

**APPLICATION FOR**

**DISTRICT COURT JUDGESHIP**

**Fourth Judicial District**

**A. PERSONAL INFORMATION**

1. Full Name: Donald James McCubbin, Jr.
- a. What name do you commonly go by? D. James McCubbin
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes.
3. Home Address: [REDACTED]
- Phone: [REDACTED]
4. Office Address: Missoula County Attorney's Office, 200 W. Broadway, Missoula, Montana, 59802
- Phone: 406-258-4737
5. Length of residence in Montana: 22 years.
6. Place of residence for the last five years:
- I have resided in Missoula, Montana, for the last five years.

**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>
University of California, Hastings College of the Law	San Francisco, CA	1997	Juris Doctor
Claremont McKenna College	Claremont, CA	1994	Bachelor of Arts

Macalester College	St. Paul, MN	Attended 1990-1992	
San Francisco University High School	San Francisco, CA	Attended 1986-1988 and 1989-1990	GED 1990

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

*Omicron Delta Epsilon*, International Honor Society for Economics, admitted 1994.

Recipient of *Eckert-Smith Economics Award*, Claremont McKenna College, 1994.

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.

During law school I devoted time to an internship with a Federal Magistrate Judge and volunteering at the Office of the Public Defender. 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 State Bar	1997
United States District Court, District of Montana	1998

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

I am employed in the Missoula County Attorney's Office in Missoula, Montana, as a Deputy County Attorney, Senior Attorney. I am currently assigned primarily to prosecution of felony drug offenses, and I am a member of the High Intensity Drug Trafficking Area (HIDTA) Missoula Drug Task Force. I also work with the other attorneys in the office for coverage of other court appearances and consultation on civil matters, on an as-needed basis.

Professional associates in the Missoula County Attorney's Office include the following:

Kirsten Pabst, Missoula County Attorney

Jason Marks, Chief Deputy Attorney

Deputy County Attorneys: Mac Bloom; Suzy Boylan; Jennifer Clark; Anna Conley; Diane Conner; Jessica Finley; Mark Handelman; John Hart; Amber Henning; Kelly Henkel; Matt Jennings; Jordan Kilby; Selene Koepke; Lacey Lincoln; Brian Lowney; Ryan Mickelson; Meghann Paddock; Karla Painter; Brittany Williams; and Caitlin Williams.

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
Missoula County Attorney 200 W. Broadway, Missoula, Montana 59802	Deputy County Attorney, Senior Attorney (Criminal)	Jan. 2015 - present
Missoula County Attorney 200 W. Broadway, Missoula, Montana 59802	Deputy County Attorney, Senior Attorney (Civil)	Nov. 2006 - Dec. 2014
Ravalli County Attorney 205 Bedford, Suites A & B Hamilton, Montana 59840	Deputy County Attorney, Civil Attorney	Nov. 2001 - Oct. 2006
Henning & Keedy, PLLC Kalispell, Montana <i>Subsequently reorganized as:</i> Henning, Rutz & McCormack 1131 S. Main Street, Kalispell, Montana, 59901	Associate Attorney	Nov. 1997 - Oct. 2001
Montana Legal Services Assn. Missoula, Montana <i>Current address:</i> 1535 Liberty Ln Suite 110D, Missoula, MT 59808	Hotline Associate	Aug. 1997 - Oct. 1997

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

I have been employed continuously in the practice of law since shortly after completion of law school.

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

My current practice of law is as a prosecutor, devoted primarily to the investigation and prosecution of felony drug offenses. I have served in this role since January, 2015.

I currently manage a caseload which consists of approximately 100 open felony cases and another dozen or so cases with outstanding warrants, as well as around 20 post-conviction Petitions to Revoke. I appear in court on a regular and frequent basis, typically with 35 or more court appointments in my cases in a given week. The Missoula County Attorney has assigned two prosecutors per District Court department to cover most appearances at law & motion sessions. Through this system, I regularly appear for routine matters in a broad range of criminal cases, in addition to the cases assigned to me as the primary prosecutor. Criminal litigation comprises approximately 85% of my current practice.

As a member of the High Intensity Drug Trafficking Area (HIDTA) Drug Task Force, I advise law enforcement on the handling of informants, and controlled drug purchase operations involving informants and undercover officers. I also regularly review search warrant applications. In addition, I maintain general availability for law enforcement consultations after hours and on weekends. These matters constitute approximately 10% of my practice.

My practice also includes occasional coverage of mental health commitments, civil child abuse and neglect cases, juvenile prosecutions, and consultations with other Deputy County Attorneys on various civil matters, drawing from my prior experience on the civil side of the office in Missoula and Ravalli counties. I estimate these matters to make up approximately 5% of my current practice.

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

While my current practice focus is in criminal prosecution, prior to 2015 I practiced law in a broad range of civil topics. From 2001 - 2006 I was employed as Ravalli County's first full time Civil Deputy County Attorney, and then from 2006 - 2014 as a Senior Civil Deputy County Attorney in Missoula County. In those positions I served as primary legal counsel to Boards of County Commissioners and Planning Boards in land use matters, including subdivisions, zoning, regulatory enforcement, road issues, and numerous district court and appellate cases. I also advised Fire District boards in employment and open government matters, including litigation. My duties also included, at various times, general employment matters such as discrimination or accommodation claims, contract drafting and negotiations, and litigation of mental health commitment and civil child abuse and neglect cases.

I have conducted some limited lobbying on behalf of Missoula and Ravalli counties, and in support of bills sponsored by the Montana County Attorneys Association.

Prior to entering public service, I had been engaged in the general practice of law from 1997-2001. In that time period, approximately half of my practice was in family law, with the remainder in general civil litigation and a few criminal defense cases.

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

The current focus of my practice, since 2015, is in the prosecution of felony drug offenses.

My prior practice as a Civil Deputy County Attorney in Missoula and Ravalli counties was general in nature, but tended to focus in the areas of land use law, public meetings and public records.

When I was in private practice from 1997-2001, approximately half of my practice was in family law.

17. Do you regularly appear in court? Yes.

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

Federal court	1%
State or local courts of record	98%
Administrative bodies	2%
Other	1%

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

The vast majority of my practice over the last four years has been in criminal litigation. Although most cases have resolved prior to trial, many of my prosecution cases have required thorough trial preparation. Prior to 2015, approximately 50% of my practice was in civil litigation. Of that, about a third was trial practice, primarily in a non-jury setting.

19. How frequently have you appeared in court?

I appear very frequently in court. In my current practice, I typically have 35 or more court appointments in my cases in a given week.

20. How frequently have you appeared at administrative hearings?

My current practice as a prosecutor does not include regular appearances at administrative hearings. At this time I appear only occasionally before bodies such as the Montana Board of Pardons and Parole.

Prior to 2015, in my role as a Civil Deputy County Attorney, I appeared very regularly at administrative hearings held by county boards including the Board of County Commissioners, Planning Board, Fire District boards, Health Board, and Park Board, as well as occasionally before State boards such as the Human Rights Commission.

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

Civil	48%
Criminal	48%
Other	4%

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 appeared before the Montana Supreme court in twelve cases. My current duties as a prosecutor generally do not include appellate work, which is handled by the Attorney General's Office. I have had one active case before the Montana Supreme Court within the last five years:

*Mark Muir, Chief Of Police, City Of Missoula v. Bilderback and Felton*, DA 14-0688, 2015 MT 180, 379 Mont. 459; and DA 14-0687, 2015 MT 181, 379 Mont. 468 (2015). Two appeals out of a single district court case. This was a civil drug forfeiture case, in which the primary issues were the validity of a warrant, and an innocent owner claim for a vehicle by the mother of the criminal defendant. Summary judgment was granted to Chief Muir upon the search warrant issue and was affirmed on appeal. Forfeiture of the vehicle was granted by the District Court, then reversed on appeal, where defendant's mother was held to have a valid innocent owner claim.  
Opposing counsel: Craig Shannon, 240 East Spruce Street, Missoula, Montana 59802, 406-542-7500.

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

I have tried five jury trials in the last ten years.

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

I have appeared at many different types of dispositive adjudicatory non-jury proceedings over the last ten years, including termination of parental rights proceedings, mental health commitments, bench trials in other civil litigation, hearings upon petitions to revoke suspended sentences, and criminal bench trials. I estimate that I have tried over forty of these various matters in the last ten years.

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.

My primary cases have included work in at least two hundred felony prosecutions over the last two years. I consider all felony prosecutions I work on to be primary cases, due to the serious nature of these matters both for the community and for those accused of an offense. Please see attached supplemental response which identifies representative cases for each of the counsel against whom I have litigated my primary cases in this time period. For counsel with whom I have litigated more than one case, two cases are referenced.

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

Adversary proceedings of this type have been a minor part of my current practice, from 2015-present.

Prior to 2015, I routinely attended hearings of all types before various county boards and commissions. My usual role in these matters was as legal advisor to the board or commission members.

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 presented many legal trainings for law enforcement, county employees, fire districts, planning boards, and County Commissioners. Most of these have been informal trainings on various topics, such as Search and Seizure law, Subdivision Review, Public Records, Open Public Meetings, and Public Road Easements. I have given these types of presentations regularly throughout my career as a Deputy County Attorney in Missoula and Ravalli counties.

I have also given presentations at a number of formal seminars for which professional education credit was awarded to participants. These have included:

Montana Association of County Attorneys, 2014 Winter Training Seminar. Presentations on zoning law, subdivision review, and conflicts of interest.

Montana Association of Registered Land Surveyors, 2013 Annual Conference. Presentation on historic road law and the legal status of the right-of-way for Mullan Road, one of the first territorial travel routes through Montana, Idaho, and Eastern Washington.

Montana Dept. of Natural Resources and Conservation, Floodplain Seminar, July 2010. Presentation on floodplain management law.

Montana Association of County Attorneys, 2006 Winter Training Seminar. Presentation on subdivision review and litigation avoidance.

Montana Association of County Attorneys, 2005 Winter Training Seminar. Presentation on civil drug forfeitures.

#### **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, 1997 - present.

Montana County Attorney Association. Associate member through employment as a Deputy County Attorney, 2001 - present.

Western Montana Bar Association. Current member, first joined in 2008, and previously served as a Director, approx. 2009 - 2011.

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.

Motorcycle Safety Foundation, certified Ridercoach, 2016 - present.

Western Montana Fish and Game Association, annual member, 2015-present.



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

I have not previously run for or held an elected public office. I have served as an appointed Deputy County Attorney in Ravalli County 2001 - 2006, and then as an appointed Deputy County Attorney in Missoula County from 2006 through the present.

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

Civilization has been established and is maintained by communities, not individuals. I believe it is important to contribute to the community. In addition to devoting my professional life to public service, I previously served for many years as a volunteer and board member for Search & Rescue in Ravalli and Flathead counties. Over the years I have participated in various fundraising events to promote charities, including the RATPOD bicycle ride to support Camp Mak-A-Dream, and the Park-to-Park bicycle ride to support CASA of Montana.

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

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

No.

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

No.

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

No.

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

No.

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

No.

#### **F. BUSINESS AND FINANCIAL INFORMATION**

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

I am a certified Ridercoach serving as a motorcycle safety instructor with the Montana Motorcycle Rider Safety program. This is nominally a paid position through MSU Northern, for time spent in instruction. I have been an instructor with the program since June, 2016. I teach motorcycle safety classes through this program approximately four to six weekends per year.

I have also occasionally assisted with my wife's businesses and have been a named director (primarily for insurance purposes). These include Blue Dragon Beads llc, 2004-2010; and Silver Moon Studios llc, 2010-present. These businesses have involved jewelry production and sales, and retail sales of beads and jewelry supplies.

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.

Silver Moon Studios llc. I am a director together with my wife Elizabeth McCubbin. This business involves jewelry production and sales, and retail sales of beads and jewelry supplies. I occasionally assist with the business but am primarily joined as a director for insurance purposes. I am prepared to withdraw from the business if necessary upon appointment as a district court judge.

39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, identify the source and the approximate percentage of your total income it constituted over the last five years.

The only fees or compensation I have received outside of my employment as a Deputy County Attorney has been from occasional weekend work as a motorcycle safety instructor with the Montana Motorcycle Rider Safety program, an educational program of MSU Northern. Money is not my primary motivation for this activity; this payment does little more than cover my expenses and has constituted less than 1% of my total income over the last five years.

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.

I am not aware of any relationships or interests that might conflict with the general performance of judicial duties. There is of course potential for conflicts of interest in individual cases, based on prior litigation I have conducted and/or with persons I have prosecuted. I am not aware of any relationships or matters that would cause me embarrassment.

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.

If not, please explain.                      Not applicable.

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

No.

If yes, please explain.                      Not applicable.

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.

Prior to 2015, a significant and regular part of my practice involved legal research and writing in civil litigation matters. I regularly researched and briefed matters connected with motions for summary judgment and appeals before the Montana Supreme Court. During my time as a Civil Deputy County Attorney in both Missoula and Ravalli counties, I conducted all of my own research and writing of briefs, with only occasional collaboration on brief writing with co-counsel.

Beginning in 2015 through the present, while engaged as a prosecutor, my legal research and brief writing has most commonly related to motions to suppress evidence. During this time I have increasingly engaged the assistance of law school interns, although I always personally review the research and briefs and remain responsible for all filings. I estimate that half of the briefs I have filed in this period have included work by interns. I also personally conduct legal research on a regular basis when advising law enforcement on search and seizure issues and in making charging decisions, as well as in connection with changes to the law following each legislative session.

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.

Prior to 2015, as a Civil Deputy County Attorney, I regularly wrote many legal memoranda on a broad variety of topics for County Commissioners and various other County officials. From 2015 through the present, as a prosecutor, I continue to write occasional legal memos, such as briefings on changes in the law for law enforcement.

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.

Please see attached.

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

Prior to 2015: 60%

2015-present: 15%

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

Yes, both.

## H. MISCELLANEOUS

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

I enjoy time spent with my wife and teenage boys, watching science fiction and superhero movies, playing games, bicycling, and going on walks. My wife and I enjoy regular gaming nights with friends. I have fun with multiple forms of bicycling, and have multiple cycles for use on different terrain in all seasons. I enjoy responsible motorcycling, on both pavement and dirt “adventure” riding, and also find it very rewarding to teach motorcycle safety courses. I have a collection of small river and lake boats that I try to get wet occasionally. I also enjoy camping at the end of a day spent exploring the outdoors.

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

A strong work ethic was encouraged in my family from a young age. I started working on my grandparents’ tree farm with odd jobs such as clearing brush when I was around ten years old. In high school, I got a job at a pizza restaurant. I then worked in construction for a summer prior to going to college. During college I worked as a lifeguard, in a sporting goods store, and in a pet supply store. While attending law school I had a series of jobs as an office temp and legal intern, the longest of which was in a law office processing Small Business Administration loan applications. I also took on a volunteer internship (not for school credit) at the public defender’s office. In my final year of law school I worked as a representative for a bar review course. I then started working for Montana Legal Services Association prior to passing the bar, and I have practiced law continuously since then (please see response to question #12).

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

Due to the high potential to create conflicts of interest with my employment as a Deputy County Attorney, I have not personally performed legal pro bono work in this time period. I have instead supported various charities.

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

A person who influenced my view of our justice system was a client I assisted when volunteering at the public defender office in law school. Here I will call him “Joe.” Joe had been observed by police receiving a quantity of cash from another individual while sitting on some door steps. Joe was arrested for suspicion of dealing drugs, and was found to have a distribution quantity of drugs in his bag. I was assigned to assist Joe with his case. I drafted a motion to suppress and dismiss in Joe’s case, because the receipt of cash, alone, was insufficient to establish probable cause for his arrest and search of his

belongings. My motion was successful, but before the motion was granted, Joe was caught selling drugs to an undercover officer. He subsequently pleaded guilty to drug distribution in the second case.

I had come to know Joe fairly well while working on his case. Joe used to loiter outside the law school and intercepted me between classes on a number of occasions. Joe was not a violent person and I never felt uncomfortable in his presence; to the contrary, I rather enjoyed our talks. Yet Joe certainly was a criminal.

My experience with Joe opened my eyes to the complicated and often contradictory factors that come into consideration in our system of justice. Joe had chosen to continue dealing drugs even after he had been arrested and charged for drug distribution. Although punishment through a prison sentence might have been justified, Joe was given a suspended sentence. What Joe needed was education and redirection to help him focus his business sense in a productive manner. Joe may not have deserved a second chance, but the sentencing judge found that the interests of society in potentially rehabilitating Joe, although not without risk, outweighed the high cost and marginal benefit of incarcerating him. Joe's case helped me understand that our system of justice must take into account the unique needs and circumstances of individual people in order to serve the overall interest of society as a whole.

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

A district court judge needs to have an excellent sense of balance. The judge must be able to keep cases moving and reach timely decisions. But a judge should not be impulsive; efficient case management must be balanced with patience, and with taking the time to adequately consider all sides of an issue before ruling. In criminal sentencing decisions, a judge should maintain objectivity and consistency among cases, while also considering and adjusting for unique circumstances. The judge should have the ability to reach a sentence that is both just and compassionate, considering the defendant's background and rehabilitation needs as well as the impact of crime on victims. In civil matters, a judge should apply the law in a neutral manner to maintain consistent and predictable application of the law. A judge should make firm decisions, but also be flexible in case management, and respectful to all parties even when making adverse rulings. A district court judge should also balance personal convictions with a strong sense of integrity and objectivity. Above all, a judge must be true to the law, and should be prepared to make decisions that the judge may not personally like.

55. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

I believe strongly in the principle of stare decisis. Consistency and predictable application of the law are very important in civil matters to enable planning and decision making that ultimately support a strong economy. In criminal cases, consistency with precedent helps ensure a fair system of justice. However, I have also found that there is sufficient flexibility in the law that a good judge can reach just and compassionate decisions adjusted for the facts of a case, while still acting consistently with legal

precedent. It is not the role of a district court judge to create new law, but a good judge is able to recognize when inapposite cases must be distinguished. The judge should then clearly explain the basis for all rulings, and particularly in any cases that could be perceived as deviating from precedent, so that litigants and members of the public will understand how consistency and predictability of the law are being maintained.

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

Serving as a district court judge would allow me the opportunity to expand my public service career while drawing upon the experience I have in both civil and criminal law. A Montana district court judge faces many challenges in a broad variety of cases. I believe that I am well suited to take on those challenges and that I could do the job well. I enjoy legal research and writing, and I would look forward to the opportunity to do more of it. I believe I could do a good job serving the community in this role, and I think I would find serving as a district court judge to be interesting and rewarding.

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

In my current work as a prosecutor, I am proud of my role in holding dozens of drug dealers accountable for their offenses, while also helping scores of drug users obtain an appropriate level of chemical dependency treatment.

I am fortunate to have had the opportunity to litigate multiple reported cases which have contributed to Montana legal precedent. The following cases are among the most significant:

*Liberty Cove, Inc. v. Missoula County*, DA 09-0183, 353 Mont. 286 (2009) and *Williams v. Missoula County Commissioners et al*, DA 12-0343, 371 Mont. 356 (2013). This pair of cases arose out of a development proposal that would have included gravel mining in an area between Missoula and Lolo. I was involved in the cases from their beginnings during public land use proceedings, and then handled the litigation for the County through the two appeals. In the first case, the Court upheld the County's enactment of interim zoning which temporarily precluded the proposed gravel mining operation. The second case was brought by a neighboring property owner after permanent zoning had been enacted by the County and then protested. The County joined the plaintiff's position challenging the validity of the zoning protest statute at §76-2-205(6), MCA. The Montana Supreme Court agreed with Williams and the County, holding that the zoning protest statute was unconstitutional, and upholding the county's zoning ordinance.

*Zunski v. Frenchtown Rural Fire Dept. Board*, DA 12-0505, 371 Mont. 552 (2013). This case had its origins in a decision by the Board of the Frenchtown Fire District to hire an interim fire chief. The initial decision was made at a meeting that was inappropriately closed to the public. The Board first consulted with me after the decision was challenged. We were able to fashion a remedy by holding a complete new public process for the Board to revisit its decision. This process and the District's method of production of public documents were both upheld by the Montana Supreme Court, and the case now

serves as guidance to public agencies regarding public participation procedures.

*John Richards, et. al. v. Missoula County, et. al.*, DA 09-0294, 354 Mont. 334 (2009), and *John Richards v. Missoula County*, DA 11-0721, 366 Mont. 416 (2012). These two cases arose out of two subdivision proposals for the same parcel of land. I was involved in the cases from their beginnings during subdivision application proceedings, and then handled the litigation for the County through the two appeals. Both subdivision proposals were denied by the County Commissioners, primarily due to adverse impacts on wildlife. The County was granted summary judgment in each case, with both rulings upheld by the Montana Supreme Court. The first case was unique in that the Supreme Court upheld the grant of summary judgment by the district court without a hearing. The second case discussed and clarified the standards for when evidence from outside an administrative record may be considered upon judicial review.

*Ravalli County v. Dallas Erickson*, Case 03-593, 320 Mont. 31 (2004). This was a case of first impression interpreting §7-5-135, MCA regarding a district court's duty to determine the constitutionality of an ordinance proposed for a ballot initiative. I had filed a petition for the County, requesting that the district court review an obscenity ordinance proposed for a ballot initiative. This request was made following a history of a prior similar ordinances in Ravalli County being struck down as unconstitutional. The district court denied the petition on the grounds that it sought an advisory opinion. The Montana Supreme Court held that pursuant to the plain meaning of the statute, the district court did have an obligation to rule upon the constitutionality of the proposed ordinance.

While I am proud of my work in these reported cases and many other successful court cases, what I am even more proud of are the many situations where disputes were avoided or resolved without litigation. I have been involved in countless situations advising clients, county commissioners, and law enforcement where I have been able to assist in finding solutions to problems that minimized or avoided litigation. The benefit to my clients and the public from finding solutions has far exceeded the benefit I could have achieved with an equivalent effort in litigation, so I am even more proud of the conflicts I have avoided than those I have fought and won.

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

I am not aware of further pertinent information.

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?

The breadth of my experience makes me uniquely qualified to serve as a district court judge. I am fortunate to have practiced law across a broad spectrum of topics. While most attorneys will have spent their careers focused in either civil or criminal practice, I have gained significant experience in both. I have also effectively managed a heavy felony caseload, and in doing so I have appeared in court more



frequently than most attorneys. The ability to competently address a large number of cases in both the civil and criminal aspects of the law is critical for a Montana district court judge, and I am prepared to meet this challenge.

### 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.

May 4, 2019  
(Date)

  
(Signature of Applicant)

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A signed original **and** an electronic copy of your application and writing sample must be submitted by  
***5:00 p.m. on 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](mailto:mtsupremecourt@mt.gov)**

<u>Attorney Name</u>	<u>Address</u>	<u>Telephone</u>	<u>Case Caption</u>	<u>Primary charges</u>	<u>Trial Date</u>	<u>Judge Name</u>	<u>Judge Phone</u>
Shandor Badaruddin	Moriarity & Badaruddin PLLC, 736 South 3rd Street West, Missoula, MT 59802	406-728-6868	State v. Christopher Curry, DC-18-641	Criminal Possession of Dangerous Drugs with Intent to Distribute	Case resolved with plea agreement prior to trial.	Hon. Shane Vannatta	406-258-4765
			State v. Cynthia Smith, DC-17-255	Criminal Possession of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
Johnna Baffa	Van De Wetering Law Office, 269 W Front St, Missoula, MT 59802	406-543-6577	State v. Steven Spanbauer, DC-16-257	Criminal Possession of Dangerous Drugs with Intent to Distribute	Case resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
Daniel Biddulph	Ferguson Law office, 425 E Spruce Street, PO Box 8359, Missoula, Montana 59807	406-532-2664	State v. Kennett Standingrock, DC-16-256	Criminal Possession of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
			State v. Ethan Swafford, DC-16-139	Criminal Possession of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. Karen Townsend	406-258-4774
Susan Boyer	Office of the Public Defender, 610 Woody St, Missoula, MT 59802	406-523-5140	State v. Michael Carter, DC-16-538	Criminal Distribution of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
			State v. Anneay Cockrell, DC-17-57	Endangering the Welfare of a Child	Case resolved with enrollment in Family Treatment Court.	Hon. John Larson	406-258-4773

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Joan Burbridge	Office of the Public Defender, 610 Woody St, Missoula, MT 59802	406-523-5140	State v. Carroll McClure, DC-16-227, DC-17-540, and DC-18-453	Criminal Possession of Dangerous Drugs with Intent to Distribute, and Criminal Possession of Dangerous Drugs	All cases resolved without trial.	Hon. Leslie Halligan	406-258-4771
			State v. Kegan Salter, CR-2019-364	Criminal Possession of Dangerous Drugs	Trial has not yet been scheduled.	Hon. Robert Deschamps III	406-258-4772
Nick Brooke	Smith & Stephens, P.C., 315 W Pine St., Missoula, MT 59802	406-721-0300	State v. Odel Stephens, DC-18-53	Criminal Distribution of Dangerous Drugs	Trial vacated, arrest warrant pending.	Hon. Robert Deschamps III	406-258-4772
Benjamin Darrow	Darrow Law, 415 N. Higgins, Suite 8, P.O. Box 7235, Missoula, MT 59807	406-647-0417	State v. Andrew Foell, DC-18-281	Criminal Distribution of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. Leslie Halligan	406-258-4771
Jennifer Dwyer	Law Office of Jennifer Dwyer, PLLC, 1700 W. Koch, Ste. 9, Bozeman, MT 59715	406-551-2219	State v. Sean Reinhart, CR-2019-310	Criminal Possession of Dangerous Drugs, and Assault with Bodily Injury	Trial has not yet been scheduled.	Hon. Alex Beal	406-258-3470
Jeavon Ehler	Office of the Public Defender, 610 Woody St, Missoula, MT 59802	406-523-5140	State v. Stygles, DC-18-748	Criminal Distribution of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. Shane Vannatta	406-258-4765
			State v. Randall, DC-18-485	Criminal Possession of Dangerous Drugs	Trial has not yet been scheduled.	Hon. Shane Vannatta	406-258-4765

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Carolyn Gibadlo	Office of the Public Defender, 610 Woody St, Missoula, MT 59802	406-523-5140	State v. Ingrid Cady	Criminal Possession of Dangerous Drugs	Trial has not yet been scheduled.	Hon. Leslie Halligan	406-258-4771
			State v. Robert Bedwell	Criminal Possession of Dangerous Drugs with Intent to Distribute	Trial has not yet been scheduled.	Hon. Robert Deschamps III	406-258-4772
Richard Gillespie	Office of the Public Defender, 610 Woody St, Missoula, MT 59802	406-523-5140	State v. Melissa Fussell, DC-18-185	Criminal Possession of Dangerous Drugs with Intent to Distribute	Trial vacated, arrest warrant pending.	Hon. Karen Townsend	406-258-4774
Robert Greenwell	Office of the Public Defender, 610 Woody St, Missoula, MT 59803	406-523-5140	State v. Kelli Nagel, DC-17-7	Criminal Possession of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. Leslie Halligan	406-258-4771
			State v. Benjamin Stratton, DC-17-510	Criminal Possession of Dangerous Drugs with Intent to Distribute	Case resolved with plea agreement prior to trial.	Hon. Robert Deschamps III	406-258-4772
Robin Hammond	Office of the Public Defender, 610 Woody St, Missoula, MT 59801	406-523-5140	State v. Autumn Heinz, DC-18-239	Endangering the Welfare of a Child	Defendant entered open guilty plea prior to trial.	Hon. Robert Deschamps III	406-258-4772
			State v. Tayla Matte, DC-18-125	Obstructing Justice	July 31, 2019	Hon. Karen Townsend	406-258-4774

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Rob Henry	Office of the Public Defender, 610 Woody St, Missoula, MT 59801	406-523-5140	State v. Matthew Brekke, DC-18-378	Criminal Possession of Dangerous Drugs with Intent to Distribute	June 12, 2019	Hon. Karen Townsend	406-258-4774
			State v. Matthew Gunter, DC-18-549	Criminal Possession of Dangerous Drugs with Intent to Distribute	Case resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
Ellie Hill Smith	Ellie Hill Smith, Attorney at Law, University Plaza 100, Ryman St., Ste 700 Missoula, MT 59802	406-218-9608	State v. Joshua Bagley, DC-17-297	Criminal Possession of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
			State v. Daniel Duval, DC-17-572	Criminal Possession of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. Robert Deschamps III	406-258-4772
Nate Holloway	Paul Ryan & Associates, 218 East Front St, Suite 210, Missoula, MT 59802	406-542-2233	State v. Darien Hensrud, DC-16-511	Criminal Possession of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. Robert Deschamps III	406-258-4772
			State v. Collin Schneider, DC-18-123	Criminal Possession of Dangerous Drugs with Intent to Distribute	Case resolved with forfeiture agreement and dismissal.	Hon. John Larson	406-258-4773

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Nathan	Hulling	Judnich Law Office, 501 S. Russel St., Missoula, MT 59801	406-215-2340	State v. Shane Dudden, DC-18-61	Criminal Distribution of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. Karen Townsend	406-258-4774
				State v. Peter McCay, DC-18-547	Criminal Possession of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
Lance	Jasper	Reep, Bell, Laird & Jasper, 2955 Sotckyard Rd., Missoula, MT 59808	406-541-4100	State v. Hunter Fisher, DC-17-742	Criminal Possession of Dangerous Drugs with Intent to Distribute	Case resolved with plea agreement prior to trial.	Hon. Karen Townsend	406-258-4774
				State v. Majesta Larocque, DC-18-384	Criminal Distribution of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
Martin	Judnich	Judnich Law Office, 501 S. Russel St., Missoula, MT 59801	406-215-2340	State v. Alex Teberg, DC-17-693	Criminal Possession of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. Robert Deschamps III	406-258-4772
Justin	Kalmbach	1 Fifth Ave W., Polson, MT 59860	406-883-1159	State v. Lisa Brueggeman, DC-19-183	Endangering the Welfare of a Child, and Criminal Possession of Dangerous Drugs with Intent to Distribute	Trial has not yet been scheduled.	Hon. Shane Vannatta	406-258-4765
Lisa	Kauffman	1234 S. 5th St. West, Missoula, Montana 59801	406-544-1903	State v. Gage Musson, DC-17-252	Criminal Possession of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. Karen Townsend	406-258-4774
				State v. Marie Wallace, DC-17-374 and DC-17-375	Criminal Possession of Dangerous Drugs with Intent to Distribute	Both cases resolved with plea agreement prior to trial.	Hon. Karen Townsend	406-258-4774

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Brianna Kottke	Stack & Kottke, PLLC, 234 E. Pine Street Missoula, MT 59801	406-284-1860	State v. Brian Glessner, DC-17-321	Criminal Possession of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
			State v. Barbara Brown, DC-18-55 and DC-18-56	Criminal Possession of Dangerous Drugs with Intent to Distribute, and Criminal Possession of Dangerous Drugs	Trials vacated at defense request, new trial dates not yet scheduled.	Hon. Karen Townsend	406-258-4774
Peter Lacny	Datsopoulos MacDonald & Lind, P.C., 201 W Main St, Missoula, MT 59802	406-728-0810	State v. Lucian Dahy, DC-17-221	Criminal Possession of Dangerous Drugs	Case resolved with deferred prosecution agreement prior to trial.	Hon. John Larson	406-258-4773
			State v. Brendan Hagan, DC-18-52	Criminal Distribution of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
Brooke Lainsbury	Nevada Legal Services, Inc., 204 Marsh Ave., Suit 101, Reno, NV 89509	775-284-3491	State v. Dillan Hopfauf, DC-17-516	Criminal Possession of Dangerous Drugs with Intent to Distribute	Case resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
			State v. Timothy Kooyman, DC-17-254	Criminal Possession of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. Karen Townsend	406-258-4774
F. Peter Landsiedel	Reep, Bell, Laird & Jasper, 2955 Sotckyard Rd., Missoula, MT 59808	406-541-4100	State v. Ethan Janetski, DC-18-567	Criminal Possession of Dangerous Drugs with Intent to Distribute	Case resolved with plea agreement prior to trial.	Hon. Leslie Halligan	406-258-4771

<u>Attorney Name</u>	<u>Address</u>	<u>Telephone</u>	<u>Case Caption</u>	<u>Primary charges</u>	<u>Trial Date</u>	<u>Judge Name</u>	<u>Judge Phone</u>
Ethan Lerman	Lerman Law Firm PLLC, 430 Ryman, Suite 100, Missoula, MT 59802	406-552-2400	State v. Cody Young, DC-17-133	Criminal Possession of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
Myshell Lyday	Office of the Public Defender, 610 Woody St, Missoula, MT 59802	406-523-5140	State v. Wynn Watson, DC-18-611	Criminal Possession of Dangerous Drugs with Intent to Distribute	Trial vacated at defense request while Defendant seeks inpatient drug treatment.	Hon. Shane Vannatta	406-258-4765
			State v. Christi Groneman, DC-18- 435	Criminal Distribution of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. Robert Deschamps III	406-258-4772
David Maldonado	Stevenson Law Office, 1120 Kensington Ave., Suite B, Missoula, MT 59801	406-721-7000	State v. Nathan Sandahl, DC-18- 153	Criminal Distribution of Dangerous Drugs, and Criminal Child Endangerment	Case resolved with forfeiture agreement and dismissal.	Hon. Leslie Halligan	406-258-4771
Reed Mandelko	Office of the Public Defender, 610 Woody St, Missoula, MT 59802	406-523-5140	State v. Cassidy McDonald, DC-17- 482	Criminal Possession of Dangerous Drugs with Intent to Distribute	Case resolved with plea agreement prior to trial.	Hon. Robert Deschamps III	406-258-4772
			State v. James Clark, DC-19-146	Escape, and Criminal Possession of Dangerous Drugs with Intent to Distribute	July 10, 2019	Hon. Robert Deschamps III	406-258-4772



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Minot	Maser	Maser Law PLLC, 415 N. Higgins Ave, Suite 118, Missoula, MT 59802	406-546-2771	State v. Megan Baughman, DC-17- 691 and DC-18-168	Criminal Possession of Dangerous Drugs, and Tampering with Evidence	Both cases resolved with plea agreement prior to trial.	Hon. Karen Townsend	406-258-4774
				State v. Michael Marshall, DC-18- 542, DC-18-623, and DC-18-650	Criminal Possession of Dangerous Drugs, and Theft	All cases resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
Matthew	McKeon	McKeon Law Firm, PLLC, 257 W. Front St., Suite A, Missoula, MT 59802	406-926-6363	State v. John Giblin III, DC-16-476	Criminal Possession of Dangerous Drugs with Intent to Distribute	June 13, 2018 (convicted all counts)	Hon. Robert Deschamps III	406-258-4772
Eli	Parker	Office of the Public Defender, 610 Woody St, Missoula, MT 59802	406-523-5140	State v. Courtney Miller, DC-17-594	Criminal Possession of Dangerous Drugs	Trial vacated while Defendant attends inpatient chemical dependency treatment.	Hon. Leslie Halligan	406-258-4771
				I have also appeared in multiple mental health commitment proceedings adverse to Mr. Parker, including bench trials, each in the Fourth Judicial District.				
Abigail	Rogers	Stack & Kottke, PLLC, 234 E. Pine Street Missoula, MT 59801	406-284-1860	State v. Matthew Grundy, DC-18-698	Criminal Possession of Dangerous Drugs	June 12, 2019	Hon. Karen Townsend	406-258-4774

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Paul Ryan	Paul Ryan & Associates, 218 East Front St, Suite 210, Missoula, MT 59802	406-542-2233	State v. Harry Cockrell, DC-14-506 and DC-17-165	Criminal Possession of Dangerous Drugs with Intent to Distribute, and Criminal Possession of Dangerous Drugs	Both cases resolved with plea agreement prior to trial.	Hon. Leslie Halligan	406-258-4771
			State v. Daniel Haffey, DC-18-205	Operation of Unlawful Clandestine Laboratory	Case resolved with plea agreement prior to trial.	Hon. Karen Townsend	406-258-4774
Patrick Sandefur	Law Office of Patrick Sandefur, 100 Ryman Ave, Missoula, MT 59802	406-721-5337	State v. James Sherman, DC-16-160, DC-16-234, DC-16-449, and DC-17-557	Criminal Possession of Dangerous Drugs and Burglary	All cases resolved with plea agreement prior to trial.	Hon. Leslie Halligan	406-258-4771
			State v. Cody Yankey, DC-16-298	Criminal Possession of Dangerous Drugs with Intent to Distribute	Case resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
Dwight Schulte	Schulte Law Firm P.C., 2425 Mullan Road, Missoula, MT 59808	406-721-6655	State v. Ricky Merriman, DC-17-188	Criminal Distribution of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. Robert Deschamps III	406-258-4772
			State v. Duard Archer, DC-19-111	Escape, and Criminal Possession of Dangerous Drugs	Trial has not yet been scheduled.	Hon. Shane Vannatta	406-258-4765
Craig Shannon	240 East Spruce St., Missoula, MT 59802	406-542-7500	State v. Chalee Mills, DC-17-432	Criminal Possession of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. Leslie Halligan	406-258-4771

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Brian	Smith	Smith Law PLLC, 202 W Spruce St, Missoula, MT 59802	406-274-0087	State v. Jacob Niebel, DC-16-396 and DC-17-40	Criminal Possession of Dangerous Drugs	Both cases resolved with plea agreement prior to trial.	Hon. Karen Townsend	406-258-4774
Ellie	Hill Smith	100 Ryman, Missoula, MT 59802	406-218-9609	State v. Misty Liberti, DC-18-140	Criminal Possession of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. Karen Townsend	406-258-4774
Katy	Stack	Stack & Kottke, PLLC, 234 E. Pine Street Missoula, MT 59801	406-284-1860	State v. Daniel Hinschberger, DC- 18-291	Criminal Production or Manufacture of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. Robert Deschamps III	406-258-4772
	with co- counsel Eric Newmark	Newmark Storms Law Office, LLC, 100 South Fifth Street, Fifth Street Towers #2100, Minneapolis, MN 55402	612-455-7050	State v. Zachary Mehr, DC-17-530	Criminal Possession of Dangerous Drugs with Intent to Distribute	Case resolved with plea agreement prior to trial.	Hon. Olivia Rieger	406-377-2666
Mathew	Stevenson	Stevenson Law Office, 1120 Kensington Ave., Suite B, Missoula, MT 59801	406-721-7000	State v. Derek Thrush, DC-18-101	Criminal Possession of Dangerous Drugs, Theft, and Official Misconduct	Case resolved with plea agreement prior to trial.	Hon. Karen Townsend	406-258-4774
Jennifer	Streano	Office of the Public Defender, 610 Woody St, Missoula, MT 59803	406-523-5140	State v. Billy Joe Rogers, DC-18-386	Criminal Possession of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
				State v. Exie France, DC-19-57 and CR-2019-433	Criminal Possession of Dangerous Drugs, and Tampering with Evidence	Trials have not yet been scheduled.	Hon. Shane Vannatta	406-258-4765

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Bryan	Tipp	Tipp Coburn Schandelson PC, 2200 Brooks St, Missoula, MT 59801	406-549-5186	State v. Joshua Nelson, DC-17-542 and DC-18-31	Criminal Distribution of Dangerous Drugs, and Criminal Possession of Dangerous Drugs	Both cases resolved with plea agreement prior to trial.	Hon. Karen Townsend	406-258-4774
				State v. David Holcomb, DC-19- 133	Criminal Possession of Dangerous Drugs with Intent to Distribute	Trial has not yet been scheduled.	Hon. Robert Deschamps III	406-258-4772
Diana	Wall	Stevenson Law Office, 1120 Kensington Ave., Suite B, Missoula, MT 59801	406-721-7000	State v. Tyler Schmoker, DC-19- 11	Criminal Possession of Dangerous Drugs	Trial vacated while Defendant attends inpatient chemical dependency treatment.	Hon. Shane Vannatta	406-258-4765
Brian	West	West Law Firm, P.C., Montana Building, 101 E Broadway St, Missoula, MT 59802	406-552-0130	State v. Jackie Ainsworth, DC-17- 205, DC-17-544, and DC-17-564	Criminal Distribution of Dangerous Drugs, and Tampering with Evidence	All cases resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
				State v. Savanna Stickney, DC-18- 165 and DC-18-299	Criminal Possession of Dangerous Drugs	Both cases resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
Ben	Williams	Office of the Public Defender, 610 Woody St, Missoula, MT 59803	406-523-5140	State v. Justina Maier, DC-17-366, DC-17-449, and DC- 18-160	Criminal Possession of Dangerous Drugs, Theft	All cases resolved with plea agreement prior to trial.	Hon. Karen Townsend	406-258-4774
				State v. Genevieve McGrath, DC-17- 750	Criminal Possession of Dangerous Drugs, and Theft	Case resolved with plea agreement prior to trial.	Hon. Robert Deschamps III	406-258-4772

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Jeff Wilson	Office of the Public Defender, 610 Woody St, Missoula, MT 59802	406-523-5140	State v. Cody Hall, DC-17-604	Criminal Possession of Dangerous Drugs with Intent to Distribute	Case resolved with plea agreement prior to trial.	Hon. Robert Deschamps III	406-258-4772
			State v. Calen Hengel, DC-15-476 and DC-17-625	Criminal Possession of Dangerous Drugs with Intent to Distribute, and Criminal Possession of Dangerous Drugs	Both cases resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
Rochelle Wilson	Wilson Law Office, 725 SW Higgins Ave # C, Missoula, MT 59803	406-543-0789	State v. James Church, DC-16-586	Criminal Possession of Dangerous Drugs	Case resolved with plea agreement prior to trial.	Hon. Robert Deschamps III	406-258-4772
			State v. Duane Marceau, DC-17-271 and DC-17-411	Criminal Possession of Dangerous Drugs	Both cases resolved with plea agreement prior to trial.	Hon. John Larson	406-258-4773
Leta Womack	Office of the Public Defender, 610 Woody St, Missoula, MT 59802	406-523-5140	State v. Truth Garrison, DC-18-45	Criminal Possession of Dangerous Drugs	Case dismissed after Defendant died from apparent overdose.	Hon. Leslie Halligan	406-258-4771
			State v. Rachel Gingras, DC-18-166	Criminal Possession of Dangerous Drugs with Intent to Distribute	Case resolved with plea agreement prior to trial.	Hon. Karen Townsend	406-258-4774

1 D. JAMES MCCUBBIN  
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2 KIRSTEN H. PABST  
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5 ATTORNEYS FOR PLAINTIFF

6  
7 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

8 STATE OF MONTANA,

9 Plaintiff,

10 -vs-

11 WILLIAM GROVER SHEGRUD,

12 Defendant.

Dept. No. 5  
Cause No. DC-18-732

**STATE'S RESPONSE TO  
DEFENDANT'S MOTION TO  
SUPPRESS AND DISMISS**

13  
14 Comes Now, D. JAMES MCCUBBIN, Deputy County Attorney of Missoula County,  
15 and respectfully files this response to Defendant's Motion to Suppress and Dismiss.

16  
17 **Introduction:**

18 Defendant argues that there was no particularized suspicion to justify an investigatory  
19 stop in this case, so that everything that followed should be suppressed and the case  
20 dismissed. However, the initial contact between officers and Defendant Shegrud was a  
21 voluntary contact without any seizure or violation of Defendant's rights. Defendant Shegrud  
22 provided his name to a police officer, who then determined that there was an outstanding  
23 arrest , as a for Shegrud. There simply was no seizure of any kind until after officers learned

1 Defendant had an outstanding arrest warrant. Lacking any seizure prior to his arrest upon a  
2 warrant, Defendant's motion to suppress and dismiss is without merit and should be denied.

3  
4 **Facts of the Case:**

5 The State anticipates that the testimony of the officers involved in this case, together  
6 with patrol car audio/video recording, will establish the following facts:

7 On December 4, 2018, at a little before 3:00 a.m., Missoula Police Officers Colyer and  
8 O'Dell were patrolling the area of 3035 Expo Parkway. The officers observed individuals  
9 sitting in two vehicles at the end of the cul-de-sac, which is bordered by empty commercial  
10 lots on all sides. The officers were aware of prior criminal activity associated with persons  
11 parked in locations similar to this cul-de-sac.

12 The officers parked their patrol car and approached the occupied vehicles on foot to  
13 make contact. The officers did not engage the emergency lights or siren on the patrol  
14 vehicle.

15 The officers separated and made contact with the occupants of the two vehicles  
16 separately, one officer per vehicle. Officer Colyer made contact with two individuals in a  
17 parked pickup truck, while Officer O'Dell contacted two persons in a parked sedan. The  
18 officers did not display any show of force, and maintained a conversational tone throughout  
19 their contact with the individuals. The individuals in the pickup truck spoke to Officer Colyer  
20 through the window of the vehicle. Defendant Shegrud and his companion in the truck  
21 identified themselves verbally to Officer Colyer. Officer Colyer then ran a routine records  
22 check of their identities through dispatch. Dispatch informed Officer Colyer that Defendant  
23

1 Shegrud had two outstanding arrest warrants. After learning of the warrants, Officer Colyer  
2 conducted an arrest of Defendant Shegrud.

3 An inventory search of Defendant Shegrud's belongings at the jail revealed suspected  
4 methamphetamine within a sunglasses holder that had been inside Defendant Shegrud's  
5 coat pocket. The substance was field tested and returned a presumptive positive result for  
6 methamphetamine. Defendant Shegrud was subsequently charged in this case with  
7 Possession of Dangerous Drugs.

8  
9 **Discussion:**

10 Under case law addressing Fourth Amendment search and seizure issues, there are  
11 three distinct levels of interaction between police and citizens: (1) consensual encounters,  
12 (2) detentions, and (3) arrests. Determining which has occurred at a given point in time  
13 requires an examination of what officers have said and done to see what degree of  
14 restriction, if any, was placed on the person's liberty. If there is no restriction and the  
15 encounter is consensual, then the encounter requires no justification. The initial police  
16 encounter involved in this case was a consensual encounter, there was no seizure prior to  
17 Defendant's arrest upon a warrant, and there was no requirement for particularized suspicion  
18 to justify the initial contact between police and Defendant Shegrud.

19 The seminal case on this topic is of course *Terry v. Ohio*, 392 U.S. 1 (1968). In that  
20 early case the Supreme Court noted that not all interactions between police and citizens  
21 amount to seizures. "Obviously, not all personal intercourse between policemen and citizens  
22 involves 'seizures' of persons. Only when the officer, by means of physical force or show of  
23



1 authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure'  
2 has occurred." *Terry v. Ohio*, 392 U.S. 1, 19, 88 S. Ct. 1868, 1879, n. 16 (1968).

3 In *United States v. Mendenhall*, 446 U.S. 544 (1980), the Supreme Court further  
4 clarified that consensual encounters between police and citizens do not require justification  
5 by particularized suspicion. In *Mendenhall*, the Supreme Court held that a police officer who  
6 approaches and questions one who voluntarily answers, is not making a search or seizure  
7 that requires any justification. "We adhere to the view that a person is 'seized' only when, by  
8 means of physical force or a show of authority, his freedom of movement is restrained. Only  
9 when such restraint is imposed is there any foundation whatever for invoking constitutional  
10 safeguards." *United States v. Mendenhall*, 446 U.S. 544, 553-554, 100 S. Ct. 1870, 1877  
11 (1980). Moreover, "As long as the person to whom questions are put remains free to  
12 disregard the questions and walk away, there has been no intrusion upon that person's  
13 liberty or privacy as would under the Constitution require some particularized and objective  
14 justification." *Id.* Therefore, "a person has been 'seized' within the meaning of the Fourth  
15 Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable  
16 person would have believed that he was not free to leave." *Id.* The Supreme Court then  
17 provided examples of circumstances that may indicate a person was seized, including "the  
18 threatening presence of several officers, the display of a weapon by an officer, some  
19 physical touching of the person of the citizen, or the use of language or tone of voice  
20 indicating that compliance with the officer's request might be compelled." *Id.*

21 The Montana Supreme Court has also explained that the first step in analysis of a  
22 claim of an illegal seizure is to determine whether a seizure had actually taken place. *State*  
23 *v. Strom*, 376 Mont. 277, 333 P.3d 218, ¶10 (Mont. 2014). "Both the Fourth Amendment to  
24

1 the United States Constitution and Article II, Section 11 of the Montana Constitution protect  
2 citizens from unreasonable searches and seizures. However, we have recognized that "'not  
3 all personal intercourse between policemen and citizens involves 'seizures' of persons.'" *Id.*,  
4 citing *State v. Wilkins*, 350 Mont. 96, 205 P.3d 795, ¶8 (Mont. 2009) (in turn quoting *Terry v.*  
5 *Ohio*, 392 U.S. 1, 19-20, 88 S. Ct. 1868, 1879, n. 16 (1968)).

6 In determining whether a seizure has occurred, Montana courts apply the same test  
7 under both the federal and Montana constitutions. *Strom* ¶10 and *Wilkins* ¶7, each citing  
8 *State v. Case*, 338 Mont. 87, 162 P.3d 849, ¶24 (Mont. 2007). A person has been seized  
9 only if, after viewing all the circumstances surrounding the incident, a reasonable person  
10 would not have believed that he or she was free to leave. *Id.* Montana adopted this test  
11 from the United States Supreme Court's decision in *United States v. Mendenhall*, 446 U.S.  
12 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). *State v. Jenkins*, 192 Mont. 539, 543, 629  
13 P.2d 761, 764 (Mont. 1981). The Montana Supreme Court has reaffirmed use of the  
14 *Mendenhall* test in multiple cases. See, e.g. *State v. Roberts*, 293 Mont. 476, 977 P.2d 974  
15 (Mont. 1999); *State v. Wilkins*, 350 Mont. 96, 205 P.3d 795 (Mont. 2009); *State v. Dupree*,  
16 378 Mont. 499, 346 P.3d 1114 (Mont. 2015). Under Montana law, circumstances which may  
17 indicate that a person has been seized include the presence of many officers, a display of  
18 weapons by an officer, physical touching of the person by the officer, or the officer's use of  
19 language or tone indicating compliance with the officer's request is required. *State v.*  
20 *Ballinger*, 382 Mont. 193, 366 P.3d 668, ¶18 (Mont. 2016), citing *Strom*, ¶10, in turn citing  
21 *Mendenhall*, 446 U.S. at 554, 100 S. Ct. at 1877.

22 The test for determining whether a police encounter was a seizure involves the  
23 application of objective factors. "[U]nder Article II, Section 11 of the Montana Constitution,

1 the test for whether a seizure occurs is a purely objective one. We re-affirm our holding in  
2 *Roberts* that no seizure occurs unless, in view of all the circumstances surrounding the  
3 incident, a reasonable person would have felt that he was not free to leave.” *State v.*  
4 *Clayton*, 309 Mont. 215, 45 P.3d 30, ¶22 (Mont. 2002), referencing *State v. Roberts*, 293  
5 Mont. 476, 977 P.2d 974 (Mont. 1999). This objective standard allows predictability for  
6 police to determine in advance whether their contemplated conduct will implicate  
7 constitutional rights, “and does not shift the focus of the inquiry to a person's subjective  
8 reaction to police conduct.” *Clayton* ¶23. The Montana Supreme Court has expressly  
9 rejected calls to adopt a subjective test based on the point of view of the person claiming to  
10 have been seized. *Strom* ¶11; see also *State v. Murray*, 359 Mont. 123, 247 P.3d 721, ¶23  
11 et. seq. (Chief Justice McGrath concurring, discussing Montana’s objective standard for  
12 determination of whether a seizure has occurred).

13 In *Wilkins*, the Montana Supreme Court also approvingly quoted Professor LaFave’s  
14 treatise noting that “if an officer merely walks up to a person standing or sitting in a public  
15 place (or, indeed, who is seated in a vehicle located in a public place) and puts a question to  
16 him, this alone does not constitute a seizure.” *Wilkins* ¶10, citing Wayne LaFave, *Search*  
17 *and Seizure* vol. 4 § 9.4(a) 419-21 (4th ed. West 2004). The U.S. Supreme Court had also  
18 cited an earlier edition of this treatise in *United States v. Mendenhall*, 446 U.S. 544, 553-554,  
19 100 S. Ct. 1870, 1877 (1980).

20 The facts of the *Wilkins* case are similar to the facts in the case at bar. In *Wilkins*, an  
21 officer was on routine patrol at 1:30 a.m. when he noticed a vehicle with its lights on parked  
22 halfway down a side street next to a salvage yard. The location where the vehicle was  
23 parked was a dark, remote area occupied by mostly industrial businesses that were closed at

1 that time. The officer drove past the vehicle and noticed that it was running. *Wilkins*, ¶2. The  
2 officer found the vehicle to be suspicious because it was unusual for a vehicle to be in the  
3 area, running and with its lights on, at that time of night, and that there had been recent  
4 burglaries in the area. The officer approached the vehicle and spoke to the driver. While  
5 speaking with her, the officer noticed the smell of alcohol and that Wilkins' speech was  
6 slurred. The officer then conducted a DUI investigation and arrested Wilkins for DUI. *Wilkins*,  
7 ¶3. The Montana Supreme Court upheld the district court's denial of Wilkins' motion to  
8 suppress, concluding that no seizure had occurred where the officer did not initiate the stop  
9 of the vehicle and did nothing to impede the driver's liberty by means of physical force or  
10 show of authority, such as activating his emergency lights or shining a spotlight in the  
11 vehicle. The initial contact with Wilkins was a voluntary exchange, and the later DUI  
12 investigation was supported by particularized suspicion gained through this exchange.  
13 *Wilkins*, ¶¶ 14-15.

14 The facts present in *State v. Dupree* are also informative. In *Dupree*, officers made  
15 contact with Dupree after receiving a tip that she was in possession of illegal drugs. Officers  
16 located Dupree at a train station and contacted her. The officers informed Dupree of the tip  
17 they had received. The officers asked Dupree whether she would be willing to sign a  
18 consent form allowing them to search her luggage. Dupree responded in the affirmative. The  
19 officers then asked Dupree if she would be willing to go to a back room to be searched.  
20 Dupree again agreed to do so. Upon reaching the back room, Dupree asked what would  
21 happen if she declined to consent to a search. The officers explained they would hold her  
22 until getting a canine unit to come sniff her luggage. *Dupree* ¶¶5 and 15. The Montana  
23 Supreme Court affirmed the District Court's ruling that the encounter between police and  
24

1 Dupree was consensual even after multiple officers escorted Dupree to another room.

2 *Dupree* ¶15. The police encounter with Dupree only became a detention requiring  
3 particularized suspicion when Dupree was advised that she would be detained if she did not  
4 consent to a search of her belongings. *Dupree* ¶16.

5 As in *Wilkins*, the initial contact between Officer Colyer and Defendant Shegrud also  
6 took place with Defendant Shegrud seated in a vehicle. Also as in *Wilkins*, the factors for  
7 determination of a seizure were not present during the initial contact between law  
8 enforcement and the Defendant herein. No weapons were displayed, Defendant was not  
9 touched or physically affected in any way, only one officer made contact with Defendant  
10 Shegrud and his companion in the pickup truck, the officers did not raise their voices, and  
11 law enforcement did not do or say anything to compel obedience of any kind. Officers did  
12 not even use the traffic control lights on their patrol car. The interaction with Defendant  
13 Shegrud in this case is significantly less intrusive than the consensual encounter in *Dupree*,  
14 where multiple officers had escorted Dupree into a separate room. The mere questioning of  
15 a person an officer encounters in a public place, such as a pedestrian in a public parking lot,  
16 is not a seizure. And, under *Wilkins*, it is clear that non-compulsory questioning of people  
17 specifically in parked cars is not a seizure. Just as was the case in *Wilkins* and *Dupree*, the  
18 contact between Officer Colyer and Defendant Shegrud in this case was not a seizure, and  
19 the consensual contact did not require justification by particularized suspicion.

20  
21 **Conclusion:**  
22  
23  
24

1           The initial contact between Officer Colyer and Defendant Shegrud was consensual,  
2 and was not a seizure. There was no requirement for particularized suspicion for the initial  
3 contact between law enforcement and Defendant, because no seizure was in effect.  
4 Defendant Shegrud does not dispute that his arrest was valid upon Officer Colyer learning of  
5 the outstanding warrant for his arrest. Defendant's motion to suppress must therefore be  
6 denied.

7  
8       **Hearing Requested:**

9           The State requests that the Court hold an evidentiary hearing upon the Defendant's  
10 motion. Under the objective standards for determination of whether a seizure has occurred,  
11 the Court must make a factual analysis of the circumstances surrounding the encounter  
12 between Officer Colyer and Defendant Shegrud. It is appropriate for the District Court to  
13 hold an evidentiary hearing upon a motion to suppress evidence in order to receive the  
14 testimony of the officers involved. *State v. Gilder*, 295 Mont. 483, 985 P.2d 147, ¶15 (Mont.  
15 1999), citing *State v. Angeline*, 289 Mont. 222, 961 P.2d 1251, ¶23 (Mont. 1998). The State  
16 intends to introduce the testimony of the two officers who were present, as well as the  
17 audio/visual recording of the police interaction with citizens. The State estimates that the  
18 hearing will require no more than 1.5 hours.

19  
20                               /s/ D. James McCubbin  
21                               D. JAMES MCCUBBIN  
22                               Deputy County Attorney  
23  
24

## **CERTIFICATE OF SERVICE**

I, D. James McCubbin, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Response Brief to the following on 04-22-2019:

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Dated: 04-22-2019