State v. Delao*, 2006 MT 179, 333 Mont. 68, 140
22 P.3d 1065. In that case law enforcement arrested Delao and his
23 vehicle was parked on the side of the road with the doors unlocked
24 and the windows open. As an officer attempted to secure the vehicle,
25 he observed and seized a bottle of vodka in plain view in the
26 vehicle. The Court held that the officer "had an obligation to
27 secure Delao's vehicle" in order to prevent damage or theft of the
28 vehicle because of the "slight duty of care that (the officer) owed

1 to Delao" as a gratuitous bailee. *Delao*, ¶¶ 18-20. Because of this
2 slight duty of care as a gratuitous bailee, the officer was lawfully
3 present inside the vehicle when he observed and seized the bottle of
4 vodka. The Court also applied this same doctrine in *State v. Kelm*,
5 2013 MT 115, ¶ 37, 370 Mont. 61, 72, 300 P.3d 687, 695, which
6 involved a pickup where the windows were rolled up and the doors
7 locked but the lights were on without the motor running in sub-zero
8 temperatures. The Court held that the officer was lawfully present
9 in Kelm's vehicle because of the slight duty of care owed to Kelm as
10 her gratuitous bailee. In *State v. Sawyer* (1977), 174 Mont. 512,
11 518, 571 P.2d 1131, 1134, the Court held that "the police could
12 protect themselves from liability for lost or stolen property by
13 taking an inventory of the items in plain view, locking the vehicle,
14 and returning the keys to the owner." *Sawyer*, 174 Mont. at 517, 571
15 P.2d at 1134; *State v. Hamilton*, 2003 MT 71, ¶ 35, 314 Mont. 507, ¶
16 35, 67 P.3d 871, ¶ 35. In doing so, the Court recognized two
17 justifications for an inventory search of an impounded vehicle: (1)
18 protection of the contents of the vehicle for the owner's benefit;
19 and (2) protection of the police from claims for lost property in
20 their custody. *Sawyer*, 174 Mont. at 517, 571 P.2d at 1134.
21 Additionally, the Court held that, as a gratuitous bailee, law
22 enforcement is charged with a slight duty of care which is violated
23 only by gross negligence. *Sawyer*, 174 Mont. at 517, 571 P.2d at 1134;
24 *State v. Delao*, 2006 MT 179, 333 Mont. 68, 140 P.3d 1065.

25 In this case Deputy Mesman did not perform an inventory search
26 or any type of "search" in the constitutional sense. The plain view
27 doctrine provides that if an article is in plain view, neither its
28 observation nor its seizure involves any invasion of privacy. A

1 seizure of the article involves an invasion only of the owner's
2 possessory interest. *State v. Delao*, 2006 MT 179, 333 Mont. 68, 140
3 P.3d 1065. Here there was not an immediate seizure of the evidence.
4 There was not a search. There was an observation of the Rx bottle
5 while law enforcement was securing the vehicle. In this case Chief
6 Deputy Mesman had a slight duty to secure the vehicle after the
7 Defendant was taken into custody. This allowed the entrance into the
8 vehicle which was unlocked with the keys in the ignition. Once in
9 the driver's seat, Chief Deputy Mesman was able to observe the orange
10 Rx container within which he could observe what he believed to be
11 shards of methamphetamine from his training and experience. This is
12 similar to what the Court approved in *Delao*:

13 "Accordingly, when Largent first stood outside *Delao's*
14 vehicle, he had no lawfully sufficient reason to enter
15 *Delao's* vehicle. However, once Largent placed *Delao* into
16 custody, Largent had a legally sufficient reason to enter
17 *Delao's* vehicle to obtain the keys from the ignition so
18 that he could secure the vehicle. Having met the
prerequisite of being lawfully in *Delao's* vehicle, the
only issue was whether Largent could see the bottle of
vodka in plain view from his vantage point inside the
vehicle." *State v. Delao*, 2006 MT 179, ¶ 27, 333 Mont.
68, 74, 140 P.3d 1065, 1069.

19 Although Chief Deputy Mesman was lawfully in the Defendant's
20 vehicle in order to secure it when he observed the Meth evidence, he
21 did not immediately seized it. Rather he later applied for and
22 received a search warrant before he seized the evidence. He used his
23 observations of the evidence as part of the probable cause for the
24 issuance of the search warrant. The Defendant asks that the
25 observations of Chief Deputy Mesman of the Rx container while in the
26 pickup be excised from the search warrant. Since those observations
27 were made while Chief Deputy Mesman was lawfully in Defendant's
28 vehicle, they should not be excised and the search warrant

1 application had sufficient probable cause to support the issuance of
2 a search warrant. The Defendant makes no other attacks on the
3 sufficiency of the application for search warrant.

4 The Montana Supreme Court applies the totality of the
5 circumstances test to determine probable cause:

6 *To determine if probable cause to issue a warrant exists,*
7 *this Court applies the totality of the circumstances test*
8 *set forth in Illinois v. Gates (1983), 462 U.S. 213, 103*
9 *S.Ct. 2317, 76L.Ed.2d 527. Pursuant to this test, "the*
10 *judge evaluates the facts asserted within the four corners*
11 *of the [search warrant] application and makes a practical,*
12 *common-sense decision as to whether there is a fair*
13 *probability that incriminating items will be found in the*
14 *place to which entry is sought. State v. Olson, 314 Mont.*
15 *402, 408-409, 66 P.3d 297, 302 (Mont.,2003)*

16 The Court has also held that great deference should be given to
17 the decision of the magistrate issuing the search warrant:

18 *When a magistrate determines that probable cause exists*
19 *to warrant the issuance of a search warrant, this Court*
20 *should not only give great deference to that decision but*
21 *we should also draw every reasonable inference possible*
22 *to support the decision. State v. Sundberg, (Mont.1988),*
23 *765 P.2d 736, 741, 45 St.Rep. 2235, 2240;*

24 Probable cause is the probability of criminal activity. A prima
25 facie showing of criminal activity need not be shown. State v.
26 Sundberg, (1988), 235 Mont. 115, 119, 765 P.2d 736, 739 (citing
27 Spinelli v. United States (1969), 393 U.S. 410, 419, 89 S.Ct. 584,
28 590, 21 L.Ed.2d 637, 645).

Probable cause is established if there is a fair probability
that incriminating items will be found at the place described in the
search warrant. *State v. Hulbert*, 265 Mont. 317, 321, 877 P.2d 25,
27 (Mont.,1994).

Overall the application for search warrant in this case
contained sufficient probable cause to justify the issuance of a
search warrant.

1 B. RIGHT TO PRIVACY NOT VIOLATED

2 In determining if a search violated the Montana Constitution,
3 we look to two factors: "(1) whether the person has an actual
4 expectation of privacy that society is willing to recognize as
5 objectively reasonable, and (2) the nature of the state's intrusion."
6 *City of Whitefish v. Large*, 2003 MT 322, ¶ 14, 318 Mont. 310, ¶ 14,
7 80 P.3d 427, ¶ 14. Only where an objectively reasonable expectation
8 of privacy has been intruded on by the State, or the State's entry
9 was overly intrusive, do we consider if an unlawful entry is
10 permitted according to an enumerated exception to the warrant
11 requirement.

12 1. NO EXPECTATION OF PRIVACY.

13 In this case the Defendant left his vehicle unlocked with the
14 windows down and the keys in the ignition on property owned by Vince
15 Renner. The Defendant was not attempting to shield the property from
16 public view or prevent entry:

17 In ascertaining if a person has a legitimate expectation
18 of privacy, we look to the circumstances, including "the
19 place of the investigation, the control exercised by the
20 person over the property [,] ... and the extent to which
21 the person took measures to shield the property from
22 public view, to communicate that entry is not
23 permitted...." *State v. Hubbel*, 286 Mont. 200, 209, 951
24 P.2d 971, 977 (1997).

25 In *State v. Tackitt*, 2003 MT 81, ¶¶ 22, 315 Mont. 59, ¶ 22, 67
26 P.3d 295, ¶ 22 the Court held that there was no expectation of
27 privacy in the area next to the residence where a car was parked,
28 when the defendant had taken no steps to evidence a privacy
expectation in the open and freely accessible area. In *City of
Whitefish*, ¶ 18 the Court held there was no reasonable expectation
of privacy in a carport in a private condominium association parking