**U.S. Department of Justice**

*950 Pennsylvania Ave, NW*
*Washington DC 20530*

FEB 14 2014

VIA EMAIL AND U.S. MAIL

Mr. Fred Van Valkenburg
County Attorney
Missoula County Courthouse
200 West Broadway
Missoula, Montana 59802

Re: The United States' Investigation of the Missoula County Attorney's Office

Dear Mr. Van Valkenburg:

As you know, for the last ten months, the Civil Rights Division ("Division"), in partnership with the U.S. Attorney's Office for the District of Montana, has been engaged in an investigation of the Missoula County Attorney's Office (the "County Attorney's Office" or "MCAO") concerning allegations of bias by the County Attorney's Office in the investigation and handling of sexual assault cases. This letter summarizes the evidence we have uncovered to date and describes the legal framework for assessing whether a constitutional or statutory violation has occurred.[1] As you are aware, we have delayed issuing this letter in the hopes that we might agree upon remedies to address the problems our investigation has found. You so far have been unwilling to respond to or even discuss the set of remedies we have proposed. Nonetheless, we are hopeful that, in light of your January 9, 2014 letter indicating a desire "to resolve this matter amicably," this letter can serve as a starting point for us to meet with you promptly and discuss a mutually agreeable resolution that will best serve the people of Missoula County, rather than expending scarce resources on protracted litigation.

We are aware of the complaint for declaratory judgment that you recently filed. As we have discussed on several occasions, and as set out further below – and contrary to each claim raised in your complaint – the Department of Justice has jurisdiction to investigate and to seek injunctive relief to remedy discriminatory conduct. This jurisdiction arises from both the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141"), and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d ("Safe Streets Act"). This letter is sent pursuant to these authorities.

[1] Previous to this letter, the Division's Special Litigation Section investigated and publicly issued findings regarding the response to sexual assault by five other law enforcement agencies: the New Orleans (LA) Police Department; the Maricopa County (AZ) Sheriff's Office; the Puerto Rico Police Department; and, most recently, the University of Montana's Office of Public Safety and the Missoula Police Department. All but one of these law enforcement agencies – the Maricopa County Sheriff's Office – have entered into agreements with DOJ, aimed at cooperatively resolving the issues identified in DOJ's investigations and findings letters. DOJ initiated a civil lawsuit against the Maricopa County Sheriff's Office, based on the concerns described in its letter of findings, in May 2012.

In April 2012, we informed you of our investigation into allegations of bias regarding the MCAO's response to sexual assault cases and invited you to work with us as we explored these allegations. You declined, and throughout the investigation you have refused to provide requested documents, information, or access to staff for interviews. Despite this, we have learned significant information by reviewing documents available from other sources and by interviewing persons knowledgeable about the policies, training, and practices related to the County Attorney's Office's investigation and prosecution of sexual assault.

Our investigation to date has revealed substantial evidence suggesting that MCAO's response to allegations of sexual assault and rape discriminates against women and that this discrimination is fueled, at least in part, by gender bias. This bias erodes public confidence in the criminal justice system, places women in Missoula at increased risk of harm, and reinforces ingrained stereotypes about women. It also undermines sexual assault investigations in Missoula from the outset, impairing the ability of both police and prosecutors to uncover the truth in these cases and hold perpetrators of sexual violence accountable.

In addition, our investigation indicates that the County Attorney's Office has often failed to take the steps necessary to develop sexual assault cases properly so that informed and fair prosecutorial assessments may be made. As a result, female sexual assault victims in Missoula are deprived of fundamental legal protections and often re-victimized by MCAO's response to their reports of abuse.

Specifically, our investigation has uncovered evidence indicating that the County Attorney's Office engages in a pattern or practice of gender discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and relevant statutes. In particular, there are strong indications that the decisions of the County Attorney's Office regarding the investigation and prosecution of sexual assaults and rape, particularly non-stranger assaults and rapes, are influenced by gender bias and gender stereotyping and adversely affect women in Missoula.

The County Attorney's conduct must be viewed in its totality. While no single fact is determinative, the following facts – taken together – strongly suggest discrimination:

- Sexual assaults of adult women are given low priority in the County Attorney's Office;

- Adult women victims, particularly victims of non-stranger sexual assault and rape, are often treated with disrespect, not informed of the status of their case, and re-victimized by the process – in many instances, victims are not even interviewed by a prosecutor before the decision is made to decline charging their case or to offer a plea agreement to the perpetrator;

- The County Attorney's Office neither has its own dedicated victim-witness personnel, as are routinely employed in prosecutors' offices across the nation, nor sufficiently coordinates with the Missoula Crime Victim Advocate Office to ensure the proper and respectful treatment of and communication with victims;

- The County Attorney's Office routinely fails to engage in the most basic communication about its cases of sexual assault with other law enforcement and other partners;

- The County Attorney's Office generally does not develop evidence in support of sexual assault prosecutions, either on its own or in cooperation with other law enforcement agencies; and

- Not until we began our investigation did the County Attorney's Office begin providing Deputy County Attorneys with the basic knowledge and training about sexual assault necessary to effectively and impartially investigate and prosecute these cases. This training remains insufficient and incomplete.

Our investigation indicates that an institutionalized indifference to crimes of sexual violence, coupled with bias against the women who represent the overwhelming majority of victims of sexual assault, handicaps the County Attorney's Office's ability to protect victims of crime effectively or handle sexual assault cases fairly. Women consistently told us that Deputy County Attorneys treated them with indifference or disrespect, and frequently made statements to women victims, advocates, and the public diminishing the seriousness of sexual violence and minimizing the culpability of those who commit it. We learned that prosecutors did not communicate with female victims about their cases, did not inform them of the charges to be filed and did not seek their input about the type of relief to seek against the accused if convicted. In many cases, prosecutors failed even to return victims' phone calls.

Manifested in these ways, the County Attorney's Office's handling of crimes of sexual assault is indicative of unlawful gender bias, perpetuates a culture that tolerates sexual assault, dissuades victims from reporting crimes, leaves violent criminal activity unaddressed, and compromises the safety of all women in Missoula. Such a situation strongly suggests that MCAO stands in violation of the Constitution and federal anti-discrimination laws. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (law enforcement action with adverse discriminatory impact violates the Fourteenth Amendment when it is motivated, at least in part, by a discriminatory purpose).

We also have repeatedly emphasized, in discussions with you and your Office, that our investigation is focused on the MCAO's policies and practices, not the County Attorney's exercise of prosecutorial discretion. We do not seek to second-guess the decisions of you or your attorneys to charge an individual with a crime. Our goal has been and continues to be identifying gender bias where it may exist in MCAO policies and practices; eliminating that bias in a constructive and cooperative manner; and thereby enhancing the public's trust in your Office's ability to respond to and make effective prosecutorial decisions about allegations of sexual assault and better protecting women in Missoula.

## BACKGROUND

Our investigation of MCAO was part of a larger inquiry conducted by the Division's Special Litigation Section and the U.S. Attorney's Office for the District of Montana. It focused not only on the role of the County Attorney's Office but also on the actions of the University of

Montana's Office of Public Safety ("OPS") and the Missoula Police Department ("Missoula Police" or "MPD") in handling allegations of sexual assault against women in Missoula. In May 2013, the Civil Rights Division reached agreements with those two agencies. The Division's Educational Opportunities Section also concluded an investigation of the University of Montana and reached an agreement to protect students from sexual harassment and sexual assault. At the same time it announced these agreements, the Division issued letters documenting its findings regarding OPS, the Missoula Police, and the University of Montana.[2] The reforms carried out pursuant to those findings and agreements have already begun to improve the response of Missoula law enforcement to sexual assault and to serve as models for other campuses and communities nationwide.

The Division's investigation was prompted by widely expressed community concerns that Missoula law enforcement, including the County Attorney's Office, was failing to respond appropriately to reports of sexual assault, both on the University of Montana campus and elsewhere in Missoula. We received information indicating that the MCAO failed to pursue viable sexual assault prosecutions and that this reflected problematic dynamics beyond the generally acknowledged challenges of prosecuting sex crimes. There were concerns in Missoula that, as a result, women reporting sexual assaults were being denied access to criminal justice, and perpetrators of sexual assault were not being held accountable. There were further concerns that because of the experience many women had with the criminal justice system in Missoula, including the widely held perception of poor treatment of women reporting sexual assault, many victims chose not to report the crime.

The Special Litigation Section brought its investigation of the County Attorney's Office pursuant to 42 U.S.C. § 14141, and the Safe Streets Act. Specifically, the investigation sought to determine whether the County Attorney's Office, as well as the Missoula Police Department and the University of Montana's Office of Public Safety, engage in a pattern or practice of unlawful gender discrimination in violation of the Fourteenth Amendment, the Safe Streets Act, and the regulations implementing the Safe Streets Act, 28 C.F.R. §§ 42.201-215. Under these laws, the County Attorney's Office is prohibited from discriminating against female sexual assault victims.

Under Section 14141(a), "[i]t shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." Section 14141(b) gives the Attorney General the authority to seek "equitable and declaratory relief to eliminate the pattern or practice."

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[2] See http://www.justice.gov/crt/about/spl/findsettle.php#police (under "Montana") and http://www.justice.gov/crt/about/edu/documents/classlist.php (under "Sex"). The investigation of sex discrimination by the University of Montana was conducted by the Division's Educational Opportunities Section pursuant to Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, and Title IX of the Education Amendments of 1972, 42 U.S.C. § 2000h-2.

The Safe Streets Act provides in part that "[n]o person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this title." Section 3789d(c)(1). The Safe Streets Act further authorizes the Attorney General to file a civil suit "[w]henever the Attorney General has reason to believe that a State government or unit of local government has engaged in or is engaging in a pattern or practice in violation of the provisions of this section." Section 3789d(c)(3). The County Attorney's Office is covered by Section 3789 as a recipient of federal funding authorized under the Safe Streets Act.

The County Attorney's Office serves as the state prosecutor in Missoula and employs 17 Deputy County Attorneys in two sections, criminal and civil. The Criminal Division prosecutes all felony offenses that occur in Missoula County and all offenses that occur in the County outside Missoula city limits. The County Attorney's Office has been led by the same County Attorney since 1998.[3]

## METHODOLOGY

The Special Litigation Section's investigation of Missoula law enforcement has to date included interviews with law enforcement officers and with advocates, victims, witnesses, and other members of the Missoula community, in person over the course of 13 days on-site in Missoula and by telephone over the past year and a half. Our interviews included conversations with a former sex-crimes prosecutor with MCAO; former Missoula Police Chief Mark Muir[4] and nine Missoula Police detectives and officers; representatives of 12 local, statewide, and university organizations that work on behalf of women and victims of sexual assault; and more than 30 women reportedly victimized by sexual assault in Missoula, or their representatives.

We engaged two expert consultants, one with nearly a decade of experience supervising a police department's sex-crimes unit and the other a former sex-crimes prosecutor and national training consultant in sexual assault response. With them, we reviewed policies, procedures, training materials, case files, related court filings, and other data and documentary evidence, including the case files for the more than 350 reports of sexual assault received by the Missoula Police between January 2008 and May 2012. We have made every effort to confirm witness accounts, where possible, with other evidence, including police reports, transcripts, and video recordings of investigative interviews, and gave weight only to those statements we could corroborate or otherwise deem credible. We have consulted with a wide range of advocates, practitioners, and academics with expertise in this field; reviewed academic studies and literature; reviewed Montana state laws relevant to the law enforcement and advocacy response to sexual assault;[5] and reviewed national prosecution standards and training materials published

[3] Missoula County Attorney Home, Missoula County Official Website, http://www.co.missoula.mt.us/cattorney/ (last visited Feb. 14, 2014).

[4] Mark Muir retired as Chief of the Missoula Police Department on December 20, 2013.

[5] Missoula advocates and attorneys expressed frustration with the limitations that Montana's sexual assault laws and sentencing standards impose on law enforcement's ability to effectively seek criminal justice for victims of sexual assault. Without expressing an opinion on these laws, we found that Montana law neither explains nor excuses the deficiencies discussed in this letter.

by the National District Attorneys Association ("NDAA") and the American Bar Association ("ABA").[6]

## LEGAL STANDARDS

The Constitution and federal statutes prohibit discrimination by law enforcement, including prosecutors, in responding to reports of sexual assault. When this discrimination amounts to a pattern or practice of unlawful conduct, the United States can sue for equitable and declaratory relief under 42 U.S.C. § 14141 or the Safe Streets Act or both. Sex discrimination by law enforcement may occur in either of two ways: where law enforcement practices reflect intentional sex discrimination, or where law enforcement practices have an unjustifiable disparate impact.

The Equal Protection Clause of the Fourteenth Amendment prohibits intentional sex discrimination, including selective or discriminatory enforcement of the law. *Whren v. United States*, 517 U.S. 806, 813 (1996) ("[T]he Constitution prohibits selective enforcement of the law based on considerations such as race."); *Elliot-Park v. Manglona*, 592 F.3d 1003, 1007 (9th Cir. 2010) (Equal Protection Clause prohibits law enforcement from intentionally discriminating in the provision of any services to any degree); *Estate of Macias v. Ihde*, 219 F.3d 1018, 1019, 1028 (9th Cir. 2000) (in case alleging "inferior police protection on account of status as a woman, a Latina, and a victim of domestic violence," holding that there is an equal-protection right to have law enforcement services administered in a nondiscriminatory manner).

In addition to affirmative discrimination against members of protected groups, a failure to take action, on a discriminatory basis, can constitute unlawful discrimination. See *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 197 n.3 (1989) ("The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."); *Bell v. Maryland*, 378 U.S. 226, 311 (1964) (Goldberg, J., concurring) ("[D]enying the equal protection of the laws includes the omission to protect."). The Ninth Circuit has explained specifically that the constitutional right to have law enforcement services delivered in a nondiscriminatory manner "is violated when a state actor denies such protection" to members of protected groups on a prohibited basis. *Estate of Macias*, 219 F.3d at 1028. The courts have applied this principle to under-enforcement of the law when deliberate under-enforcement adversely affects women. See, *e.g.*, *id.*; *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 700-01 (9th Cir. 1988) (recognizing an Equal Protection claim based upon the discriminatory denial of law enforcement services to a victim of domestic violence because of her sex).

Law enforcement action violates the Fourteenth Amendment when a discriminatory purpose is a contributing factor; discrimination need not be the sole motivation for the action or failure to act to violate the Constitution. *Arlington Heights*, 429 U.S. at 265-66. Recognizing that discriminatory purpose is rarely admitted or blatant, courts look to the totality of

[6] See, *e.g.*, Nat'l Dist. Att'ys Ass'n, National Prosecution Standards (3d ed. updated 2009), http://www.ndaa.org/publications.html; Am. Bar Ass'n, Standards for Criminal Justice: Prosecutorial Function Standards.

circumstances to evaluate whether a law enforcement activity or a failure to act was motivated by discriminatory intent. Courts will consider factors that indirectly indicate an intent to discriminate. A "not exhaustive" summary of the factors that courts may properly consider in conducting an inquiry includes: evidence of discriminatory impact; the "historical background" of the challenged discriminatory conduct; evidence of departures from "the normal procedural sequence" or "substantive departures" from a decision, "particularly if the factors considered by the decision maker strongly favor a decision contrary to the one reached"; and contemporaneous statements by the decision maker. See *id.* at 265-68; see also *Balistreri*, 901 F.2d at 701 (evidence of police officer's statement to domestic violence victim that "he did not blame [the victim's] husband for hitting her, because of the way she was 'carrying on,'" "strongly suggest[s] an intention to treat domestic abuse cases less seriously than other assaults, as well as an animus against abused women").

Differential treatment of women premised on sex-based stereotypes, including stereotypes about the role women should play in society or how they should behave, also violates the Equal Protection Clause. See, *e.g.*, *United States v. Virginia*, 518 U.S. 515, 517 (1996) (holding invalid explicit sex-based classification, and stating that "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women"); *Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 730 (2003) ("Reliance on such [invalid gender] stereotypes cannot justify the State's gender discrimination [in employment]."); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982) (holding that denying otherwise qualified males the right to enroll in state nursing school violated the Equal Protection Clause). Thus, where a law enforcement agency's failure to adequately respond to allegations of sexual assault is premised, at least in part, on sex-based stereotypes, that failure violates the Equal Protection Clause.

When law enforcement's handling of sexual assault cases is intentionally discriminatory or has an unnecessary disparate impact, it also violates the Safe Streets Act and its implementing regulations. A disparate impact violates the Safe Streets Act and its implementing regulations, even where the discrimination is not intentional, unless the defendant can demonstrate that the discriminatory impact is necessitated by some legitimate law enforcement or other purpose. See 28 C.F.R. § 42.203 (prohibiting recipients of federal funds made available under the Safe Streets Act from "utiliz[ing] criteria or methods of administration which *have the effect* of subjecting individuals to discrimination") (emphasis added); see also *United States v. Virginia*, 620 F.2d 1018, 1022 (4th Cir. 1980) (Safe Streets Act requires showing that defendants' discriminatory employment practices had an adverse impact on female job applicants, not proof of intentional discrimination, before defendants must demonstrate that challenged practices have a necessary relationship to the job).

The Safe Streets Act applies to entities receiving federal funds during the time of the discriminatory acts. The United States has jurisdiction to address discrimination based on gender by the County Attorney through the Safe Streets Act because the County Attorney's Office has received qualifying federal funding during the period in question and during the current fiscal year.

## DISCUSSION

Prosecuting sex crimes is difficult. They often present investigative and evidentiary challenges that other crimes do not. Notwithstanding these difficulties, however, the County Attorney's Office's frequent failure to prosecute sexual assaults of women stands out. Based on an analysis of the information available to us, between January 2008 and May 2012, the Missoula Police referred 85 reports of sexual assault of adult women to the County Attorney's Office. According to the Missoula Police, a referral to the County Attorney's Office indicates that the Missoula Police has concluded its investigation of the case and is recommending that the case be prosecuted. During that same period, the County Attorney's Office filed charges in only 14 of the 85 reports of sexual assault referred for prosecution – less than 17 percent. During that same period, the County Attorney's Office notified the Missoula Police that it had declined prosecution in 42 of these 85 referrals, and all but one of these declinations involved a non-stranger sexual assault.[7] The County Attorney's Office did not provide any notification to the Missoula Police in the remaining 29 cases.

MCAO's failure to prosecute sexual assault, particularly non-stranger sexual assault, does not seem to reflect inherent or insurmountable evidentiary hurdles. Rather, it is indicative of bias in the way the County Attorney's Office responds to sexual assault cases as a class. It also demonstrates how ill-prepared MCAO is with respect to prosecuting the bulk of sexual assault cases it receives from the Missoula Police. As discussed further below, our investigation revealed evidence that MCAO has a general disregard for sexual assault cases and the women who report them. This disregard is apparent in statements made by the County Attorney and Deputy County Attorneys, and in the manner in which Deputy County Attorneys interact with, or fail to interact with, women reporting sexual assault.

MCAO's bias against women victims of sexual assault is also apparent in its handling of non-stranger sexual assault cases, its failure to explain or document its decisions not to file charges in those cases, and what appear to be excessively long delays in completing its work in cases of sexual assault. Deputy County Attorneys often do not work with, or in some cases even communicate with, Missoula Police detectives to develop evidence for prosecution or to explain why existing evidence is insufficient to charge a case. They failed to communicate with victims about charging decisions or the status of their cases. Before our recent resolution with OPS and MPD, Deputy County Attorneys lacked sufficient training in the legal and scientific knowledge

[7] We arrived at these numbers by comparing sexual assault and rape charges filed in the Missoula District Court between January 1, 2008, and May 1, 2012, with MPD case reports involving adult women referred to the County Attorney's Office during the same time period. Additional analyses of the 29 cases referred for prosecution by MPD between January 2008 and May 2012 that the County Attorney's Office neither prosecuted nor expressly declined for prosecution was precluded by the County Attorney's refusal to cooperate with our investigation. While the County Attorney's Office filed charges against 68 defendants in sexual assault cases between January 2008 and May 2012, insofar as we can determine based on the information available to us, only 14 of these involved adult women and were referred by MPD after January 1, 2008. For our comparison to be accurate, we had to restrict our count of prosecutions to prosecutions of cases referred after January 1, 2008. Also to ensure an accurate comparison, we excluded referrals from agencies other than MPD (such as the Missoula County Sheriff's Office) because, without the cooperation of the County Attorney, we did not know the number of referrals from other agencies and thus could not calculate the prosecution rate for those referrals.

and strategies necessary to effectively prosecute sexual assault against women. These and other practices related to the prosecution of non-stranger sexual assault cases are at odds with the practices of prosecutors' offices around the nation and run counter to guidance set forth by the NDAA and the ABA.

In addition, MCAO's approach to sexual violence in Missoula has had significant, detrimental impacts on the law enforcement community's overall response to sexual assault. The work of Missoula Police detectives is compromised by the fact that, even if they expend the resources to conduct a comprehensive investigation, the County Attorney's Office often will not charge the case. One woman reported that the Missoula Police detective in her case informed her that because "no one had a limb cut off and there was no video of the incident," prosecutors "wouldn't see this [the rape] as anything more than a girl getting drunk at a party." Whether or not the detective's characterization was accurate, the County Attorney's actions over time left this detective – and many others like him – with the understanding that non-stranger sexual assault of women, and especially drug-facilitated sexual assault, must involve physical force or overwhelming and irrefutable evidence to be considered a crime worthy of prosecution.

For victims of sexual assault, MCAO's response indicates that a decision to report and participate in an assault investigation will be, at best, a waste of time or, at worst, a re-victimization. Indeed, in one case from early 2013, a detective told both the victim and the offender that the detective's role was limited to collecting physical evidence of sexual assault and that the County Attorney's Office would never file charges in the case – despite the fact that the detective acknowledged to the victim that she had been raped by the offender. Similarly, the advocates, social service providers, police officers, and medical and mental health professionals who together comprise Missoula's sexual assault response team (the First Step Resource Center Multidisciplinary Team) are undermined and discouraged by a County Attorney's Office that apparently leaves sexual assault and rape laws largely unenforced.

Moreover, MCAO's inability to investigate adequately or file charges in cases of sexual assault has an adverse effect not only on survivors of sexual assault, but also on the safety of women in the Missoula community as a whole. Since the majority of sexual assaults are committed by repeat offenders,[8] the effect is compounded because perpetrators who escape prosecution remain in the community to reoffend.

## Deficiencies in the County Attorney's Office's Response to Sexual Assault Indicate an Impermissible Bias Against Female Victims of These Crimes

Our investigation to date has developed evidence indicating that the County Attorney's Office's failure to adequately respond to sexual assault results at least in part from unlawful bias against women who report sexual assault, and thus violates the Equal Protection Clause of the Fourteenth Amendment and the statutes that we enforce. *See United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Washington v. Davis*, 426 U.S. 229, 239-40 (1976) (a governmental entity

[8] M. Claire Harwell & David Lisak, Why Rapists Run Free, *Sexual Assault Report*, Vol. 14, No. 2, at 17-27 (Nov./Dec. 2010) (research "clearly demonstrates that most rapes are in fact committed by serial offenders"); Nat'l Dist. Att'ys Ass'n, National Prosecution Standards Pt. II cmt. to § 2-9.

violates the Equal Protection Clause when it adopts a policy or practice that has an adverse effect on a protected group and its actions are motivated in part by discriminatory intent).

The question of whether bias motivates the actions of a law enforcement agency must be assessed by considering the totality of circumstances. *See Arlington Heights*, 429 U.S. at 265-67 (determination of whether actions were motivated by discriminatory intent can be based on both circumstantial and direct evidence, including, *inter alia*, adverse effect, historical background, departures from normal procedures, and substantive departures from decisions supported by nondiscriminatory motives). The County Attorney's Office's practices discussed below indicate its failure to vindicate the rights of women victims of sexual assault and suggest that MCAO is violating the law. *See Estate of Macias*, 219 F.3d at 1028 (discriminatory failure to enforce the law or otherwise administer governmental services violates equal protection).

Together, these failures reflect the County Attorney's Office's disregard for crimes of sexual assault – one of the most violent categories of crimes, and a category of crime whose victims are overwhelmingly female. According to the Montana Board of Crime Control, across the State of Montana, 800 adult women were victims of sexual assault in 2012, compared to 180 men.[9] Of the most serious assaults, rape and forcible sodomy, the gender disparity is even more lopsided: 368 adult women victims and 43 men. Missoula County reported to the State 102 sexual assaults and rapes against adult women and 21 against men for the same period.[10] *See Arlington Heights*, 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into circumstantial and direct evidence of intent as may be available. The impact of the official action – whether it bears more heavily on one [group] than another – may provide an important starting point.") (quotation marks and citation omitted).

### 1. The County Attorney's Office's Treatment of Female Victims of Sexual Assault Indicates a Significant Level of Animus Toward These Women

Under Montana law, a prosecutor is required to consult with victims of felony and misdemeanor offenses "involving actual, threatened, or potential bodily injury to the victim," including sexual assault, to obtain the victim's views about the disposition of the case, including about plea negotiations. *See* Mont. Code Ann. § 46-24-104 (2013). Our investigation has shown that the County Attorney's Office often neglects to hold these consultations with sexual assault victims, in contravention of Montana law. And the interactions that the County Attorney's Office *does* have with victims of sexual assault often leave them feeling offended, disregarded, and disbelieved by prosecutors. The comments made by prosecutors and their treatment of these victims suggest gender bias on the part of those charged with the obligation to prosecute crimes in Missoula. Such bias is unlawful where it results in decisions and conduct that discriminate against women.

In one instance, for example, a Deputy County Attorney quoted religious passages to a woman who had reported a sexual assault, in a way that the victim interpreted to mean that the

[9] See http://mbcc.mt.gov (last visited Jan. 13, 2014).
[10] *Id.*

Deputy County Attorney was judging her negatively for having made the report. We also spoke to a woman whose daughter was sexually assaulted, at the age of five, by an adolescent boy. In response to a question about why the perpetrator had been sentenced to only two years of community service, the prosecutor handling the case reportedly told the woman that "boys will be boys." Advocates told us that Deputy County Attorneys "said terrible things to victims," including saying to one woman, in the course of discussing the decision not to prosecute her sexual assault, "All you want is revenge."

One woman described her interaction with a Deputy County Attorney as "traumatic." Another woman stated that, by the time the prosecution was over, she was so frustrated by the Deputy County Attorney's treatment and the MCAO's failure to keep her informed about key developments in the case that she "would never suggest" that another woman pursue a sexual assault prosecution in Missoula. She said further that it "broke her heart" that other women had to go through a similar process to have their cases prosecuted. Other women reported that prosecutors treated them with "no compassion," and acted like the prosecutors were "forced to speak" with them. Several women informed us that they left meetings with prosecutors feeling like they were being "judged" for their prior sexual history, or that the prosecutors did not believe them.

Some women told us that they or others had declined to pursue prosecution because of the negative accounts they had heard from friends and acquaintances about their treatment by the County Attorney's Office. For instance, we interviewed a young woman who had suffered a gang rape as a student at the University of Montana and described feeling re-traumatized by the experience of seeking to have the assault prosecuted by the County Attorney's Office. As a result of hearing about that experience, a friend of the woman declined to report her own rape to either the police or to prosecutors. In another example, a clinical psychologist told us that she had counseled numerous sexual assault survivors in Missoula who had pursued criminal charges against their assailants and described their experience with the County Attorney's Office as being so horrendous that, when the psychologist herself was sexually assaulted, she was reluctant to have her case prosecuted by the County Attorney's Office.

In addition to the types of troubling statements and treatment of women described above, prosecutors compound the trauma sexual assault victims experience by failing to convey important information about charging decisions and other aspects of sexual assault cases to women directly, in a timely manner, or sometimes at all. For example, we heard from women that they had to repeatedly request information and updates from MCAO attorneys handling their cases. They told us that the County Attorney's Office failed to initiate communication with them, did not provide status updates or notices of scheduling changes for court dates, and, unless repeatedly prompted, did not even explain expectations for testifying witnesses in advance of hearings. As a result, the task of informing women about charging decisions generally falls to detectives with the Missoula Police or to advocates with the Missoula Crime Victim Advocate Office, despite the fact that those detectives and advocates are not involved in the prosecutor's decision-making process and thus cannot describe that process in any depth.

One woman told us, for example, that she had no contact with the County Attorney's Office during the year after her first and only meeting with the prosecuting attorney handling her

case. She only learned that the prosecutor had offered her assailant a plea agreement from an advocate with the Missoula Crime Victim Advocate Office, despite the fact that she and her mother had left numerous phone messages for the prosecuting attorney throughout the year. The woman told us that she had understood nothing about the Deputy County Attorney's decision to file charges in her case or reasons for offering a plea agreement; that she was frustrated both by what she believed to be a weak plea agreement and by MCAO's lack of responsiveness and regard for her perspective; and that the County Attorney's Office had made her and her mother "feel like [the case] wasn't that important" to the Office. Her advice to other women reporting sexual assault in Missoula, she said, would be "if at all possible, not to go" to the County Attorney's Office. Her statement underscores the reality that, where prosecutors fail to communicate with women directly, it discourages not only their own participation in the criminal justice process but also that of others who hear about their negative experiences with the justice system.

In another case, when the woman finally did meet with the prosecutor assigned to her case, she described getting the sense that the prosecutor was "just telling [her] what [he] want[ed] her to know." This woman asked a Missoula Police detective whom she trusted to accompany her to the meeting to support her and ensure that her questions were answered fully and completely. Through her own advocacy and the detective's prompting, they learned that the defendant's psychosexual evaluation, which provided information relevant to sentencing, had been conducted by doctors of the defendant's choosing. During the evaluation, the defendant had stated that the rape – to which he had already confessed – had been consensual. No one, however, challenged this statement. The woman explained to the prosecutor that the evaluation could not, therefore, be considered particularly reliable. Although MCAO could request a second evaluation, she learned, thanks to the detective's questioning, that it almost never did so. It is the rare sexual assault victim who will advocate for herself in this manner, and access to criminal justice should not depend upon self-advocacy.

MCAO's failure to communicate regularly and appropriately with complaining witnesses is exacerbated by the Office's failure adequately to coordinate and communicate with crime advocates, either by having advocates on staff, or by making proper use of available crime advocates. The Missoula Crime Victim Advocate Office is located right outside of the County Attorney's Office and has a memorandum of understanding with MCAO to notify victims of the court dates where they have a right to be present. Nonetheless, we were told that the County Attorney's Office almost never solicits the involvement of the Crime Victim Advocate Office with its complaining witnesses in cases of sexual assault. Rather, the burden of identifying and communicating with complaining witnesses falls entirely to the Crime Victim Advocate Office, whose advocates do a daily review of jail rosters to identify potential victims of sexual assault. Moreover, the Crime Victim Advocate Office is only rarely included in in-person meetings between Deputy County Attorneys and complaining witnesses. Nor is the Crime Victim Advocate Office involved in working with victims before a case is charged, even though this is when prosecutors need to demonstrate that they will support a meritorious victim through a difficult process.

Treating women with disregard in this manner not only provides evidence of bias and undermines MCAO's ability to successfully prosecute sexual assault cases, it also directly

contravenes national standards for prosecutors. The National District Attorneys Association's standards, for example, require prosecutors to keep victims informed about their cases, to "be mindful of the possibility of intimidation and harm arising from a witness's cooperation with law enforcement," and, to the extent feasible and appropriate, to provide assistance and protection to witnesses of crime.[11] Indeed, the NDAA commentary to these standards states that "[e]ffective prosecution includes a sound understanding of the value of victims and witnesses within the criminal justice system," and that prosecutors have an obligation "to facilitate the relationship with victims and witnesses" to encourage victims to report crime and "follow[ ] through with identifications, statements, and testimony."[12]

### 2. Public Comments by the County Attorney Raise Concerns of Impermissible Gender Bias

Public comments you have made further suggest that, at the very least, sexual assault is not a high priority for MCAO. Such comments are probative of discriminatory intent, *Arlington Heights*, 429 U.S. at 266-68 ("contemporary statements" by decision makers "may be highly relevant" in determining discriminatory intent), and add to the totality of circumstances indicating impermissible gender bias by the County Attorney's Office, *Balistreri*, 901 F.2d at 701 (statements from decision makers that reflect gender-based stereotypes and bias are among the factors that courts will consider in assessing discriminatory intent).

For example, in responding to questions about delays in charging decisions, you reportedly said that your attorneys review charging decisions in sexual assault cases "when they have spare time."[13] While you have subsequently attempted to explain that by "spare time" you were referring to the "additional time" after other courtroom and litigation functions have been completed, the statement seems inconsistent with the diligent investigation and prosecution of sexual abuse.[14]

Additionally, you reportedly told the Independent Reviewer for the Division's agreements with the Missoula Police and the University's Office of Public Safety (the "Independent Reviewer") that, rather than having attorneys review sexual assault investigations to assess the merits of the case, they "rely on [Missoula Police] detectives to stay on top of the [a]ttorneys to get the decisions they need," and "that if he does not hear from the detective of the case he assumes the case is not a priority for the detective."[15] The statement seems to suggest that unless a detective is willing to aggressively push attorneys in your Office to prosecute sexual assault cases, there is little chance that such cases will receive serious consideration. We note that you have recently acknowledged that you are starting to work on a protocol to ensure timely charging decisions in sexual abuse cases.[16]

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[11] Nat'l Dist. Att'ys Ass'n, National Prosecution Standards Pt. II §§ 2-9.1, 2-10.6, 2-10.7 (3d ed. rev. 2009).
[12] Nat'l Dist. Att'ys Ass'n, National Prosecution Standards Pt. II cmt. to §§ 2-9 & 2-10 (3d ed. rev. 2009).
[13] First Report of the Independent Reviewer, [re] The Agreement between the City of Missoula Police Dep't and the U.S. Dep't of Justice 24 (Nov. 5, 2013), *available at* http://www.ci.missoula.mt.us/1621/Improving-Our-Response-to-Sexual-Assault.
[14] Fred Van Valkenburg, Editorial, Words Twisted on DOJ Compliance, *The Missoulian*, Dec. 16, 2013.
[15] *Id.*
[16] *Id.*

### 3. The County Attorney's Office's Handling of Non-Stranger Sexual Assault Cases and Its Failure to Explain or Document Its Decisions Not to File Charges in Those Cases Raise Further Concerns of Impermissible Discrimination

While, as stated above, this investigation is not aimed at second-guessing the exercise of prosecutorial discretion, the County Attorney's handling of non-stranger sexual assault cases, and its consistent failure to explain or document its decisions not to file charges in those cases, raises further concerns about impermissible bias. Cf. *Arlington Heights*, 429 U.S. at 267 (it may be further relevant evidence of decision makers' purposes "if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached").

After an extensive review of police files, our prosecutorial expert concluded that the factors considered as part of the charging decision process depart from the standards of the profession. In some cases reviewed by our expert, for example, Missoula Police officers had developed substantial evidence to support prosecution, but MCAO, without documented explanation, declined to charge the case. Non-stranger sexual assault cases rarely have evidence of significant force being used, a confession, or an eyewitness account.[17] But our investigation to date reveals that the County Attorney's Office declined to prosecute some sexual assault cases even where it *did* have a confession or an eyewitness.

In one case, for example, the Missoula Police obtained a confession from a man who admitted raping a woman while she was unconscious. The Missoula Police referred the case to the County Attorney's Office with a recommendation that the prosecutor charge the suspect with sexual intercourse without consent, as well as car theft. The County Attorney's Office declined to bring any charges, citing "insufficient evidence." In another case, the Missoula Police obtained incriminating statements from a suspect who admitted to having intercourse with a mentally ill woman, including statements that he couldn't "determine" how soon he had stopped having sex with the woman after she asked him to stop and told him he was causing her "vagina" to "hurt." The Missoula Police referred the case to the County Attorney's Office, recommending that the prosecutor charge the suspect with sexual intercourse without consent. Despite the incriminating statements, the County Attorney's Office declined to bring any charge in the case.

Of equal concern, we found that the County Attorney's Office declined to prosecute nearly every case of non-stranger assault involving an adult woman victim who was, at the time of the assault, subject to some type of heightened vulnerability – for example, in cases where the assault was facilitated by drugs or alcohol. As noted above, the County Attorney's Office declined prosecution in assaults facilitated by drugs or alcohol, even when the assailant had confessed or made incriminating statements. This pattern of declining to prosecute sexual assault of women with heightened vulnerabilities is particularly troubling given the realities of how perpetrators of sexual assault identify potential victims, and the likelihood of drug- or

[17] See Teresa P. Scalzo, Prosecuting Alcohol-Facilitated Sexual Assault 12 (Nat'l Dist. Att'ys Ass'n Aug. 2007), http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf (noting that there are "almost never eyewitnesses to a rape" and that "rape cases rarely have physical evidence that conclusively proves that a rape occurred").

alcohol-fueled sexual assault affecting women in Missoula. Women who are intoxicated are at increased risk of sexual assault, and more than half of all non-stranger sexual assault involves alcohol use by the victim, assailant alcohol use by the victim, assailant, or both.[18] Moreover, women in campus settings may be particularly likely to be vulnerable or incapacitated due to drug or alcohol use.[19]

We also found that the County Attorney's Office declined to prosecute nearly every case of non-stranger sexual assault involving an adult woman victim who had a mental or physical disability, even in cases where there was evidence such as a confession or incriminating statements by the perpetrator. Here, too, the County Attorney's Office appears to resist prosecuting those sexual assault cases most likely to occur in Missoula. Local advocates report that Missoula is one of Montana's principal locations for services for persons with mental health and physical disabilities and, relatedly, is home to a substantial population of individuals with mental health issues, including a significant transient population. Moreover, women with disabilities are particularly likely to be targeted as victims by perpetrators of sexual assault.[20] Given the realities of sexual assault, and the makeup of the population in Missoula, MCAO's apparent resistance to prosecuting cases of sexual assault against women with disabilities, as well as cases of drug- or alcohol-fueled sexual assault, is of particular concern.

For instance, a woman reported that she had been drugged and raped by an acquaintance the previous day. Missoula Police officers developed evidence that included video footage of the alleged assailant slipping something into the woman's drink. The Missoula Police also obtained admissions by the assailant that although he did not remember putting something in the woman's drink, it was possible he had and, as he stated, "If I were trying to make her relax it would be Xanax." When confronted with the video footage, the assailant also stated, "My memory tells me no, but I can't argue with surveillance." The Missoula Police obtained a search warrant for the suspect's home and learned that the suspect had recently refilled prescriptions for two drugs common in drug-facilitated sexual assaults, including Xanax. Nonetheless, MCAO declined to charge the case, citing insufficient evidence, but with no documented further explanation.[21]

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[18] See Jeanette Norris, The Relationship Between Alcohol Consumption and Sexual Victimization, Nat'l Online Res. Ctr. on Violence Against Women, at 1 (Dec. 2008), http://www.vawnet.org/sexual-violence/summary.php?doc_id=1630&find_type=web_desc_AR.

[19] See Rana Sampson, Acquaintance Rape of College Students, in Problem-Oriented Guides for Police Series Guide No. 17, at 13 (U.S. Dep't of Justice, Office of Community Oriented Policing Servs. 2002) (noting that in over 75% of college rapes, the offender, victim, or both had consumed alcohol).

[20] Bureau of Justice Statistics, Crime Against People with Disabilities, Nat'l Crime Victimization Survey, at table 2 (2008); Jeanette Norris, The Relationship Between Alcohol Consumption and Sexual Victimization, Nat'l Online Res. Ctr. on Violence Against Women, at 1 (Dec. 2008), http://www.vawnet.org/sexual-violence/summary.php?doc_id=1630&find_type=web_desc_AR; William Paul Deal & Viktoria Kristiansson, Victims and Witnesses with Developmental Disabilities and the Prosecution of Sexual Assault, vol. 1, no. 12 The Voice, 1 NDAA Nat'l Ctr. for the Prosecution of Violence Against Women (2007).

[21] While toxicology tests did not detect drugs in the woman, given the other evidence, there are indications that this may have been due to a false-negative caused by setting the toxicology levels too high. See, *e.g.*, Adam Negrusz & R.E. Gaensslen, Analytical Developments in Toxicological Investigation of Drug-Facilitated Sexual Assault, 376 *Analytical & Bioanalytical Chemistry* 1192-97 (Apr. 8, 2003) (noting that the sensitivity of the drug screening technique is crucial, as some compounds commonly used in drug-facilitated sexual assaults are typically administered in a single low dose, and discussing various screening techniques).

Moreover, we found no indication that the County Attorney's Office had given any guidance to Missoula Police detectives about how to develop evidence that it believed *would* be sufficient to support bringing charges in this case.[22]

Between 2008 and 2010, the Missoula Police provided a written referral form to the County Attorney's Office, including a section designed for narrative comments about the reasons for declining prosecution. MCAO attorneys rarely documented their decision to decline prosecution in sexual assault cases in a meaningful way. The most common comments were "insufficient evidence" or "insufficient corroboration." After 2011, the written referral form disappeared from the Missoula Police files we reviewed. We learned that this was due to MCAO's chronic failure to return the form to the Missoula Police – a source of frustration for Missoula Police detectives who were often left with no specific information about the reason for MCAO's decision not to prosecute, as well as the responsibility of explaining MCAO's decision to the victim of the sexual assault.

As part of its initial efforts to implement its agreement with DOJ, MPD is revising and reinstating the use of this written referral form, once again seeking feedback from MCAO about its charging decisions in cases referred by the police department. Although we credit the Missoula Police for these efforts, their impact will be limited without the active cooperation of the County Attorney's Office. MCAO's decision not to provide feedback leaves both Missoula Police detectives and women sexual assault victims in the dark about the MCAO's declination decisions – particularly as the County Attorney's Office consistently relies on Missoula Police detectives to communicate with victims of sexual assault about the status of their criminal cases. The lack of information also deprives Missoula Police detectives of an important source of information about how they can improve their investigative techniques to collect the type of evidence the County Attorney's Office deems sufficient or to otherwise assist MCAO attorneys in developing cases for prosecution. The failure to provide material information to the Missoula Police falls far short of meeting a prosecutor's responsibility to provide information to police to aid them in performing their duties.[23]

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[22] Of course, in some cases, a prosecutor may have good reasons to exercise discretion not to charge a particular case. Under the usual circumstances for conducting an investigation such as this one, we would have met with the relevant agency to discuss specific decisions made; but as noted, the County Attorney has refused to cooperate with this investigation.

[23] National standards for prosecutors recognize the importance of maintaining clear lines of communication between prosecutors and police. These standards state that the chief prosecutor, here the County Attorney, "should actively seek to improve communications between his or her office and other law enforcement agencies," and "should keep local law enforcement agencies informed of cases in which they were involved and provide information on those cases in order to aid law enforcement officers in the performance of their duties." Nat'l Dist. Att'ys Ass'n, National Prosecution Standards Pt. II §§ 2-5.1 to 2-5.2, at 22 (3d rev. 2009). Our expert also observed that the County Attorney's Office's practices in this area were significantly out of step both with national standards for prosecutors and with the common practice of prosecutors' offices across the nation.

### 4. The Practices of the County Attorney's Office Depart from Procedures Commonly Used by Prosecutors Across the Nation and Further Indicate Bias Toward Victims of Sexual Assault

#### a. The County Attorney's Office Fails to Adequately Investigate Sexual Assault Crimes or Communicate with Law Enforcement Partners to Aid in Their Development of Sexual Assault Cases

Our investigation to date indicates that the County Attorney's Office fails to adequately investigate cases of sexual assault, cf. *Arlington Heights*, 429 U.S. at 267 ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role."); fails to collaborate with Missoula Police detectives to develop evidence, especially evidence of incapacitation, sufficient to support sexual assault charges; fails to engage in any independent investigative responsibility; and, where additional evidence could be gathered, fails to explain adequately to the Missoula Police why cases are declined. Our expert found that the MCAO's practices concerning sexual assault depart from the standards of other prosecutors' offices, indicating bias.

We also found that the County Attorney's Office fails to develop, or work with Missoula Police detectives to develop, the evidence necessary to make non-stranger sexual assault cases into viable prosecutions, particularly in cases involving drug- or alcohol-facilitated sexual assault. Under Montana law, a victim who is incapacitated is incapable of consent. See Mont. Code Ann. § 45-5-501(1)(a) (2013) (defining "without consent" to include an incapacitated victim). During our investigation, we examined several cases in which Missoula Police detectives did not attempt to develop evidence of incapacitation where the other evidence strongly suggested that incapacitation was relevant to establishing the woman's lack of consent.[24] The Missoula Police then referred these cases to the County Attorney's Office for review. Prosecutors, however, did nothing to ensure the Missoula Police knew what additional evidence they would need in order to build legally sound prosecutions from these cases.[25]

In addition, our investigation revealed that the practices of the County Attorney's Office depart from the standards of respected professional associations. While police departments undertake the majority of criminal investigations, national standards for prosecutors recognize that the investigation of crimes, both independently and through oversight of police investigators, is one of the core functions and duties of a prosecutor's office. The American Bar Association Standards provide that while "[a] prosecutor ordinarily relies on police . . . for investigation, . . . the prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies."[26]

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[24] We discuss these cases in more detail in our May 15, 2013 letter to Mayor John Engen regarding the Missoula Police. That letter is available at: http://www.justice.gov/crt/about/spl/documents/missoulapdfind_5-15-13.pdf.
[25] *See, e.g.*, Teresa P. Scalzo, Prosecuting Alcohol-Facilitated Sexual Assault, at 17-19 Nat'l Dist. Attorney's Ass'n (Aug. 2007) (discussing categories of corroborating evidence and providing numerous examples).
[26] *See* Amer. Bar Ass'n, Prosecutorial Function Standard § 3-3.1(a).

Similarly, the NDAA standards note that "there are times when the prosecutor must use his or her authority to initiate or continue an investigation," and states that "[a] prosecutor should have the discretionary authority to initiate investigations of criminal activity in his or her jurisdiction."[27] These situations may include cases where the primary investigative law enforcement agency has a conflict of interest; where the investigation has been handled improperly; or where the investigation calls for expertise available at the prosecutor's office.[28] It is in keeping with national standards for prosecutors' offices for prosecutors to work collaboratively with police departments to develop or corroborate evidence, and to follow additional investigative leads.

Moreover, both the ABA and the NDAA recognize that prosecutors should employ investigators to supplement law enforcement investigations and, in limited circumstances, conduct independent investigations. *See* ABA Prosecutorial Function Standard § 3-2.4(b) ("Funds should be provided to the prosecutor for the employment of a regular staff of professional investigative personnel and other necessary supporting personnel, under the prosecutor's direct control . . . ."); NDAA National Prosecution Standard § 3-1.6 ("Chief prosecutors should employ properly trained investigators to assist with case preparation, supplement law enforcement investigations, [and] conduct original investigations . . . ."). Our expert has stated that it is quite common for prosecutors to employ their own investigators.

The NDAA further recognizes that prosecutors have a responsibility to provide oversight and training to police investigators. *See* NDAA National Prosecution Standard § 2-5.3 ("The chief prosecutor should encourage, cooperate with and, where possible, assist in law enforcement training."). In its guidance on prosecution of alcohol-facilitated sexual assault, for example, the NDAA recommends that prosecutors "instruct investigators to look for evidence that not only proves the act occurred, but also evidence that overcomes the consent defense" and "train police to conduct offender-focused investigations in rape cases."[29]

We recognize that it is primarily the responsibility of the police to conduct investigations. But it is the responsibility of the prosecutor to work with the police to ensure that investigations are sufficient to support viable prosecutions. The County Attorney's Office falls short of this duty when it comes to crimes of sexual assault. By ignoring its role in the investigation of crimes of sexual assault, the County Attorney's Office substantially departs from national standards for prosecutors and common prosecutorial practices across the nation.

### b. The County Attorney's Office Fails to Offer Prosecutors Training that Would Facilitate Their Proper Handling of Sexual Assault Cases

Despite its location in a college town, and widespread community attention to the issue of sexual assault, the evidence we gathered to date indicates that the County Attorney's Office has failed to provide attorneys with sufficient training on prosecuting sexual assault against women,

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[27] Nat'l Dist. Att'ys Ass'n cmt. § 3-1; Nat'l Dist. Att'ys Ass'n, Nat'l Prosecution Standards § 3-1.2 (3d ed. 2009).
[28] Nat'l Dist. Att'ys Ass'n cmt. § 3-1.
[29] Teresa P. Scalzo, Prosecuting Alcohol-Facilitated Sexual Assault, Nat'l Dist. Att'ys Ass'n (Aug. 2007), http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf.

and especially non-stranger assaults. Indeed, prior to the initiation of our investigation, the County Attorney's Office provided little, if any, such training. Without training, prosecutors do not have the tools to build strong prosecutions of non-stranger sexual assault, and thus they are more likely to erroneously assess the strength of a case and rely on personal misperceptions or bias in exercising prosecutorial discretion in charging decisions.

Specifically, MCAO attorneys lack sufficient training in the bodies of legal and scientific knowledge necessary to prosecute assaults against adult women, including non-stranger sexual assault. While Deputy County Attorneys have attended trainings concerning domestic violence and the sexual abuse of children, our investigation indicates that until recently, they received no training on sexual assault.

The successful prosecution of sexual assault, like that for most offenses, relies on a grasp of relevant legal and scientific knowledge. An attorney would struggle to prosecute a homicide case that turned on DNA evidence without being familiar with the underlying science, and the same is true of sexual assault cases and the science relevant to sexual assault. As the NDAA explains in its monograph on "Victim's Responses to Sexual Assault," it is "imperative for state and local prosecutors to be aware of rape myths and how juries may be influenced by these myths"; to be educated about the various physical and psychological responses that a woman may have following sexual assault; to be able to persuasively describe to a jury how and why a sexual assault victim may not have expressed her lack of consent in a way that meets the jury's expectations of a response to a violent crime; or to explain why a victim may not be able to recall or describe the details of her sexual assault.[30] This means that, in cases involving sexual assault, the prosecutor should be familiar with core concepts such as tonic immobility, counterintuitive response to sexual assault, the interrelationship between psychological trauma and memory, and means of addressing misinformation about violence and sex.[31]

The County Attorney's Office's inadequate training impacts both charging decisions and the ability to successfully prosecute sexual assault. For instance, under Montana law, the sexual history of a woman is legally protected from introduction at trial in sexual assault cases in all but the most limited circumstances.[32] Yet one woman informed us that the County Attorney's Office stated that MCAO had declined to prosecute her case because of her sexual history. Basing prosecutorial decisions on women's sexual histories not only demoralizes and stigmatizes

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[30] Patricia L. Fanflik, Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?, Nat'l Dist. Att'ys Ass'n (Aug. 2007).

[31] *See, e.g.*, Patricia L. Fanflik, Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?, Nat'l Dist. Att'ys Ass'n (Aug. 2007); Veronique N. Valliere, Understanding the Non-Stranger Rapist, 1 *The Voice* 11 (NDAA Nat'l Ctr. for the Prosecution of Violence Against Women 2007); Jennifer Gentile Long, Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases, 1 *The Voice* 4 (NDAA Nat'l Ctr. for the Prosecution of Violence Against Women 2006); Teresa P. Scalzo, Overcoming the Consent Defense, 1 *The Voice* 7 (NDAA Nat'l Ctr. for the Prosecution of Violence Against Women 2006).

[32] *See* Mont. Code. Ann. § 45-5-511.

victims, it disregards laws and national prosecutorial standards designed to sexual assault prosecution and protect women who report assaults.

According to recent correspondence we have received from you, two Deputy County Attorneys attended a weeklong sexual assault prosecution training session conducted by the National District Attorneys Association in August 2013. Since the announcement of our investigation and in particular since the issuance of the findings letters and the entry of agreements with MPD and OPS, several prosecutors have attended the training provided to MPD and OPS investigators and first responders as part of the DOJ settlement agreements. This is a welcome development. Under the agreements with the Missoula Police and the University, there have been several required training sessions for local law enforcement, and it is our understanding that Deputy County Attorneys have attended these trainings.

While this increased attention to training is important, it is not enough. As national standards from the NDAA and the ABA indicate, training must be targeted to the function of the prosecutor, address the dynamics of working with victims and developing the evidence for a successful prosecution, and be ongoing.

We believe the commonsense remedies we have proposed to you over the last several months will help augment the trainings you have instituted by providing additional tools to prepare Missoula prosecutors to respond appropriately, respectfully and fairly to victims of sexual assault, as well as work with other law enforcement and victims to identify and develop the evidence necessary for successful prosecutions.

## CONCLUSION

Discrimination, including gender bias and stereotypes, undermines law enforcement's ability to effectively vindicate the rights of sexual assault victims and hold perpetrators accountable, and weakens public confidence in the criminal justice system. The United States has worked cooperatively with the University of Montana and the Missoula Police Department to develop durable and comprehensive remedies that better protect women and make law enforcement more effective. We urge you to join us in these collaborative efforts. We stand ready to meet with you to discuss a mutually agreeable and prompt resolution of this matter.

Please note that this letter is a public document and will be posted on the Civil Rights Division's website. If you have any questions, please contact Jonathan Smith, Chief of the Special Litigation Section, at (202) 514-6255.

Sincerely,

Jocelyn Samuels
Acting Assistant Attorney General
Civil Rights Division

Michael W. Cotter
United States Attorney
District of Montana