APPLICATION FOR

DISTRICT COURT JUDGESHIP

A. PERSONAL INFORMATION

1. Full name. Matthew S. Robertson

2. Birthdate. 04-27-1967

3. Current home address [redacted]

4. Email address. [redacted]

5. Preferred phone number. [redacted]

6. Judicial position you are applying for. Eighth Judicial District Court, Department A

7. Date you became a U.S. citizen, if different than birthdate. 04-27-1967

8. Date you become a Montana resident. 04-27-1967

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.

Name	Location	Date of Degree	Degree
CM Russell High School	Great Falls, Montana	May, 1985	Diploma
University of Montana	Missoula, Montana	June 9, 1990	B.A. and B.A.
U of M, School of Law	Missoula, Montana	May 15, 1993	Juris Doctor

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

Member of Phi Delta Phi.

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's Name	Position	Dates
Cascade County Attorney's Office 121 4th St. N., Suite 2A Great Falls, MT 59401	Deputy County Attorney	2003 – Present
Montana Department of Corrections 5 S. Last Chance Gulch PO Box 201301 Helena, MT 59620- 1301	Special Assistant Attorney General	1998 – 2003
Western Intermodal Transport, Ltd. Dissolved in Bankruptcy Proceedings (1998-1999)	In-House Counsel	6-1997 to 12-1997
Anderson, Robertson, and Stevens, PLLP Dissolved in 1997.	Partner	10-1993 – 6-1997

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.

Court or Administrative Body	Date of Admission
Montana Supreme Court, Montana	September 21, 1993
Montana Federal District Court, Montana	October 5, 1993
9th Circuit Court of Appeals	March 12, 1998
United States Supreme Court	November 27, 2000

13. Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., real estate, water rights, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, employment law, alternative dispute resolution, etc).

I am currently employed by the Cascade County Attorney's Office as a prosecutor where I practice in the civil and criminal fields dealing with juvenile justice issues in both the Youth Court and the Criminal Court pursuant to the Montana Youth Court Act. I also prosecute felony offenders on a wide variety of offenses from felony DUI cases to Deliberate Homicide cases which are pending before the Eighth Judicial District Court.

I am also involved in civil practice in the areas of prosecuting Youth in Need of Care cases in the Eighth Judicial District Court. I deal with civil litigation on the defense aspect when Cascade County is the defendant in lawsuits by inmate litigators and when it involves issues with the Cascade County Regional Juvenile Detention Center. I also deal with and counsel other attorneys who are involved in litigation concerning inmate sentence calculations, or habeas corpus petitions. I advise the various correctional facilities and assist them in investigating PREA allegations inside correctional facilities to ensure the safety of inmates in Cascade County's correctional offender population.

I provide legal advice to the Cascade County Commissioners as requested through other counsel when it deals with juvenile justice issues, primarily with detention and shelter care issues. I advise and defend the Cascade County Juvenile Detention Center and provide training to their staff on the treatment, care, and custody of inmates under their care. I have also taught at the judicial training course on the Montana Youth Court Act during the most recent course in Helena at the request of the Supreme Court Administrator's Office.

Criminal Practice constitutes approximately 50% of my current case load.

Civil Practice constitutes approximately 50% of my current case load.

I do not appear before any administrative bodies in my current employment.

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).

During my private practice in Missoula and Lolo, Montana, I assisted clients with criminal defense in felony and misdemeanor cases in Missoula and Ravalli County. I represented clients in child custody and dissolution of marriage proceedings, including property disputes in Missoula, Ravalli and Superior Counties. I assisted clients in civil defense for tort litigation involving several businesses in the Lolo and Missoula areas. I assisted many clients with incorporating or forming partnerships for purposes of conducting business in Montana. I represented clients in the Water Court on the issue of water rights in the Bitterroot Valley. I assisted the courts in representing children as a CASA-CAN Attorney Guardian Ad Litem on a

pro-bono basis, and as a court-appointed guardian ad litem in several cases. I was also appointed to assist in the closing of estates where the personal representative had failed to act or had died during the course of the estate process and worked with the heirs to close estates by appointment of the Missoula and Mineral County Judges.

When I worked as in-house counsel for an intermodal drayage company, I assisted in creating, Western Intermodal Transport, Ltd., which hauled commodities to and from railroad yards in Billings and Missoula, Montana; Spokane, Washington; and ports in Portland, Oregon. I provided legal counsel and acted as the Human Resources Director for the company and oversaw disciplinary actions involving employees and advised the president and board of directors on termination decisions. I also negotiated contracts, reviewed contracts with various vendors, and dealt with GST Corporation, Nippon Yusen Kabushiki Kaisha, or NYK, Ltd., Burlington Northern and Santa Fe Railroad (BNSF), Union Pacific and Southern Pacific Railroad (UPSP), and various port-drayage and commodities companies on the transportation and delivery of commodities in the intermodal drayage business of my employer. I also dealt with employee grievance issues concerning their conditions of employment.

During my employment with the Montana Department of Corrections as a Special Assistant Attorney General, I engaged in the defense of the State of Montana from inmate civil rights litigation under U.S.C. §1983 in the Federal District Courts. I defended the Department in Habeas Corpus proceedings before the Montana District Courts in any county where a correctional facility was located, the Federal District Courts in Helena and Missoula, the 9th Circuit Court of Appeals, the Montana Supreme Court, and the United States Supreme Court, on a wide variety of issues involving inmate sentences and the inmates civil rights. Many of the issues which arose during these habeas corpus proceedings involved the calculation of the inmate's sentence. I became an expert in the calculation of an inmate's sentence or sentences, including the calculation and impact of "good time" on an inmate's sentence while working with Janet Cox, the former chief of records at the Montana State Prison. I was one of the primary developers of the sentence calculation spreadsheet which is still utilized by the Montana Department of Corrections in the calculation of an inmate's sentence.

Prior to 1999, there were no real consequences for juveniles who assaulted staff or personnel within the Juvenile Correctional Facilities and several staff members were seriously injured during these incidents. I developed the strategy, in consultation with Director Rick Day, to amend statutes to address the issue of serious assaults inside the juvenile correctional facilities. I drafted legislation which made it a direct file offense under M.C.A. §41-5-206(1)(a), to charge juveniles who assault law enforcement or corrections and detention officers directly in the District Court with criminal penalties, to address juveniles who assaulted staff in correctional facilities. I then lobbied for the passage of the legislation which was implemented by the 1999 legislature. I was then sworn in as a Special Assistant Deputy County Attorney for Custer and Jefferson Counties and prosecuted juvenile offenders who committed offenses inside the Pine Hills and Riverside Youth Correctional Facilities following the enactment of the law. I also lobbied for amendments to the Extended Jurisdiction Juvenile Prosecution Act with the

Honorable Judge John Larson, to correct the constitutional defects as found by the Montana Supreme Court. I drafted the Criminally Convicted Youth Act codified at M.C.A. §41-5-2501, et. seq., after discussions with Pine Hills Youth Correctional Facility Superintendent Steve Gibson, to address the issues involving juveniles who were prosecuted as adult offenders pursuant to M.C.A. §41-5-206, and ultimately convicted of criminal offenses in the District Court. The Criminally Convicted Youth Act allows juveniles to petition for review of their sentence before the court of conviction for a quasi-sentence review by the courts.

I was invited to speak as an expert and present my views on the prosecution of juvenile offenders before the Colorado Legislature to speak about the disparate impact juvenile incarceration has on youth prosecuted for minor offenses. I also spoke about the serious impact the prosecution of juveniles for criminal offenses in the district court has on recidivism.

I was an instructor at the Montana Law Enforcement Academy from 1999 through 2003, and taught Corrections and Detention Officer Basic and Use of Force courses in Law Enforcement Basic and Corrections and Detention Officer Basic. I became the Juvenile Justice Specialist for the Montana Department of Corrections and the State of Montana. I have also testified as an expert in proceedings involving the application of the Montana Youth Court Act and provided legal opinions to courts and prosecutors across the State. I am still consulted by attorneys in other jurisdictions and judges on the impact of the Montana Youth Court Act, the Interstate Compact on Juveniles, and other issues involving juvenile justice in Montana.

I worked with the Montana Department of Corrections and the Montana Correctional Enterprises branch to facilitate the transfer of state land to a private entity in order to facilitate the development of the Montana State Prison ranch facilities and the installation of a pivot sprinkler system to enhance the agricultural abilities at the prison. I worked with the Montana Department of Corrections Facilities Manager on solid waste disposal act issues concerning the disposal of solid waste at the Montana State Prison. I assisted the Facilities Manager in evaluating and siting correctional facilities in Montana by reviewing Request for Proposal documents from various private prison corporations in siting the new prison in Shelby, Montana, and other proposed locations and advised the Director on the contractual issues involved. I worked with the Facilities Manager on the creation of the WATCH program at the former Xanthopoulous Building at the Montana State Hospital. This turned the former forensic unit of the hospital into a chemical dependency treatment program which is used to treat offenders for alcohol treatment by the Montana Department of Corrections.

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 my practice has been entirely before the judges of the Eighth Judicial District Court. I prosecute criminal offenders from initial review and charging through jury trial and sentencing. I prosecute civil cases including abuse and neglect petitions and

juvenile delinquency petitions before the Court, including discovery and trials on the merits. I appear and argue cases before the judges of this district regularly.

16. If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.

I previously appeared and argued numerous cases before the Montana Supreme Court as a Special Assistant Attorney General and argued two cases at oral arguments before the Court. I also filed hundreds of responses to appeals, petitions for various writs, and other briefs with the Court during my tenure at the Montana Department of Corrections. Since my change of positions to becoming a prosecutor for Cascade County, I have not appeared before the Montana Supreme Court or filed documentation with the Montana Supreme Court. Criminal and civil appeals concerning any of my cases have been handled by the Montana Attorney General's Office. I have reviewed and commented on numerous briefs drafted by other attorneys from the Attorney General's Office concerning cases I have prosecuted for Cascade County.

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 assisted in the defense of the Montana Department of Corrections and all of the employees involved when they were sued by inmates for constitutional rights violations based upon the actions of the correctional officers following the riot at the Montana State Prison in 1991. When I began my employment, I was assigned to assist with the litigation, reviewed evidence, drafted legal memorandums, and assisted at trial of the case before Federal District Court Judge Charles C. Lovell. The legal issues involved the civil rights of inmates inside the maximum-security prison cell block of the Montana State Prison, the right to be free from cruel and unusual punishment, and the actions of the correctional officers in restoring order to the facility. I also provided some assistance in the investigation of the crimes committed inside the facility with the investigation bureau of the Department. The Montana State Prison Maximum Security Unit remains the largest single crime scene known in the State of Montana and the number of crimes and lawsuits generated from the riot were extensive. The investigation resulted in numerous prosecutions of offenders inside the facility for crimes including deliberate homicide. The civil litigation included constitutional rights litigation concerning prison conditions, alleged cruel and unusual punishment, and other allegations. One of the major issues involved the "hog-tying" of inmates in No-Man's Land, which is a fenced area of land between the Maximum Security Unit and the Close Custody exercise yard. Inmates were extracted from the facility by the correctional officers, stripped and searched, and they were then left hand-cuffed and ankle-restrained on their stomachs in the grass while officials worked to figure out appropriate housing for each offender following their removal from the crime scene. The jury trial was complex and thoroughly litigated to protect each of the correctional officers from being

held liable for any alleged violation of any inmates' constitutional rights. The extremely disturbing crime spree which occurred inside the maximum-security unit compounded the and prevented rehousing of inmates within the facility for days. The difficulties were further compounded as the department addressed housing issues for the entire inmate population of the maximum security unit as the criminal investigations proceeded. This incident created extensive collateral litigation involving allegations of bias in housing offenders, protective custody placements, transfers of inmates to alternate facilities, as the Department continue to work to protect inmates from other inmates. I handled numerous legal issues and cases concerning housing of inmates and transfer of inmates to other correctional facilities. I was also involved in the lengthy resolution and further litigation on the legal fees of attorneys who sued the Department of Corrections and the value of their services under U.S.C. §1983 and the award of attorney's fees for the prevailing party, even though the pecuniary award of damages was merely $1.00 per inmate.

I litigated and ultimately argued a case before the Montana Supreme Court concerning *WORDEN, Plaintiffs and Appellants, v. MONTANA BOARD OF PARDONS AND PAROLE*, Defendants and Respondents, which was decided July 7, 1998. This case involved inmates suing the Montana Board of Pardons for access to their complete prison record files, which included numerous documents, letters, and other information provided to the board by private citizens. Many of these documents included victims statements, statements of the survivors or relatives of victims. Most of this information was traditionally withheld for protection of the victims or relatives of the victims privacy rights. Other documentation within the inmates files included custodial placement and classification materials which impacted the safety and security of the institution as it listed which inmates could not be housed with specific other inmates. This case pitted two provisions of the Montana Constitution against each other, specifically the public's right to know versus the interests of individual privacy and collaterally institutional security. I had the privilege of arguing this case before the Montana Supreme Court and obtained the result that my client, the Montana Board of Pardons and Parole, needed to insure that disclosure of certain documents was prevented for protection of private citizens. Additionally, certain types of documentation was protected from disclosure to insure the safety and security of the correctional institutions.

Juvenile justice and abuse and neglect proceedings are some of the most complex and important legal issues facing every district court judge in this nation. I am recognized as a specialist in the field of juvenile justice in the State of Montana for my extensive experience with the Montana Youth Court Act, the Interstate Compact on Juveniles and my work to lobby for amendments, changes, and improvements to the Montana Youth Court Act during my tenure with the Montana Department of Corrections, and during the past 17 years as a practitioner who specializes in the prosecution of juvenile offenders for Cascade County. I implemented a juvenile treatment court program in Cascade County with Judge Kenneth Neill and have been

instrumental in the on-going success of the program. I am regularly consulted by other prosecutors and defense counsel concerning application of the Montana Youth Court Act where it pertains to criminal charges against juveniles in terms of the sentences which can be imposed, the legal procedures to hold juveniles accountable as either juveniles or adult offenders under the complex statutory schemes and rules governing the prosecution of juvenile crime. I am also consulted on the housing of juvenile offenders in either juvenile or adult correctional facilities or programs as there are numerous issues with the housing of juvenile offenders with adult criminal offenders and the interface with Federal law and the guidelines and regulations of the Office of Juvenile Justice Delinquency and Delinquency Prevention. I have been involved in and implemented many administrative and policy changes in the Cascade County Attorney's Office which have had significant impacts on the care and custody of juvenile offenders, their time in custody, and the time it takes to address the offenses and get them into appropriate programming. I implemented detention reform in detention facilities through the Juvenile Detention Alternatives Initiative in collaboration with the Annie Casey Foundation and the Alliance for Youth. Additionally, I remain a part of a work group which is working on addressing many other issues facing juvenile offenders, including the Disproportionate Minority Contact and programming within the juvenile justice system. I am also regularly consulted on the issue of abuse and neglect proceedings and the application of the Indian Child Welfare Act in the Eighth Judicial District. I have litigated these issues before the courts for more than 17 years and have rarely had any of my cases overturned on appeal.

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

I have not published any papers, articles, or books as virtually all of my time is spent in litigation and preparation for litigation in the district courts.

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

I do not recall all of the times I have been asked to lecture or speak on legal issues over the past ten years, but have been a speaker for the Montana Board of Crime Control, Judicial Training and other courses specifically on the Montana Youth Court Act. I am recognized as a specialist in the field of juvenile justice in the State of Montana for my extensive experience with the Montana Youth Court Act, the Interstate Compact on Juveniles and my work to lobby for amendments, changes, and improvements to the Montana Youth Court Act during my tenure with the Montana Department of Corrections. During the past 12 years as a practitioner I was the specialist who prosecuted juvenile offenders for Cascade County. I am also recognized as a specialist in treatment court programs and have been invited to participate in the Montana Supreme Court Administrator's Peer Review Program which evaluates and suggests

improvements in the implementation of adult treatment court programs throughout the State of Montana. I have been involved in and implemented many administrative and policy changes in Cascade County involving the care and custody of juvenile offenders. I was one of the primary people to implement detention reform in detention facilities through the Juvenile Detention Alternatives Initiative in collaboration with the Annie Casey Foundation and the Alliance for Youth. Additionally, I remain a part of a work group which is working on addressing many other issues facing juvenile offenders, including the Disproportionate Minority Contact issue with the Montana Board of Crime Control.

20. Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.

I have been precluded from providing pro-bono services for the Montana Bar Association pursuant to my contractual obligations with the Cascade County Attorney's Office.

21. Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.

I have not held any positions with the Montana State Bar.

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

I am not a veteran of the United States Military.

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

I do not have prior judicial experience or quasi-judicial experience.

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

I have been a construction worker and rental manager working with Anderson Enterprises in Missoula. My employment with them initially involved renovating houses and turning them into rental houses for students at the University of Montana. I learned how to completely renovate a house during my employment including electrical, plumbing, insulation, drywall, flooring, cabinetry, and finish carpentry. I also was involved in dealing with tenants and tenant issues including fixing rentals, installation of new appliances and dealing with rent disputes and damage deposits. I know that theses issues may come up during litigation before the district court in terms of equal-housing issues, landlord-tenant disputes, evictions, as well as

construction issues and building code disputes. I am a silent partner in a small business involved in retail sales and understand the issues with employment and employee issues, business licenses, taxes, payroll, and inventory claims.

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.

Great Falls Gaming Rendezvous, Inc., is a local non-profit organization which raises funds for a scholarship at Providence University and for cancer research with Sletten Cancer Insitute, in Great Falls. I was the legal advisor and a member contributing to the projects and goals for Great Falls Gaming Rendezvous, Inc. I drafted their articles of incorporation, prepared their filings with the IRS to become a 501(c)(3) public charity, and drafted their bylaws for the continued operation of the company. The organization has raised thousands of dollars in scholarships and research funds over the past ten years.

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

I have not run for or held public office since graduation from law school. I was campaign manager for Republican candidate Matthew Denny, during both of his campaigns for Representative in Missoula.

I have sought judicial appointment in the Eighth Judicial District in 2015, 2019, and the Seventh Judicial District in 2017. I was not selected for any of the positions by then Governor Steve Bullock.

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.

I am a silent partner in a local business, Kelly's Comics, which is a retail store. I would continue my association with this business if I am appointed as a District Court Judge so long as it did not interfere with or impair my ability to perform my duties as a judge. I do not earn any income from my association with the business.

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. I have always timely filed my tax returns and reported income as required.

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.

Yes. I declared personal bankruptcy during the dissolution of my marriage which was dissolved, and the bankruptcy discharged all debts in 1999. At the time I had been employed by Western Intermodal Transport, Ltd., working 10-15 hours per day. I personally spent thousands of dollars traveling for business to run operations and deal with contractual issues. I spent nearly every other week in Portland, Oregon, operating the business operations, hiring drivers, and contracting for port-drayage. I routinely traveled to Frenchtown, Billings, and Three Forks, Montana, as well as Spokane, Washington, to handle business for the company and used my own personal vehicle and credit cards as the company did not issue corporate credit cards. The company was supposed to reimburse these expenses at the end of each month. When I left my position with Western Intermodal Transport, Ltd., it was due in large part to financial issues of the company. I was promised that I would be reimbursed for those debts by the vice-president of the company, as they were expenses incurred on behalf of the company, but I was not reimbursed and filed for bankruptcy to protect my own assets. Ultimately, Western Intermodal Transport, Ltd., filed for bankruptcy, was dissolved, and I was listed as one of their creditors.

G. JUDICIAL PHILOSOPHY

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

I am seeking appointment as a district court judge because I believe I would be a good judge for the community where I grew up, have worked, and lived for the majority of my life. I would like to continue to serve the public in the administration of justice, hearing their cases, and making decisions which impact the parties in a fair, objective, and expeditious manner. I have worked closely with so many great judges across Montana in my role as an Assistant Attorney General and as a Deputy Cascade County Attorney. I believe I am well-qualified and have the breadth and depth of experience to perform the job with fidelity to the laws and constitution.

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

The first quality of a good district judge is a thorough knowledge of the rules of evidence. The rules of evidence come into play in every case and attorneys will rely upon the court's knowledge of these rules during every case on a daily basis. A good judge needs to know when to sustain or over-rule any objections made during a hearing. Further, a good judge needs to understand and keep in mind what evidence should or should not be considered when reviewing cases for issuing rulings where the judge is also the finder of fact.

The second quality of a good district judge is ruling on issues in a timely fashion. Attorneys and the public rely upon the judges to keep cases moving forward through the system to a final outcome. A good judge issues a ruling on motions, contested case hearings, and other pre-trial matters as quickly as possible to keep the parties of the case informed as to the rulings on the issues. This will allow the parties to make timely decisions on how to proceed with the litigation. Justice delayed is oft times justice denied. Prompt rulings on issues pre-trial assists all of the parties in getting to a resolution.

The third quality of a good district judge is fidelity to the principle that justice is blind, as the law applies to everyone equally. However, a judge often has to decide cases on an equitable basis in accordance with the law. A good district judge will balance these two principles in coming to a just outcome and not blindly applying the black letter of the law, while at the same time adhering to the original intent of the law when it was created. A judge must consider all relevant information when rendering a decision or sentencing a defendant for a criminal offense. Justice is not one-size fits all, it must be carefully tailored to the facts, circumstances, and individuals involved to reach a just outcome and to ensure the integrity of the judicial process.

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

The Constitution and statutes must be interpreted within the framework of the founding fathers as living documents as the laws of men are constantly changing. However, the principles upon which the Constitution are founded are immutable in that a judge must adhere to the rule of law as written based upon the original intent of the people or the legislative body which drafted the law where possible. It is not incumbent upon the judge to be an activist or to loosely construe the law. The rule of law is applicable to all people, equally, and equity under the law must be founded solely upon the original intent of the law. Judicial restraint is the hallmark of the legal system, knowing that the same principles apply today as they did in the past. A judge is not in a position to legislate change, that is solely left to the will of the people and the legislative branch. The court is there solely to weigh the evidence, to apply the law as written to the facts and evidence in the case, and to render a just decision. One of my favorite judges is former Chief Justice William Rehnquist, who penned some of the more influential cases of his day and whose jurisprudence continues to guide the justice system, even today.

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.

Attached, please see the redacted writing sample for review.

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.

Elizabeth A. Best
District Court Judge
415 Second Ave. No., Room 203
Great Falls, MT 59401
Phone: 406.771.3950
Email: ebest@mt.gov

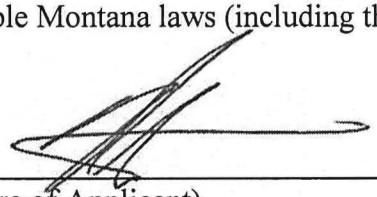
Valerie Winfield
Deputy Cascade County Attorney
121 4th Street North, Suite 2A
Great Falls, MT 59401
Phone: 406.454.6915
Email: vwinfield@cascadecountymt.gov

John W. Kutzman
District Court Judge
415 Second Ave. No., Room 300
Great Falls, MT 59401
Phone: 406-454-6897
Email: jkutzman@mt.gov

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).



May 22, 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 Tuesday, June 1, 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

Matthew S. Robertson
Deputy County Attorney
JOSHUA A. RACKI
Cascade County Attorney
121 4th Street North
Great Falls, MT 59401
Telephone: (406)454-6915

Attorneys for the State

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

STATE OF MONTANA, Plaintiff, vs. ESANDRO RODRIGUEZ, Defendant.	)	No. CDC-19-793 **RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS AND BRIEF IN SUPPORT**

Matthew S. Robertson, Deputy County Attorney for Cascade County, State of Montana, respectfully responds to Defendant's Motion to Suppress and Brief in Support.

I. FACTUAL AND PROCEDURAL BACKGROUND

[REDACTED FOR BREVITY AND PAGE LIMITATIONS]

II. ARGUMENT

The Fourth Amendment to the United States Constitution and Article II, § 11 of the Montana Constitution provide that all people shall be free from unreasonable searches and seizures. Mont. Const. art. II, § 11. Article II, § 10 of the Montana Constitution establishes the right of individual privacy which provides even broader protections than the United States Constitution.[1]

However, these protections are subject to exceptions. Where a peace officer develops sufficient probable cause to believe a vehicle contains contraband or other evidence of a crime, she may seize a person's vehicle without violating the person's IV and XIV Amendment rights to be free from warrantless seizures and her right to privacy under Article II §§ 10 and 11 of the Montana Constitution.[2] Further, where an officer has properly applied for and is properly issued a warrant to search or seize a person's property, the officer may conduct said search or seizure without violating these same rights.

[1] *State v. Hardaway*, 2001 MT 252, ¶ 34, 36 P.3d 900.
[2] *State v. Elison*, 2000 MT 288, ¶ 38, 302 Mont. 228, 243, 14 P.3d 456, 467.

A. Officer Kazior and Officer Kelsey had reasonable suspicion to believe that the suspect vehicle was sought by law enforcement and it ripened into probable cause sufficient to support the warrantless seizure of the Defendant's vehicle.

Here, the State contends that Officer Kazior and Officer Kelsey had reasonable suspicion to believe that the vehicle they were following matched that of a vehicle sought by Officer Hronek as being potentially involved in the home invasion in Countryside Village on September 27, 2019. Officer Kazior and Officer Kelsey will testify that they believed it was the vehicle, but that they were unable to make out the license plate to verify that it was actually the vehicle they sought until it had been stopped due to the conditions and road grime.[3] Based upon the make, model, and color of the vehicle, they had reasonable suspicion to conduct the stop as the suspect vehicle was a white in color Mercury vehicle, which appeared to match the suspect vehicle given the snowy and inclement weather conditions based upon Officer Hronek's request for assistance in an attempt to locate the vehicle. The stop of the vehicle ripened into probable cause to believe that the Defendant had engaged in illegal activity and that this vehicle contained evidence of that activity when Officer Kazior and Officer Kelsey were able to fully read the license plate and verify that it was the vehicle they were seeking in relation to the investigation of the home invasion in Countryside Village on September 27, 2019. This was further confirmed when the prime suspect, Jesse James Daniels, exited the driver's door of the vehicle and was immediately recognized by Officer Kelsey.

Further, the State contends that Detective Burrow, Detective Krause, Officer Kelsey, Officer Hronek, and Officer Kazior properly impounded the vehicle and properly applied for and were properly issued warrants to search the vehicle, which lead to further probable cause to link this Defendant to the crimes committed at Countryside Village.

The State does not challenge or contest this Defendant's right to challenge the stop and the search of Lauren Aviles vehicle as set forth in Section III of the Defendant's Motion.[4] However, the State contends that the property at issue is clearly relevant and probative as to the identity of the individual involved in both incidents as alleged in DDC-19-700 and CDC-19-793.

1. OFFICER KAZIOR AND OFFICER KELSEY HAD PARTICULARIZED SUSPICION TO STOP THE SUSPECT VEHICLE TO ASSIST OFFICER HRONEK WITH THE ATTEMPT TO LOCATE.

As the Defense aptly states, peace officers "may seize an automobile pursuant to probable cause entirely independent of the presence of generally applicable exception to the warrant requirement."[5] Whether Officer Kazior's stop of the Defendant's vehicle and Officer Hronek's subsequent seizure was valid turns on

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[3] See State's Exhibits 11 and 12, together with the video of the stop, Exhibit 17.
[4] Defendants Motion to Suppress Evidence, Pages 6-7.
[5] *State v. Burchill*, 2019 MT 285, ¶ 24, 454 P.3d 633, 640.

whether there was probable cause to seize the vehicle prior to towing and impounding the vehicle.[6]

The Defendant argues that Officer Kazior and by extension, Officer Kelsey, did not have particularized suspicion to initially stop the suspect vehicle, contending that that the stop of the vehicle in this case was a *Terry* stop and that the stop was merely "pretextual." The Defendant goes on to argue that the pretextual stop of the vehicle was not made with either reasonable suspicion or probable cause and therefore the officers violated the rights of Jesse James Daniels and Lauren Aviles by stopping them. The Defense then argues that the failure to establish probable cause by Officer Kazior and Officer Kelsey, resulted in an illegal stop of Lauren Aviles' vehicle, which made the seizure of the vehicle and impounding of the vehicle infirm, invalidating all subsequent search warrants obtained to search the vehicle.

The State asserts that Officer Kazior and Officer Kelsey had reasonable suspicion to believe that the suspect vehicle was that sought by Officer Hronek. The vehicle matched the description of the vehicle of the registered owner, Lauren Aviles, who was linked with the identified suspect, Jesse James Daniels. The association with Jesse James Daniels indicated that the vehicle also matched some of the possible witnesses' identification of the vehicle. The witnesses at the home invasion at Countryside Village variously describe the suspect vehicle as a 1990's model vehicle, white in color, possibly a Cadillac or a Buick. The suspect vehicle driven by Jesse James Daniels and registered to Lauren Aviles is an older model 1994 Mercury Grand Marquis, which is substantially similar to a 1990's model Cadillac or a Buick in terms of size, make and model of the vehicle described by the victims, and Lauren Aviles vehicle was white in color as described by the victims.

The vehicle observed by Officer Kazior and Officer Kelsey was a white vehicle which appeared to match that sought by Officer Hronek. Officer Hronek's investigation had developed information that the primary suspect in the home invasion was identified as "Jay Smooth" which was positively identified by the victims as Jesse James Daniels based upon the witness's statements. Officer Kazior and Officer Kelsey were initially unable to confirm the license plate, but once the vehicle had been stopped, they were able to read the license plate numbers. The license plate matched that of the vehicle sought by Officer Hronek. Based upon these factors, the State asserts that the officers involved in the stop of the vehicle had reasonable suspicion to stop the vehicle and verify that it was the same one sought by Officer Hronek.

When Officer Kazior initiated the stop of the vehicle, she stated that it was for traffic only at that moment. Upon stopping the vehicle and being able to fully see and read the license plate, she was able to confirm that the vehicle bore the license plate of the vehicle sought by Officer Hronek. Officer Hronek had probable cause to believe that this vehicle was involved in a home-invasion case and both Officer Kazior and

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[6] *State v. Pierce*, 2005 MT 182, ¶ 19, 116 P.3d 817, 821 (citing *State v. Broell*, 249 Mont. 117, 122, 814 P.2d 44, 47 (1991)).

Officer Kelsey noted that in their reports in this case.[7] Officer Hronek's reports indicate that the victims had identified the suspect as Jesse James Daniels. Officer Hronek confirmed that Jesse James Daniels was associated with Lauren Aviles, who drove a white 1994 Mercury Grand Marquis. Officer Hronek observed a white vehicle enter Countryside Village which appears to be Lauren Aviles vehicle, which could be mistaken for a 1990's Cadillac or a Buick, based upon the size, make and model of the Mercury Grand Marquis and the similarities between vehicles of that era.

When Officer Kazior and Officer Kelsey were confident that they had stopped the correct suspect vehicle sought by Officer Hronek as the vehicle suspected to be involved in an armed home-invasion, Officer Kazior instructed the driver who was unknown at that point, to turn off the vehicle. In viewing the video footage of the stop, the Court will hear the exchange. When Officer Kazior ordered the driver to exit the vehicle, he was immediately identified as Jesse James Daniels, the suspect sought by Officer Hronek in the home-invasion case. When the passenger was removed from the vehicle, she was identified as Lauren Aviles, who was also sought for questioning in the home invasion case as possibly the driver of the vehicle that night. When the officers then viewed the vehicle on the roadway that night, they observed additional facts and circumstances sufficient to establish probable cause to search the vehicle. First, the officers viewed a long magazine for a firearm in plain view through the rear window of the vehicle in the seat pocket on the back of the driver's seat. Further, officers saw what they believed to be evidence that the suspects were engaged in illegal drug use or illegal drug trafficking as they observed a blue pill container jammed into the door console of the passenger seat where Lauren Aviles had been removed from the vehicle. The photograph of the bottle and the video clearly show the blue bottle in the door compartment.[8] Officers clearly noted the container during the stop and the Court will hear them exchange theories on how to insure there was probable cause for the search of the vehicle, even when they were not the primary officers involved in the case.

In *Whren v. United States*, the United States Supreme Court ruled that an officer's subjective motives for a traffic stop does not render an objectively reasonable stop invalid.[9] The Montana Supreme Court adopted this ruling in *State v. Farabee*.[10] Thus, in Montana, an objectively reasonable stop is valid regardless of an officer's ulterior motives.[11] An exception to the warrantless stop of an individual is codified and this Court has found that "a peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person . . . has committed . . . an offense."[12]

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[7] State's Hearing Exhibit 1 and Hearing Exhibit 2.
[8] State's Exhibits 14 and 17.
[9] *Whren v. United States,* 517 U.S. 806 (1996).
[10] *State v. Farabee,* 2000 MT 265, 22 P.3d 175
[11] *Farabee,* ¶ 31.
[12] *City of Missoula v. Kroschel,* ¶11, 2018 MT 142, 391 Mont. 457, at 462-463, 419, P.3d 1208, at 1215-1216.

Under *Farabee*, even if Officer Kazior merely suspected that the Defendant had an obscured license plate at the time of the initial stop, this does not invalidate this stop. Therefore, the Defense may not challenge the validity of the stop or the subsequent investigation based on the claim that the stop was a pretext for a deeper investigation.

Officer Kazior and Officer Kelsey will testify that based upon the road conditions and the condition of the vehicles license plate, they were unable to confirm that it was that owned by Lauren Aviles that night until after they had stopped the vehicle due to the weather conditions obscuring the license plate. Officer Kazior and Officer Kelsey will testify that once the vehicle was stopped and once they were closer to the vehicle they were able to verify the license plate number and confirm that it was the vehicle sought by Officer Hronek in her investigation. The State asserts that based upon the totality of the circumstances, there was reasonable suspicion to believe that the white vehicle Officer Kazior and Officer Kelsey were following was that sought by Officer Hronek. Once the vehicle was stopped and positively identified, there was probable cause for further investigation by the officers and removal of the occupants from the vehicle due to Officer Hronek's investigation and search for the primary suspect, Jesse James Daniels.

2. THE OFFICERS HAD PROBABLE CAUSE TO SEIZE THE VEHICLE BASED UPON THE TOTALITY OF THE CIRCUMSTANCES AND KNOWLEDGE OF THE INVESTIGATION.

Probable cause does not require facts sufficient to establish a person is engaging in criminal activity; instead, it requires facts sufficient to establish a probability of criminal activity under the totality of the circumstances.[13] Whether an officer has probable cause is based on the information available to the officer prior to the execution of the seizure.[14]

The standard for probable cause is a showing of the probability of criminal activity.[15] The existence of a probability of criminal activity is based on the totality of the circumstances.[16]

Thus, whether an officer has probable cause to seize a vehicle turns on whether the information available to her prior to towing and impounding the vehicle is sufficient "to conclude that the contents of [a defendant's vehicle] 'offended against the law.'"[17]

Further, the United Supreme Court has concluded that a passenger's presence in a car with a driver

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[13] *State v. Barnaby*, 2006 MT 203, ¶ 30, 142 P.3d 809, 816 (citing *State v. Rinehart*, 262 Mont. 204, 210, 864 P.2d 1219, 1222 (1993).
[14] *State v. Pierce*, 249 Mont. 117, 122, 814 P.2d 44, 47 (1991).
[15] *State v. Broell*, 249 Mont. 117, 121, 814 P.2d 44, 46 (1991) (citing *State v. Dess*, 201 Mont. 456, 465, 655 P.2d 149, 154 (1982)).
[16] *Broell*, 249 Mont. at 465, 655 P.2d at 154 (citing *State v. O'Neill*, 208 Mont. 386, 679 P.2d 760 (1984)).
[17] *Pierce*, ¶ 19 (quoting *Broell*, 249 Mont. at 122, 814 P.2d at 47).

provides more reason "to believe that the two [are] in league."[18] While *Houghton* concerned whether the defendant's privacy interest had been abridged by an officer conducting a search of her purse, it is nevertheless persuasive here. In *Houghton*, the defendant was a passenger in a car who's driver admitting that the syringe an Wyoming highway trooper saw in his shirt pocket was for drug use.[19] After providing a false name and claiming not to have identification, the trooper conducted a search of her purse, which was found in the vehicle.[20] The search produced the defendant's identification, drug paraphernalia, and a syringe with methamphetamine.[21]

The defendant claimed the trooper did not have probable cause to search her purse on the grounds that while the trooper had probable cause to believe the drugs were in the car, they did not have probable cause to search her property.[22] The United States Supreme Court reasoned that "a car passenger . . . will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing" as "[a] criminal might be able to hide contraband in a passenger's belongings" with or even without the passenger's permission.[23] For this reason in addition to concerns that creating exceptions for passenger's belongings would be impractical, the United States Supreme Court declined to require officers to have a positive reason to believe a passenger and driver were engaged in a common enterprise.[24] Thus, the United States Supreme Court declined to differentiate between the expectation of privacy of passengers and drivers of the same car.[25]

While, as in *Broell*, the defense has attacked this collection of observations as individually insufficient to establish probable cause, they must be viewed collectively.[26] For this reason, the State contends that collectively, the officers observations create a probability that the Defendant was engaged in the home invasion, and an assault with a weapon, specifically a handgun, and that the his vehicle's contents offended against the law under *Pierce* and *Broell*.

The decision to seize the vehicle made by Officer Kazior or Officer Kelsey, was not done in a vacuum but based upon the totality of the knowledge of the police department and their clear observations in plain view that evening and the directions of Officer Hronek, the primary investigating officer. When the vehicle was stopped and officers confirmed the license plate numbers and the vehicle were the one sought by

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[18] *Wyoming v. Houghton*, 526 U.S. 295, 306 (1999).
[19] *Houghton*, 526 U.S. at 298.
[20] *Id.*
[21] *Id.*
[22] *Houghton*, 526 U.S. at 299.
[23] *Houghton*, 526 U.S. at 304-05.
[24] *Houghton*, 526 U.S. at 305-06.
[25] *Houghton*, 526 U.S. at 307.
[26] *Broell*, 249 Mont. at 121, 814 P.2d at 46; *Pierce*, ¶ 16.

Officer Hronek in her investigation, there was probable cause to seize the vehicle after the primary suspect had been removed, as well as the passenger. First, the driver of the vehicle was the suspect sought by Officer Hronek in her investigation as the primary suspect identified by the victims of the home invasion on September 27, 2019. Second, the passenger of the vehicle was Lauren Aviles, a known associate of Jesse James Daniels, and the registered owner of the vehicle, who was suspected to be the blonde female driver of the vehicle that night. Third, the vehicle matched the description of the victims as a nineties model vehicle, white in color, possibly a Buick or Cadillac. The white 1994 Mercury Grand Marquis is substantially similar to the nineties model Buick or Cadillac, which was described by the victims who viewed it at night for the brief period of time when the victims were either in the vehicle or observed the vehicle from the porch of the residence.

Once the vehicle was stopped, the officers viewed the blue bottle in the door pocket of the vehicle which they believed had a green leafy residue on it and suspected that it would contain illegal drugs. This can be seen in the door compartment where the passenger exited the vehicle on video and in the photograph by Officer Hronek.[27] The officers also observed a torch in the back seat of the vehicle, commonly used by drug users to vaporize drugs, including marijuana. The officers also viewed a long black magazine for a handgun in the seat pocket on the back of the driver's seat. The handgun magazine could belong to the firearm used during the home invasion.

Officer Hronek was aware that there was a firearm used by Jesse James Daniels at the home invasion, which was variously described as silver, black, or silver and black, possibly a 9mm caliber weapon, by the three victims who were interviewed in her investigation. Officer Hronek later inspected the vehicle on the roadside where it had been parked by Jesse James Daniels and was present when it was seized and towed to Ox and Son's Secure Impound Lot. Officer Hronek photographed evidence in plain view from the street located inside the vehicle, specifically the blue container believed to contain illegal drugs, the magazine for a firearm, and the torch in the rear passenger compartment, prior to seizing the vehicle and having the vehicle towed to an impound lot. When Officer Hronek advised the other officers to seize the vehicle based upon her knowledge of her investigation into the offenses at Countryside Village, she had probable cause to believe that Jesse James Daniels was involved in the home invasion and that the vehicle he was driving was the vehicle involved. Further, Officer Hronek was present when the vehicle was seized and towed so the officers could obtain a search warrant for the vehicle later.

Based upon these factors, the State asserts that the suspect vehicle was properly stopped and that Officer Hronek properly instructed other officers to seize the vehicle so that it could be searched for evidence of the crimes allegedly committed at Countryside Village at a later date.

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[27] State's Exhibits 14 and 17.

3. DETECTIVE BURROW HAD PROBABLE CAUSE TO SEARCH THE 1994 MERCURY GRAND MARQUIS AS EVIDENCED BY THE FOUR CORNERS OF THE SEARCH WARRANT AND BASED UPON ALL OF THE INFORMATION PRESENTED TO A NEUTRAL MAGISTRATE.

When Officer Hronek arrived on scene and photographed evidence inside the vehicle in plain view, specifically the blue container believed to contain illegal drugs, the torch in the passenger compartment, as well as the magazine for a firearm, there was probable cause to believe that there might be a firearm, specifically the firearm used at the home invasion. As the Defense aptly notes, for a judge to properly issue a warrant the application must:

> (1) [state] facts sufficient to support probable cause to believe that an offense has been committed; (2) [state] facts sufficient to support probable cause to believe that evidence, contraband, or persons connected with the offense may be found; (3) particularly [describe] the place, object, or persons to be searched; and (4) particularly [describe] who or what is to be seized.
>
> § 46-5-221, Mont. Code Ann.

The Defense now contests the validity of the search warrant application in this case and asserts that the warrant application does not satisfy § 46-5-221(3). The State contends that the warrant application was based on probable cause that the Defendant had engaged in illegal activities, specifically an armed home-invasion using a firearm and there was evidence of possible drugs in the vehicle. Based upon the totality of the evidence known at that time his vehicle's contents included evidence and contraband connected with those offenses. The State further contends that the warrant described what was to be seized with particularity.

B. The information available to Detective Travis Burrow was sufficient to establish probable cause to support the issuance of the search warrant.

As noted above, probable cause does not require facts sufficient for the issuing judicial officer to determine that there exists a probability of criminal activity.[28] Further, "[p]robable cause must be determined solely from the information contained within the four corners of the search warrant application."[29] "[I]t is also clear that interpreting a search warrant in the proper 'commonsense and realistic fashion' may result in the inference of probable cause to believe that criminal objects are located in a particular place."[30]

The information Detective Burrow included in his application for a search warrant utilized much of the information relied on by Officer Hronek in deciding to impound and tow the Defendant's vehicle. However, Detective Burrow had additional information he obtained based upon all of the prior search warrants including search warrants for cell phone pings, location data, and additional information obtained by Detective Krause who was investigating Jesse James Daniels, Lauren Aviles and Esandro Rodriguez for other

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[28] *Barnaby*, ¶ 30 (citing *Rinehart*, 262 Mont. at 210, 864 P.2d at 1222).
[29] *Barnaby*, ¶ 30 (citing *Rinehart*, 262 Mont. at 211, 864 P.2d at 1223).
[30] *Barnaby*, ¶ 33 (quoting *U.S. v. Valenzuela*, 596 F.2d 824, 828 (9th Cir. 1979)).

criminal law violations. For the reasons explained above and in all of the search warrants attached, this information was sufficient to establish a probability the vehicle was involved in the home invasion on September 27, 2019.[31] Further the information presented within each search warrant presented sufficient probable cause to believe that these suspects were involved in these criminal acts. Therefore, the State contends that the information "contained within the four corners" of the warrant application is similarly sufficient to support the issuance of the search warrant under *State v. Griffin* and *State v. Frasure*.

In *Griffin*, a police officer observed the defendant driving his pickup.[32] Knowing that the defendant did not have a valid license, she followed him to his house and arrest him.[33] After being informed that the defendant had a knife on his person, the officer felt and retrieved a small, hard object from the defendant's pocket.[34] The item was a glass pipe with white residue on it, and upon seeing it, the officer asked the defendant for permission to search his vehicle.[35] The defendant denied the officer's request, so the officer applied for and received a search warrant for his truck.[36] Through the search warrant, the police discovered items used to manufacture methamphetamine.[37]

The defendant challenged the validity of the search warrant.[38] In its analysis to determine the validity of the warrant, the Montana Supreme Court differentiated the facts and circumstances in *Griffin* from those in *Frasure*. In doing so, the Court found that the applicant officer lacked sufficient evidence to establish Probable Cause under *Frasure* because she could only produce the pipe with untested white residue on it to support her suspicions.[39]

By contrast, in *Frasure*, the Montana Supreme Court ruled that the defendant's motion to suppress drug evidence found in the defendant's vehicle was properly denied because the facts and circumstances were sufficient to establish probable cause.[40] Specifically, the Court found that the officer's observations that the defendant had a nervous demeanor, accelerated speech, and a ceramic pipe in his pocket in addition the officers' prior knowledge of the defendant's drug addiction were sufficient to support of the officers' suspicions. *Id.*

Thus, the *Griffin* Court found the dearth of evidence in that case was incomparable to the amount evidence in support of the officers' probable cause in *Frasure*. *Griffin*, ¶ 23. For this reason, the Court

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[31] Search Warrants attached as Exhibits 3 through 10.
[32] *State v. Griffin*, 2004 MT 331, ¶ 6, 102 P.3d 1206, 1207.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Griffin*, ¶ 7.
[37] *Id.*
[38] *Griffin*, ¶ 18.
[39] *Griffin*, ¶ 22.
[40] *State v. Frasure*, 2004 MT 242, ¶ 17, 97 P.3d 1101, 1104.

concluded the lone pipe to be "a mere affirmance of belief or suspicion" and therefore, insufficient to establish probable cause. *Griffin*, ¶ 23 (quoting *State v. Lott*, 272 Mont. 195, 199, 900 P.2d 306, 309 (1995)).

The present case is more akin to *Frasure* than *Griffin*. As established above, Detective Burrow had information from Officer Hronek's report, the witness interviews and statements that Jesse James Daniels was the individual identified as "Jay Smooth" through the witnesses search of Face Book profiles, the video surveillance of the suspect vehicle entering Countryside Village, as well as the other evidence set forth in the successive search warrant applications that this vehicle was involved in the home invasion as well as the torture and kidnapping of another individual by Jesse James Daniels and Esandro Rodriguez. Officer Hronek observed the vehicle at the location of the stop and observed a gun magazine for a handgun in plain view. The magazine was black, and the witnesses and victims described the firearm used by Jesse James Daniels and Esandro Rodriguez as a black and silver handgun. Additionally, Officer Hronek observed what appeared to be a pill bottle which was suspected to contain marijuana, as well as a torch, commonly used by drug users to smoke or vaporize illegal drugs for ingestion. In reviewing the four corners of Detective Burrows Search Warrant, as discussed by the Defense counsel when they cite to *State v. Cottrell*, the Court can see that there were numerous statements of factual observations by law enforcement officers of criminal behavior associated with the subject 1994 Mercury Grand Marquis driven by the Defendant, Jesse James Daniels.[41] Here, this Court can see from the four corners of the affidavit of Detective Burrow, that he relied upon a plethora of information as set forth in Search Warrant Application SW19-699. Detective Burrow documents the involvement of the suspect in the kidnapping, assault and robbery of JA, who specifically identified Jesse James Daniels and Esandro Rodriguez as the two main suspects involved. Detective Burrow then went into the fact that JA admitted that he was a "drug mule" for them and that he was beaten and tortured by them when they alleged JA owed them money. Detective Burrow then goes on to set forth how Jesse James Daniels, Esandro Rodriguez and Lauren Aviles were associated to the home invasion on September 27, 2019. Detective Burrow sets forth that Officer Hronek was advised that Jesse James Daniels was the prime suspect alleged to have pointed a gun at victims in her investigation. Daniels was alleged to have been in a white 1990s vehicle which was believed to be an older model Cadillac at the time, or later potentially a Buick. The only vehicle associated with Esandro Rodriguez, Jesse James Daniels and Lauren Aviles which matched the description provided by the victims and witnesses, was the 1994 Mercury Grand Marquis, registered to Lauren Aviles. The 1994 Mercury Grand Marquis is similar in size, weight, wheelbase, model, number of doors, and year of manufacture as the vehicle described by the witnesses in these events. Detective Burrow further documented that he had reviewed the results of cell phone records including the cell phone of the victim, JA, which indicated that this cell phone was located in the impound lot of Ox and Son's, where the

[41] *State v. Cottrell*, 2008 MT 409, 347 Mont. 231, 198 P.3d 254.

1994 Mercury Grand Marquis was towed following the stop by Officer Kazior.

As set forth in the four corners of the search warrant, the Honorable Judge John Parker found probable cause for the search of the 1994 Mercury Grand Marquis.[42] When reviewing the factual assertions in Search Warrant 19-699, there Montana Supreme Court provided guidance that "all reasonable inferences possible to support the issuing magistrate's determination of probable cause" will be made.[43] Here, the State argues that this Court must draw all reasonable inferences in favor of the State's probable cause affidavit, which documents over seven pages of factual allegations including victim statements, witness accounts, identification of the suspect vehicle possibly involved, how the vehicle was associated with Jesse James Daniels, through his connection with Lauren Aviles, and how the cell phone of the victim, JA, was located by cell phone data to be in the Ox and Son's Impound lot where the 1994 Mercury Grand Marquis was towed and stored prior to the obtaining of Search Warrant 19-699.

Given that the vehicle had been observed in surveillance video from Countryside Village. Given that the vehicle described by the victims at Countryside Village was a 1990's model white sedan, possibly a Buick or Cadillac, but otherwise unknown as to specific make or model. Given that the victim, JA, stated clearly and unequivocally that he was tortured by Esandro Rodriguez and Jesse James Daniels at a residence and that they stole his cell phone. Given that Detective Burrow then obtained a search warrant to track JA's cell phone. Given that the data obtained by Detective Burrow from the cell phone companies on the location of JA's cell phone, which was still on, still connected to a cell tower, and located at the Ox and Son's Impound lot. Given that there were no other vehicles seized by law enforcement which were stored that date which would potentially involve JA's cell phone. The Court can infer from all of the evidence presented that there was potentially evidence of the listed crimes located within the 1994 Mercury Grand Marquis.

It is further reasonable, based on these facts, for Detective Burrow to infer that the vehicle's contents could have offend against the law and related to the offenses of illegal drug use or illegal drug trafficking as well as the crimes of assault with a weapon, robbery and aggravated kidnapping, as described by the victims in these two incidents.

The Defendant then asserts that even if all of the reasonable inferences which should be drawn by a court in reviewing the probable cause affidavit, that there is insufficient probable cause within the Affidavit such that this Court should go beyond the boundaries of the application.[44] The Defendant argues that they have made a substantial preliminary showing that "a false statement was intentionally, knowingly, or

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[42] State's Hearing Exhibit 10 - Search Warrant 19-699

[43] *State v. Cottrell*, 2008 MT 409 ¶59, 347 Mont. 231, at 245, 198 P.3d 245, at 265.

[44] Brief of Defendant, Page 11, Paragraph B.

recklessly included in (or favorable information was omitted from) the affidavit."[45] The Defendant goes on to argue that Detective Burrow failed to include the off-hand comment of Officer Torres under the assumption that it would impact the court's probable cause determination, without specifically stating as such in their brief. The Defendant's brief is devoid of argument on which factual errors or failures they believe would defeat the probable cause analysis for the search of the vehicle. Assuming arguendo that Officer Torres off-hand comment about finding drug paraphernalia in order to obtain a search warrant is the sole issue raised by the Defendant, the State asserts that even if it was included, the court would still find probable cause based upon the totality of the evidence. The officers had already viewed the pill bottle and based upon their cursory view of the blue bottle in the door of the vehicle, believed that there would be drugs in the car. The officers had already viewed the torch in the passenger compartment, which is commonly used to assist ingestion of illegal drugs. The officers had also viewed the long black magazine for a handgun in the seat pouch behind the driver. The information contained in the search warrant established there were multiple grounds to search the vehicle. The comments of an officer following transport of a suspect to the Great Falls Police Department AFTER Officer Hronek had already obtained probable cause to arrest Jesse James Daniels and Lauren Aviles should not impact the court's finding of probable cause under the full review of the breadth and scope of the investigation done in this case and the amount of information presented to the magistrate when seeking the warrant in question.

C. The warrant application described the items to be seized with sufficient particularity.

Where an officer signs an application for a warrant and personally serves said warrant, "the documents are construed together to determine whether the requirement of particularly describing the thing to be seized has been met."[46]

To satisfy this requirement an officer need not identify exactly what contraband she expects to find because "no police officer can anticipate what specific wares a suspected drug dealer will possess at any given time."[47] The Montana Supreme Court has held that to require an officer to identify exactly what type or types of illegal contraband she expects to find in order to establish probable cause for the purposes of obtaining a warrant "is unsound." *Id.*

In *Broel*, the issue before the Montana Supreme Court was whether a warrant application to search for "drugs and drug paraphernalia" was overbroad and insufficient to satisfy the statutory requirement to describe "the thing, place, or person to be searched and the instruments, articles, or things to be seized" with

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[45] *Id.*, Page 11, Second Full Paragraph, Lines 13-15, citing to Franks v. Delaware, 438 U.S. 154, 98 S.Ct 2674, 57 L.Ed.2d 667. .

[46] *Broel*, 249 Mont. at 122, 814 P.2d at 47. (citing *State v. Peterson*, 227 Mont. 503, 741 P.2d 392 (1987)).

[47] *Broel*, 249 Mont. at 122, 814 P.2d at 47.

particularity.[48] In that case, the applicant officer also served the warrant in question, so the Court reviewed the search warrant and application together to determine whether the warrant was properly issued.[49]

Although, the Montana Supreme Court agreed that "'drugs and drug paraphernalia' [was] not the ideal language to use in describing particular items to be searched for in a warrant," the Court reasoned that the description was adequate based on the circumstances surrounding the case.[50] Given that the officer sought to search the defendant's vehicle and to seize "certain items which are contraband/evidence/fruits of the crime ... and are particularly described as being drugs and drug paraphernalia," the Montana Supreme Court reasoned that the conclusion that the officer would "search for and seize illegal drugs [was] inescapable."[51]

The Court found that when the warrant was read in conjunction with the application, the warrant sufficiently described the place searched and items to be seized.[52] Thus, the particularity with which a warrant and application must describe items to be seized does not need to be so specific as to name the exact type or types of illegal contraband.[53]

The current case is akin to *Broell*. Here, the officer applying for the warrant also personally served and executed the warrant. Therefore, under *Broell*, the warrant and warrant application must be read together.

As noted above, Detective Burrow outlined in his application the facts and circumstances that raised his suspicion sufficient to establish probable cause to believe that the Defendant was engaged in a continuing course of conduct including illegal drug use or illegal drug trafficking, aggravated kidnapping, assault with a weapon, and robbery, and that the vehicle contained items related to those activities, specifically listing:

> 1. Butane lighter/torches;
> 2. Packaging materials commonly used for drug possession, smoking devices, or other paraphernalia for ingesting, smoking, injecting or inhaling controlled substances, and other dangerous drugs;
> 3. Firearms, ammunition, magazines, holsters, and firearm accessories;
> 4. Cell phones;
> 5. Identifying documents including receipts, papers, mail, and checks; and
> 6. Photographs of inside and outside of vehicle.

Based on Detective Burrow's training and experience investigating these types of crimes, as well as drug use and drug trafficking, Detective Burrow set forth in his application the reason that he suspected that these items would be located inside the vehicle. Detective Burrow asserted he had probable cause to believe

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[48] *Broel*, 249 Mont. at 121, 814 P.2d at 46. Although *Broell* concerned the former statute § 46-5-201, Mont. Code Ann., the Montana Supreme Court has not reversed this holding. Additionally, the language of § 46-5-201, Mont. Code Ann., is not substantially different from the language of § 46-5-221.
[49] *Broel*, 249 Mont. at 122, 814 P.2d at 47.
[50] *Id.*
[51] *Broel*, 249 Mont. at 121-22, 814 P.2d at 46-47.
[52] *Broel*, 249 Mont. at 122, 814 P.2d at 47.
[53] *Id.*

that the vehicle could contain all of the items listed in the search warrant.

Further, in his application, Detective Burrow outlined his observations as well as all of the other officers observations that aroused his suspicion, which was sufficient to establish probable cause to believe that the Defendant was engaged in the illegal course of conduct over an approximately 10 day period prior to Officer Kazior making contact with the suspect vehicle. Based on this suspicion and his knowledge of common practices of drug users and drug traffickers and the statements of multiple witnesses and victim, Detective Burrow outlined what items he expected to find pursuant to a search of the vehicle.

Broell does not require that Detective Burrow state precisely what items he expected to find. Here, Detective Burrow used language even more precise than the officer in *Broell*. For example, he clearly stated that he expected to find a short list of items as set forth above.[54] By contrast, the officer in *Broell* merely stated that he intended to search for "drugs and drug paraphernalia"; nevertheless, the Montana Supreme Court still found that the warrant and application were described with sufficient particularity.[55]

Given that Detective Burrow listed the type of items he expected to find and the reasons he expected to find them with greater specificity than the officer in *Broell*, Detective Burrow's application and the warrant in this case states what items are to be seized under the warrant with sufficient particularity under *Broell*. Therefore, the warrant satisfies § 46-5-221(4), Mont. Code Ann.

The Defendant continues to argue that despite the voluminous applications for search warrants in this case which were obtained to better define Jesse James Daniels and Lauren Aviles association with the course of conduct described by the victims in Countryside Village and subsequently the statements of the victim, JA, about who was involved in this course of conduct that the entire investigation is infirm solely based upon comments made by patrol officers who brought the suspects from the stop of the vehicle to the Great Falls Police Department for further questioning.[56] The Defendant argues that the officers stated that they wished they could see some drug paraphernalia to get into the car.[57] The Defendant then goes on to state the blue container, which is a marijuana container from a store in Oregon, has residue which appears to Defense counsel to look more like dirt or mud, which is solely the Defense counsel's assertion and not based upon the fact that officers could see the blue container in plan view.

The Defendant continues to argue that the officers:

> "had to manufacture probable cause based upon doubtful drug paraphernalia to get into the vehicle to achieve their ultimate goal of rummaging through all of the items in the car to attempt to establish probable cause for a pretextual 'second' search warrant. The blue bottle doe not show drug residue as claimed by law enforcement, the torch is perfectly legal to

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[54] State's Hearing Exhibit 10.
[55] *Broel*, 249 Mont. at 122, 814 P.2d at 47.
[56] Brief of Defendant, Page 14, Paragraph 4.
[57] Id., at Page 14, Paragraph 5.

posses and without more was not drug paraphernalia, and the magazine (referencing the 15 round single-stack .45 caliber pistol magazine) seen in the back seat was not connected to the alleged home invasion and was not illegal to possess. Further, more than two weeks had passed since the alleged home invasion and the search of the vehicle."[58]

The State has reviewed the photographs and based upon a close examination, the residue appears green.

The Defendant then asserts that the officers "wished they could see something which was not there to gain access to the vehicle, and then inappropriately claimed the blue bottle was obvious drug paraphernalia from a view outside the vehicle."[59] The Defendant is merely assuming the officers did not see the same photographic evidence presented from the photograph of the blue bottle taken from outside of the vehicle through the open window while it was parked on the side of the road. The State asserts that it looks green to the State's witnesses and that it appears green from looking at the zoom exhibit above on the blue bottle taken at the time that the bottle was inside the vehicle by Officer Hronek prior to impounding the vehicle. Officer Hronek had been seeking this vehicle for the approximately two week period, together with other law enforcement officers based upon the totality of her investigation. Officer Hronek had reviewed the video surveillance video from Countryside Village, had interviewed the victims and witnesses and their positive identification of Jesse James Daniels from a Face Book profile photograph of "Jay Smooth" which was identified by one of the victims as his "street name."

The Defendant's assertion that the time of the stop is too remote and that it is permissible to own an extended magazine for a handgun or a torch fall flat when the officers were specifically searching for a firearm as well as all forms of drug paraphernalia based upon the totality of their investigation as documented in the search warrants. Defendant claims that there is no firearm visible from outside the vehicle, and while the exact firearm may not be visible from outside the vehicle, the magazine for the firearm was clearly visible from outside the vehicle through the window as it sat in the seat pocket of the driver's seat. While it is not illegal for a person over the age of 18 to own a handgun or a firearm, the registered owner of the vehicle was 17 years of age and it would be illegal for her to own or possess a firearm.[60] The registered owner of the vehicle, Lauren Aviles, was just over age 17 at the time of the offense on September 27, 2019. Ms. Aviles date of birth is in 2002. United States Code restricts possession of a weapon or ammunition solely for use in a handgun to persons age 18 or older unless one of the exceptions applies, there is no evidence that Lauren Aviles parent or guardian provided PRIOR written consent for her to possess a firearm or ammunition suitable for use in a handgun at the time the vehicle was observed on the side of the road. While the

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[58] Id., at Page 15, Paragraph 3.
[59] Brief of Defendant, Page 14-15, Paragraph 5, last full sentence.
[60] 18 U.S.C. 922(x)(1)(A) and 18 U.S.C. 922(x)(2).

Defendant in question was over the age of 18 at the time of these events, having discharged his juvenile sentence and been released from the Cascade County Adult Detention Center approximately two weeks prior to this event, he was not present in the vehicle and neither Jesse James Daniels nor Esandro Rodriguez could lawfully transfer possession of a handgun or a handgun bullet to the registered owner of the vehicle as they are not a parent or guardian.

The Defendant takes great pains to avoid all of the other evidence which was present in the numerous Search Warrants obtained prior to the search warrant for the vehicle and focuses the Court's attention on a few off-hand comments made by a patrol officer who was not investigating the case. The Defendant further omits and ignores the totality of the evidentiary picture of all the other law enforcement officers who were involved and the primary investigating officer, Officer Hronek. The Defendant omits the fact that the search warrant for the car which they complain of sought very specific items, including firearms, ammunition, as well as drug paraphernalia, based upon the items seen inside the vehicle by Officer Hronek and the other officers. The Defendant ignores or minimizes the fact that Officer Hronek and other officers actively sought this suspect vehicle, these particular suspects, and the specific items of evidence based upon their on-going investigation about the incident at Countryside Village. The Defendant does not mention that Officer Hronek actually left the Great Falls Police Department after her interviews with the suspects and went to the scene of the vehicle. The Defendant ignores the fact that Officer Hronek relieved Officer Bott who was holding the vehicle for Officer Hronek on the side of the road and that it was Officer Hronek who ordered that the vehicle be impounded for a search warrant based upon what she observed and photographed through the windows of the vehicle, her investigation into the factual allegations of the victims at Countryside Village, their identification of Jesse James Daniels as one of the perpetrators, and the probable cause to believe that Lauren Aviles was involved in the incident based upon her close association with Jesse James Daniels. The Defendant further omits and ignores the fact that after the incident at Countryside Village, another victim, JA, positively identified Jesse James Daniels, Lauren Aviles, and this Defendant, Esandro Rodriguez, as the individuals who took him hostage, drove him to a residence, assaulted him with a black and silver handgun with a Punisher logo on it, and robbed him of his phone.

The Defendant minimizes Detective Burrow's analysis of the cell phone ping records which show that the cell phone ping of the victim, JA's cell phone, was active and tracked to a location which is cross-referenced by their tracking data as being inside the Ox and Son's Impound lot. The Defendant asserts that "based on the location data provided and the notes in his report, it is not clear this occurred." Detective Burrow's sworn affidavit states otherwise. Detective Burrow is a Great Falls Police Detective, a sworn peace officer, who swore under penalty of perjury that he did the location data tracking and that the data analysis showed that phone inside the vehicle. Further, based upon the search of the vehicle pursuant to the lawfully

obtained search warrant, Detective Burrow FOUND the cell phone in Lauren Aviles vehicle, which is proof beyond a reasonable doubt that the location data analyzed by Detective Burrow was accurate! Defendant merely states that the Court should disregard the data analysis conducted by Detective Burrow without any objectively reasonable evidence to support that it did not occur, that it was not accurate, and makes the bold assumption that Detective Burrow lied in his report or in his sworn affidavit which resulted in the court granting the search warrant. The search warrants, the evidence presented to the magistrates on the multiple search warrants obtained in this case, and the sworn affidavits established probable cause for the search of the vehicle.

CONCLUSION

The Exclusionary Rule only applies where evidence is obtained through searches and seizures that violate the Fourth Amendment.[61] The stop of the vehicle was lawfully conducted based upon the attempt to locate it as the suspect vehicle in an alleged home invasion investigated by Officer Hronek. Officer Kazior and Officer Kelsey lawfully stopped the vehicle as at the time of first contact, they could not positively identify the license plate numbers due to inclement weather as evidenced in the video, and the road grime on the license plate which prevented it from properly reflecting light. Further, Officer Hronek had probable cause to seize the Defendant's vehicle under Montana case law. Detective Burrow properly applied for warrant to search the vehicle in compliance with § 46-5-221, Mont. Code Ann. Detective Burrow had probable cause to seek a search warrant for the vehicle based upon the totality of the reports of numerous law enforcement officers as set forth in each of the warrants and including the additional information learned with each successive search warrant and the evidence obtained from those search warrants. For these reasons the seizure of the Defendant's vehicle and search pursuant to the search warrant did not violate the Defendant's right to be free from unreasonable searches and seizures under Art. II §§ 10 and 11 of the Montana Constitution. Therefore, the evidence does not fall under the Exclusionary Rule, and the Defendant's Motion to Suppress should be DENIED.

DATED this _____ day of March 2021.

JOSHUA A. RACKI
Cascade County Attorney

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Matthew S. Robertson
Deputy County Attorney

[61] *In re B.A.M.*, 2008 MT 311, ¶ 11, 192 P.3d 1162.