

APPLICATION FOR DISTRICT COURT JUDGESHIP

A. PERSONAL INFORMATION

1. Full name. Thane Patrick Johnson
2. Birthdate. [REDACTED]
3. Current home address. [REDACTED]
4. Email address. [REDACTED]
5. Preferred phone number. [REDACTED]
6. Judicial position you are applying for. Twentieth Judicial District Court Judge
7. Date you became a U.S. citizen, if different than birthdate. N/A
8. Date you become a Montana resident. [REDACTED]. I qualified for in-state tuition in Minnesota in 1992 and graduated law school in 1993. I immediately move back to Montana in 1993 where I have been a resident since that time.

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.

I graduated from high school in 1986 from Cut Bank High School. I attended college for one year at Montana Tech from 1986-1987. I transferred to the University of Montana and achieved a Bachelor of Arts degree in political science in 1990 graduating with high honors. I attended the University of Minnesota Law School graduating in 1993, 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.

I played high school football and wrestled for Cut Bank High all four years of school. I received both an academic and football scholarship at Montana Tech. At the University of Montana, my professors voted me the most distinguished student in the political science division.

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.

I began practicing law in Cut Bank, Montana where I served as a part-time Deputy County Attorney for Glacier County and a partner in the law firm of Werner, Epstein and Johnson. I served in that capacity from 1993-2006. During this time, I was appointed a part-time trial judge in the Blackfeet Tribal Court where I served for three years. My wife and myself moved for health reasons for our daughter to Columbia Falls, Montana in 2003 leaving me to commute to work in Cut Bank. In 2006, for a period of about thirteen months, I took a position with the Montana Public Defenders office in Kalispell so that I could be a father to my three children. In 2008, I accepted a position with the law firm of Johnson, Berg and Saxby where I became a partner in 2009. I served as a partner until January, 2023, when I accepted a position with the Department of Justice serving as the Assistant Attorney General, Senior Counsel, with the Civil Service Bureau.

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.

I was admitted to the Montana Bar in September of 1993 and the Federal District Court in Montana in 1993 or 1994. I was admitted in the Ninth Circuit Court of Appeals and the United States Supreme Court in 1997. I have been admitted and have actively practiced in every Tribal Court in the State excepting the Little Shell Tribal Court. My memberships in the Tribal Courts has probably been terminated because I have not been paying the annual dues because I no longer expect to be practicing in the courts.

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).

I began my practice in Cut Bank as a part-time prosecutor and general practitioner. In Kalispell, at the Johnson, Berg and Saxby firm, I primarily focused upon litigation both in the civil and criminal arena. I have tried well over 200 jury trials in my career with 19 civil jury trials. I cannot count the number of bench trials that I have tried, but it would be well over 200 as well. My specialties would be both civil and criminal litigation, Indian law and agricultural law. Probably 40-50% of my practice involved litigation in some form, 25% involved Indian law issues which included contract drafting, water rights and employment law. I focused 20% of my practice on agricultural law which included real estate transactions, water law and contract drafting. The remaining 5% of my practice involved a general practice including estate planning, probate and family law. At the Department of Justice 100% of my practice involved Constitutional litigation.

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).

The unique part of my practice consisted of trying jury trials in every type of court across the State of Montana. I have tried several jury trials in Federal Court, State District Courts, Justice Courts, City Courts, and Tribal Courts. I have tried jury trials in the District Courts of Garfield County, Judith Basin County, Lake County, and Sanders County to name a few. As a result, I have observed numerous judges and have reflected and learned from each of them. Because of this experience, if I were to become a District Court Judge, I would incorporate many of these judges' best characteristics into the courtroom. For example, I would use the Honorable Sam Haddon and Judge Best's efficiency as well as Judge R.D. McPhillip's and Judge Robert Olsen's demeanor in the courtroom.

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.

For the past ten years I have tried multiple jury trials in the Federal Court with Judge Christianson, Judge Haddon and Judge Morris presiding. Because of my civil litigation practice I have participated in numerous mediations including two with Federal Magistrates. I have also participated in some arbitrations. I have appeared and handled matters administratively as well. These include matters before the Department of Labor, the Human Rights Commission, and the Water 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.

I have argued one case in the Montana Supreme Court when I was a third year law student. The opposing attorney was the notorious Timer Moses, the father of the former District Court Judge, in Yellowstone County, Michael Moses. I have had several cases before the Montana Supreme Court. In the last ten years, they include *Mont.Digital, LLC v. Trinity Lutheran Church*, 2020 MT 250, 401 Mont. 482, 473 P.3d 1009, *Awin Real Estate, LLC v. Whitehead Homes, Inc.*, 2020 MT 225, 401 Mont. 218, 472 P.3d 165, *In Re Ryerson*, 2022 MT 77N, 409 Mont. 553, 507 P.3d 1183, *O'Brien v. O'Brien*, 2022 MT 246, 411 Mont. 101, 532 P.3d 831, *State v. Mahlen*, 2019 MT 7N, 395 Mont. 519, 432 P.3d 716, *State v. Wagner*, 2013 MT 159, 370 Mont. 381, 303 P.3d 285, *State v. Passwater*, 2015 MT 159, 379 Mont. 372, 350 P.3d 382, *Bos Terra LP v. Beers*, 2015 MT 201, 380 Mont. 109, 354 P.3d 572, and the last civil jury trial that I had in private practice which I did not get to sign my name to the brief because of my new position at the State, *Winkowitsch v. Glacier Elec. Coop, Inc.*, 2023 MT 228, 414 Mont. 163, 538 P.3d 1140.

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.

I think my largest challenge was prosecuting the Defendant, Larry Bomar, a barber from my home town, of Cut Bank. Bomar was charged with sexual assault of a minor child. Bomar had

escaped prosecution for similar acts on other victims for at least a decade. The victim was four years old when the crime was committed, the same age as my youngest son. The Defense attacked the victim's credibility and I was able to get into evidence a validity assessment by a therapist to support the victim's testimony. Ultimately, Bomar was convicted. This is the case that unfortunately led to the Honorable Marc Buyske losing his District Court seat to Justice McKinnon who catapulted the opportunity to her seat on the Montana Supreme Court. *State v. Bomar*, 2008 MT 91, 342 Mont. 281, 182 P.3d 47.

My second most important argument was convincing the United States Attorney's Office that gravel within the Blackfeet Reservation was not a mineral as far as federal regulations are concerned. My most important client of my career, Robert Wellman, was indicted in Federal District Court for theft, by selling gravel on land in which he owned the surface. Former Assistant United States Attorney, Carl Rostad indicted Wellman and then retired. I researched the issue for days and learned that the indictment was based upon a Solicitor's Opinion and was not law. The indictment was dismissed.

My third most important issue was successfully convincing Judge Olson that a down hill neighbor could not damn the natural flow of run off water without being liable to the uphill neighbor on a continuing trespass and nuisance theory. *Winkowitsch v. Glacier Elec. Coop, Inc.*, 2023 MT 228, 414 Mont. 163, 538 P.3d 1140. This case became a topic at the annual Water Law CLE in Helena this past fall.

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.

I have not authored any legal books or articles.

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 spoke annually to the Problems in American Democracy (PAD) Senior class teaching a course on Indian law jurisdiction in Dell Meuchel's class at Cut Bank High School until he retired. I did the same lecture in the Senior PAD class at Shelby High School and Choteau High School in approximately 2020. I did the same lecture to the PAD class at Flathead High School in Lauren Gustafson's class in 2020 and 2021.

I have also conducted an Indian Law seminar as a CLE to the local bar. I do not have the date of this seminar.

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 was not able to do pro bono work at the Department of Justice for the last two years. I cannot recall what I reported for the three years prior. As attorney, Joe McKay states, when you

practice Indian law you practice poverty law. I provided my services to many Native American clients at reduced rates or free for years.

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.

I have not held any office or served on any committee in the Montana State Bar.

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

I have not served in the U.S. Military.

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.

I served as a part-time trial judge in the Blackfeet Tribal Court from around 2003-2006.

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

My experience as a rancher and farmer has aided my practice of law and would aid my ability as a trial judge.

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.

I have been a volunteer football coach for Little Guy Football in Kalispell for three seasons and I volunteered as a football coach for St. Mathew's Catholic School coaching Junior High football for five years. I served as the president of the Braves Touchdown Club, a 501(3)(c) corporation which generated funds for high school sports at Flathead High School.

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.

I have been as Assistant Attorney General, Senior Counsel, for the State of Montana from January 2023 to the present.

I served as a Deputy County Attorney for Glacier County from September 1993 until 2006.

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 I have not been publicly disciplined.

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

I was held in contempt of court by the Justice of the Peace in Cascade County in or around 1996. The Judge set a scheduling conference that I mistakenly thought I could appear by telephone in Great Falls. He held me in contempt for failing to appear in person.

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.

I have not been arrested or convicted of any of these offenses.

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).

I was sued on two occasions in Flathead District Court when I was a partner at Johnson, Berg and Saxby. I do not think there was a determination of liability in either matter. Both matters were settled before that determination.

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.

There exists no circumstances that would adversely affect my qualifications to serve.

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.

I am a 50% owner in Neil Johnson Trucking in Cut Bank, Montana and a 50% owner of Prairie Water Company in Great Falls, Montana. I own these businesses with my brother. I am a 25% owner in a storage unit facility in Flathead County. I also own some commercial property in Flathead county which is leased. I intend to continue the affiliation if appointed.

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.

I have timely filed and paid my taxes.

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.

The primary reason is because of my experience serving in front of a multitude of judges in courts across the State. I believe I can bring that experience in a positive manner to Lake and Sanders County.

I have also practiced much of my career in Lake and Sanders County, representing people in both counties in my litigation practice. Many of these people are friends to this day. I want to provide continuity in their judiciary to these fine people. Lake and Sanders Counties deserve this experience and continuity.

I thoroughly enjoy the courtroom and the interactions of parties litigating at the trial level. Being a District Court Judge in a rural setting has always been a dream and a goal of mine.

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

The most important quality is to be prompt and clear in making judgements. Peoples' lives sometimes hang in the balance of the Judges' decision. Make the judgment prompt so people can adapt to the judgment and begin living their lives. The worst thing a District Court Judge can do is delay in making judgements.

I Judge must be efficient. If a jury trial can be tried in two days, then make it happen in two days. Citizens who serve as jurors have many important matters that they are putting on hold while the trial occurs. Efficiency also helps Court staff with their morale.

A Judge must have a good demeanor. A District Court Judge is face to face with citizens of the Counties on a daily basis and that demeanor is important not only for the citizens but the lawyers, law enforcement and Court Staff.

Finally, a District Court Judge must maintain decorum and respect in the Court room.

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

The Judge's task is to construe and apply the statutes and the Constitution. At no time is a Judge to make law. This task is for the Legislature. My philosophy is that simple.

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.

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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).

1/08/2025

(Date)

/s/ Thane Johnson

(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, January 13, 2025.

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

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA-18-0109

STATE OF MONTANA,

Plaintiff/Appellee,

-VS-

SCOTT ALAN MAHLEN,

Defendant/Appellant.

APPELLANT'S OPENING BRIEF

Appealed from the Eleventh Judicial District of the
State of Montana, in and for the County of Flathead

Attorneys for Plaintiff/Appellee

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APPENDIX

Findings of Fact, Conclusions of Law, and Order on Defendant’s Motion
to Suppress and Rationale (Sept. 6, 2017).....Exhibit A

Motion to Suppress Hearing Transcript 9:2-4 (August 28, 2017)..... Exhibit B

TABLE OF CASES AND OTHER AUTHORITY

CASES

<i>Brown v. State</i> , 349 Mont. 408, 203 P.3d 842 (2009)	8
<i>State v. Benders</i> , 334 Mont. 231, 236, 146 P.3d 751, 754.....	8
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<i>Weer v. State</i> , 2010 MT 232, ¶ 10, 358 Mont. 130, 244 P.3d 311	8

STATUTES

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OTHER AUTHORITY

The Fourth Amendment of the United States Constitution	7
Article II, § 11 of the Montana Constitution	7

STATEMENT OF THE ISSUES

- I. WHEATHER THE DISTRICT COURT ERRED IN FINDNG THE INFORMANT’S TIP RELIABLE?
- II. WHEATHER THE DISTRICT COURT ERRED IN FINDING THAT THE TOTALITY OF THE CIRCUMSTANCES GAVE OFFICERS PARTICULARIZED SUSPICION TO CONTACT THE DEFENDANT?

STATEMENT OF THE CASE

On August 11, 2016, Defendant/Appellant Scott A. Mahlen (hereinafter “Mahlen”) was arrested for criminal possession with intent to distribute in violation of Mont. Code Ann. §45-9-103. *Findings of Fact, Conclusions of Law, and Order on Defendant’s Motion to Suppress and Rationale*, 3 (Sept. 6, 2017). Attached hereto as Exhibit A. A hearing was held on Defendant’s Motion to Suppress on August 28, 2017. *Id.* The District Court denied Defendant’s motion and issued a ruling on September 6, 2017. *Id.* The Defendant plead guilty to the charge reserving his right to appeal the denial of the Motion to Suppress. It is the *Order* denying the Defendant’s Motion to Suppress that the Defendant is appealing.

STATEMENT OF THE FACTS

On August 11, 2016 at approximately 10:33 p.m., an informant identified as Sheridan Fische (“Fische”) contacted law enforcement to report a road rage incident involving two motorcyclists near Willow Glen Drive and Conrad Drive in Kalispell, Montana. *Findings of Fact, Conclusions of Law, and Order on Defendant’s Motion to Suppress and Rationale*, 1 (Sept. 6, 2017). The informant informed the authorities

that he “thought the motorcycles were black and chrome Harley Davidsons. *Id.* The informant also informed the authorities that the motorcyclists were heading towards the Scoreboard Pub, Grill & Casino (“the Scoreboard”). *Id.*

The arresting officer, Deputy Shields (“Shields”) observed two motorcycles that matched Field’s vague description at the Scoreboard. *Id.* The Authorities arrived “minutes after the alleged incident was reported . . . [and upon contacting the Defendant], Officers felt the engines of the motorcycles and determined that they *had not been ridden recently.*” Emphasis added. *Id.* at 2. There were two gentleman in close proximity to the parked motorcycles. *Id.* One of those individuals, the Defendant, was contacted by Shields. *Id.*

Shields testified that he believed “the motorcycles were last seen at the Scoreboard” despite that fact not being accurate per the informant’s report. Mot. Supp. Hrg. Transcr. 9:2-4 (August 28, 2017). The motorcycles “match[ed] some of the description.” *Id.* at 10:25. The only description provided, that Shields relied upon, was that the informant “thought they were . . . black and chrome Harleys.” *Id.* at 17:20. No other descriptions were provided. *Id.* at 17:17-18:5. The description lacked even a guess as to the genders of the alleged suspects. *Id.* at 18:19. The District Court concluded that the informant identified himself and his information described multiple black and chrome motorcycles “with drivers” in the “area substantially as described by [the informant] within minutes of his report.” *Findings*

of Fact, Conclusions of Law, and Order on Defendant's Motion to Suppress and Rationale, 5 (Sept. 6, 2017).

Shields opined that because two men were standing by some motorcycles that matched some of the description, that the men had just arrived at the Scoreboard and were the suspects. *Id.* at 11:14. Shields later testified that the Scoreboard was only one establishment in the general vicinity of the motorcyclists and was approximately a half mile away. *Id.* at 14:1-16:15. Shields testified that the description provided to him, which he used to make contact with Mahlen, was “very vague.” *Id.* at 19:1-19:7. Shields testified that “he had no idea whether . . . Mahlen was the alleged suspect.” *Id.* at 21:10. Later, Mahlen testified that he does own a Harley Davidson, rather a custom chopper. *Id.* at 29:15. Mahlen's chopper is red and white, not black and chrome. *Id.*

Despite the foregoing, the District Court concluded that Shields possessed the requisite particularized suspicion based upon the “description of the motorcycles, the number of riders, their location and possible destination relayed by dispatch . . . along with the short period between the report and when the officers arrived at the Scoreboard to find [Mahlen] and another rider next to their motorcycles.” *Conclusions of Law, and Order on Defendant's Motion to Suppress and Rationale*, 7 (Sept. 6, 2017).

STATEMENT OF THE STANDARD OF REVIEW

An appellate court reviews a trial court's denial of a motion to suppress to determine whether the court's findings are clearly erroneous and whether those findings were applied correctly as a matter of law. *State v. Nelson*, 2017 MT 237, ¶ 6, 389 Mont. 1, 402 P.3d 1239.

SUMMARY OF ARGUMENT

The District Court erred in finding that the officer possessed the requisite particularized suspicion to make contact with the Defendant. The record, which includes references to Shields' report and an informant's tip, indicate that the totality of the circumstances do not justify Shields' contact with the Defendant. The contact was solely based on a vague physical description of motorcycles where the informant guessed where the riders were headed. The record and testimony provided shows the informant's tip was not ultimately corroborated by the officers. Thus, the contact law enforcement made with the Defendant was unjustified and violated his constitutional rights.

ARGUMENT

I. The informant's tip was unreliable.

This Court has identified three factors that must be considered to determine the reliability of a citizen informant's tip for purposes of creating reasonable suspicion. *State v. Dupree*, 378 Mont. 499, 502, 346 P.3d 1114, 1117 (2015).

The factors include:

1. Whether the citizen informant identifies himself to law enforcement and thus exposes himself to criminal and civil liability if the report is false;
2. Whether the report is based on the personal observations of the informant; and
3. Whether the officer's own observations corroborated the information.

State v. Pratt, 286 Mont. 156, 165 951 P.2d 37, 42-43 (1997). “[Officers] may rely on information conveyed by a *reliable* third person . . . in forming the basis for a particularized suspicion to justify an investigative stop.” *Id.* at 163.

The first factor is satisfied if the informant provides their name to the authorities. *Id.* at 165. The second factor is met if the information provided by the informant contains sufficient detail making it apparent that the informant had not been fabricating the information and the information is of the sort which in common experience may be recognized as having been obtained in a reliable way. *Id.* Finally, the third element can be met if the officer observes illegal activity or finds the vehicle and the location as substantially described by the informant. *Id.*

Here, the testimony provided to the District Court revealed that the informant's report was admittedly vague and thus fails the *Pratt* test. The informant failed to identify anything specific about the motorcycles and did not describe the motorcycles as “choppers”. The informant described the motorcycles as black and chrome but Mahlen's chopper is red and white. The informant failed to provide any

identifying details about the men driving the motorcycles, despite the alleged intimate altercation. The informant didn't even explicitly describe the riders as male. Finally, the third factor is clearly not met in this case. The informant's tip was *not* corroborated by the officers. While the officers' observed motorcycles that matched the informant's generic and vague description at the Scoreboard, they were clearly not ridden recently, as the engines were cool to the touch. The District Court found that the motorcycles were cool to the touch but later found that Shields had arrived "within minutes". *Findings of Fact, Conclusions of Law, and Order on Defendant's Motion to Suppress and Rationale*, 2 & 7 (Sept. 6, 2017). The motorcycle at the Scoreboard was white and red and was a chopper, not a motorcycle. Thus, the informant's tip lacks any indicia of reliability and Shields cannot base his contact with Mahlen upon it. The Court clearly erred in finding the tip reliable. Absent the tip, there was *no* basis for the contact and subsequent questioning of Mahlen.

II. The State of Montana violated Mahlen's constitutional rights when law enforcement made contact absent particularized suspicion.

The Fourth Amendment of the United States Constitution, and Article II, § 11 of the Montana Constitution affords all persons the freedom from unreasonable searches and seizures. The Montana Code provides:

In order to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person, a peace Deputy may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the

person . . . has committed, is committing, or is about to commit an offense.

Mont. Code Ann. §46-5-401(1).

In order to have particularized suspicion or reasonable grounds for an investigatory stop a police officer must: 1) possess objective data or articulable facts to make certain reasonable inferences; and 2) as a result of those reasonable inferences, a resulting suspicion that a person is committing [, has committed,] or is about to commit an offense. *Brown v. State*, 349 Mont. 408, 203 P.3d 842 (2009).

“While a peace officer’s experience . . . may be a factor in determining what sort of reasonable inferences he is entitled to make. . . it is not . . . the defining element of the test.” *Id.* at 847. Whether particularized suspicion exists depends upon the totality of the circumstances surrounding the stop. *State v. Benders*, 334 Mont. 231, 236, 146 P.3d 751, 754. The Court evaluates the totality of circumstances by “considering the quality, or content, and quality or degree of reliability, of the information available to the officer.” *Id.* The focus on the inquiry is “whether the officer could point to specific and articulable facts which, when taken together with rational inferences from those facts, reasonably warrant the intrusion.” *Weer v. State*, 2010 MT 232, ¶ 10, 358 Mont. 130, 244 P.3d 311 (citations omitted).

Here, Shields testified that he had vague, non-specific, and minimal information to form his particularized suspicion. The only articulable facts Shields relied upon to make his inferences was that *someone* riding a *motorcycle* made

threats, and those motorcycles were heading in a general direction. Mot. Supp. Hrg. Transcr. (August 28, 2017). Shields' contact was based upon vague/generalized information relayed to dispatch and provided little to no specificity. It was unreasonable for Shields to infer that Mahlen was a suspect in the investigation solely because he drove a chopper and was at the Scoreboard, a business establishment located a half mile away from where an alleged incident had occurred. Numerous businesses exist within the area where the alleged incident occurred. Mahlen's chopper was cool to the touch evidencing that it had not been ridden recently; Mahlen does not own a Harley Davidson motorcycle. The totality of the circumstances reveal an uncorroborated informant's tip and unreasonable inferences on Shields' part. No evidence presented would lead an experienced officer to infer that Mahlen had been engaged in the incident the informant reported – that he was recently riding a motorcycle and had threatened someone's life. The *only* information available to Shields to form his particularized suspicion was admittedly vague and Shields failed to point to any specific or quality of information that suggested Mahlen had been engaged in wrongdoing. All of the information taken together with rational inferences do not amount to particularized suspicion. The informant's tip, which Shields' solely relied upon, is grossly insufficient to invade Mahlen's constitutional rights. The Courts' finding that Shields possessed the requisite particularized suspicion was clearly erroneous.

CONCLUSION

Based on the foregoing, this Court should reverse the District Court's decision in concluding that the informant's tip was reliable and that Shields possessed the requisite particularized suspicion to make contact with Mahlen. The record reflects that Shields lacked particularized suspicion to make contact with Mahlen and that the informant's tip was unreliable.

DATED this 23rd day of May, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27, M.R.App.P., I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Word, is not more than [10,000 (principal brief) or 5,000 (reply or amicus brief)] words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 23rd day of May, 2018.

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CERTIFICATE OF SERVICE

The undersigned does hereby certified that on the 23rd day of May, 2018, a true and correct copy of the foregoing document was served upon the person named below, at the addresses set out below their names, either by mailing, hand delivery, or otherwise, as indicated below.

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