

DECLARATION OF MARK G. MUIR

Pursuant to Montana Code Annotated §1-6-105, I, **Mark G. Muir**, hereby declare under penalty of perjury and under the laws of the state of Montana that the following is true and correct:

INTRODUCTION

1. I am the retired Chief of Police of Missoula, Montana, and an attorney admitted to practice law in the States of Montana and Idaho. I also own and operate MGMuir Consulting providing expert opinions in police practices and litigation consulting. The Montana Association of Counties and Montana League of Cities and Towns, through their attorneys, retained me to assist in the analysis of historical data regarding law enforcement officer perpetrated sexual assault committed while on-duty and the explanation of police practices and procedures related to the certified question before this Court.

2. I have over thirty years of experience in law enforcement, spending nine years as a line-level officer, followed by fourteen years as a police supervisor and administrator for Missoula. Following my retirement from active duty, I have continued to receive training in law enforcement practices and professional standards. I have provided expert opinions in civil litigation cases alleging sexual misconduct by law enforcement officers in Montana.

3. I remain a member of the International Association of Chiefs of Police (IACP), including membership in the Retired Chiefs and Legal Officers Sections, to stay abreast of trends in the profession of law enforcement. I am familiar with the growing recognition of sexual misconduct by officers as a problem for law

enforcement. I am also familiar with the hiring, training and supervision of law enforcement officers within Montana.

4. I am an alumni of the IACP's National Law Enforcement Leadership Institute on Violence Against Women.

5. I have previously co-instructed Ethics training and included professionalism and ethics into my previous instruction lectures for Verbal Judo to new recruits at the Montana Law Enforcement Academy and to officers from around the state.

6. I have studied and relied on data from sources including the Montana Board of Crime Control (MBCC) and the Montana Public Safety Officers Standards and Training Council (MT POST) to evaluate the frequency of on-duty sexual assault by state and local law enforcement officers in Montana.

7. For the purpose of preparing this declaration, I have reviewed the factual background and arguments of the matter underlying this litigation. I understand the Plaintiff/Appellant's position to be that engaging in sexual assaults or sexual intercourse while on duty as a law enforcement officer should be viewed through the same lens as other uses of force under the color of authority. She asks the Court to rule that law-enforcement officers committing sexual assaults to be acting within the course and scope of their employment.

8. Law enforcement officers are employed and given training in the proper use of physical force under the color of their authority as police officers. Government endows that authority with the understanding that there often exist circumstances under which levels of force, including deadly force, may be justified

in order to assure public safety. **However, unlike the use of physical use of force, there is no imaginable legitimate law enforcement purpose that can be served by sexual assault upon members of the public.** In the same way that on-duty forcible robberies do not serve the government's interest, sexual assault and sexual intercourse without consent are always criminal conduct and law enforcement officers are trained to know what acts are crimes and to enforce those laws.

9. The Montana Legislature has deliberately enacted law as to local and state government liability for criminal acts committed by public employees.¹

STATISTICAL DATA

10. According to MBCC², in 2020 there were 1676 full-time sworn law enforcement officers employed by 103 local and county agencies across Montana. There were an additional 53 part-time sworn officers working for 28 of those agencies. There were approximately another 300 sworn law enforcement officers working for various state agencies within Montana. In total, there were approximately 2000 sworn law enforcement officers employed by state or local agencies in 2020. These officers are required to be certified by MT POST.

11. The MT POST Council Integrity Report³ identifies in summary form the administrative actions taken against public safety officers' certifications in Montana. Under Administrative Rule 23.13, Subchapter 7, the POST Council reviews complaints against public safety officers and, if appropriate, may revoke or

¹ MCA 2-9-305 (6)(b). Immunization, defense, and indemnification of employees.

² 2020 Data found at <https://mbcc.mt.gov/Data/Montana-Reports/Law-Enforcement-Personnel-in-Montana-Reports>

³ Current Data found at <https://media.dojmt.gov/wp-content/uploads/October-2020-Integrity-Report1.pdf>

suspend an officer's certification. The Council has developed and approved an allegation policy regarding how such complaints are processed and adjudicated.

12. Between January 1, 2013, and October of 2020, MT POST took administrative action against 203 individuals employed as law enforcement officers (LEO), detention officers (DO), corrections officers (CO) and public safety communicators (PSC) (dispatch personnel). The Integrity Report describes the nature of the allegations proven against the public safety officers. My research for this declaration included identifying the officer category and nature of misconduct that resulted in sanctions which most commonly resulted in decertification.

13. The MT POST Integrity Report shows that of the 203 actions taken in that eight-year period, 139 were against sworn law enforcement officers (LEO's). This was an average of less than 18 sanctions per calendar year for the sworn officer workforce and involved less than 1% of the sworn LEO's certified in Montana.

14. Of the 139 actions against LEO's, there were 36 closed cases which I identified as involving some form of sexual misconduct. On an annual average basis, less than ¼ of 1% of Montana's state and local law enforcement officers engaged in reported sexual misconduct both on and off-duty.

15. The various forms of sexual misconduct⁴ by law enforcement, some of which are criminal acts, may be directed at colleagues, citizens, detainees, juveniles, and crime victims or witnesses. Forms of misconduct here in Montana, which include but were not limited to on-duty misconduct, reflect the following:

⁴ This definition is adapted from one developed by Timothy M. Maher, professor of criminology and criminal justice at the University of Missouri at St. Louis.

- A. sexual contact by force (e.g., sexual assault, sexual intercourse without consent);
- B. sexual shakedowns (e.g., extorting sexual favors in exchange for not ticketing or arresting a citizen, which is now sexual intercourse without consent);
- C. gratuitous physical contact with suspects (e.g., inappropriate or unnecessary searches, frisks or pat-downs);
- D. officer-initiated sexual contacts while on duty;
- E. sexual harassment of colleagues/co-workers;
- F. engaging in citizen-initiated sexual contact while on duty;
- G. sexual behavior while on duty (e.g., viewing and/or distributing pornographic images, sexting);
- H. voyeuristic actions that are sexually motivated (e.g., surreptitious recordation for sexually motivated reasons); and
- I. extra-marital affairs with colleagues/co-workers or their spouses.

16. During the eight-year time frame of the MT POST report there were 16 instances of identifiable on-duty sexual misconduct, ranging from sexual activity with coworker/colleagues to viewing pornography and sexting, and to more egregious sexual assault and sexual intercourse with suspects/arrestees/confidential informants or other vulnerable persons.

17. In summary, though there is no amount of sexual misconduct that is deemed acceptable, based on the data published in the Integrity Report of Montana's

Public Safety Officer oversight board, there has been an annual average of just two cases of on-duty sexual misconduct in all forms perpetrated by law enforcement.

18. This statistic supports that Montana does not have the same degree of systemic problem with on-duty law-enforcement perpetrated sexual misconduct (much less sexual assault) that the Plaintiff's *Amici Curiae* point to outside the state.

19. The integrity report also shows that MT POST has taken seriously its role in holding officers accountable, with more than 90% of those 36 closed cases of sexual-misconduct-related offenders being decertified for on and off-duty conduct, the remaining 10% received lesser sanctions for misconduct that was determined to be non-criminal.

CHRONIC CHALLENGES

20. The nature of the policing profession brings some conditions of the job which inadvertently create potential opportunities for sexual misconduct. Law enforcement officers (1) have power and authority over others; (2) work independently; (3) frequently function without direct supervision; (4) often work late into the night when their conduct is less in the public eye; and (5) engage with vulnerable populations who lack power and are often perceived as less credible (e.g., juveniles, crime victims, undocumented people, and those with addictions and mental illness).⁵

21. The law enforcement profession recognizes that any officer who misuses the power and authority of law enforcement by engaging in on-duty sexual misconduct commits a serious breach of professional ethics and under current law

⁵ *Addressing Sexual Offenses and Misconduct by Law Enforcement: Executive Guide*, IACP, 2011

may also violate state criminal statutes. Sworn law enforcement professionals recognize the importance of making efforts for prevention and holding offenders fully accountable for all forms of ethical misconduct. Agencies can do little more than take reasonable preventative steps without knowledge of wrongdoing.

22. Prevention begins with trying to keep individuals lacking the ethical and moral character to keep true to their oath from becoming officers in the first place. The key to this is a comprehensive applicant background investigation and post-offer examinations designed to gauge the applicant's mental and physical fitness for law enforcement.

The IACP guidance on that topic suggests several methods to help uncover those lacking proper personality or ethical/ moral integrity:

*"This can be achieved through a combination of (1) medical, psychiatric, psychological, polygraph and integrity testing; (2) detailed personal interviews; and (3) thorough background investigations that include a review of social networking websites."*⁶

23. However, in Montana, state statutes⁷ prevent even law enforcement agencies from using polygraph examinations and no employer may require prospective employees to provide identification of or access to (other than what is public) on social media/networking sites. These two restrictions pose legal hurdles to improving detection of risky hires.

24. Additionally, Montana law enforcement agencies (particular in more rural areas) also face obstacles with obtaining the most comprehensive

⁶ <https://www.theiacp.org/resources/document/addressing-sexual-offenses-and-misconduct-by-law-enforcement-executive-guide>, p.7.

⁷ Montana Code Annotated §§ 39-3-304 and 39-3-307.

psychological assessments due to accessibility of services and to a lesser degree, cost. During my years in administration, I am aware that some Montana agencies even sent their candidates out of state because of geographic distance from professional service providers. By necessity, in some other agencies, less rigorous personality assessment tools have become more common-place than the multi-battery MMPI (Minnesota Multiphasic Personality Inventory).

25. Importantly, there is no guarantee that any appropriately conducting screening will prevent every bad actor from gaining employment in law enforcement; however, the statistics show that Montana agencies are doing what they can to keep that number very, very low.

PREVENTION EFFORTS

26. Widely recognized areas for focusing efforts to promote professional, ethical conduct include addressing the selection/pre-hiring process discussed above, providing officer and supervisor training, publishing clear police policies and regulations and collaboration with advocacy organizations.

27. In 2011, the International Association of Chiefs of Police (IACP) worked with law enforcement leaders from across the country to develop an Executive Guide for Addressing Sexual Offenses and Misconduct by Law Enforcement.⁸ This Guide advises law enforcement agencies to adopt policies specifically addressing sexual misconduct committed against members of the public by law enforcement.

⁸ <https://www.theiacp.org/resources/document/addressing-sexual-offenses-and-misconduct-by-law-enforcement-executive-guide>

28. MACo and the Montana Municipal Interlocal Authority have long supported law enforcement efforts to improve law enforcement policies and training of all law enforcement officers across the state.

29. In 2014, MT POST amended ARM 2.13.201, the Appointment and Continued Employment Standards for Public Safety Officers, adding a bi-annual training requirement that includes a mandatory specified Ethics curriculum. The content of the training includes review of the Code of Ethics and the POST Grounds for Sanctions, review of the Integrity Report for examples of misconduct and the serious potential consequences, discussions regarding core professional values guided by ethical and moral codes of conduct.

30. In the same year, MT POST also added a disqualifier into the ARM for any officer who previously held a similar certification in other states which had been revoked or was presently suspended. As of 2011, 29 state POST agencies contribute to a National Decertification Index database which can be queried to learn an officer's certification history.

31. In October of 2017, MT POST again amended ARM §23.13.201, adding a disqualifier for any criminal conviction involving unlawful sexual conduct. This prevents any person with convictions for even misdemeanor sexual assault from lawfully gaining or continuing employment in any public safety officer position, regardless of whether previously certified in another state.

32. Montana law enforcement agencies must comply with MCA §7-32-303 (2) and ARM 23.13.201 when appointing sworn law enforcement officers. Therefore, at a minimum, officer applicants criminal records must be free of felonies

or any sexual crime convictions, are subjected to oral interviews, thorough background investigations of their character and suitability for the position, medical and psychological evaluations and may not have been previously decertified or presently suspended by the licensing body by Montana or another state.

33. Training is a useful prevention tool, yet courts across the country while deciding litigation brought under 42 U.S.C. §1983 agree that it defies logic to believe that even the best training programs available would stop an officer who has a criminal intent from committing a crime. Sexual assault and sexual intercourse without consent are crimes against persons, whether committed on or off-duty and refraining from committing criminal acts is patently obvious.

34. Montana law enforcement as a profession has been providing greater levels of training on the investigation of sex crimes and working with victim advocacy. The Law Enforcement Officer Basic Academy curriculum includes training by POST on public safety ethics, training on criminal law and investigations (including sex crimes and other violence against women), training on professionalism and public trust bestowed upon officers.

35. Advanced and refresher training is provided by agencies in regional trainings across the state and compliance with the annual training requirements has been very good. The Ethics training requirement to review the POST Integrity Report every other year would make obvious the inherent consequence of sexual misconduct by public safety officers.

36. The Montana POST Council is presently working to adopt a definition of “sexual misconduct” for public safety officers under a new subsection of ARM

23.13.102 and to add it to the list of conduct subject to sanction by MT POST under ARM 23.13.702(3). This change will have the effect of creating a statewide understanding of prohibited conduct within the profession and augment agency policies already in existence. Due to the codification within the ARM's it will become part of the required ethics training to remain certified.

37. Prevention efforts do not come about in a vacuum. Advocacy organizations have played a role in assisting with and offering law enforcement training around the state for the last ten years. These organizations have also successfully lobbied for legislative change. Since October 1, 2019, the Montana legislature has removed any "consent defense" available to any local or state peace officer accused of committing sexual assault or sexual intercourse with a person who is "a witness in a criminal investigation or a person who is under investigation in a criminal matter and the perpetrator is a law enforcement officer who is involved with the case in which the victim is a witness or is being investigated." This legislation was developed in part due to the facts of the *L.B. v USA* matter and intended to protect citizens from law enforcement "sexual shakedowns" described in ¶15.B. above.

CONCLUSION

38. Most communities are struggling these days to fund what is arguably their top responsibility to public safety and justice. Shifting liability from the offending officer and holding local taxpayers financially liable for intentional sexual crimes committed by law enforcement would assuredly present further financial hardship to delivering public safety services down the road. At the same time, it

does little or nothing to reduce the possibility of employing potential offenders. The entities would face paying settlements and judgments or paying increased premium costs for insurance pools, since current coverages likely do not include employee's intentional criminal acts.

39. In recent years, whether justified or not, there is growing sentiment of distrust of law enforcement. Activism abounds for defunding police and it is taking a toll on the rule of law. Shifting the potential civil judgment against the offenders to the deep-pockets of the taxpayers for patently obvious criminal acts would only serve to create further distrust and disrespect for the criminal justice system.

40. There presently exist numerous deterrents to sexual misconduct by law enforcement officers, including: criminal conviction, loss of professional certification (thus employment), state law tort liability, and the prospect of federal civil rights or federal crimes. These consequences are familiar to all law enforcement officers. Yet unfortunately, there are still that very small number of officers who will betray the public trust bestowed upon them.

41. In my professional opinion, if the Court answers the question before it in the affirmative, thus essentially making on-duty sex crimes a strict-vicarious-liability exception to the current liability laws, it would take away an existing deterrent. Law enforcement officers know they presently will not be indemnified for criminal acts committed while on or off-duty. Taking personal financial liability for their crimes off the table does not serve the interests of society to seek justice against those who break its laws.

I declare under penalty of perjury and under the laws of the state of Montana that the foregoing is true and correct.

DATED and SIGNED this 10th day of December, 2021, at
CUERNAVACA, MEXICO.


Mark G. Muir

Mark
G. Muir

Digitally signed by Mark
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