IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0696

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SARAH LOUISE CARPENTER, aka,
SARAH LOUISE SKINNER,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, the Honorable Matthew J. Cuffe, Presiding

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In 1791, the Fourth Amendment was ratified with the "manifest purpose" to prohibit general warrants and general searches. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). In 1972, the Montana Constitution enshrined an enhanced right to privacy out of concern that "the sphere of individual privacy is in danger of eclipse in an advanced technological society." 2 Montana Constitutional Convention, Committee Report 632. Here, the Fourth Amendment's purpose and the Montana Constitution's concern intersect. Today and in this case, a general warrant for a cell phone will "typically expose to the government far *more* than the most exhaustive search of a house," *Riley v. California*, 573 U.S. 373, 396–97 (2014), and it is "hard to imagine many searches more invasive than a search of all the data associated with a Facebook account," *United States v. Shipp*, 392 F. Supp. 3d 300, 308 (E.D.N.Y. 2019).

In this case, the State had limited probable cause for particular text and Facebook messages around the time of an offense. The State instead got warrants for temporally and in other ways unlimited searches through all the data associated with a cell phone and Facebook account. These were general warrants and unreasonable searches. This Court should reverse and remand for a new trial.

I. The State cannot justify its general warrants.

The Facebook warrant commanded Facebook to deliver all of the "information" on Sarah's Facebook account, including wall postings, messages, logins, photos, and more. The command contained no temporal or content limitations. (Appellant's Br., App. A.) Facebook delivered to the State 4,836 pages of information comprising Sarah's Facebook account. (D.C. Doc. 13 at 3.)

The cell phone warrant ordered the State to search "the above-described premises," specified as ten digital devices, for "the property specified above," which included all the things conceivably located on a cell phone (e.g., "data," "pictures," "internet . . . records," "etc."), and "if the property is found there, seize it." The command contained no temporal or content limitations. (Appellant's Br., App. B.) From Sarah's cell phone, the State seized 11,719 image files, 474 contacts, 855 call logs, and much more. (D.C. Doc. 21, Ex. A at 12.) The page numbers of the text messages introduced at trial suggest the seized data runs, at minimum, thousands of pages long. (*See* Ex. 82.)

The State's argument on appeal rests on the asserted premise that the evidence the State actually sought could have been contained in any

and all of Sarah's Facebook and cell phone data. (*See* Appellee's Br. at 30–31.) To judge the argument, one must define what the State had probable cause to look for.

Yet, right away, we have a problem: The State's argument requires defining the thing to be looked for as more limited than all the data on the Facebook account and cell phone, yet the warrants themselves describe all that data itself as the thing to be looked for, without any further specification. (Appellant's Br., App. A–B.) By the State's implicit admission, then, the warrants do not do what the constitutions require, which is to "particularly describe" the object of the search—as the constitutions say, the "thing[s] to be seized." U.S. Const. amend IV; Mont. Const. art. II, § 11. That requirement exists to "prevent[] general searches." 2 Wayne R. Lafave, *Search & Seizure* § 4.6(a) (6th ed.) ("Lafave"). The State's argument on appeal signals that requirement's violation.

Because the warrants do not state the object of the search that the State asserts on appeal, the State's brief eschews the warrants' words and instead focuses on the warrant applications. (*See*, e.g., Appellee's Br. at 17 (arguing Rhodes's application—not the warrant—"included as

much detail as possible" for the object of the search).) That focus, however, ignores that the constitutions "require[] particularity in the warrant, not in the supporting documents." *Groh v. Ramirez*, 540 U.S. 551, 557 (2004). In *Groh,* the warrant did not specify the evidence sought. The Supreme Court rejected that anything specified in the application could make up for the lack of particularity in the warrant itself. *Groh*, 540 U.S. at 557–58. Under *Groh*, for the application to satisfy the warrant's particularity requirement, the warrant must "expressly incorporate" the application, such that the application is part of the warrant itself. *United States v. Dunn*, 719 F. App'x 746, 750 (10th Cir. 2017). Here, neither warrant expressly incorporated an application, and the cell phone warrant expressly placed the underlying application under seal. (Appellant's Br., App. A–B.) That is the opposite of incorporation. *See United States v. McGrew*, 122 F.3d 847, 850 (9th Cir. 1997) ("If the government wishes to keep an affidavit under seal, it must list the items it seeks with particularity in the warrant itself."). These warrants lacked particularity.

Even if the State's applications were incorporated into the warrants, then we reach another constitutional impasse: The

applications suggest the State was looking for things for which there was not probable cause. That is a problem because "an otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause upon which the warrant is based," Lafave, § 4.6(a), and the things sought under a warrant must be "no broader than the probable cause on which [the warrant] is based." *United States v. Zimmerman*, 277 F.3d 426, 432 (3d Cir. 2002) (citation omitted).

The Facebook application asserted the State sought evidence that "includes, but is not limited to, records of communications tending to corroborate or disprove the statements provided by witnesses, location evidence, photographs, videos, and other information relevant to the investigation." (Appellee's Br., App. B.) Yet regarding Sarah's use of Facebook, the Facebook application averred only that witnesses said Sarah used Facebook messenger to communicate with Travis's family shortly after Travis's disappearance. (Appellee's Br., App. B.) While searching for those messages was justified by probable cause, the application asserted no facts suggesting a nexus between the crime under investigation with anything beyond those messages, whether it

was photos, videos, or "other evidence." The State may have wanted to fish for such material, but it did not have probable cause to do so.

Similarly, the cell phone application asserted the State was looking for evidence of deliberate homicide in the form of "records, documents, text or other electronic messages, and/or other forms of electronic data and communications." (Appellee's Br., App. A.) Yet regarding Sarah's use of her cell phone, the cell phone application averred only that witnesses said Sarah text messaged with Travis and Travis's family the weekend of Travis's disappearance. (Appellee's Br., App. A.) Although there was a fair probability those text messages existed that were relevant to the case, those text messages were not "records, documents, . . . [non-text] electronic messages, and/or other forms of electronic data and communications" related to the case. Again, the State may have wanted to fish for such material, but it did not have probable cause to do so.

And that leads to the problem of the State searching through the entirety of the Facebook account and cell phone. A search's scope must be "defined by the object of the search and the places in which there is

probable cause to believe that it may be found." *United States v. Ross*, 456 U.S. 798, 824 (1982). These searches were not.

Regarding the Facebook warrant, it is "hard to imagine many searches more invasive than a search of all the data associated with a Facebook account." *Shipp*, 392 F. Supp. 3d at 308. Thus, courts "can and should take particular care to ensure that the scope of searches involving Facebook are 'defined by the object of the search and the places in which there is probable cause to believe that it may be found.'" *Shipp*, 392 F. Supp. 3d 309–10 (quoting *Ross*, 456 U.S. at 824). In fact, many courts have reasoned that warrants commanding the sort of unlimited Facebook search exhibited here are "overly broad and general," *United States v. Irving*, 347 F. Supp. 3d 615, 624 (D. Kan. 2018), and "unnecessarily authorize[] precisely the type of 'exploratory rummaging' the Fourth Amendment protects against." *Shipp*, 392 F. Supp. 3d at 311 (citation omitted); *accord United States v. Burkhow*, No. 19-CR-59-CJW-MAR, 2020 WL 589536, at *9–11 (N.D. Iowa Feb. 6, 2020); *see also United States v. Blake*, 868 F.3d 960, 974 (11th Cir. 2017).

The State nonetheless appears to suggest that the evidence for which there was probable cause may have been found in any of the Facebook data. (*See* Appellee's Br. at 30–31.) Not so. "Facebook is different from hard drives or email accounts in many ways, including that the information associated with the account is categorized and sorted by the company—not by the user." *Shipp*, 392 F. Supp. 3d at 309. Thus, the concern that "necessitate[s] broad digital search protocols"—that "evidence sought could be located almost anywhere"—does not "exist in the Facebook context." *Shipp*, 392 F. Supp. 3d at 309. Here, had the warrant requested messages from around the time of Travis's disappearance and only between certain persons, Facebook would have provided only those messages. *See Blake*, 868 F.3d at 974 (noting "Facebook will respond precisely" with the data requested). Instead, the warrant commanded Facebook to deliver and then permitted the State to rummage through the entirety of the Facebook account, far outstripping probable cause. The Facebook warrant was "overly broad and general." *Irving*, 347 F. Supp. 3d at 624.

Turning to the cell phone search, "[c]ertain types of data" on a cellphone are "qualitatively different" from other types. *Riley*, 573 U.S.

at 395. Thus, "[a]bsent unusual circumstances, probable cause is required to search each category of content" on a cell phone. *United States v. Morton*, 983 F.3d 421, 426 (5th Cir. 2021). Further, the "magnitude of the privacy invasion of a cell phone utterly lacking in temporal limits cannot be overstated." *Massachusetts v. Snow*, 160 N.E.3d 277, 288 (Mass. 2021). Thus, where the State's probable cause is confined to a certain time period, a warrant's failure to limit the State's search to that time period suggests the warrant's overbreadth. *E.g.*, *Snow*, at 288–89; *Wheeler v. State*, 135 A.3d 282, 304–06 (Del. 2016).

Here, there was not probable cause for an unlimited search though all the categories of information on Sarah's cell phone. The State's application presented no facts particular to the case suggesting that the certain text messages for which there was probable cause would be found outside searching Sarah's text messages in a limited date range. (*See* Appellee's Br., App. A.) "[T]hose searches deemed necessary should be as limited as possible." *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971). This search was not.

The State cites cases like *United States v. Ulbricht*, 858 F.3d 71, 100–01 (2d Cir. 2017), in which warrants permitted searching through all computer contents. (Appellee's Br. at 31.) The *Ulbricht* Court noted that case was "unusual" because the investigated crimes "were committed largely though computers" and the application provided "ample basis" to conclude evidence of the investigated crime "permeated [the searched] computer." *Ulbricht*, 858 F.3d at 103. By contrast, the investigated offense here was not a computer offense, and the State's application averred nothing but boilerplate about the possibility of data being intermixed. That boilerplate, in turn, was attuned to laptops and personal computers rather than to cell phones, which generally do not permit a user the same ease of control to hide or relabel data. *See* Andrew D. Huynh, *What Comes After "Get A Warrant": Balancing Particularity and Practicality in Mobile Device Search Warrants Post-Riley*, 101 Cornell Law Rev. 187, 207–08 (2015).

The State (Appellee's Br. at 28–29) also cites *State v. Neiss*, 2019 MT 125, 396 Mont. 1, 443 P.3d 435, but the *Neiss* Court did not address overbreadth or particularity claims, deeming them unpreserved. *Neiss*, ¶¶ 47–48. The *Neiss* Court instead addressed a "difficult to discern"

argument about whether there was *any* probable cause for a warrant, finding there was. *Neiss*, ¶¶ 54, 60.

Here, the State had limited probable cause for certain data distinguishable by category, content, and time. But the warrants permitted the State to search all the cell phone and Facebook data regardless of distinguishing characteristics. With cascading problems of particularity and overbreadth, these were unconstitutional general warrants.

II. The State cannot override statutory preclusions of extraterritorial search warrant jurisdiction.

The premise of the State's response to the jurisdictional claim regarding the Facebook warrant is that there is no Montana law "plac[ing] a territorial limitation on a district court's authority to issue a warrant." (Appellee's Br. at 16; *accord* Appellee's Br. at 18, 23.) While the State invokes federal and California law, the State appears to recognize that such non-Montana law does not have any relevance if the challenged warrant was not "issued in accordance with" Montana law.

(Appellee's Br. at 23.)[1] And the State's brief does not raise any dispute with the analysis that, if Montana law precludes the jurisdiction necessary for an extraterritorial warrant, the Facebook warrant is unconstitutional and void ab initio. (*See* Appellant's Br. at 41–47.) The problem with the State's argument is the plain terms of Mont. Code. Ann. §§ 46-5-220 and 3-5-312, which limit authority to issue a warrant to "within the state" and "coextensive with the boundaries of the state."

Section 46-5-220(2) specifies that a district judge's authority to issue a search warrant is "within this state." As argued in the opening brief, context establishes that the "within" phrase means a district judge cannot issue a search warrant outside this state, just as the statute's dual "within" phrase means a municipal court judge in Helena cannot issue a search warrant for property in Missoula. (Appellant's Br. at 41–44.)

The State responds to this interpretation by baldly asserting it is "contrary to the plain language of § 46-5-220, MCA." (Appellant's Br. at

[1] The federal Stored Communications Act does not "address whether a state court can issue a search warrant for . . . content located in another state," leaving the matter to the issuing court's state law. *In re AT&T*, 165 A.3d 711, 715 (N.H. 2017); *Oregon v. Rose*, 330 P.3d 680, 684 (Or. 2014).

21.) Yet, the State's brief does not examine the plain language of § 46-5-220. And the State's brief does not offer any reason for disagreeing with Sarah's contextual reading. And the State's brief does not respond to the Commission Comments explaining the statute's "within" phrases refer to territorial jurisdiction.[2] The State's brief, moreover, does not defend the District Court's incorrect and implausible interpretation of the statute. (*See* Appellee's Br. at 18–22.) The State has no argument, only bluster.

The rules of statutory interpretation, however, dictate that the law means what it says. Mont. Code Ann. § 1-2-101. What § 46-5-220 says is that a district court's jurisdiction for search warrants is within Montana, not outside Montana. To the extent § 46-5-220's dictate leaves anything open, "[a]n express mention of a certain power or authority implies the exclusion of nondescribed powers." *Ramon v. Short*, 2020 MT 69, ¶ 47, 399 Mont. 254, 460 P.3d 867. Section 46-5-

[2] The Commission Comments notably describe § 46-5-220 as adapted from Fed. R. Crim. P. 41. That rule limits a magistrate's authority to issue a warrant to "within the district." Rule 41(b)(1). Section 46-5-220 adapts that to "within the state." Rule 41's "within" phrase communicates that "a judicial officer in one district is generally without authority to issue a search warrant for property in another district." *United States v. Bailey*, 193 F. Supp. 2d 1044, 1051 (S.D. Ohio 2002).

220's express limitation on the authority to issue warrants to "within this state" directly implies the exclusion of the authority to issue a warrant outside the state.

Section 3-5-312 establishes the same. Section 3-5-312 specifies that jurisdiction for "ex parte orders" is "coextensive with the boundaries of the state." Whether termed a search warrant or an investigative subpoena, the Facebook order here qualifies as such an ex parte order. (Appellant's Br. at 44–46.)

The State responds to Sarah's § 3-5-312 argument by misreading two cases. First, the State asserts that under *State v. Dasen*, 2007 MT 87, ¶ 25, 337 Mont. 74, 155 P.3d 1282, search warrants are not orders. (Appellee's Br. at 20–21.) *Dasen* concerned an "as of right" substitution under Mont. Code Ann. § 3-1-804. *Dasen*, ¶ 24. Such a substitution precludes the substituted judge from issuing future orders "in the case." Section 3-1-804(10). *Dasen* recognized that a search warrant is not an order "in the case" because the warrant arises from a collateral proceeding. *Dasen*, ¶ 25. That reasoning does not mean that a search warrant is not an order. By definition, a search warrant is a type of "written order." SEARCH WARRANT, *Black's Law Dictionary* (11th ed.

2019). A search warrant is just not an order "in the case" for purposes of § 3-1-804. *Dasen*, ¶ 25.

Second, the State cherry-picks a quotation from *State v. Holmes*, 212 Mont. 526, 532, 687 P.2d 662, 666 (1984), that would lead one to conclude that *Holmes* establishes there are no jurisdictional limits on investigative subpoenas. (*See* Appellee's Br. at 21.) *Holmes*, however, concerned an investigatory subpoena for material in Montana. *Holmes*, 212 Mont. at 532, 687 P.2d at 665. The *Holmes* Court explained there is no jurisdictional limit within Montana because, under § 3-5-312, such jurisdiction is "coextensive" with the State's boundaries. *Holmes*, 212 Mont. at 532–33, 687 P.2d at 666. That analysis (1) evinces that § 3-5-312 bears on ex parte orders like the one at issue here, and (2) implies the inverse of the situation in *Holmes*—that there are limits on issuing an *extraterritorial* ex parte order because the necessary jurisdiction is "coextensive with" the State's boundaries.

Finding Montana law inhospitable, the State turns to irrelevant law elsewhere. The State equates search warrant jurisdiction in Montana to search warrant jurisdiction in New Hampshire and Connecticut law. (Appellee's Br. at 19–20 (citing *Connecticut v. Esarey*,

67 A.3d 1001 (Conn. 2013); *AT&T*, *supra*).) Those states' statutes grant trial courts blanket authority to issue search warrants regardless of territorial boundaries. *Esarey*, 67 A.3d at 1009 n. 17; *AT&T*, 165 A.3d at 715. By contrast, §§ 46-5-220 and 3-5-312 impose territorial limits on district court search warrant jurisdiction. Montana law is not like New Hampshire and Connecticut law in this regard.

The State also invokes federal and California law. (Appellee's Br. at 19.) But the State appears to correctly recognize these do not have any relevance if the Facebook warrant was not lawfully issued under Montana law. (*See* Appellee's Br. at 23.) Which leads us back to §§ 46-5-220 and 3-5-312. Because those statutes preclude district court extraterritorial search warrant jurisdiction, the Facebook warrant was void ab initio and unconstitutional, rendering the State's Facebook search and seizure unreasonable and unconstitutional.

III. The exclusionary rule applies to all the evidence derived from the unconstitutional searches.

The exclusionary rule applies to evidence obtained from an unreasonable search or seizure conducted under a general warrant, *Washington v. Perrone*, 834 P.2d 611, 621 (Wash. 1979), or where the warrant's overbreadth predominates, *United States v. Sells*, 463 F.2d

1148, 1158–59 (10th Cir. 2006); *United States v. Kow*, 58 F.3d 423, 428 (9th Cir. 1995). The exclusionary rule also applies to all evidence obtained from an unreasonable search or seizure conducted under a void ab initio warrant. *State v. Vickers*, 1998 MT 201, ¶ 23, 290 Mont. 356, 964 P.2d 756.

On appeal, the State argues inevitable discovery with regard to the Facebook warrant's jurisdictional violation and good faith with regard to the general warrants. (*See* Appellee's Br. at 40–41.) The State never raised these exceptions below and, on appeal, they are asserted with little analysis. (*See* Appellee's Br. at 40–41.)

The Facebook warrant's jurisdictional violation is not susceptible to exclusionary rule exceptions. This Court has held that evidence derived from a void ab initio warrant is automatically excludable and the exclusion requires no additional analysis. *Vickers*, ¶ 23. Whether the District Court had authority to issue some other warrant (*see* Appellee's Br. at 41) is irrelevant and offers no cogent reason to depart from or overrule *Vickers* here. Under *Vickers*, the void ab initio Facebook warrant's product is automatically excludable. (In any event, the State's inevitable discovery argument is that police would have

sought an authorized warrant had they not sought an unauthorized warrant. (Appellee's Br. at 40.) That argument may be fairly paraphrased as "police would have done it right had they not done it wrong," and such an argument is "less than compelling" and "unacceptable" to establish inevitable discovery. *State v. Ellis*, 2009 MT 192, ¶ 46, 351 Mont. 95, 210 P.3d 144 (citation omitted).)

As for the State's good faith argument, the State cites federal caselaw holding deterrence of future police misconduct is the exclusionary rule's sole purpose. (Appellee's Br. at 39–40.) That is not true in Montana. Montana's exclusionary rule additionally acts to vindicate the constitutional privacy rights the State has violated, *State v. Wolfe*, 2020 MT 260, ¶ 11, 401 Mont. 511, 474 P.3d 318, and to preserve the judiciary's integrity, which is besmirched by admitting illegally obtained evidence in the courtroom, *Ellis*, ¶ 48.

Despite arguing the good-faith exception, the State cites no case where this Court has held the good faith exception exists for a privacy violation of Montana law. (*See* Appellee's Br. at 39–40.) In fact, seemingly the only criminal case where this Court has applied something termed the "good-faith exception" concerned a claim that

Blackfeet Nation officers violated Blackfeet Nation law—not Montana law—in extraditing a defendant to Montana. *See City of Cut Bank v. Bird*, 2001 MT 296, ¶¶ 19–20, 307 Mont. 460, 38 P.3d 804. Beyond that, three cases evince this Court's reluctance to adopt the federal good-faith exception. In *State v. Stewart*, 2012 MT 317, ¶¶ 28–31, 367 Mont. 503, 291 P.3d 1187, this Court reasoned an officer's good faith did not bear on whether evidence from a privacy violation should be suppressed. In *State v. McLees*, 2000 MT 6, ¶¶ 28, 32, 298 Mont. 15, 994 P.2d 683, this Court rejected the apparent authority doctrine in part because "regardless of whether the police acted in good faith, the individual's 'privacy' is still invaded . . . ." And in *State v. Van Haele*, 199 Mont. 522, 529, 649 P.2d 1311, 1315 (1982), *overruled on other grounds*, *State v. Long*, 216 Mont. 65, 700 P.2d 153 (1985), this Court rejected the State's good-faith exception argument, reasoning, "Montana's constitutional guarantee of privacy is expressed in the strongest terms of any state constitution in the country and we are not bound by federal interpretations . . . ."

Likewise, sister state courts with independent state exclusionary rules have outright rejected the good-faith exception more than any

other aspect of federal Fourth Amendment jurisprudence. LaKeith Faulkner & Christopher R. Green, *State-Constitutional Departures from the Supreme Court: The Fourth Amendment*, 89 Miss. Law Journal 197, 198 (2020). These courts have concluded the exception is based on an incorrect view of the exclusionary rule, a short-sighted view of what promotes police deterrence, and is incompatible with the exclusionary rule purposes of validating individual rights and preserving judicial integrity. *E.g.*, *New Mexico v. Gutierrez*, 863 P.3d 1052, 1066–68 (N.M. 1993); *Idaho v. Guzman*, 842 P.2d 660, 671–77 (Idaho 1992). Those purposes animate Montana's exclusionary rule. *Wolfe*, ¶ 11; *Ellis*, ¶ 48. This Court too should reject outright incorporating the good-faith exception into Montana law, where the "guarantee of privacy is expressed in the strongest terms of any state constitution." *Van Haele*, 199 Mont at 529, 649 P.2d at 1315.

In any event, the federal good-faith exception does not apply on the facts here. The federal good-faith exception's applicability to an unparticular or overbroad warrant is a case specific one depending on the extent of the violation. *Compare United States v. Luk*, 859 F.2d 667 (9th Cir. 1988) (applying good faith to an overbroad warrant) *with Kow*,

58 F.3d 423, 429 (9th Cir. 1995) (distinguishing *Luk* and rejecting the good faith's application to a pervasively overbroad warrant). The federal good-faith exception requires that an officer's reliance on an overbroad warrant be "objectively reasonable," which is not the case when the warrant is "so facially deficient" in "failing to particularize the place to be searched or the things to be seized." *United States v. Leon*, 468 U.S. 897, 922 (1984).

Here, it is difficult to discern any good-faith effort by the State to obtain warrants that were particular and limited to probable cause. Instead, the State deliberately requested and received warrants that were as expansive as possible. The State used the warrants' command terms not to limit the search and seizure to the warrants' probable cause bases but to pick up every conceivable type of data and information in a cell phone and Facebook account with no temporal or content limitations. (*See* Appellant's Br., App. A–B.) The federal good-faith exception does not apply. *See Ohio v. Castagnola*, 46 N.E.3d 638, 660 (Ohio 2015) ("[T]he warrant was so facially deficient in failing to particularize the items to be searched for on Catagnola's computer that the detective could not have relied on it in objectively good faith.").

IV. The State has not proven that there is no reasonable possibility that the tainted evidence influenced the jury's verdict.

"An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless." *Chapman v. California*, 386 U.S. 18, 24 (1967). As the "beneficiary of [] constitutional error[s]" in this case, the State must "prove beyond a reasonable doubt that the [errors] did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. The State must, moreover, "demonstrate that, qualitatively, there is no reasonable possibility that the tainted evidence might have contributed to the defendant's conviction." *State v. Van Kirk*, 2001 MT 184, ¶ 47, 306 Mont. 215, 32 P.3d 735. The State has not and cannot carry its burden here.

The black Metal Mulisha shirt photograph derived from the unconstitutional Facebook search resists description as harmless. *See State v. Lake*, 2019 MT 172, ¶ 41, 396 Mont. 390, 445 P.3d 1211 (reversing where the error implicated the jury's assessment of the State's sole presented eyewitness); *State v. Polak*, 2018 MT 174, ¶ 23, 392 Mont. 90, 422 P.3d 112 (same). The State went out of its way to

introduce this evidence to rehabilitate and bolster Ezra's story after the detail regarding the shirt—which the State used in both opening and closing statements (Tr. at 336, 1608)—was impugned by Sarah. (Appellee's Br. at 43.) The tainted evidence's quality was that of salvaging and reinforcing Ezra's precarious story on an important detail.

Because the record supports no convincing arguments for this tainted evidence being harmless, the State incorrectly situates a merits argument regarding the photograph into its harmlessness section. Specifically, the State asserts in a single sentence that Sarah had no privacy interest in the photo. (Appellee's Br. at 43.) That claim is neither adequately preserved, adequately argued, nor true. *See United States v. Chavez*, 423 F. Supp. 3d 194, 204–05 (2019) (finding a reasonable expectation of privacy in Facebook posts not accessible by the public at large); *accord Irving*, 347 F.Supp.3d at 620–22. Indeed, the State demonstrated the photo was private information by needing a warrant to access it.

In another one-off sentence, the State asserts, without record citation, that the black Metal Mulisha photo could have been introduced

"through other sources." (Appellee's Br. at 44.) But the State must "demonstrate that the factfinder *was presented* with admissible evidence that proved the same facts as the tainted evidence." *Van Kirk*, ¶ 47 (emphasis supplied). Unadmitted evidence, if it exists (we do not know because it was not introduced), does not fulfill that requirement. The State's "[we] would have done it right had [we] not done it wrong" arguments are, again, "less than compelling." *Ellis*, ¶ 46.

Similarly, the State cannot disprove the possibility that three tainted exhibits establishing Sarah's regular access to the murder weapon were influential. Because the murder weapon was Ezra's, the State had to convince the jury that Sarah nonetheless would have had access to it. The State is correct that there was one untainted photo suggesting Sarah's access. (Appellee's Br. at 44.) However, the three separate tainted exhibits establishing Sarah's access over several months added up to a qualitatively stronger inference of Sarah's *regular* access—access that would extend to the day in question. No other evidence had this quality.

This tainted evidence was significant in a trial in which the State relied on doubtful testimony from the possible killer. Physical evidence

refuted Ezra's story of Sarah fatally shooting Travis, and the State's own detective admitted he did not believe that aspect of Ezra's story. (Tr. at 888, 1048–50.) In this context, there is a reasonable possibility that the Metal Mulisha photograph bolstering Ezra's story and the tainted messages suggesting Sarah's regular access to the murder weapon "might have contributed to the conviction." *Chapman*, 386 U.S. at 24; *Van Kirk*, ¶ 47. The other tainted evidence—cell phone messages painting Sarah in an unsavory light and Facebook messages evincing a custody motive—only enhance that possibility. In this context, the State's constitutional violations cannot be conceived of as harmless. *Chapman*, 386 U.S. at 24; *accord Van Kirk*, ¶ 47. This Court should reverse and remand for a new trial.

Respectfully submitted this 3rd day of February, 2021.

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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 4,967, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Alexander H. Pyle
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CERTIFICATE OF SERVICE

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