

**APPLICATION FOR
DISTRICT COURT JUDGESHIP**

A. PERSONAL INFORMATION

1. **Full name.** Heather Marie Perry
2. **Birthdate.** [REDACTED]
3. **Current home address.** [REDACTED]
4. **Email address.** [REDACTED]
5. **Preferred phone number.** [REDACTED]
6. **Judicial position you are applying for.**
District Court Judge, Tenth Judicial District, State of Montana
7. **Date you became a U.S. citizen, if different than birthdate.**
8. **Date you become a Montana resident.** Same as birthdate.

B. EDUCATIONAL BACKGROUND

9. **List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received.**

Geyser High School K-12	Geyser, MT	HS Diploma 1987
Montana State University	Bozeman, MT	1987-1989
College of Great Falls	Great Falls, MT	1989-1992 B.S. Accounting
University of Montana Law School	Missoula, MT	2001-2004, J.D.
10. **List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.**

Montana State University, Academic Scholarship for electrical engineering

C. LEGAL AND PROFESSIONAL EXPERIENCE

11. **In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or governmental agencies with which you have been affiliated, and your**

position. Include the dates of any periods of self-employment and the name and address of your office.

- 2004-2005 Clerk for Hon. Sam E. Haddon, United States District Court for the District of Montana, Great Falls, MT
- 2005-2007 Associate Hubble Law Firm, PLLP
- 2007-2019 Partner at Hubble Law Firm, PLLP, n/k/a Urick Law Firm, with offices in Stanford (98 Central Ave.) and Lewistown (224 W Main St., Ste. 204).
- 2015-2020 Part-time, Judith Basin County Attorney, Stanford, MT
- July 1, 2020, Full Time Judith Basin County (hereinafter JBC) Attorney, Stanford, MT

12. **In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.**

Montana State Bar, 2004

Montana Supreme Court, 2004

United States District Court for the District of Montana, 2004

13. **Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., real estate, water rights, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, employment law, alternative dispute resolution, etc).**

- Estate Planning including trusts and Probate Administration, primarily for farmers and ranchers.
- Real Property including complex purchases and sales, leases, access and conservation easements, water rights, leases.
- Commercial Transactions and Litigation, primarily involving small businesses and farms and ranches that were set up as corporations a generation or two ago and the heirs were no longer willing to co-own. Generally, the parties were the heirs who lived in town and the heirs who were living on and doing the work on the farm or ranch.
- Representing secured creditors in federal bankruptcy court.
- Guardianships and Conservatorships for both elderly persons and those under disability.
- Guardian Ad Litem for abuse and neglect cases not filed in Judith Basin County prior to becoming county attorney.
- Adoptions.
- Criminal Prosecution. As a one attorney office this includes both Justice Court cases and District Court cases. Reports from law enforcement include FWP, JBC Sheriff's Office, MHP, and the Motor Carrier Enforcement division since there is a weigh station in Hobson that is sometimes open. JBC only has two incorporated towns, Hobson and Stanford, and they both have agreements with the sheriff's office and justice of the peace for their criminal cases, so all of their citations are also handled by me.
- Local Government as attorney for the Commissioners, their boards including the weed board, fair board, planning board, three school districts, and all department heads. I also

advise when needed the two fire boards and library board. I have helped with not only the county museum but also the Hobson Museum and the Utica Museum.

- Land use and planning. JBC has a growth policy and minor subdivisions following 1973. We do have couple of subdivisions predating the subdivision platting act for which I occasionally need to address certain issues. I was also involved in several conservation easements as part of estate planning and also was involved in civil litigation over conservation easements.
- Employment and human resource law. I am the HR Director for Judith Basin County.

Since becoming a full-time County Attorney on July 1, 2020, I no longer engage in private practice; hence criminal and local government civil practice is now 100%. Before July 1, 2020, easily 80-90% of my practice was real property based which included estate planning and probate administration for rural agricultural clients. My clients were almost always owners of small rural businesses, farms, or ranches.

14. **Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etc. (exclude bar activities or public office).**

Before being elected county attorney, rarely but occasionally, the District Court Judge would ask me to meet with parents who were appearing pro se to try and negotiate and prepare parenting plans. Any cases involving children, whether civil or criminal are challenging and rightfully so, emotionally charged.

15. **Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings.**

My civil practice involved more hearings than trials in District Court. Although I did both judge and jury civil trials as part of my private practice. The trials usually involved water rights or property disputes. Since becoming county attorney, with the exception of covid-time, I do several jury trials in both District Court and Justice Court each year. JBC Justice Court has been a court of record since 2018. I do not appear in one court or the other for hearings every day but certainly every week, usually multiple days. Similar to trials, are hearings to terminate parental rights in abuse and neglect cases. I have, unfortunately, done several of those. The burden on the State is rightfully high to terminate parental rights and those are always difficult, heartbreaking, and necessary.

16. **If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.**

All are noncite. *State of Montana v. Richard Edward Adsit, Jr.*, No. DA 20-0423, 2022 MT 39N; and *State of Montana v. William Eddie Moody*, No. DA 20-0304. As Fergus County Special Deputy County Attorney *In Re Matter of R.R.S. and A.S., Youths in Need of Care*, Nos. DA 19-0122, 2020 MT 182N.

17. **Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.**

1. **Water Rights and Easements.** Both have a component of historical use and first-hand witness accounts that are almost always lost to time and death. In addition, both of those issues are complicated by their own terms since they involve an analysis of a wide range of factors with no one factor being outcome determinative. These types of cases are fact-driven so locating and preparing admissible testimony is really challenging.
2. **Testator Incapacity and Allegations of Undue Influence.** I was involved in a years' long probate litigation that involved a substantial amount of real property. The testator had at least 8 wills prepared over about 7 years with three different attorneys. Testamentary capacity and undue influence were the primary issues. It is challenging to recreate mental status for several years prior to death under the statutory definitions for testator capacity, which is different than for contracts and other legal documents.
3. **Lack of Statutory Definition for "Consent" in a Sexual Assault Case.** The most recent challenge was the *Adsit* case in which the student/player sexual assaults by a school professional took place years before the legislative change in 2019. The statutes for consent in 2011 allowed a defendant to argue that the sexual assaults were consensual, with essentially no statutory exceptions, for any child 14 years or older regardless of the age or station of the perpetrator. I was left with making up my own proposed instruction using the definition of consent from Black's Law Dictionary and hoping the District Court would agree and the Supreme Court would affirm.

18. **If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information.**

None at this time.

19. **If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke.**

None at this time. At various times since 2017, I have given updates and short presentations to the Central Montana Bar Association members on ethical issues and some of the general issues of concern to the Commission on Practice.

20. **Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.**

As a general rule my pro bono assistance falls into my practice areas of guardianships and conservatorships; elder law; estate planning; landlord/tenant; and non-profits (these include community and civic groups whether or not they actually are filed as a 501c3). I also have spent some pro bono time trying to assist individuals in family law situations because there is such a need for either free, or reduced fee assistance. My pro bono time also includes preparing for and attending Commission on Practice hearings and meetings. Before Covid, the Tenth Judicial District hosted a pro bono clinic staffed by the members of the Central Montana Bar Association. Most or all of us, including myself, would follow up with certain clinic clients and provide more time and pro bono services outside of the clinic.

2017 48 hours pro bono, 60 hours Commission on Practice

2018 56 hours pro bono, 15 hours commission on practice and 35 hours doing presentations (this was primarily on elder abuse and financial scams but also presentations to students)
 2019 32 pro bono 32 commission on practice
 2020 35 pro bono 15 commission on practice
 2021 24 hours pro bono 30 hours commission on practice

21. **Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.**

Member Commission on Practice 2017-present

Central Montana Bar Association 2005-present (We don't have elections as far as I know. As long as Craig Buehler, who was President in 2005 when I started, is agreeable to remaining in the position, the rest of us have been fine with it and grateful for his service.)

22. **Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received.** None.

23. **If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled.**

Commission on Practice hearings are quasi-judicial as we make some binding decisions and some advisory decisions/recommendations to the Montana Supreme Court.

24. **Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a judge.**

I grew up on the family commercial cow/calf ranch 17 miles north of Geyser. My husband and I were married in 1989 on my family's original homestead in Raynesford. My husband has been operating his family's ranch in Utica since 1986. Geyser didn't have FFA, so I grew up in the 4H program here doing projects in horse, market beef, and range management. As an adult I also served as treasurer on the 4H council for a few years and then 10-12 years as a 4H horse leader. My husband was President of the Central Montana Team Roping Association, and the rule always was the wife would be the secretary/treasurer, so we did that for several years until after my first year of law school when I just could not manage it any longer. All of these experiences resulted in meeting new and interesting people with different ideas and priorities. 4H in JBC is a great way to meet kids across this state and also participate in national competitions.

I worked for a few years during the tax season for Berres and Romo, CPAs, in Lewistown during the early-mid 1990s. The ranch and tax experience, including ranch bookkeeping, have given me first-hand experience in all the civil practice areas in which I practiced. The ranching background has also given me insight into the fish and game and animal abuse criminal cases as well as county growth planning and land use. It is frankly impossible here, to describe the tasks and experiences of a ranch wife and mom in a rural county. It is simply what we all do. I believe we all appreciate and respect how hard everyone works to make their farm, ranch, or local business successful enough to pass on to the next generation.

D. COMMUNITY AND PUBLIC SERVICE

25. **List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.**
- Private/small business representative for HRDC District 6 for Judith Basin County Sept. 2011-Sept.2018.
 - JBC Volunteer EMT Oct. 2009-present. Both as a licensed AEMT and county attorney, I teach the emt legal and ethics chapters for the classes for new emts.
 - We are also members of the Montana Stockgrowers and Farm Bureau
26. **List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.**
- Judith Basin County Attorney, elected 2014 and 2018 and have filed this year, 2022.
 - I recently applied for appointment to the Northern Central Elder Justice Council but have not heard back as of the date of this application.

E. PROFESSIONAL CONDUCT AND ETHICS

27. **Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.** No.
28. **Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.** No.
29. **Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.** No.
30. **Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number).** No.
31. **Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.**
No

F. BUSINESS AND FINANCIAL INFORMATION

32. **Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge.**

My husband owns and operates a commercial cow-calf operation in Utica, Montana. d/b/a Perry Land and Cattle and I'm a partner. I am the bookkeeper and part-time help as is normal for a ranch wife. We will do this as long as we can and hopefully the ranch can continue to the next generation. I was a partner in the Hubble Law Firm but dissociated as of December 31, 2019, to become full-time county attorney.

33. **Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? If not, please explain. Yes.**
34. **Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? If so, give details. No.**

G. JUDICIAL PHILOSOPHY

35. **State the reasons why you are seeking office as a district court judge.** My experience as a law clerk in federal court and my experience in both private practice and as county attorney has resulted in my becoming proficient on a wide variety of legal issues. The cases filed in state district court include diverse issues on a local level. I believe I can be efficient and effective as a new judge and that is why I'm applying. As a judicial district with only one judge, it is important that the person selected be familiar with both district court civil and criminal cases and be ready to begin working on cases as soon as possible. Each case is unique and never the same, so I would never prejudge. I will always wait for the facts and legal arguments to be presented by the attorneys or parties litigating the case.
36. **What three qualities do you believe to be most important in a good district court judge?**

1. Awareness and Respect for Each Level of the Judiciary System. Each level of the court system plays a distinct role. The district court judge is a trial court judge and therefore, I believe that absent extraordinary or novel fact patterns, or a case of first impression, the trial court's role is to give some level of consistency and predictability to settled law. I believe generally a district court judge should stay in his or her lane.

2. Instill Confidence and Trust in the Judicial Branch. It is incumbent on a district court judge to ensure all participants in the judicial system, especially parties to a case, feel confidence that their case or issue is being heard and their position is being seriously taken into account in determining a final order or disposition. This is even more important when cases involve pro se litigants. The judicial system is complicated, even to those who have been practicing for years. It is very important that all members of the public, whether or not they prevail, have an experience with the judicial system that instills some level of confidence in the process. Likewise, jurors

is very important that all members of the public, whether or not they prevail, have an experience with the judicial system that instills some level of confidence in the process. Likewise, jurors need to feel appreciated and respected because they are participating in the process by serving in one of our most important civic duties.

3. Patience and Deference as they intersect with each other. Similar to emt calls, no one retains an attorney to represent them and litigate in the district court because they are having a good day. Generally, cases are filed only after multiple attempts by the parties, and then their attorneys, to reach some sort of a resolution without involving the district court. Due process, both through constitutional and statutory protections, helps to ensure that the judicial process is necessarily both slow and thorough.

37. **What is your philosophy regarding the interpretation and application of statutes and the Constitution?** In the district court, each case must stand alone on the fact patterns presented. Through briefing, argument, and jury instructions, the applicable law (whether constitutional or statutory) is presented to the finder of fact, either the judge or the jury. Even cases with novel issues or questions of whether or not a statute violates a constitutional right(s), must be narrowly tailored to the fact pattern and evidence presented as to that case. While these cases can involve certified classes, the case itself must be decided on the admissible evidence before the court and the law that applies at the time the case is decided.

H. MISCELLANEOUS

38. **Attach a writing sample authored entirely by you, not to exceed 20 pages. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics.**
39. **Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.**

Kris Birdwell, Esq. (406)538-2623
Stogsdill & Birdwell PC
224 W Main St., Ste. 511
Lewistown, MT 59457

Jean Faure, Esq. (406)452-6500
Faure Holden PC
1314 Central Ave
Great Falls, MT 59401

John R. Christensen, Esq. and former Judge [REDACTED]
Christensen, Fulton & Filz PLLC
19 36th St. W, Ste. 3
Billings, MT 59102

CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true. By submitting this application I am consenting to investigation and verification of any information listed in my application and I authorize a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions I have attended, any references furnished by me, employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to my citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history to release to the Office of the Governor of Montana or its agent(s) any information, files, records, or reports requested in connection with any consideration of me as a possible nominee for appointment to judicial office.

I further understand that the submission of this application expresses my willingness to accept appointment as District Court Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

March 24, 2022
(Date)

Heather Perry
(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Tuesday, April 19, 2022

Mail the signed original to:

Hannah Slusser
Governor's Office
P.O. Box 200801
Helena, MT 59620-0801

Send the electronic copy to: hannah.slusser@mt.gov

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Stanford, Montana 59479
Telephone: (406) 566-2500 ext 115
hperry@jbcountry.org

MONTANA, TENTH JUDICIAL DISTRICT COURT, JUDITH BASIN COUNTY

STATE OF MONTANA,
Plaintiff,

v.

RICHARD EDWARD ADSIT JR.,
Defendant.

CAUSE NO. DC-2018-07
HON. JON A. OLDENBURG

STATE'S BRIEF IN RESPONSE TO
DEFENDANT'S MOTION TO DISMISS
COUNTS ONE THROUGH FIVE FOR
LACK OF PROBABLE CAUSE

COMES NOW Plaintiff, the State of Montana, and responds to Defendant's Motion to Dismiss Counts One Through Five for Lack of Probable Cause (Dkt. #183.) Just so the record is clear, Defendant is charged with five counts of sexual assault under Mont. Code Ann. § 45-5-502(1) (2011) which reads: "A person who knowingly subjects another person to any sexual contact without consent commits the offense of sexual assault." Because none of the subsections in (5) applied none were cited to. The following is a response to each of the sections of Defendant's brief.

Frankly it appears that this motion as to each of the first five counts separately is probably best raised as a motion for directed verdict at the end of Plaintiff's case in chief.

1 **1. Just because the Victim was over the age of 14 doesn't mean**
2 **she consented to sexual contact and Counts I through V should not**
3 **be dismissed for lack of probable cause.**

4 While Defendant argues the parties were confused about the sexual
5 assault charges due to the age of the victim, that is clearly not the case. It is
6 true that when the undersigned was contacted at home in January 2019, she
7 was trying to pack and leave for multiple days of hearings in Helena. I did
8 ask counsel for Defendant to hold off filing anything until I had a chance to
9 review the charges and applicable statute to ensure no mistake had been
10 made. Counsel for Defendant graciously allowed the additional time, and
11 nothing was filed until this motion. The undersigned did make a phone call
12 to confirm that Plaintiff would not voluntarily dismiss the charges at issue for
13 lack of probable cause.
14

15 However, it is Plaintiff's contention that this motion before trial is at
16 best misplaced. Defendant has had in addition to the initial charging
17 documents, the following record for notice of Plaintiff's theory of the case with
18 regard to the issue of consent by the victim. On March 22, 2019 Plaintiff filed
19 its Expert Witness Disclosure (Dkt. #59) in which it identified Dr. Shakeshaft
20 as an expert who was expected to testify to the "misconception of consensual
21 relationships between school employees and students." Nowhere was age or
22 any of the other statutory categories under 45-5-502(5) 2011 mentioned.
23

24 Plaintiff fully agrees that what the legislature did in 2019 with regard to
25 this issue is not relevant to this case.
26
27
28

1 On June 11, 2019 Plaintiff filed its Jury Instructions (Dkt. #95), in
2 which State's Instruction 16 addresses Immediate Outcry or Complaint with
3 no reference to age and State's Instruction 19 which clearly defines consent
4 for any person age 14 or over, including adults.

5 Defendant appears to argue that no one over the age of 14 can claim
6 there was no consent to sexual contact. The issue of consent should and will
7 be determined by the jury and they will be instructed to consider witness
8 credibility, as well as direct and circumstantial evidence, and other applicable
9 jury instructions.
10

11 Defendant was also arraigned on an additional count of sexual assault
12 in the Amended Information on July 15, 2019 (See Order, Dkt. #128) and no
13 mention of an issue requiring victim to meet the requirements of 45-5-502(5)
14 was mentioned. Certainly, any victim of the age of majority can testify as to
15 why they don't believe they consented to sexual contact and the same can be
16 said for any victim ages 14 to 17 under the 2011 statute that don't meet the
17 criteria in sub(5).
18

19 The supporting affidavit for filing the charges clearly sets out what
20 Plaintiff believes is not a relationship based on consent as defined by Black's
21 Law Dictionary and the proposed jury instruction 19 (Dkt. #181), "A
22 concurrence of Wills. Voluntarily yielding the will to the proposition of
23 another . . ."
24

25 On August 14, 2019 counsel for Defendant conducted an interview of
26 Dr. Shakeshaft and had the interview transcribed. Towards the end of the
27
28

1 interview, counsel for Defendant asked Dr. Shakeshaft if there was an issue
2 with consent or sexual misconduct if the student was a senior and 18 years
3 of age and has a relationship with a teacher. Dr. Shakeshaft answered in the
4 affirmative that it would be an issue and addressed it in terms of professional
5 boundaries. This testimony of both Dr. Shakeshaft and the victim expected
6 to put at issue if the victim in this case consented to sexual contact by
7 defendant for each count one through five.
8

9 **B. These charges of sexual assault and issues of consent are**
10 **distinguishable from the probable cause issues of sexual**
11 **intercourse without consent as set out in State v. Thompson, 243**
12 **Mont. 28 (1990).**

13 As in the Thompson case, in 2011 Mont. Code Ann. § 45-5-501 defined
14 “without consent” to certain specific circumstances. However, by its own
15 terms its application is limited to 45-5-503, Sexual Intercourse Without
16 Consent. State’s Proposed Instruction No. 25 (Dkt. #95 and 181) clearly limit
17 application to Counts VI and VII, Sexual Intercourse Without Consent.
18

19 **C. The charging documents establish probable cause for all of the**
20 **crimes charged.**

21
22 At the outset it is important to note that before charging anything the
23 victim was interviewed by a trained forensic interviewer in Lewistown and
24 that interview was more than an hour and which was transcribed. The victim
25 also provided law enforcement with a fourteen-page written statement. In
26 addition, counsel for defendant interviewed the victim for an hour in
27 December 2018 and has a second interview scheduled for the upcoming
28

1 weekend. All discovery was timely produced and there has been no sleight of
2 hand with regard to the charges and the elements thereunder. Given the
3 amount of statements made by the victim, it is important the Court recognize
4 the few victim quotes contained in Defendant's brief are not included in the
5 context of these wide-ranging interviews. Throughout the victim's testimony
6 she will discuss the circumstances for each separate charge and Plaintiff
7 believes the victim will not agree with Defendant that she consented to sexual
8 contact in those instances.

9
10 If in the second pre-trial interview of the victim, counsel for the
11 Defendant confirms with the victim that there was mutual consent for sexual
12 contact for one or all of the sexual assault charges, certainly Plaintiff will not
13 proceed to trial on those respective charges. Based on the information to
14 date, Plaintiff stands by the charges as filed. Notwithstanding Defendant's
15 practice of attaching attorney to attorney emails to filed motions and alleging
16 the undersigned committed prosecutorial misconduct, the undersigned is
17 committed to ensuring victims are represented and communities are safe only
18 as allowed by law.

19
20 Defendant cites to State v. Williams, 2010 MT 58, 355 Mont. 354, 228
21 P.3d 1127 (2010)) for the proposition that the State is "throwing out every
22 theory imaginable to see what sticks, whether permitted by statute or not."
23 (Def. Br. P8 under C.) The Williams case was about whether or not sexual
24 assault was a lesser-included offense of sexual intercourse without consent
25 because Defendant's plea to both of those charges was based on the exact

1 same conduct or incident and he alleged a violation of double-jeopardy. The
2 Court agreed in that instance where there was only one instance of conduct.
3 However, more on point to this case is Williams at ¶ 28 where the Court
4 stated:

5 “Likewise, a sexual assault conviction does not *require* the victim to be
6 less than 14 years old and the offender to be more than 3 years older
7 than the victim. The age specifications represent one way to satisfy the
8 “without consent” element under each statute. The State can
9 demonstrate the required proof in a variety of ways. Sexual assault’s
10 “without consent” plain meaning falls squarely within the scope of
sexual intercourse without consent’s statutory definition in § 45-5-
501(1), MCA.”

11
12 But unlike the Thompson case, “without consent” for sexual assault
13 under the 2011 statutes is not limited to only a statutory definition because
14 there isn’t one. Mont. Code Ann. § 45-5-511 (2011) does address provisions
15 generally applicable to sexual crimes (emphasis added). Sub (5) states
16 “Resistance by the victim is not required to show lack of consent. Force, fear
17 or threat is sufficient alone to show lack of consent.” Plaintiff has already
18 submitted the immediate outcry instruction and will likely submit another
19 instruction to include (5). Important to note, is that lack of consent for
20 sexual assault is not limited to force, fear or threat, those in and of
21 themselves, however, are enough to meet the standard of proof.

22
23 But “without consent” is not limited to those things by statutory
24 construction. Plaintiff believes the victim’s testimony may implicate one or
25 more of those when describing the circumstances of the sexual assaults. The
26 undersigned frankly never knows exactly what witnesses will testify to in trial,
27
28

1 but the victim's interviews and written statements were corroborated as to
2 dates and other items as best as could be done by law enforcement and the
3 undersigned's best information to date is that the victim does not believe she
4 consented to the sexual contacts as charged.

5
6 **D. The State was never relying on age for lack of consent for the**
7 **sexual assault charges.**

8 As set out above, through the expert disclosure and the proposed jury
9 instructions submitted, the State attempted to be very clear that the standard
10 for "without consent" was very different for the sexual assault charges versus
11 the sexual intercourse without consent charges. Those cites are in part A of
12 this response brief.

13
14 Defendant cites to State v. Resh, 2019 MT 220 for the proposition that
15 attorneys in that case did not clearly distinguish, either in argument or
16 apparently in jury instructions, that the definition of "without consent" was
17 age-based for one but not the other. Absent in Defendant's reciting of our
18 conversation about voluntarily dismissing these charges was the
19 undersigned's agreement that Plaintiff would not object to a clarifying jury
20 instruction proposed by Defendant that was either separate or just added a
21 line or two to State's Proposed 19 that the age of the victim was irrelevant or
22 not proper to consider for determining consent for sexual assault. There is no
23 disagreement that each type of charge has its own definition of "without
24 consent."
25
26
27
28

1
2 As addressed in part C., above Defendant provides very little context for
3 quotes of statements made by the victim in interviews. At trial the victim will
4 explain how the conversation about “never tell” happened and it will add
5 context to the issue of “without consent.” Although Defendant argues a
6 power imbalance does not affect the ability of a person to consent, the
7 definition of consent as set out by Black’s Law Dictionary and recited on
8 State’s Instruction 19 appears to take issue with the same. And as discussed
9 above and in the Williams case, the definition of “without consent” for the
10 crime of sexual assault is not constrained and limited to a specific statute.
11

12
13 In summary, Plaintiff’s theory of the case for counts one through five
14 has been well documented in the record and the charges should not be
15 dismissed for lack of probable cause.
16

17 RESPECTFULLY SUBMITTED this 12th day of February 2020.

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19 /s/Heather Perry
HEATHER PERRY
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CERTIFICATE OF SERVICE

I, Heather Marie Perry, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Response to the following on 02-12-2020:

Jean A. Adams (Prosecutor)
801 W Broadway
Lewistown MT 59457
Representing: State of Montana
Service Method: eService

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Great Falls 59403
Representing: Richard Edward Adsit, Jr.
Service Method: First Class Mail

Electronically signed by Anna Peterson on behalf of Heather Marie Perry
Dated: 02-12-2020