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STATE OF MONTANA
Case Number: DA 23-0613

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0613

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STATE OF MONTANA,

Plaintiff and Appellant,

v.

COLE LARSON LEVINE,

Defendant and Appellee.

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# REPLY BRIEF OF APPELLANT

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On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Shane A. Vannatta, Presiding

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The State of Montana now replies to Appellee Cole Larson Levine's response.

## INTRODUCTION

Recently, in *United States v. Westfall*, No. CR 23-42-M-DLC (D. Mont. Jan. 30, 2024),[1] Judge Christensen "respectfully disagree[d]" with Judge Watters' conclusion in *United States v. Webb*, No. CR 19-121-BLG-SPW-1, 2021 WL 22720, at *3-4 (D. Mont. Jan. 4, 2021), as well as Judge Vannatta's conclusion at issue below that "residency of the target was key to the court's jurisdiction to issue a warrant for electronic communications[,]" under Mont. Code Ann. § 46-5-605(3)(a), further explaining:

> The plain language of § 605(3)(a) states that a provider need only be doing business in Montana with *a* resident of the state—that is, at least *one* resident of the state. Had the legislature intended the qualifying language regarding residency to be specific to the target of the warrant, the legislature could have done so explicitly.

(*Westfall* Order at 13.) Addressing the legislative history, the *Westfall* Court further explained:

> Nor does anything in the legislative history of the statute indicate an intent to limit the state's investigative power to residents

[1] The same defense counsel of record in *Westfall* is appellate defense counsel here. Shortly after *Westfall* was decided—which occurred after the State's opening brief was filed but before Levine's response brief was filed—the State filed a Notice of Supplemental Authority, alerting this Court of the decision and giving Levine an opportunity to respond to the new authority.

> of the state. Another issue with this reading of the statute is that determining an individual's residency during the pendency of an investigation is often difficult and at times may be impossible. This could prove to be a significant hinderance to the issuance of search warrants where there is otherwise sufficient probable cause. Without clear direction from the Montana Legislature or the Montana Supreme Court, this Court is not inclined to read such an onerous additional requirement into the statute.

(*Id*.) The Court further reasoned that Mont. Code Ann. § 46-5-605(3)(a) should be read in tandem with Mont. Code Ann. § 46-5-602(1), which merely requires a probable cause finding for disclosure to a governmental entity of such electronic communications. (*Id*. at 13-14.)

As an alternative basis, the *Westfall* Court concluded that jurisdiction was extended via the Montana Constitution allowing jurisdictional delegation from the federal government, in combination with the express delegation of jurisdiction under the federal "Stored Communications Act ("SCA")." (*Id*. at 14-16.) Finally, the Court assumed *arguendo* the warrant was invalid and applied the "good faith" exception to the exclusionary rule. (*Id*. at 16-17.)

For the following reasons, like in *Westfall*, this Court should reject the district court's unreasonable interpretation of Mont. Code Ann. § 46-5-605(3)(a) that extraterritorial jurisdiction over a company such as Verizon Wireless is only conferred if the target of the warrant is a "resident" of this State.

# ARGUMENT

## I. This Court should reverse the district court's decision interpreting Mont. Code Ann. § 46-5-605(3)(a). Alternatively, this Court should apply the "good faith" exception to the warrant requirement.

### A. The district court incorrectly interpreted Mont. Code Ann. § 46-5-605(3)(a).

The plain language in Mont. Code Ann. § 46-5-605(3)(a) does not require that the person subject to the warrant be a "resident" of the State because "a resident" means "any resident." As the *Westfall* Court concluded, this is the only reasonable interpretation of the statute. And the clear focus of the statute is on the foreign company that is allowably subject to Montana jurisdiction by nature of the company's contacts with Montana. Further, the legislative intent of enacting the suite of electronic communications statutes in 2017 was to provide a mechanism for law enforcement to obtain extraterritorial data when necessary.

In his response, Levine does not address either the *Westfall* decision or the State's opening brief arguments. Levine thus does not dispute the State's arguments related to the plain language of Mont. Code Ann. § 46-5-605(3)(a) or the Legislative history of that and associated statutes. While abandoning any defense of the district court's statutory interpretation below, Levine attempts to argue that *other* statutes do not confer jurisdiction over extraterritorial search warrants, a non-dispositive issue. (*See* Appellee's Response at 6-11.) This Court should reverse.

### B. Alternatively, the good faith exception applies.

If this Court reaches the issue, it should apply the good faith exception to the exclusionary rule. Evidence should not be suppressed when an otherwise valid search warrant is issued by a duly authorized Montana district court judge of general jurisdiction (*see State v. Dasen*, 2007 MT 87, ¶¶ 26-27, 337 Mont. 74, 155 P.3d 1282; Mont. Const. art. VII, § 4), supported by a finding of probable cause. *See* Mont. Code Ann. § 46-5-602(1); Mont. Code Ann. § 46-5-221.

In his response, Levine repeats the analyses in *State v. Vickers*, 1998 MT 201, 290 Mont. 356, 964 P.2d 756, and *Potter v. District Court of the Sixteenth Judicial Dist*., 266 Mont. 384, 393, 880 P.2d 1319, 1325 (1994), without disputing the overwhelming authority holding that the exclusionary rule does not apply to a void warrant. As the State explained in its opening brief, *Potter*'s and *Vickers*' analyses of *United States v. Leon*, 468 U.S. 897 (1984) might have been reasonable at the time, but these interpretations have since been abrogated by further United States Supreme Court precedent. *See United States v. Master*, 614 F.3d 236, 239, 241 (6th Cir. 2010); *Herring v. United States*, 555 U.S. 135, 137 (2009); *Davis v. United States*, 564 U.S. 229, 237 (2011). Courts routinely apply the good faith exception for judicial errors in warrants because there is no reasonable deterrence effect. The "sole purpose" of the exclusionary rule is to deter future Fourth Amendment violations. *Davis*, 564 U.S. at 236. And recently,

Judge Christensen applied the same good faith exception as a backup basis to avoid suppression of the warrant in *Westfall*. (*See* Order at 16-17.)

Levine's further argument that suppression is automatically required pursuant to the Montana and United States Constitutions is based on a misunderstanding of the exclusionary rule. Exclusion is "not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search." *Davis*, 564 U.S. at 236. Instead, it is a "prudential doctrine created by [the Supreme Court] to compel respect for the constitutional guaranty." *Id*. Whether to suppress evidence under the exclusionary rule is a separate question from whether a Fourth Amendment violation has occurred. *See Herring*, 555 U.S. at 140. And application of the exclusionary rule is only intended for certain circumstances. "[E]vidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant" is not one of them and "cannot justify the substantial costs of exclusion[.]" *Leon*, 468 U.S. at 922. As an alternative basis, this Court should decline to suppress the evidence obtained via the warrant because the exclusionary rule does not apply to an invalid warrant.

## II. Levine's new issues in his response brief are not appropriately raised. They would otherwise fail on the merits.

This Court should decline to entertain the issues Levine raises in his response brief, including: (1) whether Mont. Code Ann. § 46-5-220(2),

Mont. Code Ann. § 46-5-605(3)(a) or -(b), or the federal SCA generally confers jurisdiction for extraterritorial search warrants; and (2) whether the legislative history of subsection (b) of Mont. Code Ann. § 46-5-605(3) support's Levine's theory that the electronic communications statutes do not apply outside of Montana. But even if it does consider Levine's issues, an analysis of the claims only further provides alternative or additional bases for establishing jurisdiction here. This Court should further decline to consider Levine's argument, raised for the first time on appeal in his response brief, that the "supervisory powers" doctrine should apply to suppress the warrant.

**A. Levine improperly raises new claims in his response brief.**

Levine explains he is "dissatisfied" with the issues raised in the State's opening brief and attempts to add new issues to his response brief. But Levine mistakes the nature of a State interlocutory appeal in this circumstance, as well as this Court's Rules of Appellate Procedure.

Below, Levine argued that neither Mont. Code Ann. § 46-5-220—the general warrant jurisdictional statute—nor Mont. Code Ann. § 46-5-605(3)(a), the electronic communications warrant statute, conferred jurisdiction over extraterritorial search warrants. (Doc. 47 at 5-8.) Levine further argued that the

federal SCA could not confer jurisdiction either. (*Id*. at 11-12.) Finally, Levine argued that Mont. Code Ann. § 46-5-605(3)(a) did not apply to him because he was not a resident of Montana. (*Id*. at 7.)

Addressing Mont. Code Ann. § 46-5-605(3)(a), the district court concluded that "Montana's state warrant procedures specific to electronic communications **does** provide limited authority for extraterritorial search warrants." (Appellant's App. A at 20 (emphasis added).) However, the court reasoned that jurisdiction was not established here because Levine was not a Montana "resident" pursuant to its interpretation of Mont. Code Ann. § 46-5-605(3)(a). The court invalidated the warrant on that basis. (*Id*. at 20-21.)

Here, the only avenue for the State to file an interlocutory State appeal of the district court's decision was on the basis that the district court invalidated the warrant and suppressed the evidence via the same warrant. *See* Mont. Code Ann. § 46-20-103(1)(e). The State thus appealed the district court's decision based on the district court's statutory interpretation of the residency language in Mont. Code Ann. § 46-5-605(3)(a), which was the dispositive issue. The State did not appeal the district court's decision that extraterritorial jurisdiction otherwise existed under the statute, nor would the State have any reason to do so. Thus, the question on appeal is not whether any other statute *generally* confers jurisdiction over extraterritorial warrants. The question is rather one of statutory interpretation

pertaining to the long-arm scope of such extraterritorial jurisdiction concerning the "resident" language in Mont. Code Ann. § 46-5-605(3)(a).

In this circumstance, Levine is disallowed from cross-appealing in an interlocutory State appeal. *Compare* Mont. Code Ann. § 46-20-103 *to* Mont. Code Ann. § 46-20-104; *see also State v. Armstrong*, 189 Mont. 407, 423-24, 616 P.2d 341, 389 (1980). But even if Levine could cross-appeal, he failed to do so. This Court has explained that "[i]n order to preserve an issue not raised by an appellant, a respondent must file a notice of cross appeal." *Walker v. State*, 2003 MT 134, ¶ 48, 316 Mont. 103, 68 P.3d 872 (citing *Billings Firefighters Local 521 v. City of Billings*, 1999 MT 6, ¶ 31, 293 Mont. 41, 973 P.2d 222; *Gabriel v. Wood*, 261 Mont. 170, 178, 862 P.2d 42, 47 (1993)); *see also* M. R. App. P. 4(2)(c). This Court should decline to consider Levine's claims purporting to challenge the district court's order on other bases.

### B. Levine's claims would nonetheless fail.

Even if this Court were to consider Levine's claims raised in a response brief beyond the scope of the State's interlocutory appeal authority, they would fail.

#### 1. Montana Code Annotated § 46-5-605(3)(a) authorizes jurisdiction over electronic extraterritorial warrants.

Levine first argues that "Mont. Code Ann. § 46-5-605 does not give authority to issue an extraterritorial warrant." Levine continues, explaining that "[w]hen the Montana Legislature intends to give permission for a Montana court to

exercise authority beyond the State's borders, it expressly does so in a statute." (Appellee's Br. at 9.) This is a similar argument as made in *Westfall* that, under Mont. Code Ann. § 46-5-605(3)(a), "Montana district courts are without jurisdiction to issue extraterritorial warrants under any circumstances." The *Westfall* Court rejected this argument by referencing the plain language of the statute, explaining that it "authorizes service of a warrant for electronic communications on both 'domestic' providers—i.e., those incorporated and located in Montana—and providers 'doing business in this state under a contract or terms of service agreement with a resident of this state if any part of that contract or agreement is to be performed in this state.'" (*Westfall* at 12.)

Levine's claim—that the statute that authorizes extraterritorial electronic search warrants does not mean what it says—is unavailing based on the plain language of the statute and the legislative intent to model the overall electronic communications compendium of statutes enacted in 2017 in response to the federal SCA. And as the *Westfall* Court concluded, Mont. Code Ann. § 46-5-605(3)(a) should be read in tandem with Mont. Code Ann. § 46-5-602, which merely requires probable cause to "require disclosure" to a governmental entity of such electronic information. District courts are specifically authorized to issue extraterritorial search warrants under Mont. Code Ann. § 46-5-605(3)(a).

### 2. Montana Code Annotated § 46-5-605(3)(b) does not prohibit jurisdiction over electronic extraterritorial warrants.

Levine argues that the Legislature intended to limit extraterritorial jurisdiction in Mont. Code Ann. § 46-5-605(3), because it ultimately struck the phrase "regardless of where the information is held" from Mont. Code Ann. § 46-5-605(3)(b):

> The provider of an electronic communication shall produce all electronic customer data, contents of communications, and other information sought by the governmental entity, ~~regardless of where the information is held.~~

(*See* Appellee's Br. at 10.) This argument fails. Here, after both chambers approved the original language of the bill, the Governor issued an amendatory veto of the bill and sent it back for revision. *See* Governor's letter, *available at* LAWS Action Details Page (mt.gov) and HB0148GovAmd.pdf (mt.gov); *see also* H.B. 148.03 to H.B. 148.04 (HB 148 changes).[2] Among other changes, the Governor suggested the above language be stricken amid concerns it would "authorize governmental entities to compel the production of electronic communications information that is stored *outside the United States*." (Letter, emphasis added.) The Governor further explained:

> Such a scenario may violate the laws of foreign countries and sets an unwelcome precedent of nations unilaterally obtaining

[2] Compare HB0148_3.pdf (mt.gov) to HB0148_4.pdf (mt.gov)

> information rather than cooperating with law enforcement investigations. My amendments strike the language.

(*Id.*) The Legislature adopted and approved the Governor's amendment, and the bill was transmitted and signed by the Governor.[3]

Thus, by endorsing and approving the Governor's changes to strike language to the extent that the language could be interpreted as authorizing search warrants "outside the United States[,]" such a revision based on that intent encompasses the clear reaffirmance—by both the Governor and the Legislature—of the intended broad scope of the long-arm reach of the legislative enactments relating to electronic communication warrants. In other words, the Legislature delineated an intent to allow extraterritorial warrants to issue *within* the United States concomitant with the authority extended by the federal government under the SCA. The only limitation to the broad intent is that the company must be doing a minimum amount of business in Montana to be subject to the State's long-arm reach as specified in Mont. Code Ann. § 46-5-605(3)(a).

### 3. Alternatively, jurisdiction has been permissibly delegated through the federal SCA.

Even if Levine could prevail in his challenge to Mont. Code Ann. § 46-5-605(3)(a) based on the "resident" language, jurisdiction over Levine would

[3] LAWS Detailed Bill Information Page (mt.gov)

still be established via the SCA, which authorizes extraterritorial warrants for state courts.

Montana district courts have "original jurisdiction in all criminal cases amounting to a felony and all civil matters and cases at law and in equity . . . and such additional jurisdiction as may be delegated by the laws of the United States or the state of Montana." Mont. Const. art. VII, § 4. The federal SCA confers jurisdiction to "a State court, . . . using *State warrant procedures* . . .) by a *court of competent jurisdiction*." 28 U.S.C. § 2703(A) (emphasis added).

Levine argues the SCA cannot apply because, while it generally confers jurisdiction to a state court, a warrant must be "issued using State Warrant procedures." (Appellee's Br. at 11.) Levine continues that "State warrant procedures require the issuing court to have jurisdiction to issue the warrant." (*Id.*) Levine further argues that the general warrants statute—Mont. Code Ann. § 46-5-220—acts as a geographic limitation of jurisdiction, thus the federal SCA cannot apply. (*Id.* at 6-7.)

The *Westfall* Court rejected the same "circular and inconsistent" argument by interpreting Montana's jurisdictional framework, including noting that the Montana Constitution "contemplates that *additional* jurisdiction may be delegated by the laws of the United States." (*Westfall* Order at 14-15 (emphasis in original).)

The Court also rejected defendant's similar argument highlighting the word "procedure" in the statute, explaining:

> The word "procedure" is defined as "a specific method or course of action," Black's Law Dictionary, 1457 (11th ed. 2019), or "a particular way of accomplishing something or acting," Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/procedure (last visited Jan. 30, 2024). Thus, there is a distinction between *procedures* for obtaining a search warrant and *jurisdictional limitations* for issuing a search warrant. The Act only incorporates those provisions of Montana law that address the specific method or particular way to issue a warrant, not those delimiting the courts' jurisdiction. *Cf. United States v. Ackies*, 918 F.3d 190, 201-02 (1st Cir. 2019) ("The common definition of 'procedure' supports the conclusion that [the Act] incorporates only those provisions of Rule 41 that address the "specific method" or particular way" to issue a warrant."); *United States v. Ortega-Yescas*, No. CR-19-06-BU-DLC, 2019 WL 2299749, at *4 (D. Mont. May 30, 2019) (Under the Act, Rule 41 sets forth the 'procedures' applied to the issuance of warrants, but the Act also authorizes the issuance of warrants for cell phone location information by 'a court of competent jurisdiction,' defined throughout the operative provision to include 'a State court, issued using State warrant procedures.' It follows that . . . [the Act's] 'own geographic, jurisdictional limitation' overrides the jurisdictional limits set forth in Rule 41.") (internal citations omitted.)

(*Id*. at 15.) This Court should reject Levine's challenge to the application of the federal SCA.

**4. Montana Code Annotated § 46-5-220 is a general warrant statute and does not apply, and further does not act as a geographic limiter under the SCA.**

As explained above, Levine's arguments that the general warrant statute under Mont. Code Ann. § 46-5-220 acts as a limitation of geographic jurisdiction must fail because: (1) the Montana Constitution provides for delegation of

jurisdiction via the federal government; and (2) the SCA delegates jurisdiction to the State courts of "competent" or general jurisdiction in accordance with State court "procedures" or methods for issuing the warrants; and (3) Montana district courts are courts of "competent" or general jurisdiction and utilize state warrant "procedures" to issue warrants. Accordingly, the SCA applies to establish jurisdiction.

This Court should further decline to address Levine's arguments under the general warrant statute because Mont. Code Ann. § 46-5-605(3)(a) is the more specific and directly applicable jurisdictional statute for electronic communication warrants, and therefore controls. "[I]t is a well-settled rule of statutory construction that the specific prevails over the general." *State v. Feight*, 2001 MT 205, ¶ 21, 306 Mont. 312, 33 P.3d 623. "Further, when two statutes deal with a subject, one in general and comprehensive terms, and the other in minute and more definite terms, the more definite statute will prevail to the extent of any opposition between them." *Feight*, ¶ 21 (collecting cases).

But even if this Court reached the issue of whether Mont. Code Ann. § 46-5-220(2)—which was modeled after Fed. R. Crim. P. 41,[4]—could ever be interpreted as a geographical limitation on jurisdiction, it is still overridden by the more specific federal SCA granting jurisdictional authority to states over electronic

[4] *See* Commission Comments to Mont. Code Ann. § 46-5-220(2).

communications warrants. *See generally Westfall*; *United States v. Ortega-Yescas*, 2019 Dist. LEXIS 90778, 2019 WL 2299749 (D. Mont. 2019). Indeed, courts have construed the SCA to "authorize[] state search warrants for out-of-state records even when the law of the state only provides state courts with authority to issue warrants within the state." *United States v. Peterson*, 2023 U.S. Dist. LEXIS 161364, 2023 WL 5920869 (W.D. Missouri, July 18, 2023.) For example, in *United States v. Purcell*, 2018 U.S. Dist. LEXIS 156648, 2018 WL 4378453, at *5 (S.D.N.Y. Sept. 13, 2018), *aff'd,* 967 F.3d 159 (2d Cir. 2020), the defendant moved to suppress evidence obtained from Facebook, which is headquartered in California, pursuant to warrants issued by the New York County Supreme Court because "New York courts are only authorized to issue warrants to be executed within the State of New York." *Id*. at *15. The *Purcell* court wrote:

> In addition to federal courts, the SCA authorizes "a court of general criminal jurisdiction of a State authorized by the law of that State to issue search warrants" to issue warrants for ESI [electronically stored information]. 18 U.S.C. § 2711(3)(B). Notably, the statute makes no distinction between the territorial reach of warrants issued by federal and state courts pursuant to its terms. Indeed, it would make little sense for the statute to require of state courts that which it does not require of federal courts—namely, that the ESI provider be within the ordinary territorial jurisdiction of the court issuing the warrant. Such a reading would defeat the entire purpose of the statute.

Id. at *17; *accord United States v. Beaudion*, 2019 U.S. Dist. LEXIS 41977, 2019 WL 1199853, at *4, (W.D. La. Mar. 13, 2019) (ruling that even if "the thing

to be searched was outside the state judge's territorial jurisdiction, the warrant was valid" according to the "plain terms of § 2703[.]"); *Hubbard v. MySpace, Inc.*, 788 F. Supp.2d 319 (S.D.N.Y. 2011) (finding that § 2703(a) allowed a state court to exceed its territorial jurisdiction in issuing a warrant)). Thus, the "SCA offers no indication that state courts are more restricted in their territorial reach than federal courts when issuing warrants for ESI under § 2703(a)." *Purcell*, at *20. And "[i]f the territorial restrictions in the Federal Rules of Criminal Procedure do not restrict the authorizations given by Congress in the SCA, then surely neither do parallel restrictions in state court rules and procedures." *Id*.

### 5. This Court should decline to apply the "Supervisory Powers" doctrine.

In a wholly new claim never raised or addressed in any pleading below, but instead raised for the first time in a responsive brief to an interlocutory State appeal, Levine urges this Court to apply the "Supervisory Powers" doctrine to the extent this Court agrees with the State that "*Leon* applies to void *ab initio* warrants[.]" (Appellee's Br. at 6.)

This claim should be rejected because it is waived. This Court will not consider "issues presented for the first time on appeal" because they are "untimely" and because it is "fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider." *State v. LaFreniere*, 2008 MT 99, ¶ 11, 342 Mont. 309, 180 P.3d 1161.

The claim would also fail on the merits. For application of such a doctrine, defendant must be actually prejudiced in order for the court to invoke its supervisory powers to dismiss and indictment for prosecutorial misconduct, and the doctrine cannot conflict with harmless error rules. *Bank of N.S. v. United States*, 487 U.S. 250, 252-57 (1988). Dismissal of the indictment is appropriate only if "it is established that the violation substantially influenced the grand jury's decision to indict," or if there is a "grave doubt" that the decision to indict was free from the substantial influence of such violations. *Id.* at 257.

Here, Levine wholly fails to show how the supervisory powers doctrine could ever suppress a warrant generally, nor does Levine attempt to explain how such a doctrine could apply here. Levine has not alleged any possible instance of egregious prosecutorial misconduct. Levine has not alleged any issues with the charging documents. Levine has not alleged, to the extent this Court would find the warrant void, that the prosecution, court, or police were engaging in malicious conduct or had any knowledge of the status of the warrant by reasonably assuming the warrant's validity. Levine has not explained how he has overcome the harmless error rule if any error occurred. This Court should reject Levine's claim.

## CONCLUSION

This Court should reverse the district court's September 29, 2023 order invalidating and suppressing the October 3, 2022 search warrant issued to Verizon Wireless.

Respectfully submitted this 27th day of March, 2024.

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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 Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,024 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

*/s/ Roy Brown*
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## CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 03-27-2024:

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