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STATE OF MONTANA
Case Number: DA 22-0377

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0377

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BRANDON ANTHONY PERESSINI,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable David J. Grubich, Presiding

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STATEMENT OF THE ISSUES

1. After arresting Mr. Peressini Officer Walker rummaged through his toiletry box and removed a closed toothbrush case. Was this justifiable under the plain-view exception?

2. After Officer Walker removed the toothbrush case Mr. Peressini denied owning it. Officer Walker then opened the toothbrush case and discovered a syringe loaded with heroin. Was Mr. Peressini's ownership disclaimer alone sufficient to constitute abandonment of the toothbrush case?

STATEMENT OF THE CASE

At approximately 1:00 P.M. on the afternoon of October 26, 2020, Great Falls Police Officer Scott Walker ("Officer Walker") responded to the Best Western Hotel to investigate a complaint that Mr. Peressini was trespassing. (Tr., 45, 46, 65, 73.) After arresting Mr. Peressini Officer Walker discovered a syringe loaded with heroin in his closed toothbrush case. (Tr., 68.) The jail would not accept Mr. Peressini because of COVID protocols, however, so Officer Walker released him with a summons. (Tr., 71.)

Mr. Peressini was charged by Information with **Count I:** Felony Possession of Dangerous Drugs (per 45-9-102); and **Count II:** Misdemeanor Possession of Drug Paraphernalia (per 45-10-103). (Tr., 71 & 79-80; see also D.C. Doc. 3.) Mr. Peressini moved to suppress, alleging Officer Walker violated *Miranda* as well as the Fourth Amendment and Article II, Sections 10 & 11 of the Montana Constitution. (D.C. Doc. 34, at 5-12.)

At the suppression hearing Officer Walker testified via zoom. (Tr., 27-29.) In addition to his testimony, two short audio segments from Officer Walker's bodycam were played and admitted into evidence as

State's Exhibit 1. (Tr., 78.)[1] At the conclusion of the hearing the court issued an oral decision denying Mr. Peressini's motion. (Tr., 106-108.)[2]

Pursuant to a plea agreement, Mr. Peressini preserved his right to appeal the denial of his suppression motion and entered a no contest plea to **Count I** (felony possession of dangerous drugs per 45-9-102); the State dismissed **Count II** (misdemeanor paraphernalia per 45-10-103). (D.C. Doc. 77, at 3-4; see also Tr., 119-120 & 127.) The district court sentenced Mr. Peressini to three years at the Montana Department of Corrections, all suspended. (D.C. Doc. 85 at 1-2; see also Tr., 131 & 142.) Mr. Peressini filed a timely Notice of Appeal on July 14, 2022. (D.C. Doc. 87.)

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[1] State's Exhibit 1 consists of two short audio segments from Officer Walker's bodycam. The first is a recording of Officer Walker's *Miranda* warning (referenced hereinafter as "Ex. 1, Miranda Segment"). The second is a recording of Officer Walker's activities and conversations concerning the toothbrush case (referenced hereinafter as "Ex. 1, Searching Segment").

[2] On the *Miranda* issue the district court ruled that Mr. Peressini implicitly waived his *Miranda* rights by answering Officer Walker's questions. (Tr., 106-108.) Mr. Peressini is not challenging the court's ruling on the *Miranda* issue. *Miranda* violations only preclude the admission of testimonial evidence—not derivative evidence. *State v. Scheffer*, 2010 MT 73, ¶19, 355 Mont. 523, 230 P.3d 462; *see also United States v. Patane*, 542 U.S. 630, 636-37 (2004) (Holding that *Miranda* is a prophylactic rule employed to protect a defendant's right against self-incrimination, which is not implicated by the admission of derivative evidence obtained in violation of *Miranda*.) Accordingly, even assuming *arguendo* Officer Walker violated *Miranda*, the derivative evidence (the syringe and heroin) would still be admissible.

STATEMENT OF THE FACTS

At approximately 1:00 P.M. on the afternoon of October 26, 2020, Officer Walker responded to the Great Falls' Best Western to investigate a complaint that Mr. Peressini was trespassing. (Tr., 45, 46, 65, 73.) Upon arrival Officer Walker observed Mr. Peressini standing in the hotel lobby at the base of the stairs. (Tr., 42.) Officer Walker testified that Mr. Peressini stood out on account of his "obviously red dyed hair." (Tr., 44.) Officer Walker advised that Mr. Peressini was holding an "open-topped" cardboard box containing toiletries and also had various items on a hotel trolley. (Tr., 42-43 & 66.)

Officer Walker testified that after approaching Mr. Peressini he placed his toiletry box on the trolley and began fidgeting with items inside. (Tr., 53 & 72.) Officer Walker described Mr. Peressini as sweating and nervous. (Tr., 46.) Officer Walker observed that Mr. Peressini's eyes were dilated leading him to believe Mr. Peressini was under the influence of heroin. (Tr., 48-49.) Officer Walker eventually arrested Mr. Peressini and transferred him outside to his squad car. [3]

[3] The record is unclear exactly what Mr. Peressini was arrested for. Officer Walker testified he believed Mr. Peressini was guilty of trespass and may also have stolen the hotel's pancake maker. (Tr., 51-52 & 73-74.) Officer Walker further testified he had "probable cause" that Mr. Peressini "had several arrest warrants already." (Tr.,

(Tr., 52-54; see also Ex. 1, Miranda Segment, at 0:44 – 0:58.) At some point thereafter Officer Walker was advised the jail would not accept Mr. Peressini given the COVID situation. (Tr., 59-60 & 79-80.)

In an event, after placing Mr. Peressini in handcuffs Officer Walker read him his *Miranda* rights, which Mr. Peressini briefly acknowledged but never affirmatively waived. (Tr., 52-54; see also Ex. 1, Miranda Segment, at 0:44 - 0:59.) Officer Walker then began going one by one through Mr. Peressini's toiletries and asking whether each belonged to him. (Tr., 67.) Officer Walker eventually made it to Mr. Peressini's black Bruan toothbrush case, which he described as "look[ing] like a toothbrush case, a travel case." (Tr., 67-68; see also D.C. Doc. 34, at 4.) Officer Walker reached inside the toiletry box and removed the toothbrush case. (Tr., 67-68.)

After removing Mr. Peressini's toothbrush case from his toiletry box the following dialogue ensued:

Officer Walker:	Is this yours [referring to the toothbrush case]?
Mr. Peressini:	What's that?

51-52.) Whatever the reason, Mr. Peressini does not dispute Officer Walker had the authority to arrest him and is not challenging the legality of his arrest.

Officer Walker:	[Can be heard shaking the toothbrush case with an object rattling around inside.][4]
Officer Walker:	Is that yours?
Mr. Peressini:	No, I don't know what that is.
Officer Walker:	This isn't yours? This toothbrush case, this is not yours?
Mr. Peressini:	Braun makes toothbrush[s]? (Ex. 1, Searching Segment, 0:00 – 0:16.)

After this brief exchange Officer Walker opened Mr. Peressini's toothbrush case and discovered a syringe loaded with heroin. (Tr., 68-69.) Referring to the toothbrush case, Officer Walker then says to Mr. Peressini (in a sarcastic tone) "so this isn't yours, well, its in the case full of all your stuff, and there's a loaded needle of drugs in there…" (Ex. 1, Searching Segment, 0:23 – 0:37.) Officer Walker then advises

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[4] During the hearing Officer Walker testified he did not recall shaking the toothbrush case, yet his bodycam audio unequivocally recorded the sound of an object rattling around inside the toothbrush case as he shook it. (*Compare* Tr., 67 *with* Ex. 1, Searching Segment, 0:06 – 0:08). In Officer Walker's defense, this Court has observed that "we cannot expect officers to retain information as if he or she were a computer. Therefore, a judge who has the benefit of reviewing objective and neutral video evidence along with officer testimony cannot be expected to ignore that video evidence simply because it totally contradicts the officer's recollection. Such a standard would produce an absurd result." *City of Missoula v. Metz*, 2019 MT 264, ¶30, 397 Mont. 467, 451 P.3d 530 *citing Wiggins v. Florida Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1172 (Fla. 2017).

Mr. Peressini that "in Montana, if you say something isn't yours, you have no expectation of privacy in that item, okay?" (Ex. 1, Searching Segment, 1:16 – 1:23.)

Mr. Peressini moved to suppress, alleging Officer Walker violated the Fourth Amendment and Article II, Sections 10 & 11 of the Montana Constitution. (D.C. Doc. 34, at 12.) Mr. Peressini argued Officer Walker's removing his toothbrush case could not be justified under the plain-view exception given that Officer Walker lacked "lawful access to the closed [toothbrush] case" and because the incriminating nature of the toothbrush case was not immediately apparent. (D.C. Doc. 34, at 14-15.)

In its response brief, the State conceded the plain-view exception did not authorize Officer Walker's seizing and searching Mr. Peressini's toothbrush case. (D.C. Doc. 35, at 7.) The State further conceded that Officer Walker had conducted a Fourth Amendment search, but argued suppression was unwarranted because "[t]he search of items in the Defendant's possession [wa]s legal under the Fourth Amendment exception of an inventory search at the jail and the inevitable discovery doctrine." (D.C. Doc. 35, at 6.)

During the suppression hearing, however, the State jettisoned its argument that Officer Walker's actions were authorized under the inventory and inevitable discovery exceptions, instead arguing for the first time that Mr. Peressini had abandon the toothbrush case. (*Compare* D.C. Doc. 35, at 6-10 *with* Tr., 99-104.) More specifically, the State—citing § 46-5-103(1)(a), MCA and *State v. McKeever*, 2015 MT 177, 379 Mont. 444, 351 P.3d 676—argued that by disclaiming ownership Mr. Peressini lost any reasonable expectation of privacy in his toothbrush case meaning there was no Fourth Amendment "search." (Tr., 99-101.)

Defense counsel protested the State's arguing the abandonment theory rather than the inventory and inevitable discovery exceptions, advising the court "[t]he State claim[ed] in the response brief it's a search… [and now the State is saying] its not a search because he said it wasn't his." (Tr., 104.) Defense counsel further advised the court "I'm not prepared [for this argument] and I d[on't] have an opportunity to look it up right now." (Tr., 103.)

After listening to the evidence and arguments the court took a ten-minute recess to review the law. (Tr., 106.) After the break the

court issued an oral decision denying Mr. Peressini's motion to suppress. (Tr., 106-8.) The court agreed the inventory and inevitable discovery arguments raised by the State in its response brief were meritless given that Mr. Peressini was never taken to jail. (Tr., 108-9.)

The district court was persuaded, however, that the plain-view exception justified Officer Walker's removing Mr. Peressini's toothbrush from his toiletry box, opining that "it wasn't as if the officer had to dig around through the bags to find it. It was open and visible." (Tr., 111.) The district also ruled Officer Walker's opening Mr. Peressini's toothbrush case was constitutionally permissible under the abandonment doctrine as articulated in 46-5-103 and *McKeever*. (Tr., 111-112.)

STANDARDS OF REVIEW

A lower court's denial of a motion to suppress is reviewed to determine whether the court's findings of fact are clearly erroneous and whether those factual findings were correctly applied as a matter of law. *Metz*, ¶12. "A finding is clearly erroneous if it is not supported by substantial evidence, if the lower court has misapprehended the effect of the evidence, or if our review of the record leaves us with the firm conviction that a mistake has been made." *State v. Gill*, 2012 MT 36, ¶10, 364 Mont. 182, 272 P.3d 60. A lower court's conclusions of law and interpretations of the Constitution are reviewed de novo. *State v. Hoover*, 2017 MT 236, ¶12, 388 Mont. 533, 402 P.3d 1224.

SUMMARY OF THE ARGUMENT

Officer Walker's rummaging through Mr. Peressini's toiletry box and physically removing his toothbrush case was a Fourth Amendment "search" under both the "reasonable expectation of privacy test" articulated in *Katz v. United States*, 389 U.S. 347 (1967), as well as the "trespass to property test" outlined in *United States v. Jones*, 565 U.S. 400 (2012). The plain-view exception cannot justify Officer Walker's removing the toothbrush case as he lacked lawful access to Mr. Peressin's toiletries and because the incriminating nature of the toothbrush case was not *immediately apparent*.

Officer Walker conducted a second Fourth Amendment search when he opened Mr. Peressini's toothbrush case. The abandonment doctrine cannot cure Officer Walker's second unlawful search because Mr. Peressini did not intentionally abandon the toothbrush case.

Accordingly, the district court errored in denying Mr. Peressini's motion to suppress.

ARGUMENT

The Fourth Amendment protects individuals against unreasonable searches and seizures of their persons, houses, papers, and effects. *Jones*, 565 U.S. at 404 (2012). The Fourth Amendment's prohibition against unreasonable searches and seizures is enforced against the States through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

Article II, Sections 10 & 11 of the Montana Constitution also prohibit unreasonable searches and seizures and together provide even greater protection than the Fourth Amendment. Mont. Const. art. II, §§ 10 & 11; *see also State v. Nixon*, 2013 MT 81, ¶27, 369 Mont. 359, 298 P.3d 408.[5]

I. Unlawful Search #1: The plain-view exception cannot justify Officer Walker's rummaging through Mr. Peressini's toiletry box and removing his toothbrush case—which occurred *prior* to Mr. Peressini's ownership disclaimer.

A. Mr. Peressini's toiletry box and toothbrush case are constitutionally protected "effects."

[5] Mr. Peressini contends Officer Walker violated his rights under both the Fourth Amendment of the United States Constitution as well as Article II, Sections 10 & 11 of the Montana Constitution. (Doc. 34, at 4-5 & 12-15.) In the interest of brevity, however, Mr. Peressini will refer to Officer Walker's unlawful searches as "Fourth Amendment violations" rather than violations of both the Fourth Amendment and Article II, Sections 10 & 11 of the Montana Constitution.

Both the federal and Montana Constitutions explicitly protect a person's "effects" from unreasonable searches and seizures:

> The right of the people to be secure in *their… effects*[] against unreasonable searches and seizures[] shall not be violated… U.S. Const. amend. IV (emphasis added).
>
> The people shall be secure in *their… effects* from unreasonable searches and seizures. Mont. Const. art. II, § 11 (emphasis added).

Mr. Peressini's toiletry box and closed toothbrush case are constitutionally protected "effects." *Bond v. United States*, 529 U.S. 334, 336-337 (2000) ("A traveler's personal luggage is clearly an 'effect' protected by the [Fourth] Amendment…"); *see also United States v. Ross*, 456 U.S. 798, 822 (1982) (Advising that the Fourth Amendment forecloses any distinction between worthy and unworthy containers, meaning "a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [may] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.")

B. Because Mr. Peressini had a reasonable expectation of privacy in his toiletries, Officer Walker's rummaging through them and removing his toothbrush case was a "search" pursuant to *Katz*.

Under *Katz*, a Fourth Amendment search occurs when the police invade an area for which an individual has a "reasonable expectation of privacy." *Katz*, 389 U.S. at 360-361 (Harlan, J., concur.). Whether a person has a reasonable expectation of privacy is a two-part inquiry: first, did the individual have a subjective expectation of privacy in the item or area; and second, is society willing to recognize the individual's subjective expectation as reasonable? *State of Montana v. George Burns*, 253 Mont. 37, 41, 830 P.2d 1318 (1992). Whether an individual has a subjective expectation of privacy and whether that expectation is objectively reasonable are mixed questions of law and fact. *State v. Staker*, 2021 MT 151, ¶11, 404 Mont. 307, 489 P.3d 489.

1. Mr. Peressini had a subjective expectation that Officer Walker would not bird-dog through his toiletry box and remove his closed toothbrush case.

This Court has observed that "what an individual seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *State v. Elison*, 2000 MT 288, ¶49, 302 Mont. 228, 14 P.3d 456 (internal citations omitted). Thus, when an individual places personal effects "beyond the purview of the public in a place from which the person has the right to exclude others…" the

individual is communicating a subjective expectation of privacy in his personal effects. *Elison*, ¶49.

Here, Officer Walker testified that when he first observed Mr. Peressini he was holding an "open-topped" cardboard box, which Officer Walker later determined contained various toiletries including red hair dye and a closed toothbrush case. (Tr., 43 & 66-68; see also D.C. Doc. 34, at 4.) By placing his toiletries inside a box, Mr. Peressini was communicating a subjective expectation of privacy in those items, which included his toothbrush case. *See United States v. Chadwick*, 433 U.S. 1, 13 (1977) (Noting that "luggage is intended as a repository of personal effects…") Additionally, the fact that Mr. Peressini was holding the toiletry box further evidences his subjective intention to preserve the privacy of his toiletries, especially those in opaque closed containers like his black toothbrush case.

2. Society is willing to recognize as reasonable Mr. Peressini's subjective expectation that Officer Walker would not scour his toiletry box and remove his closed toothbrush case.

To determine whether Mr. Peressini's subjective expectation of privacy was objectively reasonable, the Court asks "whether the government's intrusion infringes upon the personal and societal values

protected by the Fourth Amendment." *Oliver v. United States*, 466 U.S. 170, 182-83 (1984). Fortunately, this Court has already recognized that it is objectively reasonable for Montanans to expect privacy "in the contents of closed containers…" *See McKeever,* ¶23 (McKinnon, J., concur); *see also State v. Williams*, 153 Mont. 262, 269, 455 P.2d 634 (1969) (Recognizing that "squeezing luggage to detect [the] presence of narcotics" is a Fourth Amendment search.) (Internal citations omitted).

Turning to this case, it simply cannot be disputed that privacy-oriented Montanas would find it objectively unreasonable for a government agent to rummage through their personal effects—most especially toiletries in *closed* containers—then remove and begin shaking them. Accordingly, Officer Walker's doing so was a Fourth Amendment "search" under *Katz*.

C. Because he lacked lawful access to the contents of Mr. Peressini's toiletry box, Officer Walker's physically removing the toothbrush case was also a "trespass search" under *Jones*.

In *Jones*, the Supreme Court articulated the trespass or property-based Fourth Amendment test, which the Court emphasized was in addition to—not a substitute for—the *Katz* reasonable expectation of privacy test. *Jones*, 565 U.S. at 409. Speaking for the majority, Justice

Scalia explained that "for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates." *Jones*, 565 U.S. at 406-407.

Justice Scalia further emphasized that the text of the Fourth Amendment itself reflects a nexus to private property as evidenced by the Fourth Amendment's explicit admonishment that individuals shall be secure from unreasonable searches and seizures in *their effects*—language that would be rendered superfluous without protection from common-law trespass. *Jones*, 565 U.S. at 405 (emphasis added). Under the *Jones* property-based test, a Fourth Amendment search occurs when a government actor "obtains information by physically intruding on [a] persons, houses, papers, or effects…" *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (*citing Jones*, 565 U.S. at 406-407, n. 3).[6]

Applying the *Jones*' property-based test here, it is clear beyond cavil that a Fourth Amendment search occurred when Officer Walker—attempting to obtain information—reached inside Mr. Peressini's

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[6] The *Jones* decision has been described as a "sea-change" fundamentally altering the legal landscape regarding what constitutes a "search" under the Fourth Amendment. *United States v. Richmond*, 915 F.3d 352, 357 (5th Cir. 2019) (internal citations omitted).

toiletry box and removed his opaque toothbrush case. (Tr., 67-68; see also Ex. 1, Searching Segment, 0:00 – 0:10.) Indeed, "[o]ne virtue of the Fourth Amendments property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred." *Jardines*, 569 U.S. at 11.

So it is here. Officer Walker "learned what he learned" i.e. discovered the heroin only by physically intruding into Mr. Peressini's toiletry box and removing his toothbrush case. Thus, Officer Walker conducted a Fourth Amendment trespass-search pursuant to *Jones*.

D. Suppression is warranted because Officer Walker's physically removing Mr. Peressini's toothbrush case cannot be justified under the plain-view doctrine nor any other Fourth Amendment exception.

Having established that Officer Walker's physically removing Mr. Peressini's toothbrush case was a search under both *Katz* and *Jones*, the remaining inquiry is whether the search was reasonable, which hinges on the nature of the state's intrusion. *State v. Goetz*, 2008 MT 296, ¶¶24 & 27, 345 Mont. 421, 191 P.3d 489 *see also Kentucky v. King*, 563 U.S. 452, 459 (2011) ("[T]he ultimate touchstone of the Fourth

Amendment is reasonableness.") (Internal citations omitted.)

Absent a few carefully drawn exceptions, warrantless searches and seizures are per se unreasonable. *City of Missoula v. Kroschel*, 2018 MT 142, ¶10, 391 Mont. 457, 419 P.3d 1208; *see also State v. Minett*, 2014 MT 225, ¶16, 376 Mont. 260, 332 P.3d 235 ("In Montana the law has a strong preference for search warrants and the policy of this state is to encourage law enforcement officers to seek prior judicial approval before conducting searches and to conduct those searches pursuant to [a] warrant.") (Internal citations and quotations omitted.)

Because warrantless searches and seizures are presumptively unreasonable, "the State has the burden of demonstrating that a challenged warrantless search or seizure falls within one of the narrow range of recognized exceptions to the warrant requirement…" *State v. Zeimer*, 2022 MT 96, ¶26, 408 Mont. 433, 510 P.3d 100. "If an exception to the warrant requirement is not established, the evidence obtained as a result of an unreasonable search or seizure is excluded." *State v. Hilgendorf*, 2009 MT 158, ¶23, 350 Mont. 412, 208 P.3d 401 *citing Wong Sun v. U.S.*, 371 U.S. 471, 484-85 (1963).

Here, after arresting Mr. Peressini, Officer Walker rummaged

through his toiletry box and removed his black toothbrush case *before* asking him "is this [toothbrush case] yours?" (Ex. 1, Searching Segment, 0:00 – 0:10; see also Tr., 67-68.)[7]

The district court believed the plain-view exception justified Officer Walker's physically removing the toothbrush case from the toiletry box, opining that "it wasn't as if the officer had to dig around through the bags to find it. It was open and visible." (Tr., 111.) In other words, the district court's view appears to be that because the toothbrush case itself was in "plain-view", Officer Walker was justified in removing it from the toiletry box. The district court is wrong.

To seize evidence under the plain-view exception the State must satisfy all three of the following elements: (1) the officer had the lawfully right to stand where he saw the object; (2) the incriminating character of the object was *immediately apparent*; and (3) the officer must have had the lawful right to access the object itself. *State v. Kelm*, 2013 MT 115, ¶34, 370 Mont. 61, 300 P.3d 687. The State cannot

[7] And *before* Mr. Peressini could even answer Officer Walker began shaking the toothbrush case. (Ex. 1, Searching Segment, 0:00 – 0:10).

satisfy elements two or three.[8]

Concerning element two, Mr. Peressini correctly advised the district court that the incriminating nature of his Braun "Oral-B" toothbrush case was anything but *immediately apparent*. (D.C. Doc. 34, at 12 (emphasis added).) This is not in dispute, as evidenced by Officer Walker testifying that the toothbrush case "looked like a toothbrush case, a travel case." (Tr., 68.) Nor did Officer Walker ever contend he had probable cause to believe the toothbrush case contained contraband prior to removing it from Mr. Peressini's toiletry box.

Moreover, Officer Walker's conduct was not limited to the toothbrush case, as evidenced by his going item by item through Mr. Peressini's toiletries and asking whether each belonged to him. (Tr., 67.) In other words, Officer Walker's conduct evidences a random fishing expedition—not the plain-view seizure of contraband the criminal nature of which was *immediately apparent*.

As for the third element, Mr. Peressini also correctly informed the district court that following his arrest Officer Walker lacked the lawful

[8] The State even conceded the plain-view doctrine did not authorize Officer Walker's seizing and searching Mr. Peressini's toothbrush case. (D.C. Doc. 35, at 7.)

right to "access or manipulate any of the items in the cardboard [toiletry] box." (D.C. Doc. 34, at 12.) As the Supreme Court explained in *Arizona v. Hicks*, an unlawful search occurs when the police—without probable cause that an object in plain-view is connected to a crime—physically move the object to confirm or dispel its incriminating nature. 480 U.S. 321, 328-329 (1987).

In *Hicks*, officers lawfully entered an apartment under the exigency exception after a bullet was fired through the floor striking an individual below. *Hicks*, 480 U.S. at 323 & 326. After entering the apartment officers discovered guns and expensive stereo equipment which seemed out of place in the squalid apartment. *Hicks*, 480 U.S. at 323. Believing the items were stolen, one of the officers moved the stereo equipment to obtain serial numbers that were later used to connect Mr. Hick's to an armed robbery. *Hicks*, 480 U.S. at 323-24.

In affirming suppression, the Supreme Court held that "the distinction between looking at a suspicious object in plain-view and moving it even a few inches is much more than trivial for purposes of the Fourth Amendment." *Hicks*, 480 U.S. at 325 (internal citations and quotations omitted); *see also Coolidge v. N.H.*, 403 U.S. 443, 466 (1971)

(Holding that the plain-view exception "may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges[]"); and *Arizona v. Gan*t, 556 U.S. 332, 345 (2009) (Observing that the Fourth Amendment's central concern is "giving police officers unbridled discretion to rummage at will among a person's private effects.")

The Supreme Court reached a similar conclusion in *Minn. v. Dickerson*, rejecting the government's argument that the plain-view view exception justified an officer's "plain feel" given that "the sense of touch is far more intrusive into the personal privacy that is at the core of the Fourth Amendment." 508 U.S. 366, 370-371 (1993) (internal citations and quotations omitted); *Bond v. United States*, 529 U.S. 334, 337 & 339 (2000) (Holding that squeezing the defendant's bag violated the Fourth Amendment given that a "[p]hysically invasive inspection is simply more intrusive than [a] purely visual inspection.")

Similarly, in *Elison* this Court observed that "[a] method of investigation which tends to reveal information regarding both legal and illegal behavior will require further justification in that it frustrates a person's legitimate expectation of privacy… [and]

rummaging through a person's personal effects behind the seat of their automobile divulges everything stowed behind the seat and does not permit a person to maintain as private everything except the contraband." *Elison*, ¶52 (internal citations and quotations omitted); *see also State v. Lahr*, 172 Mont. 32, 35-36, 560 P.2d 527 (1977) (Holding in effect that the plain-view exception was inapplicable for an officer who obtained her "plain-view" of drugs by committing an unlawful traffic stop"); and *Collins v. Virginia*, 138 S. Ct. 1663, 1672 (2018) ("A plain-view seizure thus cannot be justified if it is effectuated by unlawful trespass.") (Internal citations and quotations omitted.)

As the above illustrates, neither the plain-view doctrine nor any other Fourth Amendment exception justified Officer Walker's reaching inside Mr. Peressini's toiletry box and removing his closed toothbrush case, which occurred *before* Mr. Peressini's ownership disclaimer. (Tr., 67-68; see also Ex. 1, Searching Segment, 0:00 – 0:16.)

Thus, Officer Walker's first warrantless search was per se unreasonable warranting suppression. *Kroschel*, ¶10 (Absent an exception warrantless searches and seizures are per se unreasonable[]); *Wong Sun*, 371 U.S. at 487-88 (1963) (suppressing evidence that was

obtained by exploitation of prior illegal entry); *State v. Dasen*, 2007 MT 87, ¶19, 337 Mont. 74, 155 P.3d 1282 (The fruit of the poisonous tree doctrine is premised on the legal principle that the State is barred from introducing "evidence which comes to light as a result of the exploitation of an initial illegal act of the police.")

II. Unlawful Search #2: The abandonment doctrine did not justify Officer Walker's opening the toothbrush case—Mr. Peressini's ownership disclaimer notwithstanding.

Citing 46-5-103 and *McKeever*, the district court concluded Officer Walker's opening the toothbrush case was constitutionally permissible owing to Mr. Peressini's ownership disclaimer. (Tr., 111-12.) More specifically, the district court ruled that by disclaiming ownership Mr. Peressini abandoned any reasonable expectation of privacy in his toothbrush case, which in turn meant Officer Walker's opening it was not a "search" under the Fourth Amendment. (Tr., 111-112.) The district court's conclusion is erroneous.

A. It is objectively unreasonable to conclude Mr. Peressini *intentionally* abandoned all privacy interests in his own toothbrush case.

When a person intentionally abandons her property she loses an expectation of privacy, which in turn means an officer's inspection of

that item is not considered a "search" under the Fourth Amendment. *See McKeever*, ¶¶16-17. The state bears the burden of proving the individual intentionally abandoned her property. *1993 Chevrolet Pickup*, ¶17.

To determine whether a person has abandoned her property, the paramount inquiry is whether the individual *intended* to abandon the property, which may be inferred from the individual's statements and actions. *McKeever*, ¶17 *citing 1993 Chevrolet Pickup*, ¶15; *see also State v. Laster*, 223 Mont. 152, 154, 724 P.2d 721 (Because a party's subjective intent is often unknowable, determining a party's "intent" requires looking at the objective facts and circumstances); and *United States v. Baker*, 58 F.4th 1109, 1118 (9th Cir. 2023) (Because abandonment is a question of intent, courts "must consider the totality of the circumstances to determine whether an individual, by their words, actions, or other objective circumstances, so relinquished their interest in the property that they no longer retain a reasonable expectation of privacy in it at the time of its search or seizure.")

Under the totality of circumstances in this case, it is objectively unreasonable to conclude Mr. Peressini voluntarily demonstrated an

intent to abandon all expectations of privacy in his toothbrush case.

First, Mr. Peressini did not *voluntarily* disclaim ownership in the toothbrush case. In *State v. Munson*, this Court addressed the voluntariness of an individual's consenting to a Fourth Amendment search. 2007 MT 222, ¶51, 339 Mont. 68, 88 169 P.3d 364. Pertinent considerations for determining voluntariness in the Fourth Amendment context include *inter alia* whether the suspect was in custody; whether the officer sought consent after having conducting the search; whether the individual was informed of the right to not consent to the search; whether the individual was told that a search warrant could be obtained; whether the individual was advised of her *Miranda* rights; the repeated and prolonged nature of the questioning; and whether the individual was threatened or coerced. *Munson*, ¶51.

Here, Mr. Peressini was in custody during the search and while Officer Walker did provide a *Miranda* warning, Mr. Peressini never affirmatively waived his rights. (Tr., 53-54; see also Ex. 1, Miranda Segment, at 0:44 - 0:59.) Nor did Officer Walker advise Mr. Peressini that by disclaiming ownership he was—at least according to Officer Walker—waiving his *Fourth Amendment* right to privacy in his own

toothbrush case. Rather, Officer Walker waited until *after* opening the toothbrush case and discovering the heroin to inform Mr. Peressini that "in Montana, if you say something isn't yours, you have no expectation of privacy in that item, okay?" (Ex. 1, Searching Segment, 1:16 – 1:23.)

Officer Walker also never sought Mr. Peressini's consent to search his toiletry box or toothbrush case. Officer Walker's questioning was repeated and prolonged, as evidenced by his going item by item through Mr. Peressini's toiletries and asking whether each belonged to him. (Tr., 67.)

Additionally, Mr. Peressini did not disclaim ownership of his toothbrush case until *after* Officer Walker's initial Fourth Amendment violation (removing the toothbrush case from the toiletry box). (Tr., 67-68; & Ex. 1, Searching Segment, 0:00 – 0:10.) Yet the abandonment doctrine is not even applicable "when it is the result of prior illegal police conduct." *United States v. Stephens*, 206 F.3d 914, 917 (9th Cir. 2000) (internal citation and quotations omitted); *see also California v. Hodari D.*, 499 U.S. 621, 630-631 (1991) (J. Stevens, dissent) (Observing that because the officer lacked reasonable suspicion of criminal wrongdoing suppression would have been warranted had the officer

succeeded in seizing the juvenile before he abandoned the drugs.)

Most important of all, Officer Walker's conduct forced Mr. Peressini into a constitutionally intolerable Hobsons' choice. Remembering that Mr. Peressini did not disclaim ownership in the toothbrush case until *after* Officer Walker physically removed it from his toiletry box and began shaking it, at which point Officer Walker directly asked Mr. Peressini whether it belonged to him as the heroin loaded syringe can literally be heard rattling around inside. (Ex. 1, Searching Segment, 0:00 – 0:16; see also Tr., 67-68.) As this Court explained in *State v. Isom*:

> [A] mere disclaimer of ownership in an effort to avoid making an incriminating statement in response to police questioning should not alone be deemed to constitute abandonment. Given the position that a defendant does not otherwise have to incriminate himself to preserve his Fourth Amendment rights… it is difficult to understand how a refusal to make incriminating admissions in response to police interrogation can be held to deprive a person of Fourth Amendment standing. 196 Mont. 330, 339, 641 P.2d 417 (1982) (internal citations omitted).

The United States Supreme Court has similarly held that "[w]e cannot equate an unwillingness to invite a criminal prosecution with a voluntary abandonment of any interest in the contents of the cartons."

Walter v. United States, 447 U.S. 649, 658, n. 11 (1980); *Simmons v. United States*, 390 U.S. 377, 394 (1968) ("[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another[]"); *see also United States v. Gwinn*, 191 F.3d 874, 877 (8th Cir. 1999) (Holding that a bus passenger's repeatedly denying ownership in a soft-sided duffel bag after being handcuffed "can hardly be characterized as a voluntary act.")

Second, when Officer Walker approached Mr. Peressini in the hotel lobby he was holding the toiletry box in his hands. (Tr., 42-43.) The fact that Mr. Peressini was holding his toiletries gives rise to the inference that he had no intention of abandoning them. Indeed if Mr. Peressini intended to voluntarily abandon the toothbrush case, he would have tossed it in the trash before leaving his hotel room. *See Abel v. United States*, 362 U.S. 217, 241 (1960) (Holding that the defendant abandoned items he discarded in his hotel trash bin prior to checkout.)

Third, Officer Walker testified that after approaching Mr. Peressini he placed his toiletry box on the hotel trolley and began fidgeting with items inside the box. (Tr., 53 & 72.) In other words, Mr.

Peressini did not disassociate or distance himself from his toiletries, for example by throwing them in a garbage can when Officer Walker approached. Indeed, the fact that Mr. Peressini was fidgeting with his toiletries evidences the very antitheses of an intent to abandon them. *See Smith v. Ohio*, 494 U.S. 541, 543-544 (1990) ("[A] citizen who attempts to protect his private property from inspection, after throwing it on a car to respond to a police officer's inquiry, clearly has not abandoned that property[]"; *see also Rios v. United States*, 364 U.S. 253, 262, n. 6 (1960) ("A passenger who lets a package drop to the floor of the taxicab in which he is riding can hardly be said to have 'abandoned' it.")

Fourth, the record is unequivocal that Officer Walker believed the toothbrush case belonged to Mr. Peressini when he opened it, as evidenced by his saying to Mr. Peressini (in a sarcastic tone) "so this isn't yours, well, its in the case full of all your stuff, and there's a loaded needle of drugs in there…" (Ex. 1, Searching Segment, 0:23 – 0:37.) Officer Walked even conceded he believed the heroin belonged to Mr. Peressini the moment he opened the toothbrush case and discovered it. (Tr., 69.)

In sum, the totality of objective facts leads to only one reasonable

conclusion: Mr. Peressini did not *voluntarily* disclaim, discard, leave behind, or otherwise *intentionally* relinquish all privacy interest in his own toothbrush case. Accordingly, the abandonment doctrine cannot cure Officer Walker's second unlawful search (opening the toothbrush case).

B. Neither 46-5-103 nor *McKeever* are dispositive.

In concluding Mr. Peressini had abandoned all privacy interests in the toothbrush case, the district court relied entirely on 46-5-103 and *McKeever*. (Tr., 111-12.) As discussed below, the district court's complete reliance on 46-5-103 and *McKeever* was misplaced.

Section 46-5-103(1)(a), MCA

Section 46-5-103(1)(a), MCA advises in pertinent part that a search and seizure "may not be held to be illegal if… the defendant has disclaimed any right to or interest in the place or object searched or the evidence, contraband, or person seized[.]" However, 46-5-103(1)(a) cannot be read to mean that any search conducted subsequent to an ownership disclaimer is constitutional as a matter of law. Rather, there are numerous reasons 46-5-103(1)(a) must be interpreted to mean that disclaiming ownership in property is but one factor in the court's Fourth

Amendment reasonableness determination.

First, both the Montana and United States Supreme Courts have made clear that no single factor is dispositive in determining whether a search or seizure is reasonable. *McKeever,* ¶18 (Advising that whether a defendant had a reasonable expectation of privacy in a pill bottle was based on a totality of circumstances); *Chadwick*, 433 U.S. at 9 (Whether a Fourth Amendment search or seizure is reasonable requires looking at "all the circumstances…"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); (Voluntariness is "a question of fact to be determined from all the circumstances…"; *Isom*, 196 Mont. at 339 ("[A] mere disclaimer of ownership in an effort to avoid making an incriminating statement in response to police questioning should not alone be deemed to constitute abandonment[]"); *see also Baker*, 58 F.4th at 1118 ("None of our abandonment cases has held that mere disavowal of ownership, without more, constitutes abandonment of a person's reasonable expectation of privacy in that property.") (Internal citations and quotations omitted).

Second, the United States Supreme Court has repeatedly and expressly held that a state statute cannot reduce federal Fourth Amendment protections:

> Whether or not a search is reasonable within the meaning of the Fourth Amendment… has never depended on the law of the particular State in which the search occurs… [because] [w]hile individual States may surely construe their own constitutions… state law d[oes] not alter the content of the Fourth Amendment. *Virginia v. Moore*, 553 U.S. 164, 172 (2008).
>
> We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs… Respondent's argument is no less than a suggestion that concepts of privacy under the laws of each State are to determine the reach of the Fourth Amendment. We do not accept this submission. *California v. Greenwood*, 486 U.S. 35, 43 (1988) (internal citations and quotations omitted).

Third, the Montana Supreme Court has already rejected a literal reading of 46-5-103(1)(a), advising among things that "the disclaimer statute must be interpreted in light of the Fifth Amendment privilege against self-incrimination…" *Isom*, 196 Mont. at 339.

In short, 46-5-103(1)(a) cannot be interpreted to mean Mr. Peressini's ownership disclaimer rendered Officer Walker's opening his toothbrush case per se constitutional. Rather, 46-5-103(1)(a) must be read to mean Mr. Peressini's ownership disclaimer is but a single factor the court may consider when conducting its Fourth Amendment

reasonableness assessment.

State v. McKeever, 2015 MT 177

In *McKeever*, the defendant (Mr. McKeever) was arrested by Glendive officers for driving on a suspended license. *McKeever*, ¶3. During a pat-down search one of the officers discovered a prescription bottle of Alprazolam in the cuff of Mr. McKeever's pants leg. *McKeever*, ¶3. The prescription had been issued to an individual named Motschenbacher—not Mr. McKeever. *McKeever*, ¶3. The officer asked Mr. McKeever what was in the bottle and he didn't answer; the officer(s) opened the bottle and discovered the pills. *McKeever*, ¶4. Mr. McKeever then tells the officers he didn't know where the bottle came from nor why it was in his pants cuff. *McKeever*, ¶4.

In his motion to suppress, Mr. McKeever conceded the officers' initial pat-down search was lawful but argued the officer(s) conducted a second unlawful search by opening the bottle. *McKeever*, ¶10. The district court denied Mr. McKeever's motion, concluding that because the bottle would have been searched at the jail the inventory and inevitable discovery exceptions applied. *McKeever*, ¶¶ 10-11.

On appeal the State posited a new argument, namely that no

"search" occurred because Mr. McKeever lacked a reasonable expectation of privacy in a pill bottle prescribed to another and for which he disclaimed ownership. *McKeever*, ¶13. This Court affirmed under the abandonment theory. *McKeever*, ¶18. Justice McKinnon issued a concurring opinion, advising she would affirm pursuant to the inventory and inevitable discovery exceptions. *McKeever*, ¶18 (McKinnon, J., concur.).

Mr. Peressini contends Justice McKinnon was correct, the Alprazolam pills were admissible against Mr. McKeever under the inventory and inevitable discovery exceptions—not the abandonment doctrine. Be that as it may, the majority's holding in *McKeever* is uncontrolling owing to the dissimilarity in facts vis-à-vis Mr. Peressini's case.

Concerning the first search, Mr. McKeever conceded the initial pat-down was *lawful*. *McKeever*, ¶10. Conversely, in this case Officer Walker's initial search—reaching inside the toiletry bin and removing Mr. Peressini's toothbrush case—was *unlawful* given that "the incriminating nature of the container was not immediately apparent… [and because] Officer Walker did not have a lawful right to access… the

[toothbrush] container…" (D.C. Doc. 34, at 12; see also Tr., 67-68; and Ex. 1, Searching Segment, 0:00 – 0:10.)

As for the second search—opening the closed container—in *McKeever* the majority concluded the defendant lacked a reasonable expectation of privacy in the pill bottle based in significant part on the fact that the prescription was for a controlled substance prescribed to a third-party. *McKeever*, ¶18. In other words, the Court's conclusion that Mr. McKeever lacked a reasonable expectation of privacy in the pill bottle was based on substantially more than Mr. McKeever's ownership disclaimer.

In fact, a close reading of *McKeever* reveals that the dispositive factor must have been that the prescription was written to a third party—not Mr. McKeever's ownership disclaimer. This is self-evident given that Mr. McKeever did not disclaim ownership in the pill bottle until *after* the officer(s) opened it and discovered the pills. *McKeever*, ¶4 ("The officer asked McKeever what was in the bottle and McKeever *did not respond*. One or both of the officers opened the bottle… McKeever [then] told the officers he did not know where he got the bottle and did not know why it was in his pants cuff.") (Emphasis added.)

In contrast, in this case there are no facts whatsoever that support a finding of abandonment other than Mr. Peressini's ownership disclaimer, which as noted occurred *after* Officer Walker had already violated the Fourth Amendment by removing his toothbrush case from the toiletry box. Nor was the closed container in this case a pill bottle for a controlled substance prescribed to a third party, but rather an innocuous Braun toothbrush case which Officer Walker conceded he believed belonged to Mr. Peressini when he opened it. (Tr., 69.)

In sum, even if the *McKeever* majority's abandonment analysis was correct, the dissimilarity in facts renders the opinion distinguishable and uncontrolling when applied to this case.

C. Because the abandonment doctrine cannot cure Officer Walker's second unlawful search, suppression is warranted.

Having determined that Officer Walker's second search (opening the toothbrush case) was also a Fourth Amendment search, the remaining inquiry is whether the search was reasonable. *Goetz*, ¶¶24 & 27. Officer Walker's opening the toothbrush case was not reasonable because Mr. Peressini never intentionally abandoned it. Accordingly, Officer Walker's second search was also unlawful warranting

suppression. *See Kroschel*, ¶10; *see also Hilgendorf*, ¶ 23; and *Wong Sun*, 371 U.S. at 484-85.

CONCLUSION

Officer Walker committed two unlawful Fourth Amendment searches. The syringe and heroin he discovered as result should have been suppressed. Mr. Peressini respectfully requests this Court issue an Order reversing the denial of his motion to suppress and remanding with instructions allowing Mr. Peressini to withdraw his conditional guilty plea.

Respectfully submitted this 6th day of October, 2023.

By____________/s/ Pete Wood____________
Pete Wood, Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionally 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 7,366 (including footnotes), but excluding Title Page, Table of Contents, Table of Authorities, Certificate of Compliance, Appendix, and Certificate of Service.

/s/ Pete Wood
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APPENDIX

Judgement and Sentencing Order .... App. A

CERTIFICATE OF SERVICE

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