IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0603

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TRENTON MATTHEW LARSON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable James P. Reynolds, Presiding

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STATEMENT OF THE ISSUE

Whether the district court correctly denied Appellant's suppression motion.

STATEMENT OF THE CASE

The State charged Appellant Trent Matthew Larson with sexual abuse of children, alleging that Larson knowingly possessed child pornography. (Doc. 2.)

Larson filed a motion to suppress his electronic media. (Doc. 8.) After briefing, an evidentiary hearing, and further supplemental briefing, the district court denied the motion. (Doc. 24; *see* Docs, 8, 14, 16 (principal briefing); Docs. 21, 22 (supplemental briefing); 6/11/20 Tr. (evidentiary hearing).)

Pursuant to a plea agreement, the State agreed to recommend a ten-year sentence to the Montana State Prison, with all time suspended upon conditions. (Docs. 27, 28.) The district court sentenced Larson in accordance with the plea agreement. (Doc. 33 at 1-2.) Additionally, the district court adopted the psychosexual evaluator's recommendation and designated Larson as a Tier 2 sexual offender. (Doc. 33 at 2; *see* Doc. 30, Evaluation at 6.)

Larson reserved the right to appeal the denial of his suppression motion, and now appeals that order. (Doc. 27 at 2.)

STATEMENT OF THE FACTS

I. Facts related to Larson's electronic devices

Connie Griffin Jacquez runs an adult foster care group house at her own home in East Helena. (6/11/20 Tr. at 5.) The group home is a privately owned and operated facility. Connie is not a law enforcement officer or other state employee. (Doc. 24 at 3.)

Larson was a resident of Connie's group home for seven years. (6/11/20 Tr. at 5-6.) He was required as part of his five-year probation to remain at the group home. (6/11/20 Tr. at 29-30, 6.) When his probation expired, Larson remained in the group home voluntarily. (6/11/20 Tr. at 30-31.) As Connie explained, Larson needed services and he did not do well on his own. (6/11/20 Tr. at 30.)

Upon joining the group home, Larson was advised of the 44 rules regarding hygiene, drugs and crime, chores, use of the facility, resident and staff relations, and prohibited activities. (State's Ex. 1, offered and admitted at 6/11/20 Tr. at 7-8.) Relevant here, Larson was subject to rules regarding pornographic materials and use of electronics:

> 6. No pornographic material in household, computers or movies allowed in home.
>
> . . . .
>
> 23. Client may not use any computer owned by AFCP. Usage of computers, gaming systems, is up to the discretion of the AFCP and may be confiscated/banned for violation of

> house/computer/internet rules at any time. This also pertains to gaming systems and electronics.
>
> 24. AFCP may/will set allotted amounts of time for computer usage. AFCP also may restrict any computer use in the home. Scheduled times for the use of computer is up to the discretion of the house provider.

(State's Ex. 1 at 1-2.) The agreement specified a "30-day eviction notice" or "immediate eviction" for frequent warnings. (State's Ex. 1 at 2.) While not stated in the rules, upon a resident leaving the group home permanently, Connie would allow the resident to "have [confiscated property] back." (6/11/20 Tr. at 13.)

Larson signed the agreement in 2013, affirming that he understood that he was not allowed to view pornography and that his electronics would be subject to confiscation by Connie. Every subsequent year, Larson would re-read the document, agree to the conditions, and re-sign the document. (6/11/20 Tr. at 7-9, 26; *see* renewal signatures on State's Ex. 1.)

But Larson began breaking the house rules and causing disruptions for other residents. For example, in one early incident, Larson bought a projector and projected adult pornography in a common area, leading other residents to complain to Connie. (6/11/20 Tr. at 12.) Larson was also known to steal clothing such as children's and women's undergarments. (6/11/20 Tr. at 21.) Near the end of his probationary term, Larson had even begun "propositioning" Connie's grandchildren and some neighborhood children. (6/11/20 Tr. at 10.)

Connie soon implemented internet blocking technology to prevent Larson from streaming porn at the residence. (6/11/20 Tr. at 13.) But Larson found ways around the blocking through his technological competence in his phone and computer. (*Id*.) In response, Connie confiscated his electronics. (*Id*.)

But, at some point, Larson enrolled in school and Connie gave him a chance to regain her trust with computers. (*Id*.) Connie soon learned that Larson's intent in using the computer was not to do schoolwork, but to look at more porn. (6/11/20 Tr. at 13-14.) Connie placed Larson's computer on the kitchen table so she could monitor Larson's use. (6/11/20 Tr. at 14.)

Connie soon discovered child pornography on Larson's computer. (*Id*.) Larson admitted to Connie that "he was having thoughts of molesting children." (*Id*.) Connie believed that Larson was seeking help and directed him to begin treatment with a sexual offender treatment professional. (6/11/20 Tr. at 10.) Connie even attended the treatment sessions with Larson. (*Id*.)

But even after his original electronics were seized by Connie, Larson would go out and buy new electronics, such as cell phones, and attempt to conceal them. Connie would ultimately seize and confiscate the new electronics for violations of the house rules. (6/11/20 Tr. at 17-18, 22.) This included Larson's computer and three or more phones. (6/11/20 Tr. at 17.) She also collected external hard drives and video streaming devices. (6/11/20 Tr. at 20-21.) She would place the

electronics in a safe where Larson could not access them. (6/11/20 Tr. at 18, 24-25.)

For example, in one incident, Connie found child porn on Larson's cell phone. Connie confiscated the phone and called the police, offering to give them the phone. (6/11/20 Tr. at 16.) A police officer replied that they were going to come and pick it up. (*Id*.) She kept the phone in her possession. (*Id*.) For reasons unknown, the police never responded to her house. (*Id*.)

Two or three weeks after confiscating the phone with child porn, another incident occurred in October 2019. (6/11/20 Tr. at 18.) First, a resident informed Connie that Larson was hiding a phone in the back of the toilet in a baggy. (6/11/20 Tr. at 17.) Connie confronted Larson about the phone, and Larson retrieved it and handed it to Connie. (6/11/20 Tr. at 18.) Child pornography was visibly apparent on the screen when he handed it over. (6/11/20 Tr. at 18-19.) Larson initially denied, then justified his behavior. (6/11/20 Tr. at 19.) Connie confiscated the phone and again called police. (*Id*.) A police officer responded that they were going to come and pick up the phone. (*Id*.) But police did not pick up this phone either. (*Id*.)

After the latest incident, Connie asked Larson to move out. (*Id*.) Larson agreed and stated he was already planning to do so. He told Connie that he

contacted the police to do a standby assist so he could retrieve all of his electronics from the group home. (*Id*.)

Larson did indeed call police to help him retrieve his electronics. In response, an officer asked Larson why "didn't he just wait until the 30 days was up and [his electronics] would be returned to him and he could take it when he moved out."[1] (6/11/20 Tr. at 20.) Larson replied that if he told them why he needed the electronics, "he would probably be arrested." (*Id*.) Upon further inquiry, Larson elaborated that he had child pornography on his devices. (*Id*.)

After Larson's admissions, police called Connie and informed her about the conversation. (*Id*.) Next, they responded to Connie's house. (*Id*.) As Connie explained: "They asked me to gather up all of the electronics that I could find of his." (*Id*.) Most of Larson's electronics were already in Connie's possession as confiscated material, but Connie also seized two additional thumb drives.[2] (6/11/20 Tr. at 20, 22.)

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[1]This may be a reference to Connie's 30-day eviction policy and general practice of returning confiscated items upon a resident permanently leaving.

[2]The prosecutor asked: "So what specific items do you think were not in—do you think you had not already confiscated from Mr. Larson?" Connie replied that the only items she believed she had "not confiscated from him was like the thumb—some thumb drives[.]" (6/11/20 Tr. at 21.) In listing the electronics in the affidavit, the police officer described, among other items, "two 'thumb' or flash drives[.]" (Doc. 1, Aff. at 1.)

Police took possession of a camcorder, four cell phones, a tablet, a Kindle, a large external hard drive, a laptop computer, and two thumb drives. (Doc. 1, Aff. at 1.) The electronics were placed into evidence. (*Id*.) An initial investigative report was forwarded to the Lewis and Clark County Sheriff's Office—Criminal Investigation Division—for follow up. (*Id*.) Next, a detective applied for a search warrant. (*Id*.) The search warrant was granted on December 11, 2019. (*Id*.)

The search of the electronics pursuant to the warrant yielded "80 or more" videos and pictures of child pornography, including of infants, newborns, and preteen sex with adult men. (*Id*.) A forensic search of Larson's laptop yielded several anime pictures of sex with toddlers and young females, as well as search terms used by Larson such as "Toddler girls open vagina." (Doc. 1, Aff. at 2.) During a police interview, Larson admitted to detectives that he had utilized the "Dark Web" to search and look at child pornography and described specific websites he visited. (*Id*.)

II. Facts related to the suppression motion

After briefing and an evidentiary hearing, the district court denied Larson's motion to suppress his electronic media, finding no unlawful seizure occurred. The court elaborated that Connie was not a state actor or law enforcement and was

not acting at the instigation of law enforcement but was rather acting "to enforce the group home rules to which Larson had consented." (Doc. 24 at 7.)

The court rejected the notion that this was a "situation where a third-party has given consent." (Doc. 24 at 9.) Instead, the court reasoned, by virtue of the house rules to which Larson agreed, Larson himself "gave consent to the house manager to confiscate his property." (*Id*.) Thus, the court concluded, "Larson assumed the risk [Connie] would discover the child pornography on these devices and turn this information over to the police." (*Id*.)

SUMMARY OF THE ARGUMENT

Connie did not act as a government agent when she seized electronics from Larson pursuant to his violations of the adult foster care home rules. Her seizure of Larson's material was conducted to achieve her own ends of enforcing her rules, not at the behest of law enforcement. The government did not participate in her actions, nor was any police investigation pending at the time of seizure. Under well-settled precedent, the Montana and United States Constitutions protect individuals from state action only, not the acts of private individuals. The extensive amount of electronics that Connie seized prior to police involvement implicates no constitutionally protected interest whatsoever.

Nor did Connie act as a government agent when she seized two additional thumb drives after police asked her to collect Larson's electronics. Her contact with police was minimal. She was not motivated to act as a government agent. She did not intend to assist law enforcement investigative efforts but was rather attempting to achieve her own ends of properly disposing of the electronics when Larson vacated her group home.

Finally, the exclusionary rule does not apply to suppress the seizure of items by a private citizen. It only deters unlawful police conduct. This Court should affirm the district court's denial of Larson's suppression motion.

STANDARD OF REVIEW

This Court reviews the denial of a motion to suppress to determine whether the district court's findings of fact were clearly erroneous and whether its interpretation and application of the law was correct. *State v. Wolfe*, 2020 MT 260, ¶ 6, 401 Mont. 511, 474 P.3d 318.

ARGUMENT

This Court should affirm the district court's denial of Larson's suppression motion.

Larson argues that (1) Connie became a state actor such that the government seized his electronics; (2) the third-party consent exception does not apply; and

(3) the exclusionary rule requires suppression of the evidence because the inevitable discovery exception does not apply.[3]

A. Connie was not acting as a government agent when she seized the electronics.

The Fourth Amendment to the United States Constitution and article II, sections 10-11 of the Montana Constitution protect citizens against unreasonable searches and seizures. The "fundamental purpose of Article II, Sections 10-11 is 'to protect the privacy and security of individuals from unreasonable government intrusion or interference.'" *State v. Staker*, 2021 MT 151, ¶ 9, 404 Mont. 307, 489 P.3d 489 (*quoting State v. Hoover*, 2017 MT 236, ¶ 14, 388 Mont. 533, 402 P.3d 1224.) However, these protections do not take effect unless an unlawful "search" or "seizure" is first found. *State v. Funkhouser*, 2020 MT 175, ¶ 16, 400 Mont. 373, 467 P.3d 574 (citation omitted).

The United States Supreme Court has long held that the Fourth Amendment's protection extends only to actions undertaken by government officials or those acting at their direction. *See Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (holding that the Fourth Amendment applies to government action, not that of a

[3]As he did in district court, Larson only challenges Connie's seizure of his electronics without a warrant. He does not challenge: (1) any privacy interest in the electronics; (2) the scope of the subsequent search of the electronics, which was conducted pursuant to a warrant; or (3) the reasonableness of the seizure as related to the length of time law enforcement possessed the electronics before securing a search warrant.

private party); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 614 (1989) (holding that "the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative[.]"). This Court has correspondingly held that Articles 10 and 11 of the Montana Constitution protect individuals from state action only, not the actions of private individuals. *Wolfe*, ¶ 10; *State v. Malkuch*, 2007 MT 60, ¶¶ 12-14, 336 Mont. 219, 154 P.3d 558; *State v. Long*, 216 Mont. 65, 67-71, 700 P.2d 153, 155-57 (1985).

The private party exception applies "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (citation omitted). And nothing prohibits the government's use of information revealed to a private party:

> 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. Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information[.]

Id. at 115-18 (footnotes and citations omitted).

Thus, a seizure by a private party does not violate the United States and Montana Constitutions. However, when a private party acts as an "'instrument' or agent" of the State in effecting a search or seizure, fourth amendment interests are

implicated. *Coolidge v. New Hampshire*, 403 U.S 443, 487 (1971). In determining whether a private person was acting as a government agent, this Court examines: "(1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further [her] own ends." *Malkuch*, ¶ 14 (citing *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982); *United States v. Walther*, 652 F.2d 788, 791-91 (9th Cir. 1981)).

1. Connie did not act as a government agent when she seized electronics from Larson pursuant to her house rules.

Here, the district court properly found that Connie did not act as a government agent when she took Larson's electronics pursuant to her own house rules. First, as a private actor, Connie seized Larson's electronics without the participation or direction of any government official—and even with Larson's knowing and written consent. When confronted with Larson's predatory behavior and his candid admissions to her, Connie approached the situation with an eye toward treatment—not prosecution—in directing Larson to therapy, sitting in on his therapy sessions, blocking his access to pornography, and taking his electronics. While Connie called police twice after discovering child porn on different devices, they never responded to her house. As a result, no criminal

investigation was instigated or pending while Connie gradually confiscated electronics from Larson pursuant to violations of her house rules.

Larson's argument that Connie's delivery to the police of items she already seized transformed her into a government agent is meritless. For example, In *Burdeau*, the defendant's former employer obtained books and papers of the defendant by breaking into his private office and searching his desk-locked files and safes. The former employer turned over the documents to the Department of Justice, which used the documents as a basis for indictment. *Burdeau,* 256 U.S. at 470-71. After noting that ". . . no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property or any knowledge thereof until several months after the property had been taken . . .[,]" the Supreme Court found no Fourth Amendment search or seizure occurred. *Id.* at 475. The Court concluded that the government could retain the incriminating documents which could also be admitted against the defendant at trial. *Id.* at 476.

Thus, Larson's electronics taken and confiscated by Connie constituted a private party seizure. Her seizure of Larson's material was conducted pursuant to her own ends of enforcing her rules, not at the behest of law enforcement. The delivery of material she had already seized to the police did not turn Connie into a government agent. Neither the Montana nor the United States Constitutions are implicated from Connie's private party seizure.

2. Connie did not act as a government agent when she subsequently seized two thumb drives from Larson.

As stated above, Connie would seize electronics as she would catch Larson viewing child porn in violation of the house rules. Then, Larson would buy more new electronics to continue his behavior, which would be seized by Connie as well. Accordingly, as Connie explained, when Larson was moving out of the residence, "most of" the electronics she "already had[,]" which were stored in her safe. (6/11/20 Tr. at 22, 24-25.) But after Larson's admissions to law enforcement, Connie explained that officers arrived at her house and asked her to "gather up all of the electronics that I could find of [Larson's]." (6/11/20 Tr. at 20.) Connie had already seized the other electronics pursuant to violations of her house rules, but she collected two additional thumb drives. (6/11/20 Tr. at 21.)

On appeal, while Larson does not specifically distinguish the items taken by Connie before and after police involvement and rather generally argues that all items should be suppressed, he suggests that Connie became a government agent when she was asked by law enforcement to collect "all" of Larson's electronics, because such collection "extend[ed] beyond" the items previously taken by Connie's "own accord[.]" (Appellant's Br. at 13-14.)

The Court of Appeals for the Ninth Circuit has analyzed the distinction between private party actions and governmental actions:

> While a certain degree of governmental participation is necessary before a private citizen is transformed into an agent of the state, de minimis or incidental contacts between the citizen and law enforcement agents prior to or during the course of a search or seizure will not subject the search to fourth amendment scrutiny. The government must be involved either directly as a participant or indirectly as an encourager of the private citizen's actions before we deem the citizen to be an instrument of the State.

Walther, 652 F.2d at 791 (citation omitted).

Indeed, the Ninth Circuit has explained: "Mere governmental authorization of a particular type of private search in the absence of more active participation or encouragement is similarly insufficient to require the application of fourth amendment standards." *Id.* at 792 (collecting cases). This Court has similarly rejected the assertion that private parties act as government agents when the government merely authorizes a search or suggests private conduct. *See, e.g.*, *Wolfe*, ¶¶ 13-15 (finding a private person did not act as a government agent when, during her report of abuse at a police station, officers directed her to answer her cell phone on speakerphone when the perpetrator called, "if you want to[.]"); *Malkuch*, ¶¶ 15-16 (finding a private citizen did not act as a government agent when the police officer told her he "needed evidence" to support her allegations of illegal drug use and the private citizen subsequently searched a premises and seized the drugs).

Law enforcement's direction here is insufficient to show Connie became a government agent. Initially, it is not even clear that the police authorized or

requested that Connie conduct an additional search or seizure. The officer's ambiguous request for Connie to "gather up all of the electronics that [she] could find of [Larson's]" could be interpreted as a request to gather together the electronics that Connie had already confiscated. After all, prior to the officer's conversation with Connie, Larson himself had asked the police for assistance in retrieving electronics—admittedly with child porn content—that Connie had already previously seized.[4]

Either way, this *de minimis* contact between police and Connie did not transform Connie into a government agent. The record does not show that law enforcement had any knowledge that Connie conducted an additional search and seized the two thumb drives. (*See* Doc. 1.) Even assuming that law enforcement authorized a private search, there was no "active participation or encouragement" by the police. Connie did not testify that the officer further defined the scope of her seizure by directing her to certain rooms or defining particular items to take. While Connie ultimately collected the additional thumb drives, the record does not show that the police actively participated in Connie's seizure.

[4]Additionally, Larson admitted to "the Deputy on scene" that he searched and viewed child pornography. (Doc. 1, Aff. at 1.)

In any event, this Court does not solely analyze the first factor of governmental acquiescence, but also analyzes the second factor of the private party's intent in performing the seizure. *See Malkuch*, ¶¶ 14-16. Here, at the time of law enforcement's involvement, Connie never expressed an intent to assist police in investigating a crime but instead evinced an intent to achieve her own ends. After several years of Larson's conduct, Connie expressed two personal motivations regarding Larson and his electronics: she wanted Larson to "move out" and she wanted to properly dispose of his contraband. (6/11/20 Tr. at 19, 22.)

Before the police had even contacted Connie, Larson was already planning to move out because he had contacted police for a standby assist to collect his belongings. And pursuant to Larson's violations of the house rules, Connie could evict him regardless. Thus, the subsequent investigation did not provide Connie a motive to act as a government agent.

Regarding the electronics, in the context of explaining that she would have not given them back to Larson if police had failed to respond, Connie elaborated:

> **CONNIE**: . . . I would have contacted the police again and said, here. I would have given it to [the police] and *they could have given it to him or done whatever with it*, but absolutely not. Not with child porn on it, no.

(6/11/20 Tr. at 22) (emphasis added). Thus, Connie effectively disclaimed any involvement or interest in an investigation or the ultimate disposition of Larson's electronics. Connie certainly wanted Larson's electronics out of her possession

through the proper channels, but that alone did not turn her into a government agent. But even assuming for the sake of argument that Connie partly intended to assist the police in her subsequent seizure of the two thumb drives, a private party's "legitimate, independent motivation" to further her own ends is "not negated by any dual motive to detect or prevent crime or assist police, or by the presence of the police nearby during the search." *United States v. Cleaveland*, 38 F.3d 1092, 1094 (9th Cir. 1994), *as amended* (Jan. 12, 1995).

Connie did not act as an instrument of the State or to take on the role of a government investigator. Her subsequent seizure of the two additional thumb drives did not transform her into a government agent.

If this Court disagrees and finds that officers asked Connie to conduct an additional search and seizure of new materials and, resultingly, Connie was then acting under the government's direction with the sole purpose of assisting law enforcement, only the two thumb drives are subject to suppression as beyond the scope of Connie's original seizures taken at her own direction. As stated below, Connie's private party seizure does not warrant the exclusionary rule's application.

B. The exclusionary rule does not apply to the electronics that Connie seized.

Larson argues that Connie operating under her house rules did not give her authority to seize his electronics, because, in Larson's view, the seizure would

"contradict adult foster care law" and frustrate Larson's right of possession to his electronics. (Appellant's Br. at 20, n.4.) This argument is without merit.

The exclusionary rule is meant to deter police from using illegal and unconstitutional methods of gathering evidence. *State v. Christensen*, 244 Mont. 312, 319, 797 P.2d 893, 897 (1990) (citing *Long*, 216 Mont. at 71, 700 P.2d at 157.) "When private individuals act, they are likely unaware of the exclusionary rule and its application." *Malkuch*, ¶ 13. Accordingly, the exclusionary rule does not serve to deter private individuals from engaging in searches that would be illegal if conducted by police. *Id*. (citing *Long*, 216 Mont. at 71, 700 P.2d at 157.) Thus, the exclusionary rule "does not apply to evidence resulting from the conduct of private individuals, even if felonious, unless that conduct involves state action." *Christensen*, 244 Mont. at 319, 797 P.3d at 897. Regardless of the reasons or authority for Connie's private party seizure, the exclusionary rule does not apply to suppress the evidence that she obtained.

CONCLUSION

This Court should affirm the district court's denial of Larsons's motion to suppress.

Respectfully submitted this 10th day of May, 2022.

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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 4,383 words, excluding certificate of service and certificate of compliance.

/s/ Roy Brown
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CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-10-2022:

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