

1 Karen S. Townsend, District Judge
2 Department 4
3 Fourth Judicial District
4 Missoula County Courthouse
5 200 West Broadway Street
6 Missoula, MT 59802-4292
7 (406) 258-4774

FILED SEP 04 2012

SHIRLEY E. FAUST, CLERK
By Molly Zook Deputy

8 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY
9

10 STATE OF MONTANA,	)	Department No. 4
	)	Cause No. DC-12-352
11 Plaintiff,	)	
	)	
12 vs.	)	ORDER
	)	
13 JORDAN TODD JOHNSON,	)	
	)	
14 Defendant.	)	
15	)	
16	)	

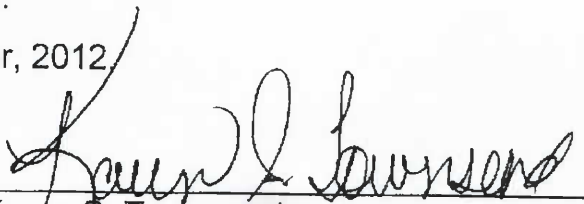
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18 Defendant has moved the Court for an Order compelling the State to
19 comply with his discovery request. Defendant seeks interview transcripts,
20 interview videos, Jane Doe's medical and psychological and counseling
21 records, Jane Doe's school records, First Step videos, all text and/or e-mail
22 messages from Jane Doe's phone from a particular date and to particular
23 individuals and an interview with Jane Doe. The Defendant asserts that the
24 State's failure to provide all of this discovery so far demands dismissal.

25 The State responds that much of the discovery sought by the
26 Defendant has been or is in the process of being provided, that the text/e-
27 mail messages need an in-camera review by the Court to see if redactions

1 for a reply brief. When filing these briefs, the parties are to advise the
2 deputy clerk of court who accepts the filing that the Court has ordered this
3 brief to be filed under seal.

4 A briefing schedule for all remaining discovery issues shall be
5 established at the Omnibus Hearing.

6 Dated this 4th day of September, 2012.

7
8 
9 Karen S. Townsend
District Judge

10 c: Suzy Boylan
11 Missoula County Deputy Attorney

12 David R. Paoli
13 Paoli Kutzman, P.C.

14 Kirsten H. Pabst
15 Attorney at Law
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SHIRLEY E. FAUST, CLERK
By *Diane O'Connell*
Deputy

10 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY
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12 STATE OF MONTANA,	)	Department No. 4
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13 Plaintiff,	)	
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15 JORDAN TODD JOHNSON,	)	
	)	
16 Defendant.	)	
17	)	
18	)	

19
20 Defendant has filed a Motion to Dismiss the Information filed in this
21 cause. Although the Defendant does not specifically allege that the Affidavit
22 for Leave to File the Information fails to support a finding of probable cause,
23 the Defendant alleges that the State submitted a materially incomplete and
24 misleading version of the facts in the Affidavit thus violating the Defendant's
25 due process rights. The Defendant asserts that such misconduct mandates
26 dismissal. Defendant then proceeded to present to the Court an unsworn
27 version of what was denominated as "facts known to the State" that were

1 inserted into the State's Affidavit. The Defendant further asserts that this
2 prosecution was influenced by a Department of Justice Investigation into the
3 handling of sexual assault prosecutions in Missoula, and that the State
4 prosecutor committed certain ethical violations by directly notifying the
5 media of the Affidavit of Probable Cause.

6 The State has responded that the Affidavit does contain sufficient
7 facts to justify the filing of this charge, that the Defendant's recitation
8 contains irrelevant, unnecessary, prejudicial, and objectively inadmissible
9 evidence, that the proper time and place to challenge the State's evidence
10 is at a trial, and not in a so-called pre-trial trial, that no ethical violations
11 occurred, and no due process violation took place.

12 The Defendant's reply brief reiterates the argument that the
13 withholding of the additional information that was in possession of the State
14 at the time that the Motion for Leave to File was presented to this Court
15 prevented the Court from making "an independent determination" that an
16 offense has been committed. The Defendant asserts that because the
17 presentation of a Motion for Leave to File is an ex parte proceeding, and the
18 Court serves as a constitutional gate keeper, the State has an extra
19 obligation to present exculpatory information to the Court so that the
20 Defendant's rights are protected.

21 **THE STATE'S AFFIDAVIT OF PROBABLE CAUSE**

22 Defendant and Jane Doe are University of Montana students who
23 have known each other since 2010. They had been texting each other over
24 the winter holidays between December 2011 and January 2012 and after
25 they returned to school after the holidays. On or about February 4, 2012,
26 Defendant sent a text message to Jane Doe suggesting they get together.
27 They decided to watch a movie at Jane Doe's house. Defendant asked Jane

1 Doe to pick him up, as he had been drinking alcohol and did not want to
2 drive. When they arrived at her house, Jane Doe introduced Defendant to
3 her roommate, who was in the living room playing a video game. Her other
4 roommate was home but asleep.

5 Jane Doe selected a movie and they watched it together in her room.
6 As they watched the movie, Defendant started to kiss Jane Doe. She kissed
7 him back but disengaged, saying "Let's just watch the movie." She did not
8 want to get physical that night, but just wanted to relax. He stopped, but
9 started kissing her again. He began pulling her on top of him. She tried to
10 keep things light and tried to discourage his advances. He tried to take off
11 her shirt. She pulled it back down and told him "no, not tonight," to which he
12 responded, "oh, come on." He subsequently tried again to take off her shirt
13 and she let him. She then took off his jacket and shirt. She then described a
14 change in his demeanor as going from playful to aggressive. He got on top
15 of her and started thrusting his hips into her. She started to get scared and
16 told him "no, not tonight" repeatedly. Defendant put his left arm across her
17 chest and held her down as he pulled her leggings and underwear off. She
18 put her knees up and tried to push against him. He then told her to turn
19 over. He said "turn over or I will make you." Jane Doe said "no." Defendant
20 then flipped her over and held her head down with his hand. He pulled her
21 legs apart, positioned himself between her legs, took off his belt and
22 lowered his jeans. He grabbed her hips and raised them towards him. He
23 penetrated her vagina with his penis. Jane Doe described this as being very
24 painful. She felt scared and "shut down." She stopped resisting at this point.
25 She was afraid he would hit her if she resisted further. He ejaculated, at
26 least in part, on her blanket. She said "everything changed when he flipped
27 me over and held me down." She also stated that he said "you told me you

1 wanted it" several times, and stated she did not say anything besides "no"
2 and "not tonight."

3 Defendant grabbed his clothes and went into the bathroom. Jane Doe
4 quickly changed into a new set of clothes. She texted her roommate who
5 was in the living room, saying "Omg...I think I might have just gotten
6 raped..he kept pushing and pushing and I said no but he wouldn't listen...I
7 just wanna cry...Omg what do I do!" He told her to come out and sit with
8 him. She grabbed her purse and phone and left the bedroom. Defendant left
9 his watch at Jane Doe's house. He did not contact her again after the night
10 of February 4.

11 Jane Doe was in shock and wanted him out so she drove him home.
12 Neither Defendant nor Jane Doe said anything on the ride to his home until
13 he got out of the car and said "well thanks." She then picked up a friend, as
14 she had promised to be his designated driver, and told him what had
15 happened. She spoke to a close female friend the next morning, went to the
16 Student Assault Resource Center at the University, and went to First Step
17 for a medical examination. The medical examination showed some genital
18 pain and physical findings consisting of mild redness, swelling, and some
19 small abrasions; marks on her chest; and tenderness to the side of her
20 head.

21 The people Jane Doe disclosed the incident to described her
22 emotional state as very unlike her usual demeanor. She has sought
23 counseling and has shown signs of depression, panic, and Post-Traumatic
24 Stress Disorder consistent with Rape Trauma Syndrome.

25 Defendant was interviewed by Detectives Brueckner and Chrestenson
26 of the Missoula Police Department. Defendant described a consensual
27 encounter initiated by Jane Doe in which she was an active participant. He

1 further stated that he stopped communicating with her after he had sex with
2 her because he liked another girl and thought she would be upset if she
3 knew he had sex with Jane Doe.

4 **ADDITIONAL INFORMATION THAT THE DEFENDANT CLAIMS THE**
5 **STATE HAD IN ITS POSSESSION PRIOR TO THE FILING OF THE**
6 **MOTION FOR LEAVE TO FILE THAT WOULD NEGATE PROBABLE**
7 **CAUSE**

8 The Defendant's initial brief took the State's Affidavit and interspersed
9 the six paragraphs with lengthy additional information that he claims the
10 State hid from the Court and argues that if the Court had been made aware
11 of all of this information the Court would not have found probable cause.
12 The Defendant claims that all of this information is factual, but the
13 information is unsworn. The additional information in paragraph 1 centers
14 around the relationship between the Defendant and Jane Doe prior to the
15 incident at Jane Doe's residence on February 4, 2012. The information
16 describes exchanges of text messages that were "flirtatious and sexual" in
17 nature. The information also describes an encounter at the Forrester's Ball
18 on February 3, 2012 where Doe is described as "intoxicated" and that can
19 also be characterized as "flirtatious and sexual" in nature. The remaining
20 additions to paragraph 1 merely add information that set up the encounter
21 on February 4th where the Defendant initiated the idea of getting together via
22 text, Doe agreed to pick him up from his house because he had been
23 drinking a little, they returned to her home where both of her male
24 roommates were at home, one in the living room playing a video game and
25 one asleep in another bedroom. The Defendant names the two
26 roommates.
27

1 Paragraph 2 describes the incident between the Defendant and Jane
2 Doe. The State's paragraph 2 consists of approximately 23 lines of text
3 which is quoted above. The Defendant contends that an additional 45 lines
4 of text should have been added. The majority of the material describes the
5 Defendant's version of the sexual encounter---a completely voluntary sexual
6 encounter. Defendant's version does not contain any reference to
7 resistance by Jane Doe or any mention that she said "no" to the sex.

8 Paragraph 3 describes the immediate aftermath of the sexual
9 encounter where Jane Doe sent a text to her roommate in the living room in
10 which she stated: "Omg...I think I might have just gotten raped..he kept
11 pushing and pushing and I said no but he wouldn't listen...I just wanna
12 cry...Omg what do I do?" Defendant suggests that the State should have
13 added information that her roommate, who is named again, has stated that
14 instead of responding to her he texted her back, he heard nothing unusual,
15 and he did not know what to make of the text, and that her other roommate,
16 also named again, later indicated that he was probably asleep when the
17 incident occurred and did not hear about it for a week.

18 Paragraph 4 consists of 11 lines from the State's Affidavit quoted
19 above. The Defendant presents 27 additional lines of text. Paragraph 4
20 describes Jane Doe's driving the Defendant back to his home, getting in
21 contact with a close female friend, and a visit to the Student Assault
22 Resource Center and later an exam at First Step. Defendant asserts that
23 Doe failed to disclose certain details of the sexual encounter to the First
24 Step examiner, that there could be different interpretations of the First Step
25 examination findings, and that there have been inconsistencies in her
26 recitation of her activities following the exam.

1 Paragraph 5 from the State's Affidavit consists of 2 sentences about
2 her demeanor since the sexual encounter. It recites that she has shown
3 signs of depression, panic, and Post-Traumatic Stress Disorder consistent
4 with Rape Trauma Syndrome. Defendant asserts that the State should
5 have included information concerning her previous psychological difficulties.

6 Paragraph 6 from the State's Affidavit consists of information that the
7 Defendant was interviewed by two Missoula City Police detectives. He
8 described a consensual sexual encounter initiated by Jane Doe in which she
9 was an active participant. The paragraph consists of 5 lines. Defendant
10 asserts that 51 additional lines of information should have been included.

11 Contained within these lines are quotes from e-mails or letters Doe wrote
12 within a month after the incident in which she second-guesses her conduct.

13 However, also contained in those quoted materials are her statements: "in
14 no verbal way did I tell him that I wanted to....but I did not want to have sex
15 that night." The last two paragraphs of what the Defendant claims should
16 have been included in the State's Affidavit are complaints about the defense
17 not yet having access to all of Doe's text messages and the e-mailing of the
18 Affidavit to members of the press.

19 LEGAL ARGUMENT

20 **I. Does the State's Affidavit of Probable Cause contain sufficient**
21 **facts for the Court to conclude that there is probable cause for the**
22 **filing of the charge against the Defendant or should the Information be**
dismissed?

23 Section 46-11-201, MCA, outlines the procedure to be followed when
24 the prosecutor seeks leave of the Court to file an Information charging an
25 individual with a felony offense. That section provides:

26 (1) The prosecutor may apply directly to the district court for permission
27 to file an information against a named defendant...

1 (2) An application must be by affidavit supported by evidence that the
2 judge or chief justice may require. If it appears that there is probable
3 cause to believe that an offense has been committed by the defendant,
4 the judge or the chief justice shall grant leave to file the information,
5 otherwise the application is denied.

6 The Montana Supreme Court has addressed the standard necessary to
7 conclude that probable cause exists to support the filing of an Information on
8 several occasions. In State v. Buckingham, 240 Mont. 252, 256, 783 P.2d
9 1331, 1334 (1989), the Court said:

10 The State need not demonstrate a prima facie case in the information
11 but need only show probable cause to believe an offense has been
12 committed. In Bradford, 683 P.2d at 929 we stated:

13 Similarly, evidence to establish probable cause need not be as
14 complete as the evidence necessary to establish guilt. (citation
15 omitted.) [T]he determination whether a motion to file an
16 information is supported by probable cause is left to the sound
17 discretion of the trial court. Thus, the scope of review is one of
18 detecting abuse in the exercise of that discretion.

19 In 1990, the Court reiterated its directions to district court judges on
20 how to view an Affidavit seeking Leave to File and Information. "A court may
21 use common sense and draw permissible inferences when examining an
22 affidavit for a determination of probable cause." State v. Ecker, 243 Mont.
23 337, 340, 792 P.2d 1079, 1080 (1990), citing State v. Riley, 199 Mont. 413,
24 649 P.2d 1273 (1982). Likewise, in State v. Thompson, 243 Mont. 28, 30,
25 792 P.2d 1103, 1105 (1990) (language in dicta overruled on other grounds),
26 the Court said:

27 This Court has held that a showing of mere probability that defendant
committed the crime charged is sufficient for establishing probable
cause to file a criminal charge. Judges, when receiving probable cause
affidavits, should use their common sense in determining whether
probable cause exists.

1 See also State v. Ramstead, 243 Mont. 162, 793 P.2d 802 (1990); State v.
2 Little, 260 Mont. 460, 861 P.2d 154 (1993); State v. Williams-Rusch, 279
3 Mont. 437, 928 P.2d 169 (1996).

4 In State v. Little, supra, the defendant contended that the information in
5 the affidavit was insufficient because the victims' allegations were not
6 corroborated and that the entire investigative file did not contain sufficient
7 information to support a probability that he had committed the offenses
8 charged. The Court rejected his claim saying:

9 An affidavit filed in support of a motion for leave to file an information
10 need only recite facts sufficient to indicate a probability that the
11 defendant committed an offense; it need not demonstrate a prima facie
12 case. [citing State v. Ramstead, supra] An information is intended to
13 provide the defendant with notice, not to provide discovery of the State's
14 evidence. [citing State v. Riley, supra] Further a court reviewing an
15 affidavit for probable cause may use common sense and draw
16 permissible inferences; the standards are less stringent than those
governing the admissibility of evidence. State v. Miner, (1976), 169
Mont. 260, 264, 546 P.2d 252,255. This probable cause determination
will not be reversed absent an abuse of discretion [citing Buckingham,
supra].

17 The Montana Supreme Court dealt with this issue again in 2002 and
18 reached the same conclusion. In State v. Tichenor, 2002 MT 311, 313 Mont.
19 95, 60 P.3d 454, defendant was charged with burglary, partner or family
20 member assault and stalking. Prior to trial, the defendant filed a pretrial
21 motion to dismiss the burglary and stalking charges alleging that he lacked
22 the requisite intent to be convicted of stalking and that he could not be
23 convicted of burglary because he had license to enter the victim's apartment.

24 The district court denied the motion noting that the defendant was essentially
25 asking the court to judge the evidence prior to trial and that it was up to the
26 jury, not the court, to weigh the evidence. The district court further noted that
27 after the presentation of the State's case, the court could order a dismissal of

1 one or more counts if warranted, but that it was premature to order a
2 dismissal before the State had presented any evidence. The case proceeded
3 to jury trial and the defendant was convicted of criminal trespass, a lesser
4 included offense of burglary, partner or family member assault, and stalking.
5 The defendant did not move for a directed verdict following the presentation
6 of the State's case or at the close of all the evidence. On appeal, the
7 defendant asserted that the district court committed error in denying his
8 pretrial motion to dismiss. The Montana Supreme Court held that the district
9 court had properly denied his pretrial motion because it was premature. The
10 Court said:

11 Whether Tichenor had the requisite intent to be convicted of stalking
12 was a question of fact for the jury. See State v. DeVore, 1998 MT 340,
13 ¶ 37, 292 Mont. 325, ¶ 37, 972 P.2d 816, ¶ 37, overruled on other
14 grounds by State v. Good, 2002 MT 59, 309 Mont. 113, 43 P.3d 948.
15 Likewise, whether Tichenor was unlawfully in Nall's apartment was a
question of fact for the jury and it would have been improper for the
judge to step into the jury's place and resolve these issues pretrial.

16 Tichenor relies on State v. David (1994), 266 Mont. 365, 880 P.2d
17 1308, to support his argument that the charges of burglary and
18 stalking should be dismissed. However, David is distinguishable from
19 the case *sub judice* because in David, the District Court denied the
20 State's motion for leave to file an Information charging the defendant
21 with stalking because there was not sufficient probable cause. David,
22 266 Mont. at 366-67, 880 P.2d at 1309. Here, the District Court had
23 already granted the State's motion for leave to file an Information
24 against Tichenor, thus establishing that the State had probable cause
25 to bring the charges. The State had no further burden of proof with
26 regard to these charges until trial. See State v. Nichols, 1998 MT 271,
27 ¶ 4, 291 Mont. 367, ¶ 4, 970 P.2d 79, ¶ 4 (holding that the defendant's
challenge to the evidence through a pretrial motion to dismiss 'was
premature because such a challenge can only be made after the State
has had an opportunity to present its evidence to the trier of fact').

Tichenor, ¶¶ 21, 22.

1 The Court has continued to follow these prior holdings in more recent
2 rulings. The legal standard that a "showing of a mere probability that the
3 [d]efendant committed the offense charged" is sufficient continues to be the
4 rule. See e.g. State v. Holt, 2006 MT 151, 332 Mont. 426, 139 P.3d 819.
5 The Court has repeatedly held that the affidavit need not make out a prima
6 facie case that the defendant committed the offense. State v. Kern, 2003
7 MT 77, 315 Mont. 22, 67 P.3d 272; State v. Steffes, 269 Mont. 214, 887
8 P.2d 1196 (1994); State v. Arrington, 260 Mont. 1, 858 P.2d 343 (1993).
9 Finally, a reviewing court is to look at the affidavit as a whole, apply
10 common sense, and is permitted to draw reasonable inferences from the
11 matters in the affidavit in determining whether or not sufficient facts were
12 contained in the information.

13 In this case, the Defendant is charged with the offense of sexual
14 intercourse without consent. That offense is defined in § 45-5-503, MCA,
15 as: "A person who knowingly has sexual intercourse without consent with
16 another person commits the offense of sexual intercourse without consent."
17 "Without consent" is likewise defined in § 45-5-501(1)(a), MCA: "As used in
18 45-5-503, the term 'without consent' means: (i) the victim is compelled to
19 submit by force against the victim..."

20 The defense concedes that sexual intercourse took place with the
21 victim in this case. The defense asserts, however, that the sexual
22 intercourse was consensual and that therefore a finding of probable cause
23 cannot be made because there is an insufficient showing that the Defendant
24 acted knowingly. The State asserts that this argument was rejected in the
25 Kern case. Further, the State refers to the paragraph in the Affidavit
26 starting at page 2, line 20 through page 3, line 3, in which the victim states
27 that his manner became aggressive, that she repeatedly told him "no, not

1 tonight" and that he put his arm across her chest and held her down as he
2 pulled off her leggings underwear. She further describes trying to put her
3 knees up and trying to push against him and that his response was to tell
4 her to turn over saying: "turn over or I will make you." She then states that
5 she again said no, he flipped her over, held her down with his hand, pulled
6 her legs apart and positioned himself between her legs, took off his belt and
7 lowered his jeans, grabbed her hips and raised them and penetrated her
8 vagina with his penis. The State's Affidavit also includes the information
9 that the Defendant claimed the sexual act was consensual and that the
10 defense disputed the mental state. When the State's entire Affidavit is read
11 in conjunction with the charging language, there are sufficient facts
12 presented for this Court, having applied common sense and drawing
13 reasonable inferences, to conclude that there is a "fair probability" that the
14 Defendant committed the crime of sexual intercourse without consent.
15 Defendant appears to be asking this Court to use a different standard that
16 probable cause for the filing of the Information. Defendant seems to be
17 asking this Court to use at least a prima facie case standard. That
18 approach has been repeatedly rejected by the Montana Supreme Court.

19 The Defendant has presented a different version of this incident and
20 inserted in his version of "material facts," including many details about the
21 victim's conduct on other occasions, claiming that these facts call into
22 question her credibility and claim that the sexual act was not consensual.
23 Thus, what he claims as missing material facts are claims about the victim's
24 credibility, his detailed version of the sexual encounter that differs from her
25 statements, some incidents of her second-guessing her behavior that night,
26 and the fact that the results of her First Step exam could be interpreted to
27

1 demonstrate a consensual sexual encounter. These are all trial issues, not
2 issues of probable cause.

3 At the trial, the victim's credibility will need to be assessed, and if the
4 Defendant should choose to testify, so will his credibility. Judging credibility
5 of witnesses is the job of the finder of fact during the trial of the case,
6 usually a jury, not the job of the district court judge in deciding whether or
7 not an affidavit presents sufficient facts to demonstrate probable cause to
8 believe that the defendant has committed the crime charged.

9 Although the Court does not believe that the State omitted material
10 facts from the Affidavit that was initially presented to the Court for the
11 decision on probable cause, the Court has looked again at this issue with
12 the additional material provided by the Defense. Looking at everything,
13 using common sense and drawing permissible inferences, and making an
14 "informed decision," the Court again concludes that there is a "fair probability"
15 that the Defendant committed the offense of sexual intercourse without
16 consent. The charge is supported by probable cause. Therefore, the
17 Defendant's motion to dismiss is premature.

18 **2. Are alleged violations of the Montana Rules of Professional**
19 **Conduct grounds for dismissal of the Information?**

20 Defendant alleges that the prosecutor for the State has committed two
21 violations of the Montana Rules of Professional Conduct, specifically Rule
22 3.3, Candor to the Court, and Rule 3.6, Trial Publicity. The allegation
23 concerning the violation of Rule 3.3, is the claim that the State failed to
24 include "salient facts" in the Affidavit submitted to the Court for the
25 determination of probable cause. The allegation concerning a violation of
26 Rule 3.6 is a claim that the State sent a copy of the Affidavit directly to the
27 press.

1 The State vigorously disputes any ethical violation. As the Court has
2 explained in some detail above, the Court does not believe that the State
3 omitted "salient facts" from the Affidavit submitted to the Court. Therefore,
4 the Court does not see room for a violation of Rule 3.3, although as
5 explained below, the District Court is not the proper forum to discuss alleged
6 ethical violations.

7 The State further disputes that it violated Rule 3.6 because no
8 "extrajudicial" statement was made. The State notes that an affidavit of
9 probable cause in a criminal case is a public document, one that is open to
10 the media as well as any other citizen, thus, no improper disclosure was
11 made. In fact, the State notes that the Affidavit was accompanied by an e-
12 mail specifically stating that no additional statement would be made. Once
13 again, the Court agrees with the State's argument in this case. With few
14 exceptions, all of the filings in a criminal case are public documents.

15 The Court notes that the Defendant has failed to cite any authority that
16 dismissal of an information is a proper sanction if the prosecutor has
17 violated either Rule 3.3 or 3.6. The Court further notes that any
18 determination that a lawyer has run afoul of the Rules of Professional
19 Conduct in Montana is exclusively the province of the Montana Supreme
20 Court, not the district courts. See e.g., In re Engel, 2007 MT 172, ¶ 18, 338
21 Mont. 179, 169 P.3d 345.

22 **3. Have the Defendant's Due Process Rights been violated and if so**
23 **should the Information be dismissed because of such violation?**

24 In the present case, the Defendant contends that the State violated his
25 due process rights because the Defendant "had no ability to correct,
26 challenge, rebut or explain" the "erroneous" information prior to the State
27 filing the current charges. The Defendant then goes on to assert that this

1 action of the State is such misconduct that it might shock the conscience of
2 the court because it is so outrageous. Although the Defendant has cited to
3 the Court certain cases where a district court has dismissed a criminal
4 charge, the circumstances of those cases are quite different. For example,
5 State v. Minkoff, 2002 MT 29, 308 Mont. 248, 42 P.3d 223, involved the
6 State interfering with the defendant's ability to get an independent blood test
7 to challenge a DUI, and State ex. rel. Forsythe v. Coate, 171 Mont. 377, 558
8 P.2d 647 (1976), concerned whether the district court or the county attorney
9 had the power to dismiss a case and concluded that only the district court
10 did.

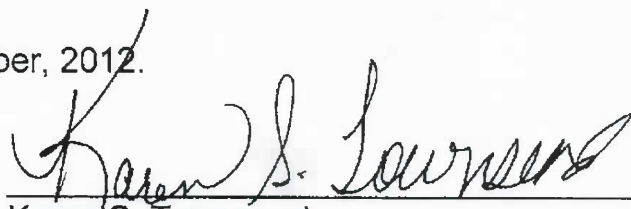
11 The Defendant provides this Court with absolutely no authority that a
12 criminal defendant is allowed to submit information to a court prior to the
13 court considering a motion for leave to file an information, and that since the
14 State failed to provide that opportunity, the Information in this case must be
15 dismissed. The Montana statutory scheme makes no allowance for such
16 action. Although a defendant would have the right to test the State's
17 evidence prior to an information being filed in the district court if the State
18 had chosen to proceed by way of a preliminary hearing, the defendant has
19 no right to a preliminary examination. The Montana Supreme Court has
20 ruled for over 100 years that this procedure does not violate a defendant's
21 due process rights. See e.g., State ex rel Donovan v. District Court, 26
22 Mont. 275, 67 P 943(1902), State v. Dunn, 155 Mont. 319, 472 P.2d 288
23 (1970), State v. Highley, 190 Mont. 412, 621 P.2d 1043 (1980). The
24 Montana procedure is fair and meets the requirements of due process
25 because the procedure requires a district court judge to make an informed
26 and independent finding that there is probable cause for the filing of a
27

1 charge. This Court sees no due process violation and therefore dismissal is
2 not proper.

3 **ORDER**

4 For the reasons outlined above, Defendant's Motion to Dismiss is
5 **DENIED.**

6
7 Dated this 5th day of September, 2012.

8
9 
10 Karen S. Townsend
11 District Judge

12 c: Suzy Boylan
13 Missoula County Deputy Attorney

14 David R. Paoli
15 Paoli Kutzman, P.C.

16 Kirsten H. Pabst
17 Attorney at Law
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