IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 19-0731

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TRAVIS MICHAEL STAKER,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighteenth Judicial District Court
The Honorable Rienne McElyea, District Judge, Presiding

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STATEMENT OF THE ISSUES

I. Whether the District Court erred in determining that Mr. Staker did not have an actual subjective expectation of privacy in his cell phone text message communications and that society is not willing to recognize that expectation as objectively reasonable.

II. Whether all of the evidence, including witness testimony, obtained by law enforcement in its investigation, must be suppressed.

STATEMENT OF THE CASE

Appellant Travis Staker was charged in the Gallatin County Justice Court with misdemeanor prostitution in violation of § 45-5-601, MCA. Special Agent Rodney Noe, from the United States Department of Homeland Security, who was working with the Gallatin County Sheriff's Office and the Bozeman Police Department, posted advertisements on Internet websites advertising a "GFE" (girlfriend experience) with an individual named "Lily." (D.C. Doc. 57 at 2, ¶ 1. (attached as App. A)) Agent Noe obtained a cell phone for the purposes of receiving and responding to inquiries. (*Id.* at 3, ¶ 3.) Mr. Staker sent a text message to Agent Noe's cell phone, who was acting in an undercover capacity as "Lily." (*Id.* at 3, ¶ 4.) Agent Noe acquired

evidence from Mr. Staker in the form of text messages. (*Id.* at 3-6, ¶¶ 4-8.) Ultimately, Mr. Staker arranged to meet "Lily" at the Hilton Garden Inn, in Bozeman, Montana, and was arrested upon his arrival. (*Id.* at 4-6, ¶¶ 5-9.) The State did not seek or obtain a search warrant during the course of its investigation. (*Id.* at 7, ¶ 9.)

Mr. Staker moved to suppress all of the evidence obtained by law enforcement in its investigation for failing to obtain a search warrant and to dismiss the case. (D.C. Doc. 40.) The Justice Court granted his motion to suppress evidence but denied his motion to dismiss. (D.C. Doc. 43 at 37.)

The State appealed the Justice Court's decision to the Eighteenth Judicial District Court. (D.C. Doc. 45.) Mr. Staker moved to suppress all of the evidence obtained by law enforcement in its investigation, including all witness testimony, for failing to obtain a search warrant. (D.C. Doc. 52.) He also moved to dismiss the case for lack of evidence. (*Id.*) After the parties submitted briefs, the State, on behalf of the parties, submitted stipulated facts and exhibits necessary for the District Court to decide his motions. (App. A.) The stipulated facts also indicated the parties believed a hearing was unnecessary. (*Id.* at 1-2.)

The District Court did not conduct a hearing and decided the matter based on the parties' briefs and stipulation.

On September 17, 2019, the District Court denied Mr. Staker's motion to suppress, concluding: "Agent Noe did not engage in a search or seizure of the text exchange with Defendant." (D.C. Doc. 58 at 13. (attached as App. B)) Mr. Staker subsequently pleaded guilty to the charge of prostitution and, pursuant to the plea agreement, reserved his right to appeal the denial of his motions. (D.C. Docs. 60, 61, 62.) This appeal followed his sentencing.

STATEMENT OF THE FACTS

During the week of August 26, 2018, Agent Noe, from the United States Department of Homeland Security, along with the Gallatin County Sheriff's Office and the Bozeman Police Department, "conducted a warrantless operation to arrest individuals responding to advertisements they placed on Internet websites." (App. A at 2, ¶ 1.) Prior to August 26, 2018, Agent Noe placed an ad on Internet websites advertising a "GFE," *inter alia*, with an individual named "Lily." (*Id; see also id.* at Exhibit 1.) "The advertisements provided individuals with the ability to contact 'Lily' by email and/or the phone number: 775-204-

0133. Agent Noe obtained a cell phone, with the number 775-204-0133, for the purposes of receiving and responding to inquiries related to the post." (*Id.* at 3, ¶ 3.) "On August 23, 2018, Agent Noe, acting in an undercover capacity as 'Lily,' began text messaging with individuals who responded to his posts." (*Id.* at 3, ¶ 4.)

On August 27, 2018, Agent Noe received a text message from Mr. Staker's cell phone. (*Id.*) Mr. Staker took the following precautions while text messaging with "Lily":

> During this time period, Mr. Staker's cell phone was password protected and he kept it in his possession at all times in order to protect his privacy. He consciously did not share his cell phone or his text messages with "Lily" with anyone and conducted his text messaging where other individuals were not physically present so that no one could oversee the communication.

(*Id.*) The following is the August 27, 2018 text message conversation, recorded by law enforcement, that occurred between Mr. Staker (TS) on his private cell phone and Agent Noe (AN) on the cell phone he obtained for the investigation. (*Id.* at 3-5, ¶ 5.) The use of emojis, such as smiley faces used to depict emotions, are denoted below by the word "emoji" in brackets:

TS: Hi Lily! I would love to book some time with you? Are you arriving tomorrow?

AN: I'll be in Bozeman tomorrow but I only have a couple times left on Wednesday

TS: Ok, what do you have available?

AN: Are you available on Wednesday?

TS: Wednesday evening/night

AN: 7

AN: What's ur name and how much time do you want?

TS: Travis, hhr

AN: Nice to meet u Travis

AN: What kind of things do you want to do?

TS: Nice to meet you too! What are my options?

AN: You let me know what you want and what kind of donation

TS: FS, GFE. $160.

AN: [Emojis] we are on the same page! Love it

TS: Awesome! Where should I plan on meeting you?

AN: So are you good for 7? I'll call or text u 30 mins before and give you directions to my hotel

AN: Lol

TS: I'm good for 7

AN: Ok! Thanks sweetie!! See you then [emojis]

TS: I'm sure you get this all the time, sorry in advance. Are those your real pictures?

AN: Yes sweetie. I only took them last week

TS: Great! See you tomorrow [emoji]

AN: Wednesday [emoji] lol

TS: Wednesday [emoji]

(*Id.*; *see also id.* at Exhibit 2, pp. 1-2.)

The parties further stipulated:

> In the context of the above text conversation Agent Noe understands the terms "donation," "FS," and "GFE" means as follows. A "donation" means an offer to pay for sexual services. "FS" is commonly used in the sex trade as a term meaning "full service." "Full service" means sexual intercourse and not just a body rub or massage. "GFE" is commonly used in the sex trade to mean "girlfriend experience." This refers to the prostitute engaging in more than just sex, meaning that the prostitute will engage in conversation, kissing, etc., to give the feel of having a relationship similar to having a girlfriend.

(*Id.* at 5, ¶ 6.)

On August 29, 2018, the following text message conversation, as recorded by law enforcement, took place between Mr. Staker and Agent Noe:

AN: Hey love! We on for 7?

TS: Yeah!

TS: Where are you located?

AN: So looking forward to it! I have to freshen up a bit first. Why don't you go to that Home Depot place and then I'll text my location.

TS: Ok

AN: So where ya at now?

TS: Just got to Home Depot

AN: I'm at the Hilton Garden Inn. We need to be discreet so park at the Lowe's and text me when you get there. I'll let you know my room number then. I'm so wet and ready for you [emojis]

TS: On my way and ready for you!

TS: I'm here

AN: Come in the back door facing Lowe's, I propped it open. What ya wearing so I know it's you at my door?

TS: Black shirt and hat

TS: Room #?

AN: Ohhh, I love black on men. Turns me on. Come in and turn left at the hall. Room 113

TS: Ok

(*Id.* at 5-6, ¶ 7; *see also id.* at Exhibit 2, pp. 2-3.) When Mr. Staker arrived at room 113, he was immediately arrested. (*Id.* at 6, ¶ 9.) "Bozeman Police Detective Dan Mayland and Agent Noe *Mirandized* and interrogated Mr. Staker and seized his cell phone." (*Id.* at 6-7, ¶ 9.) Law enforcement seized cash from his person during a search incident to arrest. (*Id.* at 7, ¶ 9.)

The District Court denied Mr. Staker's motion to suppress evidence, concluding:

> Defendant had no actual subjective expectation of privacy in his messaging with Agent Noe. Even if Defendant had a subjective expectation of privacy, it is not an expectation that society is willing to accept as objectively reasonable. Therefore, Agent Noe did not engage in a search or seizure of the text exchange with Defendant.

(D.C. Doc. 58 at 12-13.)

SUMMARY OF THE ARGUMENTS

The District Court erred in concluding Mr. Staker did not have an actual subjective expectation of privacy in his cell phone text message communication. His expectation of privacy is evidenced by the precautions he took to protect his privacy in his communication with "Lily." His text message communications with Agent Noe constitute his written thoughts and he had an actual subjective expectation of privacy

that his thoughts were communicated to "Lily," a private citizen, not a government agent.

The District Court erred in determining that, even if Mr. Staker had a subjective expectation of privacy, it was not an expectation society is willing to accept as objectively reasonable. Text messaging is ubiquitous in society and this form of communication has replaced many of the conversations once conducted in person or by phone. The Montana Constitution affords citizens a greater right to privacy than the Fourth Amendment to the United States Constitution. Pursuant to Article II, Sections 10 and 11 of the Montana Constitution, and *State v. Goetz*, 2008 MT 296, 345 Mont. 421, 191 P.3d 489, and its progeny, society accepts as reasonable the expectation that government agents are not deceptively and surreptitiously communicating with us or monitoring and recording our conversations. Therefore, law enforcement's warrantless investigation of Mr. Staker constituted an illegal search and seizure.

Finally, only government agents were involved in the investigation. Based on the nature of the investigation, the remedy for

law enforcement's illegal search and seizure requires that all of the evidence, including all witness testimony, be suppressed.

STANDARD OF REVIEW

This Court reviews a district court's denial of a motion to suppress evidence "to determine whether the court's findings of fact are clearly erroneous and its interpretation and application of the law correct." *Goetz*, ¶ 9.

ARGUMENT

I. Law Enforcement's Warrantless Investigation Constituted an Illegal Search and Seizure as Mr. Staker had an Actual Subjective Expectation of Privacy in His Text Message Communication and Society Recognizes His Expectation as Objectively Reasonable.

The District Court erred in concluding that Mr. Staker did not have an actual subjective expectation of privacy in his text messaging with Agent Noe, that society was not willing to accept that expectation as objectively reasonable, and that a search did not occur. (*See* D.C. Doc. 58 at 12-13.) "The Fourth Amendment to the United States Constitution and Article II, Section 11 of the Montana Constitution protect citizens against unreasonable searches and seizures." *Goetz*, ¶ 13. Article II, Section 11 of the Montana Constitution provides:

> The 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.

The Fourth Amendment to the United States Constitution provides similar language. Article II, Section 10 of the Montana Constitution declares: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." This Court addresses:

> Article II, Section 10 in conjunction with Article II, Section 11 in analyzing and resolving a search or seizure issue that specifically implicates the right to privacy . . . Furthermore, "[i]n light of the constitutional right to privacy to which Montanans are entitled, [the Court has] held that the range of warrantless searches which may be lawfully conducted under the Montana Constitution is narrower than the corresponding range of searches that may be lawfully conducted pursuant to the federal Fourth Amendment."

Goetz, ¶ 14 (citations omitted).

> [S]ince *City of Billings v. Whalen* (1990), 242 Mont. 293, 790 P.2d 471, this Court has given increased protection to the privacy rights of Montana citizens, limiting the scope of search and seizure cases, and since *State v. Bullock*, [272 Mont. 361, 901 P.2d 61 (1995)], the Court has applied Article II, Section 10, "emphasizing privacy as a mechanism to support interpretation of search and seizure cases" . . . In the ensuing years, [the Court] consistently analyzed search and

> seizure cases involving significant privacy issues under both Sections 10 and 11 of Article II of the Montana Constitution.

Goetz, ¶ 23 (citing *State v. Hardaway*, 2001 MT 252, ¶ 51, 307 Mont. 139, 36 P.3d 900.).

This Court analyzes three factors to determine whether law enforcement's actions constitute an "unreasonable" and "unlawful" search or seizure in violation of the Montana Constitution: "1) whether the person challenging the state's action has an actual subjective expectation of privacy; 2) whether society is willing to recognize that subjective expectation as objectively reasonable; and 3) the nature of the state's intrusion." *Goetz*, ¶ 27. In regard to the first and second factors: "'A search occurs when the government infringes upon an individual's expectation of privacy that society considers objectively reasonable.'" *Goetz*, ¶ 25 (quoting *State v. Hamilton*, 2003 MT 71, ¶ 17, 314 Mont. 507, 67 P.3d 871.). As to the third factor, if a search has occurred without a warrant, "the State bears the burden of establishing that an exception to the warrant requirement justifies the search." *Goetz*, ¶ 40. In the present case, the third factor is not at issue as the State did not argue that an exception to the warrant requirement justified its warrantless search.

This Court has addressed cases analogous to the present case, which establish that Agent Noe's actions constituted an unreasonable search and seizure. Its landmark ruling in *Goetz* held the defendants had exhibited an actual subjective expectation of privacy in the face-to-face conversations they had in private settings with confidential informants (CI) and society was willing to accept their expectations as reasonable. *Goetz*, ¶¶ 30, 37, 54. It concluded: "the electronic monitoring and recording of the Defendants' conversations with the confidential informants [by law enforcement], notwithstanding the consent of the confidential informants, constituted searches subject to the warrant requirement of Article II, Section 11 of the Montana Constitution." *Goetz*, ¶ 54.

In *State v. Allen*, 2010 MT 214, 357 Mont. 495, 241 P.3d 1045, this Court held: "[the defendant] had a subjective expectation of privacy in his cellphone conversation with [a CI] and that our society is willing to recognize that expectation as reasonable." *Allen*, ¶ 61. It concluded the CI's: "recording of the conversation at the behest of law enforcement constituted a search under Article II, Sections 10 and 11 of the Montana Constitution." *Allen*, ¶ 61.

In *State v. Stewart*, 2012 MT 317, 367 Mont. 503, 291 P.3d 1187, this Court followed *Allen*. *See generally Stewart*. It held a warrantless search, involving a detective's surreptitious recording of landline/cell phone conversations between the defendant and his daughter, who accused the defendant of abusing her, was unreasonable. *Stewart*, ¶¶ 6-11, 40-44.

Goetz, *Allen* and *Stewart* are based on the robust protections Montanans enjoy pursuant to Article II, Sections 10 and 11 of the Montana Constitution. *Allen*, ¶ 47 ("Read together, Sections 10 and 11 provide robust protection to people in Montana against government intrusions. *See Goetz*, ¶ 14.").

A split of authority exists in the Montana Eighteenth Judicial District Court as to whether law enforcement must obtain a search warrant before surreptitiously engaging in electronic communication with a defendant. (*See, e.g.*, D.C. Doc. 53 at Exhibit A, *State v. Beam,* Montana Eighteenth Judicial District Court, Cause No. DC-12-161B, Findings of Facts, Conclusions of Law and Order (Apr. 10, 2013) (concluding defendant had no actual subjective expectation of privacy in his messaging on Facebook with a detective who assumed the identity

of another person nor would society recognize any such expectation); D.C. Doc. 51 at Exhibit C, *State v. Windham*, Montana Eighteenth Judicial District Court, Cause No. DC-13-118C, Findings of Fact and Conclusions of Law Supporting January 29, 2015 Order Granting Defendant's Motion to Suppress and Dismiss (Feb. 5, 2015) (attached as App. C)). In the District Court briefing, Mr. Staker relied, in part, on the Honorable John Brown's decision in *Windham*, while the State relied, in part, on the Honorable Mike Salvagni's decision in *Beam*. (*See generally* D.C. Docs. 51, 53, 56.)

Windham, while not controlling authority, is well-reasoned and an example of the type of governmental intrusion at issue in this case. In *Windham*, a detective used the online social media platform Facebook to create a fictitious user account of a 16-year old Bozeman High School student known as "Tammy Andrews." (App. C at 2, ¶¶ 1-2.) While the detective was logged into Facebook as "Tammy," he received an instant message from Windham and the two began exchanging instant messages on Facebook and text messages on their cell phones. (*Id.* at 2-3, ¶¶ 4-7.) The contact occurred as a result of a friend suggestion made by Facebook. (*Id.* at 2-3, ¶ 5.) The detective did not obtain a search

warrant permitting the creation of a fictitious account for his investigation, or for the monitoring or recording of the communications between himself, posing as "Tammy," and Windham. (*Id.* at 3, ¶ 10.) They became "friends" on Facebook. (*Id.* at 6, ¶ 26.) The detective captured their text messages via printed photographs and Facebook communications through a series of video screenshots. (*Id.* at 3, ¶¶ 9-10.) During the course of their communications, Windham made sexually suggestive comments to "Tammy," requested nude photographs of her, and sent her an image of a nude male. (*Id.* at 7-8, ¶¶ 31-36.) Ultimately, Windham and "Tammy," via text messages, arranged to meet in the Hastings store parking lot in Bozeman, Montana. (*Id.* at 8-9, ¶¶ 36-38.) Upon arriving at the parking lot, Windham was arrested and subsequently charged with Attempted Sexual Abuse of Children. (*Id.* at 9, ¶ 39.)

The district court concluded Windham had an actual expectation of privacy in his Facebook account in that: (1) to protect his privacy, Windham set his Facebook account on the most private setting; (2) he did not publicly speak online with "Tammy" and only the two had access to their conversations; (3) when he saw "Tammy" online, he

immediately questioned how they were friends; (4) a person who was not his friend could not have access to his page or be able to chat with him; (5) his account was password protected; and (6) he decided with whom he wanted to be friends. (*Id.* at 15-16, ¶¶ 18-19; *id.* at 28, ¶ 47; *id.* at 32, ¶ 61).

Relying on the views of the delegates to the Montana 1972 Constitutional Convention on privacy and electronic monitoring, *Goetz*, and a variety of other sources and case law supporting society's expectation of privacy in the use of electronic communication, the district court determined society recognized Windham's expectation of privacy in his Facebook messages and chats as reasonable. (*Id.* at 33-36, ¶¶ 63-71.) The district court suppressed all of the evidence relating to Windham's Facebook account, and all evidence gathered as a result of the intrusion, and dismissed the case. (*Id.* at 38-39, ¶ 78.)

A. Mr. Staker had an actual expectation of privacy in his cell phone text message communications with "Lily."

Mr. Staker had an actual subjective expectation of privacy in his cell phone text message communication. It is important to frame the particular privacy expectation at issue in this case: Justice Nelson, in his concurring opinion in *Allen*, correctly identified the evidence

unlawfully searched and seized by law enforcement in *Allen* was the defendant's "verbalized thoughts" conveyed to the CI, with the audio *recording* of those verbalized thoughts "being just one fruit on that tree." *See Allen*, ¶¶ 77, 132-33, 142 (Nelson, J., specially concurring). Here, Mr. Staker's text message communications with Agent Noe are his written thoughts and he had an actual subjective expectation of privacy that his thoughts were communicated to a private citizen, not a government agent.

"The touchstone of subjective expectations of privacy is not some physical location, but rather an individual's desire to keep some aspect of his or her life secure from the perception of the general public." *Allen*,¶ 48 (citing *Goetz*, ¶ 28; *Katz v. United States*, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places."). The analysis of Mr. Staker's subjective expectation of privacy is straightforward: (1) Mr. Staker believed he was engaging in a private conversation via text message from his personal cell phone with "Lily," a private citizen, not a government agent; (2) he did not text message publicly with "Lily"; (3) he did not share their text messages with anyone and only they had access to their conversations; (4) they

communicated using acronyms and vague terms, such as "FS, GFE" and "donation," evidencing their intent to keep the nature of their discussion private and nondescript; (5) he password protected his phone and only he had the ability to unlock his phone and view his text messages; (6) he kept his phone in his possession at all times; and (7) he did not loan his phone to other individuals.

Analogous to *Goetz*, Mr. Staker did not conduct his text message conversations where other individuals were present or physically within range to see them on his phone. *See Goetz*, ¶ 30 ("The Defendants did not conduct their conversations where other individuals were present or physically within range to overhear the conversations."). He chose to text message "Lily" in private, rather than call "her," thereby conducting his conversation without fear of others overhearing his conversation and ensuring it would remain between the two. *See Goetz*, ¶ 30. As in *Goetz*, he "kept [his text message] conversations away from prying eyes (and ears), and did not expose [his] conversations to the public's 'independent powers of perception.'" *Goetz*, ¶ 30. Certainly, the conversations were not of the nature that he would share them with others.

Mr. Staker's use of acronyms and vague terms is analogous to *Allen*, where this Court held the defendant had expressed a subjective expectation of privacy in his phone call with a CI, in part, because the defendant "limited his speech to innocuous platitudes, conveying no information about the topics [they] were discussing…." *Allen*, ¶ 49. *See also Stewart*, ¶ 37 (concluding defendant's vague and evasive responses supported defendant's claim he maintained an expectation of privacy in the conversations). The District Court discounted this assertion, stating "[a]cronyms are a now common part of text messaging and have become common in other forms of written and verbal communication. They are part of society's evolving vernacular. Defendant's use of acronyms does not so much suggest privacy as it does familiarity." (D.C. Doc. 58 at 12.) However, the District Court's analysis does not fully appreciate the private nature and context of the conversations at issue, which, of course, Mr. Staker assumed was with a private citizen. Logically, he would not have used those particular abbreviations had he believed "Lily" was a government agent. There is an obvious difference between the particular acronyms used by Mr. Staker and "Lily," versus common text-message acronyms, such as "LOL" for "laughing out loud."

The District Court's analysis touches upon the influence of electronic communication on oral communication and the inevitable convergence between the two. It recognized the use of acronyms are a common part of text messaging and have become common in other forms of written and oral communication. This convergence is but one of the reasons the Montana Constitution must protect text messages the same as oral communication. Mr. Staker's actions evidence he had an actual subjective expectation of privacy in his text message communication.

B. Society recognizes Mr. Staker's actual subjective expectation of privacy in his cell phone text message communication as reasonable.

Society is willing to recognize Mr. Staker's expectation of privacy as reasonable.

> "The reasonableness inquiry hinges on the essence of underlying constitutional values—including respect for *both* private, subjective expectations and public norms. In assessing the constitutionality of technologically enhanced government surveillance in a particular case, we must identify the values that are at risk, and vest the reasonable-expectation-of-privacy test with those values."

Goetz, ¶ 31 (quoting *State v. Blow*, 602 A.2d 552, 555 (Vt. 1991)).

Public norms in communication have evolved since the advent of modern electronic communication. "As [the] United States Supreme Court noted over forty years ago, the telephone has come to play a vital role in private communications. *Katz*, 389 U.S. at 352, 88 S.Ct at 512. This role is even more pronounced today, and cell phones are ubiquitous in Montana, as elsewhere." *Allen*, ¶ 56 (citing *City of Ontario v. Quon*, 560 U.S. 746, 760 (2010)). "Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification." *Quon*, 560 U.S. at 760. Forms of communication once conducted only face-to-face or by phone are now being replaced by text messages. A 2011 Pew Research Center survey found: "Some 83% of American adults own cell phones and three-quarters of them (73%) send and receive text messages." Aaron Smith, *Americans and Text Messaging*, Pew Research Center, Washington D.C. (Sept. 19, 2011), https://www.pewresearch.org/internet/2011/09/19/americans-and-text-messaging/. The survey determined: "Young adults are the most avid texters by a wide margin[,]" and cell phone owners "between the ages of

18 and 24 exchange an average of 109.5 messages on a normal day[.]" *Id.*

In a 2014 Gallup survey, 39% of Americans reported communicating by text message "a lot" on the day prior to being interviewed, compared to using a cell phone (38%), email (37%), or a home landline phone (9%). Frank Newport, *The New Era of Communication Among Americans*, Gallup (Nov. 10, 2014), https://news.gallup.com/poll/179288/new-era-communication-americans.aspx. The survey found:

> Sending and receiving text messages *is the most prevalent form of communication* for Americans younger than 50. More than two-thirds of 18- to 29-year-olds say they sent and received text messages "a lot" the previous day, as did nearly half of Americans between 30 and 49.

Id. (emphasis added). According to Gallup:

> One of the most striking cultural and social changes in the U.S. in recent decades has been the revolution in the ways Americans communicate. Until recently, humans were confined to communicating face to face and through letters and the traditional landline phone. Now, computer and smartphone use has dramatically accelerated, and texting, cellphones and email are the most commonly used modes of communication out of seven tested in this research. The use of social media is fourth.

Id.

Along with the proliferation of electronic communication and data, society has developed a corresponding expectation of privacy.

> [A]ccording to a USC-Annenberg Center for the Digital Future survey, 70% of millennials responded favorably that, "'No one should ever be allowed to have access to my personal data or web behavior.'" That being said, those millennials seem comfortable voluntarily ceding over some of their online privacy in exchange for benefits received in return. But, even millennials are not willing to give up online privacy without their knowledge and consent.

Charles MacLean, *Katz on a Hot Tin Roof: The Reasonable Expectation of Privacy Doctrine is Rudderless in the Digital Age, Unless Congress Continually Resets the Privacy Bar*, 24 Alb. L.J. Sci. & Tech. 59 (2014), http://www.albanylawjournal.org/Documents/Articles/24.1.47-MacLean.pdf.

"As a general rule … the public policy of the State of Montana is set by the Montana Legislature through its enactment of statutes[.]" *Duck Inn, Inc. v. Mont. St. Univ.*, 285 Mont. 519, 523–24, 949 P.2d 1179, 1182 (1997). In recent years, the Montana Legislature has addressed societal privacy concerns related to modern electronic data and technology. It has enacted legislation prohibiting government entities, with limited exceptions, from obtaining from electronic devices, without a search warrant, location information (§ 46-5-110, MCA) and

stored data (§ 46-5-112, MCA), and to restrict governmental use of license plate readers (§ 46-5-117, MCA).

Perhaps nothing demonstrates American society's expectation of privacy in the content of its text messages more than a 2017 Reuters/Ipsos opinion poll, which found: "A majority of Americans are unwilling to share their personal emails, text messages, phone calls and records of online activity with U.S. counter-terrorism investigators—even to help foil terror plots[.]" Dustin Volz, *Most Americans Unwilling to Give Up Privacy to Thwart Attacks: Reuters/Ipsos Poll*, Thomson Reuters (Apr. 4, 2017), https://www.reuters.com/article/us-usa-cyber-poll/most-americans-unwilling-to-give-up-privacy-to-thwart-attacks-reuters-ipsos-poll-idUSKBN1762TQ. According to the poll, 73% of Americans answered "no" when asked: "Would you be willing to give up privacy of TEXT MESSAGES if it would help the US government foil domestic terrorist plots?" Matthew Weber, *Reuters Graphics*, Thomson Reuters/Ispos (2017), http://fingfx.thomsonreuters.com/gfx/rngs/USA-CYBER-POLL/010040FY10R/index.html. In a post-9/11 world, this statistic is remarkable.

In *Goetz*, this Court quoted from the debates of the delegates to the 1972 Constitutional Convention regarding their concerns about government electronic monitoring and surveillance, and the inclusion of the right to privacy in the Montana Constitution:

> Delegate Campbell stated that "the [Bill of Rights] committee felt very strongly that the people of Montana should be protected as much as possible against eavesdropping, electronic surveillance, and such type of activities.... [W]e found that the citizens of Montana were very suspicious of such type of activity." Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, p. 1682. Delegate Dahood reported even more strongly: "[I]t is inconceivable to any of us that there would ever exist a situation in the State of Montana where electronic surveillance could be justified.... [W]ithin the area of the State of Montana, we cannot conceive of a situation where we could ever permit electronic surveillance." Transcript, p. 1687. Thus, the Constitutional Convention delegates were aware of the great value Montana citizens place on the right to privacy and the clear risk to that privacy engendered by the existence and advancement of electronic technology as used by law enforcement.

Goetz, ¶ 33.

While the technology to communicate via text message did not exist at the time of the Montana 1972 Constitutional Convention, this Court has stated:

> [I]t is clear that the delegates' concerns encompassed the invasion of citizens' privacy without their knowledge by means of various sorts of electronic audio and visual

> monitoring and surveillance equipment. Not only were the delegates wary of existing technology of this type, but they recognized that this sort of technology would continue to be refined and would become more widespread and easily available. In this regard their concerns have been well-founded. Moreover, it is also clear that, in the delegates' view, the use of this sort of technology should be justified only in the most serious of situations, involving heinous crimes where it is necessary to "risk the right of individual privacy because there is a greater purpose to be served."

Goetz, ¶ 34 (quoting *State v. Siegal*, 281 Mont. 250, 277, 934 P.2d 176, 192 (1997), *overruled in part by State v. Kuneff*, 1998 MT 287, 291 Mont. 474, 970 P.2d 556).

In *Allen*, this Court observed:

> This generalized distrust of electronic monitoring also appears in the comment of the Bill of Rights Committee that "the privacy of communications should remain inviolate 'from state-level interceptions.'" Montana Constitutional Convention, Committee Proposals, Feb. 22, 1972, p. 633. Further indicating that *all communications should enjoy protections from government intrusion*, the committee commented that "any ... legislative enactment [allowing wiretapping] would require, [under Section 10 and Section 11], the showing of a compelling state interest." *Id.*

Allen, ¶ 54 (emphasis added).

Text message communication has become so omnipresent in society that the Montana Constitution provides it with the same level of privacy protections as the spoken word. To conclude otherwise would

have a profound chilling effect on the use of all modern electronic communication.

While the disposition of this case must be determined by analyzing the robust privacy protections provided by the Montana Constitution, it is notable the United States Supreme Court has recently found societal expectations of privacy in electronic data. In *Riley v. California*, 573 U.S. 373 (2014), the Supreme Court held that, under the Fourth Amendment, law enforcement generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. *See generally Riley*, 573 U.S. at 381-86, 403. It opined that a search of a cell phone can be more revealing than a search of a home:

> In 1926, Learned Hand observed (in an opinion later quoted in *Chimel*) that it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." … If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.

Id. at 396-97 (citation omitted).

The Supreme Court was not deterred by the fact that law enforcement efforts to combat crime would be impacted by requiring a search warrant prior to searching a cell phone's contents, declaring: "Privacy comes at a cost." *Id.* at 401. It held:

> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, *they hold for many Americans "the privacies of life*," … The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. *Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.*

Id. at 403 (citation omitted) (emphasis added).

In *Carpenter v. United States*, __ U.S. __, 138 S. Ct. 2206 (2018), the United States Supreme Court rejected the use of the third-party doctrine where law enforcement obtained the defendant's cell phone tracking information, called cell-site location information (CSLI), from the defendant's wireless carriers—MetroPCS and Sprint. *Id*. at 2212, 2223. The third-party doctrine provides: "that 'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.'" *Id.* at 2216 (quoting *Smith v. Maryland*, 442 U.S. 735, 743-744 (1979)). Law enforcement had obtained the defendant's

CSLI pursuant to a court order issued under the Stored Communications Act, which required the government to show "reasonable grounds to believe" the records were "relevant and material to an ongoing investigation." *Id.* at 2212 (citing 18 U.S.C. § 2703(d)). The government used the CSLI at trial and argued the defendant, who was convicted on firearm counts, was "'right where the … robbery was at the exact time of the robbery.'" *Id.* at 2212-13.

The Supreme Court held:

> Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.

Id. at 2217.

Montanans use text messages to communicate with family members, romantic partners, friends, doctors, psychiatrists, psychologists, mental health and addiction counselors, clergy, and attorneys, to name a few. *Cf. id.* at 2218 ("A cell phone faithfully follows its owner beyond public thoroughfares and into private residences,

doctor's offices, political headquarters, and other potentially revealing locales."). Montanan's expect their text message communications will be with their intended recipient, not a government agent who is monitoring and preserving the conversation.

Agent Noe obtained a cell phone for the purpose of deceptively and surreptitiously conversing with individuals in order to acquire their written thoughts in the form of text messages. He obtained and used his cell phone to communicate directly with citizens and to record and monitor the conversation in support of their prosecution. The intrusion, at issue, "is the fact of gathering [written] evidence [from Mr. Staker directly and surreptitiously by a government agent,] without a warrant, with the recording being just one fruit on that tree." *Allen*, ¶ 142 (Nelson, J., specially concurring).

If society recognizes an individual's expectation of privacy in his or her face-to-face conversations (*Goetz*), cell phone and landline voice conversations (*Allen* and *Stewart*), and Facebook/cell phone text messages (*Windham*), society would recognize Mr. Staker's subjective expectation of privacy in his cell phone text message conversations with his intended recipient. Moreover, if the United States Supreme Court

would find a legitimate expectation of privacy in the record of a person's *physical movements* under the Fourth Amendment, then he has a legitimate expectation of privacy in his written thoughts communicated via text message under the robust protective provisions of Article II, Sections 10 and 11 of the Montana Constitution.

C. The District Court erred in distinguishing text message communication from oral communication on the basis that text messages are "recorded."

The District Court erred in concluding Mr. Staker's text message communication with "Lily" is different from the oral communication at issue in *Goetz*, *Allen* and *Stewart* because, it reasoned, "the content of the communication was recorded by virtue of the fact that [he] composed and sent messages by electronic means." (D.C. Doc. 58 at 7, 12.) By narrowly focusing on "recordings," the District Court failed to distinguish the expectation of privacy at issue in this case with the expectations of privacy at issue in *Goetz*, *Allen* and *Stewart*. Those cases involved only limited participation on the part of the government agents, with the monitoring and recording of the defendants' conversations being the extent of their unlawful search and seizure. Instead, private citizens acquired the defendants' verbalized thoughts

through oral conversations. *See Goetz*, ¶¶ 5, 7; *Allen*, ¶¶ 8-9; *Stewart*, ¶¶ 6-11. The government agents merely requested that the private citizens allow them to surreptitiously monitor and/or record the defendants' verbalized thoughts and, in *Goetz* and *Stewart*, provided the means to do so. *See Goetz*, ¶¶ 5, 7; *Allen*, ¶ 9. *Stewart*, ¶ 6. The expectation of privacy at issue in *Goetz*, *Allen* and *Stewart* was that government agents were not *monitoring* and *recording* the defendants' conversations with private citizens.

However, the expectation of privacy at issue in this case is that government agents are not directly gathering evidence from Montana citizens, whether it be through the search of their homes or by deceptively and surreptitiously acquiring their verbalized and/or written thoughts, without first obtaining a warrant. Here, government agents alone were involved in the operation from start to finish. Agent Noe created the "Lily" advertisement and posted it on various websites. He acquired a cell phone specifically for the purposes of *receiving* and *responding* to inquiries related to his advertisements. He fabricated "Lily" in order to surreptitiously *communicate directly* with individuals. He communicated directly with Mr. Staker for the purpose of gathering

and preserving his written thoughts as evidence of his intent to commit the charged offense. Agent Noe did so without any judicial oversight.

The District Court's assertion, that Montana citizens do not have the same expectation of privacy in text message communication as they do in oral communication, because text messages are "recorded," would come as a surprise to Montanans. So, too, would the District Court's suggestion that Montanans must substitute phone calls and internet-based audio or video programs for text messages in order to protect their privacy. (D.C. Doc. 58 at 7, 8, 12.) After reviewing the transcript of the Montana Constitutional Convention, this Court determined "that the protections of the right to privacy were *intended to be dynamic*" and "as technological advancements allow personal communications to occur beyond a single physical setting, *the constitutional protections of the right to privacy keep pace and are not left behind with each passing epoch*." *Allen*, ¶ 55 (emphasis added). Text messages are increasingly replacing phone calls and face-to-face conversations and Montanans have a right to select their preferred form of communication *and* maintain their privacy. *Cf. Allen*, ¶ 48 ("Furthermore, to maintain a subjective expectation of privacy in an activity or property, a person

need not take extraordinary precautions to shield that activity or property from the public.") (citing Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, vol. 1, § 2.1(c), 438–39 (4th ed., Thompson West 2004)).

When an individual communicates by text message, the necessary and unavoidable result is the receipt of a written text message by the intended recipient. Text messages can be more revealing than oral conversations and are routinely used to share extremely private, personal and sensitive information in ways oral conversations cannot. For example, in addition to communicating written thoughts, text messages can be used to share intimate photos and videos; express emotions on controversial topics through the use of emojis; express social, political or religious views through GIFs; share criticism of mayors, governors and presidents through memes; and send audio recordings of one's voice. Text messages, like oral communication and location data, reveal a person's "'familial, political, professional, religious, and sexual associations.'" *Carpenter*, 138 S. Ct. at 2217 (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring). They "'hold for many Americans the "privacies of life."'"

Id. (citing *Riley*, 573 U.S. at 403). It is not merely the "recordings" of our electronic communication that must be safeguarded from unlawful governmental intrusion—it is our mental thoughts and expressions—the actual content and meaning of our communication—that society expects to remain private.

Given the breadth of private information Montanans share by text message, and the permanent nature of the communication, government agents should not be given free rein to intrude directly into our private thoughts and expressions without probable cause and judicial oversight and approval. *Cf. Allen,* ¶ 56 ("To allow participant monitoring and recording of telephone conversations without a warrant and, thus, subject only to the self-restraint of law enforcement would 'undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in free society.'") (citing *United States v. White*, 401 U.S. 745, 787 (1971) (Harlan, J., dissenting)). As the United States Supreme Court has observed:

> "[I]t is ... immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel

> invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

Chandler v. Miller, 520 U.S. 305, 322 (1997) (quoting *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)). *See also Allen*, ¶ 58 ("When we allow the police to bypass the warrant requirement as an undue hindrance to effective law enforcement, we have effectively forfeited our rights to privacy and freedom from unreasonable searches.").

Undoubtedly, Montanans and the delegates to the 1972 Montana Constitutional Convention would find the government's unauthorized intrusion herein to be unbearable, where law enforcement deceptively and surreptitiously conducted a warrantless operation to communicate directly with Mr. Staker and other citizens on their personal cell phones for the purposes of acquiring their written thoughts in support of their arrest.

D. The District Court erred in applying a version of the third-party doctrine.

The District Court erred in applying a version of the "third-party doctrine" to this case. It reasoned: "Even if 'Lily' had not been a law

enforcement officer, nothing prevented 'Lily' from voluntarily sharing the text messages with law enforcement." (D.C. Doc. 58 at 8.)

In *Goetz*, this Court, after citing the delegates to the 1972 Montana Constitutional Convention, explicitly rejected that citizens lose their privacy interests by communicating with an individual who could share the information with a third person:

> We are convinced that Montanans continue to cherish the privacy guaranteed them by Montana's Constitution. Thus, while we recognize that Montanans are willing to risk that a person with whom they are conversing in their home or other private setting may repeat that conversation to a third person, we are firmly persuaded that they are unwilling to accept as reasonable that the same conversation is being electronically monitored and recorded by government agents without their knowledge.

Goetz, ¶ 35. *Cf. Carpenter*, 138 S. Ct. at 2217 ("Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection."). Analogous to face-to-face conversations, while Montanans are willing to risk that the intended recipient of a private text message may repeat the conversation to a third person, they are unwilling to risk that the recipient is a government agent deceptively and surreptitiously monitoring and recording the conversation.

E. The District Court erred in concluding the nature of the communication and familiarity of the participants is determinative.

The District Court erred in concluding: "Defendant agreed to engage in criminal activity with a complete stranger. He could not have any confidence that the stranger would zealously guard his communications." (D.C. Doc. at 12.) In *Goetz*, this Court determined the fact that an individual engages in "criminal activity" and/or discusses criminal activity with another has no bearing on the individual's expectation of privacy in the individual's conversations in either setting:

> Nor should *the underlying purpose or content of the conversations at issue* reflect upon society's willingness to accept a subjective expectation of privacy in those conversations as reasonable. As the Supreme Court of Alaska aptly stated,
>
> > [a]ll of us discuss topics and use expressions with one person that we would not undertake with another and that we would never broadcast to a crowd. Few of us would ever speak freely if we knew that all our words were being captured by machines for later release before an unknown and potentially hostile audience. No one talks to a recorder as he talks to a person.... One takes the risk that his friend may repeat what has been said. One shouldn't be required to take the additional risk of an entirely different character—that his conversation is being surreptitiously transcribed or broadcast.

> .... It is axiomatic that police conduct may not be justified on the basis of the fruits obtained. *It is, of course, easy to say that one engaged in an illegal activity has no right to complain if his conversations are broadcast or recorded. If, however, law enforcement officials may lawfully cause participants secretly to record and transcribe private conversations, nothing prevents monitoring of those persons not engaged in illegal activity, who have incurred displeasure, have not conformed or have espoused unpopular causes.*

Goetz, ¶ 36 (citing *State v. Glass*, 583 P.2d 872, 877–78 (Alaska 1978) (emphasis added)). *See also Allen*, ¶ 58 ("Nothing in the transcripts of the Constitutional Convention suggests that the delegates wished to jettison the presumption of innocence and presume that all parties to a conversation who do not consent to its monitoring are engaged in criminal activity. To the contrary, our presumption must be that persons conversing on phones are doing so legitimately and thus they have a reasonable expectation of privacy.").

The District Court's assertion, that an individual has no subjective expectation of privacy with a "stranger," was also rejected in *Goetz*. While the relationship in *Goetz* between the CIs and the defendants was not expanded upon in the majority opinion, Justice Rice's dissent argued there was no expectation of privacy for the defendants in their conversations with "strangers" and "non-confidents" while engaging in a

public and commercial like criminal enterprise. *See Goetz*, ¶ 92-94, 96, 113-14 (Rice, J. dissenting). As a practical matter, the District Court's "stranger" rationale would deprive Montana citizens of their right to privacy in all of the conversations they have with individuals they do not know. Given that everyone a person encounters initially is a "stranger," it would illogically exempt first-time romantic, employment and other lawful inquiries, regardless of their private nature.

Finally, the fact that Mr. Staker believed he was conversing with a private citizen—not a government agent—is critical. In *Windham*, the district court aptly took particular exception to the detective's warrantless deception:

> Just as Montanans are willing to risk that a person with whom they are having a private online conversation via Facebook may repeat that conversation, they are unwilling to accept as reasonable that the same conversation is being electronically monitored and recorded by government agents without their knowledge. *See Goetz*, ¶ 35. Given the relatively small number of fictitious profiles, it is also not reasonable for Windham to assume that the person he is talking to is a fraud. Windham has the right to believe that the person he is communicating with is in fact that person. That level of deception would require a finding of probable cause by an independent judge. For this Court to hold otherwise would mean close to half of our communication is subject to government monitoring and the Orwellian state which the framers of the Constitution sought to avoid would be true.

(App. C at 36, ¶ 70.) Given society's ubiquitous use of text messaging, it would be Orwellian to require Mr. Staker, or any Montana citizen, to assume the individual he intended to converse with was a government agent, deceptively and surreptitiously acquiring his written thoughts for the purposes of criminal prosecution.

F. The cases relied upon by the District Court are inapplicable to Montana law.

Recognizing "[t]here are no Montana Supreme Court cases involving the application of *Goetz* to electronic communication devices transmitting text messages, emails, or messages sent through a social networking program, such as Facebook[,]" the District Court relied on *United States v. Mack*, 53 F. Supp. 3d 179 (D.D.C. 2014), *Commonwealth v. Diego*, 119 A.3d 370 (Pa. Super. 2015), *United States v. Charbonneau*, 979 F. Supp. 1177 (S.D. Ohio 1997), *United States v. King*, 55 F.3d 1193 (6th Cir. 1995), and *State v. Athan*, 158 P.3d 27 (Wash. 2007). (*See* D.C. Doc. 58 at 8-11.) Those cases are inapplicable because they address the U.S. Constitution and/or other state constitutions, rather than the uniquely robust protections provided by Article II, Sections 10 and 11 of the Montana Constitution. To date, not

a single federal court or state court outside of Montana has followed this Court's landmark decision in *Goetz* or its progeny upon which this case must be decided. Because those cases do not analyze Article II, Sections 10 and 11 of the Montana Constitution, they are irrelevant.

G. The State's search and seizure was *per se* unreasonable.

"A search occurs when the government infringes upon an individual's expectation of privacy that society considers objectively reasonable." *Goetz*, ¶ 25. Here, factors one and two of the three-factor test articulated in *Goetz* establish that a warrantless search occurred. *See Goetz*,¶ 27. Because the State did not argue, under the third factor, that a recognized exception to the warrant requirement justified the search, it was "*per se* unreasonable." *Goetz*, ¶ 40.

II. The Remedy for the State's Unlawful Search and Seizure is Suppression of all of the Evidence.

After determining that an illegal search and seizure has occurred, this Court determines the remedy for the district court to apply on remand. *See*, *e.g.*, *Allen*, ¶ 65 ("In the event of a new trial, the recording of [the CI] and [the defendant's] conversation may not be admitted into evidence."); *Allen*, ¶ 65 n. 2; *Stewart*, ¶ 31 ("[The defendant] is entitled

to have this Court's holding in *Allen* applied to his case, with the result that if there was indeed an *Allen* violation, then [he] is entitled to relief for that violation—i.e., a new trial in which the challenged evidence is excluded—unless the *Allen* violation was harmless.").

The remedy for the State's unlawful search and seizure is suppression of all of the evidence gathered as a result of the search, which includes Mr. Staker's and Agent Noe's text message communication and *all testimonial evidence* regarding the communication. *Cf. Murray v. United States*, 487 U.S. 533, 536 (1988) ("The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search … and of testimony concerning knowledge acquired during an unlawful search[.]") (citations omitted). "'The purpose of the exclusionary rule is to "deter illegal police conduct and preserve judicial integrity."'" *State v. Ellis,* 2009 MT 192, ¶ 48, 351 Mont. 95, 210 P.3d 144 (quoting *State v. Malkuch*, 2007 MT 60, ¶ 13, 336 Mont. 219, 154 P.3d 558).

In *Allen*, this Court explained why its holding required only suppression of the audio recording:

> Justice Nelson's concurrence suggests that the Court's decision does not go far enough. He argues that failing to

> suppress [the CI's] testimony "is akin to suppressing evidence obtained by means of an unlawful entry into the defendant's home, but then allowing the officers to testify about that evidence and the fact that they found it in the defendant's home." First of all, since Allen's motion was to suppress the recording, not [the CI's] testimony, the issue is not before the Court. Secondly, the analogy fails. In the hypothetical, but for the illegal entry, the officer would not have been in the home to make observations. Accordingly, his observations and testimony along with the physical evidence obtained are fruits of the poisonous tree. Here [the CI's] engaging in a cell phone conversation with Allen is not poisoned by the fact of the recording. It cannot be said that, but for the illegal recording, [the CI] would not have been conversing with Allen, particularly given that he invited her to participate in this escapade to begin with.

Allen, ¶ 65 n. 2.

In *Stewart,* this Court analyzed whether the defendant was entitled to retroactive application of its recent holding in *Allen*. *Stewart*, ¶ 31, 44. Analyzing the case under *Allen*, it held the recordings of the defendant's conversations with his daughter (A.S.) by a detective violated his rights under Montana's Constitution, but also held the admission of the recordings at trial was harmless error. *See Stewart*, ¶¶ 32-51, 72. Because this Court was confined to applying its holding in *Allen*, it observed: "Whatever expectation of privacy Stewart may have had in his conversations with A.S., it could *not* include, **for purposes of *Allen*, the expectation that the conversations would be kept**

secret and never repeated." *Stewart*, ¶ 38 (italics emphasis in original) (bold emphasis added).

This Court, after expressly referring to Justice Nelson's arguments in his concurrence in *Allen*, that "logically, *all* evidence of the conversations [in *Allen*] should [have been] suppressed[,]" and Justice Rice's concurrence and dissent on the issue, stated:

> What this means, then, **for present purposes**, is that the relevant expectation of privacy is not strictly **in the content of the conversations**, since **nothing in *Allen*** precluded A.S. from testifying in court as to what Stewart had said. Rather, the expectation of privacy **under *Allen*** is that the government is not monitoring the conversations and making recordings of them. *Allen,* ¶ 49 ("We conclude that Allen had a subjective expectation of privacy that the conversation was not being surreptitiously recorded by a police informant.").

Stewart, ¶ 38 (italics emphasis in original) (bold emphasis added).

Reading *Stewart* and *Allen* together with Justice Nelson's concurring opinion in *Allen*, neither *Allen* nor *Stewart* prohibit the suppression of in-court testimony in this case. In *Allen,* Justice Nelson stated: "Nevertheless, **for purposes of the present case**, treating 'the fact of the recording' as the poisonous tree is arguably correct, given that Allen requested suppression of only the recording, and not [the CI's] testimony about their conversation." *Allen*, ¶ 142 (Nelson, J.

specially concurring) (emphasis added). This Court's use of "for present purposes" in *Stewart*, similar to Justice Nelson's use of "for purposes of the present case" in his concurrence in *Allen*, allows for a properly-framed challenge to a government agent's direct search and gathering of an individual's verbalized or written thoughts rather than simply the "recording" of those thoughts.

Unlike the defendant in *Allen*, Mr. Staker specifically moved to suppress all of the evidence, including testimonial evidence, acquired as a result of the State's illegal search and seizure. (D.C. Doc. 52.); s*ee* *Allen*, ¶ 65 n. 2. Whether testimonial evidence should be suppressed is squarely before this Court.

The limited expectation of privacy at issue in *Allen* and *Stewart* was that government agents were not surreptitiously monitoring and recording the defendants' conversations with private citizens. As evidenced above, this Court, in *Allen*, simply did not see the rationale behind suppressing a witness' testimony regarding *the content of the conversation* she and defendant may have engaged in despite law enforcement's involvement. Unlike the present case, *Goetz* and *Stewart* are analogous to *Allen* as it cannot be said that, but for the illegal

recordings in *Goetz* and *Stewart*, the private citizens would not have been conversing with the defendants that would have justified the suppression of witness testimony in addition to the audio recordings. *See Allen*, ¶ 65 n. 2.

The expectation of privacy at issue in this case is that a government agent was not deceptively and surreptitiously directly gathering Mr. Staker's written thoughts, *in addition to* monitoring and recording the conversation. The present case is distinguishable from *Goetz*, *Allen* and *Stewart*, as the State's unlawful intrusion is far more egregious: "Lily" was a government agent, rather than a private citizen, deceptively and surreptitiously gathering written evidence from Mr. Staker. Applying the *Allen* but-for test in the present case, it is undisputable that, but for Agent Noe's warrantless search in this case, Mr. Staker would not have been conversing with Agent Noe. *See Allen*, ¶ 65 n. 2. The exclusionary rule's purpose is to deter illegal police conduct. However, a ruling suppressing the actual text message communication in this case, but allowing a government agent to testify to the contents of those text messages, would deter no one. Rather, it would encourage government agents to avoid judicial oversight and

approval entirely because they may, nonetheless, testify about the fruits of their unrestrained, unlawful searches and seizures. Indeed, it is akin to Justice Nelson's hypothetical in *Allen* of "suppressing evidence obtained by means of an unlawful entry into the defendant's home [(i.e., suppressing evidence obtained by means of an unlawfully acquiring Mr. Staker's written thoughts expressed in text messages)], but then allowing the officers to testify about that evidence and the fact that they found it in the defendant's home [(i.e., but then allowing Agent Noe to testify about the contents of the text messages)]." *Allen*, ¶¶ 74, 140 (Nelson, J., specially concurring); *Allen*, ¶ 65 n. 2. In contrast to *Goetz*, *Allen* and *Stewart*, the intrusion at issue in this case "is the fact of gathering [written] evidence [from Mr. Staker directly and surreptitiously by a government agent,] without a warrant, with the recording being just one fruit on that tree." *Allen*, ¶ 142 (Nelson, J., specially concurring).

CONCLUSION

For the foregoing reasons, Mr. Staker respectfully requests that the District Court's Order, dated September 17, 2019, be reversed and all evidence resulting from the illegal search be suppressed.

RESPECTFULLY SUBMITTED this 24th day of April, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double spaced with the exception of quoted and indented material; and the word count, calculated by Microsoft Word, is 9,991 words, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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APPENDIX

CERTIFICATE OF SERVICE

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