APPLICATION FOR

DISTRICT COURT JUDGESHIP

A. PERSONAL INFORMATION

1. Full name.

   Kathryn Ann McEnery

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 Twentieth Judicial District, Lake and Sanders County

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

   Birthdate: [redacted]

8. Date you become a Montana resident.

   July 1, 1997, then I attended law school in Indiana from 2007-2010, and returned to Montana about August 1, 2010. I lived in Sanders County from 2013-2018, and I own a residence there. I also have access to a seasonal property in Polson.

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.

- Trinity High School, River Forest, Illinois, 1979-1981, no degree
- St. Ignatius College Preparatory School, Chicago, Illinois, 1981-1983 – High School Diploma
- Grinnell College, Grinnell, Iowa, 1983-1987, Bachelor of Arts Degree, May 1987
- Institute for European Studies Abroad, August-December 1986, no degree
- University of Victoria, Victoria, British Columbia, Canada, courses in Cultural Resource Management, no degree, correspondence program, 1990
- University of Montana, Missoula, Montana, Master of Public Admin., August 2006
- Valparaiso University School of Law, Valparaiso, Indiana, Juris Doctorate, May 2010, magna 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.

- Valparaiso University School of Law
  J.D., Magna cum Laude
  Distinguished Student Award
  Internship, U.S. District Court for the Northern District of Indiana (Hammond), with Magistrate Judge Paul Cherry
- Internship, Porter County Circuit Court (Valparaiso), Judge Ed Nemeth
- Internship with Valparaiso University's Vice President for Marketing
- Faculty Research Assistant, Prof. Bernard Trujillo. My research work supported the professor's book Immigration Law and the US-Mexico Border, Kevin R. Johnson and Bernard Trujillo, U. of Arizona Press, 2011.
- Valparaiso University Law Review, Editor
- Moot Court Society, Member and Coach of the Trademark Competition Team
- Museum Assistant, Brauer Museum of Art with Museum Director Gregg Hertzlieb,
- Law Clerk, Motherway & Napleton, Chicago Illinois
- Law Clerk, Terrell and Thrall, Valparaiso, Indiana
- Law "Revue" – annual musical fundraiser for the Law Clinic: "A Funny Thing Happened on the Way to the Forum," – 2008, "Dames at Sea," – 2009," and "Wicked Law Review," 2010

University of Montana – Public Administration Program. I completed this program through the on-line portal between 2002-2006. I was able to complete this program while working full-time in the Quality Management Services Department at Kalispell Regional Medical Center.

Grinnell College – I was awarded a poetry prize in spring 1986. I attended an off-campus learning experience in Vienna, Austria in the fall of 1986, with studies in language, history, and culture. I was an editor of the school paper "Scarlet & Black." In 1985, I participated in club sports programs like track, swimming, and soccer, and also a few musical theater events.

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.

- Powell County
  409 Missouri Avenue, Suite 301, Deer Lodge, Montana, 59722
  County Attorney, January 2019 to present. Elected November 2018
  Also Special Deputy County Attorney, November-December, 2018
- Anaconda-Deer Lodge County
  800 Main Street, Anaconda, Montana, 59711
  Deputy County Attorney, February 2017 to December 2018
- Self Employment. McEnery Law Offices
  100 Wall Street, Hot Springs, Montana, 59845
  January 2013 to December 2018
- City of Thompson Falls
  108 Fulton Street, Thompson Falls, Montana, 59873
  City Attorney, July 2014 to December 2017
- Town of Hot Springs
  109 Main Street, Hot Springs, Montana, 59845
  City Attorney, October 2014 to December 2016
- Whitefish Theater Company
  1 Central Avenue, Whitefish, Montana, 59937
  Executive Director, January to August 2013
- Moore, Cockrell, Goicoechea, Johnson, P.C.,
  45 Commons Loop, Suite 200, Kalispell, Montana, 59901.
  Associate, May 2011 to December, 2012
- Buxbaum, Daue, PLLC
  3301 Great Northern Avenue, Suite 201, Missoula, Montana, 59808
  Law Clerk/Associate, August 2010 to May 2011
- Motherway and Napleton, LLP – *as law student*
  140 South Dearborn, Suite 1500, Chicago, Illinois, 60603.
  Law Clerk, June 2009-May 2010
- Terrell & Thrall, LLP – *as law student*
  1158 Lincolnway, Valparaiso, Indiana, 46385
  Law Clerk, June-August 2008

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.

State of Montana, May 2011 (#11752)
U.S. Federal District of Montana, May 2011

Montana Bar Association, member since May 2011
State of Illinois, January 2011 (#6303937, this is an inactive license)

In about 2014 or 2015, I became accredited by the Veterans Administration, completed all initial requirements and follow-up education, but I never made an appearance before the VA, and I didn't have any clients in my practice who needed those services, so I let the accreditation lapse.

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).

Criminal Prosecution – Right now as Powell County Attorney about 50% of my time is criminal prosecution of about 60 new felony cases per year and 100 new misdemeanor cases per year. Cases are referred to Powell County by the Deer Lodge Police Department, Powell County Sheriff, Montana Highway Patrol, and occasionally by Montana DCI, the Southwest Montana Drug Task Force, or even federal FBI, DEA, or ATF agents. An additional but smaller workload of cases is prosecutions pending from a prior year. I receive and file petitions to revoke suspended sentences (or to grant early discharge) upon report from Probation & Parole officers. Powell County does not employ a deputy, so I run an efficient practice reliant on the skill of my two administrative staff, and effective communication with the courts, law enforcement, the DOC/MSP, Probation & Parole, and the defense bar. I frequently attend trainings sponsored by the AG's office to strengthen professional relationships with other county prosecutors, and when needed rely on the AG's Prosecution Services Bureau office for assistance with special cases.

Civil Litigation – As Powell County Attorney, 25% of my time is spent on civil cases for the County which include child abuse and neglect cases, involuntary mental health commitments, and guardianships or probates involving the public administrator. This also includes disputes involving the County, such as quiet title actions, claims against estates for payment of taxes and assessments, or even liability that the County may have for wrongful termination, personal injury, or law enforcement use of force claims brought against the County. I have also conducted coroner's inquests of persons whose deaths occurred while in custody at the Montana State Prison and which were not deemed by the medical examiner to be natural deaths while under medical care. I am responsible for drafting responses to petitions for post-conviction relief or habeas corpus filed by persons in custody at the Montana State Prison. Finally, I have appeared on behalf of the State before the Parole Board and the Sentence Review Division.

Civil Administration – As Powell County Attorney, 25% of my time is spent working closely with the County Commissioners, Planning Department, Treasurer, Clerk and Recorder, and other departments of the County, to provide advice as necessary on contracts, grants, resolutions, tax levies, ballot measures, road disputes, employment issues, budgets, insurance, major equipment purchases, and other administrative matters.

I began my legal career in 2011 by working with a plaintiff's firm in Missoula, then moved to Kalispell to be closer to family, and worked with an insurance defense firm. In 2013, I struck out on my own in a general practice where I handled cases from family law and guardianships to

contracts and real estate deeds to wills and estates (I even had one immigration client). I did contract work for both the Office of the Public Defendant and the Office of the Appellate Defender, and legal research and writing work for other attorneys. In 2014, I began work as a prosecutor and city attorney with the City of Thompson Falls, and the Town of Hot Springs. Additionally, in an effort to make use of my Public Administration degree and pre-law background in non-profit administration, I worked with the Whitefish Theater Company in 2013 as a part-time Executive Director.

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).

There's been an incredible amount of variety in my practice as a rural attorney and that certainly is reflected in the types of cases I have handled in just over ten years. You have to be prepared to handle any question that comes in the door. When I opened my office in Hot Springs in 2013, I was the only attorney in a 50-mile radius, and there were only seven other resident attorneys in all of Sanders County. Just after the telephone guy installed my new landline, it rang, and the person calling wanted to speak to the new lawyer in town. That's how great the need for services is in some parts of the state, and underscores the need for people to be open to learn new things fast.

There's also a lot of intense emotional responsibility. As a prosecutor in a small community, you are close to your witnesses, crime victims, jurors, law enforcement, and finally, defendants. You stand behind them at the grocery store, or they come to your house to work on the furnace, maybe you buy their kid's 4-H pig at the fair. They are probably related to your hairdresser or the people who own the hardware store, or the high-school track coach. One time I donated an old sweater to the local thrift shop in Hot Springs, and when I went to court the next week, a woman facing new criminal charges stood before the judge wearing it, the nicest thing she owned. These are the people you're trying to send to treatment, or to prison.

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.

As Powell County Attorney, I appear in the Third Judicial District Court at least once every week and sometimes more. I also appear in the Powell County Justice Court once each week. I have not appeared in a federal court, administrative or arbitration proceeding, with the exception of a new federal quiet title action just recently filed for Powell County.

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.

Although my name appears on a number of cases before the Montana Supreme Court as Powell County Attorney, the cases in which I personally drafted documents were written between 2013-2016, when I was writing appeals for the Office of the Appellate Defender in cases of

termination of parental rights, involuntary mental health commitments, and revocations of criminal convictions. These are as follows:

DA 13-0206	Matter of K.G., YINC	2013 MT 361N
DA 13-0243	Matter of M.B.	
DA 13-0310	State v. Kauffman	
DA 13-0318	Matter of A.R.B.	2013 MT 310
DA 13-0544	State v. Timothy Carter	2014 MT 211
DA 13-0601	Matter of M.J.T.	*State conceded; commitment reversed.*
DA 13-0719	Matter of J.C.W., YINC	
DA 13-0794	Matter of S.L.	2014 MT 317
DA 13-0792	Matter of B.W.S., YINC	2014 MT 198 – *termination reversed*
DA 14-0020	Matter of L.N., YINC	2014 MT 187
DA 14-0041	Matter of B.O.T.	2015 MT 40
DA 14-0049	Matter of L.N., YINC	2014 MT 187
DA 14-0131	Matter of B.B.	
DA 14-0142	State v. Ferguson	
DA 14-0235	Matter of R.W.	
DA 14-0236	Matter of S.W.	
DA 14-0247	Matter of J.A.B., YINC	2015 MT 28
DA 14-0262	Matter of L.M.F., YINC	2015 MT 28
DA 14-0495	Matter of M.V., YINC	2015 MT 64N
DA 14-0496	Matter of J.M., J.L.M., and J.M.M.	2015 MT 64N
DA 14-0764	Matter of M.S. & D.S., YINC	
DA 14-0765	Matter of D.S., YINC	
DA 15-0036	Matter of J.H., YINC	2015 MT 244
DA 15-0038	Matter of J.H., J.H., and T.D.H.	2015 MT 244 – *see dissent/concur.*
DA 15-0169	State v. A. Rodriguez	
DA 15-0204	Matter of J.F.	2016 MT 15N
DA 15-0431	Matter of Y.J.M., YINC	
DA 15-0474	Matter of P.P.	
DA 15-0539	Matter of S.C., YINC	
DA 15-0607	Matter of K.Y.	
DA 15-0769	Matter of A.G. & T.G., YINC	2016 MT 203
DA 15-0770	Matter of T.G., YINC	2016 MT 203
DA 16-0042	Matter of D.D. and D.D., YINC	
DA 16-0043	Matter of D.D., YINC	
DA 16-0078	Matter of W.T.	
DA 16-0149	Matter of K.V., YINC	
DA 16-0274	Matter of S.C., YINC	
DA 16-0275	Matter of X.S., YINC	
DA 16-0315	Matter of J.M.S., YINC	
DA 16-0552	Matter of I.T., YINC	
DA 16-0553	Matter of M.T., YINC	

Other Important Cases

DA 16-0683 State v. Berger 2017 MT 229
I did not write this appeal, but it affirmed a Hot Springs City case I prosecuted.

DA 18-0156 State v. B. Anderson 2019 MT 190
This case was tried in March 2017 by another attorney before I took office, and I became responsible for the case when it was reversed and remanded in August, 2019.

OP 19-0164 Henry v. State
Henry was granted a writ of habeas corpus and the case was remanded for a restitution hearing before Judge Krueger in September 2020.

DA 19-0420 State v. C. Byrne 2021 MT 238
This case was tried in December 2018 by another attorney before I took office, and I became responsible for it when it was reversed and remanded in September, 2021.

DA 20-0347 Matter of D.D., YINC 2021 MT 66
I did not write this appeal, but it affirmed a Powell County case I prosecuted.

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.

Important: In 2019, a few months after I took office, the Montana Supreme Court reversed and remanded for a new trial the conviction in a sexual assault case that had gone to trial in March 2017 (State v. Anderson, 2019 MT 190). This had been a very important, high profile prosecution and trial for the local community, and even two years after the trial there were still strong public opinions on both sides about the rightfulness of the jury's guilty verdict, and the principles of the Supreme Court's opinion (the issue was whether one juror should have been excused for cause). This was an important case for the community and for justice. I worked closely with the Montana Attorney General and the attorneys of the Prosecution Services Bureau to prepare the case for trial again in 2020. We worked through issues of judge substitution, new defense counsel, a new prosecution team including myself - who with fresh eyes, was developing a slightly different trial strategy – plus a new venue, and, of course, COVID, which caused a number of continuances of the trial date. Most importantly, we provided support for the victim, who had felt vindicated by the jury's 2017 verdict, but now five years after the assault, was experiencing fatigue and stress in anticipation of having to endure another trial. I considered the needs of the victim versus the costs to her, and advocated for a resolution despite pressure to take the matter to a trial. Being a prosecutor is not all about getting a guilty verdict no matter what. It's about balancing all the factors of what makes up justice for the defendant, the victim, the community, and the realistic resources of our judicial system.

Challenging: In 2019, I inherited the office of the Powell County Attorney from Lewis Smith, who had held that post for twelve years. Lewis prosecuted a number of important, high profile murder and sexual assault cases, and had shepherded the County through a great number of complex legal challenges. Lewis' were big shoes to step into. The reason I bring this up is to say that at several moments in my career I have worked jobs where policies and procedures had been engrained in the staff and the system, and Powell County was one of them. It's your duty as the new manager to ruthlessly evaluate the effectiveness of the office as a whole. This requires showing respect for the effort that's been put into keeping things running but nevertheless making changes where necessary, provided you reach your people at a moment when they are

ready to change. I had to give new direction to the deputy county attorney and support staff and help them understand how the changes were going to improve things. Four years later, I am able to say that our office is more productive and efficient, thanks to the buy-in of the county attorney's staff, other stakeholders like court and law enforcement personnel, and everyone's interest in continuous process improvement.

Complex: On one of my first days as County Attorney, I received a call from a collections agency wanting payment on a $3,900,000 bill from the federal government. There was a dispute that had been ongoing for about eight years over the costs for toxic waste cleanup on a parcel of county property. For the next year, I worked closely with our county treasurer and auditors to get a handle on this thorny issue - a dispute with the U.S. Department of the Treasury. I learned everything I could, as fast as I could, about the history of the issue, and related matters of railroads, bankruptcies, environmental cleanup, and federal law. A key piece was the interrelationships between state agencies, county departments, and federal programs. Our congressional delegation was invaluable to us in providing advice and insight, as were staff at the state DEQ, and the good records kept by my predecessor and the county commissioners. Without them, the issue would probably still be a pending matter. Powell County successfully settled the matter with a much-reduced payment, and is now working again with state agencies and local business entrepreneurs to develop the cleaned-up parcel as a commercial property.

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.

The Usefulness of Non-Linear Thinking: Conceptual Analysis Tools and an Opportunity to Develop Electronic Health Information Privacy Law, *The Health Lawyer*, American Bar Association, Oct. 2010.

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.

From 2014 to 2017, I gave presentations at a number of National Business Institute Seminars on a variety of legal topics. The dates I have for these presentations is: 2/14, 12/14, 3/16, 2/17, and 3/17. The topics I recall giving are Estates and Probates, Ethics, and also Internet "Deep Web" Legal Research. I recall giving several of the presentations more than once.

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.

As a County Attorney for the past five years, I have not been permitted to work pro bono.

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 office such as described in a bar association or professional society.

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

None.

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.

None.

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

Prior to obtaining my law license, I had a career as a professional non-profit administrator, with positions at the Seattle Art Museum and Seattle Children's Museum, as well as the Fred Hutchinson Cancer Research Center, where I was a grant and contract specialist working with scientists on major national research initiatives. After I moved with my family to Montana in 1997, I worked with the Hockaday Museum of Art in Kalispell as an exhibit curator. After that, I worked at the Kalispell Regional Medical Center, in a role involved with strategic planning, regulatory compliance, patient advocacy, and quality improvement, and I was also the customer relations liaison with the Blackfeet Nation Tribal Council.

I continued to develop my interest in the arts and non-profits during and after law school, first with work at the Brauer Museum of Art on the campus of Valparaiso University. Then in 2013, the Whitefish Theater Company needed an executive director following the retirement of their founder, who had served for thirty-five years in the role, and so I assisted that group with grant writing, fundraising, special events, and their capital campaign for about eight months.

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.

The Powell County Attorney's office is fortunate to be a placement for U of M law students during the clinic phase of their education. I and my staff volunteer our time coaching students in court appearances and aspects of county attorney practice. We have been doing this for a number of years and our interns have gone on to become successful lawyers, several of whom have become criminal prosecutors. I am very proud to say that my office helps grow new criminal prosecution lawyers for the counties of Montana.

When I lived in Anaconda during the two years that I was a deputy county attorney there, I was a member of the Ladies chapter of the Ancient Order of the Hibernians, an Irish heritage organization. My activities were primarily focused on learning traditional Irish dances, which we performed on St. Patrick's Day at local nursing homes.

Now living in Deer Lodge, I volunteer at the Rialto, a community owned movie theater, I am a member of the noon Rotary Club, and I help read the lessons at morning prayer at St. James Episcopal Church. I often run 5k and sometimes longer races that raise funds for community organizations.

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.

Powell County Attorney – Elected
City of Thompson Falls City Attorney – appointed (part time, 2014-2017)
Town of Hot Springs City Attorney – appointed (part time, 2014-2016)
Town of Hot Springs Local Government Review Committee – elected, 2015

In 2015, the Town of Hot Springs voted to form a local government review committee, and I was elected to serve as a member of the committee. The committee recommended that the Town elect City Council members on an "at-large" basis rather than having districts, and this question was then put to the electors who voted to approve and make this change.

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.

Yes. In 2004 there was a dispute with family in my home and I was arrested and released. Prosecution was deferred and then dismissed. This incident gave me perspective on what ordinary people experience in our justice system. I hope that most people are treated with the dignity I was given. Before this experience I was not a lawyer and knew very few. But as a

result, I came to know quite a number of good attorneys and judges — part of my inspiration and motivation to attend law school as a single parent at the age of 40.

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.

None.

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.

In no particular order, an appointment as district court judge will allow me to motivate and inspire a new generation of Montanans to seek careers in law and government, to serve the community and pursue justice, and to continue a journey of life-long learning. Each goal is of equal importance and priority to me.

Public Service & Justice. I looked up what Judge Manley said in 2013 when he was first appointed to his position in the Twentieth Judicial District. He said that he had decided it was

time for him to give back to the community and the profession that had been good to him and his family. I met Judge Manley when I first started practicing law and was driving from Hot Springs to Polson and to Thompson Falls for civil family law cases. I brought him a number of disputes that pitted parents against grandparents over what was in the best interests of a child, and I recall he ruled against me a number of times. He would calmly and plainly explain the basis for his decision. I would then try to get my clients to understand that even though they may disagree with Judge Manley's ruling, that was how our system works and they had to live with and respect his decision. I always felt Judge Manley was fair to everyone. He came to court informed, listened carefully, and then ruled within the parameters of the law, with an overview to what was, simply, the right thing to do.

Thinking again to all the people I have met in my practice, and especially to my home communities in Sanders and now Powell County, I feel very fortunate to have had them teach me how to be a good lawyer. They have entrusted me with their cases – their rights, their injuries, their property, their families – and I've worked hard to deserve their gratitude. I want them to seek justice and to feel confident in the professionals who are there to protect it for them. Because of them, I've gained not only the knowledge and skills to do my job, but I've gained the "why" of my job. What Jim said in gratitude for his appointment rings true for me as well. My community has been good to me and it's time for me to give back.

Inspire & Motivate. I am fortunate to come from a family where doors were opened for me in terms of education and employment, although to be honest, girls of my generation were more likely to marry a doctor or lawyer than become one. Earning a masters degree and then becoming a lawyer in mid-life meant tapping into inner faith and courage, persevering in the face of hardship and reaching beyond self-doubt. Powell County doesn't have any lawyers in it under the age of 50; in fact I'm the youngest one. If I'm not selected to serve as a judge, my primary task in my second term as county attorney will be to cultivate my replacement. I'd like a future county attorney or district judge in this area to be one of the boys or girls in the local little guys wrestling club, someone from a third-generation Montana ranch family, maybe a mom or dad who thinks they're too old to go back to school. They would bring to the practice of law their business, land development, and human resources expertise from working at the prison, the hospital, Sun Mountain Lumber, or Rock Creek Cattle Company. And then they would be able to stay and thrive in their home community, which would lead inevitably to leadership roles in local government. I'd like people to see me and understand that if I can do it, so can they.

Learning Opportunity. It would be wrong to say that I'm ready to move on from Powell County. There's still so much I want to do here at work and in this community. But I wasn't "ready" to move from Hot Springs to Anaconda/Deer Lodge either, and I'm glad I did. Whenever I have taken a risk to gain knowledge and experience or to make new connections with people it has paid off. I will gladly take that risk again. There's a lot to learn about being a district court judge, and I am up for the challenge.

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

The first quality is decisiveness. A judge must make decisions that will disappoint at least half of the parties. A judge should not shirk this responsibility, have courage, and not be deterred from

issuing an order or ruling that might be appealed or even overturned. These decisions must be deliberate and should not be rushed, but pending matters should not be permitted to linger unreasonably. People are waiting for justice, often desperately.

The second quality is independence. A judge's opinions and decisions must be made independent of personal bias; there is no room for passion or prejudice to obscure judicial reason. Everyone comes into the courtroom with an agenda and the judge must resist making a decision simply based on who is arguing the loudest. Finally, a judge must not be swayed by trends or social chatter outside the courtroom. A judge must focus on the law (as made by the legislature, or established by case precedent) and the facts.

Third, a judge must have stamina of both mind and body, and be well-tempered. To achieve this means paying attention to one's health or what is currently called the work-life balance. A judge must be tactful and sensitive, must exhibit forbearance under pressure or provocation. A judge will see a very wide range of often volatile human emotions expressed in the courtroom, and a judge must remain calm, be sympathetic, but also careful to not take that kind of stress home. To maintain a professional presence on the bench, and respectful decorum in the courtroom, you have to have a strong and healthy soul. This requires effort to grow loving relationships with friends and family, tap into creative activities that restore you, and consciously treat others with kindness and respect. We used to say that a strong work ethic was the most important thing, but having lived through COVID we've become more aware of how interdependent we all are, and what's really important in life.

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

I'm guided generally by the duty to apply good and solid reasoning to every issue. The Montana Constitution and our statutes are fundamentally expressions of contract, and principles regarding the interpretation of contracts are well set forth in common sense, our Montana Code, and in our Supreme Court opinions. St. Thomas Aquinas defined a law as "an ordinance of reason for the common good, made by him who has care of the community." When faced with a question about how a statute applies, I do not hesitate to refer to the Maxims of Jurisprudence at Title 1, Chapter 3, Part 2, and principles like "the law respects form less than substance," or to the guidelines for interpretation of Contracts at Title 28, Chapter 3 like "words are to be understood in their ordinary and popular sense," and "the language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity." I have had several disagreements with other attorneys about which statute applies to a situation (see the attached briefs), and where an ambiguity or contradiction is found, the best practice is for the legislature to address it. A lower court's opinion in a specific case on how the law can be applied should only fill the gap until the legislature can provide clarification. And that judge's opinion might be informed by the parties' arguments, the case history, and might be mindful of the tradition and goals of public order and justice, but it must ultimately be based on reason responding to the facts of the matter.

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.

Please see attached examples of a sentencing memorandum and a response to a motion.

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.

The Hon. Jim Manley
Montana Twentieth Judicial District Court
106 East Fourth Avenue
Polson, MT 59860
(406) 883-7250

The Hon. Kurt Krueger
Montana First Judicial District Court
155 West Granite Street, Room 308
Butte, MT 59701
(406) 497-6410

The Hon. Ray Dayton
Montana Third Judicial District Court
800 South Main Street
Anaconda, MT 59711
(406) 563-4044

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).

April 6, 2022 _____ _____
(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, April 11, 2022***

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

Kathryn McEnery
Powell County Attorney
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MONTANA THIRD JUDICIAL DISTRICT COURT, POWELL COUNTY

LONNIE RAY MORGAN, **Plaintiff,** **-vs-** **STATE OF MONTANA,** **Defendant.**	**CAUSE NO.: DV-2021-44** **STATE'S RESPONSE TO PETITION FOR RELIEF FROM SEXUAL OFFENDER REGISTRATION**

COMES NOW, Kathryn McEnery, Powell County Attorney, for the State of Montana and submits its response to the Petitioner's request for relief from sexual offender registration. However, the State requests that the Court reserve ruling until the Montana Supreme Court issues an opinion in *State v. Hinman*, DA 20-0197.

Just on Tuesday of this week, the Montana Supreme Court directed briefing on whether it should reconsider the holding of *State v. Mount*, 2003 MT 275. The issue in *Mount* and now in *Hinman*, is whether the 1997 amendments to the Sexual or Violent Offender Act, which declared they were retroactive to 1989, violate *ex post facto* clauses.

The Court's ruling in *Hinman* will determine whether Morgan's duty to register automatically expired in 2008, or whether he is required to maintain his petition for relief.

The statute on sexual offender registration as it stood in 1994, when Morgan was convicted, provided for automatic expiration of the duty to register after ten years, provided

that during that time he did not commit another sexual offense. *See, e.g., State v. Sedler*, 2020 MT 248, ¶ 14. Morgan meets these criteria. If the Court rules that the 1997 amendments violate *ex post facto* clauses, then his request for relief must be granted.

If analyzed under the current statutory framework requiring lifetime registration, Morgan is technically eligible for relief from registration, although today the Court must first consider the opinion of the victim, and whether registration is necessary for public protection and the best interest of society. The State and victim oppose on this basis.

RELEVANT FACTS

The State concurs with Mr. Morgan as to the general facts in his petition. He is a resident of Lewis and Clark County. He was convicted in the Montana Third Judicial District Court, DC-93-14, of the crime of Incest of a 13-year old, a felony violation of Mont. Code Ann. § 45-5-507 (1993). He was sentenced January 20, 1994 to 20 years imprisonment at the Montana State Prison with 12 years suspended. A condition of his sentence was that he be required to register as a sex offender as per Mont. Code Ann. § 46-18-254 and § 46-18-255 (1993).

Mr. Morgan was released from MSP in 1998, and his duty to register began then. He discharged the sentence at DC-93-15 in 2010. Supervision by Probation & Parole was continued from 2012-2017 because of a violation of medical marijuana privileges.

In 2018, his Probation & Parole Officer agreed that Morgan met the statutory criteria for filing a petition for relief of the duty to register. In particular, the officer stated that although tier designations had not been defined at the time of his conviction, were he to be sentenced today, he would be classified as a Level 1 sexual offender.

In correspondence with the Powell County Attorney, the Probation & Parole officer recalled no lapses in registration during the period of her supervision. A check on his criminal history by the Powell County Attorney found no violations of the law from 2012 to date and found he has been registered as a sexual offender since February, 1998, slightly more than 23 years.

The State has met with the victim and provided her with a copy of the petition as required by law. The victim opposes the petition and respectfully waives a statement or hearing, but states she would appear and testify if required to by the Court.

APPLICABLE LAW

In 1993, the penalty for Incest, where the victim is under 16 years of age, was a maximum of 20 years imprisonment and a fine of up to $50,000. *Exhibit* 1. Mont. Code Ann. § 45-5-507 (1993). The statute as it stands today includes an enhanced punishment for a victim under 12 years of age, but this was not a part of the 1993 statute.

In 1993, a person's duty to register was provided at Mont. Code Ann. § 46-23-504. The duty to register, at Mont. Code Ann. § 46-23-506, terminated 10 years from date of release from prison and initial registration, provided that the person is not subject to registration for another sexual offense. *Exhibit* 2, Mont. Code Ann. § 46-23-501 to -507 (1993); Mont. Code Ann. § 46-18-254, -255 (1993).

In 1995, while Morgan was incarcerated, the Sexual Offender Registration Act was amended to require a sexual offender to register for life, but allowing an offender who has been registered for ten years to petition for relief, granted on a finding that he has remained a law-abiding citizen and continued registration is not necessary for public protection and

relief from registration is in the best interest of society. Mont. Code Ann. § 46-23-506 (1995). The 1995 amendments are not expressly retroactive. Mont. Code Ann. § 1-2-109.

In 1997, the Act's registration requirements were made retroactive to "sexual offenders who are sentenced or are in the custody or under the supervision of the department of corrections on or after July 1, 1989." Mont. Code Ann. § 46-23-502, *Compiler's Comments.* Then, in 2003, the Montana Supreme Court held that the retroactivity provision did not violate the *ex post facto* clauses of the United States or Montana constitutions, and were nonpunitive. In *State v. Mount*, 2003 MT 275, ¶¶ 89-90.

Today, tier level designations are an additional component of the statutory scheme for relief of the lifetime duty to register. Under the current statute, Mont. Code Ann. § 46-23-506 (2019), a sexual offender must register for life, except that a Level 1 sexual offender may petition for relief from registration after 10 years, and a Level 2 sexual offender may petition for relief from registration after 25 years. *Id.*

Under the current scheme, the requirement of a hearing is implied, and the court must consider any oral or written statements of the victim. A court may then grant a petition upon a finding that the offender has remained a law-abiding citizen and continued registration is not necessary for public protection and that relief from registration is in the best interests of society. *Id.* Certain offenders may never petition for relief: those who have been convicted of a second or subsequent sexual offense, or if the victim of the incest was under 12 years of age. *Id., at Subsection (5).*

The State has reviewed a recent Montana Supreme Court opinion, *State v. Sedler*, 2020 MT 248. This is an opinion regarding requirements to register as a violent offender

under § 46-23-506, and whether the 1997 registration requirement automatically ends without the need to file a petition. A portion of the Court's reasoning, at ¶ 14, states:

> Pursuant to this statute [the 1997 version of § 45-23-506], upon an offender [a violent offender] not being convicted of failing to register or of a felony offense for ten years post-release from confinement or sentencing, the registration requirement automatically ended without any petitioning requirement. This version of the statute was in effect at the time Sedler was sentenced on his original violent offense. Thus, Sedler had a reasonable expectation he did not need to continue registering as a violent offender upon expiration of ten years after he was released from DPHHS custody if he maintained his registration and incurred no felony conviction.

State v. Sedler, 2020 MT 248, ¶ 14.

The State has contacted the Montana Attorney General regarding the applicability of the Court's "reasonable expectation" reasoning in *Sedler* to a sexual offender's duty to petition for relief from registration. At this time, the Attorney General's position is that the current state of the law requires a petition. However, the State has been made aware that on August 17, 2021, the Montana Supreme Court issued an order for briefing in *State v. Hinman*, DA-20-0197, in which it was stated:

> We conclude a nonfrivolous issue exists as to whether this Court should reconsider our determination in *State v. Mount*, 2003 MT 275, 317 Mont. 481, 78 P.3d 829, upholding the retroactive provision of the Sexual or Violent Offender Registration Act.

State v. Hinman, DA 20-0197, August 17, 2021. *Hinman* is a case involving the registration of a sexual offender who was convicted in 1994 and was discharged from prison in 2000. The Attorney General's office advised that the Court may be willing to agree with an argument based on "reasonable expectation" and conclude that the retroactive lifetime registration does violate *ex post facto* clauses.

ANALYSIS

The State has analyzed this issue under two frameworks.

1993 Statute

Morgan is entitled to expiration of the duty to register as of 2008, ten years after he was released from prison and began registering. Morgan was registered from 1998 to 2008, and his felony conviction on the drug charge was not a violent or sexual offense, and did not occur within the ten years of his initial registration. Although *Sedler* applies specifically to violent offenders, the State finds the reasoning of the Court as to the "reasonable expectation" of the petitioner to be compelling. Since the statute in force in 1994 required only ten years of registration, and the 1995 statute was not specifically retroactive, then Morgan had a reasonable expectation that he did not need to continue registering after ten years and no new felony convictions, and also, that he did not even need to petition for this relief.

The Supreme Court has recently invited briefing on whether it should reconsider its determination in *Mount* that the retroactivity provisions of the 1997 amendments do not violate *ex post facto* clauses of the U.S. and Montana constitutions. The Attorney General's office has indicated that the Court may now conclude that they do.

Today's Statutory Scheme

The State agrees that based on the facts of the Judgment in DC-93-15 that none of the exceptions found at subsection Mont. Code Ann. § 46-23-506 (5) apply and he is not prohibited from filing his petition.

The State agrees that Morgan has registered as required, for at least the 10 years that

would be required of a Level 1 sexual offender, and almost the 25 years required of a Level 2 sexual offender.

The State agrees that Morgan has not been convicted of a subsequent sexual offense since his release from prison; perhaps the duty to register acted as a deterrent.

The State concurs with his Probation & Parole Officer, who opined that despite his conviction for the violation of his medical marijuana privileges, which sentence was discharged in 2017, Morgan has remained law-abiding.

Under the current scheme, Morgan is technically eligible for the relief requested based on the crime for which he was convicted.[1]

If analyzed under the current scheme, the State would assert that other than meeting the technical requirements, Morgan does not present a very compelling case for relief. His petition states only that registration represents a continued and unnecessary cost to himself and the State. He does not describe any benefit to society achieved by potential relief from the duty to register, for example, increased employment opportunities. His petition does not acknowledge the importance that the sexual offender registry represents to the community as a measure of community protection and offender deterrence. And, his petition does not address the impact of his conduct on the victim.

The State has met with the victim, who opposes Morgan's petition. If analyzed under the current statutory scheme, the State would argue that continued registration of this offender is required for public protection and is in the best interest of society. Continued registration provides a measure of justice for the victim of an offender who was only

[1] Morgan was not convicted at trial; thus the court record reflects only the facts supporting the charges for which he was convicted, not facts as to all of the other allegations in the State's Information or in the county attorney files.

incarcerated for four of the twenty years to which he was sentenced. The offender is only 57 years old, and the deterrent effect of registration is still needed to protect vulnerable members of the public.

CONCLUSION

The State opposes Morgan's petition, but concedes that it may have to be granted in accordance with the law. The State respectfully waives a hearing on this matter. The State asks that the Court reserve ruling until the Montana Supreme Court issues its decision in *State v. Hinman*.

Respectfully submitted this 19th August, 2021.

Kathryn McEnery /s/
Kathryn McEnery, *electronically signed*
Powell County Attorney

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2021, a copy of the foregoing document was electronically mailed to Michael Kakuk, Attorney for the Petitioner, at info@kakuk.com.

//ss// *Sarah E. Ward*
Electronically signed by:
Sarah E. Ward
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MONTANA THIRD JUDICIAL DISTRICT COURT, POWELL COUNTY

STATE OF MONTANA, **Plaintiff,** **v.** **CHRISTOPHER MICHAEL KEPLER,** **Defendant.**	**Cause No. DC-2013-08** **STATE'S SECOND SENTENCING MEMORANDUM**

The State now submits a supplemental sentencing memorandum.

Primary Issue: Which revocation statute applies, Mont. Code Ann. § 46-18-203, or § 46-14-304?

Answer: They both do. They work in concert. Chapter 18 is primarily focused on defendants who receive a DOC sentence where mental illness was not an issue at the time of the commission of the offense. Chapter 14 is narrowly focused on defendants who receive a DPHHS sentence where mental illness was an issue at the time of the commission of the offense. The State's position is that Chapter 14 is primary.

Secondary Issue: Assuming that § 46-14-304 is controlling, did the State present sufficient evidence that Kepler still presents a risk of harm?

Answer: Yes. See below.

Disposition of Defendant, Mental Competency – Title 46, Chapter 14, Part 3.

The Defendant should be sentenced, upon revocation, in accordance with this Part. Statutes relevant to disposition of a defendant where mental health is a factor are found at Part 3. Two kinds of mental competency are addressed in this part. The first is "not guilty by reason of lack of mental state" and the other, defined at § 46-14-311, is a person who "at the time of the commission of the offense of which convicted the defendant was suffering from a mental disease or disorder or developmental disability that rendered the defendant unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of law." Mr. Kepler is the second type.

Consideration of Kepler's mental competency at sentencing is to follow the procedure set forth at § -311. As per this subpart, a mental evaluation was recently conducted by Dr. Smelko. Although the evaluation was not statutorily required — because Kepler was already convicted in 2014 as amended in 2017 — the Court inquired in December whether a more recent evaluation could be made available, and so one was arranged. The evaluation was required to include recommendations as to Kepler's care, custody, and treatment needs, which it did.

The sentence to be imposed now is found at part § -312. Indeed, Kepler was sentenced under this subpart in both 2014 and as amended in 2017. D.C. Doc. 99. The statute describing sentencing of a person like Kepler states:

> The court shall sentence the defendant to be committed to the custody of the director of the department of public health and human services to be placed, after consideration of the recommendations of the professionals providing treatment to the defendant and recommendations of the professionals who have evaluated the defendant, in an appropriate correctional facility, mental

> health facility, as defined in 53-21-102, residential facility, as defined in 53-20-102, or developmental disabilities facility, as defined in 53-20-202, for custody, care, and treatment for a definite period of time not to exceed the maximum term of imprisonment that could be imposed under subsection (1). The director may, after considering the recommendations of the professionals providing treatment to the defendant and recommendations of the professionals who have evaluated the defendant, subsequently transfer the defendant to another correctional, mental health, residential, or developmental disabilities facility that will better serve the defendant's custody, care, and treatment needs. *The authority of the court with regard to sentencing is the same as authorized in Title 46, chapter 18, if the treatment of the individual and the protection of the public are provided for.*

Mont. Code Ann. § 46-14-312 (2), *emphasis added*. The plain language of the statute provides that it is the Director of the Department of Public Health and Human Services to arrange for an appropriate placement of a defendant and any subsequent transfer or release. The Director of DPHHS is aware of Dr. Smelko's evaluation and suggested treatment.

Revocation of Conditional Release

The revocation of a conditional release of a person for whom mental health is an issue follows Mont. Code Ann. § 46-14-304. [1] This term "conditional release" as used in this subpart is not specifically defined elsewhere in the code. These are ordinary words, and it is undisputed that Kepler at the time of his recent psychotic episodes, he was on a release from DPHHS custody, subject to a number of conditions. Hence, a conditional release. It is undisputed that at hearing held on February 22, 2022, Kepler admitted to

[1] Were § -304 not the controlling statute, since the authority of the court here is "the same as authorized in Title 46, chapter 18," Kepler's suspended sentence would be revoked under the mere preponderance standard set forth at Mont. Code Ann. § 46-18-203, and the Court could then decide to continue the suspended sentence with or without changes, or to revoke the suspended sentence and require the offender to serve the sentence imposed. § 46-18-203(7)(a).

absconding from supervision, a non-compliance violation of the conditions of his release.

Additionally, the context of the revocation statute, where it is found within Part 3, "Disposition of Defendant," of Chapter14, "Mental Competency of the Accused," means that it reasonably applies to either persons who are either NGMI (not guilty but mentally ill), or persons who are GBMI (guilty but mentally ill). Mr. Kepler is the second type.

Sufficient evidence to support a revocation must be reasonable, and "satisfy the court that the conduct of the person on release has not been in keeping with the conditions of the release agreement." *State v. Edmundson*, 246 Mont. 241, 245 (1990), *citing State v. Kern*, 212 Mont. 385, 389 (1984). The statutory requirement is found at Mont. Code Ann. § 46-18-304, and was stated in the State's *Petition*:

> In order to revoke a conditional release, the evidence must support a finding that:
>
> (a) the conditions of release have not been fulfilled; and
> (b) based on the violations of the conditions and the person's past mental health history, there is a substantial likelihood that the person continues to suffer from a mental disease or disorder that causes the person to present a substantial risk of:
>
> (i) serious bodily injury or death to the person or others;
> (ii) an imminent threat of physical injury to the person or others; or
> (iii) substantial property damage.

Mont. Code Ann. § 46-14-304(1). Then, upon revocation, the court ***shall*** immediately order the person to be recommitted to the custody of the director of the department of public health and human services, subject to discharge or release only in accordance with the procedures provided in §§ 46-14-302 and -303. Mont. Code Ann. § 46-14-304(3). It is up to the director to determine subsequent discharge or release if "the person no longer suffers from a mental disease or disorder that causes the person to present a substantial risk of

serious bodily injury or death to the person or others." Mont. Code Ann. § 46-14-302(1).

Chapter 14 includes very specific statutes that are to be applied when the mental health of a Defendant is an issue. It is therefore controlling over the statutes in Chapter 18, which apply to all Defendants in general, and all suspended sentences in general. That is why the State's position is that disposition of Kepler's revocation should proceed as per Title 46, Chapter 14, Part 3 – so that the treatment of the individual and the protection of the public can be provided for in the sentencing order.

Proof Submitted

The State in this case presented undisputed evidence that Kepler has not fulfilled the conditions of his release. Kepler absconded from Montana, a fact which he admitted.

The State also presented undisputed evidence that Kepler, who was psychotic in 2013 when he caused the death of Patricia Graves[2], continues now to suffer from the mental disease of schizophrenia, and because of which he continues to present a substantial risk of harm to himself and others. The Defendant's claim that the "petition for revocation fell short of the necessary requirement for revocation," is unsupported by the record or the testimony presented on February 22, 2022.

At the evidentiary hearing, the State presented undisputed evidence that Kepler was

[2] At the time of the fatal collision, Kepler was driving on a suspended Idaho license and was driving under the influence of methamphetamine and THC. Evidence collected at the scene indicated that Kepler had been driving the wrong way down the interstate for at least 5 miles at speeds of up to 90-95 mph. Ben Graves, Patricia's husband, was injured in the collision and Patricia's body was pinned in the vehicle for several hours. Ben told Trooper Gill that he had attempted to move out of Kepler's way several times, but that Kepler had deliberately mirrored his evasive actions until the two vehicles finally collided. Trooper Gill found no evidence that Kepler attempted to slow down or avoid hitting the Graves' vehicle, as there were no skid marks ahead of the point of impact.

psychotic while in Arizona, taking illegal drugs, and not complying with prescription medication regimens. Both Officer Sean Daly and Dr. Bowman Smelko testified and reported to these facts. Dr. Smelko specifically states he does not dispute the diagnosis.

The State also presented sufficient evidence to satisfy the court that Kepler still presents a substantial risk of injury to himself and others. Kepler does not dispute that he neglects to take his medication and continues to have episodes of psychosis and other symptoms of decompensation. He admits recent marijuana and methamphetamine use. Kepler's admissions to Dr. Smelko as to his repeated illegal drug use are not hearsay because they are statements of a party opponent; but even if they were, they are admissible as statements made for the purposes of medical treatment.

Kepler's own mother, Zaydee Rule, submitted two sworn affidavits (December 20, 2021 and February 22, 2022) indicating that he experiences episodes of acute psychosis and decompensation when he does not take his medication. She admits that one such episode occurred in July 2021, in Flagstaff.

Further, her February 22, 2022 affidavit describes an incident in March 2021, in which he became paranoid and "extremely agitated" with her because he was having an acute psychotic episode. She admits that "he kept insisting that I immediately stop the car, so much so that I became concerned he might take the wheel while I was driving so that he could get out of the car." This risk to her own safety caused her to take the nearest highway exit. Her affidavit downplays this incident as just Kepler's need to have a cigarette, but it does not negate what was earlier reported to Officer Daly. He testified that she described

this to him as an assault in which Kepler did attempt to grab the wheel of the car while she was driving. Officer Daly additionally testified to his concerns for community safety, as this incident is strikingly similar to the one in which Kepler killed Patricia Graves. Ms. Rule conveniently neglects to mention that after the incident in March, Kepler was placed in a treatment facility called Recovery Innovations in Peoria, Arizona. Nor does she admit that despite this treatment, he used meth again and suffered another decompensation episode in July 2021, leading to his arrest in Flagstaff.

The Defendant has now represented to the Court that Dr. Bowman Smelko reported and then testified that Kepler presents absolutely no danger to the community and that he recommends Kepler be immediately released to his mother. These are opinions of the Defendant not supported by the record. Dr. Smelko provided no such unqualified testimony or recommendations. It is unfortunate that Ms. Rule holds such a strong opinion that her son is not dangerous, because her efforts to advocate for him are counterproductive to the DPHHS mission. [3]

What the professional person stated was that a "major problem" for Kepler is supervision to make sure he complies with mandates to take injectable medications, engage in therapy, and have monitoring for illegal drug use. In Dr. Smelko's opinion, Kepler is only a "low risk" if he complies with these mandates. The last words in his report are, "however, his compliance will be necessary." This cautionary language is no basis on which the Court may safely release Kepler from Powell County's custody. The regulated

[3] Ms. Rule's declaration that she would like to be appointed as Kepler's guardian is irrelevant, as no petition has been filed in this Court, and a guardianship placement is not one of the sentences to be imposed at § 46-14-312.

environment of the Powell County jail is to be credited for providing a structure for Kepler which keeps the community safe from his psychosis – he has no opportunity to act otherwise. However, what Kepler needs now is a medical discharge plan and appropriate prescriptions for psychiatric medications. These must be provided by the Department of Public Health and Human Services, and Dr. Smelko's evaluation is not an appropriate substitute. Alarmingly, Ms. Rule has already stated to the Court that she does not want to supervise injectable medications if she deems them to be too expensive. The State's concern is to prevent yet another fatal vehicle event by someone who is a clear risk to public safety.

Compensation of Dr. Smelko

The Defendant has asked that the Court enter an order reimbursing Ms. Rule for Dr. Smelko's evaluation, a cost of $3,000. Cited in support of this request is a statute that is inapplicable to this case. By their plain language, Mont. Code Ann. § 46-14-301 and § -302 clearly apply only to persons who have been adjudicated NGMI (not guilty but mentally ill). The State asks that the Court decline to order this reimbursement.

Nine-Month Placement Limitation

The Defendant has made argument that Mont. Code Ann. § 46-18-203(7) and (8)(b)(ii) apply to the Court's sentencing authority, and that somehow the Court may be limited from issuing a custodial order of more than 9 months. However, a careful reading of the statute reveals that subpart (8) only applies when a Defendant has been found to have made a compliance violation —Kepler admitted to absconding from supervision, which is

a non-compliance violation. More importantly, neither subpart applies, since the statutory language at (7)(ii)(A) and (B) clearly state that placement is for a "secure facility *designated by the department*" [(7)(ii)(A)] or "a community corrections facility or program *designated by the department"* [(7)(ii)(B)], *emphasis added.* The "department" referred to in this statute is the Department of Corrections; however, Kepler was sentenced in 2014 and as amended in 2017 to the custody of the Department of Public Health and Human Services, not to the Department of Corrections. Kepler's required disposition is immediate recommitment "to the custody of the director of the department of public health and human services." Mont. Code Ann. §§ 46-14-304, -312.

Bond Hearing

The Defendant, who has been convicted of a crime, is not entitled to bail. Mont. Code Ann. §46-9-102. The court shall order the detention of a defendant in a revocation proceeding. Mont. Code Ann. § 46-9-107. The court may only order release of a defendant in a revocation matter upon findings "that, if released, the defendant is not likely to flee or pose a danger to the safety of any person or the community." *Id.* The Defendant in this case has absconded from supervision and is furthermore alleged to pose a serious danger to the community – based on his conviction history of having killed someone because of a psychotic episode involving illegal drugs, as well as his admissions regarding illegal drug use and recent psychosis, and the testimony of the Probation & Parole Officer Sean Daly. Kepler should not be released pending the disposition of this case.

Kepler did not cause anyone harm on January 6, 2022 when he was taken to Helena for a medical appointment. That is not sufficient assurance for the State that he is "safe"

to return to the community. Since his incarceration in the Powell County jail, the constant presence of law enforcement staff has given him no opportunity to be anything otherwise. Officer Daly has already testified to his concerns about the volatility of the Defendant's relationship with Ms. Rule – again, the instability of that relationship is addressed by keeping Kepler in jail until the Department can address his discharge needs.

The State has no doubt that once the Defendant is committed to the custody of the Director of Public Health and Human Services, the Director will create an appropriate discharge plan for him, and within a reasonable time, Kepler will be released to the community within many of the same parameters that Dr. Smelko has recommended. But before this can happen, the District Court must first dispose of the case and commit Kepler to the Director's care and custody. In the meantime, any request to release Kepler immediately into the care of a layperson would inappropriately jump this procedure. The proper legal procedure for Kepler's release must be adhered to.

Conclusion

A fully custodial sentence to the Montana Department of Public Health and Human Services is appropriate here.[4] The record shows that Kepler is subject to unpredictable periods of medication non-compliance, illegal drug use, and repeated episodes of psychosis. There is no evidence to indicate how long he might succeed during re-suspension of any part of his remaining sentence. None exists, because the record shows

[4] This District Court has previously sentenced other DPHHS commits, upon revocation of a suspended sentence, to a fully custodial term. *See, e.g.*, *State v. Fox*, DC-09-24, Montana Third Judicial District Court, Powell County, December 14, 2021.

that when Kepler chooses not to take his medication, and when he also uses street drugs, psychosis inevitably recurs.

Prior Sentencing Memorandum

The State reiterates its discussion regarding proposed conditions of supervision. As per the State's previous sentencing memorandum, the State has no objection to Kepler being given credit toward any sentence that the District Court imposes based on the time he has spent in custody, as well as so-called "street time" credit.

DATED this 17th day of March, 2022.

/Kathryn McEnery/
Kathryn McEnery, *electronically signed*
Powell County Attorney

CERTIFICATE OF SERVICE

I, Sarah E. Ward, Legal Assistant, hereby certify that a true copy of the foregoing Sentencing Memorandum was hand-delivered on this 17th day of March, 2022, to:

Christopher Kepler
Powell County Jail
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Courtesy copies were also e-mailed to:

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Legal Assistant

PROPOSED CONDITIONS OF SUPERVISION

Should at any time the Department of Public Health and Human Services determine it appropriate to release the Defendant from custody to any form of community supervision, the following conditions shall apply:

TERMS AND CONDITIONS

1. The Defendant shall be subject to the supervision of the State of Montana, Department of Corrections, Adult Probation and Parole Bureau, and shall strictly adhere to all rules and regulations of the Adult Probation and Parole Bureau. The Defendant shall sign an agreement as is signed by a probationer, incorporating all rules of supervision set forth in the Judgment of the Court, as well as the Defendant's agreement to strictly adhere to all state Rules of Probationary Supervision of the Montana Department of Corrections Bureau of Probation and Parole (Bureau). The Bureau shall be authorized to request the Court establish additional special conditions for the supervision of the Defendant, as necessary pursuant to Mont. Code Ann. §46-23-1011(4).
2. The Defendant shall be subject to all standard rules and regulations including those regarding: residence; travel; employment and/or program; reporting; weapons; financial; search of person or property; laws and conduct; illegal drug use; supervision fees; alcohol and gambling. The Defendant's supervising officer will explain these rules and regulations in detail.
3. The Defendant shall pay the fine and all statutorily mandated fees, costs and surcharges, unless expressly waived by the Court.
4. The Defendant shall pay court-ordered restitution by money order or cashier's check sent to the Department of Corrections, Collection Unit, P.O. Box 201350, Helena, MT 59620. The Defendant shall be assessed a 10% administration fee on all restitution ordered. All of the methods for collection of restitution provided under §46-18-241 through §46-18-249, MCA, shall apply, including garnishment of

wages and interception of tax refunds. Pursuant to §46-18-244(6)(b), MCA, the Defendant shall sign a statement allowing any employer to garnish up to 25% of his wages. The Defendant shall continue to make monthly restitution payments until he has paid full restitution, even after incarceration or supervision has ended.

5. The Defendant shall submit to DNA testing. *Already completed, per Officer Daly.*
6. The Defendant shall surrender to the Court any registry identification card issued under the Medical Marijuana Act.
7. The Defendant shall not possess or consume intoxicants/alcohol, nor will he enter any place intoxicants are the primary item of sale. He will submit to Breathalyzer testing or bodily fluid testing for drugs or alcohol as requested by his Probation & Parole Officer.
8. The Defendant shall obtain a chemical dependency evaluation by a state approved evaluator. The Defendant must pay for the evaluation and follow all of the evaluator's treatment recommendations.
9. The Defendant shall enter and remain in an aftercare treatment program for the entirety of the probationary period. The Defendant shall pay for the cost of out-patient alcohol treatment during the term of probation, if financially able.
10. The Defendant shall advise all medical personnel of addiction history/conviction, including all prescribed narcotics and/or medical marijuana.
11. The Defendant shall inform the Probation and Parole Officer of all prescriptions obtained from medical personnel prior to filling them. The Defendant shall take all prescription medications as prescribed and in the manner in which they were prescribed.
12. The Defendant shall obtain a mental health evaluation/assessment by a state-approved evaluator. The Defendant shall pay for the evaluation and shall comply with all of the evaluator's treatment recommendations.
13. The Defendant shall successfully complete Cognitive Principles and Restructuring

(C P & R) or a similar cognitive and behavioral modification program.

14. The Defendant shall not knowingly have any contact, oral, written, electronic directly or through any third party, with the victim, unless such contact is voluntarily initiated by the victim through the Department of Corrections. DOC staff may notify victims about the availability of opportunities for facilitated contact with their offenders without being considered "third parties".
15. The use of marijuana, including medical marijuana, will be detrimental to the Defendant's rehabilitation and to the safety of the community. The Defendant is, therefore, prohibited from participating in any medical marijuana program and is prohibited from using any marijuana while on supervision, unless the Defendant requests and the Court finds that due to the Defendant's changed circumstances, medical marijuana will not be detrimental to the rehabilitation of the Defendant or to the safety of the community.
16. The Defendant shall comply with all sanctions given as a result of an intervention, on-site (preliminary), or disciplinary hearing.
17. The Defendant shall not enter any bars.
18. The Defendant shall not enter any casinos.
19. The Defendant shall not possess or use any electronic device or scanner capable of listening to law enforcement communications.
20. The Defendant shall abide by a curfew as determined necessary and appropriate by the Probation and Parole Officer.
21. The Defendant will complete any community service ordered by the Court or the Probation and Parole Officer.
22. The Defendant shall not associate with probationers, parolees, prison inmates, or persons in the custody of any law enforcement agency without prior approval from the Probation and Parole Officer. The Defendant shall not associate with persons as ordered by the Court or the Probation and Parole Officer.

23. The Defendant shall timely pay the fines, restitution and surcharges as provided for herein as arranged with his Probation and Parole Officer.

24. The PSI report shall be released by the Department to certain persons, such as treatment providers, mental health providers, and/or medical providers, as needed for the Defendant's rehabilitation.

The following special conditions are also ordered:

25. During any period of community release, the Defendant shall submit to urine testing and/or hair follicle testing and/or drug patch monitoring at his own expense if recommended by his Parole and Probation Officer.

26. During any period of community release, the Defendant shall be prohibited from driving a motor vehicle or holding a driver's license.

27. The Defendant will execute an irrevocable authorization to the Adult Probation & Parole Division to receive Protected Health Information for each of his health care providers for the duration of his sentence.

28. The Defendant will reside where authorized by the Director of the Department and abide by all rules and regulations of any housing placement.

29. The Defendant will remain in mental and behavioral health services as authorized and directed by the Director of the Department and comply with all case management plans, treatment plans, and treatment recommendations of the providers and professionals. This includes inpatient or outpatient treatment, residential placement, day treatment, individual therapy, assessments, and other aspects of care, on whatever daily or weekly basis as directed.

30. The Defendant will comply with all psychiatric medication programs prescribed by his treating psychiatrist or physician. He will not purchase or have in his possession any over the counter medications unless prescribed by his psychiatrist or physician. He will not change his treating provider or enter into a treatment relationship with

another health care provider without permission of the Director. This includes any regimen of intramuscular injection of medications if recommended.

31. If in the opinion of the Defendant's treatment professionals, the Defendant requires a medication adjustment or other treatment that requires placement in an inpatient psychiatric setting, he will voluntarily agree to the placement.

32. The Defendant will meet with his treating psychiatrist or physician on a regular basis to monitor medication and psychiatric symptoms. The frequency of appointments will be as determined by the treating provider. He will cooperate with any laboratory testing if recommended by his treating provider to monitor medication supervision.

33. The Defendant will maintain an appropriate daily activity schedule of day treatment, work, or other activities as approved by the Director.