IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 19-0731

STATE OF MONTANA,

Plaintiff/Appellee,

-vs-

TRAVIS STAKER,

Defendant/Appellant.

BRIEF OF AMICUS CURIAE – MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On appeal from the Eighteenth Judicial District Court,
Gallatin County, the Honorable Rienne H. McElyea, Presiding

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Statement of Interest

The Montana Association of Criminal Defense Lawyers (MTACDL) is the Montana affiliate of the National Association of Criminal Defense Lawyers, a nationwide network of more than 10,000 dedicated criminal defense attorneys. MTACDL was formed to ensure justice and due process for persons accused of crimes in Montana; to foster integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. MTACDL, and its membership, believe that continued recognition and adherence to the rule of law by the judicial, legislative, and executive brances of government is necessary to sustain the quality of the American justice system. To accomplish this mission, MTACDL provides practical and informative continuing legal education to attorneys; files amicus briefs on behalf of its members and at the request of the courts; and offers guidance on pressing ethical questions for its members.

Statement of the Issue

MTACDL appears to address the unconstitutionality of law enforcement actions in this case, and proffer a constitutional solution

for cases of this type going forward: anticipatory or prospective warrants.

Statement of the Case

Given the resolution of this case below, the facts of the case are largely undisputed. For the purposes of this amicus brief, it is sufficient to recite the following[1]:

- In August 2018, law enforcement personnel with the Gallatin County Sheriff's Office, Bozeman Police Department and Homeland Security Investigations conducted a operation to arrest individuals responding to an advertisement they placed on internet websites.
- The advertisement purposed to be from Lily, a "discrete and classy" lady with "soft curves," offering "gentle" guidance and unrushed satisfaction in the "GFE (girlfriend experience)". Lily also loved "bubble baths, massage[s], French wines, and exploring new places." Lily was, in fact, Agent Rod Noe of the United States Department of Homeland Security.

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[1]Taken from the district court's Order Re Defendant's Motion to Suppress Evidence & Motion to Dismiss Case (Dkt. No. 58).

- Agent Noe had obtained a cell phone number for the sole purpose of receiving and responding to inquires to the "Lily" posts. Agent Noe posed as Lily in "her" responses. That cell phone number was listed in the advertisement along with an email address. Those seeking Lily's promised "unrushed 5 senses experience to satisfy . . . mind, body and soul," were provided with that contact information. Those who wished to "pre-book" were encouraged to do so, so Lily could "prepare a customized experience."
- The operation was conducted without a search or seizure warrant as contemplated by both the *Fourth Amendment* and *Art. II, § 11* of the United States and Montana constitutions, respectively.
- A number of individuals were drawn to Lily's siren song. According to new reports, over 50 inquiries were made and seven people were arrested, including Travis Staker.[2]
- Staker, and presumably all others who inquired, received text messages from Agent Noe/Lily responding to their inquiries. Staker and his ilk then replied via text or email. All

[2]https://nbcmontana.com/news/local/7-arrested-in-bozeman-human-trafficking-bust

communications between Agent Noe/Lily and the potential paramours were recorded on the cell phone law enforcement obtained for the sole purpose of Lily communications.

- These communications were then used as evidence against Staker and the others arrested in the Lily sting.

Summary of the Argument

The argument is easily summarized. Law enforcement's warrantless monitoring and recording of Lily and Staker's communications was unconstitutional. Law enforcement easily could have obtained an anticipatory or prospective warrant to render their actions constitutional.

Law enforcement created an advertisement and fictitious vixen to elicit responses from unknown individuals. The advertisement included a cell phone number and email address for these individuals to respond. The cell phone number was obtained by Agent Noe "for the purpose of receiving and responding to inquiries to the post." (Doc. 58 at 2).

Using the cell phone and email, law enforcement seized communications from the individuals, responded to those communications, and seized the additional responses. These

communications were incriminating and used against seven individuals, including Staker, in a criminal prosecution. Law enforcement did not have a search warrant to seize these communications, despite the fact that a mechanism for obtaining a warrant under these circumstances exists and has been used before in Montana. (Appendices A & B). This warrantless monitoring and recording of Staker's communications violates both the *Fourth Amendment* and two different sections of the Montana Constitution.

Argument

I. The district court's ruling should be reversed because of Fourth Amendment and Article II, §§ 10 and 11 violations.

A. The inducement and capture of Staker's text messages was performed without a warrant and was, therefore, unreasonable.

Both the United States constitution and the Montana constituion prohibit unreasonable searches and seizures. *Article II, section 11* of the Montana Constitution guarantees "[t]he people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the

person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing." This "warrant clause" is considered "a fundamental part of the reasonableness clause" of *Article II, § 11*." *State v. Neiss*, 2019 MT, 125, ¶ 23, 396 Mont. 1, 443 P.3d 435. Consequently, "barring limited exceptions, a warrantless search or seizure is categorically unreasonable." *Id.* (*citing State v. Ellis*, 2009 MT 192, ¶ 24, 351 Mont. 95, 210 P.3d 144).

This Court has repeatedly held "that warrantless participant recording is subject to the strictures of Article II, Sections 10 and 11 of the Montana constitution." *State v. Stewart*, 2012 MT 317, ¶ 26, (citing and quoting *State v. Goetz,* 2008 MT 296, 345 Mont. 421, 191 P.3d 489; *State v. Allen*, 2010 MT 214, 357 Mont. 495, 241 P.3d 1045). Montana's right to privacy, set forth in *Article II, § 10*, especially limits "the range of warrantless searches which may be lawfully conducted under the Montana Constitution." *Goetz*, ¶ 14.

Even under federal law, however, courts prefer and encourage the use of warrants. *Texas v. Brown*, 460 U.S. 730 (1983). The United States Supreme Court has concluded that greater latitude should be extended where the police resort to the warrant procedure rather than

relying on the power to search without a warrant. *United States v. Ventresca*, 380 U.S. 102, 106-07 (1965) (citing *Jones v. United States*, 362 U.S. 257, 270 (1960). The purpose of this extended latitude is to encourage the use of warrants. John Wesley Hall, "Search and Seizure," Vol. I, § 6.44 (digital ed. 2017).

Here, there was no warrant. In light of this Court's jurisprudence, especially as set forth in *State v. Allen*, a warrant was not only preferred but required. Consequently, the inducement and recording of Staker's communications with Lily were *per se* unreasonable.

B. Law enforcement could have easily obtained an anticipatory or prospective warrant.

1. Anticipatory or Prospective Warrants

"An anticipatory warrant is 'a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of a crime will be located in a specified place.'" *United States v. Grubbs*, 547 U.S. 90, 94 (2006) (citing and quoting 2 W. LaFave, Search and Seizure § 3.7(c), pg. 398 (4th ed. 2004)). "Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time – a so-called 'triggering

condition.'" *Id.* In *Grubbs*, a unanimous Court held that anticipatory warrants are not categorically unconstitutional.

In addition to the federal courts[3], a majority of states have embraced anticipatory warrants for a variety of reasons but primarily the preference for warrants over warrantless searches and seizures.[4] See Hall, "Search and Seizure, " §6.44 ("Substantially more cases permit prospective warrants than prohibit them.") One of the earliest and most exhaustive analysis of the anticipatory warrant process occurred in California in 1970. *Alvidres v. Superior Court*, 12 Cal. App.3d 575, 90 Cal. Rptr. 682 (1970). In *Alvidres*, the Court of Appeal of California looked to *Katz v. United States*, 389 U.S. 347 (1967) and *Berger v. New York*, 388 U.S. 41 (1967) as justification for anticipatory warrants. In both *Katz* and *Berger*, the United States Supreme Court held it was constitutionally possible to obtain a search warrant for the seizure of oral communications through the use of electronic

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[3]Randy J. Sutton, "Validity and Application of Anticipatory Search Warrant – Federal Cases, 31 A.L.R.2d 123.

[4]Norma Rotunno, "Validity of Anticipatory Search Warrants – State Cases," 67 A.L.R.5th 361, § 3 (citing state decisions upholding application of anticipatory search warrants).

surveillance. The *Alvidres* Court noted,

> The acknowledgment of such a possibility clearly envisions a warrant that by the very nature of things would have to be issued in advance of the time that the subject matter to be seized was present on the premises. A warrant directing the seizing of a conversation could only be directed to words which could not be in existence until vocalized by the participants thereto.

Alvidres, 12 Cal. App.3d at 582.

This same logic must exist in Montana, especially in light of this Court's decisions in *Goetz* and *Allen*. This Court held that warrants were required in both instances. The same was true in *State v. Stewart*, 2012 MT 317, 367 Mont. 503, 291 P.3d 1187 (affirming that warrantless participant recording is subject to the strictures of Art. II, Sections 10 and 11 of the Montana Constitution). Logically, if participant recording is constitutional with a warrant, the warrant and the application for that warrant anticipate a future event, i.e., future words to be uttered by the participants and recorded by law enforcment. Therefore, while this Court has never specifically opined on the constitutionality of anticipatory warrants, it has implicitly recognized the logic behind them.

2. Requirements for Anticipatory Warrants

Like all warrants, anticipatory warrants require judicial review of law enforcement action and, consistent with the constitutional mandates, a satisfactory demonstration of probable cause. In the case of an anticipatory warrant, law enforcement must convince a judicial authority that there is probable cause to believe that contraband will be at the specified location when the search warrant is executed." *Grubbs*, at 96 (citing *United States v. Garcia*, 882 F.2d 699, 702 (2d Cir. 1989); *United States v. Lowe*, 575 F.2d 1193, 1194 (6th Cir. 1978)). "It is important, therefore, that an affidavit for an anticipatory warrant indicate how it is known that the items to be seized will on a later occasion be at the place specified." 2 W. LaFave, Search and Seizure § 3.7(c) (5th Ed. 2017-2018).

This is not to say that anticipatory warrants can be issued based on mere guesswork or a hunch. In that sense, they are subjected to no less stringent judicial review than typical warrants. Arguably, a showing of anticipatory probable cause is more difficult than ordinary *post facto* probable cause warrants. "This means that affidavits supporting the application for an anticipatory warrant must show, not only that the agent believes a delivery of contraband is going to occur,

but *how* he has obtained this belief, how reliable his sources are, and what part government agents will play in the delivery." *United States v. Garcia*, 882 F.2d 699 (2d Cir. 1989) (emphasis in original).

In *Garcia*, the Second Circuit recognized "that any warrant conditioned on what may occur in the future presents some potential for abuse." *Garcia*, 882 F.2d at 703. Because of that potential for abuse, a great deal of responsibility is placed on the judicial officer presented with an affidavit in support of an anticipatory warrant. "Judicial officers must . . . scrutinize whether there is probable cause to believe that the delivery will occur, and whether there is probable cause to believe that the contraband will be located on the premises when searched." *Id.* Additionally, "the magistrate should protect against [the anticipatory warrant's] premature execution by listing the warrant conditions governing the execution which explicit, clear, and narrowly drawn so as to avoid misunderstanding or manipulation by government agents." *Grarcia*, 882 F.2d at 703-04. Finally, "anticipatory warrants require that a magistrate give careful heed to the *fourth amendment's* [sic] requirement that the warrant particularly describe the place to be searched, and the persons or things to be seized." *Garcia,* 882 F.2d at

704 (internal quotations omitted).

In *Grubbs*, the United States Supreme Court listed the "two prerequisites of probability" for "a conditioned anticipatory warrant to comply with the *Fourth Amendment.*"

> It must be true not only *if* the triggering condition occurs there is a fair probability that contraband or evidence of a crime will be found in a particular place, but also that there is a probable cause to belief the triggering conditions *will occur*. The supporting affidavit must provide the magistrate with sufficient information to evaluate both aspects of the probable-cause determination.

Grubbs, 547 U.S. at 96-97 (emphasis in original) (internal quotations omitted) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *Garcia*, 882 F.2d at 703).

Obviously, an affidavit for an anticipatory warrant does not require a showing of absolute certainty that the triggering event will occur, only that there is probable cause that it will. Again, however, there are limitations to the extent that law enforcement is allowed to prognosticate.

In *Commonwealth v. Wallace*, 42 A.3d 1040 (PA 2012), the Supreme Court of Pennsylvania relying on the language from *Grubb* concluded an anticipatory warrant was invalid because the affidavit in

support of the warrant only indicated an informant of unknown reliability asserted he *could* purchase drugs at the defendant's house on a specific future occasion. Notably, the Pennsylvania Supreme Court was unpersuaded by the fact that informant had purchased drugs before but at a location that was not the defendant's house. "There is nothing in the affidavit which would establish any nexus between Appellant's house or storage of drugs." *Wallace*, 42 A.3d at 411. Relying on *Grubbs*, the *Wallace* court noted:

> The high Court has made abundantly plain that the triggering event itself must be probable, and thus an anticipatory search warrant for a person's home may not be issued solely upon a claim that fruits of a crime will be found inside if the triggering event, such as delivery of contraband to the home, takes place and the warrant is executed.

Id.

Although the requirements for establishing probable cause for an anticipatory warrant are high, that height is justified given the risk of abuse noted in both *Garcia* and *Grubb*. The heightened criteria is also consistent with the heightened protections of privacy provided by the Montana Constitution. Should this Court adopt the *Grubbs* prerequisites for issuance of an anticipatory warrant, nothing about

those requirements would be inconsistent with this Court's holdings regarding the capture and recording of otherwise private communications provided additional precautions are taken.

II. Anticipatory Warrants and Communication

The majority of anticipatory warrants are issued in situations in which a tangible item of contraband is at issue, e.g., child pornography, narcotics, etc. Anticipatory warrants in cases of capturing communication prove more difficult for a number of reasons, not the least of which is ascertaining what "triggering conditions" warrant execution of the warrant. However, anticipatory warrants are both possible and favored.

In the *Goetz/Allen/Stewart* cases, this Court repeatedly focused on the warrantless nature of the state's intrusion into private communications. Implicit in all of those holdings is the premise that warrants are possible and, if obtained, the intrusion becomes reasonable under the *Fourth Amendment* and *Art. II, §§ 10* and *11.* Since those case were decided, law enforcement has had little apparent difficulty in obtaining warrants to record otherwise private conversations. See e.g., *State v. Fitzpatrick*, 2012 MT 300, ¶ 3, 367

Mont. 385, 291 P.3d 1106.

Attached as appendices A and B are a warrant application (Appendix A) and a warrant (Appendix B) issued by Judge McLean of the Montana Fourth Judicial District Court. These appendices represent the bare minimum that should be required to conduct an operation akin to that conducted by Agent Noe given the privacy protections extended to communications. Whether either appendix satisfies the criteria for a valid anticipatory warrant under *Grubbs* is debatable, but both are more constitutional than what happened (or, more specifically, did not happen) in Staker's case.

In *Grubbs*, the Supreme Court concluded that the *Fourth Amendment's* particularity requirement did not require the warrant to contain specific reference to the triggering condition. Under the facts of *Grubbs*, the absence of reference to the triggering condition was permissible. However, in light of the ephemeral nature of verbal and textual communications, anticipatory warrants in Montana should include reference to the triggering condition. This would provide both law enforcement with specific guidance as to what point the recording or capture of otherwise private communications becomes permitted

under the warrant. It will also provide citizens protection that all of their communications – even those unrelated to the anticipated criminal activity – do not fall subject to seizure by law enforcement due to a vague warrant.

The need for particularity in defining the triggering event in anticipatory warrants has been explained by the Court of Appeals for the First Circuit in *United States v. Ricciardelli*, 998 F.2d 8 (1st Cir. 1993).

> There are two particular dimension in which anticipatory warrants must limit discretion of government agents. First the magistrate must ensure that the triggering event is both ascertainable and preordained. The warrant should restrict the officers' discretion in detecting the occurrence of the event to almost ministerial proportions, similar to a search party's discretion in locating the place to be searched. Only then, in the prototypical case, are the ends of explicitness and clarity served. Second the contraband must be on a sure and irreversible course to its destination and a future search of the destination must be made expressly contingent on the contraband's arrival there . . . .

Riciardelli, 998 F.2d at 12. Although decided before *Grubbs*, *Riciardelli* is not incompatible with the Supreme Court's decision. In *Grubbs*, the focus was on the specificity of the triggering condition in the warrant affidavit rather than the warrant.

> In this case, the occurrence of the triggering condition – successful delivery of the [child pornographic] videotape to Grubbs' residence – would plainly establish probable cause for the search. In addition, the affidavit established probable cause to believe the triggering condition would be satisfied. Although it is possible that Grubbs could have refused delivery of the videotape he had ordered, that was unlikely. The magistrate therefore had substantial basis for concluding that probable cause existed.

Grubbs, 547 U.S. at 97.

Although identifying the triggering event with precision is easier in cases of tangible contraband, e.g., drugs or child pornography, it is not impossible in situations in which an anticipatory warrant would be sought to capture communications. Staker's case is an excellent example.

After his romp through the fields with Lily was nipped in the bud, Staker was charged with prostitution pursuant to *Mont. Code Ann. § 45-5-601(2)(b)*. The statute reads "[a] patron may be convicted of patronizing a prostitute if the patron engages in or agrees or offers to engage in sexual intercourse or sexual contact that is direct and not through the clothing of another person for compensation, whether the compensation is received or to be received or paid or to be paid." The elements of the offense could provide guidance for both law enforcement

and the judicial officer reviewing an application for an anticipatory warrant. In Staker's case, the posting of the advertisement itself is insufficient to justify monitoring all communications made to Lily. For example, an individual may respond to Lily in a fire and brimstone text condemning the wages of sin. Such an individual should not be subjected to law enforcement monitoring of their communications simply because they responded to an advertisement. Therefore, in a situation like that created here, neither the advertisement nor the fact that someone responded would constitute a triggering event that would allow for the execution of the anticipatory warrant.

In a sting operation such as this, both the application and the anticipatory warrant could focus on the content of a particular response as the triggering condition for the execution of the warrant, i.e., the point at which law enforcement can constitutionally monitor and record communications made between Lily and her would-be patrons. A judicial officer could look to contract law to determine the triggering event. The advertisement was not considered an "offer" in terms of contract law. Rather, an advertisement is generally an invitation to make an offer. *E.H. Oftedal & Sons v. State*, 2002 MT 1, ¶ 24, 308

Mont. 50, 40 P.3d 349. In a situation like that presented here, the triggering event could reasonably be when an individual responded to Lily's invitation to make an offer. Staker's response was immediate: "Hi Lily! I would love to book some time with you? [sic]." (Doc. 58 at 2).

Staker's acceptance of Lily's invitation, while not meeting the statutory criteria of prostitution, e.g., an agreement to engage in sexual intercourse or sexual contact for compensation, still satisfies the two *Grubbs* for a valid anticipatory warrant. In Staker's case, law enforcement could easily have approached a judicial officer with an application that outlined the need for an anticipatory warrant. Law enforcement could have presented an application which set forth that they would be posting an advertisement and that there was (a) probable cause to believe the triggering condition will occur, and (b) that the if the triggering condition did occur, there is a fair probability that evidence of the crime of prostitution would be found in the communications from those who accepted the invitation in the advertisement. *See Grubbs*, 547 U.S. at 96-97.

Conclusion

Despite the fact that there was a mechanism for law enforcement

to constitutionally proceed with the sting operation here, and despite the fact that other agencies and judicial districts had conducted similar operations in a constitutional manner, neither Agent Noe nor any other law enforcement officer obtained a search warrant to capture the communications with Staker. Such inaction is anathema to two different constitutions. Staker's conviction is the result of a serious constitutional violation and should be reversed.

Respectfully submitted this 9th day of 2020.

/s/ Colin M. Stephens
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Certificate of Compliance

I, Colin M. Stephens, hereby certify that this Brief of Amicus Curiae complies will all rules of appellate procedure, especially Mont. R. App. P. 11 in that this Amicus Brief does not exceed 5,000 words excluding tables and certificates. The exact word-count is 3,686 words. The brief is prepared in a 14-point Century typeface, and is appropriately double-spaced with the exception of lengthy quotations.

Respectfully submitted this 9th day of May 2020.

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CERTIFICATE OF SERVICE

I, Colin M. Stephens, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 05-09-2020:

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