IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0070

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ARTHUR RAY PEOPLES,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District Court, Flathead County, the Honorable Robert B. Allison, Presiding

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STATEMENT OF THE ISSUES

In view of Montana's heightened constitutional protection for privacy, was Probation and Parole's pre-planned forcible guns-drawn probation search, assisted by the U.S. Marshals, a constitutionally reasonable warrantless intrusion for the purpose of investigating a suspicion of an otherwise cooperative probationer's relapse with personal drug use?

Did the district court, therefore, err by denying Peoples' motion to suppress?

STATEMENT OF THE CASE

Arthur Ray Peoples is a Black man. (D.C. Doc 53 at 1.) He has lived in Montana for twenty-six years. (9/27/2018 Tr. at 46.)
In 2003, Arthur was convicted of operation of an unlawful clandestine laboratory and criminal possession of dangerous drugs. (D.C. Doc 61.) The Pre-Sentence Investigation and the State recommended a ten-year sentence for the laboratory offense followed by a consecutive five-year suspended sentence for the possession offense. The District Court imposed the maximum sentence of twenty years imprisonment for the laboratory offense, with five years suspended, plus a concurrent five-year sentence for the possession offense. (D.C. Doc 61.)

In 2018, Arthur was sixty-two years old and still serving his 2003 sentence on probation. In March, a team of government agents with guns drawn forced entry into Arthur's home and shackled him, naked, on his bed, leaving him there for thirty minutes while they scrutinized his home. They found a small quantity of methamphetamine on Arthur's bedstand.

The State petitioned for Arthur's revocation. (D.C. Doc 83., Attached as Appendix A.) The State alleged compliance violations relating to Arthur failing to answer his door and drug use, and a non-compliance violation relating to violating the law through possession of the methamphetamine.

In pertinent part, the 2003 judgment and sentence set as condition of his release:

1. K) must submit to a warrantless search of his person, vehicle, place of residence, and place of employment by his supervising officer whenever there is reasonable cause to believe that he has violated the law or any condition of his sentence. (D.C. Doc 61 at 4., Attached as Appendix B), and;

9. He must submit, at any time, to a warrantless search of his residence, person, vehicle, and place of employment, and to a chemical analysis (at his own expense) of his blood, breath, and urine, at the reasonable request of his supervising officer. (D.C. Doc 61 at 6., App. B)

At the revocation, Arthur moved to suppress evidence. (D.C. Doc 92.) He argued the warrantless search was constitutionally unreasonable when, in executing a home visit to investigate possible illegal personal drug use, Probation and Parole forcibly entered his home. (D.C. Doc 92., 9/21/2018 Tr. at 43-44.) The State asserted that the probation search was lawful because the officer had reasonable cause to believe Arthur may have violated his probation conditions, and because Condition No. 9 required that he submit to a home visit upon reasonable request of his probation officer. (D.C. Doc 93.) The district court held an evidentiary hearing on the motion to suppress. (9/21/2018 Tr. at 1-61.) The court held that the incident was not a home visit but a probation search, and the nature of the State's intrusion, forced entry, was reasonable because a probation search was supported by reasonable suspicion. (D.C. Doc 119. at 3, ¶5, Attached as Appendix C.) The motion to suppress was consequently denied. (D.C. Doc 119 at 3, ¶8., 9/21/2018 Tr. at 52, App. C.)

The District Court ultimately found Arthur in violation of all three Counts as alleged and his suspended sentence was revoked. (D.C. Doc 122, Attached as Appendix D.)

The district court sentenced Arthur to the Department of Corrections for four years and three months, with credit for 195 days time-served. (D.C. Doc 122, App. D.)

Peoples timely appealed to this Court. (D.C. Doc 123.)

STATEMENT OF THE FACTS

Probation and Parole officer Sam Stricker knew Arthur Peoples well: he supervised him both while on parole and continued to do so after Peoples transitioned to probation in September 2017. (D.C. Doc 83.) He knew Arthur had long struggled with an on and off addiction to methamphetamine.

While Arthur had been compliant with his probation reporting requirements, honest with Stricker about his relapses, and voluntarily submitted to home visits, P.O. Stricker's supervision of Arthur did require interventions as a result of his addiction. (9/21/2018 Tr. at 7-14.) In June and September 2017, Stricker conducted home visits, to which Arthur voluntarily complied. (9/21/2018 Tr. at 7-9.) During an October 2017 meeting, Peoples admitted to a relapse and was referred to the Enhanced Supervision Program, ("ESP"), which required frequent urinalysis drug testing. (9/21/2018 Tr. at 9.) Peoples participated in ESP and successfully completed the program. (9/21/2018 Tr. at 13.) In

February 2018 Stricker conducted another home visit to which Arthur again voluntarily complied. (9/21/2018 Tr. at 13.)

On March 7, Stricker met with Arthur, and he provided a clean UA. (9/21/2018 Tr. at 13.) On March 15, Lisa Peoples, Arthur's wife, called P.O. Stricker and told him that she believed Arthur was using drugs again and may have overdosed. (9/21/2018 Tr. at 14.) Despite the recent clean UA, Lisa's report that Arthur may be using again warranted another home visit. (9/21/2018 Tr. at 15.) Stricker testified Lisa had called him on other occasions to report Arthur's drug use. In his experience, her reports had often been confirmed to be true. (9/21/2018 Tr. at 15.) P.O. Stricker did not try to call Arthur after Lisa's report to check in on him or to make a request for a home visit. (9/21/2018 Tr. at 48-49.)

Despite Stricker's past experience of Arthur's compliance with his requests, on March 16, 2018, P.O. Stricker and his supervisor, Andrea Bethel orchestrated a very different kind of home visit. (9/21/2018 Tr. at 14-16.) This time, they mobilized the assistance of four law enforcement agencies: the U.S. Marshals, D.O.C. Probation and Parole and later the Missoula Police Department and Missoula County Sherriff's Department. (9/21/2018 Tr. at 16.) Without any indication that Stricker

had ever had difficulty gaining access to Arthur's home through his voluntary cooperation with home visits in the past, Stricker and his supervisor Bethel[1] planned in advance on forcibly breaking into Arthur's home. (9/21/2018 Tr. at 14-16.)[2]

When Stricker, Bethel and their team arrived at Arthur's door, initially, they knocked and indicated they were from Probation and Parole. (9/21/2018 Tr. at 18.) Arthur did not answer the knock at the door. (9/21/2018 Tr. at 18-19.) Instead of trying later, the team coaxed Arthur's landlord into giving them a key to Arthur's home. (9/21/2018 Tr. at 14, 35.) Arthur's landlord turned over a key. With guns drawn the four officers used the key and burst through the door into Arthur's

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[1] Bethel was cross-deputized as a probation officer and a U.S. Marshal. (9/27/2018 Tr. at 37.) A second U.S. Marshal also attended the search. (9/21/2018 Tr. at 15.)

[2] Stricker described the home visit preparation as follows:

Q: (State) On that day who went with you to the – to conduct the search of Mr. Peoples' residence?
A. My coworkers, Probation Officer Shawn Heidrick, Probation Officer Andrea Bethel, and then a U.S. Marshal, Agent Shane Meinhold.
Q. And why did you have a marshal with you?
A. Because of the information we received from Lisa and the other person that said there was blood, we staffed that with a supervisor, and we gained forced entry permission, and due to that forced entry permission we have marshals come because they're better trained for that sort of stuff. (9/21/2018 Tr. at 14-15.)

home. (9/21/2018 Tr. at 38-39., 9/27/2018 Tr. at 43.) [3] They found Arthur calmly sitting on his bed. (9/21/2018 Tr. at 19.) They handcuffed him. (9/21/2018 Tr. at 46, 9/27/2018 Tr. at 25.) He was naked. (9/21/2018 Tr. at 46.) They left him that way. A small amount of what was believed to be methamphetamine was spotted on his bedstand. (9/27/2018 Tr. at 14.) They seized the substance and called the Missoula Police Department to investigate a new drug possession offense. (9/21/2018 Tr. at 20.) The Missoula County Sherriff's Department was also contacted about "some spots of blood that we thought needed further investigation." (9/21/2018 Tr. at 20.) Within a half-hour, two Missoula police officers and a detective arrived at the scene. Officer Berger, wearing a body camera, arrived running. (9/27/2018 Tr. at 29, 31.) [4]

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[3] The evidentiary hearing for the Motion to Suppress was held on Sept 21, 2018. The dispositional hearing for the revocation was held one week later, on September 27, 2018. Testimony during the dispositional hearing reflecting the scope of the probationary search is cited as "9/27/2018 Tr." and relied upon in Peoples argument only where supported also by testimony in the 9/21/2018 suppression hearing.

[4] A portion of the dispositional hearing transcript reflects the parties viewing in open court Berger's body camera video. (9/27/2018 Tr. at 29.) Prior to the suppression hearing, Peoples, through counsel, subpoenaed any warrant applications, police reports, body cam videos of Missoula PD, and other investigative material relating to Arthur Peoples. These subpoenas were quashed. (D.C. Doc 116.) Peoples filed a motion to compel discovery for the same material. (D.C. Doc 100.) The motion was denied. (D.C. Doc 107.) At the dispositional hearing, Peoples showed the Court Officer Berger's body cam video- but did not admit this video into evidence.

While all of this activity was going on, the officer kept Arthur handcuffed, naked, on the floor. (9/21/2018 Tr. at 46, 9/27/2018 Tr. at 25, 27, 31-36, 46.) Upon cross-examination on this point, Stricker testified:

Q. (Defense Counsel) And while you were in his home for 30 minutes how would you describe his -- this is the 30 minutes before Missoula Police arrived, how would you describe Mr. Peoples' demeanor?
A. He was calm and compliant.
Q. And he was nude, was he not?
A. Yes.
Q. He remained naked, handcuffed on his bed?
A. We got him some clothes at some point, I don't remember when that was.
Q. Fair to say it was after Officer Berger arrived and said let's get some clothes on this man?
A. Yes.
Q. So for 30 minutes you left him nude, handcuffed on the floor?
A. Yes. (9/27/2018 Tr. at 25.)

Later, Police cordoned off Arthur's home with crime scene caution tape. (9/27/018 Tr. at 22.) Arthur deals in automobiles as an occupation. (9/27/2018 Tr. at 22.) Three of Arthur's vehicles were seized. (9/27/2018 Tr. at 23, 43.) He was only able to retrieve two eventually at his own expense. (9/27/2018 Tr. at 43.)

Stricker testified he decided to conduct the March visit for the same reason he had conducted home visits in the past: due to Arthur's

continued personal drug use. (9/21/2018 Tr. at 15., 9/27/2018 Tr. at 40.) Stricker was following up on the report from Lisa Peoples that he was using drugs again. (9/21/2018 Tr. at 15.) She was concerned he may have overdosed. (9/21/2018 Tr. at 15.) It is undisputed that the March home visit was carried out very differently than Stricker's home visits in June, September and February. (9/27/2018 Tr. at 17.) Stricker testified that he was concerned for Arthur's well-being when he didn't answer the door, but admitted that he never called Arthur to check on him after Lisa's call, or made any arrangements to have medical personnel available when they searched his home the next day. (9/21/2018 Tr. at 47-49.)

In the revocation proceeding, the State maintained that the March probationary home visit was simply a result of Lisa Peoples' report of Arthur's continued drug use and potential medical emergency. (9/27/2018 Tr. at 21.)

The district court denied the motion to suppress finding that forced entry was reasonable because there was reasonable cause to do a probation search. (D.C. Doc 119, pg. 3, ¶5, App. C, 9/21/2018 Tr. at 50-53.)

Ultimately the court found that Arthur violated all three counts as alleged in the Report of Violation. (D.C. Doc 122, 9/27/2018 Tr. at 50.)

STANDARD OF REVIEW

This Court reviews the denial of a motion to suppress to determine whether the district court's findings of fact are clearly erroneous and whether the district court's interpretation and application of the law is correct. *State v. Conley*, 2018 MT 83, ¶ 9, 391 Mont. 164, 415 P.3d 473.

SUMMARY OF THE ARGUMENT

The State's forced entry search of Arthur's home trampled his constitutional right to privacy and to be free from unreasonable searches under the Montana Constitution. A team of government agents coerced Arthur's landlord, forced entry into his home, brandished semi-automatic pistols, shackled him naked, and left him on the floor that way for thirty minutes. The State cannot justify its violent intrusion. Arthur's history with his probation officer bespoke cooperation with enhanced supervision, including compliance with home visits. The State proffers the only purpose of the search was to investigate a reasonable suspicion that Arthur may have been using

drugs, and offered no satisfactory justification as to why a search required forcible entry into his home.

The special need of a probation officer to be able to effectively supervise a probationer must not give the officer cart blanche to breach other objective and reasonable societal expectations of personal privacy in carrying out their supervision. The nature of the government's intrusion was wholly disproportionate to its purpose and far exceeded any legitimate justification for a warrantless search. It portends that supervision in Montana is not immune from racial bias. [5] The District Court's conclusion otherwise is an error of constitutional magnitude. This Court should reverse and remand for suppression.

ARGUMENT

I. The nature of the intrusion into Arthur Peoples's home during the probation search violated his right to privacy and reasonableness under the Montana Constitution.

The district court found the forced entry into Arthur's home was justified simply because there was reasonable cause, based on a suspicion of personal drug use, to conduct a probation search. But,

[5] *See*, Jesse Janetta, et al., *Examining Racial and Ethnic Disparities in Probation Revocation*, The Urban Institute, (2014). https://www.urban.org/sites/default/files/publication/22746/413174-Examining-Racial-and-Ethnic-Disparities-in-Probation-Revocation.PDF

particularly under Montana's Constitution, this front-end inquiry into whether reasonable suspicion justified a probation search is only the beginning of the analysis. A search or seizure that is initially justified may become unlawful "if its manner of execution unreasonably infringes interests protected by the Constitution," *Illinois v. Caballes*, 543 U.S. 405, 407 (2005), "by virtue of its intolerable intensity and scope," *Terry v. Ohio*, 392 U.S. 1, 18 (1968).

Searches executed in an unreasonable manner offend both Article II, Section 11's reasonableness clause and the significant privacy interests enshrined in Article II, Section 10. *State v. Neiss,* 2019 MT 125, ¶ 26, 396 Mont. 1, 443 P.3d 435, cert. denied, 140 S. Ct. 411, 205 L. Ed. 2d 233 (2019). "Article II, Sections 10 and 11 of the Montana Constitution provide greater protections against *unreasonable* searches and seizures and government infringement of individual privacy than does the federal constitution." *Neiss*, ¶26. (Emphasis in original.)

Montana's broad right to privacy is "jealously guard[ed]." *State v. Hubbel,* 286 Mont. 200, 216, 951 P.2d 971 (1997). An unlawful intrusion by the government into one's privacy, under Article II, Section 10 of the Montana Constitution depends on: (1) whether the person has an actual expectation of privacy; (2) whether society is willing to recognize that

expectation as objectively reasonable; and important to People's appeal, **(3) *the nature of the state's intrusion***. *State v. Therriault,* 2000 MT 286, ¶ 33, 302 Mont. 189, 14 P.3d 444., (Emphasis added.) The manner of execution of a search is a factor a court should consider when assessing whether a search was constitutionally reasonable. *Neiss*, ¶ 37. Determining the reasonableness of a law enforcement practice requires balancing the nature of the governmental intrusion with the interests it promotes. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). Here, the district court failed to consider how the State's deceptive and violent intrusion into Arthur's home was outrageously disproportionate to the suspicion of personal drug use which gave rise to the search.

A. Arthur had a history of cooperating with his probation officer's requests and voluntarily complying with enhanced drug testing, reporting requirements and home visits.

The supervisory relationship between Arthur and his probation officer was one of cooperation. Nothing in their history justified the degree of force used in P.O. Stricker's probation search. Likewise, nothing in Arthur's conditions of probation diminished his expectation of privacy so as to allow a warrantless guns-drawn forcible entry assisted by the U.S. Marshals into his home based on a suspicion of personal drug use.

"A probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" *Griffin v. Wisconsin,* 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). A probationer has a diminished but not extinguished expectation of privacy in his home. *State v. Moody*, 2006 MT 305, ¶¶19, 37-38, 334 Mont. 517, 148 P.3d 662. *See Griffin v. Wisconsin,* 483 U.S. 868, 875, (The "permissible degree [of impingement upon a probationer's privacy] is not unlimited."). A probationer retains the right to a significant degree of privacy. *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975), citing *Morrissey v. Brewer*, 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

This Court has further held, a defendant's right to privacy is offended under the expanded privacy rights under Article II, Section 10 and 11 when the nature of intrusion is not reasonable, even when police have a validly held basis to conduct a search. *Neiss*, ¶ 32. In *State v. Neiss*, officers obtained a valid judicial search warrant. In executing the warrant, they deployed a SWAT team in the middle of the night and used the controversial "no-knock" entry with a flash-bang device to forcibly enter Neiss's home. *Neiss*, ¶8. On appeal, Neiss challenged the reasonableness of the search. *Neiss*, ¶17. This Court considered first the

fact that the warrant was issued to investigate Neiss as a homicide suspect, and the officers' belief Neiss still possessed the firearm used in the murder. *Neiss,* ¶ 40. In addition, Neiss had previously been convicted of unlawful possession of a machine gun, and a review of past police reports indicated that Neiss both had a history of being uncooperative with authorities and that a SWAT team had been used to serve warrants on him in the past. This Court found that given the specific, articulable circumstances, the highly aggressive search did not violate Neiss's right to privacy. *Neiss*, ¶41.

Completely opposite of *Neiss*, here, the record is devoid of any articulable rationale as to why the March probation search suddenly required the assistance of the U.S. Marshals, and a pre-planned forcible, guns-drawn entry. Like in previous visits, the March probation search was based on P.O. Stricker's suspicion that Arthur had relapsed and was using methamphetamines again. Throughout his supervision, Arthur did not deny his addiction, nor resist Stricker's intervention. He had never previously refused to consent to a home visit at his probation officer's request. He had voluntarily complied with a home visit just one month prior. He reported to Stricker regularly. He admitted when he had relapsed. He agreed to and successfully completed an Enhanced

Supervision Program, requiring regular drug testing when Stricker required it. He voluntarily submitted to a urinalysis drug test one week prior to the March search. He did not have a history of evading Stricker or destroying evidence. He was not allowed to have firearms and no firearms were ever found in any of Stricker's searches. By all accounts, Arthur was cooperative with his probation officer. Even during the March search, after being left nude and handcuffed on his bed for half an hour while four armed officers searched his home, Arthur remained, in Stricker's words, "calm and compliant" throughout. (9/27/2018 Tr. at 24.)

Likewise, while Arthur's probation conditions create an expectation that a search may occur if his probation officer had reasonable cause or first posed a reasonable request, nothing in his conditions permit a probation search outrageously out of proportion to the suspicion justifying it. In setting specific probationary conditions, a sentencing court determines a probationer's expectation of privacy. *Therriault,* ¶ 49. *See also United States v. Knights*, 534 U.S. 112, 120. In Montana, a sentencing judge, authorized by Montana Code Annotated §46–18–801(1), may deprive an offender of a civil or constitutional right as a "necessary condition of the sentence directed toward the objectives of

rehabilitation and the protection of society." Arthur's expectation of privacy in his home is diminished but not extinguished by his probation conditions. His conditions simply authorize a probation search that is reasonable in scope and manner, or a home visit upon reasonable request. The degree of intrusion of the March forced entry search, without facts indicating force would be necessary, is not justified by a probation condition simply authorizing a search based upon reasonable suspicion of a probation violation. *Terry*, 392 U.S. at 18 ("The scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible.") The Court erred when it concluded that reasonable cause to conduct a probationary search alone justified the deceptive, violent and forced intrusion into Arthur's home.

B. Probation and Parole's pre-planned warrantless break-in, complete with the U.S. Marshals and with guns-drawn far exceeded the nature and scope of a reasonable probation search following a report that Arthur, known to struggle with addiction, may have used methamphetamine in his own home.

The special needs of the probation system did not warrant forced entry into Arthur's home. Neither the scope or manner of the probation search reasonably correlated to a suspicion of personal drug use by a probationer who had been actively working with his probation officer to address his addiction.

Under the Fourth Amendment of the United States Constitution and Article II, Section 11 of the Montana Constitution, a warrantless search is per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." *State v. Hubbel,* 286 Mont. 200, 212, 951 P.2d 971 (1997), quoting *Katz v. United States* 389 U.S. 347, 357 (1967). The State bears the burden of establishing that an exception to the warrant requirement justifies a search. *State v. Finley*, 2011 MT 218, ¶15, 362 Mont. 35, 260 P. 3d 175. *State v. Therriault,* 2000 MT 286, ¶ 53, 302 Mont. 189, 14 P.3d 444; *State v. Goetz,* 2008 MT 296, ¶ 40, 345 Mont. 421, 191 P.3d 489. Home intrusions are "the chief evil against which . . . the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585 (1980).

In carrying out the Constitutional mandate of Article II, Section 10 and 11 to jealously guard the broad right to privacy in Montana, this Court has maintained careful limitations to the probation search. *Hubbel*, 286 Mont. 200, 216, 951 P.2d 971 (1997)(saying warrantless searches must be "carefully carved.") In Montana, a probation officer must have reasonable suspicion of a probation violation prior to a warrantless search. *Moody*, ¶ 12. There must be a factual foundation justifying a probationary search and ***the search must not be used as***

an instrument of harassment or intimidation. *State v. Burke,* 235 Mont. 165, 171, 766 P.2d 254, 257 (1988)(emphasis added). In this case, the State exceeded these necessary and important limits.

The exception to the warrant requirement justifying warrantless searches by probation officers arises from the special need[6] for a probation officer to be able to effectively supervise a probationer. *State v. Burke,* 235 Mont. 165, 169, 766 P.2d 254, 256 (1988), a*dopting Griffin v. Wis.,* 483 U.S. 868, 878 (1987) (holding that the need for flexibility within the probation system and the special relationship existing between a probationer and his probation officer justified departing from the usual warrant requirement). In *Burke*, this Court reasoned that an officer's "continued experience with the probationer, knowledge of the original offense, with the probationer's welfare in mind" puts the probation officer (rather than a judge) in a "far superior" position to determine the degree of supervision necessary for a specific probationer. *Burke,* 235 Mont. 165, 169, 766 P.2d 254, 256 (1988). The special relationship between the probation officer and the probationer and the

[6] *Griffin v. Wisconsin*, "A State's operation of a probation system, like its operation of a school, government office or prison . . . presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements." *Griffin,* 107 S.Ct. at 3168, adopted by *State v. Burke*, 235 Mont. 165, 168–69, 766 P.2d 254, (1988).

societal need for effective supervision creates the justification for warrantless probation searches.

A search pursuant to the special needs exception to the warrant requirement is unreasonable under the federal constitution, when, as here, "the content of the suspicion fail[s] to match the degree of intrusion." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375,(2009). In *Safford Unified School District*, the U.S. Supreme Court examined the reasonableness of a warrantless search in the context of another "special needs" exception: public schools. As with a probationer, a public-school student has a diminished expectation of privacy. The Supreme Court in *Stafford* held while the school had reasonable grounds to search a student who was suspected of distributing prescription pills to other students, the scope of the search was unreasonable when it extended beyond the students backpack and outer clothing. *Safford,* 557 U.S. 364, 374. Despite having reasonable cause to conduct a search generally, the school officials' instructions to have the student take off her clothing, " "pull out" her bra and the elastic band on her underpants" violated the student's right to privacy and made the search constitutionally unreasonable. *Safford*, 557 U.S. 364, 374.

Likewise, here the officer's decision to coax Peoples' landlord into helping them break into his house violated Peoples reasonable expectation of personal privacy beyond what may be allowed by special need generally for probation searches. In *Safford*, the Supreme Court denounced the use of a strip search specifically despite reasonable cause to search generally, stating, "both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification . . . " *Safford* 557 U.S. 364, 374. Here, a warrantless search where four officers broke through Arthur's door with guns drawn required distinct justification which the State did not supply. A warrantless forcible entry into one's home is a highly disfavored, categorically distinct form of search. *See*, *State v. Hubbel*, 286 Mont. 200, 216, 951 P.2d 971, 980 (1997). (Warning against warrantless forcible entry searches because they are carried out in the absence of any safeguard [of our State's jealously guarded right to privacy]). Our nation has a strong aversion to warrantless forcible entry into one's home to search which "reflects this Nation's traditions that are strongly opposed to using force without definite authority to break down doors." *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 77, (1970). *See also*, *Miller v. United States,*

357 U.S. 301, 306–07, (1958) ("From earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest. Such action invades the precious interest of privacy summed up in the ancient adage that a man's house is his castle.") Like the strip search in *Safford*, the decision to leave Arthur naked, handcuffed on his bed for at least half an hour while officers scrutinized his home violated his right to privacy when it lacked any distinct justification. The State cannot and did not show that the nature of the intrusion into Arthur's home was justified by Stricker's role in supervising Arthur's probation.

Likewise, the decision to forcibly enter Arthur's home, assisted by the U.S. Marshals bore no relation to a search justified only by a suspicion of personal drug use. In *Safford*, the Court observed, "While the indignity does not outlaw the search, it does implicate the rule that "the search [be] 'reasonably related in scope to the circumstances which justified the interference in the first place.' " *Safford* 557 U.S. 364, 375, quoting *New Jersey v. T.L.O.* 469 U.S. 325, 341. *See also*, *U.S. v. Duff*, 831 F. 2d 176, (9th Cir. 1987.)("the [probation] search must be reasonable and must be based upon the probation officer's reasonable belief that it is necessary to the performance of her duties.")

This Court has upheld warrantless probationary searches when, unlike here, the degree of intrusion is reasonable in manner and scope and relates to a probation officer's ability to effectively supervise. In *State v. Fischer*, this Court carefully examined the circumstances of the probation search before determining whether a warrantless search of a probationer's purse for the purpose of conducting a pill count was reasonable. *State v. Fischer,* 2014 MT 112, ¶ 15, 374 Mont. 533, 537, 323 P.3d 891, 894. Given Fischer's conviction for a drug offense, and her admission that her pill count was off, this Court held the officer "did not harass or intimidate [Fischer] or otherwise infringe on her diminished privacy rights" by requesting to search her purse. *Fischer*, ¶¶ 15-16. This Court found the search was reasonable when, upon suspicion of drug use, the probation officer called the probationer first before conducting a home visit, and once in her home, asked to see Fischer's pills first rather than immediately searching her purse. The officer's contact began as a home visit and ripened into a probation search only when Fischer admitted her pill count was off. *Fischer*, ¶17. The probation exception allowed the officer to search Fischer's purse without first obtaining judicial authority. Ultimately the search was reasonable because it was related to the probation officer's supervision and in

carrying out the warrantless search, the officer "did not harass or intimidate [Fischer]", "rummage through [her] belongings" or otherwise "infringe on her diminished privacy rights." *Fischer,* ¶¶15-16.

In *State v. Stucker*, this Court upheld a warrantless probation search when, after observing an empty box of ammunition on one day, two probation officers returned the next day to request that Stucker show them around the interior of the house. *State v. Stucker*, 1999 MT 14, ¶34, 293 Mont. 123, 973 P.2d 835. Stucker voluntarily allowed a home visit on the second day so that the officers could see the layout of the house and observe any contraband in plain view. *Stucker*, ¶34. During the course of the voluntary tour, the officers discovered two weapons cases in plain sight. *Stucker*, ¶35. The officers requested Stucker to open the cases, and he complied. Only then did the officer search the home for additional weapons. *Stucker*, ¶¶35-36.

By stark contrast, the search of Arthur's home was both harassing and intimidating. The violent and degrading intrusion was wholly disproportionate to the report of personal drug use. According to Stricker, the March search began as a home visit. Unlike in *Fischer* and *Stucker*, the home visit did not ripen into a probation search due to additional information gained during the visit. Here, the only

circumstance that changed was that Arthur did not hear the knock at the door. Probation and Parole planned in advance on carrying out a surprise forcible entry into Arthur's home, complete with Stricker's supervisor, cross deputized as a U.S. Marshal and a second Marshal. The search team induced the landlord to violate Arthur's rights as a tenant by giving them a key. Four officers then charged into Arthur's home with their guns drawn. The State presented no compelling explanation to justify this violent intrusion.

As he had done before, Stricker could have instead determined whether Arthur was violating the terms of his probation by possessing and using methamphetamine with a simple home visit. See *State v. Moody*, ¶ 21, (recognizing home visits are used by a probation officer "to determine whether the individual is abiding by the conditions of probation.") Given Arthur's cooperation with home visits in the past, it would be reasonable to think he would comply again. If Arthur did not answer the door, Stricker and the team could have left and returned to try again later. Or, hearing no response to the knock, Stricker could have called Arthur by cellular phone from outside the door. The State offered no satisfactory explanation as to why it instead planned in advance to break through Arthur's door.

To the extent the State may argue that breaking into Arthur's home was necessitated by medical need, this claim is disingenuous. Lisa Peoples called P.O. Stickler on March 15, 2018, a full twenty-four hours before the armed forcible search. After hearing from Lisa, Stricker did not call Arthur to check on him, either the day Lisa called on the 15th or at any time prior to arriving at his home the next day. Instead, Stricker used that time to orchestrate a multi-agency forced entry search, which enlisted the assistance of the U.S. Marshals, and multiple probation officers, but failed to include an ambulance or other medical attention. Stricker's special need to effectively supervise Arthur did not provide justification for a forcible entry into his home.

II. The evidence seized during the unlawful search must be suppressed.

The primary purpose of the exclusionary rule is used to "deter future unlawful police conduct." *Therriault*, ¶ 57. Evidence obtained through an unlawful probationary search should also be suppressed in a revocation hearing in order to deter future probation searches that violate a probationer's right to privacy. *See*, *United States v. Rea*, 678 F.2d 382 (2d Cir.1982) (finding the exclusionary rule applicable where evidence illegally obtained by probation officer, as "a probation officer who seeks to discover and seize evidence for use in a probation

revocation hearing is very likely to be deterred from proceeding without a warrant if the officer knows that evidence so seized is apt to be excluded from the very proceeding with which he is concerned"); *See also*, *State v. Sears*, 553 P.2d 907 (Alaska 1976) (cautioning that in "the event the lawless arrest and search or seizure is carried out by enforcement personnel with knowledge or reason to believe the suspect was a probationer, we would then apply the exclusionary rule in the probation revocation proceeding"). The evidence seized during the violent intrusion into Arthur's home would not have been discovered but for the illegal search, and this type of probationary search should be deterred. Therefore, the evidence obtained during the search should be suppressed.

CONCLUSION

A pre-planned forcible guns-drawn entry into a home where, assisted by the U.S. Marshals, a calm and compliant Arthur Peoples was shackled naked on his bed for half an hour while officers conducted a thorough search of his home was a wholly disproportionate intrusion into Arthur's constitutionally protected privacy. While Arthur's expectation for privacy in his home is diminished by his status as a probationer, here, the degree of intrusion was not justified. The

contours of this search do not nearly conform to the carefully carved exception to the warrant requirement meant to accommodate the special needs of the probation system to conduct a search upon reasonable suspicion of a probation violation. The district court erred when it found that the State's intrusion, forcible entry into Arthur's home, was justified merely by a reasonable suspicion of person drug use. The search grossly violated Arthur's elevated right to privacy under the Montana Constitution. This Court must not allow a right so jealously guarded in our State to lay so utterly forgotten at Arthur Peoples front door.

Mr. Peoples respectfully requests that this Court reverse the district court denial of his motion to suppress and remand for further proceedings in accordance.

Respectfully submitted this 2nd day of October, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5946, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kathryn Hutchison
KATHRYN HUTCHISON

APPENDIX

Report of Violation .....App. A

2003 Judgment and Sentence .....App. B

Order on Motion to Suppress .....App. C

Order of Revocation, Judgment and Sentence .....App. D

CERTIFICATE OF SERVICE

I, Kathryn Grear Hutchison, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-02-2020:

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