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.

REPLY BRIEF OF APPELLANT

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

APPEARANCES:

MARK J. LUEBECK
Angel, Coil & Bartlett
125 W. Mendenhall, Suite 201
Bozeman, Montana 59715
406.586.1926
mluebeck@angelcoilbartlett.com

Attorney for Defendant and Appellant

TIMOTHY C. FOX
Montana Attorney General
MARDELL PLOYHAR
Assistant Attorney General
215 N. Sanders
P.O. Box 201401
Helena, MT 59620-1401

Continued on Next Page

MONTANA ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
Colin M. Stephens, President
Smith & Stephens, P.C.
315 W. Pine
Missoula, MT 59802

Attorney for Amicus Curiae MTACDL

MARTIN D. LAMBERT
Gallatin County Attorney
BJORN E. BOYER
Deputy County Attorney
1709 W. College
Bozeman MT 59715

Attorneys for Plaintiff and Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

ARGUMENT

Appellant, Travis Staker, respectfully replies to the State's Brief of Appellee as follows:

I. The State Violated Mr. Staker's Right to Privacy Under Article II, Sections 10 and 11 of the Montana Constitution Requiring Suppression of All of the Evidence.

The State argues that Mr. Staker:

> could not have reasonably expected that the messages he sent to the number in the advertisement would remain private. Regardless of what he did with his phone, he knew that the messages would be contained in the recipient's phone, and that the recipient could do anything they wanted to do with the messages.

(Appellee's Brief at 30.) Citing *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, and *State v. Stewart*, 2012 MT 317, 367 Mont. 503, 291 P.3d 1187, the State argues:

> As the Court observed in *Stewart*, Staker could not, based on *Allen*, have a subjective expectation that his conversations with "Lily" would remain private. *Stewart*, ¶¶ 38, 40; *see also Allen*, ¶ 65 n.2. This Court's analysis is therefore consistent with the United States Supreme Court's analysis of the third-party doctrine. Under the Fourth Amendment and under the Montana Constitution, a person does not have a subjective expectation of privacy in statements they have voluntarily made to another person if that person discloses

> the statements. *Stewart*, ¶¶ 38, 40; *Allen*, ¶ 65 n.2; *Goetz*, ¶ 35.

(Appellee's Br. at 27; *see also* Appellee's Br. at 28.)

The State further argues, in the alternative, "if this Court concludes that the text messages were an unlawful recording, *Allen* and *Goetz* still permit Agent Noe to testify about his conversations with Staker, which occurred via text message." (Appellee's Br. at 34-35.)

The State fails to appreciate the limitations of the holdings in *Goetz*, *Allen* and *Stewart*. The expectation of privacy addressed by this Court in those cases was that government agents were not surreptitiously monitoring and recording the defendants' conversations with private citizens. *See generally Goetz*; *Allen*; *Stewart*. The present case is distinguishable from *Goetz*, *Allen* and *Stewart*, as "Lily" was a government agent, rather than a private actor, who deceptively and surreptitiously gathered written evidence from Mr. Staker. Mr. Staker does not argue that he had, or could have had, a reasonable expectation of privacy that "Lily," *as a private actor*, would not share his text messages with another person or even the government. Had "Lily" been a private actor, rather than Agent Noe, it would not have been unlawful for Agent Noe to accept Mr. Staker's text messages from "Lily" without

a warrant. However, Mr. Staker had a reasonable expectation of privacy that he was text messaging with "Lily," a private citizen, not a government agent who was acquiring his written thoughts. The legal distinction between government actors and non-government actors was addressed in *Goetz*:

> 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 (emphasis added). Agent Noe violated Mr. Staker's reasonable expectation of privacy by electronically monitoring, recording and communicating with him *without his knowledge*. The State misapprehends this critical distinction.

The State asserts: "It is common knowledge that the person receiving the text message could be a law enforcement officer or could share the message with anyone, including law enforcement." (Appellee's Br. at 28.) The State's *ipse dixit* assertion, that Montanans should assume the government is monitoring them via text message,

presupposes an Orwellian Montana, not the Montana enshrined in Article II, Section 10 of the Montana Constitution. Were this Court to accept this premise, it follows that Montanans should assume the government is monitoring them through their phone calls. It further follows that Montanans should assume the government is monitoring their private conversations. This bald assertion flies in the face of 43 years of this Court's Article II, Section 10 precedent, beginning with *State v. Sawyer*, 174 Mont. 512, 571 P.2d 1131 (1977), *overruled in part on other grounds by State v. Long*, 216 Mont. 65, 71, 700 P.2d 153, 157 (1985), and explicitly in the face of *Goetz*.

This Court's recent decision, in *State v. Wolfe*, 2020 MT 260, __ Mont. __, __ P.3d __, establishes that Article II, Sections 10 and 11 of the Montana Constitution apply to *any* government action, even actions carried out by private citizens working at the behest of the government. *Wolfe*, ¶¶ 12-13. *Wolfe* further provides the remedy for a violation of those constitutional protections requires suppression of testimonial evidence as to what the individual heard and learned, in addition to what was "recorded." *Wolfe*, ¶¶ 12, 14.

In *Wolfe*, "A.O. and her friend Tricia went to the Dillon Police Department and alleged that [the] defendant … had committed sexual offenses against A.O." *Wolfe*, ¶ 3. Officer Ternes and Officer Alvarez interviewed A.O. and recorded the interview via body camera. *Wolfe*, ¶ 3. Before and during the interview, the defendant called A.O. on her cell phone. *Wolfe*, ¶¶ 3-4. A.O. allowed Officer Ternes to review the defendant's text messages to her, "which [he] concluded 'get[ ] to a point where [Wolfe] doesn't deny doing it.'" *Wolfe*, ¶ 4. Officer Ternes then suggested to A.O. that, the next time the defendant called her phone, she answer it and have a conversation with him. *Wolfe*, ¶ 4.

The following conversation between Officer Ternes, Officer Alvarez and A.O. then ensued:

> [Officer Ternes:] Um. Is it ok for her, if he calls again, to have a conversation with him like we're not here?
>
> Officer Alvarez: If she wants.
>
> Officer Ternes: If that's ok with you. If you want to do that. Like I said, there [are] some things in the messages, where he doesn't just straight come out and say that "yeah, I did this."
>
> [phone rings]
>
> Officer Ternes: If you want to. If you don't that's ok.

A.O.: I'm good.

Wolfe, ¶ 4.

A.O. subsequently answered a call from the defendant on speakerphone in the presence of the officers and the defendant made incriminating statements. *Wolfe*, ¶ 4. The officers did not obtain a search warrant prior to the conversation. *Wolfe*, ¶ 4.

On appeal, this Court addressed: "Whether the testimony of A.O. and Tricia as to the contents of the conversation with [the defendant] must be excluded as attributable to an unconstitutional privacy intrusion by a government actor." *Wolfe*, ¶ 8. The State conceded the defendant "had a reasonable privacy expectation that his cell phone conversation was not being monitored and recorded by government agents, such that exclusion of Officers Ternes' and Alvarez's *testimony* and recordings was appropriate." *Wolfe*, ¶ 12 (emphasis added). The defendant argued "that A.O. and Tricia were acting at the behest of law enforcement when they heard [the defendant's] incriminating statements, to the point where their actions should be ascribed to the government and subject to constitutional restraints." *Wolfe*, ¶ 13. Acknowledging this legal concept, this Court cited *Skinner v. Ry. Labor*

Executives' Ass'n, 489 U.S. 602, 614 (1989), for the United States Supreme Court's holding that: "Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government." *Wolfe*, ¶ 13 (citations omitted).

Recognizing that Article II, Sections 10 and 11 of the Montana Constitution "direct government action only[,]" *Wolfe*, ¶ 10, this Court enunciated the test for determining whether the actions of private citizens can be ascribed to the government: "[T]o prevent [private citizens] from testifying as to *what they heard*, [the defendant] must show that their actions are attributable to the government or that their proffered testimony was a result of government misconduct." *Wolfe*, ¶ 12 (emphasis added).

This Court determined the officers "never directed A.O. or Tricia's actions to such a degree as to conclude that they had become instruments of the State[]" and "A.O.'s conversation with [the defendant] within the police station [did] not appear any more attributable to the government of Montana than that which might have

occurred if she had chosen to answer one of his earlier calls on her way to the station." *Wolfe*, ¶ 13. It also determined "A.O.'s actions [did] not support a conclusion that she had taken on the role of a government investigator," in part, because she did not "solicit" the phone call with the defendant; her brief questioning "was not highly scripted, intensive, or leading"; she did not use government equipment or information; and A.O. and Tricia were not government informants or participants in an ongoing investigation. *Wolfe*, ¶ 14. Rather, this Court concluded "A.O. and Tricia acted as citizens reporting a crime, not as government agents investigating one." *Wolfe*, ¶ 14. Consequently, it held: "The Montana Constitution does not preclude A.O. and Tricia, as private citizens, from intruding upon [the defendant's] privacy or from testifying as to what they learned as a result." *Wolfe*, ¶ 14 (footnote omitted).

Wolfe provides two important legal principles that apply to the present case. First, *Wolfe* establishes that Montanans are protected under Article II, Sections 10 and 11 of the Montana Constitution, not only from direct unlawful governmental invasion of their right to privacy in communication, but also from the actions of private citizens acting at its behest. While *Wolfe* did not find the defendant had a

reasonable expectation of privacy in his conversation with A.O, it implicitly recognizes Montanans have a reasonable expectation of privacy that the individuals with whom they converse are not acting as a government agent, surreptitiously acquiring their communicated thoughts on behalf of the government.

The same legal principles articulated in *Wolfe* apply to the present case: Agent Noe, a government actor, was involved in the operation from start to finish. He fabricated a *private citizen* named "Lily" and *solicited* Montanans to contact "Lily" through an advertisement. Agent Noe acquired a cell phone specifically for the purposes of receiving, replying to, and recording text messages sent to him by those responding to his solicitation. He communicated directly with Mr. Staker in order to acquire his written thoughts. Pursuant to *Goetz* and its progeny, Mr. Staker had a reasonable expectation of privacy that his written thoughts communicated to "Lily," a private citizen, would be constitutionally protected in the same manner as the spoken word.

Second, *Wolfe* provides that, in cases where a private citizen's communication with an individual is attributable to the government, even the private citizen is precluded from testifying as to what they

heard and learned. *Wolfe*, ¶¶ 12, 14. Logically, the same principle applies to government agents, as conceded by the State in *Wolfe*. *See Wolfe*, ¶ 12. Suppression of all of the evidence, including testimonial evidence, is required in these types of cases because an individual's thoughts are acquired by law enforcement through human perception and memory, such as "hearing," in *Wolfe*, or "seeing," in Mr. Staker's case. Electronic monitoring and recording devices merely provide a mechanism for government agents to monitor and preserve oral and written communication. The District Court's and the State's assertion, that Mr. Staker did not have a reasonable expectation of privacy in his text message communication, because text messages are "recorded," is therefore, erroneous. (*See* D.C. Doc. 58 at 7-8, 12 (Appellant's Br. App. B); *see generally* Appellee's Br.).

Here, Agent Noe unlawfully acquired Mr. Staker's written thoughts in the form of text messages in violation of Mr. Staker's reasonable expectation of privacy. Consequently, Agent Noe must be prohibited from testifying as to what he learned as a result of his communication with Mr. Staker.

II. This Case Must be Decided Under Article II, Sections 10 and 11 of the Montana Constitution.

The State argues Mr. Staker's text message communication to "Lily" is not protected under the Fourth Amendment to the United States Constitution, and cites various federal cases and state cases from other jurisdictions that analyze the Fourth Amendment and/or state constitutional provisions. It cites *Hoffa v. United States*, 385 U.S. 293, 302-03 (1966), for the proposition that "a defendant's trust in his colleague is not protected by the Fourth Amendment when it turns out the colleague is a government agent regularly communicating with authorities." (Appellee's Br. at 13.) It also cites *Lewis v. United States*, 385 U.S. 206 (1966), for the proposition that "the Fourth Amendment does not prohibit an undercover officer from accepting a defendant's invitation to enter the defendant's home and purchase drugs."[1] (Appellee's Br. at 13.) The State further argues: "The [Montana] cases do not prohibit law enforcement from engaging in undercover conversations or prohibit law enforcement from using text messages

[1] The State also cites *United States v. White*, 401 U.S. 745 (1971), which this Court declined to follow in *Goetz*. (*See* Appellee's Brief at 13-14.); *Goetz*, ¶¶ 13, 54.

they receive on their phone during an investigation." (Appellee's Br. at 26; *see also* Appellee's Br. at 20.)

In researching the State's Reply, Mr. Staker determined this Court followed the United States Supreme Court's Fourth Amendment analysis in *Hoffa* and *Lewis* in *State v. Leighty*, 179 Mont. 366, 588 P.2d 526 (1978). *Leighty* has been implicitly overruled by *Goetz*, *Allen*, *Stewart* and *Wolfe* and relies entirely on Fourth Amendment law.

In *Leighty*, the defendant was an outfitter whose right to hold an outfitter's license was suspended. *Leighty*, 179 Mont. at 368, 588 P.2d at 528. The defendant communicated to a Montana Fish and Game official that he intended to continue outfitting despite the suspension. *Leighty*, 179 Mont. at 368, 588 P.2d at 528. Another Fish and Game official contacted an individual named Timothy J. Kelly and "asked him to act as an 'undercover agent' in a scheme to test defendant's intention." *Leighty*, 179 Mont. at 368, 588 P.2d at 528. Mr. Kelly spoke to the defendant on the phone to make arrangements to hunt bear. *Leighty*, 179 Mont. at 368, 588 P.2d at 528. He "was outfitted with a bugging device so that local law enforcement officials could listen to and record [his] conversation with defendant." *Leighty*, 179 Mont. at 368,

588 P.2d at 528. Mr. Kelly paid the defendant and the "defendant took him on a brief bear hunt." *Leighty*, 179 Mont. at 368, 588 P.2d at 528. The defendant was subsequently charged and convicted of outfitting without a license and appealed to this Court. *Leighty*, 179 Mont. at 367-68, 588 P.2d at 528.

The defendant argued "that all evidence obtained by Mr. Kelly while at defendant's house, including evidence of oral statements made by defendant, should have been excluded by the trial court because it was acquired without first obtaining a search warrant." *Leighty*, 179 Mont. at 369, 588 P.2d at 528. Mr. Kelly was the only witness who testified about his observations and conversations with the defendant. *Leighty*, 179 Mont. at 369, 588 P.2d at 529.

In deciding the search and seizure issue in *Leighty*, this Court relied entirely on the United States Supreme Court's Fourth Amendment analysis in *Hoffa* and *Lewis*. This Court noted that, in *Lewis*, "the defendant invited the government's undercover agent into his home to complete an illegal narcotics sale." *Leighty*, 179 Mont. at 370, 588 P.2d at 529 (citing *Lewis*, 385 U.S. at 210-11). It then quoted the facts in *Lewis*: "'During neither of his visits to petitioner's home did

the agent see, hear, or take anything that was not contemplated, and in fact intended, by petitioner as a necessary part of his illegal business." *Leighty*, 179 Mont. at 370, 588 P.2d at 529 (quoting *Lewis*, 385 U.S. at 210). This Court then cited *Lewis* for the federal legal principle that: "'A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant.'" *Leighty*, 179 Mont. at 370, 588 P.2d at 529 (quoting *Lewis*, 385 U.S. at 211). Analogizing the facts in *Leighty* to the facts in *Lewis*, this Court stated:

> This is exactly what happened in the instant case. Defendant's dealings with Mr. Kelly were business dealings. Defendant did not attempt to shroud them with a veil of secrecy. He engaged in the business of outfitting with full knowledge that he was prohibited by law from doing so because he did not have a license from the State of Montana. Mr. Kelly did not learn anything from defendant or see anything in defendant's home which defendant reasonably expected would remain private. He did not ransack defendant's belongings or eavesdrop on defendant's private conversations. What defendant revealed to Mr. Kelly was revealed knowingly and voluntarily.

Leighty, 179 Mont. at 370, 588 P.2d at 529.

Finally, this Court quoted the United States Supreme Court's statement, in *Hoffa*, that "'[n]either this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a

wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" *Leighty,* 179 Mont. at 371, 588 P.2d at 529 (quoting *Hoffa*, 385 U.S. at 302). This Court held: "In line with these views we hold that no right protected by the Fourth Amendment or by the 1972 Mont.Const., Art. II, § 11 was violated in the present case." *Leighty*, 179 Mont. at 371, 588 P.2d at 529.

Leighty, and the non-Montana cases cited by the State, do not analyze the robust protections from government intrusions provided to Montana citizens by virtue of reading Article II, Section 10 together with Article II, Section 11 of the Montana Constitution.[2] *See Wolfe*, ¶ 9 (citing *Allen*, ¶ 47 (citing *Goetz*, ¶ 14)). This Court has stated: "As long as we guarantee the minimum rights established by the United States Constitution, we are not compelled to march lock-step with pronouncements of the United States Supreme Court if our own

[2] In *State v. Hanley*, 186 Mont. 410, 418-19, 608 P.2d 104, 108-09 (1980), *overruled in part on other grounds by Allen*, ¶ 46, this Court declined to suppress the recording of a drug sale and drugs, in part, because the warrant used to obtain the evidence was based on the statements of an undercover agent regarding his conversation with the defendant, rather than a recording of the conversation. As in *Leighty*, this Court did not analyze the robust protections of Article II, Sections 10 and 11 in deciding the issue. *See also Allen*, ¶ 39.

constitutional provisions call for more individual rights protection than that guaranteed by the United States Constitution." *State v. Hardaway*, 2001 MT 252, ¶ 31, 307 Mont. 139, 36 P.3d 900 (citing *State v. Sierra*, 214 Mont. 472, 476, 692 P.2d 1273, 1276 (1985), *overruled in part on other grounds by State v. Pastos*, 269 Mont. 43, 887 P.2d 199 (1994)).

> When analyzing search and seizure questions that specifically implicate the right of privacy, this Court must consider Sections 10 and 11 of Article II of the Montana Constitution. *State v. Hubbel* (1997), 286 Mont. 200, 207, 951 P.2d 971, 975. Because Montana's constitutional protections exist and apply separately from those of the federal constitution, it is necessary to perform an independent analysis of the privacy and search and seizure provisions of the Montana Constitution. [*State v. Elison*, 2000 MT 288, ¶ 45, 302 Mont. 228, 14 P.3d 456] (citing [*State v. Bullock*, 272 Mont. 361, 383, 901 P.2d 61, 75 (1995)]).

Hardaway, ¶ 32.

> Furthermore, "[i]n light of the constitutional right to privacy to which Montanans are entitled, we have 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." (citation omitted).

Goetz, ¶ 14 (citing *Hardaway*, ¶ 35). The legal principles articulated in *Goetz*, *Allen*, *Stewart* and *Wolfe* were based entirely on the Montana Constitution's broader protections provided by Article II, Sections 10

and 11 of the Montana Constitution. *See Goetz*, ¶ 54; *Allen*, ¶ 61; *Stewart*, ¶ 44; *Wolfe*, ¶ 9.

In *Hardaway*, this Court observed the fact that the Court had inconsistently applied Article II, Section 10 during the time period *Leighty* was decided:

> As our body of privacy case law grew, however, inconsistencies in analysis began to appear. For example, in *State v. Sawyer* (1977), supra, this Court first applied Article II, Section 10 to a search and seizure case and explicitly stated that Section 10 provided greater individual privacy protection in such cases than did the federal constitution. We restated this rule in [*State v. Solis*, 214 Mont. 310, 693 P.2d 518 (1984)] and *State v. Sierra* (1985), supra, among others. During this same time, however, the Court ruled on numerous other search and seizure cases and made no reference to Article II, Section 10 whatsoever. Subsequently, from the mid–1980s through the early 1990s, the Court provided no greater protection for individual privacy in search and seizure cases than parallel federal law provided. However, since *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* (1995), supra, 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, we consistently analyzed search and seizure cases involving significant privacy issues under both Sections 10 and 11 of Article II of the Montana Constitution.

Hardaway, ¶ 51 (citations omitted).

Leighty held that Mr. Kelly's actions were constitutional despite the fact he was a *government agent* and acquired the defendant's oral statements at the defendant's home without a warrant. The holding in *Leighty* conflicts with *Goetz*, where this Court held that law enforcement's acts of *monitoring* and recording the confidential informants' face-to-face conversations with the defendants at their private homes and, in one defendant's case, the confines of a vehicle, violated Article II, Sections 10 and 11 of the Montana Constitution. *Goetz*, ¶¶ 30, 54. To be clear, *Goetz* determined the defendants exhibited reasonable expectations of privacy in the *conversations* they held in these private settings. *See Goetz*, ¶ 30, 35, 37. Since *Goetz*, this Court has interpreted Article II, Sections 10 and 11 to apply beyond private settings: "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 holding in *Leighty* also conflicts with *Wolfe*, which provides that an individual who acts as an instrument of the government is precluded from intruding upon a citizen's reasonable expectation of privacy in his or her communication with the individual. *Wolfe*, ¶ 12-13. In *Leighty*, Mr. Kelly, who was asked to act as an "undercover agent," was either an actual government agent or was acting as an instrument of the government. *Leighty*, 179 Mont. at 368, 588 P.2d at 528. Under either status, pursuant to *Wolfe*, Mr. Kelly would be precluded from testifying to what he heard and learned from his conversations with the defendant. *See Leighty*, 179 Mont. at 369, 588 P.2d at 528-29; *Wolfe*, ¶ 12-13. Therefore, *Leighty*, and the federal cases upon which the State relies, are inapplicable to the present case.

III. Judicial Review Serves an Invaluable Function and Will Not Hinder Effective Law Enforcement.

The State asserts Mr. Staker is arguing "for a dramatic expansion of Montana's right to privacy that would prohibit law enforcement conduct that has been routinely accepted and would drastically hinder the ability of law enforcement to perform investigations." (Appellee's Br. at 32.) It argues this Court should reject the arguments of Amicus Curiae, the Montana Association of Criminal Defense Lawyers

(MTACDL), because MTACDL's "suggestion that law enforcement should obtain an anticipatory warrant before engaging in a sting operation lacks any support in this Court's case law." (Appellee's Br. at 35.)

Mr. Staker is not arguing for an "expansion" of the right to privacy in Montana. Rather, he is requesting that this Court apply existing Montana constitutional law, protecting an individual's right to privacy in oral communication, to electronic communication. MTACDL presents a straightforward and constitutional solution to allow judicial review of probable cause, by a neutral and detached magistrate, before law enforcement intrudes upon a citizen's reasonable expectation of privacy in his or her text message conversations with an intended recipient.

The argument, that obtaining a warrant under the circumstances of this case "would drastically hinder the ability of law enforcement to perform investigations[,]" is unfounded. (Appellee's Br. at 32.) As this Court observed in *Allen*: "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." *Allen*, ¶ 58.

This Court has recognized:

> "The presence of a search warrant serves a high function. [Requiring a search warrant is] not done to shield criminals.... It is done so that an objective mind might weigh the need to invade [our right to] privacy in order to enforce the law." *State v. McLees,* 2000 MT 6, ¶ 26, 298 Mont. 15, ¶ 26, 994 P.2d 683, ¶ 26.

Hardaway, ¶ 61.

In *State ex rel. Townsend v. District Court*, 168 Mont. 357, 360, 543 P.2d 193, 195 (1975), this Court explained:

> The requirement that the magistrate decide the existence of probable cause on the basis of facts sufficient to allow an independent determination, is imposed by Montana law to ensure that some neutral and detached evaluation is interposed between those who investigate crime and the ordinary citizen. This principle was discussed in *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436, 440 [(1948)]:
>
> > 'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'

The acquisition of a search warrant in an undercover investigation governed by *Goetz* was described in *State v. Fitzpatrick*, 2012 MT 300, 291 P.3d 1106, 367 Mont. 385. In *Fitzpatrick*, several police informants

advised law enforcement that the defendants were using their medical marijuana business in Havre to sell greater quantities of marijuana than allowed for under the Medical Marijuana Act. *Fitzpatrick*, ¶ 3.

> Based on this information, Agent Federspiel applied for a search warrant authorizing Agent Brad Gremaux of the Division of Criminal Investigation *to set up undercover buys* of marijuana from the [defendants] *and to electronically monitor and record those transactions*. On July 28, 2010, District Court Judge David Rice issued the search warrant.

Fitzpatrick, ¶¶ 3 (emphasis added). In *Fitzpatrick*, law enforcement successfully obtained a search warrant authorizing it to proceed "undercover," in addition to allowing it to electronically monitor and record their conversations with the defendants. Agent Gremaux went on to communicate with the defendants and purchase quantities of marijuana from them exceeding those allowable under the Medical Marijuana Act. *Fitzpatrick*, ¶¶ 5-7.

Here, law enforcement could have easily obtained an anticipatory warrant to surreptitiously communicate with Mr. Staker and others. Law enforcement engaged in a multi-agency, deliberate and coordinated plan that developed over time. Despite the calculated nature of the investigation, no one bothered to alert a magistrate.

IV. The Defenses of Entrapment and Outrageous Government Conduct are Not Substitutes for Article II, Sections 10 and 11 of the Montana Constitution.

The State argues:

> Similarly, this Court should not expand article II, sections 10 and 11 to prohibit undercover investigations. The conduct of law enforcement is more appropriately limited by prohibitions on entrapment and outrageous government conduct and by statutes. In this case, law enforcement conducted a legal undercover investigation that should not be prohibited under the Montana Constitution.

(Appellee's Br. at 34.)

The State's argument is specious. The defenses of entrapment and outrageous government conduct do nothing to undue the societal harm caused by unlawful government intrusions into our private lives. Individuals who are charged with crimes as the result of government entrapment or outrageous conduct face bleak and uncertain futures. These defenses do nothing to remedy the potential loss of employment, finances or assets they may suffer. They do nothing to prevent the stress, stigma or embarrassment associated with formal charges. They do nothing to ensure a favorable outcome at trial. A citizen should not be left to defend against an unconstitutional and impermissible charge when judicial review would prevent the harm in the first place.

"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." Mont. Const. art. II, § 10. The State had a routine legal avenue to intrude into this protected area in the present case. As the United States Supreme Court stated in *Carpenter v. United States*, __ U.S. __, 138 S. Ct. 2206, 2221 (2018): "the Government's obligation is a familiar one—get a warrant."

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 9th day of November, 2020.

/s/ Mark J. Luebeck
Mark J. Luebeck
ANGEL, COIL & BARTLETT
Attorney for Appellant

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 with the exception of footnotes and quoted and indented material; and the word count, calculated by Microsoft Word, is 4,999 words, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance.

/s/ Mark J. Luebeck
Mark J. Luebeck
ANGEL, COIL & BARTLETT
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Mark Joseph Luebeck, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 11-09-2020:

Martin D. Lambert (Prosecutor)
1709 W. College
Bozeman MT 59715
Representing: State of Montana
Service Method: eService

Colin M. Stephens (Attorney)
315 W. Pine
Missoula MT 59802
Representing: Montana Association of Criminal Defense Lawyers
Service Method: eService

Mardell Lynn Ployhar (Prosecutor)
215 N. Sanders
Helena MT 59620-1401
Representing: State of Montana
Service Method: eService

Electronically Signed By: Mark Joseph Luebeck
Dated: 11-09-2020