IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0603

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TRENT MATTHEW LARSON,

Defendant and Appellant.

BRIEF OF APPELLANT

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

Without a warrant, the State confiscated Appellant's electronics by requesting that a non-owner third party deliver the items to the State. Did the trial court err by denying the motion to suppress?

STATEMENT OF THE CASE

The State charged Trent Matthew Larson with possessing child pornography in violation of Mont. Code Ann. § 45-5-625(1)(e). (D.C. Doc. 1, 2.) The contraband was located on Trent's digital devices. The State obtained those digital devices by asking a non-owner third party to gather up and deliver the devices to the State. (D.C. Doc. 1.) The State did not obtain a warrant to seize the devices. (*See* D.C. Doc. 1.)

Trent moved to suppress and argued the third party did not have authority to consent to the State seizing Trent's property. (D.C. Doc. 8.) The First Judicial District Court, Lewis and Clark County, denied Trent's motion. (D.C. Doc. 24, attached at App. A.)

Trent entered a plea agreement that preserved his right to appeal the motion to suppress. (D.C. Doc. 26.) Trent filed a timely notice of appeal after sentencing. (D.C. Docs. 33, 38.)

STATEMENT OF THE FACTS

Trent is a young man diagnosed with Asperger's syndrome. (D.C. Doc. 30.[1]) He has a case manager through the Center for Mental Health. (6/11 Tr. at 9.) For approximately seven years, he lived in an adult foster care group home in East Helena managed by Connie Griffin Jacquez. (App. A at 2; 6/11 Tr. at 5.)

In October 2019, as Trent was using his cell phone, Jacquez saw what she suspected was child pornography on the screen. (App. A at 2; 6/11 Tr. at 18.) Jacquez took the cellphone from Trent along with some of Trent's other digital devices. (App. A at 2; 6/11 Tr. at 17–18.)

Trent responded by moving out of the group home and calling the Lewis and Clark County Sheriff's Office. (App. A at 3; D.C. Doc. 1.) On the call, Trent explained he had moved out of the group home, and he requested a civil standby while he retrieved his digital devices. (App. A at 3; D.C. Doc. 1.) Trent disclosed that some of his digital devices might contain child pornography. (App. A at 3; D.C. Doc. 1.)

[1] Trent's waiver of confidentiality in the presentence investigation and psychosexual reports is limited to this diagnosis, and he reserves the right to object to additional public disclosures of information drawn from those reports.

Sheriff's Deputy Jordan Criske-Hall went to the group home and encountered Jacquez there. (D.C. Doc. 1.) Jacquez confirmed she had taken some of Trent's devices after seeing suspected child pornography. (D.C. Doc. 1.) Deputy Criske-Hall "asked for and [Jacquez] gave them the confiscated devices." (App. A.) As Jacquez explained, "They asked me to gather up all of the electronics that I could find of his. . . . So I got them all together and gave them boxes of stuff." (6/11 Tr. at 20.) To fulfill the request, Jacquez searched for, consolidated, and delivered more digital devices belonging to Trent than she had previously taken from Trent. (6/11 Tr. at 20–21.) Deputy Criske-Hall "confiscated the electronics and placed them into evidence." (D.C. Doc 1.)

After confiscating the devices, a detective obtained a warrant to conduct a search within the devices. (App. A.) The State did not obtain a warrant to seize the devices. (*See* App. A.)

The District Court held a hearing on Trent's suppression motion. Deputy Criske-Hall did not testify. The only testimony came from Jacquez. (*See* 6/11 Tr. at 5–31.) Through Jacquez, the State introduced an exhibit entitled "AFC[2] Home Rules." (Ex. 1, offered and admitted

[2] "AFC" presumably stands for adult foster care.

6/11 Tr. at 7.) The document bore the signatures of Trent, Jacquez, and Trent's case manager. (Ex. 1.) The State introduced no evidence that Deputy Criske-Hall was aware of this document or the group home rules when he asked Jacquez to gather up Trent's electronics and deliver them to the State. (*See* 6/11 Tr. at 5–31.)

The "AFC Home Rules" state "[c]onfidentiality will be maintained at all times in the home." (Ex. 1.) The rules forbid pornographic material and violations of the law. (Ex. 1.) To address rule violations, the rules permit the home to "confiscate[]/ban[]" electronics and to evict tenants. (Ex. 1.) Jacquez testified she understands the rules to provide her "the right to confiscate any items that I think are inappropriate in the home and they will be locked up. When [tenants] leave my home, they are allowed to have them back." (6/11 Tr. at 13.)

In his motion to suppress, Trent argued Jacquez lacked authority to consent to—and to waive his rights against—the State warrantlessly seizing his electronics. (D.C. Doc. 8.) The State responded by arguing, among other things, that the evidence would have been inevitably discovered because if Deputy Criske-Hall had not seized the electronics

without a warrant, Deputy Criske-Hall could have gotten a warrant to seize the electronics. (D.C. Doc. 14 at 3.)

The District Court denied the motion to suppress, ruling, "The house manager turning these devices over to law enforcement after the house manager had confiscated the devices and upon request is not a violation of Larson's rights." (App. A at 5.)

STANDARDS OF REVIEW

In the appeal of a motion to suppress, this Court reviews findings of fact for clear error and conclusions of law for correctness. *State v. Pham*, 2021 MT 270, ¶ 11, 406 Mont. 109, 497 P.3d 217.

SUMMARY OF THE ARGUMENT

The District Court failed to address how the State seized Trent's electronics: By requesting, without a warrant, that a third party seize them for the State.

A private party's intrusive conduct is attributed to the State when the State knows of and acquiesces in the intrusive conduct and the conduct is intended to assist law enforcement. That being the standard, intrusive conduct that the State requests a private party perform for an investigation is attributed to the State. That's this case. Deputy

Criske-Hall requested that Jacquez gather Trent's electronics and deliver them to Deputy Criske-Hall. Jacquez obliged. This was a State seizure by means of an ostensible private party acting upon the State's request and as the State's instrument.

The District Court focused on how (1) Jacquez initially took some of Trent's electronics independently and (2) the group home rules authorized that independent action to address group home rule violations. The subsequent State seizure, however, was not independent and was not for a violation of the group rules. Further, it was more intrusive than any earlier actions. An initial private seizure does not obviate a subsequent, more intrusive State seizure. The State needed a warrant or a warrant exception.

Jacquez lacked authority to consent to—and to waive Trent's rights against—a warrantless State seizure of Trent's property. Under third party consent doctrine, an officer must, before consent is relied upon, develop facts sufficient to establish the third party has actual authority to validly consent to the government intrusion. The facts known to Deputy Criske-Hall were that Jacquez took Trent's property and that Trent requested a civil standby to retrieve that property, thus

unmistakably communicating that he denied Jacquez had legitimate authority over his property. The background law of adult foster care bolsters Trent's independence when it comes to his property and his rights. The group homes rules are irrelevant because there is no evidence Deputy Criske-Hall was aware of the group home rules. Instead, Deputy Criske-Hall knew facts—and must be charged with knowing law—establishing Jacquez did not have authority to waive Trent's rights against a warrantless seizure of Trent's property. Without such authority, neither the third party consent exception nor any other exception to the warrant requirement applies.

The remedy for the State's warrantless and unlawful seizure is to reverse and remand for suppression. This Court has rejected that an argument that police would have done it right and obtained a warrant had they not done it wrong and forgone a warrant can establish an exclusionary rule exception. Subsequently obtained authority to search a thing that was unlawfully seized also does not form an exclusionary rule exception. This Court should reverse and remand for the District Court to suppress the fruit of the State's unlawful seizure.

ARGUMENT

I. The State unlawfully seized Trent's electronics without a warrant.

The Fourth Amendment to the United States Constitution and Article II, Section 11 of the Montana Constitution prohibit unreasonable seizures. *Katz v. United States*, 389 U.S. 347, 353 (1967); *State v. Hoover*, 2017 MT 236, ¶ 14, 388 Mont. 533, 402 P.3d 1224. Article II, Section 10 of the Montana Constitution enhances individual privacy. *State v. Bullock*, 272 Mont. 361, 384–85 901 P.2d 61, 75 (1995). A seizure occurs when there has been "some meaningful interference with an individual's possessory interests," *United States v. Jacobsen*, 466 U.S. 109, 113 (1984), or "dominion over his or her . . . property," *Horton v. California*, 496 U.S. 128, 133 (1990); *Hoover*, ¶ 15 n. 3.

Under these provisions, "[w]arrantless . . . seizures are per se unreasonable subject to only a few carefully drawn exceptions." *State v. Elison*, 2000 MT 288, ¶ 39, 302 Mont. 228, 14 P.3d 456. The government bears the burden to prove any exception to the warrant requirement. *State v. Goetz*, 2008 MT 296, ¶ 40, 345 Mont. 421, 191 P.3d 489.

A. The State seized Trent's electronics when Jacquez acted upon the State's request and as the State's instrument to gather, seize, and deliver all of Trent's electronics to the State.

In apparently concluding there was no government seizure of Trent's electronics, the District Court focused on how Jacquez initially confiscated some of Trent's electronics for violations of the group home rules and how the group home rules permitted her to do so. (App. A at, *e.g.*, 7 ("The house manager was not acting at the instigation of law enforcement. She was acting to enforce the group home rules to which Larson had consented.").) The court further concluded, Trent "assumed the risk [Jacquez] would discover the child pornography on these devices and turn this information over to the police." (App. A at 9.) But the District Court's analysis belies the facts of the case: Jacquez gathered up and delivered all of Trent's electronics to the State at Deputy Criske-Hall's request, not of her own accord.

Under the private party doctrine, a private party acting "of her own accord" does not effectuate a constitutionally-outlawed unreasonable search or seizure. *State v. Long*, 216 Mont. 65, 71, 700 P.2d 153, 157 (1985); *Coolidge v. New Hampshire*, 403 U.S. 443, 489 (1971); *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). But for the

private party doctrine to apply, the private party must act "of her own accord." *Coolidge*, 403 U.S. at 489. The same private party's actions, if at the government's behest, may represent an unreasonable search or seizure. *See Coolidge*, 403 U.S. at 487.

A court facing the question whether the private party doctrine applies must therefore answer "whether . . . in light of the circumstances of the case, [the private party] must be regarded as having acted as an 'instrument' or agent of the state when she produced [the evidence]." *Coolidge*, 403 U.S. at 487. Two factors bear on the analysis: "(1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the [intrusive conduct] intended to assist law enforcement efforts or to further h[er] own ends." *See State v. Malkuch*, 2007 MT 60, ¶ 14, 336 Mont. 219, 154 P.3d 558 (citation omitted).

These factors correspond to a bright line: When the government *requests* intrusive conduct by a third party, the third party obliging that request acts as the government instrument, bringing the matter within constitutional confines. After all, by virtue of requesting intrusive conduct, the government "kn[o]w[s] of and acquiesce[s] in the intrusive

conduct," and, by virtue of fulfilling the request, the party performing the intrusive conduct "intend[s] to assist law enforcement efforts." *Malkuch*, ¶ 14. For example, in *Malkuch*, this Court concluded a private party's search was not attributable to the State. Why? Because it was "neither requested nor agreed to by the police." *Malkuch*, ¶ 16.

Here, Jacquez acted as the State's instrument when, at Deputy Criske-Hall's request, she gathered up and seized all of Trent's electronic devices for the purpose of delivering them to Deputy Criske-Hall. Deputy Criske-Hall more than knew or acquiesced in the intrusive conduct, he requested it. For her part, Jacquez performed the intrusive conduct to assist law enforcement efforts rather than to respond to Trent violating the group home rules. Jacquez herself attributed the intrusive conduct to the State, explaining, "They asked me to gather up all of the electronics that I could find of his. . . . So I got [the electronics] all together and gave them boxes of stuff." (6/11 Tr. at 20.)

This case's government seizure shares much with the government seizure that occurred in *California v. Evans*, 49 Cal.Rptr. 501 (Cal. App. 1966). In *Evans*, a private third party initially took temporary

possession of some of Evans's property at Evans's request. *Evans*, 49 Cal.Rptr. at 504, 508. Police then asked the third party to deliver Evans's property to the police, and the third party obliged that request. *Evans*, 49 Cal.Rptr. at 504, 508. Given that the third party "did what the officers asked him to do and thus complied with their wishes," and that the "conduct was obviously not consonant with the purpose for which" the Evans gave the third party the property, "a conclusion that [the third party] did not act as an arm of the police is unrealistic." *Evans*, 49 Cal.Rptr. at 502.

Similarly, here, Jacquez did what the State asked, and she did so not to address a violation of the group home rules but because the State requested that she gather and deliver Trent's property. Jacquez thus acted "as an arm of the police." *Evans*, 49 Cal.Rptr. at 502.

Finally, there should be no confusion that a government instrument or agent can seize an item that has already been seized privately. In *Jacobsen*, FedEx employees opened a shipping box, discovered bags containing white powder, and contacted federal agents, who took control of the bags. *Jacobsen*, 466 U.S. at 111–12. As explained by the U.S. Supreme Court, whether a new government

search or seizure occurs after an initial private search or seizure depends on "the degree to which [the government intrusion] exceeded the scope" of the private party's initial invasion. *Jacobsen*, 466 U.S. at 115. Thus, "[a]lthough respondents had entrusted possession of the items to Federal Express, the decision by governmental authorities to exert dominion and control over the package for their own purposes clearly constituted a 'seizure,'" presumably because the government's unlimited seizure exceeded the scope of FedEx's limited possession of the items. *Jacobsen*, 466 U.S. at 120 n. 18.[3]

Jacobsen's seizure analysis applies here. Although Jacquez had possession of some of Trent's electronics before Deputy Criske-Hall arrived, that seizure comprised only some of Trent's electronics and was (by the terms of the group home rules) "for" a violation of the group home rules and contingent on Trent remaining a resident of the group home. (Ex. A.) But when Jacquez gathered and delivered all of Trent's electronics at Deputy Criske-Hall's request, the seizure encapsulated all

[3] The government seizure in *Jacobsen* was upheld because the seizure satisfied an exception to the warrant requirement. *Jacobsen*, 466 U.S. at 120 n. 18. This brief's next section addresses how there was no warrant exception in this case.

of Trent's electronics, extending beyond those previously taken by Jacquez of her own accord; Jacquez was acting to oblige a police request rather than to enforce the group home rules; and the seizure at that time was not contingent on Trent remaining a resident of the group home but would instead indefinitely deprive Trent of his devices. As in *Jacobsen*, Jacquez's actions as the State's instrument "clearly constituted a seizure." *Jacobsen*, 466 U.S. at 120 n. 18. For that State seizure, the State needed a warrant or a valid exception to the warrant requirement. *Elison*, ¶ 39.

B. The facts known to Deputy Criske-Hall did not establish Jacquez had authority to consent to—and thereby waive Trent's rights against—a warrantless seizure of Trent's property.

It is unclear from the District Court's order whether it determined Jacquez's delivery of Trent's property upon Deputy Criske-Hall's request satisfied the third-party consent exception to the warrant requirement. On the one hand, the District Court reasoned, "By virtue of the house rules to which he had agreed, Larson himself gave consent to the house manager to confiscate his property. This is, therefore, not a situation where a third-party has given consent." (App. A at 9.) On the other hand, the District Court also reasoned, "By giving the house

manager authority to confiscate his electronic devices, Larson assumed the risk she would discover the child pornography on these devices and turn this information over to the police." (App. A at 9.) As seen in discussion below, "assuming the risk" is an idea that sounds in the third-party consent exception.

Regardless, the record cannot establish the satisfaction of the third-party consent exception. Any argument regarding Jacquez's authority depends on Deputy Criske-Hall's knowledge of the group home rules, yet there is no evidence and no finding of fact that Deputy Criske-Hall was aware of the group home rules.

Consent represents an exception to the warrant requirement that "must be narrowly construed." *State v. Schwarz*, 2006 MT 120, ¶ 14, 332 Mont. 243, 136 P.3d 989. Under Montana law, "for third-party consent . . . to be valid as against the defendant, the consenting party must have actual authority" to consent to the government intrusion. *State v. McLees*, 2000 MT 6, ¶ 32, 298 Mont. 15, 994 P.2d 683. The authority to consent to a search must rest on "mutual use of the property by persons having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the

right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *McLees*, ¶ 13 (quoting *United States v. Matlock*, 415 U.S. 164, 171 (1974)). But "[w]hile one who permits a third party access or control over his property has a diminished expectation of privacy, the third party's access or control does not similarly diminish the owner's expectation that he will retain possession of his property." *Lacey*, ¶ 48 (quoting *Illinois v. Blair*, 748 N.E.2d 318, 324–25 (Ill. App. Ct. 2001)). That supports a conclusion that, for a third party to effectively consent to the seizure of another's property, the third party must have an "ownership interest" in the property. *Blair*, 748 N.E.2d at 325.

Whether search or seizure, only those "facts the officer was operating under at the time of the purported search or seizure" can establish authority to consent. *State v. Urziceanu*, 2015 MT 58, ¶ 16, 378 Mont. 313, 344 P.3d 399 (citing *State v. Gilmore*, 2004 MT 363, ¶ 22, 324 Mont. 488, 104 P.3d 1051). Facts not established as known to the officer do not enter into the analysis . *See Urziceanu*, ¶ 16; *Gilmore*, ¶ 22.

In *Urziceanu*, a woman contacted the sheriff's office to request a civil standby while she retrieved her possessions from a place where she said she had been living. *Urziceanu*, ¶¶ 2–3. Obliging the woman's request, deputies followed her halfway up the property's driveway. *Urziceanu*, ¶ 4. From that vantage, the deputies observed marijuana growing on the porch. *Urziceanu*, ¶ 4. The deputies used that observation to obtain a warrant and to prosecute Urziceanu. *Urziceanu*, ¶¶ 6–7. Moving to suppress, Urziceanu testified the woman who requested the civil standby hadn't lived at the property for months, did not depart on good terms, and did not have permission or a right to be on the property. *Urziceanu*, ¶ 7. He thus argued she could not consent to deputies coming up his driveway, which was fenced and marked with no trespassing signs. *Urziceanu*, ¶¶ 4, 7, 13. Citing *Gilmore*, this Court rejected Urziceanu's argument. Determining a third-party's authority to consent to a search or seizure turns on the "facts the officer was operating under at the time of the purported search or seizure," and the facts Urziceanu testified to were not available to the officers when they went up the driveway. *Urziceanu*, ¶¶ 16, 19. Contrasting *McLees*, the *Urziceanu* Court concluded the third-party consent exception was

satisfied because "there was no objective indication" at the time of the consent that the third party lacked common authority as to the property. *Urziceanu*, ¶ 18.

Here, the record shows Deputy Criske-Hall knew facts establishing Jacquez did not have valid common authority over Trent's property, much less the sort of authority that could permit her to consent to indefinitely depriving Trent of his property. Trent called the Sheriff's Office to request a civil standby to retrieve his electronics from the group home. The civil standby request's very premise was that the electronics were Trent's and that he denied that Jacquez had any right to retain the electronics. Deputy Criske-Hall thus had dispositive, "objective indication[s]" that Jacquez lacked common authority over Trent's devices. *Urziceanu*, ¶ 18.

Also, under law concerning adult foster care facilities and residents, residents have autonomy when it comes to their personal property and rights. An adult foster care home's purpose "is limited to light personal care, custodial care, and supervision" in a "home-like safe environment." Admin. R. Mont. 37.100.101(2), (3). Beyond that, "[r]esidents' needs are to be addressed in a manner that supports and

enables residents to maximize their ability to function at the highest level of independence possible." Admin. R. Mont. 37.100.101(2). Residents retain rights "to privacy in [their] room[s]," "to reasonable safeguards for personal possessions" and to "have reasonable access to" their personal property. Mont. Code Ann. § 50-5-1104(2)(i), (l). Residents "have the right to . . . be encouraged and assisted to exercise constitutional and legal rights . . . ." Admin. R. Mont. 37.100.137(3)(o). In sum, adult foster care providers have nothing approaching power of attorney concerning residents.

The State and its deputies must be charged with knowing the law. *See State v. Lynn*, 243 Mont. 430, 435–36, 795 P.2d 429, 433 (citation omitted) ("Ignorance of the law is no excuse."). The law does not provide Jacquez authority to waive Trent's constitutional rights and his interests in his property. Far from it, Jacquez exercising such authority conflicts with law providing for Trent to exercise his constitutional rights and to function at the highest level of independence possible.

If the District Court nonetheless found Jacquez had authority to consent, it relied on the group home rules to do so. (*See* App. A at 9.) Under *Urziceanu*, however, relying on the group home rules to establish

authority to consent in this case would constitute legal error. As in *Urziceanu*, where there was no evidence that officers were aware of the facts Urziceanu later testified about, *Urziceanu*, ¶¶ 16, 19, here, there was no evidence and no findings of fact that Deputy Criske-Hall was aware of the group home rules. If such facts existed, the State failed to carry its burden to put them in the evidentiary record. *See Goetz*, ¶ 40 (recognizing the State's burden of proof with regard to warrant requirement exceptions). The group home rules thus cannot be used to establish Jacquez had authority to consent to the seizure.[4]

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[4] If this Court were nonetheless to consider the group home rules, the rules would not establish Jacquez had a sufficient connection to Trent's property to waive Trent's rights against a warrantless seizure of it. The rules did not give Jacquez an ownership interest in Trent's electronics. (*See* Ex. A.) Indeed, such an interest would contradict adult foster care law whereby Trent had a right to his own possessions. Section 50-5-1104(2)(i), (l). Further, the group home rules would not fairly suggest to a resident that they assumed a risk that Jacquez would waive their rights as to their property. The group home rules gave Jacquez the right to confiscate electronics for the specific purpose of addressing group home rule violations and contingent on a resident's continued residency in the group home. (*See* Ex. A.) Such limited authority does not establish Jacquez's general authority to dispose of residents' personal possessions or to indefinitely obstruct residents' property rights through consenting to a State seizure of resident personal property. *Cf. State v. Sorenson*, 180 Mont. 269, 276–77, 590 P.2d 136, 141 (1979) ("Even assuming she obtained implicit permission to enter the house . . . , her authority was limited to enter to perform the requested tasks: She did not posses a 'sufficient relationship' with the residence which would give her authority to consent to a search.") (overruled on a different issue by *State v. Loh*, 275 Mont. 460, 914 P.2d 592 (1996)).

Under these facts and the law, the State was required to treat Trent and his rights with the same respect due to anyone else and their rights. The State did not. The State seized Trent's devices without a warrant, without Trent's consent, and without a proven exception to the warrant requirement. The result was an unconstitutional seizure of Trent's electronics.

II. The exclusionary rule requires suppressing the fruit of the unlawful seizure.

The "exclusionary rule bars evidence obtained as a result of an unconstitutional search or seizure, also known as 'fruit of the poisonous tree.'" *State v. Ellis*, 2009 MT 192, ¶ 48, 351 Mont. 95, 210 P.3d 144 (citation omitted); *accord Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Thus, "[a] defendant aggrieved by an unlawful search and seizure may move the court to suppress as evidence anything obtained by the unlawful search and seizure." Mont. Code Ann. § 46-13-302(1).

Here, the fruit of the poisonous tree includes the images the State used to prosecute this case. Consistent with this brief's analysis in earlier sections, the State's seizure of Trent's digital devices was unlawful. Without that seizure, the State would not have possessed the devices to search and discover contraband within. The images were

thus both the "result of," *Ellis*, ¶ 48, and "obtained by," § 46-13-302(1), the unlawful seizure. By its terms, the exclusionary rule applies.

A. The State cannot establish an exclusionary rule exception by saying it could have gotten a warrant when it didn't.

The State bears the burden to prove the applicability of any exclusionary exception. *Nix v. Williams*, 467 U.S. 431, 444 (1984); *State v. Laster*, 2021 MT 269, ¶ 36, 406 Mont. 60, 497 P.3d 224. The only exception to the exclusionary rule the State argued below was the inevitable discovery exception. The State's argument was the exception applied because "[e]ven if the devices were unlawfully seized by Deputy Chriske-Hall, he certainly had probable cause to obtain a warrant to seize the items." (D.C. Doc. 14 at 3.)

In *Ellis*, this Court rejected that an argument amounting to "if we hadn't done it wrong, we would have done it right" can establish an exception to the exclusionary rule, specifically when the State seeks to forgive its failure to secure a warrant through the suggestion that it could have obtained a warrant. *Ellis*, ¶ 57 (quoting *Utah v. Topanotes*, 76 P.3d 1159, 1164 (Utah 2003)). The *Ellis* Court rejected this argument because "[t]o 'excuse the failure to obtain a warrant merely

because the officers had probable cause and could have obtained a warrant would completely obviate the warrant requirement.'" *Ellis*, ¶ 59 (quoting *United States v. Mejia*, 69 F.3d 309, 320 (1995) (citation omitted)). The State's argument below was the same one rejected in *Ellis*. Simply put, the State cannot establish an exclusionary rule exception by saying it could have gotten a warrant when it didn't. *Ellis*, ¶¶ 57–60.

B. An otherwise authorized search of a thing does not form a valid exclusionary rule exception when the government's ability to search the thing depends on having unlawfully seized it.

The inevitable discovery exception argument immediately addressed above was the only exclusionary rule exception argument the State fleshed out below. (*See* D.C. Doc. 14 at 3.) Nonetheless, the State also offhandedly noted that, in *Lacey*, evidence contained within an unlawfully seized computer fell under the inevitable discovery exception. (D.C. Doc. 14 at 5.) On appeal, the State might argue the same should apply here due to the later-issued warrant to search the digital devices that the State had already unlawfully seized. Such an argument would, however, rest on misunderstanding *Lacey*, where the

inevitable discovery exception was about the plain view doctrine, not a later issued search warrant.

In *Lacey*, Lacey's girlfriend saw images on Lacey's computer of Lacey sexually abusing a child with sex toys. *Lacey*, ¶¶ 3, 10. The girlfriend consented to police entering the home and seizing Lacey's laptop. *Lacey*, ¶¶ 4–5. State and federal officers returned to perform a more thorough search of the home and garage the next day, again upon the girlfriend's consent. *Lacey*, ¶¶ 9–10. Before and during that search, officers spoke by phone to Lacey, who acknowledged "he knew what he did was wrong." *Lacey*, ¶¶ 6, 11. And, in the garage, officers discovered sex toys matching the description of those in the digital images on Lacey's laptop. *Lacey*, ¶ 10. Officers seized the sex toys and other evidence and subsequently obtained a federal warrant to search the laptop. *Lacey*, ¶¶ 10, 18.

Lacey moved to suppress various evidence. *Lacey*, ¶ 19. On appeal, this Court concluded the girlfriend could consent to a search and seizure of the sex toys and other evidence, *Lacey*, ¶¶ 41–42, but she could not validly consent to the laptop's seizure, *Lacey*, ¶ 49. Regarding the fruit of the laptop's unlawful seizure, this Court *sua sponte* held the

inevitable discovery exception applied. *Lacey*, ¶ 55. The *Lacey* Court explained that "the evidence on the laptop would have been inevitably discovered even if [police] had not initially seized the laptop" because, "[i]f [police] had left the laptop at [the] house," statements and "evidence discovered during the search of the garage" would have provided "probable cause to seize the laptop." *Lacey*, ¶ 56. As support, the Court specifically noted the sex toys found in the garage were the same ones the girlfriend had reported seeing in the pictures on the computer. *Lacey*, ¶ 56.

Because "probable cause to seize," *Lacey*, ¶ 56, is not, in and of itself, authority to seize,[5] one must read *Lacey* in context to discern that

[5] A seizure is authorized by a warrant "upon probable cause," U.S. Const. amend IV, or by an exception to the warrant requirement, *Elison*, ¶ 39. Several exceptions to the warrant requirement also require a finding of probable cause in order for the exception to apply, but they also always require something else. *See State v. Kenfield*, 2009 MT 242, ¶ 17, 351 Mont. 409, 213 P.3d 461 (stating the exigent circumstances exception requires "the existence of both probable case and exigent circumstances"); *State v. Pierce*, 2005 MT 182, ¶¶ 15–23, 328 Mont. 33, 116 P.3d 817 (concluding seizure valid where there is "probable cause to seize" truck and automobile seizure exception applied); *State v. Lynn*, 243 Mont. 430, 433–34, 795 P.2d 429, 432 (1990) (concluding seizure valid where there is "probable cause to seize" item and the plain view doctrine applies). Probable cause alone cannot be enough to authorize a seizure of property because, as this Court has recognized, "then there would never be *any* reason for officers to seek a warrant." *Ellis*, ¶ 59 (quoting *Mejia*, 69 F.3d at 320 (emphasis in original)).

the authority by which the officers could have inevitably seized the laptop was authority under the plain view doctrine. When the *Lacey* Court "turn[ed] to the question of whether, absent the owner's consent, the officer had probable cause to seize the laptop," it cited *Arizona v. Hicks*, 480 U.S. 321, 326–27 (1987), which is a case involving a plain view doctrine seizure. *Lacey*, ¶ 49; *see Hicks*, 480 U.S. at 326 (holding probable cause as to the item's incriminating nature is necessary for a plain view seizure). Indeed, the *Lacey* Court had earlier referred to *Hicks* and "probable cause to effect a seizure" under the plain view doctrine. *Lacey*, ¶ 47. The *Lacey* Court also referred to "plain view doctrine" immediately after it began examining whether officers "had probable cause to seize the laptop." *Lacey*, ¶¶ 49–50. Finally, *Lacey*'s facts established the doctrine's application. The day after the laptop's seizure in the home, officers again searched the entire home. *Lacey*, ¶¶ 9–10. Thus, "[i]f [police] had left the laptop at [the] house," they would have had access to the laptop for a plain view seizure with subsequently developed probable cause. *Lacey*, ¶ 56.

Plus, other interpretations of *Lacey* are not compelling. The *Lacey* Court could not have meant the laptop would have been inevitably

seized through a subsequently secured warrant because that would contradict *Ellis*. Recall, in *Ellis*, this Court stated in no uncertain terms that an exclusionary rule exception cannot rest on an argument that police could have obtained a warrant when they didn't. *Ellis*, ¶¶ 57–60. *Ellis* was decided three months after *Lacey*. If *Lacey* meant inevitable discovery applied because police could have inevitably obtained a warrant, *Ellis* reversed that holding.

The *Lacey* Court's inevitable discovery holding also was not based on the later issuance of a warrant to search the seized computer's *data*. The *Lacey* Court did not mention the subsequent issuance of a warrant to search the computer's data in the paragraph explaining its inevitable discovery holding. *See Lacey*, ¶ 56. Elsewhere, the *Lacey* Court explicitly distinguished authority to search from authority to seize. *See Lacey*, ¶ 51. *Lacey* did mention the subsequent search warrant (it was part of the facts), but it was mentioned to identify the potentially suppressible evidence rather than to explain why the evidence fell under an exclusionary rule exception. *Compare Lacey*, ¶ 52 (stating the evidence discovered under the later "search warrant is admissible under the 'inevitable discovery' exception"), *with Lacey*, ¶ 56 (explaining why

the exception applied—because there inevitably would have been "probable cause to seize the laptop" rather than because there was a later warrant to search the laptop).

Indeed, it would have been circular for the *Lacey* Court to have held the inevitable discovery exception applied to the fruit of an unlawful seizure via a subsequent warrant to search the thing that had been unlawfully seized. As the *Lacey* Court acknowledged and understood, the inevitable discovery exception requires a showing that "the evidence would have been inevitably discovered *despite* a constitutional violation." *Lacey*, ¶ 55 (emphasis supplied). As under its twin, the independent source exception, the means of inevitable discovery must be "apart," *Lacey*, ¶ 53, or "independent of" the constitutional violation necessitating the exception's invocation, Wayne R. Lafave, et al., 3 *Criminal Procedure* 9.3 at n. 77 (4th ed.). That is not true where a search of a thing can only occur because the thing has previously been unlawfully seized. For example, in cases where this Court has found an unlawful stop (*i.e.* seizure), the later development of authority to search the stopped person or vehicle is inconsequential to the suppression analysis because it flows out of the unlawful seizure.

See, e.g., *Hoover*, ¶¶ 9, 30 (concluding a stop was unlawful, suppressing regardless of later authority to search flowing out of unlawful stop). Similarly, in *Lacey*, police could only execute a search warrant on the laptop because they had obtained the laptop earlier through an unlawful seizure. These facts made that search derivative of rather than despite or separate from the unlawful seizure. The *Lacey* Court thus examined whether there was an independent, inevitable means for the laptop's seizure, and did not rest its inevitable discovery analysis on later warrant to search the laptop's data.[6] *See Lacey*, ¶ 56.

Nevertheless, likely due to sometimes ambiguous prose in *Lacey*, the basis for *Lacey*'s inevitable discovery holding has been misstated. In *State v. Neiss*, 2019 MT 125, 396 Mont. 1, 443 P.3d 435, the State executed a warrant to search Neiss's home and seized his computer. *Neiss*, ¶¶ 8–9. Later, police obtained a warrant to search the computer. *Neiss*, ¶ 10. One of Neiss's multitude of claims on appeal concerned the

[6] The attenuation doctrine exception also does not apply in such circumstances. *See Green v. United States*, 231 A.3d 398, 413–14 (D.C. App. 2020) (holding "the later issuance of a warrant to search [a] cell phone" does not "constitute an intervening circumstance that purge[s] the primary taint of unlawfulness in the phone's seizure" when "the phone already had been seized and that fact was predicate for the warrant's issuance").

first warrant being overbroad. *Neiss*, ¶ 44. In responding to that claim, this Court *sua sponte* cited *Lacey*'s paragraph in which the *Lacey* Court explained the effect of its inevitable discovery holding (that the evidence found when executing the later search warrant was admissible under the inevitable discovery exception) and took it to mean the reason the inevitable discovery exception applied in *Lacey* was because of the later warrant. *Neiss*, ¶ 46 (citing *Lacey*, ¶ 52). The State had not argued for such an interpretation in its briefing. Also, the *Neiss* Court did not mention *Lacey*'s later paragraph in which the *Lacey* Court explained that the basis for the exception's application was "probable cause to seize," referring to the plain view doctrine. *Neiss*, ¶¶ 45–46; s*ee Lacey*, ¶ 56.

Turning to Trent's case, neither *Lacey* nor *Neiss* should be taken to establish the later search warrant for Trent's electronics means the inevitable discovery exception applies to the fruit of the unlawful seizure of Trent's electronics. Again, the *Lacey* Court did not rest its analysis on a later search warrant but instead on an inevitable seizure under the plain view doctrine. *See Lacey*, ¶ 56. Under the plain view doctrine, it is necessary for officers to view an incriminating object

before they seize it. *See Hicks*, 480 U.S. at 326. That does not work here. The record does not establish Deputy Criske-Hall saw Trent's devices before the State seized them through Jacquez, nor does the record establish Deputy Criske-Hall ever returned to a place in which the devices would have been in plain view had they previously not been unlawfully seized.

Neiss also can be distinguished. In saying it was declining to address Neiss's argument regarding the search of his house and seizure of his computer, the *Neiss* Court cited not only its understanding of *Lacey* but also a conclusion that the search of Neiss's house and seizure of his computer occurred under the "lawful authority" of a warrant. *Neiss*, ¶ 46. Here, by contrast, there was no warrant authorizing the seizure of Trent's electronics. And that's the point: The State unlawfully seized Trent's electronics without a warrant or a warrant exception.

Trent submits this Court should clarify the confusion surrounding *Lacey*. Regardless, in this case, the State has not carried its burden to establish the applicability of any exclusionary rule exception. Where no exception to the rule applies, the rule does. The State unlawfully seized

Trent's electronics, and this Court should reverse and remand for the District Court to suppress the fruit of the State's unlawful seizure.

CONCLUSION

This Court should reverse and remand with instructions for the District Court to suppress the fruit of the State's unlawful seizure.

Respectfully submitted this 14th day of February, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook 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 6,650, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Alexander H. Pyle
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APPENDIX

CERTIFICATE OF SERVICE

I, Alexander H. Pyle, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-14-2022:

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