IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0070

STATE OF MONTANA,

Plaintiff and Appellee,

v.

AUTHUR RAY PEOPLES,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

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

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I. The P.O.'s cooperative experience supervising Arthur weighed against the aggressive and degrading search.

In district court, the State steadfastly maintained that the basis for the March search, and subsequent revocation, was because of a credible suspicion that Arthur was using drugs again. [1] (9/21/2018 Tr. at 15., 9/27/2018 Tr. at 40.) But unlike P.O. Striker's visit to Arthur's home just one month earlier, the planning and multi-agency coordination of the March visit was not ordinary. Striker said so himself:

> [Counsel] When you do a normal home visit you don't bring five or seven armed officers wearing banners of law enforcement identity, do you?
> [P.O.] During a normal home visit?
> [Counsel] Normal home visit.
> [P.O.] No.
> (9/21/2017 Tr. at 37-38.)

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[1] [STATE] We've alleged -- and [the]State submits have proven -- that Mr. Peoples has a drug problem, he was in possession of drugs, that's the only thing we're trying to address in this hearing, and I think -- so I don't think [defense counsel] needs to cover or rebut any insinuations with regards to --
THE COURT: Yeah, I'm not aware of any other crimes that Mr. Peoples may be suspected of or implicated in --
[DEFENSE COUNSEL]: Well, he's not.
THE COURT: -- all I'm aware of is this matter before us involving the home visit, or search, if you will, of the premises and the discovery of a small quantity of methamphetamine. (9/27/2018 Tr. at 21-22.)

But the purpose of both the February and March visits to Arthur's home was to follow up on suspicions that Arthur had relapsed and was using drugs again.[2] Any concerns for Arthur's medical condition, contrary to the State's arguments, are contradicted by the fact that Probation and Parole waited over a day to follow up on the reported potential overdose, never called Arthur to check on him, and when they did arrive at his door, they did not bring (or have on-call) any medical personnel. (9/21/2018 Tr. at 47-49.)(*See* Appellant Opening Br. at 26.)

Citing *State v. Burke*, the State argues P.O. Striker's experience supervising Arthur over a long period of time explains the pre-planned four officer guns-drawn forcible entry search. And, that when Arthur did not answer the door, the officers drew their weapons and entered Arthur's home. (*See* Appellee Br. 13.) Such decisions have had devastating consequences. [3] *Burke* generally established an exception to

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[2] And, as defense counsel asked Striker to confirm, "the only violation [found] was consistent with his prior violation, which is his drug addiction; is that fair to say?" to which Striker replied, "Yes." (9/27/2018 Tr. at 27.)
Striker also confirmed the March search revealed no weapons, other probationers or alcohol. (9/27/2018 Tr. at 27.)

[3] See Darcy Costello & Tessa Duvall, Minute by Minute: What Happened the Night Louisville Police Fatally Shot Breonna Taylor, Louisville Courier J. (May 29, 2020), https://tinyurl.com/y3ytxuju.

the warrant requirement for *reasonable* probation searches due to the need for flexibility within the probation system and the special relationship existing between a probationer and his probation officer. *State v. Burke,* 235 Mont. 165, 169, 766 P.2d 254 (1988). *Burke* does not supply justification for enlisting the U.S. Marshals Service to forcibly enter a home or shackling a man naked and leaving him that way while four officers scour his home.

However, Peoples agrees with the State's claim that a probation officer's continued experience supervising a specific probationer is relevant when considering the scope of a probation search. Indeed, in his opening brief, Peoples makes the same point. (Appellant Opening Br. at 19.) On appeal, both Arthur and the State discuss his long-term struggle with addiction and share in the reflection that his drug use caused the need for increased supervision on probation and repeated home visits. (*See* Appellant Opening Br. at 4; Appellee at 13.) The State misrepresents Peoples argument on this point, however, claiming Arthur essentially denies he violated the terms of his probation during his supervision. (Appellee Br. at 13.) This is a mischaracterization: Arthur readily acknowledged his struggle with drug addiction,

(Appellant Opening Br. at 4) and the effect it has had on his supervision (Appellant Opening Br. at 4) in his opening brief. He specifically acknowledges that during the course of his supervision, he at times violated the terms of his parole and probation by using drugs. (Appellant Opening Br. at 4.) This is common ground. Where the parties differ is in what conclusions are to be drawn from this common understanding.

For its part, the State justifies the four officers barging into Arthur's home by making arguments about Striker's experience supervising him that rely upon a mistaken reading of the record, and hypothetical rationale Striker never himself articulated.

First, the State cites Striker's report of violation to claim forcible entry[4] into Arthur's home, assisted by an *additional* U.S. Marshal, was appropriate because Arthur had evaded his P.O. in the past. (Appellee Br. at 13. citing D.C. Doc 83.) This information could be relevant if it were true. But in reality, P.O. Striker never indicated on his report of

[4] The State makes a strained distinction between gaining entry with a key and physically breaking down doors by claiming the former is only "technically" forced. (Appellee Br. at 17.) It is well-settled by this Court that the government's intrusion into a home is no different by unlocked door, with a key, or the use of physical force. *Therriault*, ¶ 53.

violation (or in his testimony) that Peoples has ever made his whereabouts unknown to him. (D.C. Doc. 83.) The State refers to nothing more than irrelevant boilerplate language to support its argument that P.O. Striker's decision to forcibly enter Arthur's home without a warrant in the manner they did was justified by Arthur evading Striker in the past. (Appellee Br. at 13, 17.) The D.O.C. report of violation form the State cites is a boilerplate fill-in-the-blank worksheet. The boilerplate language for every non-compliance violation is contained on the report of violation worksheet beside a blank box. If the box is checked, it is alleged. If the box is left unchecked, it is not. The absconding box is not checked in Striker's report. (D.C. Doc. 83.) Twice, at pages 13 and 17 of Appellee's brief, the State represents that P.O. Stricker's report of violation, "provided that Peoples had "deliberately made [his] whereabouts unknown" and other "reasonable efforts were made to locate" Peoples but had "been unsuccessful." (D.C. Doc. 83.)" (Appellee Br. at 13.) This is the statutory language defining absconding and was not at issue in this case. The State cites the record in error and is left with no record evidence that Arthur ever attempted to evade Striker throughout his long supervision.

The record supports the opposite finding. Striker knew where to find Arthur because he conducted a home visit in the same location just one month before the March search. (9/21/2018 Tr. at 13.) In addition, the State can site to no evidence in the record that Arthur, at any time during his long period of supervision, had ever been found to present a risk to his P.O. He was never found to have any weapons, or to behave aggressively or erratically in interactions with his probation officer. His only violations were for personal drug use.

The State then argues Peoples' general "history of addiction and law-breaking" justified the need for four officers to draw their weapons to enter Arthur's home, and specifically enlist one officer with special expertise in forcibly breaking through doors. (Appellee Br. at 13). For the first time, the State argues the need for the unusually high attendance and guns-drawn entry was informed by his 2002 conviction of operating a drug lab. (Appellee Br. at 14.) This too is a stretch. The record does not reflect Arthur's P.O. had any suspicion Arthur was manufacturing methamphetamine, despite Striker having been inside his home just one month previously. Instead, this is a concern the State speculates about on appeal on behalf of Arthur's P.O., but one Striker

himself never articulated. (*See* Appellee Br. at 14, "Stricker knew Peoples' original crime was operating a clandestine methamphetamine lab, a consideration which, if Peoples manufactured his own meth, would have created a dangerous, toxic environment for Peoples and the surrounding apartments.") The State's lab scare-tactic is undercut by Striker's knowledge that Arthur's original conviction was factually based upon the seizure of ingredients commonly used to manufacture meth during a traffic stop, not the discovery of a lab. *State v. Peoples*, 2005 MT 3N. The State cites cases from the Sixth and Seventh federal circuit courts[5] to say methamphetamine labs are dangerous and can cause explosions, not the record in this case. (Appellee Br. at 14-15.) It is a stretch to say knowledge of Arthur's original 2002 conviction informed his P.O.'s decision to conduct a pre-planned guns-drawn forcible entry in 2018.

II. The States accusations on appeal are merely a distraction.

None of the officers who initially arrived at Arthur's home wore a body camera, despite having pre-planned a search they anticipated

[5] *United States v.Layne*, 324 F.3d 464, 470-71 (6th Cir. 2003); *United States v. Whited*, 473 F.3d 296, 299 (6th Cir. 2007); *United States v. Chamness*, 435 F.3d 724, 727 (7th Cir. 2006).

would involve forcible entry. On appeal, the State seeks to downplay the aggressive nature of the search by accusing Peoples of "factual inaccuracies and exaggerations" regarding the initial entrance into Arthur's home. (Appellee Br. at 16.) In his dispositional hearing, Arthur remembered the terrifying day and recalls relevant excerpts here:

> …They busted my door with guns, I'm laying on the floor -- or I'm laying on my bed, whatever, I'm laying there, not once did anyone ask me was I okay.
> ...this is supposed to be a wellness check? Seriously?...
>
> . . .
>
> …Law enforcement bursting its way through my front door unannounced, it's outrageous, pointing guns at my head, verbally abusing me into submission is downright disrespectful and dehumanizing...
>
> . . .
>
> [P.O.]. . .secured the building and had me sit down in my bed naked, handcuffed…
>
> . . .
>
> …The first and only concern for my well-being came from one of the officers asking me, the handcuffs, are they on too tight? At that point I'm sitting there naked, Bethel angled behind me and scooped up something and left the room…
>
> . . .
>
> -- I mean I work hard in my community, I attend church, I take kids to church, I do the best I can, but I am a drug addict.
>
> . . .
>
> They treated me like I'm some dangerous criminal. (9/27/2018 Tr. at 42-47.)

In his opening brief, Arthur's descriptions reflect these same terrifying and degrading experiences that he recounted to the district court. The State would have this Court disregard his testimony as "exaggerated." (Appellee Br. at 16.) Arthur asks that this Court instead review the record from his perspective and take his experience- one that is disproportionally high among Black men- seriously. *See*, *Washington v. Lambert*, 98 F.3d 1181, 1187-88 (9th Cir. 1996) ("the burden of aggressive and intrusive police action falls disproportionately on African-American, and sometimes, Latino, males"). If even one of the four officers had been wearing a body camera, this Court could see for itself how forcefully the officers opened Arthur's door, how quickly or aggressively they entered his home, how loudly they announced themselves prior to doing so, and precisely how long it was before they re-holstered their weapons. The State's preferred version of the facts has no more credibility that any other.

Likewise, this Court should not take Arthur's prolonged nudity as lightly as the State. (Appellee Br. at 17.) It is not a petty indignity to be surprised by four police officers while naked in your own bed, and senselessly left shackled and nude for at least half an hour while they-

and more arriving officers- scour your home. *Terry v. Ohio*, 392 U.S. 1, 17, (1968). The judiciary has a "traditional responsibility to guard against" such "over-bearing [and] harassing" police conduct. *Terry*, 392 U.S. 1, 15. (1968).

III. Probation and Parole's discretion in conducting a search is not boundless.

Searches without warrants are exceptional. They require that an exception be made to the general rule that searches conducted outside the judicial process, without prior approval by a judge are *per se* unreasonable under the Fourth Amendment." *Katz v. United States*, 389 U.S. 347, 357 (1967.) Constitutional safeguards require that these exceptions be "carefully carved." *State v. Hubbel,* 286 Mont. 200, 212, 951 P.2d 971 (1997). The burden is on "those who seek exemption" from the warrant requirement to show "that the exigencies of the situation made that course imperative." *McDonald v. United States*, 335 U.S. 451, 456 (1948.)

Already at its highest in one's home, "[t]he right to be free of unreasonable searches and seizures is augmented by Montana's right of privacy articulated in Article II, §10." *State v. Hill*, 322 Mont. 165, 94 P.3d 752, ¶19 (2004). The Montana Constitution provides that the right

of individual privacy shall not be infringed without the showing of a compelling State interest. Mont. Const. art. II, § 10. *State v. Elison*, 2000 MT 288, ¶ 46, 302 Mont. 228, 14 P.3d 456 ("Montana's unique constitutional language affords citizens a greater right to privacy, and, therefore, provides broader protection than the Fourth Amendment in cases involving searches of private property.")

The State contends it does not have to justify a pre-planned forcible entry search in which Arthur was left naked and shackled because it must only prove there was reasonable suspicion for the search. (Appellee Br. at 18.) But "[t]he manner in which the [search was] conducted is, of course, as vital a part of the inquiry as whether [it was] warranted at all." *Terry v. Ohio,* 392 U.S. 1, 28–29, (1968). "The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation." *Terry*, 392 U.S. 1, 28-29. (1968). Upholding these limitations, further emboldened by the privacy protections provided in Article II, §10, requires that warrantless searches carried out by a probation officer remain carefully carved to suit their purpose. Peoples cited *Fisher, Stucker,* and *Thierrault* in his opening brief, cases where this Court has

carefully considered the probation warrant exception and carved narrow parameters that allow the degree of invasion into a person's privacy to be minimized. (*See* Appellant Br. at 23-24.) The State ignores these cases, arguing instead the scope of a probation search is only unreasonable if done only to harass or intimidate. (Appellee Br. at 16.) Arthur would tell you that was exactly what the officers intended when they ignored his long-standing cooperation with the probation office and burst into his home with guns drawn. More broadly, if the degree and intensity of an intrusion into a probationer's home unnecessarily compromise other widely held expectations of privacy, as it has here, this too exceeds constitutional limitations.

On appeal, the State takes the position that the events of March 16, 2018, were a "*home visit* that required *forced entry*." (Appellee Br. at 3.) The State further asserts any probationer "expects to be intensively supervised" and broadly states, "entering a probationer's residence to ascertain his whereabouts and safety is reasonable." (Appellee Br. at 13.) This characterization of a probationer's expectation of privacy is not entirely accurate. D.O.C. Probation and Parole's desire and duty to supervise is not absolute, it is checked by the protections Montana's

Constitution affords its citizens- including those on probation- against excessive intrusion into privacy and unreasonable search. Mont Const. Art. II, §§10, 11. These protections are only diminished, not extinguished, by one's status as a probationer. *State v. Moody*, 2006 MT 305, ¶19, 334 Mont. 517, 148 P.3d 662.

A probationer's reasonable expectation of privacy in their home is also informed by what is contained in their probation conditions. *State v. Therriault,* 2000 MT 286, ¶ 54, 302 Mont. 189, 14 P.3d 444. Pertaining to a home visit, this Court has held if a probationer's conditions of probation require it, a P.O. may not enter a probationer's home without first making a reasonable request. *Therriault*, ¶54. But Peoples does not dispute the district court's finding that the March "home visit" was a search. (D.C. Doc 119.) This Court does not need to address the State's arguments about whether there was authority to conduct a *reasonable* probation search. (Appellee Br. at 9-12, 22).

The issue on appeal is whether the limits of a valid probationary search include four officers forcibly entering a probationer's home, with guns drawn, and shackling him naked on his bed for half an hour while they scour his home. Peoples maintains the intensity of this search was

intolerable because "it's manner of execution unreasonably infringe[ed] interests protected by the Constitution," *Illinois v. Caballes*, 543 U.S. 405, 407 (2005); *Terry v. Ohio*, 392 U.S. 1, 18 (1968). (*See* Appellant Br. at 10.)

IV. The search of Arthur's home exceeded the privacy protection afforded by Article II, §10 and §11; this does not require inquiry into the subjective motivations of law enforcement.

The State contends Peoples asks this Court to factor subjective motivations of individual officers in its review. (*See* Appellee Br. at 18-20.) In particular, the State points to Peoples' description of the way probation and parole obtained a key from Arthur's landlord as "deceptive." (*See* Appellee Br. at 19-20.) Although neither Arthur's landlord nor the supervising P.O. who spoke to him, Andrea Bethel, testified, the record contains indications that Arthur's landlord handed over the key after being told Arthur was implicated in a homicide investigation, not that his P.O. needed to do a routine probation search involving personal drug use. (9/27/2018 Tr. at 19-20; 44-47.) Law enforcement telling a landlord they need to access a tenant's apartment because they suspect he committed a murder is deceptive when their

authority for access is really premised on a probationary compliance violation.

Peoples has asked this Court to consider whether Article II, §10 and §11 still protects a probationer from a probation search, justified by the simple suspicion of personal drug use, when it has taken on the character of a homicide investigation. In *State v. Farabee,* 2000 MT 265, 302 Mont. 29, 22 P.3d 175, this Court held an otherwise lawful traffic stop remained valid under both the Fourth Amendment and the Montana Constitution despite the subjective motivations of the individual officers involved. *Farabee*, ¶30. Unlike here, the manner and scope of the traffic stop search were not under review. Farabee was stopped while driving a vehicle that was missing both a headlight and turn signal. *Farabee*, ¶7. Farabee conceded there was reasonable suspicion for an officer to make a traffic stop, but argued it was unlawful under Article II, Sections 10 and 11 of the Montana Constitution because he felt the officer's true purpose for the stop was to search the vehicle for drugs. *Farabee*, ¶ 22. Adopting the U.S. Supreme Court holding from *Whren*, this Court held it would not consider the subjective motivations of the individual officers in

determining whether a stop was reasonable. *Farabee*, ¶ 23; *Whren v. U.S.,* 517 U.S. 806 (1996)("the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent.")

Several distinctions set this case apart. First, Farabee's argument was not the same. Farabee argued the purpose of the search rendered the traffic stop unreasonable because the motivation of the officer was concealed. By contrast, here, Arthur argues that in light of the purpose for the search, the degree of intrusion was unreasonable. The subjective intent of the officers involved is not particularly relevant to the instant case. Second, in *Farabee*, this Court held Article II, §10 was not implicated when his vehicle was stopped because regardless of the officer's subjective purpose for making the stop, operating a vehicle at night without two operable headlights is not "one of the core individual interests protected by the right to privacy." *Farabee*, ¶ 30. By contrast, here, the search at issue involves the government's breach of Arthur's home, conduct this Court has called the "chief evil" to which the 4th Amendment and Montana Constitutional protections are directed "and "where the federal and Montana constitutions draw a firm line..."

State v. Therriault, 2000 MT 286, ¶ 53, 302 Mont. 189, 14 P.3d 444. Arthur has asked this Court to consider whether law enforcement senselessly leaving him naked and shackled while they searched his home exceeded the privacy protection afforded by Article II, §10, not to inquire into the subjective motivations of law enforcement.

On appeal, Arthur asks that this Court decide whether a search conducted by a team of probation officers and federal law enforcement officers was constitutionally tolerable as a probation search in which the only probation violation for which there was reasonable suspicion was Arthur's personal drug use. (9/27/2018 Tr. at 21-22.) On page 18, the State acknowledges that law enforcement conducted a homicide investigation in Arthur's home once they were inside. (Appellee Br. at 18.) The State did not have enough evidence to form even reasonable suspicion of involvement in a homicide, nor did it allege that it did. (9/27/2018 Tr. at 21-22.) (Any vague hunch law enforcement ever had in such a matter, as the State acknowledges, was soon dispelled.)

In this appeal, Arthur does not ask this Court to determine whether P.O. Striker's true purpose was to cover for a warrantless homicide investigation. The validity of such arguments, a so-called

"stalking horse theory" was overruled by *Knights* in the context of the federal constitution. *United States v. Knights,* 534 U.S. 112, 113, (2001). A "stalking horse" refers to when a defendant contends a probation search is unlawful if it is conducted as a subterfuge by the police when they did not have probable cause to perform a Fourth Amendment search. Since *Knights*, this Court has rejected an argument that Article II, §10 rendered unlawful an otherwise reasonable probation search with an underlying "stalking horse" investigatory purpose. *State v. Crawford,* 2016 MT 96, ¶ 33, 383 Mont. 229, 371 P.3d 381. *Crawford* has no application here because Arthur does not make a "stalking horse" argument and does not ask this Court to determine what P.O. Striker's true motivation was for the March search.

CONCLUSION

The issue before this Court is whether the multi-agency guns-drawn search, pre-planned to include forcible entry, that left Arthur shackled naked on his bed exceeded its probationary purpose and the confines of a carefully carved warrant exception. Peoples argues 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. Instead, a probation search must limit its degree of intrusion to suit its purpose. The State seeks to expand the warrantless probationary search exception past its legitimate boundaries. In this case, the nature of the government's intrusion was wholly disproportionate to its purpose and far exceeded any legitimate justification for a warrantless search.

The district court erred in its conclusion that the March search was constitutionally sound. Arthur respectfully asks this Court to reverse and remand for suppression of evidence seized.

Respectfully submitted this 12th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 3899, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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CERTIFICATE OF SERVICE

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