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FILED AUG 21 2012

SHIRLEY E. FAUST, CLERK
By [Signature]
Deputy

8 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

9	STATE OF MONTANA,	*	Dept. No. 4
10			
11	Plaintiff,	*	Cause No. DC-12-352
12			
13	-vs-	*	
14	JORDAN TODD JOHNSON,	*	STATE'S RESPONSE IN
15		*	OPPOSITION TO
16		*	DEFENDANT'S MOTION
17		*	TO DISMISS
18	Defendant.	*	

17 * * * * *

19 COMES NOW Fred Van Valkenburg, Missoula County Attorney, Suzy
20 Boylan, Assistant Chief Deputy Missoula County Attorney, and Jennifer
21 Clark, Assistant Chief Deputy Missoula County Attorney, and respectfully
22 move the Court to deny Defendant's Motion to Dismiss in the above-entitled
23 cause as it lacks any legal or factual merit.
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BACKGROUND

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2 Defendant was charged with the offense of SEXUAL INTERCOURSE
3 WITHOUT CONSENT, a FELONY, by way of an Information filed direct into
4 District Court after a finding of probable cause by District Judge Karen
5 Townsend. Arraignment took place on August 7, 2012. At the conclusion of
6 the arraignment hearing, defense counsel filed a Motion to Dismiss alleging
7 lack of probable cause, arguing insufficient evidence to sustain the charge of
8 sexual intercourse without consent. Defendant's Motion, p.1.
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11 The crux of the defense's motion is that the State "cherry-picked" facts
12 to include in its Affidavit of Probable Cause to kowtow to the federal
13 Department of Justice, which is conducting an investigation into the handling
14 of sexual assault cases in Missoula County by the Missoula County
15 Attorney's Office, the Missoula Police Department, and the University of
16 Montana. Their Motion makes four claims in support of their stance that
17 dismissal is warranted in this case: 1) that probable cause is absent; 2) that
18 the prosecutor engaged in misconduct by filing a misleading affidavit that
19 lacks probable cause; 3) that the misleading affidavit was provided to
20 members of the press; and 4) that Defendant's due process rights have
21 been violated as a result of the above claims. Defendant's Motion, p.11. The
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1 defense claims that “dismissal is the only appropriate and just remedy,” and
2 appears to argue that this remedy is warranted under the “good cause”
3 provision in MCA 46-13-401. Defendant’s motion, p.11. However that
4 provision pertains to dismissals on motion of the court or the prosecution.
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6 As part of their Motion, the defense offered their own version of an
7 Affidavit of Probable Cause, which similarly summarizes some of the
8 evidence and omits other evidence. This is concerning when read in light of
9 the fact that their Motion was filed before the defense received any of the
10 State’s investigative materials in the discovery process, which is still
11 ongoing.
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14 Particularly concerning are the defense’s disclosures in their brief of
15 unnecessary information that has no impact whatsoever on a determination
16 of probable cause but that could identify the victim, as well as their use of
17 information that is clearly barred under existing Montana Supreme Court
18 case law, the Montana Rules of Evidence, and the Rape Shield law, which
19 has been in existence since 1973. MCA 45-5-511 (2011). The Montana
20 Supreme Court has long held that such protections “reflect a compelling
21 interest in favor of preserving the integrity of the trial and...preventing it from
22 becoming a trial of the victim.” St. Germain v. State, 364 Mont. 494, 276
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1 P.3d 886 (2012), citing State v. Anderson, 211 Mont. 272, 283, 686 P.2d
2 193, 199 (1984) (quoting State v. Higley, 190 Mont. 412, 424, 621 P.2d
3 1043, 1050-51 (1980). Despite these prohibitions, putting the victim on trial
4 in the court of public opinion appears to be precisely what the defense
5 intends to do.
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7 The defense has not offered any persuasive facts or legal authority in
8 support of their claims. The State respectfully moves this Court to deny the
9 defense's Motion for the reasons stated below.
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11 ARGUMENT

12 The State first asserts that the defense's claim that the charging
13 decision was affected by the Department of Justice investigation could not
14 be further from the truth. Unfortunately, the State cannot respond in detail to
15 this allegation without potentially running afoul of ethical rules regarding
16 public statements about a case. However, the defense was informed of the
17 review of the case conducted by the criminal attorneys at the Missoula
18 County Attorney's Office before the charge was filed. The defense's claim is
19 speculation at best.
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25 By definition, an Affidavit of Probable Cause cannot contain every fact
26 that will be put in front of a jury at trial. Allowing defense counsel to dictate

1 the contents of an Affidavit of Probable Cause in a criminal case would lead
2 to an absurd result.

3 At the time of the filing of an Affidavit of Probable Cause, the State is
4 the entity in possession of the most facts. This is particularly true in this
5 case, in which both parties had possession - before the filing of the
6 Information - of evidence and documents developed in the course of an
7 Order of Protection proceeding and through University of Montana
8 disciplinary proceedings, but the defense was not yet in possession of any of
9 the reports, witness interviews, or other materials developed in the course of
10 the criminal investigation at the time they articulated their version of an
11 Affidavit of Probable Cause. Instead of challenging the State's evidence in
12 the appropriate forum, which is a trial, the defense has filed a thinly veiled
13 press release under the guise of a legal pleading. Their Motion is rife with
14 irrelevant, unnecessary, prejudicial, and objectively inadmissible evidence.
15 Motions to Dismiss challenging a judicial finding of probable cause are not
16 the place to dispute the State's evidence, offer alternative interpretations of
17 the evidence, or make determinations of witness credibility. Determinations
18 of witness credibility lie squarely within the province of the jury. In fact, one
19 of the standard jury instructions given in every criminal trial states "[t]he
20 evidence presented by one witness whom you believe is sufficient for the
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1 proof of any fact in this case.” *MCJI 1-103*. Nor is a pre-trial motion an
2 appropriate way to make a claim that a rape victim did not act like a rape
3 victim should. Trauma responses are complex, often counterintuitive to lay
4 persons, and require expert testimony.

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6 The defense is attempting to turn the simple procedure of making a
7 finding of probable cause necessary to commence a case into a trail before
8 a trial and is potentially contaminating the jury pool in the process.

9
10 **I. The State is required to merely allege facts in its affidavit**
11 **sufficient to show probable cause.**

12 The Montana Supreme Court has long and repeatedly held that an
13 Affidavit of Probable Cause filed in support of a motion for leave to file an
14 Information need only recite facts sufficient to indicate a mere probability
15 that the defendant committed an offense. State v. Bradford, 210 Mont. 130,
16 139, 683 P.2d 924, 928 (1984); see also State v. Holt, 2006 MT 151, 332
17 Mont. 426, 139 P.3d 819; State v. Kern, 315 Mont. 22, ¶ 17, 67 P.3d 272, ¶
18 17 (2003). Further, the sufficiency of charging documents is established by
19 reading the Information together with the Affidavit of Probable Cause. State
20 v. Hamilton, 252 Mont. 496,499, 830 P.2d 1264, 1267 (1992); State v.
21 Elliott,308 Mont. 227, ¶ 26, 43 P.3d 279, ¶ 26 (2002).

1 The Court also has repeatedly held that the affidavit need not make
2 out a prima facie case that the defendant committed the offense. Ramstead,
3 243 Mont. at 165, 793 P.2d at 804; Elliott, 308 Mont. at ¶ 26, 43 P.3d at ¶
4 26; Kern, 2003 MT at ¶17, 315 Mont. 22, ¶17, 67 P.3d 272, ¶ 17; State v.
5 Johnson, 203 Mont. 153, 156, 660 P.2d 101, 102 (1983); State v. Arrington,
6 260 Mont. 1, 6, 858 P.2d 343, 346 (1993). State v. Buckingham, 240 Mont.
7 252, 256, 783 P.2d 1331, 1334 (1989).
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10 Similarly, and most importantly, the evidence used to establish
11 probable cause need not be as complete as the evidence necessary to
12 establish guilt. Kern, 315 Mont. at ¶ 17; Buckingham, 240 Mont. at 256;
13 Bradford, 210 Mont. at 139, 683 P.2d at 929 (1984). An Information is
14 intended to provide the defendant with notice, not to provide discovery of the
15 State's evidence. State v. Riley, 199 Mont. 413, 421, 649 P.2d 1273, 1277
16 (1982); See also State v. Little, 260 Mont 460, 469, 861 P.2d 154, 160
17 (1993). Further, a court reviewing an Affidavit of Probable Cause may use
18 common sense and draw permissible inferences; the standards are less
19 stringent than those governing the admissibility of evidence. Little, 260
20 Mont. at 469, 861 at 160 (1993); See also Ramstead, 243 Mont. at 166, 793
21 P.2d at 804. The determination of whether a motion to file an Information is
22 supported by probable cause is left to the sound discretion of the trial court.
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1 Bradford, 210 Mont. at 139, 683 P.2d at 929. This probable cause
2 determination will not be reversed absent an abuse of discretion.

3 Buckingham, 240 Mont. at 256, 783 P.2d at 1334; Little, 260 Mont. 460, 861,
4 P.2d 154, 160 (1993). See also Ramstead, 243 Mont. at 166, 793 P.2d at
5 804.
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7 In Elliott, the State charged the defendant with deliberate homicide for
8 the death of her baby. The defense moved the court to dismiss for lack of
9 probable cause because the state could not prove that the baby was alive
10 when born. The Supreme Court upheld the district court's denial of her
11 motion, stating the affidavit provided a probability that the offense occurred.
12 Elliot, 308 Mont. at ¶ 31, 43 P.3d at ¶ 31. The State was not required to
13 prove anything further at this stage of the proceedings.
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17 In Kern, a sexual intercourse without consent case, the defendant
18 argued there was insufficient probable cause in the affidavit to establish the
19 mental state of knowledge. The affidavit stated the facts surrounding the
20 events, but did not specifically state the defendant acted knowingly. Kern,
21 315 Mont. at ¶ 18, 67 P.3d at ¶ 18. The Supreme Court held that the factual
22 allegations clearly established probable cause that the defendant "knowingly
23 subjected another person to . . . sexual contact without consent" and that the
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1 trial court did not abuse its discretion in holding that the affidavit alleged
2 facts sufficient to establish "a mere probability" that the defendant committed
3 the offense. Kern, 315 Mont. at ¶18, 67 P.3d at ¶ 18.

4 In Johnson, defendants were charged with operating, possessing,
5 keeping, and maintaining a slot machine, and maintaining a bingo/keno
6 game in which cards/chances may be purchased in excess of \$.50. The trial
7 court dismissed the State's Information for lack of probable cause, stating
8 the gaming machines in this case were found to be legal in another case.
9 The State appealed. The State contended the games were slot machines
10 and the defendants claimed they were not. The Court stated "there is no
11 record regard to determine whether the machine is or is not a slot machine.
12 However, the State has shown probable cause in its affidavits that an
13 offense has been committed and that is all that is necessary." Johnson, 203
14 Mont. at 156, 660 P.2d at 102. The Court held that dismissal of Count I was
15 in error. Id. As to the second count, the Court held, "An information need
16 only show 'probable cause to believe an offense has been committed'.
17 Again, this Court has no record from which we can determine the legality of
18 the bets. We do find that the affidavit does show probable cause that an
19 offense has been committed and dismissal of Count II of the information was
20 in error." Johnson, 203 Mont. at 157, 660 P.2d at 103.

1 In its Motion, the defense in the case at bar cites a portion of the
2 Revised Commission comments addressing probable cause to file charges.
3 The portion of the comment he cited goes on to explain further what the
4 commission expects.

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6 Obtaining leave to file an Information is not a mere perfunctory
7 matter, but rests in the sound discretion of the district judge. The
8 application must be complete in itself and contain such salient
9 facts as will allow the district judge to make an independent
10 determination that an offense has been committed. **It is**
11 **impossible to delineate here what facts would be necessary**
12 **for all cases; however, a recitation of the fact the defendant**
13 **was arrested, that he was accused of a crime and that there**
14 **is good evidence (e.g. eye-witnesses) implicating him with**
15 **the crime would seem sufficient.**

16 Mont. Code Ann. § 46-11-201 (2011), Commission Comments, 1991
17 Comment. (emphasis added).

18 In the instant case, Defendant argues that the State cannot *prove* the
19 mental state of the defendant. Reading the Affidavit and the Information
20 together provides sufficient probable cause. Defendant supplements the
21 State's Affidavit with his own version of the facts, some of which do not even
22 support his legal theory. In none of the cases cited by Defendant does the
23 Court require every piece of evidence or every statement made in the case
24 to be included in the Affidavit of Probable Cause. To require such a thing in
25 this case would force the judge making a probable cause determination to
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1 read a lengthy investigative report; watch video of and read transcripts of
2 multiple witness interviews; read the medical reports, any expert reports
3 and/or related learned treatises; interview the victim and all potential
4 witnesses to determine credibility; and read approximately 35,000 text
5 messages collected in the investigation. In essence, the Court would be
6 required to conduct a non-jury trial in order to determine whether there exists
7 sufficient probable cause for the case to go to trial. Courts recognize and
8 honor that probable cause is a preliminary determination and that the
9 information required at this stature of the proceedings is minimal. Probable
10 cause is a *mere probability* that a defendant committed the crime with which
11 he is charged. Although the state must prove each element of the offense at
12 trial, it is not required to do so in the pre-trial stage.
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16 Defendant is asking this court to ignore its common sense application
17 of the facts to its finding of probable cause. The State's Affidavit of Probable
18 Cause covers the three elements needed to establish a preliminary finding
19 of probable cause. The State has alleged that there was sexual intercourse,
20 which is undisputed. The State has further alleged facts that support a
21 finding of probable cause as to the element of "without consent" as well as
22 the mental state of knowledge. The pertinent section of the Affidavit of
23 Probable Cause states:
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1 She then described a change in his demeanor as going from
2 playful to aggressive. He got on top of her and started thrusting
3 his hips into her. She started to get scared and told him "no, not
4 tonight" repeatedly. Defendant put his left arm across her chest
5 and held her down as he pulled her leggings and underwear off.
6 She put her knees up and tried to push against him. He then
7 told her to turn over. He said "turn over or I will make you." Jane
8 Doe said "no." Defendant then flipped her over and held her
9 head down with his hand. He pulled her legs apart, positioned
10 himself between her legs, took off his belt and lowered his
11 jeans. He grabbed her hips and raised them towards him. He
12 penetrated her vagina with his penis.

13 State's Affidavit of Probable Cause, p. 2. The State also made it clear
14 in its Affidavit that the elements of "without consent" and mental state are
15 disputed by the defense. The Affidavit specifically states Defendant's claim
16 that the sexual intercourse was consensual and that the victim was an active
17 participant. The fact that the defense disputes some of the State's evidence
18 does not detract from a finding of probable cause. Indeed, trials exist
19 because such disputes exist. The Court received sufficient facts to establish
20 probable cause in this case and the Motion to Dismiss should therefore be
21 denied.

22 **II. Sufficiency of the evidence is a question of fact for the jury.**

23 Defendant argues that the state cannot *prove* and has *insufficient*
24 *evidence to prove* as a matter of law the mental state element of the offense
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1 and the Information must be dismissed. Defendant's brief, p. 14 (emphasis
2 added.) Defendant has confused a probable cause analysis with a
3 sufficiency of the evidence analysis. Defendant is asking this court to invade
4 the province of the jury by determining the sufficiency of the evidence on a
5 "supplemented" affidavit that does not contain the entirety of the facts in this
6 case. The defense is also asking this Court to take its interpretation of the
7 evidence as fact, instead of addressing those disputes in the appropriate
8 forum at the appropriate time. The State is not required to prove the case
9 pre-trial. The time for presenting evidence is at trial and the sufficiency of the
10 evidence is a question of fact for the jury. The motion to dismiss is
11 premature; such a challenge is appropriate after the State has had an
12 opportunity to present its evidence to the trier of fact – the jury. *State v.*
13 *Nichols*, 291 Mont. 367, 369, 970 P.2d 79, 80 (1998).
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18 The question of Defendant's mental state is a question for the fact
19 finder at a trial. There is no precedent for a court to dismiss a charge on the
20 assumption that the State will not be able to produce sufficient evidence to
21 support its charge. The State respectfully requests this court to decline the
22 invitation of the defendant to take the role of fact finder away from the jury.
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1 **III. The State did not violate Rule 3.3, Candor to the Court.**

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3 Montana Rule of Professional Conduct 3.3(d) states: In an ex parte
4 proceeding, a lawyer shall inform the tribunal of all material facts known to
5 the lawyer that will enable the tribunal to make an informed decision,
6 whether or not the facts are adverse.
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8 The only statement necessary to establish probable cause is “on
9 February 4, 2012, defendant knowingly had sexual intercourse with Jane
10 Doe without consent.” A material fact would be one in which the victim
11 stated this did not happen. No such fact exists. The facts provided by the
12 defense are not material to the determination of probable cause. The State
13 included the Defendant’s contention that the acts were consensual,
14 providing a balanced presentation to the court. As discussed above, the
15 State is not required to list out every potential fact to the Court in its affidavit.
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19 Defendant fails to cite a single case that supports his allegations that
20 the prosecutor acted unethically in the filing of the Affidavit. As stated above,
21 the case law is clear that establishing probable cause is a low threshold and
22 that it is both unnecessary and impossible to consider every single piece of
23 potential evidence at this early stage. The State has not crossed any ethical
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1 boundary. The defense is using a pre-trial motion as an opportunity to
2 slander the State in the court of public opinion.

3 The Defendant is incensed that the law does not provide for his
4 version of the facts to be presented in the charging document and thus
5 attempts to use this as an opportunity, before the proper forum is available,
6 to do so. The Defendant argues that the affidavit bolsters the credibility of
7 the complaining witness. The time for that argument is, again, at trial.
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10 **IV. The State did not violate Rule 3.6, Trial Publicity.**

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12 Rule 3.6 provides that a lawyer who is participating or has participated
13 in the investigation or litigation of a matter shall not make an **extrajudicial**
14 statement that the lawyer knows or reasonably should know will be
15 disseminated by means of public communication and will have a substantial
16 likelihood of materially prejudicing an adjudicative proceeding in the matter.
17 Mont. R. Prof. Conduct 3.6. (emphasis added.) The key term here is
18 “extrajudicial.” The filing of an Information is not an extrajudicial statement.
19 The fact that the Missoula County Attorney’s Office provided the public
20 document to the media after numerous requests by the media does not
21 violate this rule. Informations and Affidavits of Probable Cause are *public*
22 documents. The media – as well as any individual citizen - is entitled to all
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1 public documents. The email from the County Attorney attached to the
2 Motion to Dismiss shows only that this office told the media it would not
3 make any extrajudicial statements. This disagreement of whether the media
4 should have obtained the charging documents from the court or whether the
5 state violated an ethical rule is once again an attempt of the defendant to
6 color the public opinion of the state and is in itself improper. Also missing is
7 any case law to support the allegations.
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10 The Affidavit was provided to the media because it is a public
11 document and the case is one that has garnered significant media attention.
12 No extrajudicial statements were made; therefore, the State cannot be said
13 to have violated this ethical rule.
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16 **V. Defendant's due process rights have not been violated.**

17 Defendant states that the Due Process clause is simple. The State
18 agrees. The due process clause of the 14th Amendment to the United States
19 Constitution, provides that no state shall deprive any person of life, liberty, or
20 property without due process of the law. Montana Constitution Article II, §17
21 similarly provides that no person shall be deprived of life, liberty, or property
22 without due process of law. However, Defendant then argues against
23 hundreds of years of jurisprudence. Due process is built into our legal
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1 system by the set of laws and procedures the State must follow. Due
2 process is violated when the State fails to follow the law and procedures.
3 Our statutory scheme, which is supported by the decisions of the Montana
4 Supreme Court cited above, provides for the filing of charges by way of
5 Information after a judicial finding of probable cause. Therefore, the simple
6 conclusion is that because the proper procedures were followed, no due
7 process violation has resulted. Additionally, it should be noted that it was the
8 Defendant who requested that the charge be filed directly into District Court,
9 thereby waiving the preliminary hearing. See Mont. Code Ann. §46-11-11(2).
10 The State agreed to do so as a courtesy to the defense. Once again, the
11 Defendant has failed to cite any authority to support his accusation that the
12 State has violated his due process rights.

13
14 Defendant cited State v. Martinez, 86 P.3d 1210, 1217 (Wash.App.
15 2004) as stating that dismissal is the only viable remedy when State
16 misconduct shocks the conscience of the court and is so outrageous that it
17 exceeds the bounds of fundamental fairness. Martinez relied on Washington
18 Court Rule 8.3(b): Dismissal: On motion of court. The court, in the
19 furtherance of justice, after notice and hearing, may dismiss any criminal
20 prosecution due to arbitrary action or governmental misconduct when there
21 has been prejudice to the rights of the accused which materially affects his
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1 right to a fair trial and when the prejudice cannot be remedied by granting a
2 new trial. State v. Whitney, 96 Wn.2d 578; 637 P.2d 956 (1981); State v.
3 Baker, 78 Wn.2d 327, 474 P.2d 254 (1970).

4 This is not that case. The facts of Martinez involved the prosecution
5 providing exculpatory evidence during a trial. The court found that the
6 withholding of evidence until late in trial warranted dismissal. 86 P.3d at
7 1217. Not only is this case not controlling precedent in Montana, but
8 Defendant has not shown an inability to receive a fair trial. Probable cause is
9 a preliminary matter. Discovery has been provided and discovery is ongoing.
10 The State continues to comply with the rules of discovery.

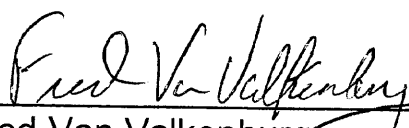
11 Defendant further complains that his due process rights were violated
12 “because he had no ability to correct, challenge, rebut or explain the
13 erroneous information prior to the State filing rape charges....” Defendant’s
14 Motion, p. 17. Curiously, the Motion offers no authority to support his
15 contention that he is entitled to such an opportunity in the early stages of the
16 case. The time to correct, challenge, rebut or explain the State’s evidence is
17 at trial. More importantly, the defense fails to mention that they were in
18 possession of the State’s Affidavit of Probable Cause the day before the
19 charge was filed and in fact met with counsel for the State several hours
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1 before the charge was filed. No mention was made of any insufficiencies in
2 the State's Affidavit.

3
4 **CONCLUSION**

5 It is a desperate accusation that the Defendant points to the
6 Department of Justice investigation as the impetus for the filing of these
7 charges. It is the long-standing practice of the criminal division of the
8 Missoula County Attorney's Office to jointly review cases and make
9 independent determinations of probable cause and trial viability, irrespective
10 of outside influences. Defendant's Motion to Dismiss is an attempt to present
11 his version of the facts to the court of public opinion, influence the public's
12 opinion of the Missoula County Attorney's Office, and invite this Court to
13 decide this case prior to the State presenting its case to a jury. Defendant
14 has provided no persuasive authority to support his claims, nor does he
15 analyze the cases presented to support his theory. There is sufficient
16 probable cause established in the State's Affidavit of Probable Cause. The
17 Motion to Dismiss must be denied.
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23 Dated this 21st day of August, 2012.

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26 Fred Van Valkenburg
Missoula County Attorney

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Suzy Boylan
Assistant Chief Deputy County Attorney


Jennifer Clark
Assistant Chief Deputy County Attorney

CERTIFICATE OF MAILING

I, Tawnie Malone, do hereby certify that on the I delivered a copy of the foregoing to Kirsten Pabst and David Paoli, attorneys for Defendant, via email.

