

APPLICATION FOR

DISTRICT COURT JUDGESHIP
Fourth Judicial District

A. PERSONAL INFORMATION

1. Full Name: Jason Troy Marks
a. What name do you commonly go by? Jason
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes
3. Home Address: [REDACTED]
Phone: [REDACTED]
4. Office Address: 200 W. Broadway, Missoula, MT 59802
Phone: (406) 258-4737
5. Length of residence in Montana: With the exception of the three years I lived in Philadelphia during law school, I have been a resident of Montana my whole life.
6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
2005 - Present	Missoula	MT

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>
Loyola Sacred Heart H.S.	Missoula, MT	1997	Diploma
Montana State University	Bozeman, MT	2002	B.A.

Temple University
School of Law

Philadelphia, PA

2005

J.D.

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

I made the Dean's List and President's List as an undergraduate at Montana State University. I was able to attend law school at Temple University because I was awarded a scholarship that paid part of my tuition.

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

I was not a member of the Law Review.

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

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

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
Montana Supreme Court	2005
U.S. District Court – Montana	2017

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

I am currently the Chief Deputy Missoula County Attorney.

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>
Missoula County Public Defender's Office	Assistant Public Defender	2005-2006
Office of the State Public Defender	Assistant Public Defender	2006-2007
Missoula County Attorney's Office	Deputy County Attorney	2007-2012
	Assistant Chief Deputy Attorney (Supervising the	2012-2014

Special Victims Unit after
it was created)

Chief Deputy County Attorney 2015-Present

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

I was not employed from June of 2005 when I graduated law school though October of 2005 when I was hired at the Public Defender's Office. During that period, I was studying for the Bar Exam and awaiting the results.

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.

In my current position, I practice within and supervise both the criminal and civil divisions of the Missoula County Attorney's Office. Our office handles criminal prosecutions, represents Child and Family Services in youth in need of care cases, provides tort defense for the county, files regulatory enforcement actions, provides legal advice to the county commissioners and county departments, and files petitions for civil involuntary mental health commitments. Approximately 60% of my personal practice and supervision area is criminal law, 10% employment law, 10% constitutional law, 5% civil mental health commitments, and 5% contract law. The remaining 5% varies greatly based on the current urgent legal issues needing to be addressed by our office.

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

As part of my current position, I temporarily take on the work of attorneys who are out of the office for extended periods and the work of attorneys who leave the office until their replacement can be hired. In that capacity I have handled youth in need of care cases, enforcement of the Missoula City-County Health Code, helped re-write sections of the Missoula City-County Health Code, defended Missoula County in a Human Rights Bureau complaint, provided legal advice to the Missoula Conservation District, and provided legal advice on property law issues. I have also presented at a CLE on the rules of evidence for the Criminal Law section of the State Bar.

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

My specialty is certainly criminal law and trial work. My focus in law school was on criminal law and trial advocacy. Since law school, I have practiced criminal law either as a defense attorney, prosecutor or supervisor.

17. Do you regularly appear in court?

Yes, I have appeared in court almost daily for the last 13 years. Since becoming a supervisor, I appear in court slightly less, however, I regularly appear in court.

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

Federal court	<u> </u> %
State or local courts of record	<u>90</u> %
Administrative bodies	<u> </u> %
Other	<u>10</u> % (Justice Court, which is not a court of record)

18. During the last five years, what percentage of your practice has been trial practice? 60 %

19. How frequently have you appeared in court? 20 times per month on average.

20. How frequently have you appeared at administrative hearings?

I have not appeared at administrative hearings.

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

Civil	<u>10</u> %
Criminal	<u>90</u> %
Other	<u> </u> %

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

I have not appeared before the Montana Supreme Court in the last five years.

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

Prior to taking my current position as Chief Deputy Missoula County Attorney, I tried between 10 and 12 criminal jury trials per year. I estimate that I have tried approximately 70 jury trials in the past 10 years.

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

I tried 3 felony criminal trials and approximately 50 contested commitment hearings.

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

I have tried three cases before juries in the last two years. Those were:

State v. Mascarenas DC-16-425 jury trial July 31, 2017 through August 1, 2017

Trial was before Judge Deschamps (406) 258-4772

Opposing counsel was Steven Scott

139 N. Last Chance Gulch

Helena, MT 59620

(406) 444-9262

State v. Orton DC-17-466 jury trial July 11, 2018

Trial was before Judge Townsend (406) 258-4774

Opposing counsel was Richard Gillespie

I do not have current contact information for Mr. Gillespie as he moved out of state in August of 2018.

State v. Stanton DC-17-615 jury trial December 17, 2018

Trial was before Judge Larson (406) 258-4773

Opposing counsel was Jeff Wilson

310 Woody St

Missoula, MT 59802

(406) 523-5140

I have represented the State in numerous contested mental health commitment hearings in front of all four judges in the 4th Judicial District.

Opposing counsel in all of these cases was Eli Parker

310 Woody St

Missoula, MT 59802

(406) 523-5140

The following are my most significant prosecution cases from the last two years that have resolved without trial:

State v. Price, DC-16-15, Deliberate Homicide

Opposing counsel was Christopher Daly who has since retired

State v. McKnight, DC-16-16, Deliberate Homicide

Opposing counsel was Lisa Kauffman

1234 S 5th St West

Missoula, MT 59801

(406) 544-1903

State v. Palmer, DC-16-373, Deliberate Homicide

Opposing counsel was Brian Smith

202 W. Spruce St

Missoula, MT 59802

(406) 274-0087

State v. Levens, DC-17-147, Negligent Vehicular Homicide
Opposing counsel was Joan Burbridge
310 Woody St
Missoula, MT 59802
(406) 523-5140

State v. Fiorino, DC-17-289, Attempted Deliberate Homicide
Opposing counsel was Lisa Kauffman
1234 S 5th St West
Missoula, MT 59801
(406) 544-1903

State v. Vance, DC-17-343, Attempted Deliberate Homicide
Opposing Counsel was Reed Mandelko
310 Woody St
Missoula, MT 59802
(406) 523-5140

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

I have not had meaningful experience in adversarial proceedings before administrative boards or commissions.

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

I have not published any legal books or articles.

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.

State Bar of Montana

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 am a member of the Kiwanis Club of Missoula. I served as a board member on the board of directors from 2014-2016.

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

I ran for Missoula County Attorney in 2014. I withdrew my name as a candidate prior to the election.

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

My philosophy of public involvement is informed by my experience with my father. My father grew up on a farm and ranch outside of Townsend. He served in Vietnam and after the war and college he became the County Extension Agent for Missoula County. I grew up with him working at his office by day and going to meetings with various community groups many nights. He wasn't paid for the extra time he put in, he did it in the interest of accomplishing larger goals and making his community a better place. Coming out of law school, I had no doubts about following his example and working in the public sector. In my view, working in the public sector has allowed me to devote my time to serving and improving my community. Whether engaged in criminal prosecution or working with county departments, I am privileged to be in a position where my job is dedicated to serving my community on a daily basis.

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.

I have not been disciplined for any breach of ethics or unprofessional conduct.

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

I have never been found guilty of contempt or been sanctioned by any court.

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.

I have never been arrested for or convicted of any violation of any law or ordinance.

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.

I have not been found guilty or liable in any civil or criminal proceedings.

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.

There is nothing that would adversely affect my qualifications to serve as a district court judge.

F. BUSINESS AND FINANCIAL INFORMATION

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

I have not engaged in any other business or profession since being admitted to the Bar.

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.

I have been reimbursed by the Office of the Court Administrator for travel to and from meetings of the Pretrial Working Committee and I have received reimbursement for travel and very minimal compensation for time from the Montana Medical Legal Panel on the two occasions I have been selected to serve. The percentage of my income is negligible.

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.

My wife is a prosecutor in the Missoula County Attorney's Office. As District Court Judge, I will recuse myself from any case in which she is involved. Additionally, I have a very close family friend who works in the Public Defender's Office. He lives in Missoula and is currently in the Appellate Division. If he were to return to trial work in the Missoula region of the Public Defender's Office, I would recuse myself from any cases in which he is involved. Finally, I am a member of the Backcountry Hunters and Anglers and provide minimal financial contributions to the Clark Fork Coalition through my license plates. I would end any financial support for these organizations if I were to be selected so as to avoid any appearance of impropriety given the advocacy role of the two organizations.

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, I am prepared to disclose the required information.

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

Yes, I have filed the appropriate tax returns.

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

No, I do not have any liens or claims outstanding against me by the Internal Revenue Service.

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.

I have not been found by the IRS to have willfully failed to disclose my income.

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 generally do my own legal research and writing. In those instances where an intern in our office did the research and writing their name also appears on the brief. I regularly have to do legal research and have filed a significant number of briefs over the past five years. Additionally, I am called upon by county departments to research specific issues and write memos giving them legal advice. In my job as Chief Deputy County Attorney, my research experience extends from criminal law, to employment law and human relations issues, to contracts, to public health regulation and conservation district 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 a few contracts related to county business and I have written a couple of wills for friends.

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. 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?

I would say that 50% of my practice involves legal research although probably only 20% involves legal writing.

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

Yes

H. MISCELLANEOUS

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

I enjoy hunting, fishing, and hiking with my family and dogs. During the summer, I kayak on Flathead Lake as often as possible. I also take a great deal of enjoyment in using some of my leave time from work to teach trial skills to law students. I have been a repeat guest in Trial Practice Classe at the University of Montana Law School and last year I accepted an invitation to be a faculty member for the Advanced Trial Advocacy program at the University of Montana Law School.

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

After high school, I held a summer job at Safeway in Missoula. I returned to work there the summer between my first and second year of college. During my second year in college, I was a resident advisor in Langford Hall at Montana State University. After my second year of college, I worked in the deli at Bi-Lo Foods, now Pattee Creek Market, also in Missoula. For the remainder of my time in college I worked at Albertson's in Bozeman stocking shelves at night in the summers and intermittently as needed and when my schedule allowed. This helped me to pay my tuition for my undergraduate education.

In law school I worked the first summer as a research assistant to one of the professors. During the summer after my second year as a law student, I worked as an intern in the Montgomery County District Attorney's office outside of Philadelphia, Pennsylvania. I also worked as a Teaching Assistant for Introductory Trial Advocacy my third year.

After law school, I returned home to Missoula and started at the Public Defender's Office after passing the Bar Exam. At that time, the office was part of Missoula County. Approximately one year after I started my employment, the Office of the State Public Defender was created and I became a state employee. When I started at the Public Defender's Office I was defending people charged with misdemeanors before one of the Missoula County Justices of the Peace. Around the time of the transition to the State Office of the Public Defender I began handling felony cases.

In the summer of 2007 I was hired at the Missoula County Attorney's Office and began handling general prosecution work, primarily prosecuting felony cases. Over time, I gravitated toward prosecuting persons crimes and when the Missoula County Attorney's Office created a unit dedicated to prosecuting domestic violence and sexual assault cases, I was promoted to supervise the unit. In January of 2015, when County Attorney Kirsten Pabst took office, she merged what had been the Chief Criminal and Chief Civil Deputy positions into a single Chief Deputy position and appointed me as her Chief Deputy. In my current position, I supervise all of the attorneys in the Missoula County Attorney's Office as well as carry my own caseload.

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

I have not performed any pro bono work, outside of some limited legal work for family members, in the last five years.

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

There are two main events that define the way I view our justice system as I understand the concept of justice. The first has to do with where I was raised. I grew up a few miles upstream from what was the Milltown Dam on the Clark Fork River. I learned to fish on the Clark Fork and, when I was older and going out fishing on my own, I remember my father telling me not to fish too far downstream because of the mining pollution trapped behind the dam. Knowing what I know now, I'm not even sure the fish near the house I grew up in would really be safe to eat. In my view, the litigation that forced the cleanup of the mining waste and the removal of the dam was justice for a greater Missoula community that had suffered the negative impacts of an industry they had no control over and received no benefit from.

The other main event that defines the way I view our justice system came about when I was a relatively new prosecutor. I prosecuted a young man who held up a convenience store, by way of pretending the finger in his coat pocket was a gun, while drunk and stole a beer and a few dollars. The store clerk thought the whole thing was ridiculous but followed company policy in letting the robbery happen and calling the police. The case was a very straightforward and I would have convicted the defendant of robbery with the consequence of him being labeled as a felon and having to register as a violent offender. His public defender convinced me that his mental health and substance abuse issues were what drove his actions that night. We entered into a deferred prosecution agreement whereby his case was dismissed on the condition that he complete the co-occurring mental health court that is one of the treatment courts in the 4th Judicial District. I am happy to say that not only did he successfully complete the co-occurring court, but he also really turned his life around and became a good member of our community. I use this example because I do not think that justice in the criminal law context is all about the conviction or incarceration of someone who committed a crime. For all of the criticism focused on incarceration rates, both nationally and at the state level, I feel that our existing justice system has the flexibility to achieve rehabilitation and the protection of the public. In the end it just comes down the willingness of people in the system to take a chance on a particular defendant.

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

I believe the most important qualities in a district court judge are an even temperament, the ability to make quick decisions, and the ability to dispassionately analyze legal issues presented in court. An even temperament is important because people appearing in court should not have their cases impacted by the mood of the judge or any feelings the judge has toward the attorneys representing the litigants in the case. This ability to make quick decisions is essential not only for presiding over trials, where evidentiary rulings have to be made on the spot, but also to provide timely rulings on motions in cases before the court. This is especially true of dispositive motions where the negative impacts of lingering uncertainty over the outcome of a case negatively impact the litigants. I think that the last quality is perhaps the most important. A district court judge is going to be presented with any number of emotionally charged issues. However, a judge cannot be swayed by the passions of the litigants or the urgings of public opinion. Ultimately a good district court judge needs to be guided solely by the law and the facts presented.

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 short answer to the question is that a judge should always follow established precedent unless there is a clear reason not to do so.

Establishing and following precedent is very important in that precedent brings a predictability to the law that is critically important to the ability of lawyers to provide accurate legal advice to their clients. In addition, reliance upon precedent gives confidence to the public at large that the application of law is not arbitrary. That being said, it is important to be able to reach a decision that is correct, based on the facts and circumstances presented, when a case is factually distinguishable from established precedent or when confronted with conflicting cases being offered as controlling precedent. Finally, I think it is critically important to remember that any court is made up of fallible human beings that are a product of their times. In looking at the role of courts in American history, for example in decisions such as *Dred Scott v. Sandford* and *Korematsu v. United States*, we can see that prior decisions, made under the pressures of the times, do not hold up under modern scrutiny. It is essential that interpretations of the law adapt to ensure that everyone in our society receives equal protection and justice.

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

I am seeking the office of district court judge because I want to continue to serve my community and the 4th Judicial District as a whole to the best of my ability. I have the skills and experience to perform the duties of a district court judge in a manner that will be credit to the institution. I am confident that my legal background, trial experience, drive to reach timely decisions, and knowledge of the rules of evidence would be an asset to the lawyers that practice in the 4th Judicial District.

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

There are a few events in my career that I take particular pride in. In 2009 I was recognized as public servant of the year by the Missoula Family Violence Counsel for my work in prosecuting domestic violence cases.

I am proud of the fact that when the Missoula County Attorney's Office was a focus of United States Department of Justice for the way sexual assault cases had been handled in Missoula County that I was promoted to supervise the newly created Special Victims Unit which prosecutes sexual assault and domestic violence cases. The unit was able to demonstrate to the Montana Attorney General's Office and U.S. DOJ that the Missoula County Attorney's Office is prosecuting those cases in accordance with national best practices.

Finally, I am proud of the work that I have been involved in to reduce pretrial incarceration rates in Missoula County while maintaining public safety as a member of the Pretrial Working Committee helping to implement legislation to use evidence-based screening tool to screen people arrested for new crimes.

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

I do not believe that there is anything to disclose that has not otherwise been listed in this application.

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 that my significant trial experience, knowledge of and experience in the application of the rules of evidence, and exposure to a broad range of different areas of law would serve me well as a district court judge. From my practice, I have a working knowledge of the areas of law that take up a significant portion of the workload of a judge in the 4th Judicial District, specifically, criminal cases, civil commitments, and youth in need of care cases. Additionally, I feel that in my time as Chief Deputy County Attorney I have demonstrated my ability to quickly learn new areas of law and provide accurate legal advice in those areas. Given my experience in learning previously unfamiliar areas of law, I am confident that I will be able to provide decisions in the full range of civil cases that will be timely and legally accurate.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 4th 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.

5/3/2019

(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 May 30, 2019.**

Mail the signed original to:

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

Send the electronic copy to: mtsupremecourt@mt.gov

1 The following is an excerpt taken from a brief I wrote. It has been edited since filing in
2 District Court.

3 **INTRODUCTION**

4 Comes Now, JASON MARKS, Chief Deputy County Attorney of Missoula County,
5 and files this Response to Defendant's Motion to Suppress Videotape Evidence of
6 Interview With [Defendant]. Defendant's motion is not supported by the facts or law and it
7 should be denied.

8 **BACKGROUND**

9 A lengthy investigation by the Missoula Police Department revealed Defendant was
10 part of a group of suspects who stole numerous checks and identifications in Missoula
11 County, primarily within the City of Missoula, between March 2, 2016, and December 9,
12 2016. Many of the stolen checks were forged and executed using the stolen
13 identifications. As a result of the investigation, the State of Montana charged Defendant
14 with Count I: Accountability for Theft by Common Scheme, a Felony; Count II:
15 Accountability for Forgery by Common Scheme, a Felony; Count III: Accountability for
16 Forgery by Common Scheme, a Felony; and Count IV: Accountability for Deceptive
17 Practices by Common Scheme, a Felony.

18 While the investigation was ongoing, Law Enforcement conducted a traffic stop on
19 Defendant on November 9, 2016, of the Defendant as she was in the process of leaving
20 the Brooks Street Motor Inn. She was arrested for Driving While Suspended and this
21 November 9, 2017, arrest is the Missoula Municipal Court conviction referenced in the
22 Defendant's brief. After Defendant denied a consent search, law enforcement obtained a
23 search warrant to search Defendant's purse and wallet. In Defendant's purse, officers
24 found two Montana driver's licenses, issued to people other than Defendant, and two
checks, which on their face did not appear to belong to Defendant. Checks from the same

series and the identifications recovered were confirmed as having been used in the passing of forged checks.

At the time of the stop, two other suspects in the theft and forgery ring were in the vehicle with Defendant. One of the other occupants of the car indicated that his wife was in a room at the motel. Officers searched the room and discovered multiple identifications and checks that they believed were stolen. Officers also discovered items used for washing ink from a check in order to forge the check. Defendant was booked into jail on the charge of Driving While Suspended. The investigation into the theft and forgery was still ongoing at the time and Defendant was subsequently released.

On November 20, 2016, Missoula City Police made contact with Defendant and she voluntarily went to the Police Department for an interview. In an audio and video recorded interview, Officer Volinkaty advised Defendant of the *Miranda* rights and Defendant waived her rights before providing a statement to officers regarding the thefts and check forgeries. Defendant recounted she had been struggling with homelessness, poverty, and drug addiction. She denied being involved in the thefts of the checks and identifications, but admitted passing some of the stolen, forging checks, and using two of them to open bank accounts. She also implicated her co-defendants in the scheme. Defendant was released following the interview.

ARGUMENT

Defendant's voluntary statement, made after administration of the Miranda warning, to Officer Volinkaty on November, 20, 2016, is not subject to suppression. Defendant argued 1) the Double Jeopardy Clause of the United States Constitution somehow bars the State's use of Defendant's statement; and 2) IM REALLY UNCLEAR ABOUT WHAT THIS ARGUMENT IS. Defendant's arguments fail because they are not

1 based on accurate facts and do not have the support of well-established jurisprudence.
2 As such, this Court should deny Defendant's motion.

3 Double Jeopardy

4 The Double Jeopardy Clause of the United States Constitution does not bar
5 admission of the statements made by Defendant on November 20, 2016. The
6 Defendant argued that somehow the Double Jeopardy Clause of the United States
7 Constitution bars admission of her interview with Officer Volinkaty. However,
8 Defendant's argument fails as it confuses the facts of this case. The Defendant was
9 arrested for Driving While Suspended on November 9, 2016. However, she was not
10 interviewed following this arrest. Rather, law enforcement officers asked her to come in
11 for an interview on November 20, 2016. She consented to this interview and it was
12 completely separate from her Driving While Suspended arrest.

13 Regardless of the crime of arrest or the crimes subject to investigation, the Double
14 Jeopardy Clause of the U.S. Constitution generally protects against three distinct abuses,
15 none of which are at issue here: a second prosecution for the same offense following an
16 acquittal; a second prosecution for the same offense following a conviction; and multiple
17 punishments for the same offense. *State v. Zabawa*, 279 Mont. 307, 311, 928 P. 2d 151,
18 154 (1996), citing *State v. Nelson*, 275 Mont. 86, 910 P.2d 247 (1996). The Double
19 Jeopardy bar applies if the two offenses for which the defendant is punished or tried
20 cannot survive the 'same elements' or 'Blockburger' test." *U.S. v. Dixon*, 509 U.S. 688,
21 688 (1993). The test of identity of offenses (Double Jeopardy) is whether each separate
22 statutory provision requires proof of an additional fact which the other does not. *U.S. v.*
23 *Blockburger*, 284 U.S. 299, 304 (1932). Even if Defendant was interviewed regarding the
24 crimes charged in this case following her arrest on another matter, Double Jeopardy

1 would not prohibit admission of her statement, as suppression of a statement is not a
2 remedy for a Double Jeopardy violation. Additionally, the charge of Driving While
3 Suspended shares no elements in common with the charges the Defendant is facing. As
4 such, the Double Jeopardy clause is wholly inapplicable to this situation.

5 Suppression

6 The evidence obtained by law enforcement was obtained legally and is not subject
7 to suppression. Defendant's motion vaguely states the Court should suppress "all
8 statements and evidence gathered prior to the administration of Miranda warnings."
9 Based on the lack of clarity in Defendant's brief regarding what she wished to suppress,
10 the undersigned contacted defense counsel who orally clarified Defendant seeks to
11 suppress 1) the recorded statement to law enforcement dated November 2016; 2) the
12 results of the search of her purse conducted pursuant to a search warrant, on November
13 10, 2016; and 3) the search of the room at the Brooks Street Motor Inn conducted
14 following the Defendant's arrest on November 9, 2016. Based on that clarification the
15 State will address each of the three issues separately.

16 Defendant's Statement to Officer Volinkaty is not subject to suppression.

17 Defendant voluntarily provided her November 20, 2016 statement after Officer
18 Volinkaty informed Defendant of her Miranda rights and Defendant waived those rights,
19 verbally and in writing. (Attached as Exhibit 1) The actions were audio and video
20 recorded. Additionally, Defendant was informed from the beginning that she was a
21 suspect and the nature of the crimes being investigated.

22 "[A] defendant may move to suppress as evidence any confession or admission
23 given by the defendant on the ground that it was involuntary." Mont. Code Ann. § 46-13-
24 301(1). The State concedes, pursuant to Mont. Code Ann. § 46-13-301(2), it shoulders the

1 burden to prove by a preponderance of the evidence that Defendant's statements were
2 voluntarily made.

3 According to the Montana Supreme Court, "voluntariness" is a factual question
4 which takes into account the totality of the circumstances. *State v. Loh* (1996), 275 Mont.
5 460, 475, 914 P.2d 592, 601. Voluntariness is supported by the presence of timely and
6 complete *Miranda* warnings. *State v. Reavley*, 2003 MT 298, ¶ 15, 318 Mont. 150, 155, 79
7 P.3d 270, 275. The voluntariness of a statement is determined by the following factors,
8 listed in *State v. Hoffman*, 2003 MT 26, ¶ 16, 314 Mont. 155, 64 P.3d 1013 (citing Section
9 46-13-301(1), MCA).

10 In determining the voluntariness of a confession, the emphasis is on
11 whether the confession was the product of free choice or compulsion.
Davison, 188 Mont. at 437, 614 P.2d at 492. This inquiry is a factual
12 question which must take into account the totality of the circumstances.
Loh, 275 Mont. at 475, 914 P.2d at 601. When considering the totality of
13 the circumstances, courts have consistently focused on a number of
14 particularly relevant factors. These include the **defendant's age and level**
15 **of education, whether the defendant was advised of his or her Miranda**
16 **rights, the defendant's prior experience with the criminal justice**
17 **system and police interrogation, the defendant's background and**
18 **experience, the defendant's demeanor, coherence, articulateness, and**
19 **capacity to make full use of his or her faculties, and the length and**
20 **method of an interrogation.** *Loh*, 275 Mont. at 475-76, 914 P.2d at 601-02. In addition, a confession or admission extracted by any sort of threat or
21 violence, by the exertion of any improper influence, or by any direct or
22 implied promises, however slight, has the potential for being involuntary.
Loh, 275 Mont. at 476, 914 P.2d at 602 (citing *State v. Phelps* (1985), 215
23 Mont. 217, 224, 696 P.2d 447, 451). (Emphasis added.)

24
25 The Acknowledgement of Rights filed in this case, Defendant's criminal history,
26 and the recording of the November 20, 2016, interview show that Defendant made her
27 statement voluntarily.

28 i. **Defendant's age and level of education support a showing that Defendant's**
29 **statements were voluntary.**

1 In *State v. Hoffman*, Hoffman (who was 21 years old) asserted that he was unable
2 to understand his *Miranda* rights because he was of low, average intelligence and had
3 completed only six years of formal education. *State v. Hoffman*, 2003 MT 26, ¶ 20, 314
4 Mont. 155, 64 P.3d 1013. The Montana Supreme Court rejected this argument, writing:

5 However, we upheld the admissibility of a confession under similar
6 circumstances in *State v. Campbell* (1996), 278 Mont. 236, 924 P.2d 1304. In
7 that case, the defendant was twenty-two years old; and although he had
8 graduated from high school, his I.Q. was well below the normal range.
Campbell, 278 Mont. at 241, 924 P.2d at 1308. We noted that the defendant
appeared to understand his rights, and was able to converse coherently with
the interviewing officer. *Campbell*, 278 Mont. at 243, 924 P.2d at 1309.

9 *Hoffman*, ¶ 20. The Court further noted that nothing in the transcript of Hoffman's
10 interview suggested that his youth or lack of education interfered with his ability to converse
11 with the detective. *Id.*

12 Defendant's age and level of education support the conclusion the interview was
13 given voluntarily. Defendant was 39 years old at the time of the interview. She indicated
14 on her Acknowledgment of Rights that she has completed 12 years of formal education.
15 State's Exhibit 2. She reported nothing to suggest her mental functioning was impaired at
16 the time of the interview and there is no suggestion that her IQ is below average. She
17 understood the questions asked of her during the interview. These facts weigh in favor of
18 the assertion that Defendant's statement was voluntary.

19 **ii. Defendant was given timely and complete *Miranda* warnings. Defendant
20 voluntarily agreed to waive her rights and speak to officers.**

21 The presence of *Miranda* warnings supports a finding of a voluntary confession.
22 Defendant made no claim that there was any sort of unlawful arrest or a constitutional
23 infringement. Under this factor, this Court should again look to *Hoffman* for precedent.

24 In *Hoffman*, Hoffman appealed the lower court's denial of Hoffman's Motion to
Suppress the statements given to police. Hoffman claimed that his low intelligence, lack of

1 sleep, use of marijuana and preoccupation with his son made him unable to understand
2 the *Miranda* warnings. The Court wrote, "Of paramount significance is Hoffman's
3 concession...that he received *Miranda* warnings...and that he waived those rights before
4 making the statement he now seeks to suppress. The presence of timely and complete
5 *Miranda* warnings supports a finding of voluntariness." *Hoffman*, 2003 MT 26, at ¶ 23, 314
6 Mont. at 162, 64 P.3d at 1018. The Montana Supreme Court affirmed the District Court's
7 denial of Defendant's Motion to Suppress.

8 Like in *Hoffman*, Defendant was given timely and complete *Miranda* warnings.
9 Defendant does not contest that she was advised of her rights and that she waived those
10 rights. Officer Volinkaty read the advisement of rights, out loud, while the Defendant
11 followed along – reading the form. Defendant acknowledged that she had been advised of
12 his rights. She acknowledged that she understood her rights. She acknowledged that she
13 wished to speak with Officer Volinkaty. At no time did Defendant stop answering
14 questions, nor did she ask to terminate the interview. These facts all support a
15 determination that Defendant's statement was made voluntarily.

16 **iii. Defendant has sufficient experience with the criminal justice system.**

17 Although Defendant's experience with the criminal justice system consists of
18 multiple misdemeanors, it is sufficient for a finding that it supports voluntariness. Again, in
19 *Hoffman* the Montana Supreme Court found that Hoffman had sufficient experience with
20 the criminal justice system and police interrogation, even though Hoffman only had three
21 prior convictions: vandalism or malicious mischief, and two convictions for possession of
22 alcohol, both misdemeanors. *Hoffman*, 2003 MT 26, at ¶ 21. In *State v. Hill*, the Court
23 concluded that although Hill's exposure to the criminal justice system was limited to a prior
24

1 misdemeanor conviction, such exposure constituted sufficient prior experience. *State v.*
2 *Hill*, 2000 MT 308, ¶ 47-48, 302 Mont. 415, 14 P.3d 1237.

3 Defendant is not a novice when it comes to the justice system. She has two prior
4 misdemeanor convictions in Montana for Obstructing a Peace Officer and Possession of
5 Drug Paraphernalia. She also has multiple unresolved misdemeanor charges from
6 Massachusetts. This constitutes sufficient prior experience with the criminal justice system
7 to show she knows what she is doing and understands her rights.

8

9 **iv. Defendant's demeanor, coherence, articulateness and capacity to make full
use of her faculties support a finding of voluntariness.**

10 From the outset of the interview with detectives, Defendant's demeanor was calm
11 and collected. Defendant was alert and oriented. Defendant understood the questions
12 asked of her and gave articulate and coherent responses. Defendant was able to make
13 full use of her faculties.

14 Importantly, Defendant was able to track the conversation. In *Hoffman*, the
15 Montana Supreme Court noted that the District Court relied on the State's expert witness,
16 Dr. William Stratford, who testified that "the demeanor of the defendant in that initial
17 interview as determined from review of the transcript, did not appear to have any material
18 effect . . . upon the 'defendant's ability to track'." *Hoffman*, 2003 MT 26, at ¶ 28.

19 Hoffman claimed that lack of sleep, the effects of marijuana and his preoccupation
20 with his son affected his ability to comprehend the *Miranda* warnings. *Hoffman*, 2003 MT
21 26, at ¶ 24. The Court rejected this argument, as well stating:

22 Questions concerning the effects of drugs or alcohol on a suspect's ability to
23 voluntarily confess are regularly addressed by the federal circuit courts of appeals.
24 In *United States v. Banks* (9th Cir. 2001), 282 F.3d 699, the Ninth Circuit Court of
Appeals articulated the general rule that "[a] confession made in a drug or alcohol
induced state . . . may be deemed voluntary if it remains 'the product of rational
intellect and a free will' . . ." *Banks*, 282 F.3d at 706 (citing *Medeiros v. Shimoda*

(9th Cir. 1989), 889 F.2d 819, 823). The defendant in *Banks* argued that his statements to police were involuntary because he was under the influence of several intoxicants at the time of his interrogation. The circuit court rejected this argument, noting first that *Banks* offered no evidence, other than his own admission, that he had taken drugs or alcohol prior to the interrogation. The court also observed that even if the defendant had taken drugs or alcohol, the record demonstrated that the defendant was "calm and able to reason" and "able to understand the circumstances, follow instructions, and answer questions." *Banks*, 282 F.3d at 706.

Similarly, the Eighth Circuit Court of Appeals held, in *United States v. Casal* (8th Cir. 1990), 915 F.2d 1225, that "intoxication and fatigue do not automatically render a confession involuntary . . ." *Casal*, 915 F.2d at 1229. Consistent with the rule articulated in *Banks*, the Eighth Circuit Court concluded that the trial court did not commit reversible error when it upheld a confession of a defendant who had not slept for five days prior to being interrogated, but was able to intelligibly converse with police. *Casal*, 915 F.2d at 1229.

Applying this analysis in the present case, we conclude that Hoffman has not established that he was so overcome by the effects of marijuana or a lack of sleep that he was unable to comprehend his circumstances or understand the Miranda warnings proffered by Detective Johnson.

Hoffman, 2003 MT 26, at ¶¶ 25-27.

In this case, the Defendant did not articulate any reason her statement was not voluntary. Should Defendant argue in her reply that her methamphetamine use and the time of the interview, which started at 2:40 a.m., impacted her ability to understand and exercise her rights, based on Defendant's behavior in the interview, there exists no evidence this is the case. As such, the Court should rely on the recording to see Defendant was coherent and articulate.

v. The length of the interrogation was not overly long and the method of interrogation was not improper.

The length and method of the interview support voluntariness. The length of the interview with Defendant was not overly long. It started at 2:40 a.m. and ended at 3:36 a.m. when the Defendant was allowed to go home. The interview was conducted by Officer Volinkaty in a calm conversational manner and did not involve any sort of improper behavior on Officer Volinkaty's part. Nothing about the length or manner of the interview would support a finding that the Defendant's statement was involuntary.

Conclusion

In sum, all of the factors to be considered by the Court support the finding that Defendant's interview was conducted voluntarily.

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