MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

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STATE OF MONTANA, Plaintiff, vs. MICHAEL CURTIS SOULE, Defendant.	Cause No. DC 12-157B **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

On August 8, 2012, the State filed an Information charging Defendant Michael Curtis Soule ("Michael") with the offense of Vehicular Homicide While Under the Influence, a Felony, in violation of Section 45-5-106, MCA. On August 20, 2012, Michael appeared before this Court and pleaded not guilty to the charge. On January 14, 2013, a binding plea agreement was proposed to the Court and Michael appeared before the Court and changed his plea to no contest. At that time, the Court found Michael guilty of Vehicular Homicide While Under the Influence, a Felony, in violation of Section 45-5-106, MCA. The Court ordered that a Presentence Investigation Report be prepared and filed with the Court for the Court to use in its determination of whether the Court would be bound by the plea agreement. Sentencing was set for February 25, 2013. Upon unopposed motions from both the Defendant and the State, sentencing was continued to June 3, 2013. At the time of sentencing, the Court advised Michael and the State that it would not be bound by the plea agreement. The Court allowed Michael one week to decide how he would like to proceed. On June 6, 2013, Michael filed a Notice of Withdrawal of

Nolo Contendere Plea, Request to Enter Not Guilty Plea, and Motion to Continue Omnibus Hearing. On June 7, 2013, the Court entered an Order Withdrawing Nolo Contendere Plea, and Entering Not Guilty Plea. A Status Conference was held on June 17, 2013 at which time the Court set the matter for an Omnibus Hearing on February 10, 2014. An Omnibus Hearing Order was entered on February 10, 2014.

On June 18, 2014, Michael filed Defendant's Pretrial Motions and Brief in Support. On August 11, 2104, thc Sate filed State's Response and Brief to Defendant's Motions. On September 8, 2014, Michael filed Reply Brief re Pretrial Motions. On September 16 and 17, 2014, the Court heard Michael's pretrial motions. Chief Deputy County Attorney Eric Kitzmiller represented the State. Al Avignone and Lisa A. Banick represented Michael. Michael was present. On October 24, 2014, counsel for the parties filed their Proposed Findings of Fact and Conclusions of Law. Based upon the Court's review of the testimony and evidence presented, the arguments of counsel and the parties' briefs, the Court is fully advised and makes the following Findings of Fact:

FINDINGS OF FACT

1. On January 25, 2012, Michael and his wife, Jennifer Soule ("Jennifer") were traveling westbound on Interstate Highway 90 just west of Bozeman when they were involved in a one vehicle rollover accident. The crash happened at approximately 2:00 a.m. Both Michael and Jennifer were found outside the vehicle. Jennifer suffered fatal injuries

2. Michael was taken to Bozeman Deaconess Hospital ("Hospital"). Trooper Glen Barcus ("Barcus") of the Montana Highway Patrol was called out at 2:30 a.m. to assist with the crash and was advised by Trooper Josh Giddings ("Giddings") of the Montana Highway Patrol to head directly to Bozeman Deaconess Hospital to interview the suspected driver involved in the

crash. Barcus was also advised the passenger was deceased.

3. Barcus testified he did not know how Giddings knew within 60 minutes of the crash that Michael was the driver.

4. Barcus went to the Hospital. He was in full uniform and had a pistol on his hip. He entered the emergency room. He does not recall speaking to anyone before entering the emergency room. To enter the emergency room, Barcus had to enter through some doors. There is an administrative portion that is the hub of the emergency room with desks located all the way around the room. Barcus testified that the emergency room was wide open.

5. Located off the emergency room are trauma rooms. The trauma rooms have walls. The trauma rooms also have a glass partition that can be closed. There are also curtains that can be closed.

6. Barcus located Michael in a trauma room because he saw all the staff working on and performing emergency medical treatment on Michael.

7. Because hospital staff was working on Michael, Michael was not made available to Barcus at that time. Barcus does not recall whether staff noticed he was there or having any conversations with staff.

8. Barcus remained in the emergency room. Barcus obtained health care information about Michael by listening to conversations among medical staff caring for Michael.

9. When he entered Michael's trauma room, Barcus documented Michael's pulse rate from the monitoring equipment in Michael's trauma room.

10. Barcus learned Michael was intubated and unresponsive by observing him in the trauma room. Barcus also learned Michael had a punctured lung but he is not sure how he learned that information. Barcus did not believe he would be able to interview Michael because

he was unconscious and intubated. Barcus did not have permission from Michael or any member of his family to be there. Barcus did not ask hospital staff for permission to be in the emergency room.

11. Barcus did not have a search warrant.

12. Barcus testified medical staff never questioned why he was in Michael's trauma room.

13. Barcus testified the process of taking a blood draw takes approximately five to fifteen minutes.

14. Barcus was at the Hospital for approximately one hour-and-a-half. Barcus testified he was there to obtain a blood draw on the suspected driver of the crash and to perform an interview. Because of the degree of trauma to Michael, Barcus was not allowed to see Michael when he arrived. Barcus was given access to Michael after 4:00 a.m.

15. When Michael was in his trauma room, Barcus read the Montana Department of Justice Non-Commercial Motor Vehicle Implied Consent Advisory Form to Michael.

16. Barcus read the form to Michael advising him, "You are under arrest for driving (or being in actual physical control of) a motor vehicle while under the influence of alcohol (and/or drugs)," and checked the box on the form. Ex. C. Barcus did not make an audio recording of the Implied Consent Advisory.

17. Barcus also told Michael, "You must decide to take or refuse to take this test without talking to an attorney."

18. Michael was unconscious when Barcus read the Implied Consent Advisory.

19. Barcus requested Hospital staff to collect a legal blood draw from Michael. A phlebotomist performed the legal blood draw in accordance with the applicable standards.

Barcus used the blood test request form from the Montana Department of Science Laboratory. Ex. B.

20. Barcus packaged up the blood sample and sent the blood sample to the Crime Lab for analysis. Ex. D.

21. The Montana State Crime Lab Toxicology Drug Screen Report indicates Michael's blood alcohol to be .07 grams per 100 milliliters, the level of THC is 1 nanogram per milliliter, and there is no cocaine present in Michael's blood sample. Ex. E.

22. Trooper Patrick McCarthy ("McCarthy") was called to assist with the crash and arrived at the scene around 2:30 a.m. McCarthy described the weather conditions when he arrived as the road being wet, but not icy or slick.

23. McCarthy observed the vehicle had heavy damage and looked like it had been in a violent rollover. The vehicle was on all four wheels in the right-hand lane of the interstate.

24. McCarthy observed the vehicle and noticed a long brown hair on a piece of jagged torn metal on the driver's door. The hair appeared consistent with the hair of the female victim in the roadway. There was a small amount of blood near the hair on the driver's door.

25. Giddings photographed the hair while it was still on the driver's door. Ex. H. McCarthy did not collect the hair and the hair is now gone. McCarthy admitted that the brown hair embedded on the metal on the driver's door, consistent with the female victim's hair, was an important piece of evidence to collect.

26. McCarthy testified "he just missed getting it done" because it was a very busy night. However, McCarthy collected a shoe from inside the vehicle and a bloody piece of paper and piece of plastic outside the driver's door. McCarthy admitted he had to reach around the brown hair and reach inside the vehicle to collect the shoe.

27. McCarthy initially testified the shoe was on the floor near the driver control pedals. However, when he was shown a photograph of the location of the shoe, McCarthy admitted the shoe was actually against the left side of the driver's seat not near the pedal.

28. McCarthy left the scene at 3:55 a.m. and went to the Hospital. McCarthy decided he wanted to check on the status of the blood draw that Barcus was performing. McCarthy met Barcus at the Hospital. McCarthy was in uniform and armed with a pistol. McCarthy entered the emergency room by first going through a set of sliding doors and then went to another door and pushed a button to open the next set of doors.

29. McCarthy testified there were a lot of people in the trauma room attending to Michael. Michael's trauma room was about 15 feet by 20 feet with walls on three sides and sliding glass doors that can be closed.

30. Barcus told McCarthy Michael had a mark near his collarbone that should be photographed. McCarthy entered the trauma room where Michael was located. McCarthy did not have permission from Michael to enter his room. McCarthy did not have permission from any family member to enter Michael's trauma room. McCarthy did not have permission from any of the administration of the Hospital to enter Michael's room.

31. McCarthy found Michael in his trauma room in the emergency room. Michael had multiple medical staff around him. Michael was unconscious.

32. After entering the trauma room, McCarthy noticed some clothing bagged up on a chair. McCarthy saw a brown shoe sitting upright on a chair near Michael, and photographed the shoe. McCarthy then moved and rotated the shoe, and photographed the bottom of the shoe. McCarthy said he picked up and moved the shoe because he was concerned if there were marks from the brake pedal or accelerator pedal on the bottom of the shoe, they would be lost.

33. McCarthy then photographed Michael's shoulder. Michael had a gown or sheet covering him that was moved to photograph Michael's shoulder. Someone had to move Michael's gown or sheet, but McCarthy does not remember who moved it. McCarthy took at least one photograph of Michael's shoulder, possibly more. The photograph of Michael's shoulder shows a gloved hand pulling back Michael's robe. Ex. I (under seal)).

34. Trooper Ace Meskimen ("Meskimen") of the Montana Highway Patrol and Giddings arrived at the Hospital around noon that day. They went to the Hospital's Intensive Care Unit to speak with Michael, and to collect the physical evidence of Michael's clothes. Michael was in a private room in the Intensive Care Unit. To get into the Intensive Care Unit, there is a phone outside the door. They called the nurses' station and identified themselves as Troopers and were let in.

35. Meskimen testified that Michael was unconscious due to Michael's injuries. Giddings asked the nurse if Michael came in with clothing and was informed the clothes were in a bag. Meskimen did not have a search warrant. Meskimen instructed the nurse to take possession of Michael's clothes and put the clothes in a locked locker.

36. Trooper Josh Brown ("Brown") assumed the role of primary investigating officer of the crash. Brown did not go to the accident scene until early afternoon after the crash. Brown did not see the vehicle until after it had been moved from the crash site. Brown was involved with some witness interviews, took some measurements of the crash scene, assisted with serving a search warrant of the vehicle, did a download of the airbag control module and prepared an accident report.

37. On February 22, 2012, Brown participated in the processing of the vehicle with Joe Pasternak ("Pasternak") from the Montana Crime Lab. Brown testified Pasternak collected a

swab of a stain on the driver's side dash marked as Item 15. Brown could not locate Item 15 to deliver it to the Crime Lab. Brown does not know what happened to Item 15.

38. Brown admitted he was told that Michael was the suspected driver before Brown started doing his report.

39. Brown has a bachelor's degree in sociology from Montana State University. Brown does not have any formal education in engineering. Brown believes he took one physics class at Montana State University. He does not remember much about the class because it was a long time ago.

40. In 2001, Brown had a basic accident investigation training at the Montana Highway Patrol Academy. In 2002, he attended an 80 hour course in technical crash investigation. In 2003, he had an 80 hour reconstruction training.

41. Brown admitted the State Crime Lab test result for Michael's blood alcohol concentration is .07 grams per 100 milliliters which is below the per se limit. Brown admitted no inference can be drawn and admitted Michael's legal blood draw test result of .07 is not enough evidence upon which to conclude Michael was under the influence.

42. Brown admitted the Crime Lab blood test result indicated Michael had 1 nanogram of THC in his blood. Brown admitted this amount is a very low concentration of THC and is well below the legal limit of 5 nanograms per milliliter for driving.

43. Brown testified Michael had a medical marijuana card.

44. Brown testified his opinion that Michael was under the influence of drugs was also based on his belief Michael was under the influence of cocaine. However, Brown was not aware the State Crime Lab found no cocaine in Michael's blood.

45. Brown relied on hospital records for his opinion Michael had cocaine in his

blood. Brown testified he is now aware the Hospital did not test Michael's blood for cocaine. Brown testified he relied on unconfirmed results of a Hospital urine screening test. Brown relied on the Hospital result even though the Hospital warns the screening result is to be used for medical purposes and must not be used for nonmedical purposes such as employment or legal testing.

46. Brown admitted he is not familiar with drug screening tests. Brown admitted it might have been a good idea to consult with a toxicologist or medical person who understood the drug test results before he concluded Michael was under the influence.

47. Brown testified a circumstance that contributed to the severity of the injuries sustained was lack of seat belt use by both driver and passenger.

48. Brown concluded Jennifer was ejected through the sunroof of the vehicle. Brown did not do any mathematical or physics calculations to support this conclusion. Brown did not use any measurements for his conclusions.

49. Brown did not do any occupant kinematic calculations to determine who was driving the vehicle.

50. Brown did not input data into a computer to do a computer simulation to re-create the accident. Brown has not worked with a computer simulation. Brown testified there is one sergeant with the Highway Patrol that has the equipment to do a computer simulation. Brown requested a computer simulation be done. The computer simulation was started but it was never completed.

51. Brown testified that occupant injuries can assist in determining seating positions during a crash and that is properly done by a forensic pathologist. Brown is not a forensic pathologist, and a forensic pathologist did not assist him.

52. Brown admitted the State never collected any purported blood or biological evidence from the guardrail. Brown admitted there was no testing of the biological evidence.

53. Brown concluded Michael was driving the vehicle, and he was ejected out of the driver's side. Barcus testified the fact that Michael was located near the driver's side door by first responders was a very important factual basis for Brown's opinion that Michael was the driver. However, Brown testified he was not aware the very first witnesses on the scene actually found Michael near the front of the vehicle.

54. Brown admitted he interviewed Gloria Wells who described Michael as being more in front of the vehicle when she first arrived on the scene, and that Michael was moving or "kind of scooting." Brown admitted Gloria Wells drew a diagram and showed Michael in front of the vehicle.

55. Brown admitted Krista Michael was with Gloria Wells and was the other witness who first arrived on the scene. An electronically recorded interview of Krista Michael was done by the Montana Highway Patrol that has since been lost.

56. Brown admitted that after the crash began and the vehicle began to rotate the nose of the vehicle in a clockwise position, all forces caused anything that wasn't tied down to move in the direction of the driver's side of the vehicle. Brown admitted it is possible the forces could have caused a shoe to go from the passenger side to the driver's side of the vehicle.

57. Brown admitted the forces created inside the vehicle immediately after it started to crash was a forward motion. Brown admitted he states in his report that DNA testing revealed Michael's DNA was the major profile on the passenger airbag. Brown also admitted his report states Jennifer's DNA was found on the driver's side airbag. Brown testified Jennifer's DNA was on the back left side of the driver's airbag over towards the driver's door.

58. Brown admitted the Montana Highway Patrol conducted interviews of Julie Grooms, Mindy Bechtell, Dan Grooms, Brent Dschaak and Krista Michael, Todd Russell and Bernie Westra. He admitted that audio recordings were made for the interviews of Brent Dschaak and Krista Michael and was not sure if the other interviews were recorded. The audio recordings of the Brent Dschaak and Krista Michael interviews cannot be located. Brown has no explanation why the recordings are gone.

59. Meskimen conducted the recorded interviews of Brent Dschaak and Krista Michael with Giddings. Meskimen does not know where the audio recordings of the witness interviews of Krista Michael and Brent Dschaak are located.

60. Mike Long ("Long") is the laboratory operations manager at the Hospital. Long manages the day-to-day operations of the Hospital laboratory. Long has his degree in microbiology with an option in medical technology from Montana State University. He completed a one-year internship in medical technology from St. Patrick's Hospital. He is certified by the American Society of Clinical Pathologists as a medical technologist and licensed by the State of Montana as a clinical laboratory scientist

61. Long testified concerning the Hospital's laboratory test of blood and urine purportedly collected from Michael on January 25, 2012 for medical purposes. The Hospital lab reported on a lab form that Michael had a blood alcohol concentration of 231.0 milligrams per deciliter. This is the equivalent of .23 grams per hundred milliliters.

62. Long searched the Hospital records to determine the identity of the person who collected the blood sample from Michael for purposes of medical treatment. Long searched the laboratory records and the medical records of Michael's visit to the emergency room. Long was not able to identify the person who collected Michael's blood. Because Long could not identify

the person who took Michael's blood sample, Long cannot identify the qualifications of the person who took the blood sample.

63. Long testified that at some point after Michael's blood was collected, the Hospital lost the manual that is used in the laboratory for phlebotomy. Long is not aware of the existence of a separate manual in the emergency room or anywhere else in the Hospital. The manual would cover blood specimen collection, labeling and patient identification. Long could not find any records which identify the method used to collect Michael's blood, the site on Michael's body where the blood was drawn, how the site was prepared, the type of container used to collect the blood sample, how the sample was handled, who handled the sample prior to arrival in the laboratory, how the sample was transported to the laboratory, and who transported the sample.

64. Long testified the Hospital maintains records concerning the methodology and testing of blood and urine samples and calibration of instruments used to test blood and urine samples for two years. Any such records that existed at the time Michael's blood and urine was tested have been destroyed. Long testified there is no way of knowing at the present time whether the blood sample that was tested and reported as Michael's blood in the Hospital records was in fact Michael's blood. Long is aware of test tubes arriving at the lab with an incorrect patient's name.

65. Long testified the Hospital did not test the blood purported to be Michael's blood for THC or cocaine.

66. The Hospital did a screening test on the urine sample purported to be Michael's urine and it was positive for cannabinoids and for a metabolite of cocaine, but a confirmatory test was not done. The Hospital record includes a note for the screening test that says "Note: this report contains unconfirmed results. These results are to be used only for medical (i.e. treatment

purposes). They must not be used for nonmedical purposes, such as employment or legal testing."

67. Any findings of fact contained in the following Conclusions of Law are hereby incorporated herein.

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. Any conclusions of law contained in the foregoing Findings of Fact are hereby incorporated into these Conclusions of Law.

2. In the following Conclusions of Law, the Court addresses the issues argued in Michael's various pretrial motions in the same order addressed in the parties' briefing and proposed Conclusions of Law.

Motion 1. Whether the State's failure to provide Michael with a prompt initial appearance following his warrantless arrest on January 25, 2012 requires dismissal of the Information or other sanction.

3. Section 46–6–311(1), MCA, provides a peace officer may arrest a person when a warrant has not been issued if the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest.

4. When determining whether an individual has been arrested, there are three factors that must be examined: "(1) authority to arrest; (2) assertion of that authority with intention to affect an arrest; and (3) restraint of the person arrested." *State v. Schubert*, 2010 MT 255, ¶ 14, 358 Mont. 286, 244 P.3d 748 (citing *State v. May*, 2004 MT 45, 320 Mont. 116, 86 P.3d 42; and *State v. Widenhofer* (1997), 286 Mont. 341, 347, 950 P.2d 1383, 1386).

5. While Barcus and McCarthy were at the emergency room of the Hospital during the early morning hours of January 25, 2012, they observed Michael receiving emergency medical care. When the troopers contacted Michael, Michael was intubated and unconscious. At no time during the troopers' contact with Michael did Michael appear conscious or responsive. The troopers did not make any assertion of intent to arrest Michael or restrict or limit his movement or freedom. The troopers did not issue Michael a citation, or monitor his condition to determine when he was to be released from the hospital. The troopers did not demonstrate any intent to arrest Michael. There is no evidence to suggest Michael was aware that law enforcement officers were present at the emergency room during the morning of January 25, 2012. There is no evidence that Michael was charged with any criminal offense regarding the crash until the State filed the Affidavit of Probable Cause and was granted leave to file the Information in this case.

6. The circumstances of this case are similar to those addressed by the Montana Supreme Court in *State v. Campbell*, 189 Mont. 107, 615 P.2d 190 (1980). In *Campbell*, law enforcement officers responded to a hospital to investigate a person (Campbell) who was involved in a vehicle crash. The officers spoke with Campbell and noted he could not provide any coherent answers and generally appeared confused and incoherent. One of the officers requested that a blood sample be taken from Campbell, and a blood sample was taken from Campbell. It was determined that Campbell was not under arrest. Campbell was not notified of the implied consent advisory and he did not consent to the taking of his blood sample. The Supreme Court determined that: "[I]t is apparent from a reading of the implied consent statute that an arrest is not a prerequisite to administering a blood alcohol test to a party who is unconscious or otherwise incapable of consenting to the test." *Campbell*, 189 Mont. at 115-116.

615 P.2d at 195.

7. When the circumstances of this case are examined according to the factors set forth in *Schubert* and *Campbell*, the Court concludes that Michael was not under arrest on January 25, 2012. Despite the fact that Barcus read the Implied Consent Advisory form and told Michael that he was under arrest, Barcus's act of reading the form was gratuitously done. Michael was unconscious. Telling Michael that he was under arrest did not result in his actually being under arrest. Therefore, an initial appearance was not warranted until Michael was charged by the filing of the Information in this case.

Motion 2. Whether evidence and any derivative evidence obtained by the State's warrantless searches and seizure at the Hospital must be suppressed.

8. Michael argues the State conducted warrantless searches and a warrantless seizure at the Hospital that violates Michael's rights under the United States and Montana Constitutions.

9. The Fourth Amendment to the United States Constitution protects the right of the people to be secure in their "persons, houses, papers, and effects" against unreasonable searches and seizures. A search occurs when the government physically intrudes upon one of these enumerated areas, or invades a protected privacy interest for the purpose of obtaining information. *United States v. Jones,* 132 S.Ct. 945, 049-51 (2012).; *Katz v. United States,* 389 U.S. 347, 360-361 (1967) (Harlan, J., concurring). A seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property.

10. Article II, Section 11, of the Montana Constitution, prohibits the government from conducting unreasonable searches and seizures. *State v. Jarman,* 1998 MT 277, ¶ 9, 291 Mont. 391, 967 P.2d 1099, citing *United States v. Cortez*, 449 U.S. 411, 417 (1981).

11. Article II, Section 10 of the Montana Constitution guarantees the right of privacy. The Montana Supreme Court has frequently stated in the search and seizure context that

Montanans are afforded a broader privacy protection under Article II, Sections 10 and 11 of the Montana Constitution than under the Fourth Amendment. *See State v Goetz,* 2008 MT 296, ¶ 14, 345 Mont. 421, 191 P.3d 489; *Hulse v. Dept. of Justice*, 1998 MT 108, ¶ 25, 289 Mont. 1, 961 P.2d 75; *State v. Siegal*, 281 Mont. 250, 263, 264, 934 P.2d 176, 183, 184 (1997) (overruled in part on other grounds), *State v. Kuneff*, 1998 MT 287, ¶ 19, 291 Mont. 474, 970 P.2d 55; *State v. Bullock*, 272 Mont. 361, 384, 901 P.2d 61, 75 (1995); *State v. Long*, 216 Mont. 65, 67, 71, 700 P.2d 153, 155, 157 (185).

12. The right to privacy is the cornerstone of protections against unreasonable searches and seizures. *State v. Hardaway,* 2001 MT 252, ¶34, 307 Mont. 139, 36 P.3d 900.

13. The Montana Supreme Court has found that medical records and health care information are quintessentially private and deserve the utmost constitutional protection under Article II, Section 10's guarantee of privacy. *State v. Nelson,* 283 Mont. 231, 242, 941 P.2d 441, 448 (1997). In *Nelson,* the Supreme Court held health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy and health care or other interests. *Id.* The constitutional right encompasses a fundamental right to control circulation of personal information. *Nelson,* 283 Mont. at 241, 941 P.2d at 448; *See also, Malcomson v. Northwest,* 2014 MT 242, __P.3d ____ (finding § 39-71-604(3), MCA unconstitutional because it violated claimant's right of privacy by permitting agent of insurer to communicate directly with healthcare provider and receive healthcare information without prior notice to the claimant).

14. The Montana legislature has recognized health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy and health care or other interests, and has adopted the Uniform Health Care

Information Act and Health Care Information Privacy Requirements for Providers subject to HIPPA. *See* §§ 50-16-502, MCA et seq. and §§50-16-801, MCA et seq.

15. While the Uniform Health Care Act is mainly directed at health care providers, there are two reasons the Act is relevant here. First, it is further evidence that a person has a reasonable expectation of privacy in one's health care information. Second, the Act provides for civil and criminal penalties for non-health care providers who improperly access private health care information. For example, it is a crime for a person by misrepresentation of entitlement to health care information to examine or obtain health care information maintained by a health care provider. *See e.g.* §50-16-551, MCA.

16. Federal law also provides privacy protection for health care information under the Health Insurance Portability and Accountability Act (HIPAA). 42 U.S.C. §1320d. Failure to comply with HIPAA can result in civil and criminal penalties. 42 USC § 1320d-5.

17. This Court concludes Michael had a reasonable expectation of privacy in his medical and health care information when he was in the trauma room at the Hospital emergency room and in his room in the Intensive Care Unit. This Court concludes Michael had a reasonable expectation of privacy when he was in the trauma room in the Hospital emergency room and when he in was in his room in the Intensive Care Unit.

18. The troopers conducted a number of warrantless searches and a warrantless seizure which the Court must examine.

19. On January 25, 2012, without Michael's consent and while he was unconscious, McCarthy conducted a warrantless search when he entered Michael's trauma room and while Michael was unconscious, obtained Michael's private health care information, removed Michael's hospital gown and sheet, examined Michael's body, and took photographs of Michael

and his injuries and personal property items including a shoe and anything else he may have observed when he was in Michael's trauma room.

20. On January 25, 2012, without Michael's consent, Barcus conducted a warrantless search by entering the emergency room and remaining in the emergency room to obtain Michael's private health care information including blood test results, information about Michael's injuries, and any other information Barcus may have learned while he remained in the emergency room.

21. On January 25, 2012, without Michael's consent, Barcus conducted a warrantless search by entering Michael's trauma room and obtained Michael's private health care information including his pulse rate information, specific injuries sustained by Michael and searched personal property items in Michael's room, conducted a blood draw, and any other information Barcus may have learned when he entered Michael's trauma room.

22. On January 25, 2012, without Michael's consent, Giddings and Meskimen conducted a warrantless search when they entered Michael's room in the Hospital's ICU and conducted a search for Michael's clothing. Meskimen directed hospital staff to seize Michael's clothing and put the items in a locked locker.

23. Hospital staff's seizure of Michael's clothing at the direction of Meskimen constitutes State action because Meskimen directed the actions of the Hospital staff. *See United States v. Souza,* 223 F.3d 1197, 1201-1202 (10th Cir. 2000).

24. While Michael was still unconscious in the hospital room, Barcus read the Implied Consent Advisory Form to Michael. Despite this Court's conclusion that Michael was not arrested for the purpose of an initial appearance, the Implied Consent Advisory Form indicates Barcus arrested Soule for driving under the influence of alcohol. Even though Michael

was unconscious, the line indicating Michael's consent to a *breath* test is checked "Yes." The State has not produced any audio recording of the Implied Consent Advisory so there is no record of Barcus informing Michael that Barcus was electing to do a *blood* test.

25. Warrantless searches and seizures are per se unreasonable and unconstitutional -- subject only to a few specifically established and well-delineated exceptions -- under the United States Constitution, the Montana Constitution, and federal and Montana law. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *Stoner v. California*, 376 U.S. 483, 486 (1964); *Katz v. United States*, 389 U.S. 347, 357 (1967); *State v. Loh*, 275 Mont. 460, 468, 914 P.2d 592, 597 (1996). These constitutional protections are codified at Section 46-5-101, MCA

26. Because the law enforcement officer did not have the authority of a search warrant the State has a very heavy burden to demonstrate a judicially recognized exception exists to justify the warrantless searches and seizure. *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984). If the State fails to meet its heavy burden then all evidence obtained as a result of the seizure and searches must be suppressed pursuant to the exclusionary rule. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Bullock*, 272 Mont. at 385, 901 P.2d at 76.

27. In addition, the use of other evidence acquired directly or indirectly as a result of a Fourth Amendment violation must be suppressed as "fruits of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471 (1963). This means any and all evidence obtained as a result of the illegal searches of Michael and the illegal seizure must be suppressed. *See, e.g., Taylor v. Alabama*, 457 U.S. 687 (1982). The exclusionary rule applies to both tangible and intangible evidence and also excludes derivative evidence, via the fruit of the poisonous tree doctrine, if such evidence is obtained by exploitation of the illegality. *See, Wong Sun*, 371 U.S. at 488; *State v. Bassett*, 1999 MT 109, ¶ 57, 294 Mont. 327, 982 P.2d 410. In the broadest sense the fruit of

the poisonous tree doctrine can be regarded as a device to prohibit use of any secondary evidence which is the product of or which owes its discovery to illegal government activity.

28. The purpose of the exclusionary rule is to compel respect for the constitutional guaranty in the only effectively available way by removing the incentive to disregard it. *Elkins v. United States,* 364 U.S. 206, 217 (1960). The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits. The exclusionary rule is premised on suppressing evidence that is in some sense the product of illegal governmental activity. *Nix v. Williams*, 467 U.S 431 (1984). The primary purpose of the exclusionary rule is to deter future unlawful police conduct. *United States v. Calandra*, 414 U.S. 338, 347 (1974).

29. The State contends that two exceptions apply. The State asserts the plain view exception applies. Under the plain view exception, a warrantless seizure of evidence is lawful if certain conditions are met. First, the officers must be lawfully in the place where the items are in plain view. The essential predicate to any valid warrantless seizure of incriminating evidence is that the officer must be lawfully at the place from which he could plainly view the evidence. In other words, the officer's initial entry onto or intrusion into the place where he views the evidence must not have been in violation of the Fourth Amendment or in violation of Article II, section 11 of Montana's Constitution. *Horton v. California,* 496 U.S. 128, 136 (1990); *State v Loh,* 275 Mont. 460, 473, 914 P.2d 592, 600 (1996).

30. Second, the item must not only be in plain sight, but its incriminating character must also be immediately apparent. *Id.; Coolidge v. New Hampshire,* 403 U.S. 443 (1971). If officers have to manipulate the object, even by minimal movement, in order for its incriminating nature to become readily apparent, it is considered to be a search beyond plain view and will not

satisfy the plain view exception. *Arizona v. Hicks,* 480 U.S. 321 (1987).

31. Finally, not only must the officer be lawfully located in the place where the object can be plainly seen, but the officer must also have a lawful right of access to the object itself. *Horton,* 496 U.S. at 136; *See also, Minnesota v. Dickerson,* 508 U.S. 366, 375 (1993).

32. The State has failed to establish the plain view exception is applicable. First, Barcus, McCarthy, Meskimen, Giddings, or any other law enforcement officer was not lawfully in Michael's trauma room and ICU room. Barcus was not lawfully in the emergency room after it became apparent he could not have access to Michael for a blood draw.

33. The State fails to cite any Montana authority that allows a police officer to enter a person's hospital room or hospital treatment area. The State seems to suggest that because medical staff was present providing medical treatment to Michael that he had no expectation of privacy at the hospital. The State cites no authority for this position.

34. While Michael could expect that hospital staff would enter his hospital room to provide medical treatment, Michael had no reason to believe that law enforcement officers would enter the treatment area and his room to search for his health care information, to inspect and take pictures of his body and to seize his personal property. *See Jones v State,* 648 So.2d 669, 677 (Fla. 1994). The general public did not have access to the emergency room treatment area, Michael's trauma room, or Michael's room in ICU.

35. In Montana, the right to privacy is a fundamental constitutional right and the Montana Supreme Court specifically recognizes the right to privacy in health care information. *State v. Nelson,* 283 Mont. 231, 941 P.2d 441 (1997). This fundamental right includes the right to control circulation of personal information. *Nelson,* 283 Mont. at 241, 941 P.2d at 448. The Montana Supreme Court recently reaffirmed the right to privacy in health care information

includes the right to control access to that information. *See Malcomson v. Northwest,* 2014 MT 242, __P.3d ____ (finding § 39-71-604(3), MCA unconstitutional because it violated claimant's right of privacy by permitting agent of insurer to communicate directly with healthcare provider and receive healthcare information without prior notice to the claimant).

36. Merely because medical staff was attending to Michael does not vitiate his expectation of privacy at the hospital and give police officers the right to enter Michael's hospital room or an emergency treatment area. *See State v Bassett,* 1999 MT 109, ¶ 37, 294 Mont. 327, 982 P.2d 410 (although a firefighter is justified to enter a home to extinguish a fire, this does not mean that Montanans reasonably expect that the private sanctity of their home will now be open to other government officers to search for evidence of unrelated criminal activity because a firefighter was legitimately on the premises).

37. Second, the items were not in plain sight and the incriminating nature was not readily apparent. For example, McCarthy had to move Michael's hospital gown and sheet to look at his body and take photographs of his injuries. McCarthy moved the shoe that was in Michael's hospital room to photograph the shoe and the bottom of the shoe. McCarthy and Barcus had no right to access hospital monitoring equipment to collect medical information about Michael. The incriminating nature of the evidence seized was not readily apparent. McCarthy and Barcus did not have a right of access to the evidence.

38. The State has failed to meet its burden that the plain view exception applies.

39. The second exception relied on by the State is exigent circumstances. Exigent circumstances and probable cause must be present for a warrantless seizure. *State v Wakeford,* 1998 MT 16, ¶ 22, 287 Mont. 220, 953 P.2d 1065. Probable cause exists if the facts and circumstances within the officer's personal knowledge, or imparted to the officer by a reliable

source, are sufficient to warrant a reasonable person to believe the suspect has committed an offense. *Wakeford,* ¶ 22.

40. To justify the warrantless searches and warrantless seizure of evidence, the State bears the burden of proving both (1) the existence of circumstances that would cause a reasonable person to believe that a search or seizure was necessary to prevent the destruction of relevant evidence, and (2) that a warrant could not have been obtained in time. *See Wakeford,* ¶23*; State v. Good,* 780 F.2d 773, 775 (9th Cir. 1986); *Missouri v. McNeely,* 133 S.Ct. 1552 (2013) (no per se exigent circumstance exception to warrant requirement for blood tests in drunk driving cases); *State v. Lewis,* 2007 MT 295, ¶21, 340 Mont. 10, 171 P.3d 731. The Court must look to the totality of the circumstances to determine if exigent circumstances justified acting without a warrant. *See McNeely,* 133 S.Ct. at 1559; *Lewis,* ¶49.

41. The State has failed to present any facts justifying the warrantless searches and seizure. If law enforcement agents were really concerned about destruction of evidence they could have applied for a search warrant by telephone. The State has not presented any evidence establishing law enforcement agents could not have sought a search warrant to seize the evidence rather than make a warrantless search or seizure. *See e.g. Missouri v McNeely,* 133 S.Ct. 1552 (2013) (in the modern world of technology police can obtain a warrant quickly by using cellphones or email and a judge is usually available at all hours to grant a warrant request); *Thomas v. State,* 127 So.3d 658, 663 (Fla. Dist. Ct. App. 2013) (possible destruction of cell phone did not justify exigent circumstances); *State v. Hubbard,* 2008 WL 4809475 (N.J. Super. Ct. App. Div. 2008) (warrantless seizure of cell phone unreasonable and required suppression; officer could have obtained a telephonic search warrant); *United States v. Manfredi,* 722 F.2d 519, 522 (9th Cir. 1983) (telephone warrant available).

42. The State has not established probable cause existed to conduct the warrantless searches and warrantless seizure at the hospital. Beyond citing the law about exigent circumstances, the State did not present any facts or argument to support exigent circumstances exception to the warrant requirement.

43. This Court concludes the State has failed to demonstrate an exception to the warrant requirement for the warrantless search and seizure of Michael's person and property at the Hospital.

Motion 3. Whether evidence obtained as a result of a warrantless arrest of Michael on January 25, 2012 must be suppressed.

44. This Court has concluded that Michael was not arrested at the Hospital for purposes of requiring a prompt initial appearance after January 25, 2012. Regardless, Michael contends that under any circumstances, the State did not have probable cause to arrest Michael at the Hospital. This issue is important because if the State had probable cause to arrest Michael, certain consequences of the arrest might apply. Assuming that there was a proper arrest for purposes of the seizure of evidence, the Court will analyze whether there was probable cause for the arrest.

45. On January 25, 2012, approximately two hours after the accident, Barcus read Michael the Implied Consent Advisory and advised Michael he was under arrest for driving (or being in actual physical control of) a motor vehicle while under the influence of alcohol (and/or drugs) without a warrant. Barcus also indicated on the Form he had probable cause to believe Michael was under the influence of alcohol (and/or drugs) in violation of §61-8-401, MCA and the vehicle he was driving was involved in a motor vehicle accident resulting in property damage and serious bodily injury or death. Michael was in the hospital and unconscious at the time.

46. The State asserts Michael was not arrested. The Court has concluded that

Michael was not arrested for the reasons set forth in Motion 1.

47. The Fourth and Fourteenth Amendments to the United States Constitution and Article II, Sections 11, of the Montana Constitution, prohibit the government from conducting unreasonable searches and seizures. Article II, Section 10 of the Montana Constitution guarantees the right of privacy. The Montana Supreme Court has frequently stated in the search and seizure context that Montanans are afforded a broader privacy protection under Article II, Sections 10 and 11 of the Montana Constitution than under the Fourth Amendment. *See Goetz,* ¶ 14; *Hardaway,* ¶ 34.

48. Section 46–6–311(1), MCA, provides a peace officer may arrest a person when a warrant has not been issued if the officer has probable cause to believe the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest.

49. The Court concludes the State did not have probable cause to arrest Michael on January 25, 2012 for driving under the influence or probable cause to believe he was was driving the vehicle involved in a motor vehicle accident resulting in property damage and serious bodily injury or death.

50. Barcus testified he was called out at 2:30 a.m. to assist with the crash and was advised by Giddings to head directly to Bozeman Deaconess Hospital to interview the driver involved in the crash. Barcus was also advised the passenger was deceased.

51. Barcus testified he did not know how Giddings knew within 60 minutes of the crash that Michael was the driver. The State presented no evidence that the officers had any evidence establishing probable cause Michael was the driver such as witness statements or statements from Michael. Both Michael and Jennifer were found outside the vehicle.

52. Probable cause requires more than a hunch or mere suspicion. *See Terry v. Ohio,* 392 U.S. 1, 22 (1968); *State v Lahr,* 172 Mont. 32, 35, 560 P.2d 527, 529 (1977).

53. The officers had no reason to suspect that any one particular occupant of the vehicle had been the driver or that Michael was under the influence of alcohol while operating a motor vehicle. *See e.g. State v. Hudson,* 168 Wash. App. 1023, 2012 WL 1941796 (Wash. App. Div. 2 2012) (police did not have probable cause to arrest defendant for being driver of vehicle that crashed and evidence obtained from his arrest should have been suppressed); *State v. Weber,* 120 So.3d 328 (La. App. 1 Cir. 2013) (police officer did not have probable cause to believe defendant was driver or under the influence of drugs or alcohol when blood test administered).

54. Use of evidence that has been acquired directly or indirectly as a result of a Fourth Amendment violation must be suppressed as "fruits of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471 (1963). This means that any and all evidence obtained as a result of the illegal search of Defendant must be suppressed. *See, e.g., Taylor v. Alabama*, 457 U.S. 687 (1982). The exclusionary rule applies to both tangible and intangible evidence and also excludes derivative evidence, via the fruit of the poisonous tree doctrine, if such evidence is obtained by exploitation of the illegality. *See, Wong Sun*, 371 U.S. at 488; *State v. Bassett*, 1999 MT 109, ¶ 57, 294 Mont. 327, 982 P.2d 410. In the broadest sense the fruit of the poisonous tree doctrine can be regarded as a device to prohibit use of any secondary evidence which is the product of or which owes its discovery to illegal government activity.

55. The seizure of evidence, including Michael's blood sample, any blood test results, DNA results, and any other derivative evidence, cannot be justified as a result of a warrantless arrest that is not supported by probable cause. This Court has concluded that an arrest did not occur on January 25, 2012.

56. Michael next argues that even if the Court determines the State had probable cause to arrest Michael, the State exceeded the statutory authorized use of Michael's blood sample under the Implied Consent law requiring suppression of DNA testing results.

57. On January 25, 2012, Barcus took Michael's blood sample pursuant to the Implied Consent law. Section 61-8-402(1), provides that a person who operates or is in actual physical control of a vehicle upon ways of this state open to the public is considered to have given consent to a test or tests of the person's blood or breath *for the purpose of determining any measured amount or detected presence of alcohol or drugs in the person's body.* (emphasis added). The State used Michael's blood sample taken pursuant to the Implied Consent law to obtain a DNA profile for Michael. Section 61-8-402(1), MCA does not permit a blood sample taken under Section 61-8-402(1), MCA to be used for DNA testing by the State.

58. The State asserts that inevitable discovery and independent source doctrine applies to the State's use of the Implied Consent blood draw for DNA testing.

59. The independent source rule provides that if police obtained the evidence from an independent source not connected to the illegal search or seizure, the evidence is admissible. *United States v. Crews,* 445 U.S. 463 (1980). If the police initially discover evidence during an illegal search, but subsequently discover the same evidence during a valid search, the evidence is admissible. However to avoid the exclusionary rule, the second search must be pursuant to a warrant totally independent of the first illegal search. *See Murray v. United States,* 487 U.S. 533 (1988). Genuine independence may be difficult to establish where the seized evidence is kept in the police's possession. *State v Dasen,* 2007 MT 87, ¶20, 337 Mont. 74, 155 P.3d 1282. Here, the State retained possession of the blood sample taken pursuant to the Implied Consent law and never obtained a warrant to obtain Defendant's blood sample or DNA sample. The State has not

demonstrated the blood sample or DNA was obtained through a lawful independent source.

60. The inevitable discovery doctrine provides if the State can establish by a preponderance of the evidence the evidence would have been inevitably discovered by lawful means, then the exclusionary rule will not prevent introduction of the evidence. *Nix v. Williams,* 467 U.S. 431 (1984). There are limits because inevitable discovery is not the same thing as "possible" or "probable" discovery. *United States v. Allen,* 159 F.3d 832, 842-43 (4th Cir. 1998).

61. Also, the inevitable discovery doctrine will not justify a warrantless search simply because the agents had probable cause to seek a warrant but did not. *See United States v. Mejia,* 69 F.3d 309, 319-20 (9th Cir. 1995); *State v. Ellis,* 2009 MT 192, ¶¶58-59, 351 Mont. 95, 210 P.3d 144. If evidence were admitted notwithstanding the officers' unexcused failure to obtain a warrant, simply because probable cause existed, then there would never be any reason for officers to seek a warrant.

62. The State never obtained a warrant for Defendant's blood sample or DNA. The State makes an unsupported assertion "DNA evidence from Defendant would have been inevitably discovered." The State does not explain or demonstrate DNA or a blood sample would have been inevitably discovered. If the Court condones law enforcement's conduct here, there would never be any reason for officers to seek a warrant for DNA evidence or a blood sample after collecting a blood sample under the Implied Consent law. The Implied Consent statute is clear and strictly limits the State's use of a blood sample. § 61-8-402(1), MCA.

Motion 4. Whether the affidavit of probable cause filed in support of the Information contains false statements and material omissions and statements and when purged of its falsities and the material omissions are considered it is not sufficient to support a finding of probable cause.

63. The United States Supreme Court determined a criminal defendant may challenge

the truthfulness of the factual statements made in an application for a warrant, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth and Fourteenth Amendment require a hearing be held at the defendant's request. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978); U.S. Const. Amend. IV and XIV. This challenge is permitted based on the assumption the factual showing establishing probable cause must be truthful in the sense that the information put forth in the warrant application is believed or appropriately accepted by the affiant as true. *Id.* at 165. Misstatements in affidavits are a serious matter since, unless they are controlled, law enforcement can effectively circumvent the probable cause requirement by the simple expedient of exaggeration. *United States v. Mankani*, 738 F.2d 538, 546 (2d Cir. 1984); *Franks*, 438 U.S. at 168 (Fourth Amendment would be reduced to a nullity if police officer able to use deliberately falsified allegations to demonstrate probable cause and remain confident the ploy was worthwhile).

64. In *Franks*, the United States Supreme Court held a defendant can challenge a facially valid affidavit by making a substantial preliminary showing that (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit purged of its falsities would not be sufficient to support a finding of probable cause. *Franks*, 438 U.S. at 155. At the preliminary stage, clear proof of deliberate or reckless misstatements is not required, but is reserved for the evidentiary hearing. Where the defendant makes such a showing, the Fourth Amendment requires a hearing be held at the defendant's request. *Id.* at 155-56. If after the limited evidentiary hearing the court concludes the magistrate or judge was misled by the information in the affidavit that the affiant knew was false or would have known was false except for reckless disregard of the truth, then suppression is an appropriate remedy. The Court must void the search and suppress the fruits thereof. *Franks*, 436 U.S. at 156; *United States v.*

Leon, 468 U.S. 897 (1984).

65. Material omissions as well as false statements are subject to challenge. *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985); *United States v. Jacobs*, 986 F.2d 1231 (8th Cir. 1993) (officer acted with reckless disregard when officer told magistrate that drug sniffing dog showed "interest" in defendant's bag but failed to tell magistrate dog had not "alerted" on bag); *See also, State v. Worrall*, 1999 MT 55, ¶ 33, 293 Mont. 439, 976 P.2d 968. The defendant must show the affidavit supplemented by the omissions would not be sufficient to support a finding of probable cause. *Stanert*, 762 F.2d at 782; *Worrall*, ¶ 46 (would omitted material add anything to the probable cause analysis). The Eighth Circuit Court of Appeals held omissions are made with reckless disregard if an officer withholds a fact in his knowledge that "any reasonable person would have known that this was the kind of thing the judge would wish to know." *Jacobs*, 986 F.2d at 1235.

66. The fact that probable cause existed and could have been established in a truthful affidavit will not cure a *Frank's* error. *Baldwin v. Placer County*, 418 F.3d 966, 971 (9th Cir. 2005); *United States v. Davis*, 714 F.2d 896 (9th Cir. 1983). The deliberately false or reckless inclusion of perceptions of sight, smell, and sound - given the court's reliance on officers' experience - is "unforgiveable." *Hervey v. Estes*, 65 F.3d 784, 789-91 (9th Cir. 1995) (applying *Franks* to false statements regarding officers' experience and the smell of a meth lab). The due process principles of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny concerning the production of exculpatory or potentially exculpatory evidence are applicable to suppression hearings involving a challenge to the truthfulness of allegations in the affidavit for a search warrant. *United States v. Barton*, 995 F.2d 931, 934-36(9th Cir. 1992).

67. The Montana Supreme Court has modified the approach used in *Franks*. In

Worrall, the Court questioned placing the burden on the defendant of proving the false statements were made knowingly, willingly, intentionally, or with reckless disregard for the truth. *Worrall*, ¶ 31-34. If inaccurate or misleading information is included in the application, it must be excised from the application regardless of whether that information was included mistakenly, negligently or intentionally. *Id.*, ¶ 33. A search based upon a warrant application which contains material misstatements and inaccurate information may skew the magistrate's determination of probable cause. A search is no more reasonable nor less an invasion of privacy merely because the misstatements and inaccuracies were made mistakenly, unintentionally or negligently. *Id.*

68. There is nothing in the *Franks* or *Worrall* decisions that would lead to the conclusion that the rule should not apply to false statements or material omissions in the affidavit of probable cause in support of the Information where the false statements or material omissions were necessary for an impartial judge to fairly determine probable cause. *See State v. Mann*, 123 Wis.2d 375, 385-386, 367 N.W.2d 209, 213 (Wis. 1985); *State v. Manuel*, 213 Wisc.2d 308, 315, 570 N.W.2d 601, 604 (Wisc. App. 1997) (*Franks* applies to challenge to complaint forming basis for arrest warrant); *State v Bergin*, 214 Conn. 657, 666, 574 A.2d 164, 169, n.8 (1990) (*Franks* applies to challenge to a complaint forming basis for arrest warrant). In the *Franks* context of a criminal complaint, the misrepresentations of the complainant are removed from the complaint or the qualified omitted facts are inserted, and if probable cause does not exist independently, the effect and sanction is the dismissal of the complaint. *Mann*, 123 Wisc.2d at 387, 367 N.W.2d at 214.

69. The State asserts Michael has failed to make a sufficient preliminary showing because Michael has not submitted any supporting affidavit, sworn statement or documentation

to the motion.

70. Michael's motion provides a list of the false statements and material omissions. Michael asserts the false statements and material omissions are based on the State's forensic evidence and recorded witness statements obtained by law enforcement agents. The false statements and material omissions are established in documents and materials from the State including the forensic toxicology report from the Montana Department of Justice, Forensic Science Division ("State Crime Lab"), the State's recorded witness statements to law enforcement agents, incident reports by McCarthy and others, and the accident report by Brown.

71. The State relies on *State v. Minez,* 2004 MT 115, 321 Mont. 148, 89 P.3d 966 and *State v. Feland,* 267 Mont. 112, 882 P.2d 500 (1994). Both *Minez* and *Feland* are distinguishable from this case. In *Feland,* the defendant made unsupported general denials of an informant's statements contained in an affidavit. *Feland,* 267 Mont. at 115, 882 P.2d at 502. Similarly, in *Minez,* the defendant made an unsupported assertion that statements attributed to a person in the affidavit now denied making the statements. *Mines,* ¶ 24.

72. Here, Michael did not make an unsupported general denial of an informant's statements or claim a witness changed his or her testimony. Rather, the information that is the basis for the *Franks/Worrall* claim is the State's investigative information. Michael challenged false statements and material omissions based on documents in the State's possession and provided to Michael in discovery by the State. Michael established the false statements and material omissions through witness testimony and exhibits at the hearing.

73. After *Feland* was decided, the Montana Supreme Court revised the preliminary showing that was needed for a hearing on false statements and material omissions in *State v. Worrall,* 1999 MT 55, 293 Mont. 439, 976 P.2d 968. In *Feland,* the Montana Supreme Court

noted the primary factor required for a preliminary showing under *Franks* is that the affiant deliberately or with reckless disregard for truth included false statements in the warrant application. Later, in *Worrall,* the Court questioned placing the burden on the defendant of proving the false statements were made knowingly, willingly, intentionally, or with reckless disregard for the truth. *Worrall,* ¶ 31-34. If inaccurate or misleading information is included in the application, it must be excised from the application regardless of whether that information was included mistakenly, negligently or intentionally. *Id.*, ¶ 33. Therefore, Michael does not need to make a preliminary showing that the affiant deliberately or with reckless disregard for truth included false statements or material omissions.

74. The Court concludes Michael made a sufficient preliminary showing in the briefing filed in support of his pretrial motions that the affidavit of probable cause contains false statements and material omissions based on references to the State's discovery.

75. Michael established the following false statements and material omissions in the affidavit of probable cause ("APC") at the hearing:

A. Jennifer's DNA and Michael's DNA were both found on the driver's side airbag. Only Michael's was found on the passenger side airbag. The APC does not inform the Court of this information. This is a material omission.

B. A long brown hair consistent with Jennifer's hair was found on a piece of jagged torn metal on the driver's door along with blood. The APC does not include this information and is a material omission.

C. There are no fingerprints recovered from the keys or steering wheel that provide evidence who was driving the vehicle. The APC does not include this information and is a material omission.

D. There are no witnesses who can identify whether Michael or Jennifer was driving the vehicle. This is a material omission.

E. Neither Michael nor Jennifer was wearing their seatbelts. This is a material omission.

F. Both Jennifer and Michael were found outside the vehicle. This is a material omission.

76. In paragraphs 6 and 16, the APC asserts Michael was found by the driver's side door. The APC fails to inform the Court that witnesses who first came upon the accident scene reported that Michael was located in front of the vehicle not by the driver's side door as alleged in the APC. This is a material omission and makes the allegation concerning Michael being found by the driver's side door a false statement.

77. The APC refers to "blood and biological evidence" outside the truck and at the accident scene. The State failed to collect and test any of the purported blood and biological evidence at the accident scene so any such allegations in the APC are false, or at a minimum are not credible evidence.

78. Brown's conclusions stated in the APC in paragraphs 15 and 16 about where Michael and Jennifer were seated in the vehicle, the accident mechanism, the ejection path and blood and other biological evidence is based on non-existent or unreliable evidence, conjecture and speculation.

79. The APC in paragraph 8 alleges that upon his arrival at the Hospital after the accident, Michael's BAC was .231 and tested positive for the presence of THC and cocaine. There are several problems with this allegation. First, the allegation includes private health care information and was illegally obtained in violation of Michael's constitutional rights and cannot

be used to establish probable cause. Second, it is also unreliable and incompetent evidence because the State cannot establish it is Michael's blood. The State cannot establish the blood draw referred to in the APC taken at 02:30 for medical treatment purposes is Michael's blood. Additionally, the State cannot establish who took the blood draw, and the credentials of the person who took the blood draw. This allegation is based on incompetent and unreliable evidence that cannot be used to establish probable cause. Third, the medical blood draw at 02:30 did not show the presence of cocaine or THC. Therefore, this allegation in the APC is a false statement. The Hospital conducted a preliminary urine screening test at 02:40 that shows a "positive" result, but the Hospital records indicate the urine test results are "unconfirmed" and require confirmation. There is no confirmatory test in the Hospital records. The Hospital screening test cannot be used for legal purposes.

80. The APC fails to inform the Court the only legal blood draw after the accident was taken at 04:18 and later sent to the Montana Crime Lab, and revealed Michael's BAC was 0.07 gm/100ml (below the legal limit), had 1 ng/ml of THC (below the legal limit), and did not show the presence of cocaine. This is a very low level of THC in the blood. Michael has a medical marijuana card. The amount of 1 ng/ml is well below the quantity of 5 ng/ml of THC set forth in the Medical Marijuana Act, §50-46-320(7)(a), MCA (amount of THC in blood needed for person with medical marijuana card to be charged with violation of driving under the influence under §61-8-401, MCA). The failure of the State to include this information in the APC constitutes material omissions.

81. The APC refers to a brown shoe seen in Michael's Hospital room in paragraph 7. This information was illegally obtained at the Hospital in violation of Michael's constitutional rights and cannot be used to establish probable cause.

82. The APC refers to Michael's health care information concerning his injuries in paragraph 7. This is confidential private health care information illegally obtained at the Hospital and cannot be used to establish probable cause.

Motion 5. Whether the State failed to preserve and destroyed evidence requiring the Information to be dismissed or other sanction.

83. On January 25, 2012, law enforcement responded to the accident scene. McCarthy observed a long brown hair on a piece of jagged torn metal near the driver's door. McCarthy observed the hair was consistent with the Jennifer's hair. There was blood on the driver's side door near the hair. Giddings took a photograph of the hair. The State took possession of the vehicle on January 25, 2012 at the accident scene.

84. The State admits the long brown hair was not preserved and is now missing.

85. During its forensic review of the vehicle, the State took a swab from the driver's side dash. The State admits this evidence item was not preserved and is now missing.

86. The Court concludes the evidence that has been destroyed is exculpatory evidence. The hair on the driver's side door on a jagged piece of metal was long and brown, and consistent with Jennifer's hair. There was blood on the driver's side door near the hair. The hair is exculpatory evidence because Michael could use the hair to rebut the State's theory Jennifer was in the passenger seat and ejected out the sunroof. Evidence of Jennifer's hair on a jagged piece of metal on the driver's side door could be evidence that Jennifer was the driver and was ejected out the driver's side door. The same is true of the missing swab from the driver's side dash.

87. The State contends Michael is not prejudiced by the destruction of this evidence because other evidence shows DNA from Jennifer was present on the driver's side of the vehicle. It is not for the State to decide if the defense has enough evidence. There is no exception to the

State's discovery obligations under § 46-15-322, MCA, the United States and Montana Constitutions, and *Brady/Giglio* and its progeny allowing the State to unilaterally decide there is sufficient other evidence for the defense or excuse the State's conduct.

88. Also, it was apparent during Brown's testimony the State intends to dispute that Jennifer's DNA on the driver's airbag demonstrates she was the driver.

89. The State relies on *State v. Heth,* 230 Mont. 268, 750 P.2d 103 (1988) and *State v Wagner,* 2013 MT 47, 369 Mont. 139, 296 P.3d 1142. To the extent the State is suggesting this is a case of failure to gather evidence rather than failure to preserve, the State is incorrect. In *Heth,* the defendant was arrested for DUI and taken to the Gallatin County Detention Center. An officer activated a video recorder to film Heth's activities but failed to turn on the audio so no sound was recorded. Heth claimed he was denied due process because the audio may have contained exculpatory evidence showing he did not have slurred speech. Heth argued the police were required to gather evidence by engaging the audio on the video tape. The video was not admitted in evidence after objections by the defense counsel. The Montana Supreme Court explained the difference between "gathering" and "preserving" exculpatory evidence and held the police did not have a duty to gather exculpatory evidence. *Heth,* 230 Mont. at 271-272, 750 P.2d at 104-105. Similarly, *Wagner* is distinguishable because the defendant did not identify specific evidence that was not preserved, and only speculated that potentially exculpatory evidence existed. *Wagner,* ¶33.

90. Here, Michael does not claim the State failed to "gather" evidence. At the hearing, Michael demonstrated the State identified the hair on the vehicle and took possession of the vehicle. The State failed to "preserve" identified exculpatory evidence that was in the exclusive possession and control of law enforcement. The swab of the driver's side dash was in

the possession of the State and it was not preserved.

91. The State conducted recorded interviews of witnesses in this case. Despite Michael's written request for all audio recordings and the defense motion to compel the audio recordings, the State failed to provide all audio recordings. The State admits the audio recordings of certain witnesses are missing. With respect to the State's missing audio recordings of witness interviews, the Court concludes the audio recordings contain exculpatory information.

92. Giddings and Meskimen conducted a taped interview of Krista Michael on January 25, 2012. Krista Michael is a critical witness who was one of two individuals to first arrive on the accident scene and provide assistance to Michael at the scene. Krista Michael was traveling in a car with Gloria Wells. Ms. Wells told law enforcement agents that Michael was in front of the vehicle and Michael moved to the side of the road near the driver's door after the accident occurred and before law enforcement arrived. Michael's initial position in front of the vehicle directly contradicts statements included by the State in affidavits submitted to the Court. The State has placed great weight on Michael's position near the driver's side door for its assertion that Michael was the driver. This witness directly contradicts the State's theory and is critical exculpatory evidence. It is troubling the State has failed to provide the audio recording of Krista Michael's interview and has apparently destroyed it.

93. At the motions hearing, the State argued that Meskimen had prepared a summary of his interview with Krista Michael that is a sufficient replacement for the missing audio recording. The Court disagrees that Meskimen's six-line summary can replace the audio recording.

94. Under the Due Process Clause of the United States Constitution and the Montana Constitution, criminal prosecutions must comport with prevailing notions of fundamental

fairness. U.S. Const. Amend. V and XIV and Mont. Const. Article II, §§ 17 and 24; *See, State v. Colt*, 255 Mont. 399, 843 P.2d 747 (1992). The Montana Supreme Court has interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed a constitutionally guaranteed right of access to evidence. *See, e.g., State v. Swanson*, 222 Mont. 357, 722 P.2d 1155 (1986). This constitutional privilege delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system. *Brady v. Maryland*, 373 U.S. 83 (1963).

95. The prosecution has an affirmative duty under the Due Process Clause to disclose exculpatory and impeachment evidence to the defense. This has been the law for half a century. *Brady*, 373 U.S. at 87; *Kyles v. Whitley*, 514 U.S. 419, 432–33, (1995); *Benn v. Lambert*, 283 F.3d 1040, 1052–53 (9th Cir.2002); *State v. St. Dennis*, 2010 MT 229, ¶¶ 46–47, 358 Mont. 88, 244 P.3d 292; *State v. Ellison*, 2012 MT 50, ¶¶ 15–16, 364 Mont. 276, 272 P.3d 646. The disclosure obligation has also been a statutory requirement for several decades. See § 95–1803, RCM (enacted 1967); §§ 46–15–301, –302, MCA (1979 to 1985); § 46–15–322, MCA (1985 to present). The obligation applies not only to prosecutors, but also to persons who have participated in the investigation or evaluation of the case. *Kyles*, 514 U.S. at 437–38; § 46–15–322(4), MCA.

96. Suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady*, 373 U.S. 83. Exculpatory evidence is not limited to evidence of guilt or innocence, but instead can be either impeachment evidence or exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S.

150, 154 (1972). Evidence is considered material if there is a reasonable probability of a different result had the evidence been disclosed. *Bagley,* 473 U.S. at 682. Materiality does not require a demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. *Kyles v. Whitley,* 514 U.S. 419, 434 (1995). Rather the defendant must show that the government's suppression would undermine confidence in the outcome of the trial. *Id.*

97. Dismissal with prejudice is warranted where the State fails to preserve primary physical evidence constituting destruction of exculpatory evidence prejudicial to an effective defense. *State v. Halter,* 238, Mont. 408, 777 P.2d 1313 (1989). Where the State intentionally suppresses exculpatory evidence there is a *per se* violation of the accused's right to due process and dismissal is warranted. *State v. Schauf,* 2009 MT 281, ¶ 24, 352 Mont. 186, 216 P.3d 740. These standards apply whether the prosecutor or a government investigator is responsible for the suppression. Any prejudice suffered by the defendant remains the same in either circumstance. *State v. Patterson,* 203 Mont. 509, 512 662 P.2d 291, 293 (1983) (citing *Barbee v. Warden, Maryland Penitentiary,* 331 F.2d 842 (4th Cir. 1964)). Limiting the standards to suppression by the prosecutor might foster future suppression of evidence by investigating agencies. *Id.*

98. Since the forensic evidence (the hair from the driver's side door and swab from the driver's side dash), and audio recordings of witness interviews existed and were in the exclusive possession of the State, this case involves the failure of the State to "preserve" evidence rather than the failure to "gather" evidence. *See Swanson,* 222 Mont. 357, 722 P.2d 1155; *Halter,* 238 Mont. at 413, 777 P.2d at 1316. There is a distinction between gathering evidence and preserving evidence. *Id.* Therefore, once potentially exculpatory evidence is gathered or collected by the police, and is in the police officers' possession, then the officers are

obligated to preserve such possible evidence. The police have a duty to see to its safekeeping so that a defendant can exercise his or her right to gather possible exculpatory evidence. *Swanson,* 222 Mont. at 362, 722 P.2d at 1158.

99. The *Swanson* case involved law enforcement officers' possession of the defendant's blood sample that was drawn upon his arrest for driving under the influence of alcohol. The sample was to be refrigerated and sent to a lab for analysis, but the deputy sheriff in possession of the blood sample failed to refrigerate the sample while the defendant was held in custody. The sample remained unrefrigerated for two days, and the lack of refrigeration prevented the parties from obtaining a valid determination of the sample's blood alcohol content. *Swanson,* 222 Mont. at 359-361, 722 P.2d at 1156-1158. The Montana Supreme Court recognized the defendant had the right to attempt to obtain exculpatory evidence. *Swanson,* 222 Mont. at 360, 722 P.2d at 1157. Accordingly, the Court held that once the authorities took control of the sample, they had the duty to properly care for it. *Swanson,* 222 Mont. at 362, 722 P.2d at 1158.

100. While the police have no duty under Montana law to assist a defendant in gathering exculpatory evidence, once it is obtained, the police have a duty to preserve the evidence. The police cannot frustrate the defendant's efforts to gather evidence through either affirmative acts. *Id.* Police officers must avoid interference with the efforts on the part of the accused to obtain such exculpatory evidence. *State v. Patton,* 280 Mont. 278, 285, 930 P.2d 635, 5639 (1996) quoting *State v. Sadowski,* 247 Mont. 63, 79, 805 P.2d 537, 547 (1991). *See also Hammond v. State,* 569 A.2d 81, 88 (Del. 1990) (law enforcement agencies have a duty to preserve evidence in their possession which could be favorable to a defendant).

101. The forensic evidence is exculpatory because it is evidence that can be used to

demonstrate Jennifer was in the driver's seat and was ejected out the driver's side door. The State failed to preserve the hair from the driver's side door and the swab from the driver's side dash. The State failed to preserve all audio recordings of witness interviews. The audio recordings of witness interviews are exculpatory. One missing audio recording is the witness who first came upon the accident scene and places Michael in front of the vehicle (contrary to the State's accident reconstruction assumption that he was by the driver's side door). The State's conduct can only be found to be intentional conduct and in bad faith.

102. The vehicle and audio recordings were in the exclusive possession of the State. The State believes evidence from the vehicle is important since it preserved other items that it wants to use in its case-in-chief. For example, the State made a deliberate decision to preserve other items such as a shoe, noting that the shoe could be lost or destroyed by the movement of the vehicle during the towing process.

103. Even assuming the evidence is only potentially exculpatory evidence, pursuant to *Arizona v. Youngblood*, 488 U.S. 51 (1988), when law enforcement, acting in bad faith destroys or fails to preserve evidence which is potentially exculpatory, a violation of due process occurs. This Court concludes the State acted in bad faith in failing to preserve the hair on the driver's side door. The law enforcement officer saw the hair, photographed the hair but intentionally did not preserve the hair but preserved the shoe in the vehicle.

104. Even if the State's conduct in failing to preserve forensic evidence and audio recordings of witness interviews does not rise to the level of intentional conduct and bad faith, such conduct certainly rises to the level of negligent conduct. Such conduct does not comport with the notions of fairness embodied in the Due Process Clause of the Montana Constitution.

105. Although a showing of bad faith is required to constitute a violation of the federal

due process clause, the Montana Supreme Court has in fact adopted a more rigorous standard regarding the State's obligation to preserve potentially exculpatory evidence: the State's negligent failure to preserve or produce possible exculpatory evidence is sufficient to constitute a deprivation of a defendant's due process right to gather such evidence if it is material and of substantial use, vital to defense, and exculpatory. When the State's negligence precludes a fair trial, dismissal of the case with prejudice is the appropriate remedy. *See*, *Swanson*, 222 Mont. at 362, 722 P.2d at 1158; *State v. Gollehon*, 262 Mont. 1, 864 P.2d 249 (1993).

106. The forensic evidence is material and of substantial use, vital to the defense and exculpatory. The audio recordings are the best evidence of what the witnesses told law enforcement about the accident and recollection of events at the time of the accident. The lengthy passage of time from the incident to the trial (three years) alone dulls or compromises witnesses' memories. The audio recordings are critical for the Defendant to be able to either refresh the recollection of the witness or to impeach their testimony at trial.

107. The Court concludes the State's destruction of evidence violates Michael's right to due process.

108. The State's destruction of evidence violates Michael's right to confrontation under the Sixth Amendment and Article II, Section 24, Montana Constitution. The Confrontation Clause of the Sixth Amendment guarantees a defendant in a criminal prosecution the right to be confronted with the witness against him. *Crawford v. Washington*, 541 U.S. 36 (2004); *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Olden v. Kentucky*, 488 U.S. 277 (1988). The "main and essential purpose of confrontation is to secure for the opponent the opportunity of cross examination," and "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross examination." *Van*

Arsdall, 475 U.S. at 678-79 (citing *Davis v. Alaska*, 415 U.S. 308, 315-317 (1974)).

109. Unlike the federal counterpart, Article II, Section 24, of the Montana Constitution guarantees a defendant in a criminal prosecution the right "to meet the witnesses against him face to face," and protects the right to cross-examination to a greater extent than the Sixth Amendment. *State v. Clark*, 1998 MT 221, ¶¶ 20-25, 290 Mont. 479, 964 P.2d 766. As the Montana Supreme Court noted in *State v. Young*, 249 Mont. 257, 260, 815 P.2d 590, 592 (1991), "[t]he 1972 Montana Constitution and subsequent cases analyzing the Confrontation Clause have made it abundantly clear that full cross examination is a critical aspect of the right of confrontation." The rights contained in the Declaration of Rights, which include the rights guaranteed to an accused person in a criminal prosecution, are fundamental rights. *Wadsworth v. State*, 275 Mont. 287, 299, 911 P.2d 1165, 1171 72 (1996).

110. Critical to a defendant's constitutional right to confrontation is cross-examination of the witnesses. One goal of cross-examination is to impeach the credibility of opposing witnesses, and the examiner is permitted to delve into the witness's story to test the perceptions and memory of the witness. *Davis*, 415 U.S. at 316. The evidence is critical so Michael can prepare a defense and challenge the reliability and credibility of the State's witnesses. For example, the long brown hair on a piece of jagged torn metal on the driver's door that appeared consistent with the victim's hair is critical to Michael. Without the hair, Michael is prevented from conducting an effective cross-examination of the State's witnesses, including Brown's opinion that Michael was the driver of the vehicle and Jennifer was ejected out the sunroof. The presence of Jennifer's hair on a jagged piece of metal on the driver's side door undermines his opinion about where Jennifer was located in the vehicle and the ejection path.

111. The missing audio recordings of witness interviews implicates Michael's ability

to effectively cross-exam witnesses. The forensic evidence is material and of substantial use, vital to the defense and exculpatory. The audio recordings are the best evidence of what the witnesses told law enforcement about the accident and recollection of events at the time of the accident. The lengthy passage of time from the incident to the trial (three years) alone dulls or compromises witnesses' memories. The audio recordings are critical for Michael to be able to either refresh the recollection of the witness or to impeach their testimony at trial.

112. The Court concludes the State's destruction of the evidence violates of Defendant's right to confrontation.

113. Section 46-15-322(1)(e), MCA, imposes a mandatory duty on the prosecution to disclose all material or information that tends to mitigate or negate the defendant's guilt as to the offense charged or that would tend to reduce the defendant's potential sentence. This obligation extends to evidence in the possession or control of any other persons which have participated in the investigation or evaluation of the case. §46-15-322(4), MCA. As discussed above, the vehicle and other forensic evidence meets the definition under Section 46-15-322(1)(e), MCA. The audio recordings are required to be produced under Section 46-15-322(a), MCA.

114. The Court concludes the State violated its statutory discovery obligations under Section 46-15-322, MCA.

115. The Court concludes the State deliberately and intentionally suppressed exculpatory evidence. At best, the State negligently destroyed exculpatory evidence. The State is responsible for the loss of irreplaceable evidence and must be held accountable. To allow the State to proceed with prosecuting Michael will only encourage the State to destroy evidence with impunity.

116. Any less severe sanction other than dismissal cannot cure the prejudice to

Michael. The State obviously knew the importance of evidence located on the vehicle since it preserved other evidence from the vehicle that the State wants to use at trial.

117. Section 46-15-329, MCA, provides in part that if at any time during the course of the proceeding it is brought to the attention of the Court that a party has failed to comply with any of the provisions of the discovery statutes, the Court may impose any sanction that it finds just under the circumstances. The Court finds dismissal of the Information is a just sanction under the circumstances.

118. Moreover, Section 46-13-401(1), MCA, provides that a Court may, on its own motion and in furtherance of justice, order an Information to be dismissed provided good cause for dismissal is shown. The legislature has not attempted to define the phrase "in furtherance of justice." It is left for judicial discretion exercised in view of the constitutional rights of the defendant and the interests of society to determine what particular grounds warrant dismissal of a pending criminal action. *State v. Cummins*, 257 Mont. 491, 493, 850 P.2d 952, 953 (1993), (quoting *State ex rel. Anderson v. Gile*, 119 Mont. 182, 187, 172 P.2d 583, 586 (1946)).

119. The State has an obligation to provide discovery to Michael under Section 46-15-322, MCA and pursuant to Michael's right to due process and the right to confrontation under the United States Constitution and Montana Constitution. The State's destruction of the evidence is in disregard for its obligations under the Montana discovery statute, Section 46-15-322, MCA, the United States and Montana Constitutions and the interests of justice warranting dismissal of the Information.

Motion 6. Whether Michael's medical records and other health care information obtained by the State with investigative subpoenas must be suppressed.

120. On January 25, 2012 the State submitted affidavits in support of obtaining

investigative subpoenas to obtain Michael's health care information from Bozeman Deaconess Hospital, the American Medical Response (AMR), and the individual AMR responders. The investigative subpoenas were issued on January 25, 2012 and January 26, 2012.[1]

121. When an investigative subpoena seeks discovery of protected medical records or health care information, the subpoena is like a search warrant and must satisfy the strictures of the Fourth Amendment and Article II, Section 11 of the Montana Constitution, and can be issued only upon a showing of probable cause. *State v. Nelson,* 283 Mont. 231, 243, 941 P.2d 441, 449 (1997). The affidavit in support of the investigative subpoena fails to establish probable cause.

122. Probable cause exists if the facts and circumstances within the officer's personal knowledge, or imparted to the officer by a reliable source, are sufficient to warrant a reasonable person to believe that the suspect has committed an offense. *State v Wakeford*, 1998 MT 16, ¶22, 287 Mont. 220, 953 P.2d 1065. Probable cause requires more than a hunch or mere suspicion. *See Terry v. Ohio,* 392 U.S. 1, 22 (1968); *State v Lahr,* 172 Mont. 32, 35, 560 P.2d 527, 529 (1977).

123. When the State submitted its application for investigative subpoenas to obtain Michael's health care records from Bozeman Deaconess Hospital and AMR, the State had no reason to suspect that any one particular occupant of the vehicle had been the driver of the vehicle. Further, the State did not have probable cause to suspect Michael was under the influence of alcohol while operating a motor vehicle. *See e.g., State v. Hudson,* 168 Wash. App. 1023, 2012 WL 1941796 (Wash. App. Div. 2 2012) (police did not have probable cause to arrest defendant for being driver of vehicle that crashed and evidence obtained from his arrest should

[1] The Court takes judicial notice of the affidavits submitted in support of the investigative subpoenas and the investigative subpoenas filed with the Eighteenth Judicial District, Gallatin County MT. Rules 201 and 202, M.R.Evid.

have been suppressed); *State v. Weber,* 120 So.3d 328 (La. App. 1 Cir. 2013) (police officer did not have probable cause to believe defendant was driver or under the influence of drugs or alcohol when blood test administered).

124. The Defendant further argues the affidavit in support of the investigative subpoena contains illegally obtained information, false statements and material omissions and when purged of the illegally obtained information, its falsities and the material omissions are considered it is not sufficient to support a finding of probable cause.

125. The Court has previously set forth the relevant law in Motion 4 above and incorporates it herein by reference. The affidavits submitted in support of an investigative subpoena for testimony from the AMR first responders, Chad Jacobson and Britton Clark and for information from Bozeman Deaconess Hospital are similar. Paragraphs 5 and 6 includes private health care information concerning Michael that was illegally obtained in violation of Michael's constitutional rights and cannot be used to establish probable cause. *State v Bilant,* 2001 MT 113, ¶26, 307 Mont. 113, 36 P.3d 883.

126. The affidavits in paragraph 5 includes information concerning personal property items located in Michael's hospital room that was illegally obtained in violation of Michael's constitutional rights and cannot be used to establish probable cause.

127. The affidavit submitted in support of records from AMR dated January 26, 2012, includes an additional false statement in paragraph 8 because it refers to the Hospital blood draw and a purported alcohol content of Michael's blood of .231. As the Court has previously ruled, the hospital blood draw constitutes private health care information and was illegally obtained in violation of Michael's constitutional rights and cannot be used to establish probable cause.

128. Second, the Hospital blood draw result is unreliable and incompetent evidence

because the State cannot establish it is Michael's blood. The State cannot establish the blood draw referred to in the APC taken at 02:30 for medical treatment purposes is Michael's blood. Additionally, the State cannot establish who took the blood draw, and the credentials of the person who took the blood draw. This allegation is based on incompetent and unreliable evidence that cannot be used to establish probable cause.

129. The affidavit in support of the investigative subpoena also contains false statements and material omissions including the following.

130. Both Jennifer and Michael were ejected from the vehicle. This is a material omission because there was no reason to suspect that any one person had been driving the vehicle.

131. The witnesses who first came upon the accident scene reported to law enforcement that Michael was located in front of the vehicle not by the driver's side door as alleged in the affidavit in paragraph 4. This is a material omission and renders the statement in the APC false.

132. The affidavit refers to a "bloody spot" and "blood" outside the driver's door at the accident scene in paragraph 4. The State failed to collect and test any of the purported blood so any such allegations are false, or at a minimum is not credible evidence.

133. The illegally obtained information must be excised. *See State v. Tackitt,* 2003 MT 81, ¶41, 315 Mont. 59, 67 P.3d 295 (suppressing evidence after excluding illegally obtained information from affidavit and finding no probable cause existed for search warrant); *Bilant,* ¶26.

134. If the illegally obtained information and the false statements are omitted and the material omissions are considered, probable cause does not exist independently, for the investigative subpoenas.

Motion 7. The affidavits in support of the search warrant contains illegally obtained evidence, false statements and material omissions and when purged of the illegally obtained information, its falsities and the omissions are considered it is not sufficient to support a finding of probable cause.

135. The Court has previously addressed the relevant law in Motion 4 above and incorporates it herein by reference. The State submitted affidavits in support of search warrants for certain evidence including for Michael's personal items at the Hospital, the vehicle, and cell phones on January 25, 2012, February 21, 2012, and July 26, 2012 respectively.[2]

136. The affidavits contain similar defects found in the affidavit in support of filing the Information and in the affidavit in support of the investigative subpoenas.

137. For example, the Affidavit in support of the search warrant for the vehicle contains the following illegally obtained information, false statements and material omissions:

A. Both Jennifer and Michael were ejected from the vehicle. This is a material omission.

B. The witnesses who first came upon the accident scene reported that Michael Soule was located in front of the vehicle not by the driver's side door as alleged in the affidavit in paragraph 5. This is a material omission and renders the statement in the affidavit false concerning the location of Michael.

C. The affidavit refers to a "bloody spot" and "blood" outside the driver's door at the accident scene in paragraph 5. The State failed to collect and test any of the purported blood so any such allegations are false or at a minimum is not credible evidence.

[2] The Court takes judicial notice of the affidavits filed in support of search warrants and search warrants field with the Eighteenth Judicial District, Gallatin County, MT. Rules 201 and 202, M.R.Evid.

D. The affidavit refers to a brown shoe seen in Michael's hospital room in paragraph 6. This information was illegally obtained at the Hospital and cannot be used to establish probable cause. Evidence obtained by illegal action of law enforcement cannot be used to establish probable cause. U.S.Const. Amend. IV, XIV; Mont. Const. Art. II, §§10, 11; *State v. Kuneff,* 1998 MT 287, ¶17, 291 Mont. 474, 970 P.2d 556; *Bilant,* ¶26; *See Murray v. United States,* 487 U.S. 533, 540 (1988).

E. The affidavit refers to Michael's injuries in paragraph 7. This is confidential private health care information illegally obtained at the Hospital and cannot be used to establish probable cause.

F. The affidavit refers to Michael's blood alcohol content from a hospital blood draw in paragraph 9. This information was illegally obtained. It is also unreliable and incompetent evidence because the State cannot establish it is Michael's blood. There are also material omissions in connection with this statement. The blood draw after the accident taken at 04:18 and later sent to the Montana Crime Lab, revealed Michael's BAC was 0.07 gm/100ml (below the legal limit).

138. If the illegally obtained information and the false statements are omitted and the material omissions are considered, probable cause does not exist independently, for the search warrants.

Motion 8. Whether the Hospital blood test results are unreliable and not competent evidence and must be precluded by the Court.

139. For a medical blood test taken for medical treatment purposes to be competent evidence under § 61-4-404(3), MCA, the evidence must meet the requirements of § 61-8-404(1)(b)(ii), MCA and § 61-8-405, MCA. *McGrath v. Twenty-First Judicial District,* 2001 MT 305, ¶ 18, 307 Mont. 491, 39 P.3d 820. Section 61-8-404(b)(ii) requires a blood sample to be

withdrawn from the defendant by a person competent to do so under § 61-8-405(1), MCA. Section 61-8-405(1), MCA requires a physician, registered nurse, or other qualified person acting under the supervision and direction of a physician or registered nurse to withdraw the blood sample.

140. Most problematic for the State is the fact the State cannot establish the blood draw taken at 02:30 for medical treatment purposes is Michael's blood. The Hospital laboratory operations manager testified there is no way of knowing at the present time whether the blood sample that was tested and reported as Michael's blood in the Hospital records was in fact Michael's blood. Long also testified he is aware of test tubes arriving at the lab with an incorrect patient's name.

141. Additionally, the State cannot establish who took the blood draw, and the credentials of the person who took the blood draw. The State cannot establish the method used to collect the blood sample, the site where the blood was drawn, how the site was prepared, the type of container used to collect the blood sample, how the sample was handled, who handled the sample prior to arrival in the laboratory, how the sample was transported to the laboratory, and who transported the sample.

142. The State failed to establish the necessary foundation for the admission of the Hospital blood draw. The blood test result from the Hospital blood sample is not competent evidence and must be precluded.

143. Michael also argues the State obtained blood test results from the Hospital with an investigative subpoena on January 25, 2012, but failed to obtain the blood sample as allowed under § 61-8-405, MCA. Since the Court has granted Michael's motion to preclude the State from using the Hospital blood draw result this issue is moot.

Motion 9. Whether the Court must preclude the State from offering the testimony and opinions of Trooper Joshua Brown.

144. Michael seeks to preclude the State from offering certain testimony and opinions from Brown concerning the location of occupants in the vehicle, ejection paths of the occupants, source or cause of injuries to the occupants, who was driving the vehicle, whether Michael was under the influence of drugs or alcohol, cause of the accident and other similar testimony and opinions.

145. Michael asserts the State has failed to establish proper foundation for the testimony and opinions concerning Brown's accident reconstruction, that Brown's analysis is reliable and admissible under Rule 702, M.R.Evid., and the admission of Brown's testimony and opinions will not create a substantial danger of unfair prejudice to Michael and may be admitted under Rule 403, M.R.Evid.

146. Rule 702, M.R.Evid. contains three distinct components, all of which must be met in order for any witness to be allowed to testify as an expert: 1) If scientific, technical, or other specialized knowledge, 2) will assist the trier of fact to understand the evidence or to determine a fact in issue, 3) a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

147. Rule 703, M.R.Evid., addresses the foundation necessary for expert opinion. It permits an expert to use sources and kinds of information which other experts in that particular field reasonably rely on to form an opinion on a particular subject. In determining whether an expert's reliance on information is reasonable, the courts evaluate the opinion and its foundation on a case-by-case basis. *State v Henderson,* 265 Mont. 454, 460, 877 P.2d 1013, 1017 (1994).

148. Where the expert lacks an adequate basis, the trial court must reject the expert opinion testimony. *Henderson,* 265 Mont. at 460, 877 P.2d at 1017.

149. While an expert may properly testify as to an ultimate issue of fact, expert opinion that states a legal conclusion or applies the law to the facts is inadmissible. Rule 704, M.R.Evid.; *Perdue v. Gagnon Farms, Inc.*, 2003 MT 47, ¶28, 314 Mont. 303, 65 P.3d 570.

150. Brown testified he has a bachelor's degree in sociology from Montana State University. Brown does not have any formal education in engineering. Brown believes he took one physics class at Montana State University. He does not remember much about the class because it was a long time ago. Brown had basic accident investigation training at the Montana Highway Patrol Academy in 2001, attended an 80 hours course in 2002 in technical crash investigation, and an 80 hour reconstruction training in 2003. Brown has formulated certain opinions about the crash. In Brown's opinion, Michael was driving the vehicle and the cause of the crash was, in part, the result of Michael being under the influence of alcohol and drugs. The crash resulted in Jennifer, who was unrestrained, being ejected through the sunroof of the vehicle. However, Brown did not do any mathematical or physics calculations to support these conclusions Brown did not use any measurements for his conclusions. Brown did not do any occupant kinematic calculations to determine who was driving the vehicle. Brown did not input data into a computer to do a computer simulation to re-create the accident. Brown requested a computer simulation be done. The computer simulation was started but it was never completed.

151. Brown testified that occupant injuries can assist in determining seating positions during a crash and that is properly done by a forensic pathologist. Brown is not a forensic pathologist, and a forensic pathologist did not assist him.

152. Brown relied on certain evidence at the scene including what he described as "blood" and "biological evidence" on a guardrail. Brown admitted the State never collected any of this blood or biological evidence from the guardrail. Brown admitted there was no testing of

the biological evidence. Therefore, Brown cannot say with scientific certainty whether Michael or Jennifer was the source of the blood or biological evidence.

153. Brown relied on Hospital records for his opinion Michael was under the influence of alcohol and drugs and had cocaine in his blood. The State cannot establish the medical blood draw relied on by Brown is Michael's blood. The State cannot establish the identity or qualifications of the person who took the medical blood draw. The Hospital blood test results are incompetent and inadmissible evidence. Also, the Hospital never tested Michael's blood for the presence of THC and cocaine. There was a preliminary screening test on urine that was not to be used for legal purposes. The legal blood draw tested by the State Crime Lab shows Michael had a blood alcohol level below the legal limit (0.07 gm/100 ml) and below the legal limit of THC (1 ng/ml of THC).

154. Brown's opinions are based on inadmissible and unreliable underlying data.

155. An expert can rely on facts or data that are not admissible in evidence if of a type reasonably relied upon by experts in a particular field forming opinions or inferences upon the subject. Rule 703, M.R.Evid. An expert would not rely on blood test results if it cannot be demonstrated the blood test results are from Michael. Likewise, an expert would not testify that blood or biological evidence is from a particular person unless it has been identified through scientific testing such as DNA testing. The Hospital urine screening test that was purported to be of Michael's urine was a screening test only and cannot be used for legal purposes.

156. Although an expert witness is entitled to render an opinion premised on inadmissible evidence when the facts and data are the type reasonably relied on by experts on the subject, the witness may not serve merely as a conduit for the presentation of inadmissible evidence. *See Maklakiewicz v. Berton,* 652 So.2d 1208 (Fla. 3d DCA 1995) (presentation of

inadmissible evidence through police officer accident reconstruction expert caused unfair prejudice by giving inadmissible evidence expert's imprimatur of approval and reliability).

157. Rule 703, M.R.Evid., as with all rules of evidence may collide with Rule 403, M.R.Evid. *Tripp v. Jeld-Wen, Inc.,* 2005 MT 121, ¶ 15, 327 Mont. 146, 112 P.3d 1018 (heightened danger expert testimony based on inadmissible evidence not subject to cross-examination would be treated as unrebutted substantive evidence).

158. Rule 403 provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

159. The first essential precondition of any expert testimony is that the proposed witness have specialized knowledge. Brown's testimony fails to meet the precondition of any specialized knowledge. While Brown may have experience as an accident reconstructionist, Brown's opinions are not based on the application of any specialized knowledge. He reached his conclusion without applying defined principles of accident reconstruction, without performing any scientific analysis, calculations or measurements of the location and movement of the occupants of the vehicle during the accident. Rollovers are complex, chaotic events, and the occupant kinematics and potential injury mechanisms are similarly complex. *See e.g. State v Geiser,* 2011 MT 2, ¶ 10, 359 Mont. 95, 248 P.3d 300 (proper evidentiary foundation for HGN test requires showing test is properly administered along with expert testimony demonstrating scientific basis for reliability of test results).

160. Brown failed to conduct any scientific calculations or other scientific based analysis to form his opinions. Brown's opinion is based on nothing more than the *ipse dixit* opinion that Michael was the driver of the vehicle "because he says so." No allegation can be

proven by the *ipse dixit* opinion of any expert unless the facts or phenomena upon which the expert bases his or her opinion are disclosed either by his or her own testimony or that of other witnesses. *State Highway Comm'n v. Biastoch Meats, Inc.*, 145 Mont. 261, 275, 400 P.2d 274, 281 (1965).

161. Moreover, the opinions of Brown do not have a foundation in cognizable, objective methodology. Without a proven and tested methodology, cross-examination of such experts is virtually impossible because the results themselves cannot be impeached. The cross-examining attorney is left with the task of impeaching the expert's entire field in open court. *State v. Clifford,* 2005 MT 219, ¶85, 328 Mont. 300, ¶85, 121 P.3d 489, ¶85 (Nelson, J., concurring opinion). Especially in criminal proceedings, this raises a distinct problem with the constitutional right to effective cross-examination of witnesses.

162. A proper expert puts forth an opinion and methodology for criticism and cross-examination. Brown's opinions do not provide any scientific or mathematical calculations or scientific basis identifying how he determined the position of the occupants, the trajection path and resulting forces, including the direction of forces, how much force experienced by the occupants in this rollover accident. Mere training and experience is not a basis for establishing reliability

163. The State also cannot meet the second requirement for admissibility of expert testimony. Rule 702, M.R.Evid., requires the knowledge "assist the trier of fact." Testimony by Brown fails to assist the trier of fact because Brown's opinions are nothing more than what a lay jury might do when it is speculating what happened during the accident and who may have been driving.

164. Brown is not a forensic pathologist has no medical training. He is not qualified

or competent to testify as to the injuries, the cause of injuries suffered by Michael Soule and Jennifer Soule in the accident, and when the injuries were incurred.

165. Without an adequate foundation, any proposed testimony from Brown concerning his opinions and conclusions about the cause of the crash, who was driving the vehicle and whether Michael was under the influence of alcohol is improper lay witness opinion. Rule 701 does not permit a lay witness to offer an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness. *See Christofferson v. City of Great Falls*, 2003 MT 189, ¶¶ 35-49, 316 Mont. 469, 74 P.3d 1021.

166. The purpose of an expert is to make a technical examination of facts in the area in which the expert is qualified, and explain such facts to a jury, which they would not otherwise fully understand in order to assist them in determining the ultimate issue in the case. There is a difference between an expert, who has specialized training and knowledge and applies that to the facts of the case and an experienced layman who simply expresses a common-sense opinion that the jurors could form using their own common-sense.

167. The danger of permitting Brown's opinions and testimony is that it is speculative testimony. Brown may have experience to look at yaw marks or gouge marks on the road. However, Brown did not perform any mathematical or scientific calculations for his opinions concerning who was driving the vehicle, the position of the occupants of the vehicle, and the trajectory or ejection path of the occupants. He is not trained in the field of medicine or forensic pathology to be able to testify concerning the cause of injuries to the occupants.

168. Testimony by Brown presents a great danger of unfair prejudice to Defendant and misleading the jury. Because the testimony may be perceived by the jury as pseudo-scientific testimony there is a danger that the jury will misinterpret and give more weight to the testimony

than it deserves. When the jury is presented testimony or evidence from someone that has been qualified as an "expert," the jury may perceive it as infallible.

169. "There is virtual unanimity among courts and commentators that evidence perceived by jurors to be 'scientific' in nature will have particularly persuasive effect." Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions of Function, Reliability and Form*, 71 Or. L. Rev. 349, 367, n.81 (1992). If there are legitimate questions as to whether the field itself is bogus or whether the methods used by experts do not produce reliable results, then that testimony and evidence should be subject to challenge pre-trial. *Clifford*, ¶87. Non-scientific expert testimony may cause the dangers Rule 403, M.R.Evid. is designed to prevent: undue prejudice, confusion of the issues or misleading of the jury.

170. The Court concludes Brown's opinions are not admissible because his opinions are not based on any scientific, technical, or other specialized knowledge that will assist the trier of fact. He did use any methodology or scientific principles to reach his conclusions.

171. The Court concludes that Brown's opinions lack the necessary foundation to be admissible.

Motion 10. Whether the State must provide notice of intention to rely on 404(b) evidence.

172. Michael argues the State should be required to provide notice of its intention to use 404(b) evidence.

174. It is a frequent misconception that Rule 404(b) bars evidence. The rule does not bar evidence, but instead prohibits the theory of admissibility that evidence of other crimes, wrongs, or acts to prove the defendant's subjective character, disposition, or propensity (for example that he is inclined to wrongdoing in general, or that he tends to commit a particular type of wrongdoing) in order to show conduct in conformity with that character on a particular

occasion. *See State v. Eighteenth Jud. Dist. Ct.*, 2010 MT 263, ¶ 47, 358 Mont. 325, 246 P.3d 391.

175. The State is required to disclose such evidence of other crimes, wrongs or acts, and the defendant must then identify any of the State's evidence that he believes should be excluded as irrelevant (Rule 402), unfairly prejudicial (Rule 403), relevant only for an improper propensity inference (Rule 404), or inadmissible under some other rule and to explain with argument and authority why the evidence should be excluded. The prosecutor will then be required to respond to the defendant's objections and to demonstrate the evidence's admissibility. The Court should then conduct a hearing and issue a written decision with appropriate findings of fact and conclusions of law. *See State v. Eighteenth Jud. Dist. Ct.*, 2010 MT 263, 49, 358 Mont. 325, 246 P.3d 391.

176. In this case, Michael seeks what the Montana Supreme Court has clearly and specifically determined is not warranted. "Where the prosecution discloses in the charging documents or through discovery the evidence it may introduce at trial, no practical purpose is served by requiring the prosecution to provide an additional, separate notice dedicated to extrinsic evidence. *Eighteenth Jud. Dist. Ct.*, ¶ 43.

176. Michael has not identified any evidence that he believes is inadmissible according to the procedure established by the Supreme Court in *Eighteenth Jud. Dist. Ct.* In the absence of such showing by Michael, the State is not required to provide any additional notice.

Motion 11. Whether the Court should preclude improper comments or arguments by the prosecutor at trial.

177. Michael seeks a pretrial ruling precluding the prosecutor from making certain arguments or improper comments at trial, including during voir dire and to prepare witnesses to avoid precluded comments.

178. Due process requires that trials be conducted with dignity, order, and decorum. *State v. Hart*, 191 Mont. 375, 381, 625 P.2d 21, 25 (1981). The prosecutor has a responsibility to see that the prosecution of a criminal case is fair and just; he must be interested in justice, not just convictions. *Hart*, 191 Mont. at 381, 625 P.2d at 25, citing *Berger v. United States*, 295 U.S. 78, 88 (1935). Misconduct by the prosecutor may form the basis of a new trial where the prosecutor's actions have deprived a defendant of a fair and impartial trial. *State v. Bain*, 176 Mont. 23, 575 P.2d 919 (1978). Improper conduct by the prosecutor, including improper statements and arguments at trial denies a defendant the right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article II, Sections 17 and 24, of the Montana Constitution.

179. Michael argues that an in limine ruling to preclude the prosecutor from making certain arguments or comments is required because a curative instruction at trial will generally exacerbate rather than cure the prejudice caused by a prosecutor's improper comment, argument or statement. A ruling on this motion prior to trial is necessary to protect his right to a fair trial and due process. When an improper argument or statement is made by the prosecutor at trial, a curative instruction to the jury is insufficient to protect Michael's right to a fair trial and due process.

180. The so-called "curative instruction," which allegedly erases the effect of an error, more frequently waves a red flag and makes the jury focus on the improper argument or statement even more rather than "cure" the error. No bell can be unrung. The "curative" instruction is ineffective and does not wipe the inadmissible declaration from the minds of the jury. The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. *Bruton v. United States*, 391 U.S. 123,

129 (1968), quoting *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring). Michael also makes this Motion to preserve all objections to any improper comments, statements or arguments that might be made by the prosecutor at trial.

181. The State argues that the Court can address any improper comments by counsel for Michael or the State in the context of the trial if such comments arise during the trial. However, the State does not oppose the Defendant's motion.

Motion 12. [The Court has previously granted the motion for a supplemental jury questionnaire.]

Motion 13. Whether the Court should permit individual voir dire to protect Michael's fundamental constitutional right to a fair trial by an impartial jury guaranteed by both the U.S. Constitution and the Montana Constitution.

182. Michael argues that in light of the pretrial publicity and the nature of the charge, liberal individual voir dire should be permitted to protect Defendant's fundamental constitutional right to a trial by a fair and impartial jury under the Sixth Amendment of the U.S. Constitution and Article II, Section 24 of the Montana Constitution and the due process clause of the Fifth and Fourteenth Amendments of the U.S. Constitution and Article II, Section 17 of the Montana Constitution. Individual voir dire is a procedure permitted under Section 46-13-203(2) (c), MCA to ensure a fair trial. *Bar-Jonah*, ¶87.

183. Individual voir dire is highly recommended when the impact of pretrial publicity is an issue. *See, United States v. Dellinger*, 472 F.2d 340, 366-267 (7th Cir. 1972); ABA Standard Relating to the Administration of Criminal Justice, Fair Trial and Free Press, Standard 8-3.5(a) (3rd ed. 1992). Individual voir dire is necessary to prevent exposing the entire jury panel to views and opinions held by potential jurors who may have been exposed to pretrial publicity about this case, have knowledge about the case, or have already formed opinions concerning this

case. ABA Standard Relating to the Administration of Criminal Justice, Fair Trial and Free Press, Standard 8.3.5(a) concerning individual voir dire, provides:

> (a) If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure should take place outside the presence of other chosen and prospective jurors. An accurate record of this examination should be kept by a court reporter or tape recording whenever possible. The questioning should be conducted for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial, not to convince the prospective juror that an inability to cast aside any preconceptions would be a dereliction of duty. [ABA Standard 8-3.5(a)]

Motion 14. Whether the Court must sequester witnesses under Rule 615, M.R.Evid.

184. All persons expected to testify in this case shall be excluded from the courtroom during the trial in this case except for Michael.

185. Michael further requests that the Court preclude a witness who has testified at trial from speaking about the case with a witness that has not yet testified, and precluding the prosecutor or other representative of the State from informing or disclosing to a witness the trial testimony of any other witness or from interviewing or preparing any witness in the presence of another witness. This restriction is likewise needed to accomplish the same purpose underlying Rule 615, M.R.Evid. - as a means of discouraging and exposing fabrication, inaccuracy and collusion.

186. The Sequestration Order is needed to preserve and protect Defendant's fundamental constitutional right to a fair trial guaranteed by the due process clause of the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution and Article II, Sections 17 and 24 of the Montana Constitution.

Motion 15. Whether the Court should permit Michael to file additional motions after the deadline.

187. A defendant has the right to a fair trial as guaranteed by due process clause of the U.S. and Montana Constitutions. U.S. Const. Amend. VI and XIV; MT Const., Art. II, §§ 17 and 24. To protect a defendant's right to a fair trial, a defendant in a criminal case must be permitted to prepare and present a defense, including pretrial motions.

188. Section 46-13-101, MCA, entitled "pretrial motions and notices" provides that except for good cause shown any defense, objection, or request that is capable of determination without trial of the general issue must be raised at or before the omnibus hearing. Failure to raise defenses or objections or to make requests that must be made before trial, at the time set by the court, constitutes a waiver. However, the court, for good cause shown may grant relief from any waiver. § 46-13-101(3), MCA.

189. Michael has filed a number of pretrial motions in compliance with the Court's deadline for pretrial motions.

From the foregoing Findings of Fact and Conclusions of Law, the Court enters the following Order:

ORDER

IT IS HEREBY ORDERED:

1. As result of the decisions of this Court as explained in these Findings of Fact and Conclusions of Law, the Information containing the criminal charge filed against the Defendant is dismissed. Despite the fact that the Court has dismissed the Information, the Court has elected to decide each of Defendant's motions. Some of the motions relate to the suppression of evidence and others relate to trial matters. Although the Court has given its reasoning and decision for each motion, some of the conclusions are moot in light of the fact that the trial is vacated.

2.. Defendant's Motion to Dismiss the Information for the State's alleged failure to provide Defendant with an initial appearance after an alleged warrantless arrest on January 25, 2012 is **DENIED.**

3 Defendant's Motion to Suppress any evidence obtained at the Hospital including but not limited to Defendant's health care information, photographs, physical evidence, and any testimony by the State's witnesses concerning such evidence and any derivative evidence is **GRANTED**. The evidence is suppressed.

4. Defendant's Motion to Suppress the DNA profile obtained from Defendant's blood sample, and any other derivative evidence resulting from the State's improper use of DNA evidence and the blood sample taken pursuant to the Implied Consent law is **GRATNED.** The evidenced is suppressed.

5. Defendant's Motion to Dismiss the Information because the Affidavit of Probable Cause filed in support of the Information contains false statements and material omissions and when purged of its falsities and the omissions are considered the Affidavit of Probable Cause is not sufficient to support a finding of probable cause is **GRANTED**. The Information is **DISMISSED with prejudice.**

6. Defendant's Motion to Dismiss the Information because the State failed to preserve and destroyed evidence is **GRANTED.** The Information is **DISMISSED with prejudice.**

7. Defendant's Motion to Suppress Defendant's medical records and other health care information obtained by the State with investigative subpoenas is **GRANTED.** The evidence is suppressed.

8. Defendant's Motion to Suppress evidence seized from the search warrant is **GRANTED.** The affidavit in support of the search warrant contains illegally obtained evidence, false statements and material omissions and when purged of illegally obtained information, its falsities and the omissions are considered it is not sufficient to support a finding of probable cause.

9. Defendant's Motion to preclude the Hospital blood test results as being unreliable and not competent evidence is **GRANTED**. The State is precluded from offering this evidence.

10. Defendant's Motion to preclude the State from offering the testimony and opinions of Trooper Joshua Brown is **GRANTED.**

11. Defendant's Motion to order the State to provide notice of its intention to rely on Rule 404(b), Mont. R. Civ. P. evidence is **DENIED.**

12. Defendant's Motion to preclude the State from making improper comments or arguments at trial is **GRANTED**. However, the Court reserves further consideration of this Motion depending upon comments made at a trial.

13. The Court has previously granted the Motion for a Supplemental Jury Questionnaire.

14. Defendant's Motion to permit individual voir dire is reserved for consideration during the voir dire process.

15. Defendant's Motion to sequester witnesses under Rule 615, M.R.Evid. is **GRANTED.**

16. Defendant's Motion asking the court to permit Defendant to file additional pretrial motions after the deadline is reserved.

17. In light of the fact that the Court has dismissed the Information, the Final Pretrial

Conference set for December 30, 2014, is **VACATED**. The jury trial set for January 20, 2015 is **VACATED.**

18. The Conditional Release Order issued by the Court on August 20, 2012, is **VACATED**. Because in the Conditional Release Order the Court released Defendant on his own recognizance and because Defendant has continued to be released on his own recognizance during these proceedings, there is no amount of bail to be exonerated.

19. The Clerk of District Court shall immediately notify counsel by phone and email that the Court issued this Order.

Dated this 19th day of December 2014.

Hon. Mike Salvagni
District Judge

c: Eric Kitzmiller
Al Avignone
Lisa Banick
Pretrial Services
e-mailed & called 12/19/14