No. 20220896-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff / Appellee,

v.

DUSTIN GILES ANDRUS,
Defendant / Appellant.

Appellant's Reply Brief

On appeal from the Second Judicial District Court, Davis County,
Honorable David Connors, District Court No. 211700097

Mr. Andrus is incarcerated.

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1. The court improperly denied Dustin's motion to suppress

The district court improperly denied Dustin's motion to suppress. The evidence derived from the federal subpoenas was "obtained in violation of state and federal law," so the "fruits of such subpoenas" should have been excluded under the Utah Code and the Utah Constitution. (Op.Br.15.)

But the State argues that (1) Dustin lacks standing to challenge the federal subpoenas; and (2) the evidence obtained from the federal subpoenas was admissible. The State is wrong on both points.

1.1. Dustin has standing to challenge the federal subpoenas

The State claims Dustin "lacks standing to challenge federal subpoenas served on third-party businesses." (State.Br.2, 21–22.) But the State is wrong. Consumers have standing to challenge subpoenas that implicate their personal information, even if the subpoena is issued to a third party, under (1) Utah's Electronic Information Privacy Act and (2) the Utah Constitution.

1.1.1. The Utah Electronic Information Privacy Act

The Electronic Information or Data Privacy Act ("the Act") gives subscribers standing to challenge subpoenas implicating their personal information. Utah Code §77-23c-102. (Op.Br.16–17.) The Act's very title demonstrates consumers have a privacy interest in their electronic information, and thus have standing to challenge an infringement, even if the government seeks that information through a third party. *See generally* Utah Code §77-23c.

The Act specifically prohibits law enforcement agencies from obtaining, "without a search warrant issued by a court upon probable cause…electronic information or data transmitted by the owner of the electronic information or data to a remote computing service provider." *Id.* §77-23c-102(1). It also prohibits them from obtaining a "subscriber record" unless they follow the statutes under the Subpoena Powers for Aid of Criminal Investigation and Grants of Immunity. *Id.* §77-23c-104(1)–(2). And under the Subpoena Powers statute, law enforcement agencies can only obtain electronic and subscriber information through a court order. *See id.* §77-22-2.5(2).[1]

The Act provides a remedy when law enforcement agencies violate these procedures. Electronic information or data "obtained in violation of the provisions of this chapter *shall be subject to the rules governing exclusion* as if the records were obtained in violation of the Fourth Amendment to the United States Constitution and Utah Constitution, Article I, Section 14." *Id.* §77-23c-105 (emphasis added).

[1] That warrants are generally required to obtain personal information shows the legislature recognizes that individuals have a privacy right to their personal information. *See* Utah Code §77-23c-104(3). The court order investigative avenue outlined under the Subpoena Powers statute is an exception to that general rule, but still shows the legislature sought to protect consumer information through specific legal procedures.

By providing a *remedy*, the Act acknowledges an *injury*. The remaining question is *to whom* does the Act's remedy apply? The plain language provides the answer: customers and subscribers facing criminal prosecution.

Two provisions demonstrate this. First, the Act's provider-protection provision, which grants legal protection to "provider[s]" that "provid[e] information, facilities, or assistance in good faith reliance on" the government's representations. *Id.* §77-23c-102(3). And second, the Act's remedial provision, which equates a violation of the Act with a violation of the State and federal Constitutions and mandates that "[a]ll electronic information or data and records" obtained in violation of the Act "be subject to the rules governing exclusion." *Id.* §77-23c-105.

Reading these provisions "in harmony" with each other "and with other statutes under the same and related chapters," *Berneau v. Martino*, 2009 UT 87, ¶12, 223 P.3d 1128 (quotation simplified), demonstrates that these provisions define the scope of remedies offered to *consumers*. Through the provider-protection provision, consumers learn they may not pursue legal recourse against their providers for the good-faith dissemination of personal information to the government. Utah Code §77-23c-102(3). Instead, through the remedial provision, consumers are entitled to the exclusion during a criminal proceeding of the fruits of that dissemination if the government obtained the information in violation of the Act. *Id.* §77-23c-105.

In sum, by providing consumers with a remedy for statutory violations, the Act grants consumers standing to challenge investigative procedures that violate the Act. Thus, Dustin has standing.

1.1.2. The Utah Constitution

In addition to the Act, this Court's precedent recognizes that customers have standing to challenge an invalid subpoena issued to third parties implicating customer information.

Specifically, customers "ha[ve] standing to challenge an invalid subpoena" issued to their banks because customers have "a right to be secure against unreasonable searches and seizures" of their banking information. *State v. Thompson*, 810 P.2d 415, 417–18 (Utah 1991). Justice Zimmerman concurred in *Thompson*, "not[ing] explicitly for the benefit of the bench and bar that in so ruling, [the Court] reject[ed] the arguments advanced by the State that [the Court] should follow federal standing law and deny those not directly subjected to the search any right to challenge its legality." *Id.* at 420 (Zimmerman, J., concurring). Indeed, "standing law is state law," and federal precedent is not binding on this Court. *Id.*

Given this, the State's contention that only "subpoena recipients" can "challenge the subpoenas' validity" is simply wrong. (State.Br.21.) Under the Utah Constitution, Dustin has standing to challenge subpoenas issued to third parties that concern his personal information.[2]

[2] The State cites *State v. Roberts*, 2015 UT 24, ¶29, 345 P.3d 1226, and

1.2. The evidence obtained from the federal subpoenas should have been excluded

In Dustin's case, the "plain language of the Utah Code required the State's evidence to be excluded" and "the evidence should also have been excluded because it was obtained in violation" of the Utah Constitution. (Op.Br.15.)

The State disagrees. (State.Br.21–27.) It claims that because the subpoenas complied with federal law and investigated "potential federal crimes," they "were valid." (*Id.*21.) It also argues that Utah law "do[es] not require suppression of the valid federal subpoenas or their fruits." (*Id.*27.)

United States v. Perrine, 518 F.3d 1196, 1204–05 (10th Cir. 2008) to assert that "subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy expectation." (State.Br.21–22.) But Dustin has not raised a claim under the Fourth Amendment. Rather, his primary contention is that the State violated the Electronic Information Privacy Act during its investigation and, *under the Act*, the fruits of the invalid subpoenas must be excluded. *See* Utah Code §77-23c-105.

Regardless, the State misunderstands *Roberts*. There, this Court rejected a defendant's challenge to the validity of a subpoena issued to an internet service provider "[b]ecause the [internet provider] subpoena was issued in compliance *with the law at the time*." 2015 UT 24, ¶¶1–2, 7, 30, 33 (emphasis added). But the law has since changed—the Utah legislature enacted the Electronic Information Privacy Act. *See* Utah Code §77-23c-104(1)–(2); *id.* §77-22-2.5(2). And unlike in *Roberts*, law enforcement in Dustin's case did *not* comply "with the law at the time." *Id.* ¶33. *See* Part 1.2, *supra*.

The State's reliance on federal precedent is also misplaced because, again, this Court "reject[ed]" the federal approach to third-party standing. *See Thompson*, 810 P.2d at 420 (Zimmerman, J., concurring). "Even where federal rights are at stake, standing law is state law, and [this Court] [is] not bound to follow federal precedent." *Id.*

But the State is wrong. As explained below, (1) the Act requires exclusion of the evidence; (2) Dustin's subscriber information is protected under the Utah Constitution; and (3) Dustin was harmed by the admission of the evidence.

1.2.1. The evidence should be excluded under the Act

The Act requires the evidence to be excluded, even if the federal subpoenas are valid under federal law, because section 77-23c-105 requires evidence "obtained in violation of the provisions of *this chapter*" to be "subject to the rules governing exclusion *as if* the records were obtained in violation of the Fourth Amendment to the United States Constitution and Utah Constitution, Article I, Section 14." Utah Code §77-23c-105 (emphases added). (Op.Br.19–20.)

The State does not deny that it failed to comply with the Act. But it still claims: (1) under section 77-23b-4, it could use a federal subpoena rather than comply with the Act; and (2) compliance with federal law allows noncompliance with the Act. (State.Br.28–29.) Neither argument has merit.

Section 77-23b-4 does not apply: Section 77-23b-4 regulates the dissemination of the "*contents* of an electronic communication"—it does not regulate the dissemination of "subscriber records" like those sought by the State here. *Compare* Utah Code §77-23b-4(1) *with id.* §77-23c-104(1)–(4).

Section 77-23b-4 is irrelevant here because law enforcement did not subpoena the "contents" of any alleged "electronic communication" between Dustin and Laura. (State.Br.28.) Rather, the State relied on a subpoena to obtain Dustin's *subscriber information*, which is not covered by section 77-23b-4.

Subscriber information is covered by Chapter 23c—the Act. So while the State contends the Act has no language "expressly delineating its scope" (State.Br.32), this is not true, at least as far as section 77-23c-104 is concerned. This section is specifically aimed at "Third-party electronic information." Utah Code §77-22-104(1). And it is the only place in the Utah Criminal Code to expressly identify and define "subscriber record[s]" and place limitations on the means law enforcement can use to obtain them.

Chapter 23c also states that "a law enforcement agency may not obtain, use, copy, or disclose a subscriber record" unless that record is obtained by following the procedures "provided in Chapter 22, Subpoena Powers for Aid of Criminal Investigation and Grants of Immunity." *Id.* §77-23c-104(2). And Chapter 22 requires a three-step process for law enforcement to obtain the "names of subscribers, service customers, and users," which the State does not contend it followed in Dustin's case. *Id.* §77-22-2.5(2)(c)(i).[3]

Reading these statutes "literally" results in a "[]reasonable" and "[]operable result." *State v. Jeffries*, 2009 UT 57, ¶7, 217 P.3d 265. Law enforcement cannot obtain subscriber information, *see* Utah Code §77-23c-104(2), *unless* the required three-step procedure is followed, *see id.* §77-22-2.5(2). When this procedure is

[3] Rather, the State only argues the federal subpoenas are "valid and lawful *under federal law*." (St.Br.21 (emphasis added).)

not followed, chapter 23c unambiguously requires exclusion of the evidence. *Id.* §77-23c-105.[4]

Finally, to the extent the State argues there is any conflict between chapter 23b and chapter 23c, the "provision more specific in application governs over the more general provision." *Carter v. University of Utah Medical Center*, 2006 UT 78, ¶9, 150 P.3d 467 (quotation simplified). Thus, section 77-23c-104's procedure for obtaining "subscriber record[s]" preempts section 77-23b-4's general discussion of "information pertaining to a subscriber." Indeed, reading 77-23b-4 to govern the production of subscriber records, as the State recommends, would render *all* of section 77-23c-104 "superfluous [and] inoperative." *Hall v. Dep't of Corr.*, 2001 UT 34, ¶15, 24 P.3d 958 (quotation simplified).[5]

Thus, the State's interpretation of the Act is wrong.

Compliance with federal law does not excuse the State's violation of the Act: The subpoenas here do not comply with federal law. (Op.Br.26–28.) But even if the subpoenas were valid under federal law, "[s]tates

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[4] The State contends this interpretation would "hamstring" "state-federal task forces" (State.Br.35), but the State overlooks that the Act's three-step process for obtaining a "court order" to get a "subscriber record" is not difficult. *See* Utah Code §77-22-2.5(2)(a)–(c). If anything, it is only a little "slow" compared to the federal subpoena route. (*See* Def. Exh. 1.)

[5] Sections 77-23c-104 and 77-23b-4 also differ in that section 23c-104 is specifically aimed at governing "law enforcement agenc[ies]" while section 23b-4 applies to "government entit[ies]" more broadly. The more specific direction given to the more specific audience in section 23c-104 should supersede that given to the broader audience in section 23b-4. *See Carter v. University of Utah Medical Center*, 2006 UT 78, ¶9, 150 P.3d 467.

cannot bypass the mechanisms of federal law," *Fernandez v. Kerry, Inc.*, 14 F.4th 644, 646 (7th Cir. 2021), and the federal government likewise cannot bypass the mechanisms of state law. *See Younger v. Harris*, 401 U.S. 37, 46 (1971) (emphasizing "the fundamental policy against federal interference with state criminal prosecutions").[6]

The State disagrees, resisting any interpretation of 77-23c-104 that "forbids [State law enforcement] from accessing such information through any other avenue" besides complying with the Act. (State.Br.32.) But the plain language shows this is what the Utah legislature intended. The legislature did not incorporate or otherwise acknowledge any other federal means to obtain subscriber information, although it could have done so and even did so elsewhere in the Act.

In section 77-23c-102(4), for instance, the legislature ensured law enforcement agencies could "receive or use information, without a warrant or subpoena, from the National Center for Missing and Exploited Children." The legislature's failure to include the FBI in this exception shows it did not intend for the FBI to be exempt from the general rule described in section 77-23c-104(2).

[6] Even the district court below expressed its concern that the State's investigative methodology allowed it to "circumvent the state statute by virtue of Detective Carlson's fortuitous dual-position with" the FBI. (R.448.)

Cf. Marion Energy, Inc. v. KFJ Ranch Partnership, 2011 UT 50, ¶14, 267 P.3d 863 (giving effect "to omissions in statutory language").[7]

The Act's other language supports this conclusion. For instance, section 77-23c-104(2) prevents "[a] law enforcement agency" from obtaining, using, copying, or disclosing a subscriber record unless it follows the three-step process in the Subpoena Powers Act. At the time the Act was initially enacted, "law enforcement agency" was not defined, but "government entity" was.[8] And that definition was limited to *non-federal* entities, including "the state, a county, a municipality,…or any other political subdivision of the state," including "a law enforcement entity or any other investigative entity…acting or purporting to act for or on behalf of a state or local agency." Utah Code §77-23c-101(3) (West 2019). Thus, the plain language of the Act clearly identifies non-federal law enforcement officers—*and those "acting or purporting to act for or on behalf" of them*—as bound by the provisions of the Act. *Id*. (emphasis added).

And here, there is no dispute that Detective Carlson contacted the FBI administrative assistant "for or on behalf of" Detective Vance, who is a state law enforcement officer. (*See* Def. Exh. 1.) The district court recognized that Detective

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[7] And as the State points out, "[s]ection 77-23b-4 was in effect when the Legislature enacted the Act in 2019" (St.Br.28), meaning it was presumptively aware of Chapter 23b's policies and procedures, yet did not incorporate them into the Act.

[8] "Law enforcement agency" is now defined as "an entity of the state…or an individual or entity acting for or on behalf of an entity [of the state]." Utah Code §77-23c-101.2(4).

Carlson's actions "certainly" were just "a favor to Detective Vance to avoid the state procedures." (R.2000–01.) This is a factual finding, which "enjoy[s] a high degree of deference" and should be "overturned only [if] clearly erroneous." *See Randolph v. State*, 2022 UT 34, ¶18, 515 P.3d 444 (quotation simplified). And the State has not disputed this factual finding on appeal.

Moreover, since Detective Carlson was "acting or purporting to act for or on behalf of a state or local agency" when he secured the federal subpoenas, *see* Utah Code §77-23c-101(3) (West 2019), and because the Act prohibits law enforcement agencies from obtaining, using, copying, or disclosing a subscriber record unless they follow section 77-22-2.5(2), *see id.* §77-23c-104(2), the State violated the Act when it did not follow that procedure. This, in turn, triggers the Act's remedial provision, which requires that "[a]ll electronic information or data and records of a provider…pertaining to a subscriber or customer…shall be subject to the rules governing exclusion as if the records were obtained" unconstitutionally. *Id.* §77-23c-105.

In sum, the State's statutory interpretation is incorrect. Chapter 23c requires the exclusion of the information obtained in violation of the Act.

1.2.2. Dustin's subscriber information is protected under the Utah Constitution

Dustin also had a reasonable expectation of privacy under the Utah Constitution, and it was unreasonable for the State to obtain this protected

information through bypassing the Act. (Op.Br.21–28.) Thus, the evidence must also be excluded under the Utah Constitution. (*Id.*28–31.)

Still, the State asserts that "the public-facing communication tools" Dustin allegedly used to meet Laura are not entitled to "the same constitutional expectation of privacy as are the bank records" in *State v. Thompson*, 810 P.2d 415 (Utah 1991). (State's Br.36 n.6) But the State is wrong.

Again, in *State v. Thompson*, 810 P.2d 415 (Utah 1991), this Court recognized that a bank's "depositor or customer" has "a right to be secure against unreasonable searches and seizures of their bank statements." *Id.* at 417. This right comes directly from "article I, section 14 of the Utah Constitution" and covers a wide swath of customer information: "bank statements, checks, savings, bonds, loan applications, loan guarantees, and *all papers* which [were] supplied to the bank to facilitate the conduct of [customers'] financial affairs upon the reasonable assumption that the information would remain confidential." *Id.* at 418 (emphasis added). This Court held that customer information, given to a third-party entity "to facilitate the conduct of [the customer's] financial affairs upon the reasonable assumption that the information would remain confidential," is protected under the Utah Constitution. *Id.*

The State's argument to the contrary conflates "public-facing communication tools" with Dustin's personal subscriber information. (St.Br.36, n.6.) Indeed, while some operations of a bank may be public-facing, a customer's *private information* used to "conduct…[the customer's] financial affairs" at the

bank is not. *Id.* at 418. The same is true of the subscriber information Dustin allegedly used to connect with Laura on an electronic platform. Dustin's information was not generally available to the public—that's why the State had to obtain the information through legal measures (albeit those measures violated the Act and Utah Constitution here).

Just as a customer has a protectable privacy interest in his personal information he shares with the bank to facilitate his banking, a customer also has a protectable privacy interest of personal information he shares with an electronic platform to facilitate his use of the platform. Dustin shared private information with those platforms with "the reasonable expectation that the information would remain confidential." *Id.* Indeed, this Court has expressly recognized that what individuals seek to "preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* (quotation simplified).

Plus, the state of Utah has given consumers an objective privacy interest in subscriber information. Through the passage of Utah's Electronic Information Privacy Act, Utahns recognize as reasonable one's privacy interest in his personal identification information used to subscribe to various communication platforms.

Moreover, Dustin subjectively had a privacy interest in the information he shared with the third-party platforms, too. Dustin allegedly met Laura using Omegle, which is "an online chat app" that lets users "meet strangers" "anonymous[ly]." (R.977–79.) Dustin's alleged use of anonymous communication

tools shows he had an actual subjective privacy interest in his identity. Same with his alleged use of TextNow, which "assigns [users] a random phone number." (R.949.) These anonymizing messaging tools, as well as the lack of a profile picture on at least the Snapchat accounts (St. Ex. 1 at 1), show Dustin intended his personal information to remain private.

In sum, *Thompson* recognizes that customers have a constitutionally protected privacy right in regard to the personal information they share with third-party businesses. Dustin had an objective and subjective expectation of privacy in his subscriber information. And for the reasons explained in his opening brief, that right was violated here. (Op.Br.25–31.)

1.2.3. Dustin was harmed

The State contends there "is no prejudice" because Laura's "in-court identification" coupled with the Snapchat messages would have secured Dustin's convictions without the federal subpoenas. (State.Br.38–42.) But the State overlooks that the subpoenas were key to establishing Dustin's identity in court.[9]

When the State obtained Laura's cell phone, it conducted a "forensic download" and was "able to identify an individual going by Timmy or Timothy within [Laura's] cell phone." (R.947.) This person's name was "Tim Lee

[9] Because the district court's denial of his motion to suppress equated to a violation of Dustin's federal constitutional rights, "the burden shifts to the State to demonstrate that the error was harmless beyond a reasonable doubt." *State v. Walker*, 2017 UT App 2, ¶37, 391 P.3d 380 (quotation simplified). It cannot do so for the reasons set forth in this section.

Romano." (*Id.*) Using this information, Detective Vance orchestrated a photo lineup with Laura, but Laura did not identify "Mr. Romano as the individual she had been engaging with." (R.948.)

After this failed attempt to identify Dustin, Detective Vance circumvented the Act and asked a favor of Detective Carlson to obtain the subscriber information connected to the account and phone number. (R.951.)[10] And through the "location or individual information regarding those accounts," law enforcement was able to locate a residential address connected to Dustin. (*Id.*) Detective Vance admitted that it was through "those records"—obtained by the subpoenas—that Dustin was identified. (R.988.)

Then, after the State used the information from the subpoenas to include Dustin in a second photo lineup, Laura identified two men—one of whom was Dustin. (R.988–90; *see also* R.316–17 .) Only from there was Laura able to identify Dustin in court—a tainted identification given her previous inability to identify Dustin conclusively in the second photo lineup.

Timothy's identity was unknown until the State obtained Dustin's subscriber records through the subpoenas. And Laura exclusively testified about her interactions with "Timothy" at trial—not Dustin. So, while the State asserts that Laura testified about "her four-month relationship with *Andrus*" and

[10] For this reason, the State's assertion in the proceedings below that the federal task force "conducted this investigation independently" and that this investigation "began in their own [federal] department" is false. (R.2005.)

"*Andrus's* multiple sex acts with her" and that the jury saw "*Andrus's* subsequent Snapchat messages to Laura" (St.Br.39 (emphases added)), without the subpoenaed information the jury would have only heard Laura's testimony about her relationship with *Timothy*, and *Timothy*'s sex acts and Snapchat messages. (*See, e.g.*, R.945 (Detective Vance identifying the Snapchat messages as "between Timmy and [Laura]"); R.144, 1068–70 (explaining the Snapchat account was connected to Dustin "via the subpoenas").) Without the subpoenaed information, there is no evidence connecting Dustin to Timothy's alleged crimes or messages, and Laura's in-court identification of Dustin would not have taken place.[11]

To counter this, the State asserts in a footnote that Laura's in-court identification of Dustin cannot be suppressed because "[t]he Supreme Court has declined to suppress in-court identifications, even if the defendant's identity is only discovered via a constitutional violation." (St.Br.38, n.7.) But the State's own authority undermines its point.

In *United States v. Crews*, 445 U.S. 463 (1980), for example, the Supreme Court acknowledged that a victim's in-court identification of a defendant can make the defendant's "physiognomy" "something of evidentiary value, much like a photograph showing [the defendant] at the scene of the crime." *Id.* 474–75. It

[11] The State seemed to recognize as much below, explaining that "[e]ven if the Defendant concedes identity" at trial, "the methods by which he concealed his identity and the reasons for that deception are relevant and highly probative." (R.501.)

then explained it "need not decide whether [the defendant's] person should be considered evidence, and therefore a possible 'fruit' of police misconduct" in that case. *Id.* 475. Why? Because prior to the defendant's arrest, "the police both knew [his] identity and had some basis to suspect his involvement in the very crimes with which he was charged." *Id.*

Similar facts plague *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984). There, a deportee was arrested *after* giving his name to police and admitting "he was from Mexico with no family ties in the United States." *Id.* at 1035. And police first encountered him while "[r]esponding to a tip"—i.e. *after* already having information about his immigration status. *Id.* The police in that case, too, therefore "knew [the deportee's] identity and had some basis to suspect his involvement" in the illegal immigration activity with which he was ultimately charged. *See Crews*, 445 U.S. at 475.

But here, as explained above, that is not the case. The State had evidence of *Timothy*'s alleged crimes—not Dustin's. It suspected *Mr. Romano* to be the perpetrator—not Dustin. And it was not until after the State obtained the federal subpoenas that it could connect Timothy to Dustin. Dustin's identity—as well as his subsequent arrest, the physical evidence gathered from his residence, and identification at trial—is therefore a fruit of the State's violation of the Act. His identity is not "wholly untainted by the police misconduct," and it therefore falls outside the purview of the cases the State cites. *Id.*

Moreover, absent the challenged evidence, Dustin's convictions are "not strongly supported by the record." *State v. Burnett*, 2018 UT App 80, ¶39, 427 P.3d 288 (quotation simplified). "There was no confession, no third-party eyewitnesses, and no physical evidence [of the crimes]; the only direct evidence that [the crimes] occurred was [Laura's] testimony." *Id.* Further, the State's "emphasis in closing argument of [the challenged evidence] is not only an indicator that the State considered that [evidence] important…, but also that the [evidence] was important enough to make a difference." *Id.* ¶40; *see State v. Gourdin*, 2024 UT App 74, ¶91 ("When the State emphasizes evidence to this extent in closing argument, that is a very good clue that the evidence mattered."). (*See, e.g.*, R.1667–1677 (State emphasizing this "34-year-old man" nine times and highlighting the Summit County evidence).

In sum, had the motion to suppress been granted here, "the State's main piece of evidence"—the link connecting Timothy to Dustin—"would have been inadmissible." *State v. Beames*, 2022 UT App 61, ¶38, 511 P.3d 1226. Without that link, there is no evidence suggesting Dustin would have been tried for these crimes at all. Thus, Dustin was harmed by the district court's denial of his motion to suppress. *Accord id.* ¶41 n.10 ("[A] reasonable probability exists that the trial outcome would have been different because most likely there never would have been a trial at all.") (Christiansen Forster, J., dissenting).

2. The evidence does not support Dustin's conviction on Count 1

In this case, "[t]he district court erred when it did not arrest judgment on the human trafficking conviction (Count 1) because the State failed to prove that anything of value was given or received (as opposed to merely offered) on account of a sexual act with a child." (Op.Br.35–42.)

The State responds that "no actual transfer of value is required" for human trafficking of a child. (State.Br.47, 44–47.) It also argues that Laura's testimony supports the "reasonable inference" that Dustin gave her things of value in exchange for the alleged acts. (*Id.*47–49.) But the State's interpretation conflicts with the plain language of the human trafficking statute and other statutes, and its inferences are not supported by the evidence.

The State's argument conflicts with the human trafficking of a child statute's plain language: A defendant "commits human trafficking of a child if the actor recruits, harbors, transports, obtains, patronizes, or solicits a child *for sexual exploitation*." Utah Code §76-5-308.5(2) (West 2019) (emphasis added). "Sexual exploitation" "includes all forms of *commercial sexual activity* with a child" *Id.* §76-5-308.5(3)(b) (West 2019) (emphasis added). And "commercial sexual activity with a child" means "any sexual act with a child, on account of which anything of value *is given to or received* by any person." *Id.* §76-5-308.5(1) (West 2019) (emphasis added). Reading these definitions

together, human trafficking of a child requires something "of value" being "given" or "received." *Id.*

Therefore, the State's argument that "no actual transfer of value is required" directly conflicts with the statute's plain language. (State.Br.47.) And because the State's interpretation is not supported by the statute's plain language, this Court should reject it.

The State conflates human trafficking of a child and sexual solicitation: The State's interpretation is also at odds with the sexual solicitation statute.

By its plain language, the sexual solicitation statute criminalizes an "offer" while the human trafficking statute does not. (R.575.) *Compare* Utah Code §77-10-1313(1)(a) *with id.* §76-5-308.5. Therefore, an "offer" of something of value is punishable under the solicitation statute rather than the human trafficking statute.

In other words, the legislature intended an offer of something of value to be sufficient to convict a defendant for sexual solicitation, but not for human trafficking. *E.g., Bagley v. Bagley,* 2016 UT 48, ¶10, 387 P.3d 1000 ("[T]he best evidence of the legislature's intent is the plain language of the statute itself.") (quotation simplified.) And since "offer[s]" are explicitly covered by the sexual solicitation statute, this "more specific statute governs." *State v. Hill*, 688 P.2d 450, 451 (Utah 1984); *see In re C.N.*, 2023 UT App 41, ¶28, 529 P.3d 1030.

Simply put, the State's interpretation is wrong because it conflates sexual solicitation with human trafficking of a child, equating the actus reus elements of the one with the other's.

The State's speculation is not supported by the evidence: "[J]ury verdicts decided on the basis of remote or speculative possibilities of guilt are invalid." *Salt Lake City v. Carrera*, 2015 UT 73, ¶11, 358 P.3d 1067 (quotation simplified). "A jury draws a reasonable inference if there is an evidentiary foundation to draw and support the conclusion," but "[i]n the case of speculation…there is no underlying evidence to support the conclusion." *Id.*

Laura's testimony did not prove beyond a reasonable doubt that "anything of value [was] given to or received by" her for any sexual act. *Id.* Although Laura testified Dustin *offered* her things like a car, money, or housing, she did not testify that he gave or she received any of these things. (Op.Br.38–41.)[12]

Moreover, although Laura testified Dustin gave her marijuana, the State did not prove the amount she received had "value"—something the State was

[12] During closing, the State argued that Dustin committed human trafficking by giving Laura marijuana. (R.814, 848–49.) It took the position that his other offers to Laura were "circumstantial evidence of…the defendant's intent." (R.815, 848–49.) The State should not now be permitted to argue that these other offers could satisfy the human trafficking charge after electing to prosecute Dustin based on the marijuana allegation below. If the State had taken the position below that multiple acts could satisfy the charge, the jury should have been given a unanimity instruction requiring the jury to agree on which act constituted the crime. *State v. Alires*, 2019 UT App 206, ¶22, 455 P.3d 636; *see also* Part 3, *supra*.

required to show. (Op.Br.40–41.) Nor did Laura testify she was given marijuana in exchange for any sex act; to the contrary, she said Dustin did not say the marijuana was for anything. (Op.Br.41; R.1104–05.) Likewise, Laura did not testify about the timing of whether she received the marijuana before or after purportedly touching Dustin's groin area. (R.1104–05.) Thus, her testimony does not support an inference that an amount of marijuana that had value was given in exchange for any act.

In sum, the State did not prove the elements of this offense. The district court therefore erred in denying Dustin's motion to arrest judgment.

3. The evidence does not support Dustin's conviction on Count 2

In this case, "[t]he district court erred when it did not arrest judgment on the sexual exploitation of a minor conviction (Count 2) because the State failed to produce evidence that Dustin directed Laura to create sexually explicit images of herself." (Op.Br.43.)

In response, the State first claims "the jury could reasonably infer that [Dustin's] requests for nude photos were knowing requests for Laura to take nude pictures of herself." (*Id.*) Second, it contends the definition of producing child pornography was satisfied because Laura testified she masturbated over video chat. (State.Br.50–52.) But the State is wrong on both points.

Sending nude pictures: As to the State's first argument, the jury could *not* have inferred that Dustin "directed" Laura to take nude photographs because the State produced no evidence to support such an inference. (R.576.)

As discussed in Part 2, *supra*, "[j]ury verdicts decided on the basis of remote or speculative possibilities of guilt are invalid." *Carrera*, 2015 UT 73, ¶11, (quotation simplified). A verdict is based on speculation when "there is no underlying evidence to support the conclusion." *Id.* Here, the State's argument is based on speculation rather than evidence.

Laura did not testify that Dustin directed her to create nude images of herself. Instead, she testified that Dustin "ask[ed]" for nude photos and she "sen[t] him nude photos." (R.1105.) She did not testify that Dustin directed her to *create* these images. And the remaining evidence supports the opposite. In State's

Exhibit 1, which the State relied on in asking the jury to convict on Count 2, Dustin purportedly asked Laura to send pictures by messaging, "Got any good ones *saved* baby?" (State's Exh. 1 at 8 (emphasis added).) At various times he also asked for "a selfie"—not "a nude selfie"—as well as "a pic of you…like a snap of you today," "a pic of you," and "some sexy pics." (*Id.*3, 6, 7, 10.) Indeed, Dustin even clarified in one message that "not even nude is ok"—thereby showing he was not directing her to create nude images for him. Indeed, the one image shown in the State's exhibit is a non-nude photo. (*Id.*11.)

In sum, the State did not produce evidence that Dustin *directed* Laura to take nude photos. Without such evidence, the verdict rests on impermissible speculation. *Carrera*, 2015 UT 73, ¶11.

Masturbating on video chat: The State argues that it proved Dustin committed sexual exploitation of a minor through evidence that Laura masturbated on video chat. (St.Br.50). But this argument ignores that, below, the State explicitly elected to prosecute Dustin for the sexual exploitation charge based on his purportedly asking Laura to *send him nude photographs*. (R.576, 815.) The State actually elected to prosecute Dustin for allegedly asking Laura to *masturbate* on video chat by charging him with *unlawful sexual conduct with a 16- or 17-year old*. (R.587, 816.)

When the State took the position below that it had proved the charge of sexual exploitation of a minor with evidence that Dustin had asked Laura to "send [him] sexy pics" (R.576, 815–16), it "elect[ed]" the conduct that constituted

the charged crime. *See State v. Alires*, 2019 UT App 206, ¶22, 455 P.3d 636 (explaining that the State can "elect which act supported each charge").

In contrast, the State elected to prosecute the charge for *unlawful sexual conduct with a 16- or 17-year old* with evidence that Dustin "instructed her to masturbate on camera for him." (R.816.) And the jury was explicitly instructed that it must find beyond a reasonable doubt that "the defendant instructed [Laura] to masturbate on camera" to convict on this charge. (R.587.)

The State cannot now escape the elections it made below. If the State had not explicitly elected the conduct underlying the offense, and had instead argued that multiple acts could constitute the charged crime, Dustin would have been entitled to a unanimity instruction directing the jury that it must agree on which act constituted the charged crime. *Alires*, 2019 UT App 206, ¶22. But no such unanimity instruction was given or required here because the State elected what act constituted sexual exploitation of a minor—Dustin purportedly asking Laura to "send [him] sexy pics." (R.815–16.)

The State made its election but failed in its burden of proof. Thus, the court should have arrested judgment on the sexual exploitation charge. (Op.Br.43.)

4. The evidence does not support Dustin's conviction on Count 3

Laura's testimony was insufficient to prove Dustin distributed a controlled substance the first time they met. (Op.Br.50–51.) And there was no evidence that the other instances of Dustin allegedly supplying marijuana occurred in Davis County. (*Id.*51.)

Nonetheless, the State claims Laura's testimony was sufficient because she "had used marijuana" before she met Dustin. (State.Br.58.) It also claims that the jury could infer at least one of the other instances occurred in Davis County. (*Id*.58–59.) But the State is wrong, and its arguments again rest on impermissible speculation. *Carrera*, 2015 UT 73, ¶11.

As to the State's first argument, the mere fact that Laura used (or thought she used) marijuana before does not make her testimony sufficient. (State.Br.58; R.1099.) Without a foundation showing Laura's familiarity with details about the drug, like its appearance, odor, and the like, Laura's general testimony that she had smoked marijuana before does not establish that she was familiar enough with the drug that she could accurately identify it. *See Provo City Corp. v. Spotts*, 861 P.2d 437, 442 (Utah Ct. App. 1993).

And even if the evidence indicated Laura was familiar with marijuana's effects, she did not testify that she felt those effects when smoking the substance Dustin allegedly gave her. She did not testify that she felt "high" after using the substances Dustin allegedly shared, in contrast to her saying she was "high" on the occasion she said she used marijuana before meeting Dustin. (R.976.)

Further, while Laura identified "the cartridges" obtained from Dustin's residence "as visually similar to the 'carts'…that [Dustin] would give her" (R.1078, R.1117), there is no evidence these vape cartridges looked different from vape cartridges used for legal substances. That is, there was no foundation to

support that Laura could discern whether a vape cartridge contained marijuana or something else merely by its appearance.

As to the State's second argument, Laura testifying that Dustin gave her marijuana on multiple occasions does not establish *where* the conduct took place. The State did not ask Laura or produce other evidence proving these other instances occurred in Davis County. And for the jury to assume they occurred in Davis County, without evidence, would be speculation. *Carrera*, 2015 UT 73, ¶11.

Moreover, instead of relying on the jury to assume multiple acts could constitute the charged crime, the State emphasized the jury should convict on this charge based on the marijuana from the "first sexual encounter." (R.1706–07.) As with the sexual exploitation of a minor charge above, the State therefore "elect[ed]" which act constituted the charged crime and cannot now escape its election because Dustin would otherwise have been entitled to a unanimity instruction during trial. *Alires*, 2019 UT App 206, ¶22; Part 3, *supra*.

Thus, the district court erred when it did not grant a directed verdict on the charge for distribution of a controlled substance (Count 3).

5. The Summit County evidence is barred under rule 404(b)

The district court abused its discretion when it allowed the State to produce the Summit County evidence at trial because this evidence was improper under rule 404(b) of the Utah Rules of Evidence. (Op.Br.54.)

Nonetheless, the State asserts the court did not abuse its discretion because it claims the Summit County evidence was intrinsic to the charged conduct, was narrative evidence, and did not harm Dustin. (State.Br.60, 62, 64–65.) But the State is wrong.

First, the Davis County events were not inextricable from the Summit County events. The former events started and ended in Davis County, and the State does not contest that the Summit County events were necessary to prove the elements of any charges stemming from conduct allegedly occurring in Davis County. Instead, the State asserts, "[E]xclusion of any or even all of the Summit County evidence was [not] reasonably likely to alter the result here." (State.Br.64.) Thus, by the State's concession, the Summit County acts were extrinsic, and therefore subject to rule 404(b).

Second, even if the sexual encounter in Summit County was part of the "narrative" of the alleged relationship, the underwear, alcohol, and drug cartridges were not. Dustin was not charged for any of the alleged sexual acts that occurred in Summit County, and so the underwear purportedly belonging to Laura was "extrinsic to the crime[s] charged" in Davis County. *Lucero*, 2014 UT 15, ¶14 n.7. Same for the alcohol: Dustin was not charged with any crime having

to do with his alleged partaking or distribution of alcohol, and Laura's testimony provided evidence of alcohol intake that rendered the photos of the alcohol flasks unimportant. And though Laura identified the cartridges as being "similar" to those she used with Dustin on prior occasions, there was no evidence that *these* cartridges were used in any criminal activity, let alone the charged criminal activity. Indeed, there was no evidence these or the prior alleged cartridges held the same substance, and there was not even any evidence that the seized cartridges had marijuana in them at all.

Third, Dustin was harmed by the introduction of the Summit County evidence. Although the State claims the evidence was not harmful because "[i]dentity was not an issue" and Dustin's "sexually explicit messages to Laura" "corroborated her overall story" (State.Br.64–65), the State ignores its own choice to introduce and emphasize the Summit County evidence during closing. (Op.Br.60–63; R.570, 817.) "The prosecution's emphasis in closing argument" of the Summit County evidence "is not only an indicator that the State considered that testimony important corroborative evidence, but also that the testimony was important enough to make a difference." *State v. Burnett*, 2018 UT App 80, ¶40, 427 P.3d 288; *see Gourdin*, 2024 UT App 74, ¶91.

Because the district court abused its discretion in admitting the Summit County evidence, this Court should reverse and remand for a new trial.

Conclusion

This Court should vacate the convictions for Counts 1, 2, and 3 because the State failed to carry its evidentiary burdens at trial. Additionally, because the district court erred in denying Dustin's motion to suppress, this Court should reverse Dustin's convictions and remand his case for a new trial.

DATED this 21st day of May, 2024.

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Certificate of Compliance With Rule 24

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(a)(11) and 24 (g) because this brief contains 6,991 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with Utah R. App. P. 21.

DATED this 21st day of May, 2024.

/s/ Melissa Jo Townsend

Certificate of Service

This is to certify that on May 21, 2024, I emailed the foregoing to the following:

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