

APPLICATION FOR
DISTRICT COURT JUDGESHIP

A. PERSONAL INFORMATION

1. Full name.
Brett Daniel Linneweber
2. Birthdate.
[REDACTED]
3. Current home address.
[REDACTED]
4. Email address.
[REDACTED]
5. Preferred phone number.
[REDACTED]
6. Judicial position you are applying for.
Thirteenth Judicial District Court, Yellowstone County, Department 4
7. Date you became a U.S. citizen, if different than birthdate.
American-born citizen
8. Date you become a Montana resident.
Summer 1973

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.

Park High School, Livingston, MT (1984 graduate)

Montana State University – Bozeman, MT (B.A. in Political Science, 1991)

University of Montana School of Law – Missoula, MT (2000 graduate)

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

Montana State University student body senate, at large elected seat (1989)
Montana State University student newspaper editor in chief, appointed (1988-1989)

University of Montana School of Law: International Law Moot Court Team (1999)

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.

February 2014 – present: Senior Deputy Yellowstone County Attorney
217 North 27th, Suite 701
Billings, MT 59101
(406) 256-2870

July 2005 – February 2014: Park County Attorney
414 East Callendar
Livingston, MT 59047
(406) 222-4150

January 2001 – June 2005: Deputy Park County Attorney
414 East Callendar
Livingston, MT 59047
(406) 222-4150

September 2000 – January 2001: self-employed/contract attorney with
Antonioli & Wade
700 South Avenue West, Suite F
Missoula, MT 59806
(firm inactive; Jo Antonioli, ret., Stacey Weldele-Wade)

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.

US District Court, District of Montana – June 2011 (active)

State Bar of Montana – September 2000 (active)

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).

Since February 2014 the vast majority of my practice (99%) has been in criminal litigation as a Senior Deputy Yellowstone County Attorney. See answer #15 for more details as to what this encompasses. For a limited time I also assisted the Yellowstone County Attorney's Office Civil Division with abuse and neglect proceedings while maintaining my criminal case workload.

As Park County Attorney my practice was approximately 50% civil and 50% criminal proceedings. The criminal matters are more fully described in answer #15. The civil areas of practice included substantial time representing county officials, civil departments, and statutorily mandated representation of agencies such as the local conservation district. County offices included commissioners, auditor, clerk and recorder (and elections), clerk of district court, sheriff's office (and detention center), superintendent, and treasurer. County departments included airport, county fairground and fair, emergency services, GIS-rural addressing, health department, human resources, and information technology (IT). Boards, committees and programs included the city-county library, museum, planning, public works, roads and bridges, solid waste, transit and transportation, weed control, mental health local advisory council, and county TV districts.

Each county office was run by an elected official. Each county department was headed by an employee appointed by an elected official. Each board, committee and program was comprised of appointed volunteer citizen filled by the commission. As a result, the legal areas of concentration varied depending on the mission of the respective entity and the members' backgrounds. All required on-going legal advice on statutory governmental operations. Routine areas of practice included negotiations, budgeting, bidding processes and public works, contract drafting and review (including public works purchases as well as interagency administrations, such as federal and state wildland fire agencies), employment and personnel (including hirings/terminations), workers' compensation, property law (including road and bridge easements), solid waste management, water law, and general defense for claims against these agencies.

Additional civil areas of practice included routinely appearing on behalf of the State of Montana in involuntary mental commitments, youth court, and elder guardianships.

I became extremely versed in the specific topics of the areas during my practice. Additionally, this has given me extensive knowledge in constitutional law, the rules of evidence, the rules of civil procedure, torts, and administrative law.

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 often train multi-disciplinary fields in the law of mental competency/mental health issues. Having previously served as a volunteer on the Central Service Area Authority (CSAA) of the Department of Public Health and Human Services, combined with my experience in involuntary commitments and criminal mental competency proceedings, I have repeatedly instructed treatment providers, probation and parole officers, and law enforcement about legal issues regarding their interactions with mentally ill individuals.

I have provided other trainings to non-attorneys regarding the law and best practices to avoid re-victimization in child sexual assault reports. This includes state-wide peer review/critiques of child advocacy center forensic interviews.

I was a co-sponsor and curriculum co-developer for multi-disciplinary trainings, including the 2016 Montana Children's Justice Conference and the 2010 National District Attorney's Association's Montana Institute on the Prosecution of Domestic Violence.

I received approximately 80 hours of specialized instruction in all aspects of capital offense litigation, including multiple state and national trainings.

In 2009 I gave an ethics presentation at a national training in South Carolina. I also graded/critiqued multiple prosecutors in mock trials that involving trained community member volunteers who served as witnesses. My critiques covered prosecutors' opening statements, direct examinations, cross examinations of defendants, and closing arguments.

I assisted the organizers of Park County's Court Appointed Special Advocate (CASA), including training.

I was a volunteer family law mediator in my first year of practice.

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.

Over the past ten years I routinely appeared in state court for many different types of proceedings. As Park County Attorney it was nearly daily. I handled virtually all of the felony cases, with approximately 120 matters active in some form at any given time. As a Senior Deputy Yellowstone County Attorney I still have regular court appearances and maintain similarly heavy and complex caseload.

In the criminal arena these appearances included multiple Law and Motion settings per month, as well as regular individual settings such as evidentiary hearings on motions,

mental competency hearings, criminal mediations, change of pleas, sentencings and subsequent sentence revocations, sentence review, post-conviction relief and parole hearings.

As more fully described in Answer #13, civil appearances over the past ten years have included regular appearances for county officials, involuntary commitments, youth court, elder guardianships, and abuse neglect proceedings. For example, I appeared in employment lawsuits as well as road, easement, and road and bridge easement and use litigation on behalf of the County. In one multi-year case I appeared and supervised the county's role in a civil lawsuit, joining with the Park County Stockgrowers Association and Montana Farm Bureau against the Montana Department of Livestock, Department of Fish, Wildlife and Parks, Montana State Veterinarian, and then-Governor Brian Schweitzer regarding their management of bison leaving a federal park and the effect this had on county citizenry.

Over the past ten years I routinely tried complex cases before the district court. In 2015, I tried 12 felony jury trial cases, the highest historical number of any prosecutor from the Yellowstone County Attorney's Office. These cases included a homicide, a violent home invasion robbery and sexual assault, a sexual assault of a minor, other violent assaults, and property crimes.

In the past ten years I also appeared multiple times in US District Court, District of Montana, on behalf of the county. This included mediation before a federal magistrate.

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.

The Montana Attorney General's Office handles all criminal case appeals as well as abuse and neglect matter appeals on behalf of every county attorney's office. All other cases I have had before the Montana Supreme Court within the past ten years have been determined solely on the briefs. The Supreme Court has ruled on approximately twenty cases in that time period. I currently have two homicide and three sexual assault convictions that defense counsel has appealed to the Montana Supreme Court. It has not yet been determined whether one or more of these cases will involve an appearance.

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.

One of the most important issues I dealt with was whether or not to seek the death penalty in *State v. William Wassmer*, Montana Sixth Judicial District Court, Park County, Cause No. DC 06-115. In that matter the Defendant killed a 62 year old woman, M.B., in her own residence. The Defendant shot her in the face twice and then raped her M.B. with the firearm, including shooting for a third time with that bullet

travelled through her body and exited her back. The autopsy revealed that although M.B. was likely unconscious immediately after the facial shots, her heart continued pumping for approximately ten minutes, including during the third shot. A death penalty aggravating circumstance of Mont. Code Ann. § 46-18-303 was potentially applicable, specifically the deliberate homicide being committed by torture. Therefore, I requested then-Attorney General Mike McGrath to convene his death penalty committee. I attended with the lead investigator. We participated in a factual and legal analysis that considered the applicable statute, the nature and circumstances of the crime, the Defendant's Sureños gang background and lack of any mitigation, as well as numerous other considerations. The majority of the committee recommended against seeking the death penalty. I then had a subsequent discussion with Attorney General McGrath before finalizing my decision. We concluded the applicable Montana Supreme Court precedent on torture as an aggravating factor was applicable, relying on *State v. Dawson*, 233 Mont. 345, 761 P.2d 352 (1988). However, we also concluded based on federal precedent that a defense-based "vague as applied" constitutional challenge would likely be successful because the medical evidence could not establish M.B. was conscious during the torture. Therefore, we determined there was an unacceptable risk of a reversal under federal precedent (potentially years later) if the death penalty was imposed upon conviction. After careful consideration of these factors, as well as discussions with M.B.'s surviving family, I determined not to seek the death penalty. After announcing my decision the Defendant changed his plea without trial and received an aggregate 160 year sentence. There was no basis for the Defendant to file an appeal. The Sentence Review Division denied his request to modify his sentence.

One of the most challenging legal issues I have dealt with was a multi-state agency unilateral imposition of an Interagency Bison Management Plan near Yellowstone Park. This plan, backed by then-Governor Schweitzer and his successor then-Governor Bullock, was vehemently opposed by our local government and numerous citizens in that area. Despite public meetings, it did not appear the state was providing sufficient concessions to alleviate the property damage or protect ranchers. Ultimately we joined a lawsuit with the Park County Stockgrowers Association and Farm Bureau Federation against the Montana Department of Livestock, Montana Department of Fish Wildlife and Parks, the Montana State Veterinarian, and the then-Governor. While the District Court ultimately denied the injunctive relief sought (affirmed by the Supreme Court), initiation and continued pursuit of the lawsuit ensured many of the county's ultimate goals were achieved before the case even went to trial, including mitigation and remuneration steps by the state agencies towards the affected citizens.

One of the most complex set of legal proceedings I have dealt with was the prosecution of Jessy Lee Williams. *State v. Williams*, 2018 MT 194. In that matter the Defendant was charged with a night-time home invasion and rape of a woman followed by a continued physical assault of her, including at one point in front of her seven year old son and nine year old daughter. This four-day jury trial entailed 23 witnesses (as well as the Defendant testifying on his own behalf) and 138 items admitted into evidence, including numerous physical objects. In addition to the large number of witnesses and exhibits, the complexity was compounded by the necessity of the two young children

testify. Additionally, complex medical and forensic testimony had to be presented, including serology and DNA results. The Defendant challenged the jury's guilty verdict prior to sentencing, claiming a former crime lab technician compromised evidence. However, at the post-trial evidentiary hearing crime lab administrators established that tainted technician was not yet employed when the evidence was received at the crime lab, the chain of custody was never compromised before or after serology and DNA testing, and the tainted technician's only connection to this case mailing sealed items back to law enforcement after testing was completed. The items were received intact. The District Court denied the Defendant's motion to dismiss. Finally, because the Defendant was a violent repeat offender with a post-trial evaluation and pre-sentence investigation reflecting a significant likelihood of future danger to the community, it was necessary to research and compile comparable cases to seek his permanent removal from society. The Defendant received a 110 year aggregate sentence. The Supreme Court affirmed the conviction.

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.

2013 Montana Dependency & Neglect Best Practice Manual - contributor
(a publication of the Montana Supreme Court, Court Assessment Program, funded Uniform Dependency and Neglect Workgroup)

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.

October 11, 2013 (Whitefish, MT)

Conference: Montana Judges Association Fall Conference

Sponsor: Montana Supreme Court

Title: DN Workgroup presentation (workgroup member)

Attendees: Montana District Court Judges (including retired)

June 12-13, 2013 (Billings, MT)

Conference: Defending the Forensic Interview

Sponsor: Western Regional Children's Advocacy Center

Titles: Qualifying the Forensic Interviewer and Demonstration

Reviewing the Interview in Preparation for Trial

Trial by Fire

Court Advocacy

Attendees: Montana prosecutors (CLE credits approved)

Montana law enforcement (Post credits approved)

Montana and Wyoming forensic interviewers (CE credits approved)

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 pro bono services include training, advice and education for individuals and organizations. I have also given limited advice to individuals regarding orders of protection as well as estate planning and/or probate. I reported the following:

2016 = 75 hours
2017 = 75 hours
2018 = 45 hours
2019 = 42 hours
2020 = 40 hours

The recent decrease in hours reflects my extensive prior service for the Children's Alliance of Montana before transitioning to an advisory member position.

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.

Montana County Attorneys Association Executive Board (2006 – 2012)

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

NA

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.

NA

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

Bozeman Daily Chronicle – Commercial Print Services (1989 – 1993)

I went from entry level to running this department in just a matter of a few years. I assisted small businesses in graphic design as well as large scale productions (including Montana State University athletics department football and basketball game-day programs). Beyond the legal contacting and negotiations skills, this position gave me a

significant understanding on the different perspectives varied community members face every day, be it a small or large business setting.

Loyola Sacred Heart High School (Missoula) – Speech & Debate coach and volunteer, part-time instructor (1997 – 2000)

I coached high school students to a four year, aggregate 39-0 team record, including state championships each year. Beyond the necessary research and advocacy skills that I honed, I learned how to evaluate the same in others. School administrators eventually asked me to provide high school level basic legal instruction for students during free periods. I used the Street Law: A Course in Practical Law, a West Publications text. Topics included introduction to the legal system, juvenile justice and criminal law, consumer law, family law, housing law, and individual rights and liberties. The interactive class required immediately determining the correct answers to students' varied legal inquiries, something a judge must be able to do.

D. COMMUNITY AND PUBLIC SERVICE

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

I am a founding member of the Children's Alliance of Montana, a non-profit organization whose mission is to provide support, training and technical assistance to child advocacy centers and multi-disciplinary teams across Montana to ensure every child victim of abuse and non-offending caregiver(s) have access to the services. In the past 10 years I have had the following positions:

2011 – Secretary-Treasurer
2012-13 – Vice Chair
2014-15 – Chair
2016-17 – Past Chair
2017 – present – advisory member

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

Park County Attorney: July 1, 2005 – February 24, 2014
(elected 2010, elected 2006, appointed 2005)

2012 - unsuccessful election – Montana Sixth Judicial District Court Judge

E. PROFESSIONAL CONDUCT AND ETHICS

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

No

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

No

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

No

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

No

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

No

F. BUSINESS AND FINANCIAL INFORMATION

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

No

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

Yes

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

No

G. JUDICIAL PHILOSOPHY

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

I am seeking the office of district judge because it is the highest position in the legal profession. I am excited for the opportunity to step up and accept the challenge of this leadership role for the citizens of my community. I was raised to value personal advancement while using life skills to make a difference for others. In more than two decades of practice, I have had the opportunity to spend every day making a difference in the lives of countless people. I started in employment law and family law mediation as an attorney fresh out of law school. I quickly transitioned to legal proceedings involving criminal law, youth court, abuse and neglect, guardianships, and mental commitments as a deputy county attorney. My skills expanded with more civil government representation as an appointed and then elected county attorney. In 2014 I chose to spend the rest of my career in Billings. Presently I handle some of Yellowstone County's most complex and serious matters, requiring significant legal skills and judgment.

I have been blessed with the opportunity to have a family and career in Montana. My career has allowed me to stand up for our values and way of life by applying the law to a myriad of different situations. I mediated dissolution proceedings to ensure equitable outcomes. I helped previously abused children become safe and see them become happily married with their own families. I held serious criminals accountable, allowing survivors of the crimes to move forward with their lives without looking over their shoulders in fear. I listened to citizenry's concerns with their government, working with commissioners and other departments and citizen boards, and assisted our leaders better serve society. What this has

engrained in me is that every case is important to all parties, regardless of the perceived stakes. This is one reason why I have always applied reasonable judgment and respect to opposing parties to ensure true justice for each case rather than just seeking an outcome. I am proud to have had a hand in the resolution of so many cases and legal issues over my career.

Becoming a district judge will allow me to further that positive difference for both myself and for others. A district judge has the responsibility of maintaining legal competence, which can only be developed by spending long hours in a courtroom. My trial skills have enabled me to develop techniques to evaluate positions and present reasonable and persuasive positions. I have prided myself in my ability to actively listen to all parties and then employing sound judgment when making decisions. The citizens of our community can always count on me to go above and beyond the basic job requirements by dedicating myself to ensure the freedoms and protections of our federal and state constitutions and statutes. I look forward to the intellectual challenge and opportunity to using these skills to further serve all of Yellowstone County.

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

A good district court judge must have true listening skills, sound judgment, and unwavering integrity. All other necessary judicial qualities flow from these.

True listening means a balanced, fair and respectful approach with all litigants. True listening includes patience and giving all parties the opportunity to present a complete argument. Litigants then have confidence their positions are considered. It also ensures the appropriate level of humbleness because without truly listening to all sides one never fully understands the complete context of any issue. As an attorney I always consider opposing counsel's positions regardless of my initial impressions in a case. This is not simply a negotiation skill. It ensures I consider all information and options to seek true justice for each particular case.

Sound judgment encompasses a fair, consistent and objection application of the law. Sound judgment also encompasses competence, common sense, as well as serious consideration to all relevant arguments and positions. Few cases are ever one-sided. My varied background gives me a strong grounding in a vast array of legal topics. Common sense is something I apply to every issue to be considered. My lengthy experience gives me a strong grounding in the applicable court rules, particularly the rules of evidence and procedure. This in turn gives me a better ability to apply the relevant facts to the applicable rules of law. My demeanor is one that is approachable, yet decisive to ensure resolution.

A district judge must have unwavering integrity. Unwavering integrity includes honesty, reliability, and a strong work ethic. Strong moral principles are necessary in neutrally applying the facts to the applicable law. Unwavering integrity also mandates the district judge not just issue rulings, but also promptly making correct decisions because the parties are relying on the court to resolve their dispute. This is only accomplished by devoting

significant time and energy at the outset of each case to fully evaluate the matter and to ensure a prompt and sound decision. Justice delayed is justice denied. I have always had the integrity to be honest, reliable and put in long days to ensure the work is done correctly, quickly and efficiently.

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

I adhere to judicial restraint and strict constructionism regarding the interpretation and application of statutes and both the federal and state constitutions.

It is the role of the judge to apply facts to the law established by the federal and state constitutions and our Montana legislature. It is not the role of the judge to make new law from the bench, be result oriented, or substitute anyone's personal preferences over enacted legislation. Judicial restraint and strict constructionism best honor the separation of powers and the government branches' equality as provided for by both the federal and state constitutions. Judicial restraint and strict constructionism allow the citizenry to be secure in their expectation of their rights and freedoms. It is the legislature that enacts statutes to fill in undefined parameters not covered by either the federal or state constitutions.

Further, unlike judicial activism or loose constructionism, judicial restraint and strict constructionism best protect individual rights and respects the legislature by allowing the political process to work. Liberty is a central constitutional value. While the district judge is properly a check and balances system that does not strip anyone of their freedom, liberty is the foundation of our democracy. Judicial restraint and strict constructionism even provides those of other judicial philosophies the best expectation of how the law will be applied.

Finally, judicial restraint and strict constructionism are the best approach to ensure our federal and state constitutional protections are maintained, while still allowing society to advance and grapple with contemporary changes. New legislation is the best means to bring about change and safeguard rights. Additionally, the federal and state constitutions both provide for their own amendment process when society, not a judge, deems such a change necessary.

As an attorney, I have always looked to the plain language of the applicable statute and the constitutions when interpreting the law. Applying the facts to the plain language of the applicable law has always served me in advising individuals and organizations, and provides the most persuasive arguments before any court.

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.

Motion to Grant Co-Defendant Haverty Use Immunity and to Compel Testimony, *State v. Donald Cherry*, Montana Thirteenth Judicial District Court, Yellowstone County, Cause No. DC 17-1461, certified copy attached. The motion exhibit remains sealed as confidential criminal justice information and is therefore omitted.

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.

Hon. Nels Swandal
Montana 6th Judicial District Court Judge, Ret.
Swandal Law Firm
305 East Lewis Street
Livingston, MT 59047
(406) 222-3301

Scott Twito
Yellowstone County Attorney
219 North 27th Street, Suite 701
Billings, MT 59101
(406) 256-2870

Kelly J. Varnes
Hendrickson Law Firm, P.C.
208 North Broadway, Suite 324
Billings, MT 59101
(406) 245-6238

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).

October 8, 2021

(Date)

/s/ Brett D. Linneweber

(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 Wednesday, October 13, 2021

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

Brett D. Linneweber
Senior Deputy Yellowstone County Attorney
P.O. Box 35025
Room 701, Courthouse
Billings, MT 59107-5025
Telephone 406/256-2870
Attorney for Plaintiff

State of Montana } ss CERTIFICATE
County of Yellowstone }

I hereby certify that this sheet and all attached
sheets identified by impression of my Official Seal
are each and all true and correct copies of originals
filed in my Office in Case No. DC-17-1461

WITNESS my hand and Official Seal this
day of October 2021

Terry Halpin
Clerk of the District Court

Deputy

Susan Jones



MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

STATE OF MONTANA

Plaintiff,

vs.

DONALD RAY CHERRY,

Defendant.

Cause No. DC 17-1461

Judge Gregory R. Todd

**MOTION TO GRANT CO-DEFENDANT
HAVERTY USE IMMUNITY AND TO
COMPEL TESTIMONY**

COMES NOW the State of Montana, by and through Senior Deputy County Attorney Brett D. Linneweber, and moves this Court to grant co-defendant Jeff Haverty use immunity to compel his testimony in this matter. However, the State is not seeking, nor should the Court order, transactional immunity.

BACKGROUND

The State has charged the Defendant Donald Cherry with the deliberate homicide of M.K. Trial is set for January 24, 2020. In DC 17-1462 Jeffrey Haverty has also been charged with the deliberate homicide of M.K., alleged to have been committed as a co-Defendant. Haverty's trial is set for April 17, 2020. The two co-defendants will not be tried together.

On July 15, 2019, Haverty entered into a Mont. Code Ann § 46-12-211(1)(b) plea agreement (hereinafter 1(b) agreement) with the State. See DC 17-1462 Clerk of District Court Document #81, sealed (copies previously provided to all parties in this matter as well). The 1(b) agreement

obligated Haverty to give a statement to investigators about the details of the crime. *Id.* On July 15, 2019, Haverty gave the statement, detailing his and Cherry's role in the deliberate homicide of M.K. State's Exhibit #1. The Court ultimately rejected the 1(b) agreement. As a result, that statement may not be used against Haverty. However, the plain language of the agreement, as well as federal and state law, permit the use of that statement against Cherry through use immunity.

LEGAL ANALYSIS

Pursuant to both state and federal law a co-defendant may be compelled to testify over a claim of privilege against self-incrimination if granted use immunity prohibiting introduction of that testimony (and any derivative use) at his own trial. Such use immunity is routinely encouraged by the Supreme Courts, and in some instances is actually required. Based on the factual and procedural circumstances, here use immunity is wholly supported by the controlling law. Further, the resultant testimony will be accompanied by the necessary corroboration, and is permissible under the plain language of Haverty's 1(b) agreement.

1. State law supports use immunity for Haverty's testimony against Cherry.

There is little uncontested state law given the plain language authorizing limited use immunity. Either the prosecution or defense may seek the District Court's leave for an order compelling a co-defendant to testify:

Before or during trial in any judicial proceeding, a justice of the supreme court or judge of the district court, upon request by the attorney prosecuting or counsel for the defense, may require a person to answer any question or produce any evidence that may incriminate him. If a person is required to give testimony or produce evidence in accordance with this section in any investigation or proceeding, no compelled testimony or evidence or any information directly or indirectly derived from such testimony or evidence may be used against the witness in any criminal prosecution.

Mont. Code Ann. § 46-15-331. It is at the discretion of a district court to grant immunity. *State v. Haskins*, 255 Mont. 202, 212, 841 P.2d 542, 547 (1992). The Court in *Haskins* found the district court did not abuse its discretion denying an immunity request for 16 purported witnesses because what they would testify to was purely speculative. *Id.* By contrast, the Court in *Young*

1 found that failure to grant use immunity for known critical information was reversible error. *State*
2 *v. Young*, 249 Mont. 257, 259, 815 P.2d 590, 591 (1991).

3 While both *Haskins* and *Young* addressed a defense request for immunity, the analyses they
4 applied are applicable here. In *Haskins* the request was made for purely speculative testimony. By
5 contrast, in *Young* the attorneys and court were aware that a key witness (co-Defendant) had critical
6 information that went to the facts at issue, but such testimony would incriminate that witness. As in
7 *Young*, here the sought after information is not speculative. Rather, it is critical information known
8 by a participant in the homicide for which Cherry is being tried.

9 Further, to aid the court in its discretion, the Montana Supreme Court has specifically
10 delineated the rationale policy for granting limited use immunity.

11 ‘* * * the purpose of immunity statutes is to aid prosecuting officers in apprehending
12 criminals, or those engaged in criminal enterprises, by inducing them or their confederates to
13 turn state’s evidence and tell on each other or to place at the disposal of the prosecuting
attorney evidence which constitutional provisions granting a witness the privilege of refusing
to testify against himself make unavailable.’

14 *State v. Lambert*, 167 Mont. 406, 538 P.2d 1351 (1975) (citing *Smith v. Superior Court, Pima*
15 *County*, 17 Ariz.App.79, 495 P.2d 519, 521). This comports with similar federal law, which
16 abhors a lack of immunity being granted where it will “distort the fact-finding process.” *U.S. v.*
17 *Straub*, 538 F.3d 1147, 1158 (9th Cir. 2008) (discussing abuse of discretion where trial court denied
18 limited use immunity for defense witness).

19 A similar distorted fact-finding process is at risk here without Haverty’s use immunity
20 ensuring his testimony. While witness Zyonna Wilson will testify about many of the events on the
21 night of the homicide, she is limited to the audible observations she made of events outside once she
22 went into the tent, including the actual beheading of M.K. while Haverty and Cherry remained
23 outside. More importantly, Wilson and the two co-defendants were using drugs that night, and she
24 thereafter went into a treatment center for mental health treatment. The attacks on her credibility
25 will be significantly distorted without Haverty’s testimony. By contrast, with Haverty’s testimony,

1 not only do the two independently corroborate each other, but their testimony together will connect
2 the fine details of the events before, during, and after the homicide. With Haverty's testimony, the
3 fact-finding process is not at risk of an unreasonable distortion.

4 2. Federal authority supports use immunity for Haverty's testimony against Cherry.

5 Under federal law the government may compel testimony over a co-defendant's claim of
6 privilege against self-incrimination by granting use and derivative use immunity. *U.S. v. Dudden*,
7 65 F.3d 1461, 1467 (9th Cir. 1995). Use immunity means that the compelled statements cannot be
8 used against the defendant. *Id.* Derivative use immunity means the government may not use the
9 statements to uncover other incriminating evidence. *Id.* Rather, in proceeding against a defendant
10 who has been given use immunity, the government must derive all information used from sources
11 wholly independent of the testimony. *Id.*

12 The seminal federal authority regarding immunity is *Kastigar v. U.S.*, 406 U.S. 441, 92
13 S.Ct. 1653, 32 L.Ed.2d 212 (1972). The Court in *Kastigar* upheld the compelled use of testimony
14 through the grant of limited use immunity.

15 [I]mmunity from use and derivative use is coextensive with the scope of the privilege against
16 self-incrimination, and therefore is sufficient to compel testimony over a claim of the
17 privilege. While a grant of immunity must afford protection commensurate with that afforded
18 by the privilege, it need not be broader. Transactional immunity, which accords full
19 immunity from prosecution for the offense to which the compelled testimony relates, affords
20 the witness considerably broader protection than does the Fifth Amendment privilege. The
21 privilege has never been construed to mean that one who invokes it cannot subsequently be
22 prosecuted. Its sole concern is to afford protection against being 'forced to give testimony
23 leading to the infliction of 'penalties affixed to . . . criminal acts.' Immunity from the use of
24 compelled testimony, as well as evidence derived directly and indirectly therefrom, affords
25 this protection. It prohibits the prosecutorial authorities from using the compelled testimony
in any respect, and it therefore insures that the testimony cannot lead to the infliction of
criminal penalties on the witness.

22 *Kastigar*, 406 U.S. at 453, 92 S.Ct. at 1661.

23 In re-affirming this long-established rule, the Court analyzed the policy basis for immunity
24 and balanced it against the constitutional right for one to not be forced to incriminate himself. The
25 power of the government to compel persons to testify is firmly established. *Kastigar*, 406 U.S. at

1 443, 92 S.Ct. at 1655. This is based on the “common-law principle that the public has a right to
2 every man’s evidence . . .” *Id.* Immunity statutes also have a deep historical root that seek the
3 “rational accommodation between the imperatives of the privilege [not to incriminate one’s self] and
4 the legitimate demands of government to compel citizens to testify.” *Id.*, 406 U.S. at 446, 92 S.Ct.
5 at 1657. Immunity law existence recognizes “the importance of [this] testimony, and the fact that
6 many offenses are of such a character that the only persons capable of giving useful testimony are
7 those implicated in the crime.” *Id.* Based on this, the United States Supreme Court repeatedly
8 holds “immunity statutes as essential to the effective enforcement of various criminal statutes.” *Id.*,
9 406 U.S. at 447, 92 S.Ct. at 1658. This includes immunity where investigation of crimes where
10 proof and punishment are otherwise impracticable. *Id.*, FN 15.

11 Challenges to this application are repeatedly rejected based on the important societal needs
12 served by limited use immunity. *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d
13 409 (1984), *Lefkowitz v. Turley*, 414 U.S. 70, 84, 94 S.Ct. 316, 325, 38 L.Ed.2d 274 (1973).

14 Use immunity protects Haverty as envisioned by the U.S. Supreme Court. Haverty’s
15 testimony in Cherry’s trial may not be used against him in his own trial. It cannot be used to inflict
16 any penalty against him. The State has a legitimate reason to compel his testimony as a result.
17 While Haverty’s testimony will also be sufficiently corroborated, as briefed *infra*, he is the only
18 person capable of giving some details of those points.

19 3. Corroboration standards support use immunity for Haverty’s testimony against Cherry

20 Haverty’s testimony will be properly corroborated and therefore provide critical relevant
21 information for the jury against Cherry. The standard for corroboration is

22 A person may not be found guilty of an offense on the testimony of one responsible or
23 legally accountable for the same offense, as defined in 45-2-301, unless the testimony is
24 corroborated by other evidence that in itself and without the aid of the testimony of the one
responsible or legally accountable for the same offense tends to connect the defendant with
the commission of the offense.

25 Mont. Code Ann. § 46-16-213. The sufficiency of corroborating evidence for accomplice testimony

1 is that in the light most favorable to the prosecution. *State v. Torgerson*, 2008 MT 303, ¶ 25. It
2 must be independent evidence that connect the defendant with the commission of the offense. *Id.*, at
3 ¶ 26. The required corroborating evidence need not be alone sufficient to support conviction or
4 even make out a prima facie case against the defendant. *Id.* However, it may be circumstantial,
5 dispute, or even consistent with innocent conduct. *Id.*

6 Here Haverty's statements will be corroborated in multiple ways, including pre-assault
7 casino video surveillance, law enforcement subsequent discoveries, and crime lab follow-up, as well
8 as statements of Wilson (who never had access to any of the discovery or statements of Haverty). A
9 non-exclusive list of examples includes the following: After the statement law enforcement located a
10 purported murder weapon wrapped and buried where Haverty described, which upon testing had
11 trace amounts of blood on it. The autopsy reflects instruments consistent with brass knuckles and a
12 hammer were used in the homicide as described by Haverty. Wilson heard the sound of
13 "butchering" which Haverty described as the decapitation of M.K. Both Haverty and Wilson also
14 independently described a pre-planned robbery motive that Haverty and Cherry discussed, M.K.'s
15 reaction when first struck, and Cherry making a statement to Haverty (which Wilson heard from the
16 tent) about eating M.K.'s brains. Casino surveillance videos will corroborate much of the pre-
17 assault activity Haverty described.

18 4. The 1(b) agreement supports use immunity for Haverty's testimony against Cherry.

19 Haverty's plea agreement provides for the government to compel his testimony against
20 Cherry while still preserving his right not to be compelled against himself. Under both state and
21 federal law plea agreements are contracts, subject to contract law standards, including giving their
22 objective meaning. *State v. Shepard*, 2010 MT 20, ¶ 14; *U.S. v. De La Fuente*, 8 F.3d 1333, 1337
23 (9th Cir. 1993).

24 The applicable terms of the plea agreement, listed in the Other Provisions on (unnumbered)
25 page 5 are as follows:

- 1 1. The Defendant shall give a full and truthful statement to law enforcement about the facts and
2 circumstances known to him about the offenses, including knowledge of the conduct of the
3 co-Defendant, Donald Ray Cherry, charged in DC 17-1461 with Count I: Deliberate
Homicide with a weapons enhancement, all as specified in Mont. Code Ann. §§ 45-5-
102(1)(b) and 46-18-221.
- 4 2. The Defendant shall cooperate in the prosecution of the co-Defendant, Donald Ray Cherry,
5 including testimony in any hearing and/or trial proceedings against him.
- 6 3. In the event the Court rejects the plea agreement at sentencing pursuant to Mont. Code Ann.
7 § 46-12-211(1)(b), and as a result this matter goes to trial, the parties agree 1) the Defendant
8 is not required to cooperate in the prosecution of the co-Defendant, Donald Ray Cherry, and
2) that the State may not introduce the contents of the statement made to law enforcement as
described above in Paragraph 1 of these Other Provisions to the extent the information was
not provided in his previous statements to law enforcement.
- 9 4. The State agrees that no statement or information provided by Defendant during his interview
10 may be used by the State in its case in chief against the defendant in any criminal case. In
11 the event Defendant should testify under oath as a witness in any proceeding, including a
12 trial, and offers testimony materially different from any statements or other information
provided by him during his interview, the State may cross-examine Defendant concerning
any such statements or information provided during the interview.
- 13 5. The Prosecutor will abide by the terms of the Agreement throughout all proceedings relevant
to the determination of sentence including sentence review and parole proceedings.

14 Upon execution of the plea agreement, Haverty complied with Provision 1. Subsequently,
15 the Court rejected the 1(b) agreement. As a result, under Provision 3, subsection 1, Haverty is not
16 required to comply with Provision 2 (cooperate against Cherry). However, Provision 3, subsection
17 2, provides the following elements:

- 18 a. If the Court rejects the plea,
- 19 b. This matter (17-1462) goes to trial,
- 20 c. The State may not introduce Haverty's new statement.

21 This will be complied with. The State will not introduce Haverty's statements in his own DC 17-
22 1462 matter since the Court rejected the plea. This subsection has no bearing on involuntary
23 testimony provided against Cherry in DC 17-1461. Nor does it apply on the first portion of
24 Provision 4, which has the following elements:

- 25 a. No statement provided by [Haverty] may be used by the State in its case in chief,

The State has provided a courtesy copy of this motion to Haverty's counsel.

DATED: November 25, 2019.

/s/ Brett Linneweber
Deputy County Attorney

cc: Lance G. Lundvall
Juli M. Pierce