

**APPLICATION FOR  
DISTRICT COURT JUDGESHIP**

**A. PERSONAL INFORMATION**

1. Full name.

Alisha Marie Rapkoch

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 Lake/Sanders Counties

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

N/A - Same as birthdate.

8. Date you became a Montana resident.

I relocated to Montana in January, 2015 and became a Montana resident in June, 2015.

**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.

Glenwood High School Chatham, Illinois  
High School Diploma achieved in May, 2004

University of Illinois – Springfield, Illinois (2004 – 2008)

Criminal Justice and Corrections focus, no degree obtained

University of Texas Permian Basin – Odessa, Texas (2011 – 2012)

Bachelor of Arts, Criminology major, Psychology minor achieved in May, 2012

Dwayne O. Andreas School of Law – Orlando, Florida

J.D. achieved in December, 2014

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

Dwayne O. Andreas School of Law

- Received financial scholarship to attend
- Obtained High Honors Certificate in Litigation and Trial Advocacy
- Received the “Book Award” in Trial Advocacy, Motions & Depositions, and Out of State Bar Essay Writing for receiving the highest grade in each class
- Completed Guardian Ad Litem Training
- Florida Supreme Court Certified County Mediator
- Obtained LexisNexis Advance Legal Research Certification
- Member of the American Bar Association, Florida Association Of Criminal Defense Lawyers, The Florida Bar – Young Lawyers Division, American Civil Liberties Union, and Florida Association for Women Lawyers
- Attended over 100 hours of CLE including 84 hours focused on the death penalty

University of Texas Permian Basin

- Hemphill, Dan & Hermine Endowment Scholarship
- Junior League AAUW Scholarship
- Dean’s List for academic achievement
- Internship with the University of Texas Police Department
- National Society of Leadership and Success Member
- Jump For The Rose – Fundraising Chairperson for 501(c) skydiving organization
- Leukemia & Lymphoma Society Team In Training Member and fundraising mentor – completed the Marathon De Paris 2011, South Maui Triathlon 2012, and Dublin Marathon 2012. I have fundraised approximately \$27,500 for LLS.

University of Illinois at Springfield

- Capital Scholars Honors Program
- UIS Innocence Project member – working on actual innocence and wrongful convictions litigation
- American Cancer Society – Relay for Life Survivor Dinner Chair and Entertainment Chair
- Habitat For Humanity – Volunteering with house construction and fundraisers
- Special Olympics – Fundraising volunteer, Softball coach, Bowling captain

- Helping Hands – Soup kitchen volunteer
- Dance team member

### **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.

#### November, 2021 – Present

Assistant Public Defender  
 State of Montana – Office of the State Public Defender  
 Public Defender Division – Region 1  
 723 5<sup>th</sup> Avenue East, Suite 100  
 Kalispell, MT 59901

#### December, 2020 – November, 2021

Managing Attorney  
 State of Montana – Office of the State Public Defender  
 Conflict Defender Division – Region C  
 211 N. Higgins Avenue, Suite 401  
 Missoula, MT 59802

#### May, 2015 – December, 2020

Assistant Public Defender  
 State of Montana – Office of the State Public Defender  
 Public Defender Division – Region 1  
 723 5<sup>th</sup> Avenue East, Suite 100  
 Kalispell, MT 59901

#### January, 2015 – May, 2015

Legal Intern  
 State of Montana – Office of the State Public Defender  
 Public Defender Division – Region 1  
 723 5<sup>th</sup> Avenue East, Suite 100  
 Kalispell, MT 59901

#### April, 2015 – May, 2015

Legal Secretary  
 Wenz Law Office PC  
 118 S. Main Street  
 Kalispell, MT 59901

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.

April, 2015 – Current

Admission to the State Bar of Montana and the U.S. District Court for the district of Montana.

July, 2016 – July 2018

Admission to the State Bar of Arizona. Obtained the license through UBE score transfer. I never practiced in the State of Arizona and allowed the license to expire because of establishing roots in Montana.

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).

My areas of concentration include both civil litigation, criminal litigation, and quasi criminal litigation. Civil litigation has included dependency and neglect cases, writs arising out of criminal matters, and representing individuals in involuntary commitment proceedings. For dependency and neglect cases I have represented fathers, mothers, and children. Criminal litigation has included cases ranging from traffic offenses to deliberate homicide and 1 death penalty case.

For the first three months of practice, I handled 100% criminal litigation in the area of misdemeanor cases. I was transferred to another assignment and spent approximately 2 years doing approximately 1% civil litigation in the area of involuntary commitments, 20% civil litigation in the area of dependency and neglect cases, 5% quasi criminal litigation in juvenile delinquency cases, 73% criminal litigation, and approximately 1% civil litigation from writs arising out of criminal matters. My next assignment lasted for approximately 3 years doing approximately 10% quasi criminal litigation in juvenile delinquency cases, 89% criminal litigation, and 1% civil litigation from writs arising out of criminal matters. For the past year while I was in a management capacity, I handled approximately 79% civil litigation in the area of dependency and neglect cases, 20% criminal litigation, and 1% quasi criminal litigation in juvenile delinquency cases. Currently I handle approximately 98% criminal litigation in the area of felony cases, 1% civil litigation in the area of involuntary commitment hearings, and 1% civil litigation from writs arising out of criminal matters.

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

I have been qualified as defense counsel in death penalty cases and have been assigned to 1 death penalty case. I have been invited to speak for continuing education credits to other employees with the State of Montana Office of the Public Defender. I have assisted in teaching new



attorney training through the Public Defender training department. I have been a guest speaker at the Alexander Blewett School of Law and the Stillwater Christian High School. I have participated in one criminal mediation case pursuant to Section 46-1-502 M.C.A. While in a management capacity in Missoula I helped teach and supervise 3 law school clinic students.

Being a public defender has also exposed me to several aspects of mental illness and chemical dependency. For many cases, a unique aspect of my law practice includes social work. I assist in helping individuals locate housing, apply for treatment centers, secure benefits such as Medicaid, coordinate with family members and community resources, and obtain necessary evaluations.

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.

My legal practice has included significant and regular appearances in state court proceedings. I have handled several bench trials and jury trials. I have been assigned to 12 homicide cases. I have practiced in multiple counties to include: Flathead, Lincoln, Lake, Sanders, Missoula, Ravalli, Silver-Bow, Deer Lodge, Roosevelt, and Yellowstone.

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.

OP 20-0395 – Geno v. 15<sup>th</sup> Judicial District  
OP 20-0278 – A. Torppe v. 11<sup>th</sup> Judicial District  
OP 20-0269 – Torppe v. 11<sup>th</sup> Judicial District  
OP 20-0029 – A. Torppe v. Hon. Heidi Ulbricht  
OP 18-0517 – Quen v. 11<sup>th</sup> Judicial District  
OP 18-0135 – C.N. v. 11<sup>th</sup> Judicial District  
OP 15-0741 – Norris v. Kalispell Municipal Court

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.

1. One of the most complex legal issues that I have dealt with was a case that was noticed as a death penalty case. This case required a significant amount of research, writing, investigation, and coordination with individuals outside of Montana. This case required an in depth look at Montana's death penalty scheme, the legal requirements to file a death penalty case, and a historical glance at what aggravating factors mean in Montana. Montana has a very unique death penalty scheme as compared to other states and is currently the only state who has death penalty sentencing by a single judge.
2. One of the most important legal issues that I have dealt with involved litigating a youth's constitutional right to education while incarcerated. I was representing a youth in youth court case where the youth was held in custody while the case was pending. The youth was incarcerated outside of the youth's own county and community. At the time little

was known about the conditions or circumstances of incarceration for youth outside of the community. It was discovered that the detention facility had a teacher, but that the youth was only taking computer courses that were from an unaccredited source because the youth was not enrolled in a local school. I researched and litigated the issue of the Youth's constitutional right to education and ultimately the youth was provided work that would count toward the youth's high school graduation.

3. One of the most challenging legal issues that I have dealt with in my practice has been litigating mental health issues in criminal cases. One case in particular involved a mentally ill client who spent a significant amount of time at the Montana State Hospital. This case required me to learn a significant amount of research on medications and mental illness treatment. It also required an in depth look into procedure and law surrounding when an individual is unfit to proceed. The case was not only legally challenging, but was also challenging on a personal level because my client could not assist me in the defense while unfit to proceed. This case involved several expert witnesses, evaluations, and treatment records. The case also involved a significant amount of investigation into the client's past trauma and abuse history.

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.

None.

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.

- Voir Dire, October 11, 2017, Office of the State Public Defender
- New Attorney Trial Skills Training, September 19, 2018, Office of the State Public Defender
- Me Too Panel, October 9, 2019, Office of the State Public Defender
- New Public Defender Training – Week 1 Intro to Being a Public Defender, September 18, 2020, Office of the State Public Defender
- New Public Defender Training – Week 2 Case Theory Development, September 25, 2020, Office of the State Public Defender
- New Public Defender Training – Week 3 Ethical and Client-Centered Bail Practice, October 2, 2020, Office of the State Public Defender
- New Public Defender Training – Week 4 Creative Motion Practice, October 9, 2020, Office of the State Public Defender
- New Public Defender Training – Week 5 Selecting Your Jury, October 16, 2020, Office of the State Public Defender
- New Public Defender Training – Week 6 Opening Statements, October 23, 2020, Office of the State Public Defender
- New Public Defender Training – Week 7 Effective Questioning, October 30, 2020, Office of the State Public Defender
- New Public Defender Training – Week 8 Closing Arguments, November 6, 2020,

Office of the State Public Defender

- Montana's Approach To Intoxication, September 16, 2021, Criminal Law class at the Alexander Blewett III School of Law

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.

My status for the past 5 years has been as a government lawyer and I have reported 0 or limited pro bono service for the past 5 years. The limited amount of pro bono service I have provided has been in the area of assisting others with developing parenting plans, order of protections, and in one instance I assisted someone in setting up a LLC.

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.

N/A

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

N/A

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

N/A

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

I have prior training and experience in the field of customer service from working in a call center for Blue Cross and Blue Shield. This training and experience taught me listening skills and de-escalation skills. This training and experience will assist me in the courtroom serving as judge in a variety of aspects. Customer service experience will help me as a Judge to navigate pinpointing what the issue is with each litigant and help to steer the parties to efficiently and effectively resolve issues in the courtroom.

**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.

Please see item #10 which outlines some charitable work.

- In 2011 – 2012 I was a fundraising chairperson for Jump For The Rose which was an organization raising money for breast cancer patients through skydiving. I assisted in helping to plan fundraising events, secure donations, and donated time and skydiving training.
- In 2013 I was the lead organizer for a skydiving fundraiser to a Florida domestic violence shelter.
- I also have organized Christmas card donations to local Montana jails during the holidays from 2016 – 2020
- I have organized Christmas gift donations to a local Flathead county youth home from 2016 - 2021

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.

N/A

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

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

No.

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

No.

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

No.

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

No.



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

No.

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

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

No.

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

Yes.

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

No.

## **G. JUDICIAL PHILOSOPHY**

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

I am seeking office as a district court judge to continue my legal journey as a public servant in the state of Montana. I believe that I have the qualities required to be fair and measured while at the same time bringing a spark of enthusiasm to the bench. I have a unique understanding of the community issues in Montana through working with criminal defendants and individuals dealing with CPS. Unlike other players in the justice system, I have had direct access to talk to and work with defendants to develop a better understanding of why they end up in the criminal justice system and what is needed to prevent recidivism and relapse. I also have a unique understanding of how victims feel through personally experiencing and witnessing domestic violence. In my practice I have vigorously defended the Constitution for each individual I have represented. These experiences will help me to make my courtroom an open and public place where all participants are treated fairly.

One of the major reasons I have decided to apply to the 20<sup>th</sup> Judicial District vacancy is to participate in the Drug Court. Unfortunately, Flathead county has been unable to obtain an agreement with the Flathead County Attorney's Office to staff a drug court in Flathead county. Funding was made available for a drug court, but had to be rejected due to these staffing issues. The 20<sup>th</sup> Judicial District has been running a drug court that has been influential in saving tax

payers money and reducing recidivism in the community. I am passionate about working in the 20<sup>th</sup> Judicial District drug court to help reduce drug use, reduce violent crime arising out of addiction, reduce recidivism, and help the community in the fight against drugs.

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

A good district court judge must have patience. A district court judge will routinely deal with a variety of issues and litigants. Some litigants will be self-represented while others will have attorneys. Many individuals experiencing the court system are dealing with trauma or high emotions. A good district court judge is patient regardless of whether or not the litigant has an attorney and will listen to each argument and issue presented to the court to effectively and efficiently resolve matters before the court.

While patience is required, a good district court judge must also be consistent and efficient. A good judge will hold parties accountable and require a high level of courtroom decorum. A good judge is consistent in temperament, consistent in listening, and consistent in strictly applying the law to each case regardless of their feelings about the law.

Finally, a good judge must be willing and eager to learn. A good judge is well-versed in many areas of the law and must be willing to go the extra mile to learn new areas of the law and to conduct research when they are uncertain. A good judge is humble and always seeking to advance their legal knowledge.

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

I believe that the statutes and the Constitution should be interpreted as written. A Judge must look at the words for context and adhere to any existing precedent.

#### **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.

Nick Aemisegger  
Managing Attorney  
Office of the State Public Defender  
723 5<sup>th</sup> Avenue East, Suite 100  
Kalispell, MT 59901  
406-270-0554

Judge James Manley  
20<sup>th</sup> Judicial District Court

106 Fourth Avenue  
Polson, MT 59860  
406-883-7251

Noel Larrivee  
Retired Attorney  
406-260-5693

## 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).

4-8-2022

(Date)

Disha Rapkoch

(Signature of Applicant)

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



Alisha Rapkoch  
Office of State Public Defender  
723 5th Ave. East, Suite 100  
Kalispell, MT 59901  
Phone: (406) 751-6080

**MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY  
BEFORE THE HONORABLE JASON T. MARKS**

|                                                                                  |                                                                             |
|----------------------------------------------------------------------------------|-----------------------------------------------------------------------------|
| STATE OF MONTANA,<br>Plaintiff,<br><br>v.<br>WILLIAM LOWREY HESSE,<br>Defendant. | Cause No. DC-19-246<br><br>BRIEF REGARDING PAYMENT<br>OF JURY SERVICE COSTS |
|----------------------------------------------------------------------------------|-----------------------------------------------------------------------------|

Following the scheduling conference on August 14, 2020, counsel for the Defendant files this brief regarding the issue of financial responsibility for the Court Ordered supplemental jury questionnaire. In this matter, the Lake County District Clerk of Court issued a bill in the amount of \$1,070.00 to the Office of the Public Defender for copies and postage of a Court Ordered supplemental jury questionnaire on July 14, 2020. Ex. A. Following the issuance of the supplemental jury questionnaire, the Court vacated and continued Mr. Hesse's jury trial over his objection. This issue will arise again for the upcoming jury trial that is scheduled to occur on September 25, 2020.

Counsel for the Defendant has found that the following authorities applicable to this issue allow, but do not require, a court to force a *convicted* defendant to pay for the costs of a jury trial at a sentencing hearing. Counsel has not found any authority allowing the District Court Clerk to bill the Office of the Public Defender (or any other privately retained defense attorney) for these costs. To charge substantial costs in advance of a jury trial would result in a chilling effect on a criminal defendant's right to a jury trial, especially when Mr. Hesse has already been determined to be indigent. Furthermore, charging a criminal defendant for costs incurred for a jury trial that the Court vacated over his objection would constitute actual prejudice against the Defendant to be weighed against the State for any speedy trial balancing test. Additionally, charging a criminal defendant for jury costs for a jury trial that did not occur may constitute a due process violation.

**I. COSTS OF JURY SERVICE IN A CRIMINAL CASE CAN ONLY BE IMPOSED UPON A DEFENDANT AT SENTENCING AND ARE SUBJECT TO AN INQUIRY INTO THE DEFENDANT'S ABILITY TO PAY.**

Montana statutes and case law are clear that the costs of jury service in a criminal case may be billed to a defendant in the event the defendant is convicted at a jury trial. The statutes allow, but do not require, the court to force a defendant (not the Defendant's counsel) to pay the costs of jury service after a sentencing hearing is held in which the Court does an inquiry into the Defendant's ability to pay costs of jury service. If the Defendant does not have the ability to pay, or the imposition of such costs would cause a substantial burden upon the Defendant, then the Court may not impose the costs of jury service.

Section 46-18-232 M.C.A. describes the payment of costs by Defendant:

(1) A court may require a convicted defendant in a felony or misdemeanor case to pay costs, as defined in 25-10-202, plus costs of jury service...the costs, in addition to those allowable under 25-10-201, must be limited to expenses specifically incurred by the prosecution or other agency in connection with the proceedings against the defendant or \$100 per felony case...whichever is greater.

(2) The court may not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take into account the financial resources of the defendant, the future ability of the defendant to pay costs, and the nature of the burden that payment of costs will impose.

Section 46-18-232(1) M.C.A. by its plain language only allows the Court to impose the costs of jury service if a defendant is convicted at trial. This statute only permits the Court to impose costs of jury service at a sentencing hearing. Nothing in the statute contemplates billing the Office of the Public Defender (or any other private defense attorney) directly for the costs of jury service in advance of any conviction or sentencing hearing, nor does the statute provide any authority for billing a criminal defendant's counsel for the costs after a jury trial. The statute only provides authority for a criminal defendant who has been convicted to be held responsible for costs of jury service. In this matter, Mr. Hesse has not been to trial, nor has he been convicted.

Furthermore, Section 46-18-232(2) M.C.A. requires the Court to conduct an ability to pay inquiry at the time of sentencing prior to imposing such costs. Recent case law in *State of Montana v. Madplume*, 2017 MT 40 has interpreted this portion of the statute to require the court to

‘demonstrate a serious inquiry or separate determination into the defendant’s ability to pay the fine.’ *State v. Moore*, 2012 MT 95, ¶14, (quoting *State v. McLeod*, 2002 MT 348, ¶34.) This type of inquiry is particularly important before sentencing a defendant to pay the costs of jury service pursuant to Section 46-18-232(1) M.C.A. *Moore*, ¶18. Due to the potential chilling effect a sentence to pay jury costs could have on a defendant’s constitutional right to request a jury trial, trial courts must ‘scrupulously and meticulously’ determine the defendant’s ability to pay those costs. *Moore*, ¶18.

In *State v. Moore*, 2012 MT 95, the Montana Supreme Court held

[e]ach person has the right to a jury trial and that right ‘shall remain inviolate.’ Mont. Const. art. II, Section 26. In accord with this principle, we recognized in *Moore* that to require a defendant to pay costs of a jury trial poses a potential ‘chilling effect’ on an indigent defendant’s right to a jury trial. A defendant who cannot afford to pay the costs of a jury trial may forego a jury trial, even if her best interests require the matter be resolved by a jury. *Moore*, ¶18. As a result, courts, prior to the imposition of costs of jury service, must “first scrupulously and meticulously determine [ ] the defendant’s ability to pay those costs.

By the plain language of this statute, the Court cannot impose costs of jury service that the Defendant will not have the ability to pay. Although unknown at this time, it is anticipated that the Court will not be able to impose the costs of jury service against Mr. Hesse even if he is convicted in this matter for two reasons: First, Mr. Hesse has been incarcerated for almost one year without the ability to work. Prior to his incarceration his only means of income was social security – which is not considered income for purposes of an ability to pay inquiry, and second, if Mr. Hesse receives any substantial prison sentence as a result of conviction he would not have any future ability to pay costs of jury service. Without a demonstrated ability to pay, the Court may not impose the costs of jury service at Mr. Hesse’s sentencing hearing.

From the authority outlined above, it is clear that before the Court may impose the costs of jury service all of the following things must occur:

1. The jury trial must have occurred;
2. The Defendant must be convicted at the jury trial;
3. The Court must hold a sentencing hearing;
4. The Court must conduct an inquiry into the Defendant’s ability to pay.

The Court cannot impose the costs of jury service until all of these things have occurred. Additionally, counsel for the Defendant has not found any authority for imposing the costs of jury service on a criminal defendant’s counsel. Therefore, the Office of the Public Defender is

not responsible to pay for the costs of jury service as billed by the Lake County Clerk of District Court. The Lake County Clerk of District Court must bear the burden of the expense and then attempt to recoup any costs at a future sentencing hearing.

**II. COSTS OF JURY SERVICE CANNOT BE BILLED TO A DEFENDANT WHEN THE JURY TRIAL IS VACATED BY THE COURT OVER DEFENDANT'S OBJECTION.**

It would violate due process if a Court were to force a criminal defendant to pay for costs of a jury trial that was vacated over his objection. This would also cause an absurd result because a criminal defendant could be billed for multiple vacated jury trial expenses and incur a bill in excess of \$10,000 before ever making it to a jury trial. This would undoubtedly result in a chilling effect on a criminal defendant's right to a jury trial. Fundamental fairness would imply that when a jury trial is vacated over the Defendant's objection that any costs of the vacated jury trial should not be billed to the Defendant. In the short amount of time counsel has had to research this issue, counsel has not found any case on point where a Montana Defendant was billed for costs of jury service when the jury trial was vacated over the Defendant's objection.

**III. COSTS OF JURY SERVICE BILLED TO A DEFENDANT WHEN THE JURY TRIAL IS VACATED BY THE COURT OVER DEFENDANT'S OBJECTION WOULD CONSTITUTE ACTUAL PREJUDICE AGAINST THE DEFENDANT.**

There can be no question that a financial burden is actual prejudice to a criminal defendant. In the event that the Court imposes the \$1,070.00 costs of jury service against Mr. Hesse, it would constitute actual prejudice that should be heavily weighed against the State for purposes of a speedy trial analysis. By no fault of the Defendant the trial was vacated, and Mr. Hesse would only be incurring this bill as a product of the delay in this case. Defendant asserts that his case must be dismissed for a violation of his speedy trial rights as outlined in his first motion to dismiss for lack of a speedy trial in addition to this added prejudice by incurring costs of a vacated jury trial.

**IV. NO AUTHORITY EXISTS FOR ORDERING THE OFFICE OF THE PUBLIC DEFENDER TO PREPARE, PAY FOR, AND MAIL SUPPLEMENTAL JURY QUESTIONNAIRES DIRECTLY TO JURORS AND SUCH CONDUCT RAISES SERIOUS ETHICAL CONCERNS.**

As outlined above, the costs of jury service in a criminal case can only be billed to a criminal defendant under specific circumstances. No authority exists to require a state agency to bear the burden of such expense. As such, it would be inappropriate for the Court to order the

Office of the Public Defender to prepare, pay for, and mail out supplemental questionnaires for the upcoming jury trial

Additionally, serious ethical concerns and fairness concerns are raised when a party to a criminal action is having ex parte communications with jurors. Even more problematic in this case is that the jurors will undoubtedly be wondering why they are being called for a Lake County Jury Trial and mailing their completed questionnaires to an office in Kalispell, Montana. The communication would have to be mailed back to OPD's office and then the jurors will know that the questionnaire and the communication came from the defense attorney. It is unknown how this will benefit or prejudice Mr. Hesse. On one hand, the jurors may appreciate an attorney doing a diligent job for their client by inquiring into the personal affairs of all 200 potential jurors. On the other hand, the juror may feel angered by counsel for requiring them to spend their time completing such a questionnaire. Furthermore, a questionnaire coming directly from counsel may receive less responses as a juror may feel that the mailing is inappropriate or less official than if the mailing came directly from the Court.

Montana Rule Of Professional Conduct 3.5 states, "A lawyer shall not: (a) seek to influence a...juror...by means prohibited by law; (b) communicate ex parte with such a person except as permitted by law[.]" In the limited time counsel has had to research the matter, counsel has not found any law that permits either party's counsel in a criminal matter to communicate with a juror in advance of trial to ask them questions. Surely if there was a law that existed that permitted counsel to communicate ex parte with potential jurors, many attorneys across the State of Montana would be engaging in such practice. Counsel for the Defendant is not aware of any such conduct amongst Montana lawyers and believes that such conduct would constitute an ethical violation. Therefore, the Court should not Order Mr. Hesse's counsel to engage in ex parte communications with the jurors by mailing out supplemental juror questionnaires directly to the jurors.

## **V. CONCLUSION**

Based upon the research available, counsel for the Defendant believes that the Office of the Public Defender is not responsible for the \$1,070.00 invoice for the costs of supplemental jury questionnaires in Ex. A. Furthermore, counsel for the Defendant believes that based upon the unique circumstances in this matter that Mr. Hesse should not be responsible for the \$1,070.00 bill because his jury trial was vacated over his objection.



Concerning the future mailing of the supplemental questionnaire, the Court should Order the Clerk of the Lake County District Court to send the supplemental questionnaires to potential jurors for the jury trial to begin on September 25, 2020. The Clerk should then submit the costs of sending the questionnaires to the Court. In the event that Mr. Hesse is convicted at the September 25, 2020 jury trial the Court should set the matter for a sentencing hearing. Then, the Court will need to conduct an ability to pay hearing concerning the costs of jury service. If the Court determines that Mr. Hesse has an ability to pay such costs, then the Court is permitted to, but not required to, force Mr. Hesse to pay the costs of jury service as part of his sentence.

Respectfully submitted this 18th day of August, 2020.

  
Alisha Rapkoch, Attorney for Defendant