APPLICATION FOR

DISTRICT COURT JUDGESHIP

A. PERSONAL INFORMATION

1. Full name. Brett Joseph Irigoin

2. Birthdate. [redacted]

3. Current home address. [redacted]

4. Email address. [redacted]

5. Preferred phone number. [redacted]

6. Judicial position you are applying for. Montana Seventh Judicial District Court Judge, Department 2.

7. Date you became a U.S. citizen, if different than birthdate. N/A

8. Date you become a Montana resident. At birth [redacted]

B. EDUCATIONAL BACKGROUND

9. List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received.

Name	Location	Date of Degree	Degree
Lambert Public Schools	Lambert, Montana	2004	High School Diploma
Montana State University	Bozeman, Montana	2009	Bachelor of Arts in English, with honors Minor in Native American Studies
William Mitchell College of Law	St. Paul, Minnesota	2014	Juris Doctorate, *cum laude*

10. List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.

2014: Transactional Law Meet: Midwest Region, Kansas City, Missouri- Second Place selected to represent William Mitchell College of Law.

2005-2008: Montana State University Football Team: Athletic Scholarship
-Academic All-Conference: 2005, 2007

2004-2005: Montana State University Track and Field Team

C. LEGAL AND PROFESSIONAL EXPERIENCE

11. In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or governmental agencies with which you have been affiliated, and your position. Include the dates of any periods of self-employment and the name and address of your office.

2017-Present: Dawson County Attorney: 121 S. Douglas Avenue, Glendive, Montana 59330.

2015-2017: Deputy Dawson County Attorney: 121 S. Douglas Avenue, Glendive, Montana 59330.

2014- 2015: Associate Attorney: Fay and Associates, LLC, 19 South 10th Street, Minneapolis, Minnesota 55404.

12. In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.

Montana State Bar Association: April 2016-present.

Minnesota State Bar Association: 2014-2016: lapsed once no longer practicing law in Minnesota.

13. Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., real estate, water rights, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, employment law, alternative dispute resolution, etc.).

2017-Present: Dawson County Attorney: My typical legal area of concentration as the Dawson County Attorney is criminal prosecution. Prosecution constitutes approximately 60% of my total practice. I handle the prosecution of most of the felony offenses in Dawson County. I have one deputy county attorney, Cody Lensing, who also handles some of the felony prosecutions, as he

handles most of the prosecutions for misdemeanor offenses. The majority of cases I handle involve dangerous drug possession, possession with intent to distribute dangerous drugs, violent crimes, sexual offenses, domestic violence, failure to register as a sexual or violent offender, and property crimes. Although most criminal cases are settled through plea agreements, I have prosecuted 14 felony cases through trial for a variety of offenses, including but not limited to deliberate homicide, negligent homicide, sexual intercourse without consent, incest, sexual abuse of children, criminal child endangerment, DUI, strangulation PFMA, criminal possession of dangerous drugs, and criminal possession of dangerous drugs with intent to distribute. I have also assisted the Dawson County Coroner in coroner inquests.

I have represented the Department of Public Health and Human Services in Abuse and Neglect proceedings, some of which have involved the Indian Child Welfare Act. I represent the State of Montana in all the civil involuntary commitment proceedings in Dawson County. These cases constitute approximately 5% of my current practice.

Civil legal issues comprise about 35% of my total practice. Along with being the Dawson County Public Administrator, where I have filed probate actions in Dawson County District Court, I have advised the Dawson County Commissioners and County departments on the following issues including but not limited to: lease agreements, irrigation district opinions, special improvement districts, confidential criminal justice information review, haul route road use agreements, wrongful discharge lawsuit review, election/ballot issues, quit claim deed preparation, warranty deed preparation, duties of Clerk & Recorder, Tax Deed sales, easement disputes, subdivision issues, restrictive covenants, sewer easements, construction easements, sewer district creation, irrigation district issues, rural special improvement districts, civil v. criminal contempt opinion, county mill levy issues, windfarms issues, medical marijuana issues, recreational marijuana ballot issues, zoning issues, Dawson County Conservation District elections, school district sale of property, ward and precinct redistricting opinion, Weed Board opinion, waivers of liability, contract drafting, contract reviewing, actions to abate public nuisance, site title opinions, annual accounting for school trusts, tax appeals, disposition of county property opinions, prevailing wage issues, county step and grade wage opinion, county library sale and purchase of land, floodplain issues, opioid settlement, abandoned properties, Keystone Pipeline, metropolitan sewer district creation, wages and longevity for Sheriff's Department, gravel pit permits, and road abandonment opinions.

I also represent Dawson County in Union disputes and the drafting and negotiation of the Collective Bargaining Agreements.

2015-2017: Deputy Dawson County Attorney
My typical legal area of concentration as a Deputy County Attorney was prosecution of misdemeanor offenses in Justice Court and some prosecution of felony offenses in District Court. I prosecuted dozens of misdemeanor offenses through trial and one felony offense through trial as a Deputy County Attorney. Criminal prosecution was about 60% of my total practice. I also handled various civil issues and contract drafting for the Dawson County Commissioners and county department heads. Civil legal issues comprised about 40% of my practice as a Deputy Dawson County Attorney.

2014-2015: Associate Attorney - Fay and Associates, LLC
I worked for Fay and Associates, LLC, as an Associate Attorney. About 60% of my practice involved civil litigation, and about 40% involved alternative dispute resolution through no-fault insurance arbitrations, arbitrating the payment of medical bills.

14. Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etc. (exclude bar activities or public office).

I have testified to the legislature on behalf of the Montana County Attorney's Association and as the Dawson County Attorney regarding HB 872 and the issues facing and possible legislative solutions for the Montana State Hospital.

15. Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings.

I have practiced in State District Court, Justice Court, and City Court.

16. If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.

No.

17. Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.

A. One particularly complex and challenging issue involving the right to a speedy trial arose in a negligent homicide case I successfully prosecuted through jury trial. I addressed this issue in the attached writing sample. The Defendant moved to dismiss the case for a speedy trial violation because, at the time of filing the motion, the trial was set for a date fourteen (14) months past the 200-day trigger date for the speedy trial deadline as set in state law. The reasons for the delay were numerous, including changes in defense counsel, substitution of judge, notice by defense counsel that the Defendant would rely on a Mental Disease or Defect defense, indication by defense counsel that the Defendant would no longer rely on this defense, multiple continuances moved for by the Defendant, assignment of co-counsel for the Defendant, a second notice by the Defendant to rely on a Mental Disease or Defect defense, and the State's inability to get the Defendant evaluated at the State Hospital in a timely manner. The Defendant agreed to many of the delays. I prevailed through my response and ultimately convicted the Defendant at trial of negligent homicide despite the Defendant's use of a Mental Disease or Defect defense. The facts of this case made it particularly important to hold the Defendant accountable for her actions because the victim was the Defendant's two-year-old son who the Defendant left in her vehicle while she partied with friends. The Defendant's son ultimately passed away due to heat exposure as he was trapped in the vehicle for

approximately fourteen (14) hours, with approximately eight (8) of those hours during daylight on a hot June day.

B. Another legal issue I have dealt with that is important, challenging, and complex is the realm of civil mental commitments. I have represented the State of Montana in dozens of civil mental commitment proceedings as the Dawson County Attorney and Deputy County Attorney. Each individual that comes before the court for a civil mental commitment needs to be handled based on the unique facts and circumstances surrounding the individual's mental health and how their mental health affects their ability to care for their own basic needs or causes them to be a danger to themselves or others. Not only are the cases difficult, but the current mental health crisis facing the State of Montana is exacerbating the problems that the Montana State Hospital faces. From staffing issues to bed availability, the Montana State Hospital cannot handle and appropriately care for the mentally ill in our communities that require commitment. The issues are further exacerbated in rural Montana because there are few to no community placement options. Consequently, rural communities are tasked with providing mental health care for such individuals with limited resources available. As this is an issue that touches nearly all Montanans, I have testified to the Montana Legislature on several occasions and have helped work on proposed legislation as part of the HB 872 Commission work group to address bed availability at the Montana State Hospital and create community evaluation and placement options to better serve the citizens of Montana.

C. A challenging issue that has arisen at many trials is trying to protect the record despite opposing counsel. A good prosecutor and trial lawyer should always do whatever is necessary to make sure that the rules of civil or criminal procedure and rules of evidence are followed at all stages of a case. Doing so ensures a fair trial for both parties. A prosecutor should never try to get a conviction at all costs. Some evidence should be barred from being entered into the record to ensure due process. Sometimes, opposing counsel will try to enter evidence despite it being barred by the rules of evidence, and even if it is evidence that could ultimately benefit the prosecution, it is the prosecutor's ethical duty to keep the evidence out. One particular instance occurred during an incest trial in which I successfully obtained a conviction. The victim disclosed her abuse that had occurred ten (10) years before when she heard that the Defendant's young stepdaughters had made similar disclosures about the abuse they were currently suffering at the hands of the Defendant. I agreed, through motions *in limine,* that any mention of the new abuse allegations should be kept out of the record and not be introduced as evidence. Despite the court's Order, the Defendant's counsel continually asked questions insinuating that the abuse of the victim here did not happen as she had not disclosed the abuse for ten (10) years. While eliciting testimony of new abuse allegations against the Defendant's stepdaughters would have aided in a successful prosecution, it was not proper pursuant to the rules of evidence. Consequently, I was in a position of objecting to the Defendant's questioning despite knowing the answers would benefit my case. I continually objected to this line of questioning and requested a sidebar with the judge and opposing counsel, outside the presence of the jury, to protect the record and ensure that, if the Defendant was convicted, no appealable issues could require a new trial that would revictimize the victim in our case.

18. If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information.

N/A

19. If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke.

I have taught as an adjunct professor at Dawson Community College (DCC), teaching Principles of Criminal Law in the fall semester and Criminal Evidence and Procedure in the spring semester from 2018 through the fall of 2023. Due to a drop in student enrollment, there have not been enough students signed up for the classes I teach for DCC to offer the classes the last three semesters.

20. Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.

I have not provided any *pro bono* work due to my employment as a full-time County Attorney.

21. Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.

2023-Present: Elected Board Member- Montana County Attorney's Association

2024- House Bill No. 872 Commission Work Group member through the Law and Justice Interim Committee

2024- House Bill 79 Sexual Assault Response Network (SARN) Committee member – appointed by Attorney General Austin Knudson

22. Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received.

N/A

23. If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled.

N/A

24. Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a judge.

I was raised on a dryland farm/ranch in Richland County, Montana, where I developed a good work ethic and learned that you reap what you sow, literally and figuratively. I also learned the challenges of agriculture as a business and observed the many agricultural issues farmers and ranchers face. I have worked as a landscaper and a laborer for both a plumbing company and a construction company. These jobs provided me the opportunity to see that the law touches everyone, no matter their line of work. My experience as an attorney in private practice, handling civil cases, and as a county attorney, handling criminal and civil cases, has exposed me directly to the legal issues that regularly come before a district court judge. My business, agricultural, occupational, and professional experience provides me with a broad perspective that will help me put into context the legal issues I will address as a district court judge if I am fortunate enough to be appointed for this position.

D. COMMUNITY AND PUBLIC SERVICE

25. List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.

Glendive Lions Club member

26. List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

2022- Re-Elected as the Dawson County Attorney
2018- Elected as the Dawson County Attorney
2017- Appointed as the Dawson County Attorney

E. PROFESSIONAL CONDUCT AND ETHICS

27. 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.

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

No.

29. 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.

30. Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number).

No.

31. Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would 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

32. Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge.

No.

33. Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? If not, please explain.

Yes.

34. Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? If so, give details.

No.

G. JUDICIAL PHILOSOPHY

35. State the reasons why you are seeking office as a district court judge.

I am seeking the position of district court judge to ensure that our judiciary continues to serve as a cornerstone of justice, safeguarding the community, and upholding the rule of law. Having

observed firsthand the judiciary's vital role in protecting rights and maintaining order, I am inspired to contribute to this essential work by bringing my experience and dedication to the bench. My professional experience has reinforced the importance of judges approaching every case with fairness, impartiality, and a commitment to applying the law as written, grounded in the specific facts before them.

Throughout my career, I have developed significant experience in both criminal and civil litigation, with substantial trial experience that equips me to address evidentiary issues efficiently and correctly. This depth of experience is critical to the timely administration of justice and ensures public trust in the judicial process. In addition to my work as a County Attorney, I have dealt extensively with civil matters commonly addressed in District Court.

As someone who grew up in eastern Montana, I deeply understand the unique challenges our rural communities face. I am committed to serving this region with integrity, ensuring that the courts provide equitable access to justice, and operate predictably to foster stability and trust. The opportunity to serve multiple counties as a district court judge would allow me to apply my trial expertise, legal knowledge, and commitment to fairness to benefit a broader community.

By serving in this capacity, I hope to contribute to a judiciary that prioritizes our citizens' safety, respects all individuals' rights, and provides a reliable framework for resolving disputes. I firmly believe that a well-functioning judiciary is foundational to the health and prosperity of our community, and I am ready to dedicate myself fully to this responsibility.

36. What three qualities do you believe to be most important in a good district court judge?

The three qualities of a good district court judge I believe to be most important are impartiality, integrity, and a strong work ethic.

37. What is your philosophy regarding the interpretation and application of statutes and the Constitution?

My judicial philosophy is firmly rooted in the rule of law and guided by the principles of fairness, respect, and impartiality. I believe that a judge's primary duty is to uphold the integrity of the legal system by faithfully applying the law as it is written, not as they might wish it to be. Every decision I render would be grounded in the relevant facts on the record, interpreted through the lens of established legal principles.

The doctrine of *stare decisis* serves as an essential safeguard of judicial consistency and predictability, and I would treat it as a cornerstone of my approach to legal issues. While understanding that the law must evolve in response to societal changes, I firmly believe that judges should not legislate from the bench or substitute personal beliefs for the clear intent of the legislature or the framers of the Constitution.

I would adhere strictly to the 1972 Montana Constitution, the U.S. Constitution, and established statutes, applying their provisions as intended and in accordance with binding legal precedents. In doing so, I would ensure that my interpretations respect the balance of power between the

branches of government and honor the rights and liberties enshrined in these foundational documents.

My role would be to serve the people by applying the law predictably and impartially, fostering confidence in the judiciary, and preserving the stability of our legal system.

H. MISCELLANEOUS

38. Attach a writing sample authored entirely by you, not to exceed 20 pages. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics.

39. Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.

Judge Olivia Rieger- Montana Seventh Judicial District Court
207 W. Bell St., Glendive, MT 59330
(406) 377-2666

Judge Michael B. Hayworth- Montana Sixteenth Judicial District Court
1010 Main Street, Miles City, MT 59301-3419
(406) 874-3335

Judge Matthew J. Wald- Montana Twenty-Second Judicial District Court
400 E. 3rd Ave. N., Columbus, MT 59019
(406) 322-5406

CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true. By submitting this application I am consenting to investigation and verification of any information listed in my application and I authorize a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions I have attended, any references furnished by me, employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to my citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history to release to the Office of the Governor of Montana or its agent(s) any information, files, records, or reports requested in connection with any consideration of me as a possible nominee for appointment to judicial office.

I further understand that the submission of this application expresses my willingness to accept appointment as District Court Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

Nov. 25, 2024 — (Date)

(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by ***5:00 p.m. on Monday, December 16, 2024***

Mail the signed original to:

Hannah Slusser
Governor's Office
P.O. Box 200801
Helena, MT 59620-0801

Send the electronic copy to: hannah.slusser@mt.gov

DAWSON COUNTY ATTORNEY'S OFFICE
Mr. Brett J. Irigoin, Dawson County Attorney
Mr. Cody Lensing, Deputy County Attorney
Mrs. Hailey Forcella, Deputy County Attorney
121 South Douglas
Glendive, MT 59330
Phone: (406) 377-2532
Fax: (406) 377-2531
countyattorney@dcatty.net

MONTANA SEVENTH JUDICIAL DISTRICT COURT, DAWSON COUNTY

STATE OF MONTANA, **Plaintiff,** **v.** **ASHLEY MARIA HOWARD,** **Defendant.**	**Cause No.: DC-18-062** **STATE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR SPEEDY TRIAL VIOLATION**

COMES NOW, Brett Irigoin, County Attorney for Dawson County, Montana, and files the State's Response to the Defendant's Motion to Dismiss for Speedy Trial Violation filed with this Court on March 6, 2020. The State hereby submits this Response for consideration by the Court and asks the Court to deny the Defendant's Motion to Dismiss.

FACTS

Trial in this matter was set for March 6, 2019, by Judge Olivia Rieger. The Defendant made her initial appearance on August 21, 2018, and she was represented by Cynthia Thornton, who requested a later date for entry of plea, as the Defendant had previously moved for substitution of Judge. Judge Best accepted jurisdiction on August 20, 2018, and reset the trial date for May 6, 2019. In the Revised Order Setting Trial and Pretrial Schedule, the Court set the date for Notice & Disclosure Regarding Defense of Mental Disease/Defect for November 5, 2018. Mr. Hartford, representing the Defendant, indicated to the State via email on December 30, 2019, that Dr. Woolston had conducted a mental health evaluation with the Defendant. No notice of the Defendant's reliance on a Mental Disease or Defect Defense was filed with the

Court at that time. Mr. Hartford indicated to the State on January 29, 2019, that based on Dr. Woolston's evaluation, the Defendant would no longer be relying on such a defense.

At a status hearing on February 11, 2019, Defendant's counsel, Mr. Hartford, orally moved the Court to continue the trial for ninety (90) days to six (6) months. The Defendant stated that she did not object to a continuance. The Motion was granted by the Court both orally and by written motion on February 11, 2019, which required the Office of the State Public Defender to immediately assign counsel to act as co-counsel with Mr. Hartford. The Court further scheduled a scheduling conference for February 27, 2019, to set a new trial date. A Notice of Additional Counsel was filed on February 13, 2019, assigning J.B. Wheatcroft as co-counsel for the Defendant.

On February 27, 2019, the Defense filed a Status Report indicating a written Motion to Continue was forthcoming. The State filed a Status Report on February 27, 2019, and indicated that as no Motion to Continue was filed by the Defendant, the State is preparing for Trial set for May 6, 2019. On February 27, 2019, the Defense then filed a Motion to Continue the Trial which stated that, "Co-counsel has recently been assigned. As such, attorneys need additional time to prepare for trial. This matter and motion to continue was discussed with the Defendant and she is in agreement that the motion should be continued." The Court granted the Defense's written Motion to Continue the trial on February 28, 2019, and reset the trial for December 9, 2019.

On April 5, 2019, Defendant's counsel J.B. Wheatcroft filed a Notice of Intent to Rely Upon the Defense of Mental Disease or Disorder, just one (1) month prior to the original trial date. The Defendant attached Dr. Woolston's mental health evaluation to the Notice. The State filed a Motion for Mental Health Evaluation on May 1, 2019, and a Second Motion for Mental Health Evaluation on May 10, 2019. The Court granted the State's Motion on May 10, 2019.

On August 7, 2019, Mr. Hartford moved to withdraw as counsel which was granted by the Court after extensive questioning of Mr. Hartford, Mr. Wheatcroft, and the Defendant. The Court required Office of the State Public Defender to find a new attorney to replace Mr.

Hartford within seven (7) days. A Notice of Additional Counsel for the Defendant was filed with the Court on August 13, 2019, assigning Mr. Bunitzky.

On October 10, 2019, the Defendant wrote an Ex Parte letter to the Court expressing concerns with her case. On October 30, 2019, the Court held a Status Hearing in which the Court addressed the Ex Parte letter. The Parties discussed the possible need for a continuance of the currently set trial date. Mr. Bunitzky indicated that the Defendant was still pursuing a Mental Disease or Defect defense and was requesting approval from the Office of the State Public Defender for a second mental health evaluation. The State did not object to a continuance in the respect that the State believed the Defendant should have every opportunity to a good defense. The State did indicate it would be ready for the December 9, 2019, trial date if necessary. The Court then addressed the fact that it was not getting any sense of urgency from the Defense. The Defendant did not object to the continuance. The Court reset the trial for February 3, 2020.

In the Court's order dated October 30, 2019 resetting this trial Judge Best stated that the "Defendant filed a "Joint (sic) Motion to Continue Trial"" and indicated this was because the State Hospital had yet to do an evaluation for the Defendant's defense and that the Defendant's lawyers were now seeking permission to hire a second evaluation from Office of the State Public Defender. The Court also issued an Order for Montana State Hospital to Prioritize Evaluation on October 30, 2019.

The Court held a Status Hearing on December 20, 2019, and the State advised that the State Hospital had a bed date of January 2, 2020, but they would require the full sixty (60) days for evaluation. Mr. Bunitsky advised that a continuance would likely be required. The Defendant did not object to the trial being continued. On December 23, 2019, the Court signed the order resetting the trial for May 4, 2020, due to the necessity of the Defendant's evaluation at the Montana State Hospital. As of the December 20, 2019, hearing, the Defendant had not obtained a second mental health evaluation as was suggested as a reason for continuance of trial on October 30, 2019. The Defendant did not object to the continuance.

The Court filed an Order on February 28, 2020 in regards to an extension of the motion deadline. In this order the Judge stated that "This case has lingered, with inexplicable delays, mostly caused by Defendant's counsel." And has a footnote stating "The Court acknowledges that some of the delays are attributable to prior counsel, but one of her current lawyers was on board during many of those delays."

On March 10, 2020, the Court filed an Order on the Defendant's Sixth Motion in *Limine* and stated "Although the scheduling order was never amended, the trial in this case was continued more than once because of delays required by the defense and in order to seek a mental evaluation for Howard."

ARGUMENT

I. Delay May be Attributed Partially to the State as Institutional Delay, but Must be Attributed in Large Part to the Defendant.

The Defendant asserts that her rights to a speedy trial have been violated. A criminal defendant's right to a speedy trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article II, Section 24 of the Montana Constitution. State v. Ariegwe, 338 Mont. 442 (2007) (citing Klopfer v. North Carolina, 386 U.S. 213, 222-26, 87 S. Ct. 988, 993-95, 18 L. Ed. 2d 1 (1967); Mont. Const. art. II, § 24). The Ariegwe Court held that the following four (4) factors are to be considered for speedy trial analysis: the length of the delay; the reason for the delay; assertion of the right; and prejudice to the defendant. Ariegwe, 338 Mont. 442 at ¶34. That said, no such analysis is necessary, "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Barker v. Wingo, 407 U.S. 514, (1972).

While Ariegwe set the two hundred (200) day speedy trial mark, the facts of Ariegwe are distinguishable from the instant case. The State in Ariegwe was responsible for the vast majority of the delay, because it failed to timely provide discovery to the defendant and failed to produce crime lab reports. Ariegwe, 338 Mont. 442 at ¶135. There is no contention by the Defendant or evidence that such behavior has occurred in the case at hand.

The case most factually similar to the case at hand, yet still somewhat distinguishable, is State v. Couture, 357 Mont. 398 (2010). In Couture, the defendant was charged with deliberate homicide and ten (10) days after his arrest, the defendant was arraigned, and his attorney requested a mental health evaluation. Couture, 357 Mont. 398 at ¶4. The court ordered an evaluation through the Montana State Hospital. Id. The omnibus and (due to the court's policy on omnibus hearings prior to a firm trial date) the trial date was continued a number of times. Id. at ¶8. The trial date was further delayed due to the defendant's need for further investigation and trial preparation as well as significant delay in obtaining a psychological evaluation through the State Hospital. Id. at ¶11. The defendant affirmatively asserted a mental state or mitigation defense two hundred and fifty-five (255) days after the defendant's arrest. Id. at ¶ 13,14.

A number of other continuances occurred before the defendant received new counsel (five hundred and twenty-eight (528) days after arrest) due to his first counsel being criminally charged in another matter. Id. at ¶ 15-25. Several more continuances occurred until approximately eight hundred (800) days after the defendant's arrest, his new counsel withdrew due to a conflict. Id. at P39. The conflict arose after the State noticed a witness, long known to the State, who was a cellmate of the defendant, whom the defendant's attorney represented. Id. The defendant filed a motion to dismiss asserting his right to a speedy trial was violated, which the court denied. Id. at ¶42. The case eventually proceeded to trial nine hundred and twenty-four (924) days (nearly thirty-one (31) months) and thirty-five (35) continuances after the defendant's arrest. Id. at ¶43. The defendant appealed the District Court denial of his speedy trial motion to dismiss and the Supreme Court affirmed the District Court ruling despite the extreme delay. Id. The Court attributed only ninety-one (91) days weighing significantly against the State, which the Court attributed to the State's lack of diligence in failing to notice a witness, long known to the State, which resulted in the defendant's withdrawal as counsel for a conflict. Id. at ¶97, 98. The remainder of the State's delay was institutional in nature or for valid reasons. Id.

None of the four speedy trial factors "is either a necessary or a sufficient condition to the legal conclusion that the accused has been deprived of the right to a speedy trial. Rather, the factors

must be considered together with such other circumstances as may be relevant." Id. (citing Ariegwe, 338 Mont. 442.)

1. Factors 1 and 2: Length of Delay and Reason for Delay.

The Ariegwe Court held that the following four (4) factors are to be considered for speedy trial analysis: the length of the delay; the reason for the delay; assertion of the right; and prejudice to the defendant. Ariegwe, 338 Mont. 442 at ¶34. In the instant case, the State does not deny that the current trial date is roughly fourteen (14) months past the initial 200-day trigger date for speedy trial outlined in the first Ariegwe factor.

With regard to the second Ariegwe factor, reason for delay, the Defendant outlines four separate "periods of delay": August 13, 2018, to March 6, 2019 (205 days); March 6, 2019, to May 6, 2019 (61 days); May 6, 2019, to December 9, 2019 (217 days); December 9, 2019, to May 4, 2020 (147 days). The first and second period of delay are attributable to the Defendant. When "a defendant postpones the entry of his plea, as he is statutorily authorized to do, he concomitantly delays the first trial date. Couture at ¶ 82. The same line of thought can be viewed in light of a defendant's right to substitute a judge. In the instant case, the Defendant requested a continuance of her arraignment and a substitution of judge, both of which delayed the initial trial setting. Consequently, both the first and second periods of delay are attributable to the Defendant. If the Court determines that the first two periods of delay are considered institutional delay, such delay, while attributable to the State, weighs less heavily against it than delay caused by bad faith, negligence, or lack of diligence. Id. at ¶72 (citing Ariegwe at ¶ 60).

Mr. Hartford, orally moved the Court to continue the trial February 11, 2019, and the Defendant did not object at that time. The State filed a Status Report on February 27, 2019, and indicated that as no Motion to Continue was filed by the Defendant, the State is preparing for Trial set for May 6, 2019. The Defendant followed up the oral Motion with a written Motion on February 27, 2019, which stated that, "Co-counsel has recently been assigned. As such, attorneys need additional time to prepare for trial. This matter and motion to continue was discussed with the Defendant and she is in agreement that the motion should be continued." As the Court reset the trial for December 9, 2019, by granting the Defendant's Motion to Continue,

with the Defendant's consent, all delay prior to the December 9, 2019, trial date must be attributed to the Defendant.

The Defendant argues, incorrectly and without any authority, that delay attributed to Mr. Hartford should be attributed to the State as Mr. Hartford was appointed by the "STATE Office of the Public Defender". This assertion is completely without legal authority. Delay associated with defendant's complaints about counsel and subsequent withdrawal of counsel is attributed to the Defendant. (see State v. Lamas, 388 Mont. 53 at ¶17 (2017), State v. Rose, 348 Mont. 291 at ¶58 (2009). The right to counsel does not include the right to select an attorney of one's own choosing or to require the particular attorney be appointed. State v. Rose, 348 Mont. 291 at ¶94 (citing State v. Pepperling, 177 Mont. 464, (1978)). Such delay should be attributed to the Defendant.

The last period of delay (December 9, 2019, to May 4, 2020) was first at the request of the Defendant although in a "Joint Motion". The Defendant argues that the reason for the delay was the State's inability to have the Defendant evaluated at the Montana State Hospital in time for the December 9, 2019, deadline. While this is partially true, the evaluation likely would have been completed well in advance of trial if the Defendant gave the State official Notice of their intent to rely on the defense of Mental Disease or Defect at any point prior to April 5, 2019. The Defendant's Notice was filed just one month prior to the May 6, 2019, trial date and five months after the Court's November 5, 2018, deadline for such notice. The fact that the defendant must be competent to proceed does not make the delay for obtaining a mental health evaluation institutional delay. Couture, at ¶81. Consequently, delay attributable to the delay in the Montana State Hospital is not institutional delay, it should be at the very least attributable to the State and Defendant. Furthermore, the Defendant filed the Motion to Continue the December 9, 2019, trial, not only to allow time for the Montana State Hospital evaluation but also to allow her to seek permission to hire a second evaluator from the Office of the State Public Defender. Accordingly, it is apparent that the Defense was not prepared for trial regardless of any delay.

Furthermore, the December 9, 2019, trial date was also continued due the Defendant's "need for additional time [sic] predicated on new co-counsel being assigned to assist the

Defendant" (Def. Mo. To Dismiss Pg. 4 Ln. 16-18.) The Defendant further stated that the reason for delay was the Defendant's lawyers were seeking permission to hire a second evaluation from Office of the State Public Defender. Again, even if the Court views delay of the Montana State Hospital as attributable to the State, the delay from December 9, 2019, to May 4, 2019 was due to the Defendant's need for further trial preparation and request for a second mental health evaluation.

The Court also held a Status Hearing on December 20, 2019, and the State advised that the State Hospital had a bed date of January 2, 2020. Mr. Bunitsky, representing the Defendant, advised that a continuance would likely be required and the Defendant did not object to the continuance. On December 23, 2019, the Court signed the order resetting the trial for May 4, 2020. As of the December 20, 2019, hearing, the Defendant had not obtained a second mental health evaluation as was suggested as a reason for continuance of trial on October 30, 2019. Again, while the Montana State Hospital delay may be attributed to the State, it was apparent that the Defendant was not prepared for trial as of December 20, 2019 and the continuance was in part based on their lack of preparation. Accordingly, the last period of delay should at the very least be attributed to both the State and Defense.

Lastly, "valid reasons" for delay, such as a missing witness, are weighed least heavily against the State. Id. at ¶72 (citing Ariegwe at ¶70). The State's inability to obtain a witness for rebuttal to the Defendant's Mental Disease or Defect defense is similar to that of a missing witness and is a valid reason for delay. As such, the Montana State Hospital's inability to obtain a bed for the Defendant should be weighed least heavily against the State. As in Couture, any delay attributable to the State is that of institutional delay or a valid reason. Unlike Couture, there is no evidence or argument that the State has not been diligent in its prosecution.

2. Factor Three: The Accused Responses to the Delay.

Under the third speedy trial factor, the Court must consider the Defendant's acquiescence or objections to the pretrial delays. Id. at ¶50.

> The issue is not simply the number of times the accused acquiesced or objected; rather, the focus is on the surrounding circumstances, such as the timeliness,

> persistence, and sincerity of the objections, the reasons for the acquiescence, whether the accused was represented by counsel, the accused's pretrial conduct (as that conduct bears on the speedy trial right), and so forth. Id. at ¶50 (citing Ariegwe at ¶¶76-77.)

"The totality of the accused's responses to the delay is indicative of whether he or she actually wanted a speedy trial." Id. (citing State v. Billman, 346 Mont. 118, P 31 (2008); Ariegwe, P 79.) In the instant case, the Defendant acquiesced to each continuance.

On February 11, 2019, Defendant's counsel, Mr. Hartford, orally moved the Court to continue the trial for ninety (90) days to six (6) months. The Defendant stated that she did not object to a continuance. On February 27, 2019, the Defense then filed a Motion to Continue the Trial which stated that, "Co-counsel has recently been assigned. As such, attorneys need additional time to prepare for trial. This matter and motion to continue was discussed with the Defendant and she is in agreement that the motion should be continued." Again, affirmative statement that not only did the Defendant not object, but acquiesced to the continuance.

The only time the Defendant showed any objection or made any indication she wanted a speedy trial was in her *ex parte* letter to the Court, in which she attributes delay for speedy trial purposes to the "state's failure to provide a reliable public defender who would be diligent in my case to ensure trial within the 200 day threshold…" (Ex Parte Comm.) She does not object to anything that the State has done in any way and does not assert that she did not acquiesce to the previous continuance, but attempts to attribute delay due of her counsel to the State. On October 30, 2019, the Court held a Status Hearing in which the Court addressed the Ex Parte letter and the Defendant did not object to a continuance of the December 9, 2019 trial date.

The Court held a Status Hearing on December 20, 2019, and the State advised that the State Hospital had a bed date of January 2, 2020, but they would require the full sixty (60) days for evaluation. Mr. Bunitsky advised that a continuance would likely be required and once again Defendant did not object to the trial being continued. As stated *supra*, the issue is not simply the number of times the accused acquiesced or objected, but "The totality of the accused's responses to the delay is indicative of whether he or she actually wanted a speedy trial." Couture at ¶50 (citing State v. Billman, 346 Mont. 118, P 31 (2008); Ariegwe, P 79.) When considering the

factors regarding the Defendant's responses to delay outlined in Couture and Ariegwe, the Defendant only objected in any way, one time, and that was with regard to her attorney's representation. The Defendant was represented by one or two attorneys at all times, and continuing the trial dates appears to have been in her best interest, as she received new counsel two (2) times and each time they required additional time to prepare for trial.

Accordingly, as was the case in Couture, even though the Defendant consistently insisted on being brought to trial by refusing to consider plea offers on multiple occasions and instead insisting to go to trial, the third factor at most weights "lightly" in the Defendant's favor. Id. at ¶52. Consequently, the third factor should be given little to no weight in the speedy trial determination.

3. Factor Four: Prejudice to the Accused.

Under the fourth factor, the Court must consider whether the pretrial delay prejudiced the accused in light of the interests that the speedy trial rights protect: (i) preventing oppressive pretrial incarceration, (ii) minimizing anxiety and concern caused by the presence of unresolved criminal charges, and (iii) limiting the possibility that the accused's ability to present an effective defense will be impaired. Id. at ¶55. The burden is on the State to show that the Defendant was not prejudiced. Id. at ¶49, *supra.*

A. The Defendant's Pretrial Incarceration is Not Oppressive.

The Defendant argues that her pretrial incarceration is oppressive. "Whether an accused's pretrial incarceration was "oppressive" depends on the particular circumstances of that incarceration." Id. at ¶56 (citing Ariegwe at ¶ 90.) The Court considerers the duration of the incarceration, the complexity of the charged offense, any misconduct by the accused directly related to his incarceration, and the conditions of the incarceration, such as overcrowding, recreational opportunities, adequate food, climate control, proper medical care, cleanliness, and legal research capabilities. Id. (citing Ariegwe at ¶¶ 90-93.) The duration of incarceration must be considered in concert with the complexity of the charges. Id. at ¶ 59. As was the case in Couture (deliberate homicide charge), the charge of negligent homicide in the instant is a complex charge as evidenced by the lengthy and involved nature of the investigation and the

defense counsel's inability to prepare for trial on short notice after being brought onto the case. There are no conditions of the incarceration that prejudice the Defendant in any way. She has complained about medical and dental issues that have been addressed by correctional staff and have largely been deemed minimal by corrections staff and unfounded by the Defendant. The Defendant alleges that she has had "limited access to a legal library, which only consists of a copy of the MCA" and that "detention centers are overcrowded, and allow for very little recreation." Def. Mo. Pg. 7, Ln. 17-19. She makes such assertions without a single piece of evidence to back her claims. There is no evidence of overcrowding or little recreation and the Defendant herself admits that the library contains a copy of the MCA. If she would like to do more research, she has attorneys that assumedly will and have conducted legal research on her behalf. The Defendant cites no authority to suggest that more than a copy of the MCA is required in a correctional facility. As was the case in Couture and as discussed *infra*, much of the delay is attributable to the Defendant.

Lastly, the Court in Couture indicated that bail, and the Defendant's inability to pay it, may be relevant, but, "it is by no means a tipping point." Id. at ¶60. The Court further stated:

> …the fact that the accused remained incarcerated due to a high bail is less likely to be deemed "oppressive" when the record establishes that the high bail was necessitated by the nature of the offense charged or the accused's status as a high flight risk. Id.

The Court in the instant case has addressed bail in this matter a number of times. Part of the Court's determination of bail is whether bail is commensurate with the nature of the offense charged and sufficient to ensure the presence of the defendant in a pending criminal proceeding. Sec. 46-9-301(1), (5), MCA. The Court has determined that bail as set is sufficient and required to comply with Sec. 46-9-301(1), (5), MCA and bail has remained at $100,000.00. Accordingly, the Defendant's pretrial incarceration has been in no way oppressive.

B. Anxiety and Concern.

The Defendant argues that her anxiety and concern have been aggravated by the delays and have unduly prolonged the disruption of the Defendant's life. Anxiety and concern are likely high for any person charged with committing a criminal act but "the speedy trial guarantee is designed

to shorten the disruption of the accused's life, not to eliminate it altogether." Id. at ¶64. The Defendant argues that her anxiety and depression has been aggravated. The District Court in Couture, noted that on one occasion, the defendant suffered a panic attack and believed he was going to die and required medication and was hospitalized twice. Id. at ¶65. The defendant was also held in solitary confinement for two hundred and seventy-five days. Id. Nevertheless, the court weighted this factor only lightly in the defendant's favor. Id. In the instant case, the State Hospital evaluated the Defendant for sixty (60) days, and while they found the Defendant to have some mental health issues, the evaluation in no way gives credence to the Defendant's arguments of aggravated anxiety or depression that would lead the Court to determine she has been prejudiced by the delay. The circumstances of the instant case pale in comparison to the circumstances and anxiety in Couture. Therefore, this factor should not be weighed in the Defendant's favor.

C. Limit the Possibility the Defense Will be Impaired.

The last issue to be considered is whether the Defendant's ability to prepare for trial has been impaired by the delay. This is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony can rarely be shown. Id. at ¶67 (citing Ariegwe at ¶99.) Here, the delay has not hampered the Defendant's ability to prepare for trial, but has benefited the Defendant, as each continuance was made in order to allow her counsel additional time to prepare for trial. At each stage, the State was prepared to try this case, with the exception of a rebuttal witness for the Defendant's Mental Disease or Defect Defense, while the Defendant's counsel requested the continuances for the purpose of further preparing for trial. The same was true in Couture as well as State v. Morrisey, 351 Mont. 144, (2009) in which the Court stated:

> a substantial portion of the delay was requested by Morrisey for the express purpose of conducting investigations, having evidence tested, locating and interviewing potential witnesses, and preparing his defense to the charges. If anything, therefore the record suggests that Morrisey's ability to prepare his defense was benefited, not prejudiced, by the continuances in his trial. Morrisey at Pg. 214.

As was the case in Morrisey, the Defendant has benefitted by the delay and having the trial dates continued, as her counsel has been granted extra time to prepare for trial in this matter.

CONCLUSION

Based on the foregoing, no violation of the Defendant's speedy trial right has occurred. The length and reason for the delay is largely attributed to the Defendant and any portion attributed to the State is institutional in nature and minimal. The Defendant only objected in any way to the delay on one occasion, and then almost immediately thereafter acquiesced to a continuance. Lastly, no prejudice to the Defendant has been shown, as none has occurred.

WHEREFORE, the State prays the Court DENY the Defendant's Motion to Dismiss for Speedy Trial Violation.

Dated this 23rd day of March, 2020.

Brett Irigoin
Dawson County Attorney

Certificate of Service

I do hereby certify that on the 23rd day of March, 2020, I delivered a true and correct copy of the foregoing Response to the Defendant's Attorney's Victor Bunitsky and Brad Wheatcroft electronically to victor@vnblaw.com and jb_wheatcroft@yahoo.com.

For the Dawson County Attorney's Office