
STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHRISTOPHER LEDEAU,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable John A. Kutzman, Presiding

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ARGUMENT

- I. **The electronic device search condition is unnecessary, unreasonably broad, and unconstitutional.**
 - A. **Christopher has a reasonable expectation of privacy in his personal electronic data, and he is right to challenge condition 29 before his probation officer uses it to conduct an unconstitutional search.**

The State claims the U.S. Supreme Court's language in *Riley v. California*, 573 U.S. 373 (2014), about the intimately private nature of cell phone data does not apply here because Christopher is a probationer with a diminished expectation of privacy. (Appellee's Br. at 18.) The State overlooks that this Court in *Mefford* echoed *Riley*'s pronouncements about the highly invasive nature of cell phone searches. *State v. Mefford*, 2022 MT 185, ¶ 15, 410 Mont. 146, 517 P.3d 210. And the defendant in *Mefford* was a parolee with even fewer expectations of privacy than a probationer like Christopher. *Mefford*, ¶ 2; *Samson v. California*, 547 U.S. 843, 850 (2006) (“[P]arolees have fewer expectations of privacy than probationers.”).

In fact, the State in *Mefford* conceded that the defendant, even as a parolee, had an objectively reasonable expectation of privacy in his cell phone data, and this Court agreed. *Mefford*, ¶ 15. If a parolee like

Mefford had a reasonable expectation of privacy in the contents of his cell phone, a probationer like Christopher has a comparatively *heightened* expectation of privacy.

The State also argues there is no harm in leaving condition 29 in place even if it does invite unconstitutional searches. If and when Christopher's probation officer conducts a constitutionally unreasonable search under the authority of this condition, the State claims Christopher can simply move at that time to suppress any illegally obtained, incriminating evidence. (Appellee's Br. at 18–19.)

The State incorrectly presumes Christopher's only apprehension is that his probation officer will find incriminating evidence on his devices and use that against him in a revocation proceeding or new prosecution. But Christopher's concern is that his probation officer will rely on condition 29 to violate his digital privacy and inspect the most intimate, *lawful* facets of his personal life. (Appellant's Br. at 13–25.)

If Christopher's probation officer conducts an unreasonable search of his devices and the search does *not* reveal any incriminating evidence, Christopher will not be able to file a motion to suppress, because there will be no evidence to suppress. Nor will Christopher be

able to go back in time and undo this violation of his constitutional rights.

The exclusionary rule, to which the State implicitly refers (*see* Appellee’s Br. at 18–19), is not a personal remedy to a violation of one’s constitutional rights. It is “a judicial remedy designed for the narrow purpose of deterring government agents from acquiring incriminating evidence through violation of constitutional rights.” *State v. Peoples*, 2022 MT 4, ¶ 28, 407 Mont. 84, 502 P.3d 129. Whether evidence should be excluded from a criminal or revocation proceeding “is an issue separate from’ the question of whether a constitutional search or seizure violation occurred.” *Peoples*, ¶ 28.

Christopher’s purpose in this appeal is to protect himself against the unconstitutional searches that condition 29 will inevitably unleash. (Appellant’s Br. at 10–27.) No post-search legal action will retroactively cure the violation of his rights that an unreasonably invasive search would cause. The proper time for Christopher to challenge this condition is now, before his probation officer relies on it to conduct an unlawful search.

B. The sweeping search condition is not reasonably related to Christopher’s probation supervision.

The State claims condition 29 is reasonable because it is specially tailored to Christopher’s offense and criminal history. In arguing this condition is not overbroad, the State claims it expressly limits a probation officer’s search authority to when the officer reasonably suspects Christopher has attempted to contact M.E. “*using electronic communication.*” (Appellee’s Br. at 14 (emphasis in original).)

First, this condition paints with too broad a brush by authorizing a search if Christopher merely *attempts* to violate his no-contact probation condition, not if he *actually* violates that condition.

(Appellant’s Br. at 20–21.) The State does not address this issue at all in its response brief. (See Appellee’s Br. at 10–25.)

Second, condition 29 says nothing about limiting searches to when Christopher has been “*using electronic communication*” to attempt to contact M.E., as the State suggests. (Compare Appellee’s Br. at 14, with Doc. 30 at 9.) The plain language of this condition allows Christopher’s probation officer to search his electronic devices or social media accounts merely upon suspicion that he “is attempting to contact the victim.” (Doc. 30 at 9.) The condition on its face applies to *any* form of

attempted contact, not just electronic communication. The overly broad language of this condition renders it unreasonable. *See State v. Johnson*, 2023 MT 143, ¶ 7, 413 Mont. 114, 533 P.3d 335.

Next, the State claims that because this Court in *Hotchkiss* approved of certain conditions for monitoring that defendant's usage of electronic devices and the internet, that logic should apply equally to Christopher. (Appellee's Br. at 13.) But the defendant in *Hotchkiss* committed sexual assault against a child. *State v. Hotchkiss*, 2020 MT 269, ¶ 3, 402 Mont. 1, 474 P.3d 1273. This Court approved of the internet- and device-monitoring conditions because of "the nature of his offense and the other conditions imposed," which included prohibitions on Hotchkiss viewing online pornography or depictions of child exploitation. *Hotchkiss*, ¶¶ 19, 20. This is not a child sexual abuse case, and the corresponding concerns about a probationer using electronic devices for such illicit purposes as viewing child pornography are not comparable here.

Finally, the State claims condition 29 is a reasonable and necessary "enforcement provision" for condition 23, which orders Christopher to not "have any contact" with M.E. (Appellee's Br. at 12;

Doc. 30 at 8.) Condition 23 does not need a separate “enforcement provision.” It already has an enforcement mechanism: revocation. If the State proves by a mere preponderance of the evidence that Christopher contacted M.E. in violation of condition 23, a court may revoke his suspended sentence and send him to prison. Mont. Code Ann. § 46-18-203(6)–(7). And if the State has a compelling reason to believe Christopher has unlawfully contacted M.E. and needs more evidence to prove its case to the preponderance standard, it could obtain this evidence from M.E. voluntarily or get a warrant to search Christopher’s phone. The so-called “enforcement” provision of condition 29 is redundant and unnecessary.

II. Forcing Christopher to tell all future romantic partners that he is a convicted felon—when such information is already publicly available—is unreasonable and unconstitutional.

A. The Intimate Partner Disclosure requirement violates Christopher’s constitutional privacy right.

In the State’s view, forcing someone to disclose to the government the names, addresses, and phone numbers of every person with whom he or she becomes romantically involved is not particularly invasive of privacy. (Appellee’s Br. at 24.) To the contrary, as the District Court

agreed, compelling even a probationer to divulge the identities of all future romantic or sexual partners to law enforcement has deeply troubling privacy implications. (*See* Appellant’s Br. at 32–38; 11/29/2022 Sentencing Hearing Transcript (11/29 Tr.) at 17.)

The State also asserts that the line of U.S. Supreme Court cases establishing a right to privacy in one’s intimate associations does not apply “to protecting intimate relationships in which one partner is abusing the other.” (Appellee’s Br. at 24.) That goes without saying, but that is not the issue here.

Christopher has already acknowledged that his PFMA conviction against M.E. forfeits his constitutional right to privacy in a romantic relationship *with her*. (Appellant’s Br. at 34–35.) But the Intimate Partner Disclosure provision of condition 31 does not apply to M.E. It instead applies to all of Christopher’s future romantic or sexual partners, even if Christopher never abuses anyone other than M.E. This condition is not about “intimate relationships in which one partner is abusing the other”; it is about *all* of Christopher’s intimate relationships.

The State claims that even if the Intimate Partner Disclosure requirement violates Christopher’s right to privacy, it serves a compelling government purpose of “ensuring that future partners [of Christopher] are aware of” his past conduct. (Appellee’s Br. at 25.) As Christopher has noted, and as the State acknowledged in its brief, his felony PFMA record and status as a “violent” offender are already publicly available—and easily searchable—on the violent offender registry website. (Appellant’s Br. at 39; Appellee’s Br. at 21–22.) And, as the State correctly observes, this very appellate briefing—which is available to the public online—describes Christopher’s criminal record. (Appellee’s Br. at 22, n. 11.)

A simple query of Christopher’s name in an online search engine or the violent offender registry would swiftly inform the searcher of his criminal record. It is hard to imagine in this day and age that a person initiating a romantic relationship with Christopher would not at least conduct a basic Google search of his name. To the extent the State wants Christopher’s future partners to know about his criminal record, the existing, easily accessible public information about him satisfies

that concern. The Intimate Partner Disclosure requirement does nothing unique to advance the State's asserted government interest.

The State also offers no substantive rebuttal to the Intimate Partner Disclosure's assault on the constitutional privacy rights of Christopher's future partners. Under this condition, innocent, law-abiding citizens who happen to romantically associate with Christopher will have their sexual associations, names, and contact information reported to the government, with or without their consent. (Appellant's Br. at 36–38.) The State dodges this concern by simply asserting Christopher does not have standing to defend these people's constitutional rights. (Appellee's Br. at 25, n. 12.)

Christopher has not asserted a third-party, standalone claim about others' constitutional rights. (See Appellant's Br. at 32 (stating in the argument heading that the Intimate Partner Disclosure requirement violates "his" constitutional right to privacy).) The opening brief specifies that condition 31's infringement on third-party rights simply "highlight[s] its overbreadth." (Appellant's Br. at 36.) The "collateral damage" this condition causes to the rights of Christopher's future partners is evidence that it "is not 'narrowly tailored' to" achieve

its stated goal. (Appellant’s Br. at 37.) The State fails to explain how the Intimate Partner Disclosure requirement can be considered “narrowly tailored” to achieve a compelling government interest when it causes such wanton collateral damage to the privacy rights of ordinary citizens.

B. Forcing Christopher to tell anyone with whom he goes on a date or has sex that he is a convicted felon unconstitutionally compels his speech.

The constitutional right to freedom of speech means “the right to speak freely *and the right to refrain from speaking at all.*” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added). The State claims forcing Christopher to tell every person with whom he becomes romantically or sexually involved that he stands convicted of violent felonies is not a free speech violation. (Appellee’s Br. at 22.)

To support its position, the State cites one U.S. Supreme Court civil case about *commercial* speech. (Appellee’s Br. at 22 (citing *Nat’l Inst. Of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018).) The State relies on *Becerra* to argue the government may compel individuals to speak, so long as the content of the forced speech is “factual, [non]controversial information.” (Appellee’s Br. at 22.)

Becerra does not suggest condition 31's forced speech provision is constitutional. First, Christopher is not a business entity subject to the government's commercial regulatory authority. He is an individual. His constitutional right to free speech is specific to his person. *See* Mont. Const. art. II, § 7 ("Every *person* shall be free to speak . . .") (emphasis added). *Becerra's* analysis of compelled commercial speech has no bearing on questions of forced personal speech.

Second, the State relies on *Becerra's* reference to the "factual, noncontroversial information" standard for forced commercial speech. But the Court in *Becerra* declined to apply that standard. This was because the compelled speech at issue pertained to abortion, which the Court held was "anything but an 'uncontroversial' topic." *Becerra*, 585 U.S. at 769. Christopher being forced to tell every budding romantic interest that he is a violent offender with a felony record is hardly "uncontroversial." The State's commercial speech test is irrelevant here, and even if it were relevant, condition 31 would not satisfy it.

C. The Intimate Partner Disclosure requirement does not advance the goals of probation supervision.

The State claims it is important for Christopher's supervision that he tell his probation officer the identities of everyone with whom he has

sex and don the scarlet letter of “violent felon” on every first date. In the State’s view, this “ensure[s] his rehabilitation and the partner’s safety.” (Appellee’s Br. at 21.) Rehabilitating Christopher and keeping his future partners safe may be legitimate goals of probation supervision, but this condition does not advance those goals.

To withstand judicial scrutiny, probation conditions must be “reasonably related” to at least one of the three goals of probation: rehabilitation of the offender, protection of the victim, and protection of the society. Mont. Code Ann. §§ 46-18-201(4)(p), 46-18-202(1)(g); *Johnson*, ¶ 9. Condition 31 does none of these things.

The Intimate Partner Disclosure requirement does not rehabilitate Christopher; it stigmatizes him by forcing him to tell any woman with whom he has even a casual, romantic fling that he is a convicted felon. It does nothing to protect the victim in this case, M.E., because M.E. already knows about Christopher’s criminal record. And it does nothing to protect Christopher’s future partners from abuse beyond what the publicly available information about his criminal record already does.

Because this condition does not meaningfully advance Christopher's rehabilitation, protect M.E., or protect Christopher's future partners, it is not reasonably related to the objectives of probation supervision.

CONCLUSION

The electronic device and social media search provision of condition 29 is superfluous, unreasonably broad, and unconstitutional. The Intimate Partner Disclosure provision of condition 31 is not reasonably related to any legitimate goal of probation supervision, it violates Christopher's right to privacy, and it unconstitutionally compels his speech. These two conditions must be stricken from the judgment.

Respectfully submitted this 5th day of September, 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 Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,392, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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CERTIFICATE OF SERVICE

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