

APPLICATION FOR

**DISTRICT COURT JUDGESHIP
First Judicial District**

A. PERSONAL INFORMATION

1. **Full Name:** Palmer Arthur Hoovestal
 - a. **What name do you commonly go by?** Palmer Hoovestal
2. **Birthdate:** [REDACTED] **Are you a U.S. citizen?** Yes
3. **Home Address:** [REDACTED]
Phone: [REDACTED]
4. **Office Address:** 608 Lincoln Rd. West, Helena, MT 59602
Phone: 406-457-0970
5. **Length of residence in Montana:** Fifty-one years. I have lived in Montana virtually my entire life, with the exception of two years in Spain and France and five years in Portland, Oregon, for law school and post law school employment. I returned to Montana in March of 1990 and have lived here ever since. I was also in the United States Marine Corps Reserve and spent periods of time out-of-state for boot camp, schools, and various assignments.
6. **Place of residence for the last five years:** 355 Happy Trail
Helena, MT 59602

B. EDUCATIONAL BACKGROUND

7. **List the names and location of schools attended beginning with high school:**

//

//

<u>Name</u>	<u>Location</u>	<u>Date</u>	<u>Degree</u>
Capital High School	Helena, MT	1980	High School Diploma
Montana State University	Bozeman, MT	N/A	N/A
Universidad de Sevilla	Seville, Spain	N/A	N/A
L'Institut de Touraine	Tours, France	1982	Certificât d'Etudes Français
Carroll College	Helena, MT	1984	BA, Spanish, Int'l Relations, French
Northwestern School of Law of Lewis and Clark College	Portland, OR	1988	Juris Doctorate

8. List any scholarships, awards, honors and citations that you have received:

1998	Trial Lawyer of the Year	Montana Trial Lawyer's Association
2011	Trial Lawyer of the Year	Montana Criminal Defense Lawyer's Association
5/20/2017	United States Powerlifting Association Montana state record for raw bench press in Master Men 275 lbs. weight class.	
3/17/2018	World Association of Benchers and Deadlifters national record for raw deadlift in Master Men 259 lbs. weight class.	
3/17/2018	World Association of Benchers and Deadlifters national record for raw bench press in Master Men 259 lbs. weight class.	
5/18/2019	United States Powerlifting Association Montana state record for raw deadlift in Master Men 275 lbs. weight class.	

Throughout my lifetime I have also won awards in other areas. For example, I won several state boxing titles while in high school and was on the Capital High football team which won the 1978 State Championship for AA high schools against CMR.

While in the United States Marine Corps I received various commendations and promotions at the enlisted level. I attended Infantry Training School, Amphibious Recon School, and Scout Swimmer School. In Scout Swimmer School we started with approximately thirty-five students and ended with eighteen. Of the eighteen students who finished the school, I ranked second in the class. Whether in reconnaissance or infantry, I was generally always either a squad leader or a platoon sergeant. Here's a picture of me as a young Lance Corporal at ITS in Camp Pendleton, circa 1982.



I am also a black belt in Goju Ryu karate, although I no longer practice karate.

I have also held a Top Secret Security Clearance from the Defense Industrial Security Clearance Office for approximately 30 years.

9. Were you a member of the Law Review? If so, provide the title and citation of any article that was published and the subject area of the article.

I was not a member of the Law Review Board while in law school. However, I was President of the International Law Society and during my tenure we established and published the first edition of the International Law Journal for Northwestern School of Law for Lewis and Clark College. At the time it was called *International Legal Perspectives*, and its successor, *International Law Journal* is still in publication to this day. *International Legal Perspectives* was a journal of international law that was published twice annually by Northwestern School of Law. It printed articles on all aspects of international law and the domestic law of countries outside the United States.

//

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

- 10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.**

<u>Court or Administrative Body</u>	<u>Date</u>
Idaho State Bar ¹	4/19/90
Idaho Supreme Court	4/19/90
United States District Court for Idaho	4/19/90
United States District Court for the District of Montana	5/4/90
Washington State Bar	7/25/90
Washington Supreme Court	7/25/90
Montana State Bar	9/13/90
Montana Supreme Court	9/13/90
Ninth Circuit Court of Appeals	1/28/93
United States Supreme Court	8/13/93
United States District Court for the Western District of Washington	10/29/93
United States Court of Federal Claims	1/20/99
United States District Court for the Eastern District of Washington	7/22/99
Fourth Circuit Court of Appeals	11/15/2012
Armed Services Board of Contract Appeals	11/2014

I have also been admitted to practice *pro hac vice* in state and federal trial courts in Alabama, Arizona, California, Maryland, New Mexico, Texas, Utah, and Virginia, and litigated cases to final resolution there. I have done oral argument before state and federal appellate courts on more than 32 separate occasions including the Montana Supreme Court and the Fourth and Ninth Circuit Courts of Appeals.

- 11. Indicate your present employment. (List professional partners or associates, if any).**

¹ Currently on inactive status due to lack of work in Idaho state courts.

I am currently employed as a sole practitioner in Helena. I was involved in a partnership with Michael Kakuk and Mike Fanning from approximately 2001 until 2006.

12. State the name, dates and addresses of law firms with which you have been associated in practice, governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
Jackson, Murdo & Grant 203 N. Ewing St. Helena, MT 59601-4298 Tel. (406) 442-1300	Law Clerk	5/86 to 8/86
Hon. Alan C. Bonebrake Presiding Circuit Court Judge Washington County Courthouse 145 N.E. 2nd Ave. Hillsboro, OR 97124 Tel. (503) 648-8872	Judicial Clerk Indigency Verifier	8/88 to 3/90
Greenway Enterprises, Inc. 608 Lincoln Rd. West P.O. Box 5553 Helena, MT 59604-5553 Tel. (406) 458-9411	In-house counsel	3/90 to present
Hoovestall Law Firm 608 Lincoln Rd. West P.O. Box 747 Helena, MT 59624-0747 Tel. (406) 457-0970	Sole practitioner	7/91 to present

From July of 1991 until December of 2000 my office was located at 28 N. Last Chance Gulch. I entered into a partnership with Michael Kakuk in January of 2001 and our offices were located at 40 W. 14th Street, in the Great Northern Block. In 2003, Michael Fanning joined the firm as a partner. Our

partnership disbanded in 2006. In 2012 I moved my office back to 608 Lincoln Rd. West.

13. If you have not been employed continuously since completion of your formal education, describe what you were doing.

Not applicable.

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

I am and have been engaged in the full-time practice of law since 1990. I litigate civil and criminal cases in municipal, state, and federal courts at the trial and appellate levels. I practice criminal defense (misdemeanors and felonies, including DUIs, PFMA's and orders of protection, drugs, violent crimes, sex, child pornography, and human trafficking cases, sentence review, post-conviction and habeas petitions, and juvenile matters), family law (divorces, child support, parenting plans), dependent/neglect cases, construction, breach of contract and commercial litigation, declaratory judgment actions, civil rights (42 U.S.C. § 1983, *Bivens* actions and tort claims), property (easements and boundary disputes), personal injury (motor vehicle accidents, assaults, wrongful death, slip and fall), and employment matters, both plaintiff and defense. I also do a fair amount of administrative matters, including practicing before various boards such as the Lewis and Clark County Board of Adjustment, Board of Personnel Appeals, Board of Dentistry, Board of Nursing, Board of Medical Examiners, Board of Pardons and Parole, the Commission on Practice, and the Armed Services Board of Contract Appeals.

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

None.

16. If you specialize in any field of law, what is your specialty?

Trials and appeals of civil and criminal cases in state and federal courts. I also do federal government contracts as in-house counsel to Greenway Enterprises, Inc.

17. Do you regularly appear in court?

Yes.

What percentage of your appearance in the last five years was in:

Federal court	45 %
State or local courts of record	45 %
Administrative bodies	5%
Other	5 %

18. During the last five years, what percentage of your practice has been trial practice?

Obviously, not all cases go to trial. Every case is prepared and litigated toward final resolution through negotiated settlement, motions practice or trial. If a case is not resolved through motions or mediation, then the matters are resolved through trial. Every case is therefore prepared as if it were going to trial. In that sense, one-hundred percent of my practice is geared toward trial practice.

19. How frequently have you appeared in court?

I typically appear in either municipal, state, or federal courts at least a couple of times a week. It is not uncommon for me to have a court appearance somewhere every day of the week. I have appeared multiple times before nearly every federal judge (except bankruptcy) currently sitting in the District of Montana. I have also tried major jury trials before Judges Jack Shanstrom and Rick Cebull when they were on the bench.

20. How frequently have you appeared at administrative hearings?

This depends on the case, and is closer to several times a year.

21. What percentage of your practice involving litigation has been:

Civil	45 %
Criminal	50 %
Other	5 %

22. Have you appeared before the Montana Supreme Court within the last five years? If so, state the number and types of matters handled. Include the case caption, case citation (if any), and names, addresses and phone numbers of all opposing counsel for the five most recent cases.

Yes. I have appeared before the Montana Supreme Court in twelve cases within the past six years.

In the past five years I have also filed and argued more than five cases before the Ninth Circuit Court of Appeals. Here's a picture of me arguing a Fourth Amendment issue before United States Supreme Court Justice Sandra Day O'Connor and Ninth Circuit Judges Sid Thomas and Stephen Reinhardt in the auditorium at the law school in Missoula.



See, *United States v. Bear*, 473 F. App'x 525 (9th Cir. 2012).

The following cases were the primary cases that I litigated before the Montana Supreme Court. I am including more than just the five most recent cases because three cases are still pending.

Case Caption and Citation	Date and Description	Opposing Counsel
<i>State v. Glead</i> , DA 13-0116 2014 MT 151	Decided June 10, 2014; appeal of guilty verdict in criminal case; conviction reversed and case remanded for new trial	Tammy K. Plubell Assistant Attorney General 215 North Sanders P.O. Box 201401 Helena, MT 59620-1401 406-444-2026 tplubell@mt.gov
<i>Fenwick v. State</i> , DA 15-0252 2016 MT 80	Decided April 5, 2016; Appeal of district court order on claims relating to severance of employment; district court order affirmed	Trevor L. Uffelman 1410 Knight Street Helena, MT 59601 (406) 461-0569 trevor@uffelmanlaw.com Curt Drake Patricia H. Klanke P.O. Box 1181 Helena, MT 59624-1181 Tel. (406) 495-8080 curt@drakemt.com
<i>State v. Schlepp</i> , DA 18-0244 2019 MT 8N	Decided January 8, 2019; appeal of denial of motion to dismiss in felony DUI case attacking prior convictions; district court order affirmed	Madison L. Mattioli Assistant Attorney General 215 North Sanders P.O. Box 201401 Helena, MT 59620-1401 Phone: 406-444-2026 MLMattioli@mt.gov
<i>Carter v. D.R.E. and Campbell</i> , DA 18-0622 2019 MT 43N	Decided February 12, 2019; appeal of denial of order of protection; district court reversed and order of protection entered	Timothy W. McKeon McKeon Doud, P.C. 1211 Echelon Place, Suite B Helena, MT 59602 Tel. (406) 996-1830 tim@mckeondoudlaw.com

<p><i>Harrison v. Harrison, et al.</i>, DA 18-0657 2019 MT 149N</p>	<p>Decided July 2, 2019; appeal of order requiring corporate shareholders to pay money to wind down affairs of corporation by receiver; district court order affirmed</p>	<p>Candace Payne, Esq. P.O. Box 9796 Helena, MT 59604 Tel. (406) 431-4445 cp@candacepaynelaw.com</p> <p>Scott Svee, Esq. 203 North Ewing Helena, MT 59601 406-442-1300 Ssvee@jmgm.com</p>
<p><i>Flowers v. Board of Personnel Appeals, Montana Department of Fish, Wildlife and Parks</i>, DA 19-0549 2020 MT 150</p>	<p>Decided June 9, 2020; appeal of district court order dismissing petition for judicial review; district court order affirmed.</p>	<p>Aimee Hawkaluk, Esq. Montana Department of Fish, Wildlife and Parks P.O. Box 200701 Helena, MT 59620-0701 Tel. 406-444-4045 Ahawkaluk@mt.gov</p>
<p><i>Sperle v. State</i>, DA 19-0530</p>	<p>Pending; appeal of district court's denial of petition for post-conviction relief; briefing completed but no decision yet</p>	<p>Mardell Ployhar Assistant Attorney General 215 North Sanders P.O. Box 201401 Helena, MT 59620-1401 406-444-2026 mployhar@mt.gov</p>
<p><i>Rowe v. Rowe</i>, DA 20-0089</p>	<p>Pending; appeal of issuance of order of protection circumventing parenting plan amendment procedure; briefing completed</p>	<p>Sara S. Berg Laura K. Buchholtz 800 N. Last Chance Gulch, Suite 101 P. O. Box 1697 Helena, MT 59601 (406) 443-6820 sara@bkbh.com laurab@bkbh.com</p>
<p><i>Eakin v. State</i>, DA 20-</p>	<p>Pending; appeal of</p>	<p>Tammy K. Plubell</p>

0207	denial of declaratory judgment action seeking return of property seized pursuant to criminal investigation that did not result on charges being filed; case is still in briefing stage	Assistant Attorney General 215 North Sanders P.O. Box 201401 Helena, MT 59620-1401 406-444-2026 tplubell@mt.gov
------	--	---

23. State the number of jury trials that you have tried to conclusion in the last ten years.

Twenty-nine jury trials in state and federal courts.

24. State the number of non-jury trials that you have tried in the last ten years.

I have done numerous bench trials and evidentiary hearings, including show cause hearings, TRO hearings, that were dispositive. I have participated in countless pretrial motions, change of plea, and sentencing hearings.

25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, provide the same information regarding opposing counsel and the nature of the matter.

The following are the primary cases that I have litigated, in no particular order, over the past two years. I haven't tried any major cases since February, 2020, due to the Covid-19 pandemic and the general stay of jury trials in state and federal courts.

Name of Case and Judge	Opposing Counsel
<p><i>United States v. Adam Galliher</i>, CR 18-11-H-BWM</p> <p>Hon. Brian Morris (406) 454-7800</p> <p>No trial. Litigated a suppression motion and client entered into a conditional plea agreement reserving the right to appeal the suppression issue.</p>	<p>Paulette L. Stewart Kalah A. Paisley Assistant U.S. Attorneys U.S. Attorney's Office 901 Front Street, Suite 1100 Helena, MT 59626 Phone: (406) 457-5120 FAX: (406) 457-5130 paulette.stewart@usdoj.gov kalah.paisley@usdoj.gov</p>
<p><i>State v. Rene Carter</i>, ADC 2018-76</p> <p>Hon. Mike Menahan (406)447-8205</p> <p>Trial is scheduled to occur December 7, 2020. Litigated numerous legal issues.</p>	<p>Leo Gallagher County Attorney Melissa Broch Stephanie Robles Lewis and Clark County Courthouse 228 Broadway Helena, Montana 59601 (406) 447-8221</p>
<p><i>Eakin v. State</i>, DDV 2018-954</p> <p>Hon. James Reynolds (406) 447-8209</p> <p>Declaratory judgment action seeking the return of property seized in a criminal investigation that did not result in the filing of criminal charges. Currently on appeal to the Montana Supreme Court.</p>	<p>Fallon Stanton Deputy County Attorney Lewis and Clark County Courthouse 228 Broadway Helena, Montana 59601 (406) 447-8221 FSTANTON@lccountymt.gov</p>

<p><i>United States v. Roel Centeno</i>, CR 18-29-GF-BMM</p> <p>Hon. Brian Morris</p> <p>Litigated suppression issue. Motion granted and client pled to plea agreement providing for time served.</p>	<p>Jessica A. Betley Assistant U.S. Attorney U.S. Attorney's Office P.O. Box 3447 Great Falls, MT 59403 119 First Ave. North, Suite 300 Great Falls, MT 59403 Phone: (406) 761-7715 FAX: (406) 453-9973 Jessica.Betley@usdoj.gov</p>
<p><i>State v. Shelley Kroum</i>, DC-19-269</p> <p>Hon. Kurt Krueger (406) 497-6410</p> <p>Attempted Deliberate Homicide; Resolved by guilty plea to lesser charge</p>	<p>Kelli Fivey Deputy County Attorney Butte-Silver Bow Courthouse 15 5 West Granite Street Butte, MT 59701 Telephone: (406) 497-6230 kfivey@bsb.mt.gov</p>
<p><i>State v. Joshua Reams</i>, DC 2017-06</p> <p>Hon. Luke Berger (406) 683-3745</p> <p>Incest Four day jury trial in January of 2018</p>	<p>Ole Olson Dan Guzynski Assistant Attorneys General Special Deputy Jefferson County Attorneys P.O. Box 201401 Helena, MT 59620-1401 Telephone: (406) 444-2026</p>
<p><i>State v. Paul Smith</i>, DC 2017-453</p> <p>Hon. Kathy Seeley (406) 447-8205</p> <p>Sexual Assault; SIWC; Assault with a Weapon; Sexual Abuse of Children; Intimidation Four day jury trial in August of 2019</p>	<p>Katie Jerstad Deputy County Attorney Lewis and Clark County Courthouse 228 Broadway Helena, Montana 59601 (406) 447-8221 KJERSTAD@lccountymt.gov</p>

<p><i>United States v. Arielle Cowser</i>, CR 19-06-H-DWM</p> <p>Hon. Donald Molloy (406) 542-7286</p> <p>Conspiracy; Hobbs Act Robbery; Possession of Firearm in Furtherance of Crime of Violence Three day jury trial in February, 2020</p>	<p>J. Thomas Bartleson Assistant U.S. Attorney U.S. Attorney's Office 901 Front St., Ste. 1100 Helena, MT 59626 Phone: (406) 457-5120 FAX: (406) 457-5130 Thomas.Bartleson@usdoj.gov</p>
<p><i>United States v. Peter Margiotta</i>, CR 170143-BLG-SPW</p> <p>Hon. Susan Watters (406) 247-2350</p> <p>Clean Air Act Violation General Duty Clause and Knowing Endangerment</p> <p>Five day jury trial in September, 2019</p>	<p>BRYAN T. DAKE Assistant U.S. Attorney ERIC E. NELSON Special Assistant U.S. Attorney U.S. Attorney's Office James F. Battin Courthouse 2601 Second Avenue North, Suite 3200 Billings, MT 59101 Phone: 406-657-6101 Fax: 406-657-6058 Email: Bryan.Dake@usdoj.gov</p> <p>Eric E. Nelson Box 25227 Denver, CO 80225 303-462-9456 nelson.eric@epa.gov</p>

<p><i>United States v. Jaime Milsten</i>, CR 18-10-H-CCL</p> <p>Hon. Charles Lovell (406) 441-1350</p> <p>Conspiracy; Hobbs Act Robbery; Possession of Firearm in Furtherance of Crime of Violence Four day jury trial in October 2018</p>	<p>J. Thomas Bartleson Assistant U.S. Attorney U.S. Attorney's Office 901 Front St., Ste. 1100 Helena, MT 59626 Phone: (406) 457-5120 FAX: (406) 457-5130 Thomas.Bartleson@usdoj.gov</p>
<p><i>United States v. Terrance Edwards</i>, CR 16-103-BLG-SPW</p> <p>Hon. Susan Watters (406) 247-2350</p> <p>Sex Trafficking; Transportation of a Minor with Intent to Engage in Prostitution; Transportation of a Minor with Intent to Engage in Criminal Sexual Activity Eight day jury trial in January and February of 2018</p>	<p>ZENO B. BAUCUS CYNDEE L. PETERSON Assistant U.S. Attorneys U.S. Attorney's Office 2601 Second Avenue North Box 3200 Billings, MT 59101 Phone: (406) 657-6101 FAX: (406) 657-6989 E-mail: zeno.baucus@usdoj.gov cyndee.peterson@usdoj.gov</p>
<p><i>Branham v. State</i>, CV 18-59-M-DLC</p> <p>Hon. Dana Christensen (406) 829-7140</p> <p>Petition for Habeas Corpus; Resolved on motion and currently before the Ninth Circuit Court of Appeals</p>	<p>TIMOTHY C. FOX Montana Attorney General MARDELL PLOYHAR Assistant Attorney General 215 North Sanders P.O. Box 201401 Helena, MT 59620-1401 Phone: 406-444-2026 Fax: 406-444-3549 mployhar@mt.gov</p>

In 1998, I spent more than four months in federal jury trials alone between the *Freeman* and the *Prison Riot* cases. I also did the *W.R. Grace*

jury trial that was tried before Judge Molloy in 2009. In that case there were 36 days of jury trial. I represented William McCaig, the mine manager. Over the course of my career I have also tried many other jury trials that lasted between three to five weeks.

26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

I have made appearances before a variety of commissions and boards relative to license and permit applications at the state and local levels. I have appeared before the Board of Pardons and the Sentence Review Division of the Montana Supreme Court. I have also litigated contested cases before the Montana Department of Labor and Industry and the Department of Environmental Quality.

27. If you have published any legal books or articles, other than Law Review articles, list them, giving citations, dates, and topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, state the topic, date, and group to which you spoke.

I have taught courses on various trial techniques at continuing legal education seminars, including:

Cross-Examining the Snitch, Chico Hot Springs, March 16, 2007

Trial Objections, Chico Hot Springs, March 14, 2014

Voir Dire and Jury Selection, Billings, March 20, 2015

Objections During Jury Selection, Billings, February 24, 2016

Expert Witnesses: Depositions, Direct Examination and Cross-Examination, Helena, March 25, 2016 and Kalispell, March 28, 2016

D. PROFESSIONAL AND PUBLIC SERVICE

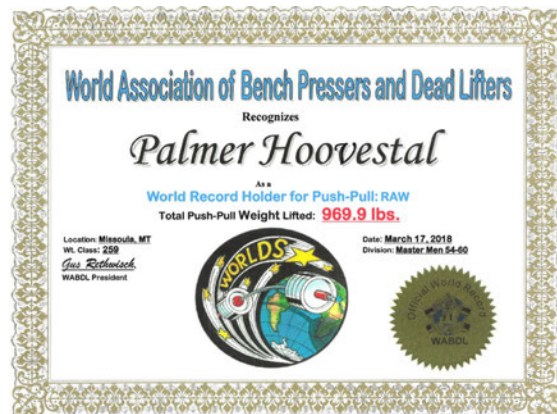
28. List all bar associations and legal professional societies of

which you are a member. Provide the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

I am a life member of and in 1999 was the President of the Montana Association of Criminal Defense Lawyers. I am formerly a member of the Montana Trial Lawyers Association, the National Association of Criminal Defense Lawyers, and the American Bar Association.

29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. State the title and date of any office that you have held in each organization. If you held any offices, describe briefly your activities in the organization.

I am a life member of the National Rifle Association. I am also a member of the United States Powerlifters Association and the World Association of Benchpressers and Deadlifters. Here are some certificates of my powerlifting records.



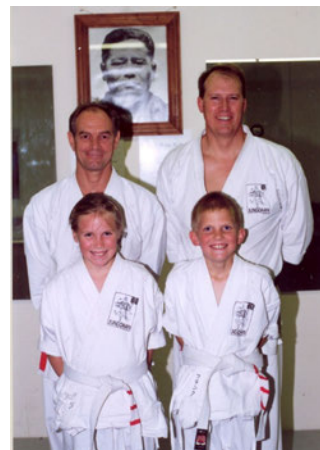
I am also an enrolled member of the Ft. Belknap Indian Community. I am almost a quarter Gros Ventre and Assiniboine. Tribal enrollment papers can be provided on request.

30. Have you ever run for or held public office or sought a judicial appointment? If so, provide the details.

In 1999 the Judicial Nomination Commission nominated me to Governor Racicot for appointment as District Judge in the new 22nd Judicial District which the legislature had just created. After interviews were conducted, Governor Racicot told me personally that his decision boiled down to a choice between me and Blair Jones. He stated that he ultimately decided to appoint Blair Jones because he thought Blair was more likely to win the election in November of 2000 since he had been the county attorney in that district and had better name recognition than I would have had. Of course, he was correct as Blair did win the election against Christine Cooke. The position is currently held by District Judge Matthew Wald.

31. Explain your philosophy of public involvement and practice of giving your time to community service.

My philosophy is to step-up and provide assistance where and when it is needed. With the exception of the two years that I lived in Spain, time in the Marine Corps, and five years in law school and post-law school employment, I have lived in this community the majority of my life. I raised my kids here and know many, many, people here. I have been actively involved in local activities, ranging from participating in “Dancing with the Stars,” “Nutcracker” and “Cinderella” ballets at the Civic Center, coaching boxing and karate, donating time and money to Capital High School and Carroll College, and being actively involved in and preaching sermons in my church.



I have also provided countless hours of *pro bono* legal services to people and organizations. My philosophy of public involvement is the primary reason I am submitting my name for this position, as set forth below.

E. PROFESSIONAL CONDUCT AND ETHICS

32. 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.

On May 22, 2007, I was publicly censured by the Montana Supreme Court. The matter arose from litigation involving *State v. Clifford*, 2005 MT 219, 328 Mont. 300, 121 P.3d 489. The Commission on Practice's Findings of Fact, Conclusions of Law, and Recommendation, as well as my objections to those findings and conclusions, are available on request. The matter was complicated and involved a disgruntled former employee's breach of confidential and privileged communications. See, *Matter of Palmer A. Hoovestal*, S.Ct. No. 05-094.

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

I was publicly censured by Judge Lovell in 1991. I had just finished a month-long criminal jury trial before Judge Lovell during which time Judge Lovell directed all counsel not to speak with jurors without the express written authority from the Court. After the trial, I called an attorney who represented a co-defendant in the trial to discuss another matter in another case. During our conversation he indicated that he had just spoken with one of the jurors in the case. When I inquired whether he hadn't been prohibited from doing so by the Court, he replied that the trial had ended, the juror had contacted him and not vice-versa, and the Judge's primary concern in making the order was to prevent jurors from being harassed by lawyers. He therefore thought that the contact was permitted.

Later that same afternoon, the same juror also called my office. I was out and my secretary took a message. Relying on that attorney's opinion, I later returned her call and spoke to her. An affidavit was later taken from her by yet another attorney in the case and filed. In this affidavit, the juror indicated that she had contacted the lawyers. Judge Lovell then issued an

order for all four lawyers that she had contacted to show cause why they should not be held in contempt. A hearing was held on September 26, 1991, and the case was dismissed for want of proof.

34. 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.

In May of 1980 I was cited for open container. I had just graduated from Capital High School and was drinking beer with some friends in Hill Park across from the Civic Center. That was on “the drag” where high schoolers drove up and down the street and congregated back in those days. At the time the drinking age was 19 years old. I was cited by police, appeared in Helena City Court before City Judge Julio Morales, pled guilty, and paid a \$ 25.00 fine.

In October of 1983, I was arrested and cited for disorderly conduct in Bozeman Municipal Court. I posted and forfeited \$ 50.00 bond. I had just left a Halloween party at MSU and was dressed as a Palestinian terrorist. To play a joke, I approached a woman on the street and said with an arabic accent, “Let me see your papers. What are you Christian or Moslem?” She was not amused. Moreover, she was a dispatcher for the Bozeman City Police and we were next door to the police station so she turned around and went in the police station and made a complaint. I made no court appearance, did not enter a plea, and simply forfeited the bond.

In December of 1983, I was again arrested and cited for disorderly conduct in Bozeman Municipal Court. Again, I posted \$ 50.00 bond, made no court appearance, and simply forfeited the bond. The details were that a friend and I were in a Bozeman tavern called “Little Johns” having a drink. The friend was a Midshipman at the U.S. Naval Academy who was home on Christmas leave and he was wearing a Naval Academy shirt. A drunk, claiming to be a Green Beret in the U.S. Army, began harassing my friend with remarks like, “You Midshipman all think you’re hot stuff,” although he didn’t use the word “stuff.” This exchange soon escalated into a fistfight. At the time I was a young corporal in the Marines. Knowing that the Navy needed help, I eagerly joined in. The fight broke up and the bouncers kicked us out. As we were leaving, the police arrived and arrested all three of us.

35. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, provide the details.

No.

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

None.

F. BUSINESS AND FINANCIAL INFORMATION

37. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, provide the details, including dates.

I was also a part-time Spanish teacher at the Montana Foreign Language Institute between 1999 and 2001.

I was a karate instructor at the Helena Jundokan Goju Ryu Karate Dojo. This was a volunteer position and I was not compensated.

38. If you are an officer, director, or otherwise engaged in the management of any business, provide the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.

I have been in-house counsel and Secretary to my family's construction company, Greenway Enterprises, Inc. since 1991. Greenway is an international construction company that does work (new construction, renovation, maintenance and repair, etc.) on American embassies and consulates abroad, as well as other classified federal government contracts and projects both in the United States and abroad.

I formerly sat on the board of directors of some of Greenway's subsidiary companies. I was inactive in the day-to-day affairs of those companies and for the most part my involvement was ministerial.

39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, identify the source and the approximate percentage of your total income it constituted over the last five years.

Yes, I receive payment from Greenway Enterprises, Inc. in part for my services as Secretary of the corporation.

40. Do you have any personal relationships, financial interests, investments or retainers that might conflict with the performance of your judicial duties or that in any manner or for any reason might embarrass you? If so, please explain.

Aside from my involvement with Greenway Enterprise, Inc., none. Obviously, if Greenway were involved in any litigation in the Montana state court I would recuse myself and not participate in the litigation.

41. If appointed by the Governor, are you prepared to disclose the information required under 2-2-106, MCA (i.e., the name, address and type of your business; any present or past employer from which you currently receive benefits; any business or professional entity or trust in which you hold an interest; any entity in which you are an officer or director; and any real property, other than a personal residence, in which you hold an interest)?

Yes.

42. Have you filed appropriate tax returns as required by federal, state, local and other government authorities? Yes XXX No

If not, please explain. N/A

43. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?

Yes No XXX

If yes, please explain. N/A

44. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, provide the details.

No.

G. WRITING SKILLS

45. In the last five years, explain the extent to which you have researched legal issues and drafted briefs. State if associates or others have generally performed your research and the writing of briefs.

I personally perform all of the writing that bears my signature or comes from my firm. My involvement is one-hundred percent, with no assistance from anybody else.

46. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., explain the type and extent of writing that you have done.

I have also drafted contracts, promissory notes, wills, powers of attorney, deeds, and other legal instruments.

47. Attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable. The writing sample should be as recent as possible.

Attached is the first ten pages of the most recent appellate brief that I filed with the Montana Supreme Court.

48. What percentage of your practice for the last five years has involved research and legal writing?

One-hundred percent.

49. Are you competent in the use of Westlaw and/or Lexis?

Yes, I am competent in both, but I prefer Lexis.

H. MISCELLANEOUS

50. Briefly describe your hobbies and other interests and activities.

I am an accomplished classical and flamenco guitarist. I have been playing since I was 10 years old and I travel to Spain every summer to take a flamenco guitar course. I was formerly a student of Christopher Parkening.

I am also fluent in Spanish and French and enjoy travelling abroad and learning foreign languages.

I have been competing as a powerlifter for the past seven years and hold state and national records in my age group and weight class in benchpress and deadlift.

I also live on my parents' horse ranch and enjoy horses and horseback riding.

Having worked for the family construction business for years, I also enjoy doing construction work such as operating heavy equipment and performing excavation and other dirt work, doing carpentry, concrete work, etc.

I no longer hunt, but I collect and shoot firearms and am a member of the Prickly Pear Sportsman's Association.

My wife and I own a pontoon and we can be found boating, fishing, and picnicking in the Gates of the Mountains in the summer. In the winter we ski at Big Sky.

51. Describe the jobs that you have held during your lifetime.

As referred to above, I have worked for the family business, Greenway Enterprises, Inc., since it was first incorporated. My jobs ranged from hydroseeding and fertilizing lawns when we first started, to working on major construction projects for the federal government. I have been a laborer,

equipment operator, carpenter, and now am in-house counsel. When I was at my best as an equipment operator, I also obtained my private pilot's license. I let that license lapse when I was in law school due to the expense of flying private aircraft.

52. Identify the nature and extent of any pro bono work that you have personally performed during the last five years.

I consistently perform *pro bono* work and have represented scores of people without compensation. I currently have three *pro bono* cases pending, a PFMA, a DUI, and a parenting plan modification.

53. In the space provided, explain how and why any event or person has influenced the way that you view our system of justice.

My federal practice has far and above most influenced the way I view our system of justice. We are extremely fortunate to have an excellent federal bench here in Montana. The attorneys and judges that I have met in my federal practice are exceedingly intelligent and capable and have influenced me the most in the way I view our system of justice. Our federal judges require strict adherence to very high standards of professionalism. They expect thorough preparation and hard work. That standard has certainly influenced the way I practice law.

I have had judges grant motions not because of a "technicality," but rather so that the guarantees of our constitutionally protected rights might continue to benefit and be available to all members of society. That is a significant judgment which speaks volumes for our system of justice in my view.

I have also disagreed with our judges on occasion, and have taken decisions they have made up on appeal. I was highly impressed the first time I argued before the Ninth Circuit Court of Appeals that there actually is some oversight of trial court judges, and that it works. I realized that there is indeed a process wherein wise and experienced men and women review the decisions of other wise and experienced men and women and that reasonable minds can differ on a particular issue. This realization filled me with pride in being a lawyer involved in that process. Our system of justice really is the best in the world.

54. In the space provided, explain the qualities that you believe to be most important in a good district court judge.

I believe the following four qualities are the most important in a good judge:

1. Impartiality. Impartiality is, of course, the primary most important quality. Judges who cannot be impartial should not be on the bench, or at least on the case. A judge should be fair, willing to follow the law, and absolutely committed to equal justice for all people. The playing field should be level and litigants should win or lose on the merits and not for any other reason. Judges should be immune from undue influences that might tip the playing field one way or another.

2. Experience. The best judges I have ever practiced before were all experienced trial attorneys before becoming judges. They know the rules of procedure. They know how discovery should be conducted. They know how to try a case, keep the record clean, rule on objections, make rulings on the merits quickly and decisively, and bring a case to final disposition through either settlement or trial. Experience promotes wisdom and sound judgment and discretion. I am personally distressed by inexperienced judges who do not know what they are doing or who have only done things one way. Judges who have never practiced law, tried a case, had a client, been in the trenches, or stepped out of the same courthouse make the worst judges in my opinion.

3. Demeanor and temperament. Because judgment and its execution is so final, a good judge should have a stable demeanor and temperament. Decisions should be well-reasoned, thought out, and made based upon careful and impartial consideration of the facts and the law. Decisions should never be made based on suspicion, sympathy, passion, or prejudice, or because a judge is angry at or does not like a party or his/her counsel.

4. Industriousness. A judge should work hard, issue rulings, and not allow cases to languish due to inattention. They should be promptly moved toward final resolution. As the maxim goes, justice delayed is justice denied. See also, § 16, Art. II. Mont. Const. (courts of justice open to every person and speedy remedy afforded).

55. In the space provided, explain how a court should reach the

appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

A court should always follow legislative intent and precedent. Where that guidance does not exist, as in a case of first impression, courts should consider the argument of counsel, other applicable commentary (law review articles, for example) and ultimately rely on its common sense, life experiences, and sense of fairness, honesty, and morality.

56. In the space provided, state the reasons why you are seeking office as a district court judge.

In the past two years I have read the biographies of Alexander Hamilton, George Washington, John Adams, Thomas Jefferson, James Madison, Benjamin Franklin, James Monroe, and John Quincy Adams. With the exception of Washington and Franklin, all of these individuals were attorneys who had successful law practices. They each gave up their private practices to devote their time and efforts to public service, even to their financial detriment. That is admirable in my opinion.

I have been engaged in the private practice of law now for thirty years. It is time to dedicate my wisdom and experience, to the extent that I have any, to public service. A district judge in the First Judicial District in Helena has the opportunity to sit on matters that involve interesting constitutional and government-related issues that run beyond the run-of-the-mill cases that a judge in the other judicial districts in the state might have. It's a rare intellectual opportunity for a judge. Furthermore, a judge's duty is not to advocate a particular position, but to make the correct decision under the law and the circumstances of the case. Being entrusted to do the right thing, particularly when the right thing might not be the popular thing, is a high honor that with it carries great responsibility.

Plus, because of my name recognition in this community, I think I could win an election in 2023 based on more than just incumbency if appointed.

57. What items or events in your career have distinguished you or of which you are most proud?

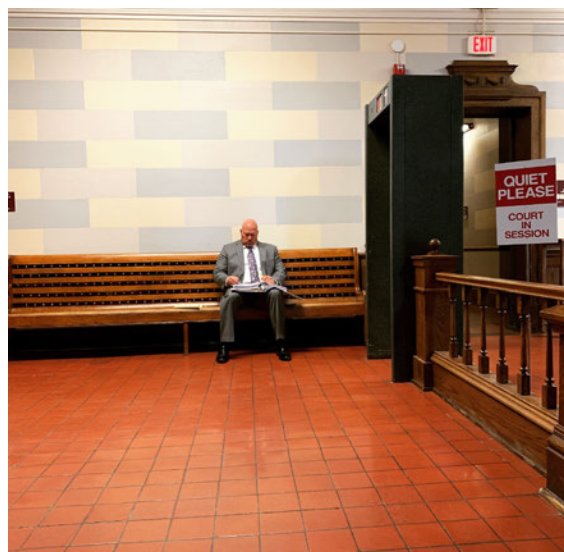
I am most proud of the following statement made by the Ninth Circuit Court of Appeals in a published opinion:

Undaunted by *Larson*, the district judge this time didn't merely shut down defense counsel's valid efforts to vindicate his client's right to confrontation, he threatened sanctions: "Your effort to inject this issue into the case is . . . entirely inappropriate, borders on being reprehensible, and I am cautioning you not to repeat it in this courtroom again." *It was the district judge, not defense counsel, who was out of line in making such a heavy-handed threat against an advocate seeking to serve his client zealously and ethically.* (Italics added.)

United States v. Nickle, 816 F.3d 1230, 1236 (9th Cir. 2016). They were, of course, talking about me when referring to "an advocate seeking to serve his client zealously and ethically." I have always thought that this statement, written by a panel of judges for the Ninth Circuit Court of Appeals, should have placed me at least in the running for MtACDL's John Adams Award. It takes some mettle, after all, to stick to one's position under the threat of sanctions from a federal judge when you know you're right.

58. Provide any pertinent information reflecting positively or adversely on you that you believe should be disclosed to the Judicial Nomination Commission.

Although I have over the years represented numerous drug addicts and drug dealers, I have never used any kind of illegal drug, including marijuana. I was also a Cub Scout and so am very reliable and trustworthy. That, of course, translates into a sound work ethic; I show up for court on-time and am well-prepared.



I have an active law practice and a full caseload. If appointed I will require some time to wind down my practice. I am 58 years old and healthy and strong. I have at least another 15 good years of work left in me.

59. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge applicant?

As an attorney in a solo private practice, I have learned the practice of law in the real world, with great variety, and not as an associate in a firm relegated to answering interrogatories in a tiny office stuffed with bankers boxes full of business records, or a deputy county attorney who has never stepped out of the same courthouse or practiced in a different court. I have appeared on behalf of clients and tried cases in municipal and justice courts in such communities as Townsend, Virginia City, Boulder, Lewistown, Livingston, Miles City, not to mention all of Montana's larger cities, and have argued to the Montana Supreme Court, to the Fourth and Ninth Circuit Courts of Appeals, the U.S. Court of Federal Claims, and the Armed Services Board of Contract Appeals in Washington, D.C. I have taken cases from beginning to final disposition, both as plaintiff and defendant, in federal courts in Los Angeles, Salt Lake City, Spokane, Tacoma, Maryland, Virginia, and state courts in Washington, Idaho, Maryland, Texas, Alabama, New Mexico, and Arizona. As an attorney in private practice, I have gained substantial trial and appellate experience that I never would have obtained had I worked for a firm or for the state or federal government. As an attorney in the private practice of law, I have actually had a client who was a live, breathing human being with a pulse and a mother and father and wife and kids. I have seen the stunned look on a client's face while she is being handcuffed and led away to prison as her loved ones sob in the gallery. I have been with a person sitting on death row in the Maximum Security Unit awaiting execution. I represented Terry Langford who was a plaintiff in the *Prison Riot* case, and he was executed a week before the trial began. Opposing counsel in that case was then-attorney Sam Haddon. I know what it is like to deal with a bully prosecutor, a cranky judge, and an uncooperative and difficult client. I know what it is like to try to make payroll when you have no money and everybody else gets paid except you.

On the other hand, I also know what it is like to win, to have things go well, and to make a difference for your clients, for the better. I also know what it means to be recognized as "Trial Lawyer of the Year," not once, but

twice, by your peers. I also know the rules of evidence and civil and criminal procedure.

In short, the private practice of law has taught me maturity, how to be adversarial without being abrasive, and hopefully, some wisdom, good judgment, and proper discretion. If appointed I can bring that to the bench.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 1st Judicial District, if tendered by the Governor, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.

(Date)

Aug. 24, 2020

(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 Thursday, August 27, 2020.

Mail the signed original to:

Office of Court Administrator
c/o Lois Menzies
P.O. Box 203005
Helena, MT 59620-3005

Send the electronic copy to: mtsupremecourt@mt.gov

SUMMARY OF THE ARGUMENT

The District Court abused its discretion when it considered defenses that had not been pled, that had no evidentiary support, and that prejudiced the E [REDACTED]. To the extent that the District Court made findings of fact that the devices had been “given” to law enforcement, that [REDACTED] did not want to relinquish her communications to [REDACTED] and [REDACTED], and that the State has not declined prosecution, those findings are clearly erroneous because they are either not supported by substantial evidence or because the District Court misapprehended the evidence and a mistake has been made. The District Court was also incorrect as a matter of law when it determined that [REDACTED] and [REDACTED] do not have a right to possess the electronic data on the devices. The E [REDACTED] are entitled to possess that electronic data because it is on devices that belong to the E [REDACTED] and [REDACTED] has no legitimate expectation of privacy in emails that were transmitted and received by the recipient. Nor are these items confidential criminal justice information when law enforcement has had more than sufficient time to investigate its case and has not charged. In any event, satisfactory arrangements can be made for its return for subsequent use as evidence. Finally, due process also requires that the items be produced.

//

ARGUMENT

Point No. 1:

The District Court erred when it did not require the Defendants to abide by the Rules of Civil Procedure and plead affirmative defenses.

M.R.Civ.P., Rule 1, provides in part that “[t]hese rules govern the procedure in all civil actions and proceedings in the district courts of the state of Montana.”

M.R.Civ.P., Rule 57, also states in part that “[t]hese rules govern the procedure for obtaining a declaratory judgment under Title 27, Chapter 8.”

M.R.Civ.P., Rule 8(b)(1)(A), required the Defendants to “state in short and plain terms its defenses to each claim asserted against it.” Affirmative defenses must be affirmatively pled. M.R.Civ.P., Rule 8(c)(1). This Court has explained the distinction between a denial under M.R.Civ.P. 8(b) and an affirmative defense under Rule 8(c): “Rule 8(b), M.R.Civ.P., ‘is concerned with negative defenses — those that controvert the adversary’s claim. Rule 8(c), on the other hand, is concerned with affirmative defenses — the pleading of matter that is not within the claimant’s prima facie case.’” *Burns v. Cash Constr. Lien Bond*, 2000 MT 233, ¶ 32, 301 Mont. 304, 8 P.3d 795 (quoting *Sterrett v. Milk River Prod. Credit Ass’n*, 234 Mont. 459, 463-64, 764 P.2d 467, 469 (1988)); see also, *Weaver v. State*, 2013 MT 247, ¶ 34, 371 Mont. 476, ¶ 34,

310 P.3d 495, ¶ 34.

The State did not file an answer to the Complaint as required by M.R.Civ.P., Rule 7(a)(2). The absence of an answer even left the District Court in the dark. At the beginning of the hearing the District Court inquired, “what is the State’s position with regard to this property?” Defense counsel then asserted ██████’s right to privacy in the electronic data, a claim that had neither been addressed in the State’s motions to dismiss or motions to quash. The State also claimed that there were potentially criminal charges pending. *App.* 2, 5:2 to 6:25, *cf.*, *CRR* 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 15, 19, 20, 21, 25, 32, and 33.

The E█████ responded that the State waived those defenses for failure to properly plead them. *App.* 2, 7:1 to 8:6; 10:19-22. Furthermore, § 27-8-301, MCA, required that if there was a necessary party whose rights were involved such as ██████, then the State should have filed a third-party complaint. ██████ could have intervened under Rule 24, or the State should have filed a request for a joinder under Rule 19(a)(1). They did not do any of that.

Rule 4(c) also allowed the E█████ to plead reasons for not joining ██████, which they did. Rule 4(c) says that when asserting a claim for relief, a party must state, one, the name, if known, of any person who is required to be joined, if feasible, but not joined, and the reasons for not joining that party.

Pursuant to Rule 4(c) the E [REDACTED] properly made those allegations in paragraphs 30, 31, 32 and 33 of their Complaint:

If [REDACTED] has or had a privacy interest in her communications with [REDACTED], then that privacy interest was lost when the information was placed on devices that belonged to the plaintiffs.

CRR 1, ¶ 33; see also, ¶¶ 34 and 35. Also in the record was the E [REDACTED]' brief filed in CDN 2013-80 explaining why [REDACTED] did not have a privacy interest in the communications. *CRR* 26, Tab D; *App.* 2, 8:7 to 10:18.

In the absence of any pleadings or evidence asserting a privacy interest, the E [REDACTED] further argued that the Defendants did not have standing to assert a privacy right for somebody who is not a victim, not a youth in need of care, not a minor, not a party, and not somebody who had been pled into the case, something that the State had the obligation to do. Aside from the bare assertion of counsel, there was no evidence that [REDACTED] had any desire to assert a privacy interest. The Defendants didn't present any evidence to the Court in the form of an affidavit or testimony that [REDACTED] did not want her "electronic data" to be turned over. The record lacks evidentiary support of any kind for that claim. The Defendants further presented no legal authority to support that effect, nor did the District Court specifically refer to any such authority.

App. 2, 11:24 to 14:11.

Notwithstanding their failure to plead those affirmative defenses and the paucity of evidence to the contrary, the District Judge stated, “I think the State’s made its defenses known through the proceedings that are authorized under that particular statute. You’re here on a declaratory judgment asserting you have rights under this particular statute, which has a particular procedural outline to it, and I think that specific statute governs over the general one that you’re referring to, the general requirement.” *App. 2*, 13:7-12.

It was error as a matter of law for the District Court to not have required the Defendants to abide by the rules of civil procedure regardless of whether the matter was filed pursuant to § 46-5-312, MCA, or not. M.R.Civ. P. 57 states that the rules of civil procedure govern declaratory judgment actions. § 46-5-312, MCA, says:

- (1) A person claiming the right to possession of property seized as evidence may apply to the judge for its return. The judge shall give written notice as the judge considers adequate to the prosecutor and all persons who have or may have an interest in the property and shall hold a hearing to determine the right to possession.
- (2) If the right to possession is established, the judge shall order the

property, other than contraband, returned if:

- (a) the property is not needed as evidence;
- (b) the property is needed and satisfactory arrangements can be made for its return for subsequent use as evidence; or
- (c) all proceedings in which the property might be required have been completed.

First, there were no “proceedings” authorized under § 46-5-312, MCA. There were no criminal charges filed, no criminal “proceedings,” and consequently no “judge” to whom the E█████ could apply for the return of the property. That is why they sought a declaratory judgment, a civil matter subject to the rules of civil procedure. M.R.Civ.P., Rule 57.

Second, the Defendants did not file an answer, or even a general denial, much less plead the affirmative defense that ██████ had a right to privacy in the electronic data on the laptop. The Defendants did not file a motion arguing ██████’s right to privacy. Instead, their Rule 12(b)(4), (5) and (6) motions asserted only insufficient process and the argument that E█████’ claims were improper under declaratory judgment laws. It was only at the hearing that for the first time since the E█████ filed their Complaint that the Defendants asserted in oral argument that ██████ had a privacy interest in the electronic data on the laptop and that the E█████ don’t have a right to possess

that electronic data forget about the fact that other members of the family also used the laptop and had their electronic data on it. *App. 2*, 21:1, 2.

Third, even though seven years had passed, which was more than sufficient time for the State to complete its investigation, no charges had been filed. *Cf.*, § 46-5-311(1), MCA, (“[e]vidence or contraband lawfully seized without a warrant may be retained in the custody of the officer making the seizure for a time sufficient to complete an investigation”); *State v. Branam*, 2006 MT 300, ¶ 23, 334 Mont. 457, ¶ 23, 148 P.3d 635, 2, ¶ 23; and *App. 2*, 24:19 to 25:5; 39:19 to 40:8 (the property was taken without a warrant with permission to search and then return).³ However, it wasn’t until the hearing that Defendants’ counsel argued for the first time that interests in the confidential criminal justice information and for preserving the integrity of the investigation prohibited the return of the property. *App. 2*, 21:13-18.

None of these defenses had been pled and it was an abuse of discretion for the district court to consider them. The failure to affirmatively plead a defense set forth in Rule 8(c) results in a waiver of that defense. *Columbia Grain Int’l v. Cereck* (1993), 258 Mont. 414, 852 P.2d 676; *Nitzel v. Wickman*, 283 Mont. 304, 312, 940 P.2d 451, 456 (1997); *Petaja v. Mont. Pub. Empl.’*

³ Significantly, ██████’s grant of permission to search the devices was not a grant of permission to keep them. See, *CRR 26*, Tab C, ██████ E ██████ Affdvt., ¶ 2, Exh. A (“Permission to Search”); § 46-5-311(2), MCA.

Ass'n (MPEA), 2016 MT 143, ¶ 23, 383 Mont. 516, ¶ 23, 373 P.3d 40, ¶ 23.

In *Weaver v. State*, 2013 MT 247, ¶ 35; 371 Mont. 476, ¶ 35; 310 P.2d 495, ¶ 35 this Court affirmed the district court's grant of a motion to strike a public duty doctrine defense because it did not raise that defense in its answer and the property owners had not sufficiently been put on notice that the state intended to invoke that defense. The District Court abused its discretion when it allowed the Defendants to ignore the rules of civil procedure and then considered defenses that had never been pled. ■■■ is not a "victim" because the State has not and will not file charges against ■■■. E■■■. CDN 2013-80 was dismissed when ■■■ turned 18 years of age. ■■■ is now 22 years old and she can assert her own claim to privacy. If the Defendants had intended to rely on her right to privacy defense then they should have pled that defense, or filed a third-party complaint bringing her into the case, or sought to join her. They did none of the above and waived those defenses, yet the District Court considered them. That was an abuse of discretion.

Point No. 2:

The District Court's factual findings were clearly erroneous because there was no evidence to support the Defendants' claims.

The District Court clearly erred when it found that the E■■■ have

made several requests for the return of the laptop and cellphone “given” to Cory Olsen. *App.* 1, 3:3, 4. The uncontroverted evidence in the record was that they didn’t “give” the devices to Cory Olsen. Instead, Olsen took them from ■■■■, a minor, at the airport, without a warrant, when ■■■■ E■■■■ was not present. *App.* 2, 33:11 to 36:5; 42:17 to 43:17. This finding is important for purposes of § 46-5-311(1), MCA, *Branam*, and the *Ellis* case discussed below. Because they were seized without a warrant, the State can only retain them “for a time sufficient to compete an investigation.” That time has long passed.

At the hearing Defense Counsel claimed that ■■■■ wanted to assert her right to privacy, although Defense Counsel had not been a party to any communications with ■■■■. Defense Counsel claimed that ■■■■ was “out of state,” “does not want to be coming back here,” and was “the alleged victim of serious sexual crimes.” Defense Counsel further asserted that the District Court should not hold a hearing “when there’s pending criminal matters and essentially allow the witnesses to that criminal matter to all lay their cards on the table about what’s out there and other things like that.” *App.* 2, 22:4 to 23:22. The Defendants presented no evidence whatsoever to support those claims.

■■■■ E■■■■, on the other hand, testified that ■■■■ is living in Missoula

and has a job there. *App. 2*, 26:18-24. ██████ also testified that ██████ E█████, has never been charged with any offense and that they have been told numerous times by numerous officials that it would not happen. *App. 2*, 41:11-13; 47:15-19. To the extent that Defense Counsel’s pronouncements to the District Court that “there are potentially criminal charges pending” and their “office has not declined prosecution” carried any weight, those statements were offset by the representations of Plaintiffs’ counsel that indeed, “the State’s going to decline prosecution.” *App. 2.*, 5:17-21, *cf.*, 24:2-12.

The District Court concluded in its order that the E█████ purchased the laptop and cellphone for use by ██████ E█████ have established a right to possession of the electronic devices. E█████ did not, however, create the stored data on these devices. ██████ created these data. *App. 1*, 4:8-10. That conclusion is erroneous.

██████ E█████’s uncontroverted testimony was that the laptop was a “family computer” and that they all had access to and used it, and that the cell phone was also a family phone. *App. 2*, 28:1-6; 30:2-7; 42:17-19; 43:8-17. There was electronic data stored on the laptop that ██████ and ██████ also created.

//