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.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, the Honorable Edward McLean, Presiding

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The U.S. and Montana Constitutions require the State to have a warrant or operate under a warrant exception when seizing property. The State did not have a warrant or operate under a warrant exception when it enlisted Jacquez to gather property for the State. Because the property was Trent's (he did not give it away or relinquish his interest in it), Trent can challenge the intrusion. Because "[t]hat which [is] wrong when done directly, is equally wrong when done indirectly," *Tipton v. Sands*, 103 Mont. 1, 12, 60 P.2d 662, 667 (1936), the State's unlawful conduct of enlisting Jacquez to seize property for the State without a warrant or warrant exception warrants suppression.

The State does not argue Jacquez could provide valid third-party consent for the State seizing Trent's property. (*See* Appellee's Br. at 1–19.) Nor does the State argue any exclusionary rule exception if Jacquez was the State's instrument when she executed the challenged intrusive conduct on the State's behalf. (*See* Appellee's Br. at 9, 19.) The State simply argues Jacquez never acted as the State's instrument, and constitutional requirements and the exclusionary rule are therefore inapplicable. The State's argument—that intrusive conduct performed

at the State's request is not attributable to the State—is illogical and degrades our constitutional protections.

I. Jacquez acted as the State's instrument in the State's seizure of Trent's electronics.

The State's argument is premised on an implicit assumption that all of Trent's electronics were seized only once. Per the State, most of Trent's electronics were seized when Jacquez took and deposited Trent's property in a shed pursuant to the group home rules, except for two additional thumb drives that were seized later when the State asked Jacquez to go get all of Trent's electronics and give them to the State and Jacquez obliged. (*See* Appellee's Br. at 9–18.)

The State fails to recognize, however, that items can be seized more than once, and indeed, that occurred here. Jacquez's initial actions conducted at her own behest executed private seizures. Jacquez's subsequent actions conducted at the State's behest executed public seizures. The subsequent actions were seizures because they represented meaningfully greater interference with Trent's "dominion over his . . . property" than anything that had occurred privately before. *Horton v. California*, 496 U.S. 128, 133 (1990); *State v. Hoover*, 2017 MT 236, ¶ 15 n. 3, 388 Mont. 533, 402 P.3d 1224; *see United States v.*

Jacobsen, 466 U.S. 109, 113–15, 121 (1984). (*See* Appellant's Br. at 13–14.)

Analogously, when a parent loans her car to a teenager for the night, the teenager effectively seizes the car with the parent's consent. But when the State pulls over the teenager and takes the parent's car, a second seizure has occurred, this one by the State. Likewise, Trent consented to Jacquez taking his property for group home rule violations while he remained a resident, and Jacquez effectively seized some of Trent's electronics upon that consent. But regardless of that first set of private seizures, a second set of seizures occurred when Jacquez acted as the State's instrument and seized the same and additional property, for a different purpose, and effected meaningfully greater interference with Trent's rights concerning all that property.

That Jacquez was involved in both seizures is inconsequential; two sets of seizures nonetheless occurred. Jacquez was a wholly private party acting independently to enforce house rules during the first set of seizures. But during the second set of seizures, she was the State's instrument effectuating seizures at the State's request. Even where an ostensibly private party, like Jacquez, commits intrusive conduct, a

court must ask "whether . . . in light of the circumstances of the case, [the otherwise private party] must be regarded as having acted as an 'instrument' or agent of the state when she produced [the evidence]" through the intrusive conduct. *Coolidge v. New Hampshire*, 403 U.S. 443, 489 (1971). The answer to that question depends on weighing "(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." *State v. Malkuch*, 2007 MT 60, ¶ 14, 336 Mont. 219, 154 P.3d 558 (citation omitted). These factors weigh strongly in favor of concluding Jacquez was the State's instrument in the second set of seizures. (Appellant's Br. at 10–12.) When the State explicitly requests conduct, the conduct is attributable to the State.

The State disagrees and cites *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921), *State v. Wolfe*, 2020 MT 260, 401 Mont. 511, 474 P.3d 318, and *State v. Malkuch*, 2007 MT 60, 336 Mont. 219, 154 P.3d 558. (Appellee's Br. at 13, 15.) But this case is unlike those cases. In *Burdeau* and *Malkuch*, private parties foisted physical evidence onto law enforcement, and there was never any request by law enforcement

that the private parties do so. *See Burdeau*, 256 U.S. at 475; *Malkuch*, ¶ 16 (noting the search was "neither requested nor agreed to by the police"). Likewise, in *Wolfe*, the complainant's friend asked an officer whether the complainant could answer her phone and the officer responded, "If you want to. If you don't, that's ok." *Wolfe*, ¶ 4. This Court accordingly concluded the officer "never directed [the complainant or her friend's] actions to such a degree as to conclude that they had become instruments of the State." *Wolfe*, ¶ 13.

But here, we have the State directing Jacquez. In contrast to *Burdeau*, *Malkuch*, and *Wolfe*, Jacquez gathered and gave all of Trent's electronics to the State in response to the State explicitly asking her to do so. The facts show law enforcement knew of the challenged intrusive conduct (*i.e.*, the second set of seizures) and that Jacquez performed the challenged intrusive conduct to assist law enforcement. As such, Jacquez was acting as the State's instrument in the performance of the challenged intrusive conduct of gathering up Trent's electronics for the State and providing them to the State. *See Malkuch*, ¶ 14. One's eyes need not strain to see this. Law enforcement's request for intrusive

conduct and a private party's assent to that request represents a bright line dividing private from public conduct. (Appellant's Br. at 10.)

Nothing the State cites obscures the bright line; rather, cases like *United States v. Walther*, cited by the State, highlight the bright line. (*See* Appellee's Br. at 15 (citing *Walther*, 652 F.2d 788 (9th Cir. 1981).) Under *Walther*, "[m]ere governmental authorization of a particular type of search *in the absence of more active participation or encouragement* is . . . insufficient to require the application of fourth amendment standards." *Walther*, 652 F.2d at 792 (citing *United States v. Goldstein*, 532 F.2d 1305 (9th Cir. 1975)) (emphasis supplied). *Goldstein*, the case *Walther* cites for that proposition, illustrates what *Walther* means by it.

In *Goldstein*, a statute authorized telephone companies to record calls in certain instances, and a telephone company then, of its own accord, recorded a call and, of its own accord, turned the call over to police. *Goldstein*, 532 F.2d at 1308–10. Per *Goldstein* and *Walther*, the mere authorization of the intrusive conduct did not necessitate concluding the telephone company was the State's instrument because there was no active participation or encouragement by the government as to intrusive conduct. *Walther*, 652 F.2d at 792; *Goldstein*, 532 F.2d

1311. The same applies to *Wolfe*, where, in response to a question posed by private parties, an officer said the private parties *could* do something but the officer did not request or encourage the private parties to do that thing. *Wolfe*, ¶¶ 4, 13. By contrast, in this case, the officer encouraged the challenged intrusive conduct by explicitly requesting the private party to conduct the intrusion, and the private party obliged.

While the State asserts that request contained "no 'active participation or encouragement'" (Appellee's Br. at 16), the State's assertion flouts common sense. When a parent directly asks a child to mow the lawn, the parent is, of course, actively encouraging the child to mow the lawn. If or when the child obliges and mows the lawn, anyone being fair would agree that the child is acting as the parent's instrument for lawn care. Likewise, when the officer here directly asked Jacquez to perform the challenged seizures, the officer was actively encouraging the challenged seizures. The factor of "whether the government knew of and acquiesced in the intrusive conduct," *Malkuch*, ¶ 14, therefore weighs overwhelmingly in support of

concluding Jacquez was acting as the State's instrument in performing the challenged seizures.

Regarding the second *Malkuch* factor—"whether the party performing the [intrusive conduct] intended to assist law enforcement efforts or to further h[er] own ends," *Malkuch*, ¶ 14—the State asserts Jacquez "never expressed an intent" to assist law enforcement but "instead evinced an intent to achieve her own ends." (Appellee's Br. at 17.) Jacquez's testimony, however, explained how an officer asked her "to gather up all the electronics that I could find of his," identified those electronics, and explained, "So I got [the electronics] all together and gave them boxes of stuff." (6/11 Tr. at 20–21.) The fair import of Jacquez's testimony was that she seized all of Trent's electronics for the State at that time because the State asked her to do so, and not for any other purpose.

The State counters that Jacquez may have, had she not been asked to do so by the State, given the electronics to the State of her own accord. (Appellee's Br. at 17–18.) But that is not this case. Jacquez indicated the State's request was the reason for her second set of seizures. (6/11 Tr. at 20–21.) In any event, insofar as Jacquez had

additional purposes for gathering and giving items to law enforcement besides law enforcement requesting that conduct, the factor of the State knowing of and acquiescing in the intrusive conduct—indeed, requesting it—would still dispositively weigh in favor of concluding Jacquez's conduct was fairly attributable to the State and she was acting as the State's instrument.

The Fourth Amendment and Article II, Section 11 should not be construed so as to let pass "equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right." *Byars v. United States*, 273 U.S. 28, 33–34 (1927); *see also Cummings v. Missouri*, 71 U.S. 277, 325 (1866) ("The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows."). These constitutional guarantees are not so flimsy as to permit the State to circumvent them by asking and enlisting a private citizen to do what the State itself cannot do directly.

In conclusion, this Court should look to the similar circumstances of *California v. Evans*, 49 Cal. Rptr. 501 (Cal. App. 1966), which was

cited in the opening brief and to which the State offers no response. (Appellant's Br. at 11–12.) Given Jacquez "did what the officers asked h[er] to do and thus complied with their wishes," and that that intrusive "conduct was obviously not consonant with the purpose for which" Trent had consented to Jacquez having some of his property—to enforce the group home rules while he remained a resident—"a conclusion that [Jacquez] did not act as an arm of the police is unrealistic." *Evans*, 49 Cal. Rptr. at 502. Because the State used Jacquez as its instrument to seize property without a warrant or a warrant exception, the challenged seizures were unconstitutional.

II. The exclusionary rule applies.

The State's exclusionary rule argument is premised entirely on Jacquez not being the State's instrument when she seized property for the State and at the State's request. (Appellee's Br. at 19.) The argument is insufficient because, as discussed above, its premise is incorrect. Applying the exclusionary rule in this case will deter unlawful police conduct—specifically, the unlawful police conduct of police asking and enlisting private parties to perform intrusive conduct that the State itself cannot perform without a warrant or warrant

exception. *See Cummings*, 71 U.S. at 325 ("[W]hat cannot be done directly cannot be done indirectly."); *accord Tipton*, 103 Mont. at 12, 60 P.2d at 667.

With the exclusionary rule by its terms applying to the evidence that the State obtained as a result of the challenged unconstitutional conduct, and with the State arguing no exclusionary rule exception, the State cannot be said to have carried its burden to render the exclusionary rule inapplicable. *See Nix v. Williams*, 467 U.S. 431, 444 (1984); *State v. Laster*, 2021 MT 269, ¶ 36, 406 Mont. 60, 497 P.3d 224. All the evidence resulting from the unconstitutional seizure of Trent's electronics should be suppressed, and this Court should reverse.

Respectfully submitted this 8th day of June, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,173, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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CERTIFICATE OF SERVICE

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