

**APPLICATION FOR
DISTRICT COURT JUDGESHIP**

A. PERSONAL INFORMATION

1. Full name.

Benjamin Leo Refling

2. Birthdate.

[REDACTED]

3. Current home address.

[REDACTED]

4. Email address.

[REDACTED]

5. Preferred phone number.

[REDACTED]

6. Judicial position you are applying for.

Eighteenth Judicial District, Gallatin County

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

I was born in the United States.

8. Date you become a Montana resident.

I grew up in Bozeman, Montana from 1993 to 2005 when I graduated high school. After attending undergraduate and law school out of state, I returned to Bozeman and have resided here full-time since 2013.

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.

School	Location	Degree	Graduated
Bozeman High School	Bozeman, MT	College Prep Diploma	June 2005
St. Olaf College	Northfield, MN	Bachelor of Arts cum laude – Religion	June 2009
University of Colorado Law School	Boulder, CO	Juris Doctor	May 2013

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

In college I served as president for the school chapter of the Theta Alpha Kappa religious studies honor society. I was a member of the Phi Alpha Theta history studies honor society. In addition to these academic activities, I also played as principal hornist and section leader with the St. Olaf Band and St. Olaf Orchestra. I served as co-president for the St. Olaf Horn Club, a student-organized club and music ensemble for horn players. Outside of school, I served as a volunteer and a member on the Board of Elders for the Main Street Moravian Church.

In law school I was a mock trial competitor and judge. I participated in mock trial competitions in my first and second years, finishing as a semi-finalist. In my third year I volunteered as a mock trial judge. I also represented indigent criminal defendants in their court proceedings under Colorado's student practice rules in my third year criminal defense clinic.

In the summer of 2011, between my first and second years in law school, I had the opportunity to intern for the Hon. James Reynolds, District Court Judge, in Helena. The following summer in 2012, I interned for the Bozeman office of the Office of State Public Defender. Under Montana's student practice rules, I represented clients in court proceedings, including contested hearings and jury trials, under the supervision and guidance of attorney mentors.

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.

Employer	Date	Position	Address
Office of State Public Defender	January 2017 – present	Assistant Public Defender	502 S. 19 th Ave Ste 211, Bozeman, MT 59718
Refling Hodges Law Group PLLC	October 2013 – December 2016	Associate Attorney	233 Edelweiss Dr Ste 10A, Bozeman, MT 59718
Refling Hodges Law Group PLLC	August 2013 – October 2013	Legal Assistant (pending bar admission)	233 Edelweiss Dr Ste 10A, Bozeman, MT 59718

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 Bar of North Dakota – Admitted June 2014. My North Dakota admission has been in voluntarily inactive status since 2017 because I no longer have need to practice there.
United States District Court, District of Montana – Admitted October 2013.
State Bar of Montana – Admitted October 2013.

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 January 2017, I have practiced exclusively as a trial litigator for the Office of State Public Defender in Bozeman. I am assigned to represent indigent clients in cases where their liberties are threatened by the State, including both criminal and sometimes civil cases. Ninety-five percent of my current caseload is criminal litigation, providing legal counsel to and courtroom advocacy for felony defendants who are frequently in mental health or chemical dependency-related crises, or both. The remaining 5% involves

representing respondents in civil involuntary commitments in cases where the State seeks to institutionalize individuals against their will.

Prior to working for the Office of State Public Defender, I worked in private practice for a small firm from October 2013 to December 2016. My firm specialized in civil litigation, and more specifically in construction litigation. Seventy-five percent of my practice centered around construction litigation, where we typically represented contractors and subcontractors against developers and banks in contract and lien enforcement disputes. The remaining 25% consisted mostly of business-related civil practice including providing legal advice regarding corporate law, employment law, and drafting liens, contracts, and other legal documents as needed by our clients.

Overall, 55% of my practice experience has been criminal litigation, 35% civil litigation, and 10% other civil practice.

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 had the opportunity to dive deeply into two very different realms of litigation. I spent a significant period as a civil litigator, representing a variety of Gallatin County businesses in large-scale, complex business disputes, before returning to public service and criminal litigation as a public defender.

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 practice as a litigator for the Office of State Public Defender has been before the state district courts and courts of limited jurisdiction in Gallatin, Park, and Sweet Grass Counties. I am in court on a weekly, if not daily, basis. I started with case assignments in Bozeman Municipal Court, Big Timber City Court, and Sweet Grass Justice Court. In early 2019 I transitioned to a full felony caseload in the Eighteenth Judicial District Court in Gallatin County. My practice includes everything from initial jail appearances for newly arrested defendants to contested evidentiary hearings and trials. I also participate in contested hearings for civil commitment proceedings. I am comfortable in a courtroom and fluent in courtroom procedure and protocol, particularly for the Eighteenth Judicial District.

In my prior civil practice, I litigated civil cases primarily before Montana's state district courts, as well as occasionally before the Montana Supreme Court, Montana courts of limited jurisdiction, the United States District Court for the District of Montana, and North Dakota state district courts. My practice covered all aspects of formal litigation including pleadings, discovery, mediation, and motions practice, as well as evidentiary hearings and a handful of judge trials. As with most civil litigators, I was rarely physically in the courtroom. My interactions with the courts instead revolved mostly

around written pleadings, motions, and briefs. My experience as a civil litigator gave me the opportunity to hone my skills as a researcher and a writer.

I have spent 90% of my practice engaged in formal court proceedings before various courts. The remaining 10% has consisted of providing other legal services and advice like contract drafting.

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.

dck Worldwide Holdings v. CH SP Acquisition LLC, 2015 MT 225, 380 Mont. 215, 355 P.3d 724

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

I worked on the most complex case of my career early on, litigating the aftermath of the failure and bankruptcy of a large-scale, luxury resort development project. My firm represented contractors and subcontractors fighting to get paid for work they had performed on the project. The dispute started in state district court, spilled over to federal bankruptcy court first in Delaware and then in Montana, spawned a separate action in federal district court, and ultimately resolved only after an appeal to the Montana Supreme Court. The case involved numerous litigants and the exchange of hundreds of thousands of documents in discovery. It was by far the largest and most complex piece of litigation I have worked on.

Another of the most challenging cases I have worked on was a breach of contract and lien foreclosure action that my firm litigated for our client in North Dakota. The case was both challenging and frustrating, logistically and procedurally, because of how backlogged the courts were in western North Dakota. The trial, already scheduled years after the original incident and originally scheduled for three days, ended up taking nine days spread out over the course of a year and a half. Although our client ultimately prevailed at trial, this case stands always stands out in my mind as an example of the proposition that justice delayed can be justice denied.

Finally, an important issue I have litigated was a constitutional due process issue that arose during the early days of the coronavirus pandemic. During the early days of the pandemic, my clients started having their pretrial supervision and testing requirements arbitrarily changed without notice or the opportunity to respond to the changes. These testing changes, while well-intentioned and designed to protect the government personnel administering the tests, created significant problems for some supervisees, including two of my clients who did not have access to reliable internet for remote testing. I challenged these arbitrary testing changes as a due process violation for these two clients. Although the courts dismissed my due process arguments, they nevertheless agreed to modify testing conditions for both clients. Despite the cool reception my arguments received, I

continue to feel that challenging unfair and arbitrary burdens imposed on my clients – even, or perhaps especially, in the face of the unusual challenges posed by a global pandemic – was an important stance to take, and one I remain proud of taking. While courts and other government entities may face novel challenges in an ever-changing world, the burden of overcoming those challenges should not fall on the people that government institutions are designed to serve.

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

N/A.

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

N/A.

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 public defender, I have dedicated my career, rather than just a handful of hours, to service of the public good. In late 2016, I made a conscientious choice to leave private practice and return to public service and to the principles of fairness and justice that had motivated me to become an attorney in the first place.

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.

Between college and law school I served as a full-time volunteer for a service program called the Lutheran Volunteer Corps, or LVC. This year of service gave me the opportunity to interact and engage with a broad diversity of individuals and communities, focusing on uniting peoples of faith to work toward the common goals of peace and justice. As a Bozeman kid from a privileged upbringing, my year with LVC was my first real experience seeing the traumatic effects of poverty up close. It was one of my first real experiences working with and for people facing vastly different circumstances and challenges from what I had ever encountered.

My service with LVC solidified my conviction, as a person of faith, that all people are intrinsically entitled to dignity, fairness, and respect regardless of their backgrounds, perspectives, or circumstances. My experience also sparked my commitment to a life of service, and kick-started my pursuit of a career in law.

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.

From 2015 to 2021, I was a member musician of the Bozeman Symphony Orchestra. As musicians we received nominal remuneration to provide a world-class performance experience for our community and opportunities for education and engagement for our kids. I also performed in small ensembles with other Symphony members throughout the community in churches, retirement homes, and schools. Playing with the Symphony not only gave me an opportunity to share my musical gifts with the community, but also gave me a creative outlet to pursue a hobby unrelated to my law career. Sadly, I made the difficult decision to resign my position with the Symphony earlier this summer due to unavoidable scheduling conflicts between my trial calendar and the Symphony's rehearsal and performance calendar.

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.

Gallatin County expects and deserves a judge equipped with the right combination of experience, temperament, and proven commitment to public service to fairly and effectively adjudicate legal conflicts within our community. I want to be Gallatin County's next district court judge because I understand the challenges that face a district judge and how to tackle them; the patience and steadfastness to endure the stress and conflict of litigation; and the dedication to continue serving this community.

District court judges must confront a huge variety of legal issues and questions. Some issues judges face are so routine that the judge's primary challenge is to always remember to approach them with fresh eyes and an open mind; others are so novel or so complex that the judge has to delve headlong into depths of constitutional law, statutes, cases, administrative rules, and other sources that may not have seen the light of day since they were first inked decades ago.

I do not presume that my eight years of experience as a litigator has prepared me with the answers to all the questions I would face as a district court judge. If the transition from complex civil litigation to the fast-paced world of criminal law taught me anything, it is that the skill of a successful attorney does not lie in knowing all the answers, but in possessing the humility, the patience, and the persistence to seek them out. My experience has given me the tools to find solutions, and the understanding that I can never stop learning, listening, and relying on the talents and wisdom of those around me.

Humility, patience, and persistence are also traits of a good judge – some refer to this as “judicial temperament.” My experience as a public defender has given me plenty of opportunity to develop the interpersonal skills to listen, reflect, and engage with people who may find me to be the only outlet as they live out some of the most daunting legal and personal challenges a person can face. Those who have observed me in the courtroom and elsewhere can attest that I am slow to anger and introspective almost to a fault. I have experienced what the courtroom feels like when tempers – even judicial tempers – flare, and I am confident my temperament is well-suited to deescalating conflict and maintaining decorum and professionalism.

Finally, I have the proven commitment to public service that is necessary for a good judge. I am under no illusion that serving as a district court judge is easy or glamorous. I do not seek this position because I feel I am entitled to it or to add it to a collection of accomplishments. I have seen enough of how the courts work to understand the

commitment and hard work that is required. I believe I possess the qualities to fulfill this role to the benefit of our whole community. Five years ago, I left private practice because I felt called to serve my community as a public defender. Today I feel that the best use for my particular skills, talents, and experience is in service to our community as a district court judge.

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

The three most important qualities a good district court judge should strive to exhibit from the bench are consistency, decency, and thoughtfulness.

America is a nation of laws and not of men. That means our laws apply equally to everyone, regardless of their history, status, or station. The rule of law is the basic foundation of a society that values fairness and equality. The best way for a district judge to promote the rule of law is by practicing consistency: A judge should be predictable in their decisions and transparent in their reasoning. Litigants should feel confident that they are getting similar results to others who are similarly situated to them. They should not feel that they might have gotten a better or worse outcome if their case had been in front of a different judge. Attorneys familiar with a court should be able to give accurate and reliable advice to their clients based on what they have previously observed from or heard about a judge. Only by being predictable, transparent, and consistent can a judge ensure not only that their decisions are just, but also that their decisions are *perceived* as just. As a judge, I would not only make every effort to practice consistency across my own caseload, but I would try to be as consistent as practicable with the other three departments.

Decency is also a fundamental, but sometimes overlooked, characteristic of a good judge. Being in court is already hard enough, not only for attorneys but for litigants, witnesses, victims, and everyone else involved. The experience should not be made any worse by a judge who is temperamental or dismissive. A good judge takes their role as a public servant seriously, and treats everyone – inside or outside of the courtroom – as a person intrinsically entitled to basic human dignity and courtesy, regardless of their circumstance. As a judge, I would treat people with the same courtesy and respect that I would want to be shown in their shoes.

Thoughtfulness is the third quality that distinguishes a good judge. Thoughtfulness ties back not only to the previous qualities of consistency and decency, but to the basic concept of “judicial temperament.” A good judge is not reactionary. A good judge does not assume they know the solution to every problem or the answer to every question. Instead, a good judge recognizes the limitations of their own wisdom and experience, carefully considers the positions and arguments presented to them by litigants, and then uses the tools of research and analysis to come to result that best serves justice. As a judge, this is the type of thoughtfulness I would strive to bring to every case.

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

American democracy is founded on the principle of separate, independent, and co-equal branches of government: The executive, the legislative, and the judiciary. The duty of the judiciary branch is to interpret and apply the law, and not to create it.

My goal in statutory and constitutional construction is to take the path of least resistance through the texts. If the meaning and application of a particular constitutional clause or statute is plain on its face, then the analysis need not go any further. If the meaning can be *made* plain from reading the surrounding texts, applying the appropriate maxims of construction, and looking at the relevant case law and precedent, then the analysis only need go that far and no further.

Unfortunately the law is not always so simple. Our laws were authored to shape how people and institutions should act in the future but they are based on the authors' understanding of what happened in the past. As a result, there will always be new situations and circumstances that arise that are simply not contemplated by the law, either in the plain text or by subsequent case law. This is true regardless of whether a law originated at the Constitutional Convention in 1787 or it was drafted by state legislators at the last legislative session. This is where the most difficult work of statutory and constitutional construction begins.

When the law is unclear, I try to rely on the facts of the case and narrowly tailor my interpretation of the law to most closely align with the facts and with the general principles of justice and fairness that the law exists to promote.

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.

Annie DeWolf

The Hon. Holly B. Brown

The Hon. Jessie Connolly

(Contact information provided separately to protect privacy.)

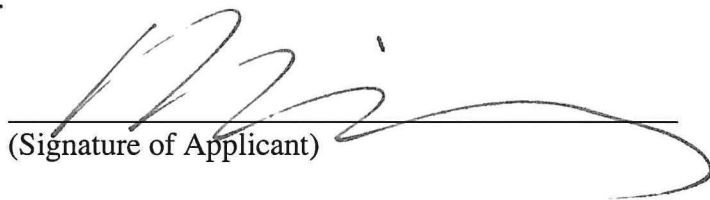
CERTIFICATE OF APPLICANT

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).

10/6/2021

(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 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

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Attorney for Defendant

IN THE JUSTICE COURT, SWEET GRASS COUNTY, STATE OF MONTANA
BEFORE JESSIE CONNOLLY, JUSTICE OF THE PEACE

STATE OF MONTANA,

Plaintiff,

v.

JOHN DOE,

Defendant.

Cause No. TK-XX-XXXX

MOTION TO PARTIALLY DISMISS

MOTION

Defendant John Doe, through counsel, hereby respectfully requests the Court to partially dismiss the charges against him. Specifically, Mr. Doe requests that the charge of Driving While Suspended or Revoked be dismissed pursuant to the principle of equitable estoppel: The State, having taken the affirmative step of issuing Mr. Doe a commercial driver's license during the period when he was allegedly suspended, should be equitably estopped from penalizing him for relying in good faith on the validity of that license.

BRIEF IN SUPPORT

I. Statement of Relevant Facts

The State alleges that Mr. Doe committed the offenses of Careless Driving and Driving While Suspended or Revoked ("DWS") on or about February 5, 2018.

In support of its allegation, the State had produced a certified copy of Mr. Doe's driving record. *See*: Certified Driver Record, dated March 15, 2018, attached as **Exhibit A**. Mr. Doe's driving record shows that the Department of Justice, Motor Vehicle Division ("MVD") suspended Mr. Doe's driving privileges on January 20, 2007. Mr. Doe's driving privileges were restored on February 13, 2018. Ex. A.

Mr. Doe's driving record also indicates that the first year he received a license in Montana was 2017 – during the period of his alleged suspension. Ex. A.

Mr. Doe applied for a commercial driver license (“CDL”) through the MVD on December 27, 2017. *See*: Application for Commercial Driver License, attached as **Exhibit B**. Mr. Doe received approval for his CDL on or about December 29, 2017. Ex. B. A certified copy of Mr. Doe’s CDL, as maintained by the MVD in the ordinary course of its business through its card issuance manager software, shows an issue date of January 18, 2018 and an expiration of November 14, 2025. *See*: CDL, attached as **Exhibit C**.

The MVD itself issued Mr. Doe a CDL during the period in which the State now alleges his privilege to drive was suspended or revoked. Mr. Doe possessed what he reasonably believed to be a valid CDL, issued to him by the MVD, on February 5, 2018 when he was issued the citations for DWS and Careless Driving.

II. Argument

The doctrine of equitable estoppel arises out of the principles of equity; it is applied to “promote justice, fair dealing and to prevent injustice.” *Cleasby v. Sec. Fed. Sav. Bank*, 243 Mont. 306, 309, 794 P.2d 697, 699 (1990), citing *Keneco v. Cantrell*, 174 Mont. 130, 135, 568 P.2d 1225, 1228 (1977). Equitable estoppel acts to prevent a party from taking advantage of its own wrong while asserting its own strict legal rights. *Id.*

Equitable estoppel is generally a civil defense. It does not typically apply against the government in the context of criminal prosecutions. It appears no Montana case has addressed the question of whether or when equitable estoppel can be asserted against the government in the context of criminal prosecution. However, there is out-of-state precedent for the application of equitable estoppel in a criminal context where the underlying nature of the “criminal” charges is effectively administrative – for example, in zoning and tax cases. *See, e.g., State v. Ramirez*, 597 N.W.2d 575, 577 (Minn. Ct. App. 1999). In such cases, “Estoppel is available as a defense against the government if the government’s wrongful conduct threatens to work a serious injustice and if the public’s interest would not be unduly damaged by the imposition of estoppel.” *Ramirez*, 597 N.W.2d at 577.

In *State v. Liepke*, 403 N.W.2d 252, 253 (Minn. Ct. App. 1987), Liepke was an owner of a residential lot in Eden Prairie, Minnesota. Liepke submitted building plans to an Eden Prairie building inspector. When he submitted the plans, he informed the inspector that he intended to expand his garage into a storage

building to store heavy equipment for his construction business. Liepke met with city employees on several occasions. He discussed the nature of his plans and his intended use of the property with those city employees. Liepke received approval to begin construction. City employees inspected and approved Liepke's construction at various points throughout the project. *Id.*

However, when construction was nearly complete, a city official "red tagged" the project. *Liepke*, at 253. The city cited Liepke with misdemeanor criminal charges for alleged zoning ordinance violations. Despite having approved Liepke's plans, and having repeatedly inspected and approved construction throughout the project, Eden Prairie alleged that Liepke's intended use of the building to run his construction business was a violation of its zoning ordinances. Liepke moved to dismiss the criminal charges, claiming Eden Prairie was estopped from prosecuting him because it had known his intended use for the property and had approved his construction. *Id.* at 254. The trial court denied Liepke's motion, ruling that equitable estoppel does not apply to prevent a city government from enforcing its zoning ordinances. *Id.*

On appeal, the Court of Appeals of Minnesota reversed and remanded. *Liepke*, at 256. The court found that equitable estoppel *can* apply against criminal prosecutions where the defendant can show three things: First, the defendant must show wrongful conduct on the part of the government. Second, the defendant must show they incurred costs by relying on the government's conduct. Finally, the defendant must show the equities favor relief to the individual when the individual's interests outweigh the "public interest frustrated by the estoppel." *Id.*

In Montana,

A party asserting equitable estoppel must establish the following six elements by clear and convincing evidence: 1) the existence of conduct, acts, language or silence constituting a representation or concealment of a material fact; 2) the fact must be known to the party to be estopped at the time of the conduct or the circumstances be such that knowledge of the fact is necessarily imputed to that party; 3) the truth concerning the fact must be unknown to the party claiming estoppel at the time it was acted upon; 4) the conduct must be done with the intent, or at least the expectation, that it will be acted upon by the other party or under circumstances both natural and probable that it will be acted upon; 5) the conduct must be relied upon by the other party and, thus relying, the party must be led to act upon it; and 6) the other party must, in fact, act upon it in such a manner as to change the party's position for the worse.

Wurl v. Polson Sch. Dist. No. 23, 2006 MT 8, ¶ 24, 330 Mont. 282, 127 P.3d 436.

Here, the government acted wrongfully when the MVD issued Mr. Doe a CDL while his privilege to drive was suspended or revoked. Montana state explicitly provides that “The department may not issue a license under this chapter to a person: [...] (2) whose license or driving privilege is currently suspended, revoked, or canceled [...].” § 61-5-105, MCA.

The MVD is the government entity responsible for maintaining driver records. There is no reason the MVD should not have known of Mr. Doe’s alleged suspension at the time it issued him a CDL.

By affirmatively issuing Mr. Doe a CDL at the same time it now alleges he was suspended, the MVD not only made a direct representation to Mr. Doe that he was able to validly drive, but it also indirectly implied to him that any possible prior suspension must have been resolved. After all, it is not just a matter of statute that the MVD cannot and should not issue a license to a person who is suspended: It is a matter of common sense. A person whose privileges are suspended MVD should not be issued a driver’s license by the MVD. Common sense therefore dictates that a person who applies for and receives a driver’s license must not be suspended. The MVD’s conduct of issuing a CDL to Mr. Doe while it knew or should have known he was suspended satisfies the first four elements of estoppel:

1. The MVD’s issuance of a CDL to Mr. Doe was an affirmative representation that he was entitled to drive, and an omission concealing from him the alleged fact that he was suspended at the time.
2. The MVD is the keeper of driver records in Montana. It knew or should have known that Mr. Doe was suspended if, as it now claims, he was.
3. The “truth” that he was suspended was unknown to Mr. Doe. Not only was the alleged suspension over a decade old, but the MVD’s issuance of the CDL would have alleviated any suspicions he may have had about whether he was suspended or not.
4. The MVD knew or should have known that Mr. Doe would act upon its issuance of the CDL by using the CDL to drive.

Mr. Doe’s conduct satisfies the final two elements:

5. He acted in reliance on the MVD’s conduct by driving with the CDL.
6. His reliance has changed his position for the worse. Mr. Doe is now the subject of criminal prosecution for DWS.

Allowing the State to pursue charges for DWS against Mr. Doe in this case is precisely the kind of injustice that equitable estoppel exists to prevent. It would be unconscionable for the government to hold Mr. Doe criminally liable for the government's own error.

The balance of the equities between Mr. Doe and the State – and, importantly, the public whose interests the State should represent – clearly favors estopping prosecution in this case. If the State were permitted to move forward, Mr. Doe would face serious penalties including possible jail time, fines, court fees, and collateral consequences including additional suspension of his driving privileges, as well as the time, monetary, emotional, and reputational costs of having to defend himself in a public trial in front of his peers. Fortunately, there would be little or no cost to the public interest in estopping prosecution in this case. If anything, estopping prosecution advances the public interest because it should incentivize the MVD to avoid these types of costly, and hopefully rare, mistakes in the future.

WHEREFORE, Defendant John Doe hereby respectfully requests that the Court apply the principles of equitable estoppel to dismiss the charge of Driving While Suspended or Revoked.

DATED this ____ day of _____.

Ben Refling
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of _____, I served a true and correct copy of the foregoing Motion on:

Patrick N Dringman
Sweet Grass County Attorney's Office
P.O. Box 1188, Big Timber, MT

OFFICE OF THE STATE PUBLIC DEFENDER