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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

STATE OF MONTANA,

Plaintiff,

-vs-

JORDAN TODD JOHNSON,

Defendant.

* * * * *

FILED NOV 28 2012

SHIRLEY E. FAUST, CLERK
Shirley E. Faust
Deputy

* Dept. No. 4

* Cause No. DC-12-352

* **DEFENDANT'S RESPONSE
TO STATE'S MOTION TO
COMPEL DISCOVERY**

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COMES NOW David Paoli and Kirsten Pabst, attorneys for
Defendant [Jordan] and respond to the State's Motion to Compel
Discovery, filed Friday, November 16, 2012. The State's Motion is
speculative, dramatic and without merit and should be denied by the Court.

The State—by its own admission-- made the decision to file the charge against Jordan, after receiving the complaining witness' text messages but prior to reviewing them. Since then, the defense has made many, many requests for specific items of existing discovery, including exculpatory evidence, most of which have been ignored.

For months, the defense has made repeated discovery requests of the State that remain unanswered and are hampering the trial preparation process. Most importantly, the State has not made its material witnesses available for interviews, including the complaining witness, the First Step nurse, the First Step medical review professional, and the lead detective, Connie Brueckner. These interviews are critical in evaluating and then retaining the types of experts necessary to rebut the State's presentation.

Moreover, without a report from the State's expert witness, it is difficult to evaluate, consult and retain an expert in rebuttal. (See State's Motion, paragraph 3, last sentence). It appears from the brief description provided in its notice, the State's expert intends to provide testimony that is not allowed in Montana, because it invades the province of the jury but, without a report, that analysis is as difficult as formulating a response. A Motion to Exclude Lisak's testimony will be the subject of a separate forthcoming motion.

The State's own witness list and discovery file contain the bulk of evidence which the defense will reply upon at trial. (See accompanying Witness and Exhibit List). The remaining disclosures will be made as soon as possible but are dependent on pending witness interviews and disclosures by the State.

For instance, the State produced a select portion of the complaining witness' counseling records for February, 2012, through September 21, 2012. Unfortunately, the accuser and her personal lawyer imposed an explicit limit on the full production of her counseling records. Their edict states that no records generated after September 21, 2012, may be released. On the record before us, in fairness, her remaining counseling records must be produced. The accuser and her lawyer released the partial set of records at the State's urging because the State assured "it would show how she has been impacted" by the alleged assault. The State and accuser cannot accomplish this by feeding the court cherry-picked counseling notes to suit only their purpose. Thus, we need to examine the complete records pertaining to this issue.

On November 27, 2012, it became very clear that the complete counseling record must be produced. We took a statement from the accuser's counselor wherein the counselor testified regarding critical

information that is included in the counseling records that have been withheld. This testimony relates to a counseling session that has direct impact on this case. When asked whether the State was going to attain and disclose these records, Ms. Boylan responded that she is "thinking about it." Further, the additional unproduced records contain information regarding how the accuser has been impacted.

The defense specifically responds to the State's assertions:

1. Motions in Limine. Motions in Limine are not yet due.
2. Names of Witnesses. See Witness and Exhibit list.
3. Experts—unable to proceed. See above.
4. Tangible objects. The defense intends on using tangible objects, documents, text messages, photographs, videos and other materials contained within the State's file.
5. Materials generated by our investigators. The State claims that as of this date we have not provided any of this information to the State. To the contrary, witness interview summaries prepared by an investigator were provided to the State and Detective Brueckner well before charges were ever filed. We would direct the State's attention to the white notebook entitled, *In Re: the Allegation of [Jane Doe]* which was hand-delivered to Suzy Boylan

last spring. In addition to the fact that Ms. Boylan signed Mr. Thompson's Motion to compel, the complaining witness made references to the defense notebook in her text messages. A cursory review of the text messages would similarly remind each of the prosecutors on this case of the disclosures previously made by the defense.

6 through 8. Recent Requests for Discovery. The requests were not ignored. The only additional material to provide is described on the Witness and Exhibit list.

9. The State, via Thompson's brief, signed by Boylan, claims it hasn't received a single piece of discovery. This statement is false. See response to paragraph 5, above. This information was provided in the form of a binder and included witness summaries, photographs, the names and letters written by multiple people in support of Jordan's good character.

In its "Law" section, the State complains that the defendant "has not provided the statutorily required notice" of good character evidence. Again, Mr. Thompson, the author of the Motion to Compel, should review documents previously filed in the case and see that on the omnibus form, submitted and signed by Ms. Boylan, that this

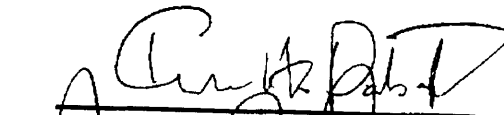
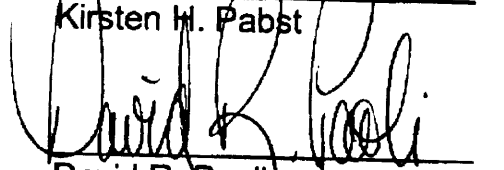
evidence is due 30 days prior to trial, which will be January 8, 2013.

Nonetheless, the defense has already provided much of these names and letters and will submit additional evidence of Jordan's good character prior to the deadline.

In its haste to draw attention away from its own discovery violations, the State misrepresents the status of the defense disclosures. Thompson's claims are disingenuous. The State's disclosures of "thousands of pages of discovery" have been delayed, arbitrarily redacted, cumbersome in form, and incomplete. The redacted texts were only disclosed after many, many requests and only because the defense happened upon the exculpatory text messages that the complaining witness sent to another witness.

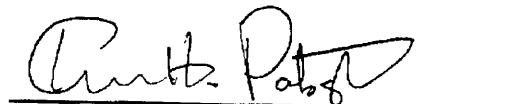
The State has not disclosed its expert witness' report. Most importantly, the State has not provided the defense reasonable access to interview its main witnesses and yet, complains—wrongfully—that it hasn't received a scrap of discovery. This conduct on behalf of the government should be discouraged.

DATED this November 28, 2012.


Kirsten H. Pabst

David R. Paoli

CERTIFICATE OF SERVICE

I, Kirsten Pabst, certify that on November 28, 2012, I served a copy of the foregoing document upon Suzy Boylan at the Missoula County Attorney's Office.


Kirsten H. Pabst