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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

STATE OF MONTANA,

* Dept. No. 4

Plaintiff,

* Cause No. DC-12-352

-vs-

* **MOTION TO DISMISS**

JORDAN TODD JOHNSON,

*

*

Defendant.

*

* * * * *

COMES NOW Kirsten H. Pabst, Attorney for Jordan Johnson [Jordan], and moves this Court to dismiss the above-named cause for the reason that there is not probable cause sufficient to sustain the charge of sexual intercourse without consent. In seeking leave to file its charge against Jordan, the State presented to the reviewing magistrate (this Court) a materially incomplete and misleading version of the facts in its Affidavit of Probable Cause. The State then sent the incomplete, misleading and prejudicial document to multiple members of the media. Such conduct by the state violates Jordan's right to Due Process under the Montana Constitution and the United States Constitution. Based upon the conduct of the State and considering the omitted and corrected facts that should have

been contained in the charging documents, dismissal is the only appropriate remedy.

INTRODUCTION

This case has arisen in the unfortunate context and under the cloud of a federal Department of Justice investigation into complaints about how the University of Montana, the Missoula City Police and the Missoula County Attorney's Office handle cases involving alleged sexual assault. These investigations have placed the Missoula authorities under the scrutiny of the national news media and special interest groups promoting victims' rights. Moreover, in Missoula, Montana, there has been a barrage of media stories criticizing the police and local prosecutors for an allegedly insufficient response to alleged victims of sexual abuse.

Understandably, the State would like to demonstrate its reflexive and compassionate response to victims of sexual crimes and demonstrate to the community at large that the County's hard-line stance against sex crimes is having a deterrent effect. The State has chosen to demonstrate this commitment in the case at bar, which not coincidentally happens to be under intense scrutiny from the local, state, national and world media. Unfortunately, while multitudes of competent and noble exercises of prosecutorial discretion go unnoticed, the State has chosen to use Jordan's case—one which lacks probable cause—as a means to try to send a message. The collateral damage to Jordan and his family is immeasurable.

On July 31, 2012, the Missoula County filed the pending charge against Jordan and filed in support its Affidavit of Probable Cause. The carefully cherry-picked 'facts' the State has chosen for inclusion in the affidavit make it look like probable cause exists to support the charge. However, material facts—known to the State long before the charge was filed—were intentionally omitted and other facts in the affidavit are misstated. The State's Affidavit is repeated below, in its entirety, in gray print. Jordan presents additional facts, taken directly from the State and University investigations, and overlays them in black, to illustrate the contrast between what the State presented and what it omitted. When all relevant facts are taken into account and the portrayal of the event is corrected and fleshed out, an entirely different picture emerges of the sexual event between Jordan and "Jane Doe" on February 4th.

FACTUAL BACKGROUND

Jordan re-presents the State's Affidavit of Probable Cause in gray, breaking it down into 6 paragraphs and inserts facts known to the State at the time of its filing. Corrections and new facts which were omitted by the State are included and bolded for the Court's consideration.

Paragraph 1.

Defendant and Jane Doe are University of Montana students who have known each other since 2010. **Their relationship could be described as casual and friendly with a flirtatious component. They hung out occasionally, watching movies, having ice cream, texting and talking. At one time last year, the two were alone in her room kissing. Jordan expressed an interest in engaging in sexual behavior with Doe. Doe told him "no" and he discontinued the sexual advances.**

The two drifted in separate directions yet Doe continued to periodically send Jordan text messages which were friendly and complimentary of his athletic performances. Doe began dating another man for a while but after they broke up, in part because of her relationship with Jordan, she again initiated contact with Jordan. They had been texting each other over the winter holidays between December 2011 and January 2012 and after they returned to school after the holidays. **These texts were flirtatious and sexual in nature. For example, there were discussions about taking showers together, etc. Doe later said that she thought Jordan was kind, attractive and thought she would have a relationship with him some day.**

On February 3, 2012, Doe attended the Forrester's Ball at the University of Montana with some of her friends and Jordan attended with several of his friends. Doe had been drinking a significant amount of alcohol and was intoxicated. Doe saw Jordan dancing with and kissing his friend Kelly, with whom Jordan maintains a romantic interest. Doe approached Jordan and put her arm around his back, leaned into him and said, "Jordy, I would do you anytime," according to Jordan and Alex Bienemann, who heard Doe make the comment. She slid her hand along the small of his back and asked Jordan if he wanted to dance with her. They

danced a couple of songs and Doe asked Jordan if he wanted to get “married,” at a pretend ceremony at the Ball in which pairs of people exchange plastic rings. Jordan got in the “marriage” line with Doe but left Doe in the line when he saw Kelly and his other friends across the gym.

The following day, Jordan texted Doe, “Hey you,” asking if she wanted to hang out. After exchanging texts, they agreed that Doe would drive to pick up Jordan at his house, approximately 5 minutes away, and bring him back to Doe’s house where they would watch a movie together.

On or about February 4, 2012, Defendant sent a text message to Jane Doe suggesting they get together. They decided to watch a movie at Jane Doe’s house. Defendant asked Jane Doe to pick him up **from his house**, as he had been drinking alcohol and did not want to drive. **Though he had only had a couple of beers, he never drives after drinking any alcohol. Doe went to Jordan’s house around 11:00 pm to bring him back to her house. When she picked him up and brought him back to her house she did not think he had been drinking.** When they arrived at her house, Jane Doe introduced Defendant to her **male** roommate, **Stephen Green**, who was in the living room playing a video game **approximately 7-8 feet away from her bedroom door. Jordan shook his hand.** Her other **male** roommate, **Neil Sauer**, was home but asleep **in his nearby bedroom.**

Paragraph 2

Jane Doe selected a movie, and they watched it together in her room. **Doe brought Jordan straight into her bedroom and the two of them lay down on her bed and started watching a movie. Doe suggested the movie “Easy A,” a comedy about a young woman who lies about fictitious sexual escapades to gain popularity, and they started watching. According to Doe,** As they watched the movie, Defendant started to kiss Jane Doe. She kissed him back but disengaged, saying “Let’s just watch the movie.” She **later said that she** did not want to get physical that night, but just wanted to relax. **In her own words, Doe wrote, “After playfully arguing with him for a minute, I gave in and let him take off my long sleeve shirt. After he took off my shirt, I took off his shirt.” She continued, “We continued kissing while I was on**

top of him..." So, after she and Jordan took off each other's shirts, she got on top of him. He stopped, but started kissing her again. He began pulling her on top of him. She tried to keep things light and tried to discourage his advances. He tried to take off her shirt. She pulled it back down and told him "no, not tonight," to which he responded, "oh, come on." He subsequently tried again to take off her shirt and she let him. She then took off his jacket and shirt. She then described a change in his demeanor as going from playful to aggressive. He got on top of her and started thrusting his hips into her. She started to get scared and told him "no, not tonight" repeatedly. Defendant put his left arm across her chest and held her down as he pulled her leggings and underwear off. She put her knees up and tried to push against him. He then told her to turn over. He said "turn over or I will make you." Jane Doe said "no." Defendant then flipped her over and held her head down with his hand. He pulled her legs apart, positioned himself between her legs, took off his belt and lowered his jeans. He grabbed her hips and raised them towards him. **She said that while he was lying on top of her, "he grabbed me by my hips and began thrusting my body onto his," describing a physically violent situation and somewhat implausible position. There were no bruises or marks of any kind on her hips where Jordan's hands would have had to forcefully grab her hips.** He penetrated her vagina with his penis. Jane Doe described this as being very painful. She felt scared and "shut down." She stopped resisting at this point. She **said she** was afraid he would hit her **in the face** if she resisted further, **despite that she had never seen Jordan angry and had never seen him hit any person, she was facing away from him and his hands would have been otherwise occupied.** He ejaculated, at least in part, on her blanket. She said "everything changed when he flipped me over and held me down." She also stated that he said "you told me you wanted it" several times, and stated she did not say anything besides "no" and "not tonight."

According to Jordan, Jordan was on his left side and Doe was also on her left side tucked up next to Jordan, with her back to him and his arms around her. After about 20 minutes, Doe turned onto her right side, directly facing Jordan very close to his face and began kissing him on the mouth. After kissing for a few minutes, Doe rolled over completely on top of Jordan while they continued to kiss.

Jordan took off Doe's long-sleeved shirt. In response, she took off Jordan's

shirt and continued to kiss him. Jordan removed her yoga-type pants. She cooperated with him removing her pants by arching her back and lifting her hips to allow room for them to move under her. They continued to kiss and Doe was on her back on the bed.

Jordan touched Doe's vaginal area outside of her underwear. Jordan then took off her underwear and touched in and around her vagina with his hand and fingers. In response, Doe asked Jordan whether he had a condom. When Jordan told him he did not have a condom, Doe told him "that's ok." Jordan took off his own pants and then the two began having sex, with her still on her back. They continued to kiss.

After a couple of minutes in that position, Jordan pulled out because he thought he was going to ejaculate. He did not, however, and they changed positions, with her turning over onto her stomach and Jordan helped her turn around. Doe lifted her hips slightly to raise her vagina to allow him to penetrate her vagina from behind. Doe, still on her stomach, turned her head around to look at Jordan and say, "Oh, you're bad!" in a flirtatious tone. According to Jordan, this statement is the only thing that Doe said during the time they were having sex.

They had intercourse in this position for a few minutes until Jordan pulled out again and ejaculated into his hand and onto the bed. Doe rolled off the bed and got up. Jordan asked for something to use to clean up the bed. Doe grabbed a towel and handed it to Jordan. Jordan got up, wiped up the bedspread and left the room to use the bathroom. When Jordan came back into Doe's room, she asked him if he wanted to go home right now or later, as Doe's friends at the Forrester's Ball needed a ride. Jordan got the impression that she wanted him to stay with her but he decided he would rather go home immediately.

Paragraph 3

Defendant grabbed his clothes and went into the bathroom. Jane Doe quickly changed into a new set of clothes. She texted her roommate, **Stephen Green**, who was in the living room, saying "Omg...I think I might have just gotten raped..he kept pushing and pushing and I said no but he wouldn't listen...I just wanna cry...Omg what do I do!"

Green did not respond to her. Instead, he sat on the couch and texted her back. He had been steps away from her room and had heard nothing unusual. He later said that he really didn't know what to make of her text. He told her to come out and sit with him. She grabbed her purse and phone and left the bedroom. **Doe's other roommate, Neil Sauer, said that he was probably asleep when this happened and that he hadn't heard about it until a week later.**

Defendant left his watch at Jane Doe's house. **He explained that he normally doesn't wear a watch, but had one on that night that his sister had given to him after she received it for free from her work with an athletic apparel company.** He did not contact her again after the night of February 4.

Paragraph 4

Jane Doe **said that she** was in shock and wanted him out so, **instead of having either or both of her male roommates take him home, instead of calling 911, instead of calling other friends, instead of having someone come with her, and instead of making him walk home,** she **decided to drive** drove him home, ***after fixing herself a snack in her kitchen and eating it.*** Neither Defendant nor Jane Doe said anything on the ride to his home until he got out of the car and said "well thanks." She then picked up a friend, **Brian O'Day, from the Missoula Club** as she had promised to be his designated driver, and told him what had happened. She spoke to a close female friend the next morning, **and also texted her that "I think I got raped last night" and that she didn't want to report his name because she, Jane Doe, felt 'responsible'.** **They** went to the Student Assault Resource Center at the University, and went to First Step for a medical examination. **At First Step, Doe was seen by nurse Clair Francouer. Doe didn't tell Francouer about kissing Jordan, about getting on top of him or about taking his shirt off. She did not mention the sex while she was on her back. Francouer's assessment was "medical exam of 20 yo reveals physical trauma findings."** However, two independent medical providers have concluded that the findings of tiny vaginal abrasions and mild genital swelling are similarly consistent with consensual sex. **At First Step, Doe was instructed to collect her blanket for evidentiary purposes but declined to do so because she didn't want to**

give up her blanket. The medical examination showed some genital pain and physical findings consisting of mild redness, swelling, and some small abrasions; marks on her chest; and tenderness to the side of her head. **The photos of Doe's chest do not show obvious injuries, even though Francouer later testified that the chest injuries were the basis for her conclusion of sexual assault. In fact, the redness present, if any, is diminished by the presence of a redder, more prominent pimple. Other than those slight red marks, which appear more recent than the sexual event, Doe had no other visible injuries.**

After her First Step exam, Doe attended a Super Bowl party and then later that evening went to work at the Ronald McDonald House. Doe mentioned attending the party in her first written statement but, in later versions, including the one she later used to get an order of protection, Doe asserts that after the First Step exam, *she remained home for the rest of the day*, with the exception of the Ronald McDonald House. The reference to the Super Bowl party had been deleted in her "official" statement to University officials.

Paragraph 5

The people Jane Doe disclosed the incident to described her emotional state as very unlike her usual demeanor. She has sought counseling and has shown signs of depression, panic, and Post-Traumatic Stress Disorder consistent with Rape Trauma Syndrome. **Doe has a history of previous bouts with depression and anxiety attacks. Doe offered information that she was extensively bullied as a child, in Power and in Great Falls and as a result developed an anxiety disorder. At times she has contemplated suicide and has received treatment to address the anxiety. Doe has experienced post-traumatic stress symptoms for many years, since her diagnosis of PTSD as a child. She described a re-triggering of symptoms after this incident.**

Paragraph 6

Defendant was interviewed by Detectives Brueckner and Chrestenson of the Missoula Police Department. Defendant described a consensual encounter initiated by

Jane Doe in which she was an active participant. He further stated that he stopped communicating with her after he had sex with her because he liked another girl and thought she would be upset if she knew he had sex with Jane Doe.

In written statements obtained by Jordan's attorneys, Doe said, "The reason I feel this whole situation is my fault is because I feel like *I gave Jordan mixed signals* which caused him to act in the way he did." She blames herself for the sex happening at all because she gave him mixed signals, in other words--*signals of consent*. Doe also wrote, "Maybe it was the clothes I was wearing that day, *us making out, or me taking off my shirt* that made Jordan think that I wanted to have sex? *Anything I did that night could have given Jordan the idea that I wanted to have sex*, but in no verbal way did I tell him that I wanted to. Granted I probably *would have had sex with him in a consensual way in the future*, but I did not want to have sex that night....". Doe also wrote, "When I first met Jordan Johnson I was attracted to him instantly, not only by his physical appearance but by his sweet and genuine nature....He was particularly quiet when we first met, but when we talked he was honest and caring."

Despite having no contact with Jordan, approximately four weeks after the incident, Doe applied for an order of protection. In the OP process, more than one month after the alleged incident, Doe *claimed to be presently afraid for her safety*, a legal element necessary in order to qualify for the order, even though Jordan had never threatened her and has had no contact with her in any way since February 4th.

In a letter dated March 6, 2012, Doe wrote Jordan a letter in which she tells him she thinks that deep down he is a truly good person and doesn't want to ruin his life. In the letter she continually refers to her feelings being hurt. However, to the contrary, Doe and her attorney sent a letter to the Missoulian which was the source of an article published on March 28, 2012. According to Doe's attorney, she was angry that he was not having to suffer any consequences and appeared to be living a "normal life."

Six weeks after the incident, Doe made a report to the police department, seeking to have Jordan charged with rape. Jordan has had no contact with her since February 4th.

In a series of text messages with Brian O'Day on February 7, 2012, Doe admitted that Jordan would be *very surprised* when he learned of her allegations of rape.

"It will hit him like a ton of bricks which I'm okay with ☺ so wanna get lunch Thursday?"

"I don't think he did anything wrong to be honest...he didn't show any remorse or anything so idk :/"

... "I'm not super sensitive about the subject too much anymore so its all good...and I don't think he thinks he did anything wrong."

After learning about the existence of the O'Day texts, Jordan's attorneys requested Detective Brueckner of the Missoula Police Department to preserve all other electronic messages that Doe sent or received relating to this incident. Brueckner contacted several of Doe's friends and all of those people said that they did not have texts remaining or did not have anything "worth looking at." The police did not follow-up with investigative subpoenas or even requests to look at the cell phones. According to the police report, several texts messages were recovered from Doe's phone but those have not been turned over to the defense.

The County Attorney's Office filed charges late in the afternoon of July 31, 2012, shortly before Jordan's football team was about to begin summer practice. At 4:38 pm, that same afternoon, the County Attorney e-mailed a copy of the Affidavit and Information to multiple members of the news media. (Defendant's Exhibit A). The State's version of the facts immediately went viral, as expected.

SUMMARY OF ARGUMENTS

Montana Code Annotated 46-13-401 allows a District Court to dismiss a felony offense in the interest of justice. Subsection (1) of that statute provides, in pertinent part, that the Court may, on its own motion and in furtherance of justice, order a complaint, information or indictment to be dismissed. However, the Court may not order a dismissal

of a felony charge unless good cause for dismissal is shown. Though the statute does not define 'good cause' in this context, the Montana Supreme Court has indicated that the court, in exercising its discretion, may dismiss if dismissal is in the interest of justice, considering the constitutional rights of the defendant and the interests of society. State ex rel Anderson v. Gile, 119 Mont. 182 (1946); State v. Cole, 174 Mont. 380 (1977); "At the very least, the reason for dismissal must be that which would motivate a reasonable judge." People v. McGlothlin, 79 Cal Rptr. 2d 83 (Cal App. 1988).

In the present case, Jordan asserts multiple, independent legal bases warranting dismissal of the charge. First, probable cause is absent. Specifically, the State does not have facts sufficient to establish the "knowingly" element of sexual intercourse without consent. Second, the prosecutor has engaged in misconduct by presenting a materially incomplete and misleading version of the facts to the reviewing magistrate and by filing a charge that lacks probable cause. Third, the prosecutor engaged in misconduct by presenting the materially incomplete and misleading version of the facts to multiple members of the press. Fourth, such conduct by the government had violates Jordan's right to Due Process under the Montana Constitution and the United States Constitution.

Given the egregious facts of this case and the applicable rules of law, dismissal is the only appropriate and just remedy. The prosecutor's discretion has been compromised by external factors and the prosecutor has intentionally withheld mitigating evidence, skewing the finding of probable cause. One certainly cannot fault the State for giving in to this external pressure, but the mitigating evidence omitted from the initiation of this case is prima facie proof the prosecutor's discretion has been constitutionally compromised.

I. CHARGES AGAINST JORDAN ARE NOT SUPPORTED BY PROBABLE CAUSE

The bringing of charges by information is governed by Montana Code Annotated [MCA] 46-11-201, which provides, in pertinent part:

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

Mont. Code Ann. 46-11-201 (2).

To establish the probable cause required by this statute, the State must make a “showing of mere probability that a defendant committed the offense charged,” and the Court is to determine whether that showing has been made using “common sense.” State v. Holt, 2006 MT 151, ¶28, 332 Mont. 426. The State is not required to make out a *prima facie* case at this stage and, in making its determination, the Court may draw reasonable inferences from the facts alleged in the information. State v. Mason, 283 Mont. 149 (1997). Further, this showing of a “mere probability” can be based on evidence that may not be admissible at trial. Holt, ¶29.

“The ‘probable cause’ standard seeks both ‘to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime’ and ‘to give fair leeway for enforcing the law in the community’s protection.’” State v. Barnaby, 2006 MT 203, ¶81, 333 Mont. 220, 142 P.3d 809 (quoting *Brinegar v. U.S.*, 338 U.S. 160, 176 (1949))). The Montana Supreme Court explained that “[n]otwithstanding the ‘fluid’ nature of the [probable cause] concept...[t]he substance of all the definitions of probable cause is a *reasonable ground* for belief of guilt.” Barnaby, ¶83 (emphasis added).

Yet, obtaining leave to file is not a “mere perfunctory matter,” and the application must “contain such salient facts as will allow the district judge to make an independent determination that an offense has been committed.” State ex rel Murphy v McKinnon, 171 Mont. 120, 126 (1976)(quoting Revised Commission Comment to R.C.M. § 95-1301). For example, it is not sufficient to simply allege that the accused was present at the crime scene or that the accused was aware of the criminal activity and did not attempt to stop it. Murphy, 171 Mont. at 125, 556 P.2d at 909. In reviewing the sufficiency for leave to file, the Court is prohibited from considering matter beyond the submitted affidavit and any other supporting evidence which was included by the movant at the time the motion was filed. Murphy, 171 Mont. at 124, 556 P.2d at 909.

Moreover, filing a criminal charge is, by definition, an *ex parte* proceeding. Rule 3.3 of the Montana Rules of Professional Conduct, “**Candor toward the tribunal**,” specifically requires that an attorney include exculpatory and balanced facts in all *ex parte* matters. It states:

(d) in an ex parte proceeding, a lawyer ***shall*** inform the tribunal of **all material facts known to the lawyer** that will enable the tribunal to make an **informed decision, *whether or not the facts are adverse.***

Mont. R. Prof. Cond. 3.3 (emphasis added).

The reason for the rule arises from traditions of due process and fundamental fairness. Because the opposing party in an *ex parte* matter has no opportunity to respond, cross examine or provide additional material to the tribunal prior to a life-altering decision being made, the moving party must reasonably provide known adverse facts so that the tribunal can make a legally and factually sound decision.

The probable cause affidavit is insufficient unless it establishes probable cause as to ***each*** element of the charged offense. Jordan is charged with committing sexual intercourse without consent in violation of MCA 45-5-503. That statute provides:

Sexual intercourse without consent. (1) A person who knowingly has sexual intercourse without consent with another person commits the offense of sexual intercourse without consent.

Mont. Code Ann. § 45-5-503.

Sexual intercourse without consent is considered by legal scholars to be a 'double mental state' crime in that the State must prove ***both*** that the victim did not consent ***and*** that the defendant acted was aware that she did not consent.

The Legislature has provided that

a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct. **When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high probability of its existence.**

Mont. Code Ann. § 45-2-101 (emphasis added).

Compare the act of Assault, which is always unlawful, with the act of sexual intercourse, an activity that is normally legal, absent the mens rea, or the intent described above. The act of sex itself is usually not in dispute and is not in dispute in the present case. Because the act of sex is usually lawful, the facts surrounding a rape suspect's

mental state become of elevated and paramount importance. A finding that a defendant acted knowingly becomes the critical question in the magistrate's review of probable cause. In this area, the State should be particularly careful and forthright.

The State acts with reckless disregard in omitting information from an affidavit if it omits known information that "any reasonable person would have known the judge would wish to know." Wilson v. Russo, 212 F.3d 781, 786-787 (3d Cir. 2000)(quoting Sherwood v. Mulvihill, 113 F.3d 396,399 (3d Cir. 1997)).

In the present case, the only facts indicating that Jordan acted "knowingly," within the statute, are statements from the alleged victim that she said no and he had sex with her anyway. However, Doe's own statement and her texts to O'Day negate the very claim that Jordan acted knowingly, or that she was not consenting or that Jordan **knew** she was not consenting. An examination of the other facts germane to this issue, yet omitted from the affidavit include evidence showing Doe's claims to be incredible; Doe's concessions that she gave Jordan many indications of her consent to have sex with him; that she's suffered symptoms of trauma and anxiety or years and, most importantly, that "this will hit him like a ton of bricks."

Considering this additional evidence, which was known to the State, the alleged victim's credibility is seriously undermined, the Defendant's mental state is wanting and the charge of sexual intercourse without consent lacks probable cause. Examining the bigger picture, there are not sufficient facts that indicate a "mere probability" that Jordan knew Ms. Doe did not consent. Intentionally omitting mitigating or—in this case—evidence negating the most crucial element of the offense is egregious conduct on behalf of the government. This additional evidence, well-known to the State at the time it filed the affidavit of probable cause yet omitted from the document, would have presented an entirely different picture of the event to the reviewing magistrate. Because the State's grounds for charging Jordan are based entirely upon the alleged victim's statements, the contradictions of her story would have completely undercut the alleged probable cause for the crime. Consequently, the State cannot prove and has insufficient evidence to prove as a matter of law the mental state element of the offense and the information must be dismissed.

II. THE PROSECUTOR PRESENTED TO THE REVIEWING MAGISTRATE MATERIALLY INCOMPLETE AND MISLEADING INFORMATION IN THE AFFIDAVIT OF PROBABLE CAUSE and THEN FILED A CHARGE THAT LACKS PROBABLE CAUSE

MRPC Rule 3.8, Special Duties of the Prosecutor, forbids a prosecutor from filing charges that lack probable cause. As stated earlier, MRPC Rule 3.3, Candor toward the tribunal, specifically requires that an attorney include exculpatory and balanced facts in all ex parte matters.

The Prosecution Standards published by the National District Attorney's Association [NDAA] hold prosecutors to an even higher standard in deciding when to levy charges against an individual. NDAA Standard 4-2.2, "Propriety of Charges", states that a prosecutor should file charges that he or she believes adequately encompass the accused's criminal activity and which he or she reasonably believes can be *substantiated by admissible evidence at trial*. (emphasis added). In the commentary supporting this rule, the NDAA explains:

While commencing a prosecution is permitted by most ethical standards upon a determination that probable cause exists to believe that a crime has been committed and that the defendant has committed it, the standard prescribes a higher standard for filing a criminal charge. To suggest that the charging standard should be the prosecutor's reasonable belief that the charges can be substantiated by admissible evidence at trial is recognition of the powerful effects of the initiation of criminal charges. Pursuant to the prosecution's duty to seek justice, the protection of the rights of all (even the prospective defendant) is required.

...

In making a charging decision, the prosecutor should keep in mind the power he or she is exercising at that point in time. The prosecutor is making a decision that will have a profound effect on the lives of the person being charged, the person's family, the victim, the victim's family, and the community as a whole. The magnitude of the charging decision does not dictate that it be made timidly, but it does dictate that it should be made wisely with the exercise of sound professional judgment.

NDAA Prosecution Standards, Third Edition.

Here, the omissions left out of the Affidavit of Probable Cause similarly have the effect of inappropriately bolstering the credibility of the complaining witness. Had the

information that the prosecuting attorney withheld been disclosed to the trial court, it is highly unlikely that the court could have concluded that the alleged crime “probably” occurred. And it is elementary that probable cause is a prerequisite to charge a defendant and subject him to criminal prosecution, much less humiliation.

III. THE STATE ENGAGED IN SERIOUS AND PREJUDICIAL MISCONDUCT BY PROVIDING AN ERRONEOUS AND MISLEADING EX PARTE DOCUMENT TO MULTIPLE MEMBERS OF THE MEDIA

Mont. R. Prof. Cond. 3.3, requiring a party to provide a fair picture to the Court must also be read in conjunction with Rule 3.6 governing trial publicity. That rule states:

(a) a lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Mont. R. Prof. Cond. 3.6. When a party knowingly provides incomplete, inaccurate and prejudicial information to a tribunal in an ex parte proceeding and then provides the same “public document” to members of the media moments after filing the ex parte affidavit, Rule 3.3 is simultaneously violated. The proverbial bell has been rung—quite loudly—and can never be un-rung. In this case, the ringing and re-ringing of that bell have irreversibly prejudiced the potential jury pool and immeasurably damaged Jordan's reputation, studies, and psychological and financial well-being.

IV. THE CASE SHOULD BE DISMISSED BECAUSE THE STATE HAS VIOLATED JORDAN'S RIGHT TO DUE PROCESS

The Due Process Clause is simple—no State shall deprive any person of life, liberty, or property without due process of law. In that regard, the United States Supreme Court and the Montana Supreme Court have recognized that due process contains both procedural substantive components. Substantive due process reflects the American and historical common-sense notion that “the Due Process Clause, like its forebear in the Magna Carta . . . was ‘intended to secure the individual from arbitrary exercise of the powers of the government.’” Daniels v. Williams, 474 U.S. 327, 331 (1986)(quoting

Hurtado v. California, 110 U.S. 516, 527 (1884). See also County of Sacramento v. Lewis, 523, U.S. 833, 845 (1998).

“Within that framework, the United States Supreme Court has recognized that by requiring the government to follow appropriate procedures when its agents decide to deprive any person of life or liberty, the due process clause promotes fairness in such decisions. And by barring certain government actions, regardless of the fairness of the procedures used to implement them, it serves to prevent governmental power from being used for purposes of oppression.”

Daniels, *supra*, 474 U.S. at 331. The right to substantive due process translates into an opportunity for argument, rebuttal and explanation. State v. Redding, 208 Mont. 24, 29, 675 P.2d 974, 977 (1984)(overruled on other grounds in *State v. Waters*, 1999 MT 229, ¶20, 296 Mont. 101, 987 P.2d 1142). In Redding, the Court found a violation of the defendant’s right to due process when the judge had an impermissible *ex parte* conversation with the probation officer about sentencing.

In the Lewis case, the Court explained that “[t]he touchstone of due process is protection of the individual against arbitrary action of government” which necessarily includes “the exercise of power without any reasonable justification *in service of a legitimate government objective*.” Lewis, 523 U.S. at 845 (emphasis added). The criterion for review of executive actions is whether the executive action was a deliberate act that is arbitrary in the constitutional sense. The majority characterized that standard as deliberate conduct amounting to extraordinary egregious conduct that is offensive to traditional ideas of fair play and decency or interferes with rights implicit in the concept of order and liberty. Lewis, 523 U.S. at 846-847.

In the present case, the State violated Jordan’s due process rights because he had no ability to correct, challenge, rebut or explain the erroneous information prior to the State filing rape charges or prior to the State feeding the same document to eagerly-awaiting news media. The world had been told that Jordan is a rapist and regardless of an eventual acquittal, that will never change.

DISMISSAL IS THE ONLY APPROPRIATE REMEDY

It is a function of the prosecuting attorney to make certain that a person is not erroneously charged. A trial court considering a motion to dismiss has that same obligation. The Court has broad discretion in dismissing a case if good cause is shown, particularly if constitutional violations have occurred. In the present case, the errors are egregious and affect Jordan's substantive and procedural rights. The duty not to mislead the court is particularly critical in probable cause determination, in which evidentiary standards are relaxed and a certain degree of inaccuracy is tolerated. Permitting the State to obtain a probable cause determination by presenting only the favorable evidence and omitting the exculpatory evidence would effectively nullify the protections of the Fourth Amendment and make a mockery of the probable cause requirement.


Similarly, in Washington, the rule is that dismissal is the appropriate remedy for a violation of due process that pervades the whole case. Dismissal is the only viable remedy when the State misconduct shocks the conscience of the court and is so outrageous that it exceeds the bounds of fundamental fairness. State v. Martinez, 86 P.3d 1210, 1217 (Wash. App. 2004).

Although filing of a criminal charge against an individual may not ultimately result in conviction, as a practical matter, it invariably carries negative social, professional, psychological and financial consequences for the accused. Although it is true that the decision to prosecute, and for what offense, lies in the prosecutor's discretion, that discretion is not without limits and must be exercised reasonably to be constitutionally valid. State v. Hamilton, 167 P. 3d 906, 914 (2007); State v. Bauer, 36 P. 3d 892, 896 (2001). Here, the State's failure to disclose the whole story shows that the prosecutor's exercise of discretion was constitutionally unreasonable.

CONCLUSION

Because the State unreasonably disregarded known, exculpatory information and knowingly presented an altered version of material facts to the reviewing magistrate in an *ex parte* proceeding and in so doing violated Jordan's rights as established by case law, statutes and the Montana and United States constitutions, and because the charge of sexual intercourse without consent lacks requisite probable cause, the case against Jordan should be dismissed immediately, with prejudice.

DATED this 7th day of August, 2012.



Kirsten H. Pabst

CERTIFICATE OF SERVICE

I Kirsten Pabst, certify that on August 7, 2012, I served a copy of the foregoing document upon Suzy Boylan at the Missoula County Attorney's Office.



Kirsten H. Pabst

From: fvanvalk@co.missoula.mt.us
To: peterc@centric.net, news@keci.com, news@kpax.com, gwen.florio@missoulain.com, sally.mauk@missoulian.com
CC: sboyland@co.missoula.mt.us
Sent: 7/31/2012 4:38:48 P.M. Mountain Daylight Time
Subj: State v. Jordan Todd Johnson - DC-12-352

This is to advise you that Jordan Johnson has been charged today in Missoula County District Court and the Information are attached for your use. A Order For Arraignment has been issued for the Defendant.

The County Attorney's office has no other comment at this time with respect to the case.

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