DISTRICT COURT JUDGESHIP
First Judicial District

A. PERSONAL INFORMATION

1.   Full Name: David Ole Olson

     a. What name do you commonly go by? Ole

2.   Birthdate: ▮▮▮▮▮▮▮   Are you a U.S. citizen? Yes

3.   Home Address: ▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮   Phone: ▮▮▮▮▮▮▮

4.   Office Address: Department of Justice, 215 N. Sanders, Helena, MT 59601

     Phone: 444-2026

5.   Length of residence in Montana: 36 years

6.   Place of residence for the last five years:

Dates	City	State
2006 to Present	Helena	MT

B. EDUCATIONAL BACKGROUND

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

Name	Location	Date of Degree	Degree
Helena High School	Helena, MT	May, 1995	High School Diploma
Montana State University	Bozeman, MT	May, 2000	B.S. in Chemical Engineering,
Georgetown University Law Center	Washington, DC	May, 2006	Juris Doctorate

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

I was the Montana State AA Pole Vault champion in 1995. I received an honors scholarship to attend Montana State University for graduating near the top of my high school class. I graduated with high honors from Montana State University, Bozeman. I graduated *cum laude* from Georgetown University Law Center.

I received the 2012 Pro Bono Award for the First Judicial District for my work on pro bono divorce cases.

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 a member of the Georgetown International Environmental 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.

Court or Administrative Body	Date of Admission
Montana Bar	10/2006
Montana Federal District Court	8/2007

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

I am an Assistant Attorney General in the Prosecution Services Bureau of the Montana Department of Justice. I also hold the position as State Training Coordinator for Montana's County Attorneys, which is a statutory position that requires nomination by the Montana County Attorneys Association and appointment by the Attorney General.

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

Employer's Name	Position	Dates
Montana Department of Justice	Assistant AG	5/2010—Present
United States Attorney for the District of Montana	Special Assistant U.S. Attorney	11/2012—11/2017
City of Helena	Deputy City Attorney	5/2008—5/2010
Montana Department of Justice	Assistant AG (Appellate)	11/2007—5/2008
Mountain West Bank	Lawyer	8/2007—11/2007
Montana Supreme Court	Law Clerk for Justice Brian Morris	8/2006—8/2007

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

I have been employed continuously since I graduated from Georgetown Law as noted above.

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 two primary roles at the Department of Justice are as a criminal prosecutor and Montana's Prosecution Training Coordinator. As a prosecutor I handle major felony matters, with a focus on child sexual assault cases, adult rapes, and homicides. I also advise and assist county attorneys on criminal matters. In the past, I have specialized in internet crimes against children cases in both state court and federal court.

In my role as Prosecution Training Coordinator for the Montana's county attorneys, I develop the continuing legal education and training agendas for the Montana County Attorneys Association's biannual conferences. I also develop training curriculum for training county attorneys and law enforcement. For example, I led a team to create and host Montana's first prosecution boot camp for new prosecutors in January of 2019. This four-day intensive course trained new deputy county attorneys and deputy city attorneys in the basics of criminal prosecution and trial advocacy. I have developed a similar course for sex assault cases that had to be postponed to 2021 due to COVID-19.

In addition to these roles, I have a variety of special assignments within the Attorney General's Office, including legislative activities, capital litigation team, sexual assault team, and a board member for the Montana Sexual Offender and Treatment Association.

I spend roughly 75% of my time on prosecution, 15% on training and training coordination, and 10% on special assignments.

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

I have participated extensively in legislative work for the 2015, 2017 and 2019 legislative sessions, including drafting bills, reviewing bills, testifying before committees, and answering criminal law questions from legislators and lobbyists.

I train other criminal justice professionals frequently, on a variety of topics, as I outline below at question 27.

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

Criminal Law.

17.   Do you regularly appear in court?

        Yes.

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

Federal court	2	%
State or local courts of record	98	%
Administrative bodies		%
Other		%

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

        75%

19.   How frequently have you appeared in court?

        While my schedule varies greatly, in the last five years I estimate roughly four appearances per month in court and roughly three jury trials per year.

20.   How frequently have you appeared at administrative hearings?

        I do not practice before administrative boards or judges.

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

Civil	2 %
Criminal	98 %
Other	0%

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.

        Because most criminal convictions are appealed, I am frequently named on Supreme Court pleadings. These appeals are actually handled by our appellate bureau. I would not consider myself making anything other than a formal appearance.

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

        I have tried 18 felony jury trials in jurisdictions all around Montana.

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

        None.

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

        State v. Clay Brady Ripple, DC-18-07, Montana Fourteenth Judicial District Court, Meagher County
        Jury Trial: February 24-27, 2020
        Honorable Randal I. Spaulding, presiding: (406) 323-1701

        Defense Counsel:

        Adam Larsen
        Office of State Public Defender
        Regional Office, Region 7
        505 W. Main St., Suite 418
        Lewistown, MT 59457
        (406) 535-3703

        Breena LeCount
        Office of State Public Defender
        Regional Office, Region 7
        505 W. Main St., Suite 418
        Lewistown, MT 59457
        (406) 535-3703

        State v. Virgil Siegel, DC-18-08, Montana Fourteenth Judicial District Court, Musselshell County
        Jury Trial: November 6-8, 2019
        Honorable Randal I. Spaulding, presiding: (406) 323-1701

        Defense Counsel

        Adam Larsen
        Office of State Public Defender
        Regional Office, Region 7
        505 W. Main St., Suite 418
        Lewistown, MT 59457
        (406) 535-3703

        Breena LeCount
        Office of State Public Defender

Regional Office, Region 7
505 W. Main St., Suite 418
Lewistown, MT 59457
(406) 535-3703

State v. Corena Marie Mountainchief, ADC-18-776, Eighth Judicial District Court, Cascade County
Jury Trial: October 7-10, 2019
Honorable John W. Larson, presiding: (406) 258-4773

Defense Counsel
Lawrence LaFountain
109 2nd St. W
Havre, MT 59501
(406) 265-2199

State v. Justin Quinlan, DC 2017-31, Montana Sixteenth Judicial District Court, Rosebud County
Jury Trial: August 21-29, 2018
Honorable Nicholas Murnion, presiding: (406) 346-6109

Defense Counsel
Lisa Bazant
2722 3rd Avenue North, Suite 400
P.O. Box 1832
Billings, MT 59103-1832
(406)-696-2197

Hon. Ashley Harada
Yellowstone County District Court
(406) 869-8010

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

None.

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 collaborated with a number of professionals on the authorship of the *Missoula County Attorney's Office, Sexual Assault and Procedural Manual*, First Edition, 2014, which serves as a model for prosecution offices in Montana and can be found here: https://dojmt.gov/wp-content/uploads/SEXUAL-ASSAULT-POLICY-AND-PROCEDURE-MANUAL.pdf

I have trained extensively over the last 10 years. The following are a selection of some of my presentations:

Montana Legislative Updates on Criminal Law and Procedure: I presented on this topic at the Montana District Court Judges Conference for the 2015 legislative session on May 15, 2015 in Lewistown, MT; for the 2017 legislative session on May 12, 2017 in Great Falls, MT; and for the 2019 legislative session on May 10, 2019 in Whitefish, MT. I have also presented on this topic to the Montana League of Cities and Towns and the Montana County Attorneys Association multiple times, and one time for State Bar Criminal CLE in Great Falls, MT on April 10, 2015.

Preparing a Child for Court and Advocate Privilege: I have presented this 1.5 hour course three times at the following Montana Child Victim Advocate Trainings: December 5, 2017 in Helena, MT; November 6, 2018 in Bozeman, MT; and July 7, 2020 by Webinar to attendees throughout Montana. The audience is primarily system-based and community-based victim advocates.

Case Law and Legislative Update on Internet Crimes against Children: I have presented on this topic several times to Law Enforcement, including my most recent presentation on May 7, 2019 in Helena, Montana.

Cooperative Response to Sexual Assault on College Campuses: I coordinated and co-presented this one-hour presentation with University of Montana University System Compliance Officer, Jessica Weltman and University of Montana Police Chief, Marty Ludemann on May 9-10, 2016 at the *Alaska Conference on Domestic Violence and Sexual Assault* in Anchorage, Alaska,.

Criminal Prosecution of Human Trafficking: I have presented on this topic many times, including but not limited to the following conferences: On May 15, 2014 at a conference entitled *Freedom in Montana: Fighting Human Trafficking at Home*, in Missoula, MT; on May 27, 2016 at the *Stop Human Trafficking in Montana Conference*, in Missoula, MT; and as part of a State and Federal panel on June 14, 2018 at the *Trucker's Against Trafficking Coalition Build*, in Billings, MT.

Investigation and Prosecution of Sex Assault Cases: I have presented on various aspects of prosecuting child sex abuse and adult rape cases, including but not limited to the following presentations: May 24, 2016, *The Legal Framework Applicable to Sex Offenses in Montana*, at the Montana Multi-Disciplinary Team on Sexual Assault Pilot Conference in Helena, MT; August 7, 2013, *Sex Assault Investigations Training for Missoula Law Enforcement*, Missoula, Montana; May 23, June 11, and June 13, 2014 at various locations around Montana for Deputy County Attorneys; and April 4, 2012, at the Montana Child Forensic Interview Training, in Helena, MT.

Trying the Difficult Self Defense Case: I co-presented with Asst. Attorney General Dan Guzynski on this topic on July 9, 2015 at the Montana County Attorney's Conference.

Understanding Sex Offender Tier Level Designations: I presented this at the Montana County Attorneys Conference, December 2, 2014, in Billings, MT.

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, First Judicial District: 2006 to Present.
Montana County Attorney's Association: May 2010 to Present.
National Association of Prosecution Coordinators: 2018 to Present.

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

I was a member of the Board of Directors for Family Promise of Greater Helena from 2013 through 2017. During that time, I served in various positions, including a term as Board Chair in 2016. Family Promise is a local affiliate of a national organization that is dedicated to helping families experiencing homelessness get back on their feet, and back into sustainable jobs and housing. My activities on the board included primarily coordination and participation in fundraising activities as well as general governance of the organization and limited legal advice.

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

I have never sought judicial appointment. I was elected to District 5 of the Helena Citizen's Council in 2008. The HCC is an elected body composed of four representatives from each of seven neighborhood districts in Helena. Established by City Charter, the HCC advises the City Commission. I resigned before the end of my term in light of the fact I took a job as a Deputy City Attorney and continuing in both positions would have been a potential conflict of interest.

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

I believe life is best lived in service to others. My most cherished professional moments are those where I have served others. Through my work on a pro-bono case to help a disabled woman with her contested divorce, I found the respect, admiration, and friendship of a person who up to that point had found the legal system daunting and frustrating. During my time on the Board of Family Promise of Greater Helena, I met many wonderful families who were down on their luck and just needed an opportunity to succeed. Now I see these families actively participating in our community, making Helena a better place to live. I am proud to have met them and played some small part in giving them a chance to succeed. In my work as a prosecutor, the most meaningful moments were when I looked victims in the eye and assured them that I would give them a voice and do everything in my power to show a jury the truth of what happened to them. Based on these experiences and many others, I have learned that to truly find satisfaction and happiness in life, we must find a way to serve others.

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.

1994—Minor in Possession of Alcohol/marijuana: I was cited for possession of alcohol because I was drinking at a party and I plead guilty in justice court. I was cited for possession of marijuana because I was at a party where marijuana was present. The marijuana matter was handled informally through juvenile probation and was never formally adjudicated.

2010—Failure to retain evidence of sex on a game animal. I had taken a doe deer and partially processed it at a friend's ranch prior to transporting it home to finish processing it. I stopped at a game check station on the way home. The wardens informed me that although they could tell it was a doe because of its size, I had violated the regulations by failing to retain evidence of sex on a game animal until it is fully processed. I thanked them and paid the ticket on the spot.

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.

I am not engaged in the management of any business. I had previously owned commercial property in an LLC, but the property has been sold, the LLC has no remaining assets or liabilities, and the LLC will be dissolved soon.

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

43.   Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?

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 extensive experience in researching and writing motions and briefs on a variety of trial issues including evidentiary motions *in limine*, responses to motions to suppress, and motions for new trial. I have written findings of fact and conclusions of law, plea agreements, and sentences and judgments. I have written several responses to petitions for post-conviction relief. I research and write all my own briefs and motions. I also frequently review and offer comment on appellate briefs written by our appellate lawyers on appeals before the Montana Supreme Court.

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 reviewed and drafted many criminal law and procedure bills for the last three legislative sessions.

     I occasionally will draft formal memorandums regarding a request by a county attorney to review a case for charging. These requests usually arise from a situation where there is a conflict between a victim and the county attorney's office leading to a complaint to our office for a second opinion.

47.   Attach a writing sample of no more than ten pages that you have <u>written yourself</u>. A portion of a brief or memorandum is acceptable. The writing sample should be as recent as possible.

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

     Roughly 30%.

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

     Yes. I've used both extensively, but most recently Lexis.

H. MISCELLANEOUS

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

     My primary interest and activity is spending time with my family in Montana's outdoors.

     I also enjoy building and operating amateur radios. I am a licensed amateur radio operator with a general class license. I have most recently built a lightweight high-frequency radio capable of receiving and transmitting continuous wave signals (e.g., Morse code).

     I have completed roughly two-thirds of my training towards my private pilot license.

     I am a regular at my CrossFit gym, enjoy mountain biking, and I am an avid big game hunter.

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

     In high school and early college, I worked at a Lube and Oil shop, at a KOA campground, as a construction laborer, and owned my own lawn mowing business.

     During late college I worked as a paid intern for Air Liquide in Bozeman, Montana as a laboratory technician and in Houston, Texas as an engineering intern. Air Liquide is a company that specializes in the production and distribution of gases that can be distilled from our atmosphere, including nitrogen, oxygen, and the noble gases.

     After college I worked for Air Liquide as a Process Engineer. I was tasked with assisting in the design, construction and operation of air separation plants along the Gulf Coast.

     While enrolled in Georgetown Law School, I worked as a law clerk for The International Network for Environmental Compliance and Enforcement in Washington, DC, where I worked on policy papers on various international environmental issues. I clerked for the Environmental and Natural Resources Division of the Department of Justice in Washington, DC, where I drafted memos and assisted on briefing. I clerked for the United States Attorney's Office for the Northern District of California in San Francisco, CA, where worked on a civil litigation team as part of their environmental unit.

     The remainder of my jobs are listed in question 12, above.

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

     Prior to 2015, I took on a number of pro-bono divorce cases through the Montana Legal Services Association. Over the last five years the pro-bono work I performed was primarily limited legal advice for Family Promise of Greater Helena. Most of my work with Family Promise was not legal in nature, however when legal issues arose, I would address them or advise on whether we needed outside counsel.

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

In my position at the Attorney General's Office, we frequently get calls from people who are disappointed, angry or hurt about a decision made by a court, jury or prosecutor. In many cases, there is nothing we can do to give them the outcome they are seeking. During a busy day it can be frustrating to spend long periods of time on the phone with someone who you know you cannot help, while other priorities are put on hold. Even so, I have learned that is well worth the time to make a genuine effort to show that person that I understand what they are saying and that I empathize with their situation. The reason I do this is because people will forgive a decision they disagree with, but they will never forget the way they were treated.

I see this as an important principle in our justice system. Everyone in the justice system must make the extra effort to truly hear people and try to understand where they are coming from. While we will rarely please everyone who enters the justice system, most people will still respect our justice system if they leave it having felt heard, understood and respected.

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

I believe there are two important qualities to a good judge. The first is the ability to get the job done. This requires a willingness to work hard, the ability to prioritize workload, and the focus to handle matters efficiently. To do this, the judge must have strong legal reasoning skills and the ability to think through problems under pressure. A good judge will be prepared for hearings and rule on matters according to the law and facts.

The second important quality of a good judge is the ability to communicate high expectations for lawyers and litigants, while still approaching matters with humility and kindness. Most lawyers respect and respond well to a court that expects and demands lawyers to be prepared and treat the court respectfully. A good judge will balance this with an open mind, a willingness to work with the parties to resolve matters efficiently, and ability to approach the parties with a kind disposition. I believe that a judge who can strike this balance will bring out the best in those who appear before the court, while also creating a pleasant atmosphere in which to practice law.

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.

A court strikes the right balance between precedent and flexibility in the law by requiring extraordinary circumstances to depart from precedent. The establishment of a body of precedent promotes stability in legal principles, allowing people to arrange their affairs with confidence that the law will remain as it has been. Following precedent also promotes efficiency in the law by putting some issues to rest so they need not be relitigated every time they arise. On the other hand, courts make mistakes and society changes. On occasion, courts will need to depart from or overrule precedent. To strike a balance

between these policy concerns, courts must ensure that their reason for departing from the precedent is not merely that the present court would have decided the issue differently. Rather it should be shown that the legal reasoning was plainly wrong or that the decision was made in a societal context that no longer exists today.

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

I am seeking this position because I feel it is where I can make the most positive impact on the legal system and on my community at this point in my career. I am motivated by two things: a challenge and a good cause. I became a prosecutor because I could challenge myself to become a skilled trial attorney, while helping victims of crime find justice. This fueled a fire in me over the last 12 years to work my way up from trying misdemeanor cases in city court to being nominated by my peers and appointed by the Attorney General to advise and train all prosecutors in Montana. Through my work both inside and outside the courtroom, I am both privileged and proud to have made a positive impact on Montana's community and justice system through my work as a prosecutor.

At this point in my career, I feel that same energy and enthusiasm for the office of district court judge that I felt as a new prosecutor. I see a district court judgeship as an exciting challenge. Dockets are extremely busy and the range of issues are wide. I find the reward for this challenge is even greater. Being a judge in the First Judicial District is a way for me to serve where I grew up and where I returned to work and raise my family. I know that this would fuel a fire in me to work tirelessly to become a skilled and respected jurist who would bring speedy and just resolution to issues, while also working to improve the bench through service with my fellow judges on issues of importance to the district and the state.

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

I am most proud of the work I have done advocating for children. The justice system is not a friendly place for a child. The facts that bring children to the justice system are often horrendous. When advocating for a child's truth, I gave all my skill and energy to ensure that she felt heard, understood and believed. I know this is true when I look at the crayon drawings, cards, and other mementos these brave children have left for me to remember our work together.

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

My previous career as a chemical engineer and continued pursuit of technical hobbies such as amateur radio and aviation is evidence of a lifelong love of technical and scientific subjects. While this may seem somewhat removed from law, I have actually found it to be quite helpful in the practice of law. When technical subjects arise, my background and intellectual curiosity for these subjects has often set me apart from my legal peers. In law school my background helped distinguish me in the technical fields such as environmental law and patent law. In my work as a prosecutor, I have been sought out on technical issues ranging from source code litigation to collection and presentation of digital evidence at trials. My writing sample relates to litigation I recently engaged in on cell phone geolocation evidence.

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

I believe what distinguishes me is a combination of three qualities. First, I have a proven ability to be a leader in my chosen field of law as evidenced by my position as the Prosecution Training Coordinator for the State of Montana. Second, I have demonstrated the ability to successfully work with and earn the respect of people of all walks of life and political leanings. I have worked successfully with county attorneys, law enforcement, judges, witnesses and legislators from all around Montana. Meanwhile, I have enjoyed continuing advancement in my position at the Attorney General's Office through both democratic and republican administrations. Finally, I have a deep connection and commitment to the First Judicial District. This district is where my family has lived for generations, where I grew up, and where I have returned to practice law and raise my family.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 1st 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.

8/25/20
_____
(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 Thursday, August 27, 2020.*

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

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Helena, MT 59620-1401
Telephone: (406) 444-2026

COUNSEL FOR STATE

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, SANDERS COUNTY

STATE OF MONTANA,
 	
                    Plaintiff,
     v.
 	
DANIELLE JEANETTE WOOD,
 	
                    Defendant.
	Cause No. DC-19-07
	
	The Honorable D. Kim Christopher
	
	STATE'S RESPONSE TO DEFENDANT'S SECOND BRIEF IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE NOVEL SCIENCE EXPERT TESTIMONY BASED UPON HISTORIC CELLPHONE BILLING RECORDS AND GOOGLE CELLPHONE DATA

Ole Olson, an Assistant Attorney General for the State of Montana and a Special Deputy County Attorney for Sanders County, respectfully files this response to the Defendant's Second Brief in Support of Motion in Limine to Exclude. The State requests this Court hear testimony on this matter at the currently scheduled June 16, 2020 hearing.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

Below are the facts that the State plans to offer at trial in order to give this Court a context in which to rule on the instant motion: On May 3, 2018 Matthew LaFriniere (LaFriniere) was found dead at his residence on 11 River View Lane, just west of Thompson Falls, MT. A subsequent autopsy showed he was killed by multiple gunshot wounds consistent with a .38 caliber bullet.

Danielle Wood became a suspect due to a number of facts, only a few of which are highlighted here. First, she had a motive in the form of an ongoing,

bitter custody dispute with LaFriniere over their daughter, S.L., which resulted in LaFriniere gaining "primary custody" over S.L. a few months before his murder. The two were seen having a very tense discussion on the afternoon of May 2 when Wood picked up their daughter from LaFriniere for an evening visit.

Investigation showed that Wood purchased a .38 special caliber revolver from Ronan Sports and Western a few months before LaFriniere's death. LaFriniere was shot with a .38 caliber bullet that was found to have consistent markings as having been fired by the weapon that Wood purchased. A direct comparison was never made to her actual weapon because it was never found.

Wood was supposed to return S.L. to LaFriniere at 7:30 p.m. on May 2. She never returned S.L. Instead Wood told witnesses that she was going to LaFriniere's house by herself to check on him just after 7 p.m. on May 2, 2018. LaFriniere was found dead the next day.

Investigators learned that some of the last communications Wood had with LaFriniere involved an anonymous number assigned to a Tracfone. Tracfones are a non-contractual cell phone known to be purchased by persons who prefer anonymity. Although Wood denied any knowledge of who the Tracfone number belonged to, investigators learned that it had been in communication with both Wood and LaFriniere in the days and weeks just prior to LaFriniere's death. The Tracfone had sent at least one message purporting to be from LaFriniere. These are the messages investigators uncovered involving the Tracfone:

- April 20, 2018 at 7:13 a.m. the Tracfone sends a text message to Danielle Wood's phone: *"Quit calling [S.L.] every morning. Just leave them alone.!"*

- April 20, 2018 at 10:08 a.m. the Tracfone sends a text message to Danielle Wood's phone: *"I toldyou to leave them alone quit bothering them"*

- May 2, 2018 at 1:41 p.m. the Tracfone sends a text message to Danielle Wood's phone: *"Don't you get it? quit calling them"*

- May 2, 2018 at 7:07 p.m. the Tracfone sends a text message to Danielle Wood's phone: *"Held up in trout creek. Just hang on to [S.L.] ill call when i headbackto town   matt"*

- May 2, 2018 at 9:32 p.m. Danielle Wood sends a message to both LaFriniere's phone and the Tracfone: *"I am not sure what is going on. But, it is way past bed time. We'll snuggle on the couch and wait for your call. Hope I am doing the right thing. Danielle."*

Investigators also learned that the Tracfone made an anonymous call to 911 on the evening of May 2, 2018 at 7:26 p.m. (the day before LaFriniere was found shot to death). This call was from a voice that sounded female to the dispatcher. The caller reported that she was driving west of Thompson Falls in an area near LaFriniere's residence. She reported that she had heard a boom and witnessed something concerning in a residential living room.

Investigators focused in on trying to determine who was using this Tracfone. Investigators recognized that digital records with cell phones could play an important role in the investigation. Investigators know from training and experience that various types of digital records associated with cell phones can provide compelling insight into the locations and movements of the devices. This type of analysis is called a "geolocation" analysis. When a geolocation analysis is combined with the other facts in the case it can provide information regarding the locations and movements of cell phones, and by inference, locations and movements of the people who own them.

In this case investigators were able to obtain data from the digital accounts for the three devices at issue: (1) Matthew LaFriniere's phone, (2) Danielle Wood's phone and (3) the anonymous Tracfone. All three devices were assigned to Verizon accounts. Investigators forwarded the information received from Verizon to Mike Fegely (Mr. Fegely). Mr. Fegely is a former Criminal

Investigator for the Montana Department of Fish, Wildlife and Parks and is now an Investigative Support and Subject Matter Expert for Zetx, Inc. Mr. Fegely specializes in the analysis of various types of location data that can be distilled from phone records, Google records, and other electronic providers in order to present a cohesive, real-time representation of the location data on a Google Earth map. Mr. Fegely's CV is attached as State's Exhibit 14.

Mr. Fegely will testify at the hearing in this matter that he relies on two general types of historical data from Verizon wireless to do his geolocation analysis, which the state will refer to in this brief as (1) tower/sector data and (2) distance from tower data. This type of data is commonly lumped together under the title "cell site location history."

Tower/sector data is simply a record of the tower and sector to which a phone has connected at a particular time. This data can narrow down the location of a device connecting to a tower by mapping the known or presumed geographical range of that tower and sector. Generally, this will be a fairly large area centered in a certain direction from the tower. The size of the area can vary greatly for any particular tower depending on the location of the tower and the surrounding geography.

Distance from tower data is more precise than tower/sector data. Distance from tower data not only records the tower and sector to which a phone has connected at a particular time, but also provides an estimate of the phone's distance from a particular sector on a tower. Very generally, the State understands that the distance from a tower is based on an algorithm that takes into account the time it takes for the radio signal to travel from the tower to the phone and back. Using this information, Mr. Fegely can draw an arc on a map that represents the possible locations of the phone along the distance arc in that particular sector. While this method of geolocation is more precise, it can also

vary if factors such as geography interfere with the radio signal used to calculate the distance from tower.

Distance from tower data is collected quite frequently. When the distance from tower arcs are drawn on a map over time, and compared with geographical features such as roads, geographical terrain, and other known facts in the case, the distance from tower data can provide compelling circumstantial evidence of the locations and movements of a cell phone over the period of time for which the data was collected. More importantly, when the distance from tower arcs of two devices are compared, they can show if there is a correlation in the movements of the devices.

Mr. Fegely also noted that Danielle Wood's phone appeared to have a Google account associated with it. Mr. Fegely knows from training and experience that Google accounts can provide a wealth of information about the location history of the device as Google gathers and uses location history for marketing and applications associated with cell phones. Google does this by combining various signals on the cellphone, which can include Wi-Fi probe requests, GPS, and the cell site connection history. (Declaration of Marlo McGriff at ¶ 7, attached as State's Exhibit 15.) Google combines all this information to come up with a location estimate. The location estimate is presented as a latitude and longitude. Google also provides a "display radius" for each location estimate. The display radius can be thought of as the radius of the circle in which Google is calculating where the device is located with a certain confidence. Google refers to this data as Google Location History. (*Id*. at ¶ 4.) Google employee Marlo McGriff explains:

> "[Google location history] may be considerably more precise than
> other kinds of location data, including cell-site location information
> ("CSLI"). That is because, as a technological matter, a mobile
> device's location-reporting feature can use multiple inputs in

estimating the device's location. Those inputs could include GPS signals (i.e., radio waves detected by a receiver in the mobile device from orbiting geolocation satellites) or signals from nearby Wi-Fi networks, Bluetooth beacons, or cell towers. Combined, these inputs (when the user enables them) can be capable of estimating a device's location to a higher degree of accuracy and precision than is typical of CSLI. For example, I understand that when a strong GPS signal is available, a device's location can be estimated within approximately twenty meters or less."

(*Id.* at ¶12).

By taking the location history provided by Verizon and Google and plotting it on a Google map over time, Mr. Fegely was able to conclude that the Tracfone appeared to generally track the same location as Danielle Wood's phone from the time it was activated until the time of LaFriniere's death. Here are a few, but not all of the datapoints supporting this conclusion:

A. On April 19, 2018, there is initial phone activation on the Tracfone in the Missoula area at approximately 10:41 p.m. At the same time there are corresponding Google Location reports from Wood's phone that are consistent with being the same distance from the Missoula cell phone tower as the Tracfone.

B. At 7:03 p.m. on May 2, the Verizon data for both the Tracfone and Wood's cell phone is consistent with both devices being in proximity of Wood's residence at 105 Eddy Street in Thompson Falls, MT. At 7:03 p.m. on May 2, a Google location report also places Wood's cell phone at or near Wood's residence at 105 Eddy Street.

C. At the time that the anonymous female makes the 911 call at 7:31 p.m. on May 2 from the Tracfone, the Verizon data for the Tracfone and Wood's phone show that both phones are in the same geolocation. Three minutes later, at 7:34 p.m. Wood's cell phone Verizon data is consistent with being in an area between the Thompson Falls airport and Highway 200. At 7:35 p.m. a Google location report places Wood's cell phone at or near S&S Sports at 4 Airport Rd, Thompson Falls, MT which is also between Thompson Falls airport and Highway 200.

Based upon the information and other information not mentioned herein, the State charged Danielle Wood with Deliberate Homicide on or about March 19, 2019. The Defendant has pled not guilty. On December 26, 2019, the

Defendant filed a Motion to Exclude Cell Phone Records. The State made a timely response on April 22, 2020, pursuant to a scheduling order. In its response the State suggested that the Defendant did not have a complete picture of the "cell phone records" and may want to supplement her brief. After interviewing Mr. Fegely, the Defendant filed a supplemental motion on June 10, 2020. The State now responds in anticipation of an evidentiary hearing on June 16, 2020 where Mr. Fegely will testify along with one of the investigating agents, Kevin McCarvel.

ARGUMENT

The Defendant's motion to suppress misunderstands both the nature of the evidence that the State is offering and the standard under which this Court should admit the evidence. As to the legal standard, she suggests that *Daubert* applies to all the evidence Mr. Fegely is presenting. She forgets that Daubert applies only to "novel" scientific evidence. *Hulse v. DOJ, Motor Vehicle Div.*, 1998 MT 108, ¶ 69, 961 P.2d 75.

This is based on the broad principle that the Montana Supreme Court has instructed trial courts to "construe liberally the rules of evidence to admit all relevant expert testimony." *State v. Damon*, 2005 MT 218, ¶ 19, 328 Mont. 276, 119 P.3d 1194. The court has explained that "it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation." *Barmeyer v. Montana Power Co.,* 202 Mont. 185, 193-94, 657 P.2d 594, 598 (1983). The United States Supreme Court has similarly expressed this sentiment by stating that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 596, 113 S. Ct. 2786, 2798, 125 L. Ed. 2d 469, 484 (1993).

Under these principles, a trial court should in most cases conduct a "conventional Rule 702, M.R.Evid. analysis to determine the admissibility" of expert testimony. *Hulse v. DOJ, Motor Vehicle Div.*, 1998 MT 108, ¶ 69, 961 P.2d 75, 92. Rule 702 provides that, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." The reliability of the evidence is generally left up to the jury to decide.

Only when a court is presented with "an issue concerning the admissibility of novel scientific evidence," need the trial court go further and conduct a *Daubert* analysis. *Hulse v. DOJ, Motor Vehicle Div.*, 1998 MT 108, ¶ 63, 961 P.2d 75. The State will explain below that Mr. Fegely's use of the TRAX program and almost all geolocation data at issue in this case is not even arguably novel. The only arguably novel evidence is a single portion of the Google records that uses Wi-Fi signals to assist in geolocation estimates. Even this technology, however, has passed the *Daubert* test in all courts that the State has found that have considered the question. Finally, the State will show that Mr. Fegely is more than qualified based on his training and experience to explain this data to the jury.

I. The State need not provide a *Daubert* foundation for Mr. Fegely's use of the TRAX program.

First, the Defendant incorrectly argues that the TRAX program is a novel scientific technique that the State will rely on to interpret the data in this case. That is not the case and Mr. Fegely explained as much to the Defense during their interview of Mr. Fegely. Mr. Fegely will testify at the hearing on this matter that the TRAX program simply takes data provided by digital providers and plots it on a map over time. The TRAX program does not interpret the

data, change the data, or add to the data. For example, in this case Google provided a location history point based on Wi-Fi stating that on May 2, 2018 at 1:03:46 UTC the device was at a latitude of 47.5939868, a longitude of -115.3280291, with a Display Radius of 16 meters. All TRAX does is put a point on Google Earth Map at this latitude and longitude and draws a circle around it that is 16 meters in diameter. *See* State's Exhibit 5. Mike Fegely will testify that you could do this by hand, but the TRAX program just automates the process.

The same is true for the Verizon data. For example, in this case Verizon provides a data point that states that on May 2, 2018 at 19:03:54 the device was 3.74 miles from tower 238 on sector 1. TRAX simply draws an Arc that is 3.74 miles from the known location of tower 238, to the limits of sector 1. *See* State's Exhibit 8. Again, Mike Fegely could do this by hand, but TRAX automates the process. Anyone with very basic math and mapping skills could check to see if TRAX is correct or not. This "technique" is not novel science. In fact it is hardly a scientific technique. It is just a visual representation of data on a map, over time. With respect to this visual presentation of data, the only real expert opinion that the State will ask Mr. Fegely to offer is whether in his experience, when looking at the data on this map he can make common sense inferences about the general location of the devices at issue.

Accordingly, with respect to the TRAX program, this Court need only conduct a conventional Rule 702 analysis of whether Mr. Fegely's presentation of the Verizon and Google data on a map will "assist the trier of fact to understand the evidence or to determine a fact in issue" and (2) whether Mr. Fegely is "a witness qualified as an expert by knowledge, skill, experience, training, or education [and] may testify thereto in the form of an opinion or otherwise."   Mr. Fegely will present this visual representation of the data to

this Court at the June 16, 2020 hearing on this matter. Mr. Fegely will show this Court that the mapping of this data creates an easy to understand visualization of the data that is of great assistance to the trier of fact in visualizing what would otherwise be thousands of numbers on an Excel spreadsheet. Mr. Fegely will testify that he has considerable training and experience in interpreting Verizon and Google data and in mapping that data over time. Based on the foregoing this Court should find Mr. Fegely's use of the TRAX program admissible pursuant to Rule 702.

II. The State need not provide a *Daubert* foundation for the Verizon and Google Cell Cite Location data as it is not "novel scientific evidence."

While the TRAX program is not a scientific technique, the State agrees that the underlying cell cite location data from Google and Verizon that is being used by the TRAX program is based on science. However, it is not "novel" science to which *Daubert* must be applied. In order to determine what is "novel scientific evidence" the Montana Supreme Court has looked to whether (1) Law enforcement had been using the technology for decades; (2) appellate courts had been addressing the issue for some time and (3) other courts had determined that the scientific technique was neither novel nor a new scientific technique. *Hulse*, ¶ 68. An analysis of these factors establishes that cell-site location data is non-novel.

A Pennsylvania Appellate Court recently addressed the same issue with respect to the use of cell site data for "historical cell site analysis." *Commonwealth v. Nevels*, 203 A.3d 229 (P.A. Super 2019). Similar to this case, Nevels was charged with homicide and sought to suppress expert testimony "regarding historical cell-site analysis and . . . cell phone records." *Nevels* at 235. At issue in the *Nevels* case was also whether or not "historical cell-site analysis" is "novel science." *Id.* at 236. The trial court held that historical cell