IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0731

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TRAVIS MICHAEL STAKER,

Defendant and Appellant.

BRIEF OF APPELLEE

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

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STATEMENT OF THE ISSUE

Whether the district court erred when it denied Staker's motion to suppress text messages that he sent to, and were received by, an undercover officer.

STATEMENT OF THE CASE

Appellant Travis Michael Staker was charged in justice court with misdemeanor prostitution in violation of Mont. Code Ann. § 45-5-601. (Doc. 1.) The justice court granted his motion to suppress evidence of text messages Staker sent to an undercover officer on the ground that the officer's recording of the text messages violated Staker's right to privacy under article II, sections 10 and 11 of the Montana Constitution, as interpreted by this Court in *State v. Allen*, 2010 MT 214, 357 Mont. 495, 241 P.3d 1045, and *State v. Goetz*, 2008 MT 296, 345 Mont. 421, 191 P.3d 489. (Doc. 43.)

The State appealed to the district court, which reviewed the case de novo and denied Staker's motion to suppress. (Doc. 46; Doc. 58, available at Appellant's App. B.) Staker entered a guilty plea, reserving his right to appeal the denial of his motion to suppress. (Doc. 60.) The court deferred the imposition of sentence for one year. (Doc. 62.)

On appeal, Staker is challenging the district court's denial of his motion to suppress. He asks this Court to expand *Goetz* and *Allen* to prohibit law

enforcement from exchanging text messages in an undercover investigation without a warrant.

STATEMENT OF THE FACTS

I. The offense

The parties submitted stipulated facts to the district court. (Doc. 57.) The stipulation explained that law enforcement conducted a warrantless operation to arrest individuals responding to advertisements they posted on internet websites offering sexual services. Special Agent Rodney Noe from the Department of Homeland Security posted an advertisement on Swifter, SkiptheGames, and CityxGuide, stating:

> Hi Gentleman! My name is Lily. I'm independent and love to provide the perfect experience for you. First time? I'll be gentle and guide you. Experienced? What you desire is all that matters.
>
> I'm discreet and classy from beginning to end and all the details in between. If the GFE (girlfriend experience) is your desire, you will leave fully satisfied because my unrushed attention is on you. I like to listen to you and give you what you want in a peaceful atmosphere. I love bubble baths, massage, French wines, and exploring new places.
>
> I take great care of my body for your enjoyment and safety. You will melt into my soft, silky arms and be aroused by my exotic scent. My soft curves nestled in silky lingerie are enticing and sensual for your pleasurable experience with me in person. I provide an unrushed 5 senses experience to satisfy your mind, body and soul.

> Prebook with me so I can prepare your customized experience to help unwind and relax.

(*Id*. at 2.)

The advertisement provided an email and phone number that could be used to contact "Lily." (*Id*. at 3.) Agent Noe received a text message from Staker's cell phone. (*Id*.) They exchanged the following messages:

> 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*. at 4-5.)

The parties also stipulated that in the sex trade, "donation" means an offer to pay for sexual services, "FS" stands for full service, and means sexual intercourse, and "GFE" stands for girlfriend experience, which means the prostitute will engage in conversation and make the experience more similar to having a girlfriend. (*Id*.)

The day they had arranged to meet, Staker and Agent Noe exchanged the following messages:

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

TS: Ok

(*Id*. at 5-6.)

When Staker arrived at the Hilton Garden Inn, he was arrested. Officers seized his cell phone and cash. (*Id*. at 6-7.)

The stipulation stated that

> 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*. at 3.)

II. Procedural history

Because the State appealed the justice court's suppression of the evidence, the case was tried anew in the district court pursuant to Mont. Code Ann. § 46-17-311(1). Staker moved to suppress "all evidence, including all witness testimony related to the evidence, obtained by law enforcement in its investigation of Mr. Staker for failing to obtain a mandatory search warrant; and dismissing the case for lack of evidence." (Doc. 52.) Staker relied on article II, sections 10 and 11 of the Montana Constitution and the Fourth and Fourteenth Amendments to the United States Constitution. (Doc. 52.) Staker filed an accompanying brief in which he argued law enforcement's use of the text messages that he believed he was sending to Lily violated his right to be free from an unreasonable search and seizure. (Doc. 51.) Staker's analysis was based primarily on this Court's decisions in *Goetz* and *Allen*.

In response, the State argued that Staker did not have a reasonable expectation of privacy in the text messages he sent to a law enforcement officer

who was posing as Lily. (Doc. 53 at 2-14.) The State also argued that, even if the text messages were suppressed, Agent Noe should be able to testify about his communication with Staker. (*Id*. at 15-16.)

Staker replied, arguing that, under Montana law, his text messages was unlawfully seized when law enforcement used an undercover officer to obtain text messages from him without a warrant. (Doc. 56.)

The district court issued an order denying Staker's motion to suppress. (Appellant's App. B.) The court concluded that Staker did not have an "actual subjective expectation of privacy in his messaging with Agent Noe." (*Id*. at 12.) And "[e]ven 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." (*Id*. at 12-13.)

The court noted that the content of the communications in this case was recorded by virtue of the fact that Staker composed and sent the messages by electronic means. The court explained,

> The content of the text message is therefore unlike a spoken conversation, where there is no recording of the conversation unless one of the participants, or a third party, causes a recording to be made. The nature of the communication in this case, sending written text to another person, is therefore different from the nature of the oral

> communications that were the subject of the *Goetz*, *Allen*, and *Stewart* decisions.

(*Id*. at 7-8.)

The court pointed out that Staker "was directly communicating with law enforcement via text." (*Id*. at 8.) Therefore, "[e]ven if 'Lily' had not been a law enforcement officer, nothing prevented 'Lily' from voluntarily sharing the text messages with law enforcement. By writing and sending messages via text, Defendant knew or should have known his conversation was recorded and was memorialized in written form." (*Id*.) The court also observed that Staker could have called Lily to avoid creating a record of the conversation, but he did not do that. (*Id*.)

The district court explained that various courts have held that a person does not have a right to privacy in text messages, emails, or letters that the person sends to another. (*Id*. at 8-11.) The court held that Staker similarly "did not have a reasonable expectation of privacy in his text communications with Agent Noe." (*Id*. at 12.) The court explained that citizens have an expectation that their oral communications will not be recorded. But they "do not have the same belief or guarantee with emails, text messages, or internet chats because, by their very nature, those communications are recorded. It is error to extend the reasoning of *Goetz*, *Allen*, and *Stewart* to written text communications voluntarily sent by a defendant to law enforcement." (*Id*. at 12.) The court also noted that Staker

"agreed to engage in criminal activity with a complete stranger. He could not have any confidence that the stranger would zealously guard his communications. The Defendant had no reasonable expectation that he could trust 'Lily' with the contents of the text messages that he sent her." (*Id*.)

The court rejected Staker's argument that the use of acronyms meant that he intended to keep the conversation private and nondescript. (*Id*.) The court stated that acronyms are a common practice in text messages, which the court described as "part of society's evolving vernacular." (*Id*.) The court observed that Staker's "use of acronyms does not so much suggest privacy as it does familiarity." (*Id*.)

SUMMARY OF THE ARGUMENT

Agent Noe's text message communication with Staker, which Staker initiated, does not violate the Fourth Amendment of the United States Constitution, or article II, sections 10 and 11 of the Montana Constitution. Under the Fourth Amendment, a person does not have a right to privacy in their communication with a third party if the other person chooses to repeat the conversation. By communicating with another, either orally or in writing, a person takes the risk that the other person is a government agent or will pass the information on to a government agent. A person does not have a privacy interest in a written message after it is given to another because the writer no longer has control over the

message. Therefore, Staker did not have a reasonable expectation of privacy under the Fourth Amendment in text messages that he voluntarily sent to an undercover officer.

The same analysis applies under the Montana Constitution. In *Goetz* and *Allen*, this Court concluded that the Montana Constitution provides an enhanced right to privacy that prohibits law enforcement from surreptitiously monitoring or recording anyone without a warrant. This Court did not prohibit law enforcement from using an informant during an investigation, but this Court concluded that Montanans would not be willing to accept that they might be electronically monitored or recorded by law enforcement without their knowledge.

This case is fundamentally different because Staker initiated communication with "Lily" through written text messages. He, therefore, knew that he was creating a written record. Unlike law enforcement in *Goetz* and *Allen*, Agent Noe was not surreptitiously recording. Written messages sent to other people were not what this Court was concerned with in *Goetz* and *Allen*. Staker did not have a reasonable expectation of privacy in the messages he sent to the undercover officer.

By arguing that his right to privacy was violated because he did not know that Lily was Agent Noe, Staker seems to be arguing that it was improper for law enforcement to conduct an undercover investigation. This Court has never

suggested that undercover investigations implicate the right to privacy, and this Court should decline Staker's invitation to dramatically expand the right to privacy in this way. Doing so would significantly hinder law enforcement and is unwarranted.

Agent Noe conducted a lawful undercover investigation that did not implicate Staker's right to privacy. The district court therefore correctly denied his motion to suppress.

ARGUMENT

I. Standard of review

This Court reviews the denial of a motion to suppress to determine whether the district court's findings of fact are clearly erroneous and whether the district court's interpretation and application of the law are correct. *State v. Conley*, 2018 MT 83, ¶ 9, 391 Mont. 164, 415 P.3d 473. Findings of fact are clearly erroneous if not supported by substantial credible evidence, if the court misapprehended the effect of the evidence, or if this Court's review leaves a definite or firm conviction a mistake has been made. *Id*.

II. Stakers text messages to an undercover agent are not protected by the Fourth Amendment.

Staker does not have a privacy interest under the Fourth Amendment in the text messages that he voluntarily sent to an undercover officer who posted an advertisement posing as a prostitute. The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. The Supreme Court has explained that a "'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

The Supreme Court follows a two-part test to determine whether a search occurred. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). The first question "is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy.'" *Id*. (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). "The second question is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable[.]" *Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring); internal quotation marks removed). The Court explained in *Katz* that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389 U.S. at 351. "But what he

seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id*. at 351-52.

Consistent with *Katz*, the Supreme Court has generally held that when a person discloses information to another, the person no longer has a reasonable expectation of privacy in that information. "It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information." *Jacobsen*, 466 U.S. at 117. After the original expectation of privacy has been frustrated, the information is no longer private, and can be used by the government. *Id*.

The Supreme Court has repeatedly relied on that theory, known as the third-party doctrine, to hold that statements made to a third-party are not protected by the Fourth Amendment. *Hoffa v. United States*, 385 U.S. 293, 302-03 (1966) (holding 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); *Lewis v. United States*, 385 U.S. 206 (1966) (holding the Fourth Amendment does not prohibit an undercover officer from accepting a defendant's invitation to enter the defendant's home and purchase drugs); *see also United States v. White*, 401 U.S. 745 (1971) (holding that the

Fourth Amendment does not prohibit law enforcement from listening to a conversation a defendant has with an informer or from recording that conversation with the cooperation of the informer). The Court explained in *Hoffa* that the Fourth Amendment provides no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." 385 U.S. at 302.

Applying the third-party doctrine, the Supreme Court held in *United States v. Miller*, 425 U.S. 435, 440-43 (1976), that Miller did not have a legitimate expectation of privacy in his bank records, including checks and deposit slips. The Court explained that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Id*. at 443. The Court noted that the bank records were not Miller's "private records" because they were in the possession of the bank, and because the records pertained "to transactions to which the bank was itself a party." *Id*. at 440-41. Significantly, all of the documents provided to the government contained "only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *Id*. at 442. The Court explained that a depositor takes the risk that the information will be conveyed to the government. *Id*. at 443.

The Supreme Court later reaffirmed in *Smith* that a person does not have a reasonable expectation of privacy in information that he voluntarily reveals to a third party. At the request of the police, a phone company placed a pen register on Smith's phone line that recorded the phone numbers that Smith called. *Smith*, 442 U.S. at 737. The Supreme Court held that evidence of the phone numbers Smith called was not protected by the Fourth Amendment, and therefore a search did not occur, because Smith did not have a reasonable expectation of privacy in phone numbers he called. *Id.* at 745-46. The court observed that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id*. at 743-44. The court explained that when the defendant used his phone, he "voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business. In so doing, [Smith] assumed the risk that the company would reveal to police the numbers he dialed." *Id*. at 744.

Applying *Smith*, the Ninth Circuit held in *United States v. Forrester*, 512 F.3d 500, 510-11 (9th Cir. 2008), that surveillance techniques that reveal the to/from addresses of email messages, the IP addresses of websites visited, and the total amount of data transmitted to or from an account do not constitute a search because users have no legitimate expectation of privacy in that information. The court compared emails to physical mail, observing that although the government

cannot search the contents of physical mail that is sealed, the government may observe any information that can be gained from the outside of a package because the sender has voluntarily transmitted that information to third parties. *Id*. at 511.

The Supreme Court recently declined to apply the third-party doctrine to cell phone location data because of the unique, comprehensive nature of that data. *Carpenter v. United States*, 138 S. Ct. 2206, 2217-20 (2018). The Court emphasized that cell-site records are qualitatively different than the telephone numbers and bank records at issue in *Smith* and *Miller* because cell-site records provide such a detailed record of a person's movements, which is available for years. *Carpenter*, 138 S. Ct. at 2216-17, 2219-20. The Court stated that allowing the government to access this information without a warrant would negate a person's expectation of privacy in their physical location. *Id*. at 2217. The Court also concluded that a person using a cell phone is not voluntarily sharing his location information with the cell phone company. *Id*. at 2220. Rather, the information is shared simply by turning on the phone. *Id*. The Court recognized that using a cell phone is a necessity in modern life. *Id*. Thus, "in no meaningful sense does the user voluntarily 'assume[ ] the risk' of turning over a comprehensive dossier of his physical movements." *Id*. The Court noted that its holding was narrow, and that it was not overruling prior cases. *Id*.

The holding from *Carpenter* does not limit a case like this one, which is squarely within the third-party doctrine. In this case, Staker voluntarily responded to an online advertisement by sending text messages to a person he did not know. By doing so, he assumed the risk that the recipient would be an undercover officer or that the recipient would provide the messages to law enforcement. *See Hoffa*, 385 U.S. at 302-03; *Lewis*, 385 U.S. 206. Staker lacked a reasonable expectation of privacy in the messages because he voluntarily assumed that risk and no longer had a privacy interest in the messages after he sent them.

This case is similar to other cases where courts have held that the sender of written information does not have a privacy interest in the message after it has been sent because the sender of written information cannot control what the recipient does with the message. *State v. Patino*, 93 A.3d 40 (R.I. 2014) (holding the defendant did not have a reasonable expectation of privacy in his text messages contained in his girlfriend's phone); *People v. Katzman*, 942 N.W. 2d 36 (Mich. Ct. App. 2019) (holding the defendant lacked standing to challenge the search of a coconspirator's phone, which law enforcement used to communicate with the defendant); *see also United States v. King*, 55 F.3d 1193, 1195 (6th Cir. 1995) ("[I]f a letter is sent to another, the sender's expectation of privacy ordinarily terminates upon delivery."); *United States v. Maxwell*, 45 M.J. 406, 418-19 (C.A.A.F. 1996) (concluding emails recipient provided to the government were

admissible; stating "once the transmissions are received by another person, the transmitter no longer controls its destiny.").

In *Patino*, the Rhode Island Supreme Court held that the defendant did not have standing to challenge the search of his girlfriend's phone, which contained messages he sent to her, because he did not have a reasonable expectation of privacy in her phone. 93 A.3d at 57.[1] Although a person's phone generally may not be searched without a warrant, *Riley v. California*, 573 U.S. 373, 386 (2014), the *Patino* Court held that a defendant does not have a right to privacy in text messages he has sent that are contained in another person's phone. *Patino*, 93 A.3d at 55. The court noted that "when the recipient receives the message, the sender relinquishes control over what becomes of that message on the recipient's phone." *Id*. Thus, the court concluded, the sender "no longer enjoys a reasonable expectation of privacy in the digital copy of the message contained on the recipient's device." *Id*. at 56.

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[1]Although *Katzman* and *Patino* both addressed the Fourth Amendment analysis through the concept of "standing," the United States Supreme Court explained in *Rakas v. Illinois*, 439 U.S. 128, 139 (1978), that the standing requirement is subsumed by the Fourth Amendment doctrine. Instead of determining whether a defendant had standing, courts should address "whether the challenged search and seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas*, 439 U.S. at 140.

In this case, Staker's phone was not searched without a warrant. Instead, Staker sent a text message to a government agent, believing the agent was a prostitute. By sending the message, Staker took the risk that the recipient either was a government agent, or that the recipient would reveal the message to others, including law enforcement. As the Supreme Court held in *Jacobsen*, once a person has assumed that risk, the Fourth Amendment does not prohibit governmental use of that information. 466 U.S. at 117.

For that reason, *Riley* does not apply to the facts of this case. When the Supreme Court held in *Riley* that the government generally may not search a person's phone without a warrant, the Court did not hold that a defendant has a right to privacy in messages that he has sent to another person's phone that are obtained from the other person's phone. *Riley*, 573 U.S. 373. The Supreme Court cases addressing the third-party doctrine, rather than *Riley*, are instructive on the issue in this case. These cases demonstrate that a person does not have a reasonable expectation of privacy in messages they have sent to another person's phone.

Addressing facts similar to this case, a federal district court correctly concluded that the "Defendant did not have a legitimate expectation of privacy in the [text] messages he willingly, and without undue Government prompting, sent to the undercover officers." *United States v. Mack*, 53 F. Supp. 3d 179, 186 (D.D.C. 2014). Similarly, in *Commonwealth v. Diego*, 119 A.3d 370, 378 (Pa.

Super. Ct. 2015), the Pennsylvania Superior Court observed that *Riley* did not apply where the defendant's phone was not searched, and held that the defendant lacked a reasonable expectation of privacy in text messages he sent to another person. The Court stated that when Diego "engaged in a text message conversation with [another person], he knew, or should have known, that the conversation was recorded. By the very act of engaging in the means of communication at-issue, [Diego] risked that [the other person] would share the contents of the conversation with a third party." *Id*. at 377. *See also United States v. Charbonneau*, 979 F. Supp. 1177, 1185 (S.D. Ohio 1997) (holding a defendant did not have a reasonable expectation of privacy in conversations he posted in chat rooms containing undercover officers).

The district court correctly relied on *Mack* and *Diego* and concluded that, under the Fourth Amendment, Staker did not have a reasonable expectation of privacy in text messages he voluntarily sent to an undercover officer.

III. Article II, sections 10 and 11 of the Montana Constitution do not protect text messages Staker sent to an undercover agent.

Nothing in this Court's case law interpreting the Montana Constitution prohibits law enforcement officers from engaging in undercover investigations. Rather, this Court has interpreted Montana's Constitution to give Montanans an

enhanced right to privacy that guards against warrantless electronic monitoring and surreptitious recording. Neither occurred in this case.

A. Montana's right to privacy

Article II, section 10 provides that "[t]he 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." Article II, section 11, provides that "[t]he people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures." It further provides that a warrant shall not be issued without probable cause. Mont. Const. art. II, § 11. "Article II, Section 11 protects Montana citizens from unreasonable searches and seizures." *State v. Goetz*, 2008 MT 296, ¶ 26, 345 Mont. 421, 191 P.3d 489.

To determine whether a state action constitutes an "unreasonable" or "unlawful" search or seizure in violation of the Montana Constitution, the court examines three factors:

> 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. The first two factors are considered to determine whether a search or seizure occurred. *Id*. "Where no objectively reasonable expectation of privacy

exists, a 'search' does not occur." *Goetz*, ¶ 25. The third factor must be considered to determine the reasonableness of the search or seizure under the circumstances. *Goetz*, ¶ 27. Under the third factor, the Court determines whether the state action complained of violated article II, sections 10 and 11 "because it was not justified by a compelling state interest or was undertaken without procedural safeguards such as a properly issued search warrant or other special circumstances." *Goetz*, ¶ 27.

This Court has interpreted article II, sections 10 and 11 to give Montana citizens heightened privacy rights that prohibit law enforcement from electronically monitoring or surreptitiously recording a person without a warrant, even with the consent of a third party. *State v. Allen*, 2010 MT 214, ¶¶ 47-65, 357 Mont. 495, 241 P.3d 1045; *Goetz*, ¶¶ 25-54. Relying on statements by delegates to the 1972 Montana Constitutional Convention, this Court has concluded that the delegates were concerned about potential intrusions by the government into the privacy of Montanans using electronic monitoring and surveillance. *Goetz*, ¶¶ 33-34 (quoting Montana Constitutional Convention, Verbatim Transcript, March 7, 1972 at 1682, 1687).

In *Goetz*, this Court held that the warrantless electronic monitoring and recording of a face-to-face conversation with the consent of one participant in the conversation violates the other participant's rights to privacy and to be free from unreasonable searches and seizures under article II, sections 10 and 11. *Goetz*, ¶ 4.

The case involved two defendants, Goetz and Hamper, who sold drugs to informants who were wearing a body wire, allowing law enforcement to electronically monitor and record the drug sale. *Goetz*, ¶ 5. This Court determined that the defendants had a subjective expectation of privacy in the conversations they had in their home or vehicle. *Goetz*, ¶ 30. The Court explained that "where a person has gone to considerable trouble to keep activities and property away from prying eyes, the person evinces a subjective expectation of privacy in those activities and that property." *Goetz*, ¶ 29. Because the defendants conducted the face-to-face conversations in private settings, this Court determined that they held a subjective expectation of privacy. *Goetz*, ¶ 30.

Relying on statements made by delegates to the 1972 Montana Constitutional Convention, this Court concluded "that society is willing to recognize as reasonable the expectation that conversations held in a private setting are not surreptitiously being electronically monitored and recorded by government agents." *Goetz*, ¶ 35. The Court thus concluded that while "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, . . . they are unwilling to accept as reasonable that the same conversation is being electronically monitored and recorded by government agents without their knowledge." *Id*. Because the defendants had an expectation of privacy that society is willing to accept as reasonable, the Court

concluded that the electronic monitoring and recording of the defendants constituted a search protected by article II, sections 10 and 11. *Goetz*, ¶ 37.

Applying the third factor, the Court held that a warrant is required to conduct electronic monitoring and recording. *Goetz*, ¶¶ 53. This Court concluded that the defendants' rights under article II, sections 10 and 11 were violated by the warrantless monitoring and recording of the defendants' conversations. *Goetz*, ¶ 54. Significantly, it was the government's surreptitious electronic monitoring and recording that violated the defendants' rights to privacy, not the use of an informant.

In *Allen*, this Court expanded *Goetz* to prohibit the warrantless, surreptitious recording of a phone call with the consent of one participant when the other participant believed the call was private. *Allen*, ¶¶ 57, 61. This Court concluded that Allen had a subjective expectation of privacy in the phone call based on his testimony that he believed the person he was speaking to was not using the speaker phone function and that no third party was listening in and because the substance of the phone call demonstrated Allen's desire to keep the substance of his conversation away from other listeners. *Allen*, ¶ 49. The Court noted that only one half of the conversation could have been overheard by a third-party; that Allen was moving throughout the conversation, making it difficult to overhear intelligible

information; and that when Allen was in public, he limited his statements to innocuous platitudes. *Id*.

The Court held that Allen's subjective expectation of privacy was objectively reasonable. *Allen*, ¶ 61. The Court concluded that "society is willing to recognize as reasonable the expectation that private cell-phone conversations are not being surreptitiously monitored and recorded by government agents." *Allen*, ¶ 47. Because Allen had a reasonable expectation of privacy, the recording of his phone conversation constituted a search under article II, sections 10 and 11.

The Court concluded that no exception to the warrant requirement applied, so the recording of Allen's phone conversation would have to be suppressed upon retrial. *Allen*, ¶ 65. In a footnote, the majority responded to Justice Nelson's concurrence in which he argued that the informant's testimony about the phone call should also be suppressed. *Allen*, ¶ 65 n.2. The majority explained that the informant's "conversation with Allen is not poisoned by the fact of the recording. It cannot be said that, but for the illegal recording, [the informant] would not have been conversing with Allen, particularly given that he invited her to participate in this escapade to begin with." *Id*.

As this footnote highlights, this Court's concern in *Goetz* and *Allen* was with law enforcement using technology to monitor and record an oral conversation that the speaker would not expect to have recorded. The concern was not with an

informant's cooperation with law enforcement or with testimony from an informant, who is acting as a government agent, about a defendant's statements. This Court reaffirmed that in *State v. Stewart*, 2012 MT 317, ¶¶ 38, 40, 367 Mont. 503, 291 P.3d 1187, where it noted that the defendant did not have a reasonable expectation of privacy, based on *Allen*, that his phone conversations would be kept secret and never repeated. He instead had a reasonable expectation that his conversation was not being surreptitiously recorded by the police. *Stewart*, ¶ 40.

B. Montana's cases analyzing the right to privacy under the Montana Constitution do not protect the text messages Staker sent to an undercover officer.

Goetz and *Allen* hold that law enforcement has to obtain a warrant before using technology to electronically monitor or surreptitiously record a person with the consent of another party to the conversation. The cases do not prohibit law enforcement from engaging in undercover conversations or prohibit law enforcement from using text messages they receive on their phone during an investigation. Applying Montana's three-factor test demonstrates that Agent Noe's text message conversation with Staker was not a search protected by the Montana Constitution.

1. Staker did not have a subjective expectation of privacy.

Unlike the defendants in *Goetz* and *Allen*, who had no reason to expect that their oral conversations were being recorded, Staker sent text messages to a phone number contained in an advertisement. By their very nature, text messages create a

recording in the sender's and the recipient's phone. No matter how carefully the sender guards their phone, they have no control over the message contained in the recipient's phone. Staker therefore knew that he was creating a record of his conversation. *See Diego*, 119 A.3d at 377 (stating the defendant knew or should have known his text message conversation was recorded).

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.

That is particularly true when those messages are communicated in writing through text messages. The Rhode Island Supreme Court observed in *Patino* that it could "think of no media more susceptible to sharing or dissemination than a digital message, such as a text message or email, which vests in the recipient a digital copy of the message that can be forwarded to or shared with others at the mere click of a button." 93 A.3d at 56 n. 21. It is also significant that many cell phones contain an alert on their screen informing anyone viewing the phone that

the sender has sent a text message and of the beginning of the message. Any person with the password for the phone can open the message.

Even under Montana's heightened right to privacy, as discussed in *Goetz* and its progeny, Staker did not have a subjective expectation that the text messages he sent to the number placed in the online advertisement would remain private. The district court correctly noted that this Court's holding in *Allen* was based, in part, on the fact that Allen did not know his conversation with the informant was being recorded. (Appellant's App. B at 8 (quoting *Allen*, ¶ 49).) In contrast, as the district court noted, Staker "knew or should have known his conversation was recorded and was memorialized in written form." (Appellant's App. B at 8.) The court correctly found that Staker's "messages were not being surreptitiously recorded or intercepted by law enforcement. Rather, Defendant was directly communicating with law enforcement via text." (*Id*.)

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. When Staker sent a text message to the number in the advertisement, he accepted the risk that the message would be obtained by law enforcement.

Staker argues that this case is similar to *Allen* because he used acronyms and vague terms, and Allen spoke about "innocuous platitudes" when he was in a public setting. (Appellant's Br. at 20.) The district court correctly rejected this argument,

observing that "[a]cronyms are now a common part of text messaging and have become common in other forms of written and verbal communication . . . Defendant's use of acronyms does not so much suggest privacy as it does familiarity." (Appellant's App. B at 12.) The stipulated facts demonstrate that Agent Noe used an acronym in his advertisement, and the acronyms Staker used are commonly used to book services for prostitution. (Appellant's App. A at 2, 5.) The use of acronyms does not demonstrate that Staker had an expectation that the conversation was private. Staker's use of acronyms actually suggests the opposite—that Staker avoided fully writing out what he was requesting because he knew that the recipient's messages might be read by others. Contrary to his assertion, Staker's use of common acronyms in his text message does not demonstrate that he had a subjective expectation of privacy.

2. Staker did not have an expectation of privacy that society would recognize as reasonable.

Even if Staker had a subjective expectation of privacy, that expectation was not objectively reasonable. In *Goetz*, this Court recognized 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," but this Court explained that Montanans are not willing to accept as reasonable that the conversation may be electronically monitored. *Goetz*, ¶ 35. This Court similarly explained in *Stewart* that the defendant had an expectation of privacy that

prevented law enforcement from monitoring and recording his conversations, but he did not have an expectation of privacy in the content of the conversations because nothing precluded the listener from repeating what he said. *Stewart*, ¶ 38.

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. When Staker sent text messages to an undercover officer, he assumed the risk that the recipient would be an officer or would share those messages.

The existence of recorded messages does not create a right to privacy that would not exist in an oral conversation. Staker himself created the text messages and sent them to an undercover officer knowing they would be contained in the recipient's phone. Law enforcement did not engage in surreptitious electronic monitoring and recording. Instead, they conducted a straightforward undercover investigation. The messages are contained in a phone possessed by law enforcement because Staker sent them there. Nothing in this Court's analysis of article II, sections 10 and 11 requires suppression of those messages. This Court's cases prohibit the government from surreptitiously monitoring and recording conversations. They do not prohibit law enforcement from engaging in written communication in an undercover capacity.

The State believes that a person does not ever have a reasonable expectation of privacy in a text message that has been sent to and is contained in a third-party's phone. But even if a person could have a reasonable expectation of privacy in a text message, Staker did not have a reasonable expectation of privacy in messages he sent to a stranger in response to an online advertisement for illegal services. By choosing to communicate via a text message, Staker gave up the ability to assess the voice and demeanor of the person on the other end of the line, which he would have had with a telephone call. He had no way to know whether he was communicating with a woman named Lily, a pimp who was booking Lily's services, or a male undercover officer. Even if the person he was communicating with was a prostitute name Lily, Staker still had no way to know whether she shared her messages with others, or if she would be arrested for her illegal activities and have her phone searched. Society is not willing to recognize as reasonable an expectation that a text message sent to a stranger in a response to an online advertisement for prostitution would be kept private.

Staker points out that this Court has declined to find that a person does not have an expectation of privacy when engaging in crime. (Appellant's Br. at 39 (quoting *Goetz*, ¶ 36).) But this Court has also stated that "[t]he existence of a subjective expectation of privacy depends on the unique circumstances of each case." *Stewart*, ¶ 40. Similarly, the reasonableness of a person's expectation of

privacy depends on the circumstances of the encounter. It is not reasonable for a person to expect that an electronic communication sent to a complete stranger in response to an advertisement for illegal services would remain private.

Because Staker did not have a reasonable expectation of privacy in the text messages he sent to an undercover officer, the conversation is not a search that is protected by the Montana Constitution.

C. This Court should decline Staker's invitation to extend its jurisprudence to text messages sent by a citizen to an unknown person.

Staker argues 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. Staker argues that law enforcement improperly, "deceptively and surreptitiously conducted a warrantless operation to communicate directly with Mr. Staker." (Appellant's Br. at 37.) He objects not just to the method of communicating—text messages—but to the basic fact that law enforcement communicated in an undercover capacity. He seems to suggest that law enforcement should be required to obtain a warrant before engaging in an undercover investigation.

This Court should not expand Montana's right to privacy to cover an undercover text message conversation for two reasons. First, there is no support for it in this Court's case law. Criminal cases often involve undercover

investigations, and this Court has not indicated that undercover investigations require a warrant unless law enforcement is electronically monitoring or recording a conversation. Nothing in *Goetz* or *Allen* or this Court's other cases suggests that law enforcement is required to obtain a warrant to communicate with a citizen without revealing their identity. *Goetz* and *Allen* prohibit the government from monitoring or recording a person without the person knowing they are being electronically monitored or recorded. They do not prohibit law enforcement from using an informant, who is acting as a government agent, or even from using an undercover officer. This Court's conclusion that law enforcement may admit testimony from a government agent demonstrates that it is appropriate for law enforcement to engage in undercover operations. *See Allen*, ¶ 65 n.2; *Goetz*, ¶ 35.

At several points in Staker's brief he relies on Justice Nelson's concurrence in *Allen* to argue that law enforcement improperly gathered his "verbalized thoughts." (Appellant's Br. at 17-18, 31.) But Justice Nelson's concurrence, which was not joined by any other justice, is contrary to the majority decision in *Allen* and with *Stewart*, which was authored by Justice Nelson. *Compare Allen*, ¶¶ 47-65, and *Stewart*, ¶¶ 38, 40, *with Allen*, ¶¶ 73-144. Justice Nelson argued in his concurrence that this Court should discard its definition of a search and adopt a much broader definition. *Allen*, ¶¶ 73-144. This Court should rely on its precedent, rather than a

concurrence written by one justice. Under this Court's precedent, an undercover officer may communicate with a person without revealing his identity.

Second, such an expansion would dramatically hinder the ability of law enforcement to conduct investigations. Undercover investigations are a critical tool used by law enforcement to identify perpetrators of previous crimes and prevent future crimes. The Supreme Court wisely warned against such a dramatic expansion of privacy law in *Lewis*, where it stated:

> Were we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional per se. Such a rule would, for example, severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest.

385 U.S. at 210.

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.

D. Even if this Court expands article II, sections 10 and 11 to apply to written communication, Agent Noe's testimony is admissible.

The State believes the district court correctly denied Staker's motion to suppress evidence. But 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. As explained above, this Court excluded the warrantless recordings in *Goetz* and *Allen*, but not testimony from the informants who were present and could testify about the defendants' statements. *Allen*, ¶ 65; *Goetz*, ¶ 54. Therefore, if this Court concludes it was improper for Agent Noe to keep the text messages, Agent Noe may still testify about the conversation.

E. The argument of Amicus Curiae, Montana Association of Criminal Defense Lawyers, should be rejected.

For all of the reasons stated above, Agent Noe's text message conversation with Staker did not violate Staker's rights to privacy under the Federal or Montana Constitutions. There is no requirement that law enforcement obtain a warrant before communicating with somebody, even if they are communicating in an undercover capacity and that communication is done via text message. MACDL'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. As the cases MACDL cites demonstrate, anticipatory warrants are used in rare circumstances where law enforcement has probable cause to believe an event will occur at a specific location, and law enforcement seeks to search that location after the event occurs. *See, e.g.*, *United States v. Grubbs*, 547 U.S. 90 (2006); *United States v. Garcia*, 882 F.2d 699 (2d Cir. 1989). Anticipatory warrants are

not required before conducting a sting operation; specifically, they are not required before receiving text messages that a citizen chooses to send to a number in an advertisement posted by law enforcement. MACDL's suggestion that anticipatory warrants should be required before law enforcement can engage in a text message conversation, initiated by the defendant, should be rejected.

CONCLUSION

This Court should affirm Staker's conviction for prostitution because the district court correctly denied his motion to suppress his text message conversation with an undercover officer.

Respectfully submitted this 25th day of September, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 8,235 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-25-2020:

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