IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0023

STATE OF MONTANA,

Plaintiff and Appellee,

v.

PHILIP MICHAEL FRISCIA,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from Montana's Eighth Judicial District Court,
Cascade County, the Honorable Elizabeth A. Best, Presiding

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STATEMENT OF THE ISSUES

1. Did officers have probable cause and exigent circumstances to justify their continued presence in the curtilage of Friscia's home after he told them to leave at 20:14:55?

2. Is § 45-7-102(1)(a)(i), MCA unconstitutional?

STATEMENT OF THE CASE

Shortly after 8:00 p.m. (20:00) on the evening of November 18, 2022,[1] Great Falls Pollice Officer Zaine O'Meara was dispatched to a multi-dwelling unit for what was characterized as a "disturbance." (4/24/23 Tr., 21, 41-43.)[2] The call was placed by a woman named Shanelle Parker, who was the Appellant Philip Friscia's girlfriend. (4/24/23 Tr., 6, 41; see also Ex. 1.)

After determining the disturbance was coming from the upstairs apartment, officers headed up an interior stairwell towards that unit (which Friscia rented). (4/24/23 Tr., 10, 26-28, 45.) Prior to reaching Friscia's upstairs apartment Officer O'Meara saw a person's feet under the door prompting him to say, "open the door I can see your feet, police department." (Ex. 2, 20:14:40-49; & 4/24/23 Tr., 30.)

Friscia—who was behind the closed door leading into his apartment—responded "what's up?." (Ex. 2, 20:14:49-51.) Officer

[1] All dates refer to the year 2022 unless otherwise stated. Timestamps are approximations only as indicated on Officer O'Meara's dashcam video/audio (State's Exhibit 2 (when viewed in Watchguard)) and refer to the time of day in military time e.g. 20:14:55.

[2] The record indicates there were a total of five officers on scene including Officer O'Meara, although only three entered Friscia's stairwell. (4/24/23 Tr., 58.)

O'Meara asked Friscia to step outside and Friscia—*who had not yet opened the door*, responded, "I will not, please get out of my house." (Ex. 2, 20:14:50-55; see also 4/24/23 Tr., 32.) The officers did not leave as requested; Friscia eventually opened the door and said something to the effect of, "I have a right to defend myself from people who are in my house." (Ex. 2, 20:14:55-15:45; & 4/24/23 Tr., 32.)[3]

Friscia was arrested and charged with Count I: felony threat to an officer under § 45-7-102(a)(1)(i), MCA; and Count II: misdemeanor destruction of a communication device under § 45-6-105(1)(a), MCA. (D.C. Doc. 3, at 1-2.) Count II stemmed from a broken cell phone belonging to Ms. Parker that was purportedly discovered inside Friscia's apartment after his arrest. (D.C. Doc. 1, 5-6.)

Friscia moved to suppress and dismiss. (D.C. Doc. 18.) As it pertains to the suppression motion, the district court framed the issue as follows: "Friscia argued that the search was unlawful and lacked probable cause. The State argues that the entry into the apartment

[3] Officer O'Meara testified that Friscia used the word "fucking"—as in he had a "f-ing right to defend" his home. (4/24/23 Tr., 33.) The district court likewise concluded that Friscia said, "I have the right to fucking defend myself…" (D.C. Doc. 29, 3.) It is unclear from the audio whether Friscia actually used the F-word, but either way the communication is materially the same. (See Ex. 2, 20:15:40-45.)

was legal based on exigent circumstances." (D.C. Doc. 29, 4.) As it pertains to the motion to dismiss, Friscia argued 45-7-102(1)(a)(i) was facially overbroad in violation of the First Amendment. (D.C. Doc. 29, 7; see also D.C. Doc. 18, 6-12.) Friscia did not raise an as-applied challenge to 45-7-102(1)(a)(i). (D.C. Doc. 18, 8.)

An evidentiary hearing was held on April 24, 2023; during the hearing Friscia and Officer O'Meara testified and the State admitted the following seven exhibits: a copy of the 911 call (State's Exhibit 1); Officer O'Meara's dashcam video/audio (State's Exhibit 2); and numerous photographs of the entrance(s) to Friscia's apartment (State's Exhibit 3-7). (See 4/24/23 Tr., 3-8, 12-14, 38; see also Exs. 1-7.)

The day after the hearing the district court issued a written order denying Friscia's motion to suppress and dismiss. (See D.C. Doc. 29.) More specifically, the district court ruled that the officers' presence in Friscia's stairwell was justified under the exigent circumstances doctrine. (Id., 5-6.) The district court also rejected Friscia's argument that 45-7-102(1)(a)(i) was unconstitutional, ruling that "as applied to Friscia's alleged conduct in this case, where the words could be interpreted as a threat to harm Officer O'Meara or other officers, the

Court concludes that the proscribed conduct is reasonably clear in its application to Friscia." (Id., 9.)[4]

Pursuant to an agreement with the State, Friscia entered an Alford plea to Count I (felony threat to an officer under 45-7-102(a)(1)(i)) by stipulating to the facts in the State's affidavit. (9/29/23 Tr., 6, 8; see also D.C. Docs. 1 & 51.)[5] During the plea colloquy Friscia agreed with his attorney that:

> [W]hile there was some disagreements about the nature of the[] statements to the officers… you agree that you could be found guilty [at trial] of threats to a law enforcement officer based on the statutory requirements… (9/29/23 Tr., 11-12.)

And when Friscia was asked during his PSI interview what he thought the court should do, Friscia responded, "DROP THE CHARGES BECAUSE I REALLY DON'T FEEL LIKE I MADE ANY THREATS[.]" (D.C. Doc. 54, 4 (capitalization in

[4] The district court correctly framed Friscia's motion to dismiss as a facial challenge, yet its ruling was based on as-applied analysis. (See D.C. Doc. 29, 7-9.) The district court also appears to have primarily analyzed 45-7-102(1)(a)(i) under the vagueness doctrine rather than the overbreadth doctrine. (Id.)

[5] Count II (misdemeanor destruction of a communication device under 45-6-105(1)(a)) was dismissed pursuant to the parties' agreement. (9/29/23 Tr., 6, 8.) Prior to changing his plea Friscia reserved his right to appeal the denial of his motion to suppress and dismiss. (Id., 8, 12.)

original).)

Friscia was sentenced on November 13, 2023; he filed a timely notice of appeal with the Montana Supreme Court on January 9, 2024. (D.C. Docs. 57 & 59.)

STATEMENT OF THE FACTS

1. Layout of Friscia's Apartment.

1626 6th Ave N is a multi-family dwelling containing several ground level apartments and a single second-story unit (rented by Friscia). (4/24/23 Tr., 10, 22, 28.)[6] Because Friscia's apartment was the only second-story unit, it had two doors, one on the ground level i.e. the exterior of the building and a second (interior) door located at the top of a short flight of L-shaped stairs. (See Exs. 3-7; see also 4/24/23 Tr., 11-13.) Thus, to access Friscia's apartment a person had to open the ground level (outside) door, proceed up the L-shaped stairwell, then enter the interior door into the apartment at the top of the stairs. (Id.)

2. Ms. Parker's 911 call.

Shortly after 20:00 on November 18, 2022, Great Falls dispatch received a call from Ms. Parker who told the dispatcher "my partner locked me out of the house and he has our baby." (4/24/23 Tr., 6, 41; & Ex. 1, 0:00-0:10.) The dispatcher asked Ms. Parker for her location and she advised "1626 6th Ave North." (Ex. 1, 0:10-0:20.) The remaining 40-

[6] During the evidentiary hearing Friscia advised that his address was 522 17th St. North. (4/24/23 Tr., 10.) It appears the two addresses are in effect the same location.

seconds of the call are difficult to understand, but it appears Ms. Parker yelled "don't" before calling Friscia an "asshole"—who in turn accuses Ms. Parker of attempting to break down his door. (Id., 0:20-0:39.) Moments later Ms. Parker hangs-up the phone. (Id., 0:50-0:59; & 4/24/23 Tr., 6, 21.) In explaining what he was told about the call, Officer O'Meara testified that, "[dispatch] advised that they heard a lot of yelling and screaming, that the female provided an address, and then... hung up." (4/24/23 Tr., 21.)

3. Officers arrive on scene.

Several minutes after Ms. Parker's 911 call Officer O'Meara arrived on scene (at approximately 20:06:25). (4/24/23 Tr., 41; see also Ex. 2.) The first person Officer O'Meara contacted was a neighbor who purportedly came to the door with a gun. (Ex. 2, 20:08:00-05.) The audio is not great but it appears the neighbor told Officer O'Meara something to the effect of, "you're wasting a lot of time in my mind." (Id., 20:07:00-10.) A few minutes later Officer O'Meara told a fellow officer he didn't get "too deep into with him [i.e. the neighbor]" and that "he started to say he was having neighbors that were causing issues or something and then stopped talking…" (Id., 20:11:35-45.)

After being on scene for approximately 6.5 minutes Officer O'Meara, who was having difficulty locating where the disturbance had occurred, asked dispatch to call Ms. Parker back and apparently she did not answer. (See Ex. 2, 20:12:45-55; see also 4/24/23 Tr., 25.) Seconds later Officer O'Meara opined that the call might have been hoax, quipping "it looks kind of fake to me now." (Ex. 2, 20:13:00-05.)

After being on scene for approximately 7-minutes Officer O'Meara observed an individual exit one of the ground level apartments and yelled, "hey, can we talk to you, bud?" (Ex. 2, 20:13:15-25; & 4/24/23 Tr., 23.) It turns out the individual was Friscia's brother ("Marc"), who happened to live in one of the ground level apartments. (Ex. 2, 20:14:15-25; see also 4/24/23 Tr., 23.)

While conversing with Marc Officer O'Meara "heard a male and a female screaming back and forth to each other loudly" in the upstairs unit. (4/24/23 Tr., 23-24.) Officer O'Meara testified that he couldn't hear what the male and female were saying, but it was clear to him "there was some form of a physical or verbal disturbance happening upstairs." (4/24/23 Tr., 23-24.) Officer O'Meara later testified that he was worried about the safety of the female. (Id., 24-25.)

4. Officer O'Meara makes verbal contact with Friscia.

After hearing the disturbance in the upstairs apartment Officer O'Meara opened the ground level door and proceeded up the L-shaped stairs towards Friscia's interior door. (Id., 26-28, 45.)[7] Officer O'Meara testified that when he entered the ground level door he initially thought the stairwell was a "common area", but later learned the stairwell led to a single upstairs unit i.e. Friscia's apartment. (Id., Tr., 28.) Inside the stairwell were various personal property items belonging to Friscia including a bike, a sled, a spare tire, a water cooler, and a baby stroller. (See Exs. 4-6; & 4/24/23 Tr., 49.)

As Officer O'Meara walked up the stairwell he saw movement under the door, prompting the following conversation between Officer O'Meara (who was standing in the stairwell) and Friscia (who was behind his closed interior door):

Officer O'Meara:	"Open the door I can see your feet, police department."
Friscia:	"What's up?"
Officer O'Meara:	"Hey can you come step out here real quick, Dude?"

[7] Note that Officer O'Meara had been on scene over 8-minutes before entering the stairwell to Friscia's apartment. (*Compare* Ex. 2, at 20:06:25 *with* 20:14:30-40.)

Friscia:	"I will not, please get out of my house."
Officer O'Meara:	"We are not in your house."
Friscia:	"You are in my house, get out of my house."
Officer O'Meara:	"Can you tell me what's going on?"
Friscia:	"No, I do not want to talk to you, get out of my house." (Ex. 2, 20:14:40-15:05; see also 4/24/23 Tr., 32.)

Rather than leave the stairwell as Friscia had requested, Officer O'Meara continued asking Friscia to exit his apartment, while Friscia continued demanding that the officers leave. (See Ex. 2, 20:15:05-30; & 4/24/23 Tr., 32.)

Eventually Friscia opened the door holding a small child; prior to that point in time Officer O'Meara was unaware there was a child in the apartment. (4/24/23 Tr., 31-32.)[8] Friscia, who was clearly frustrated by the officers' refusal to leave despite his repeated requests, eventually said to the officers something to the effect of, "I have a right to defend myself from people who are in my house." (Ex. 2, 20:15:38-42; see also 4/24/23 Tr., 33.) Moments later Officer O'Meara said, "back out" and all

[8] Officer O'Meara was also unaware that Marc's 15-year old son was in the apartment until after Friscia opened the door. (4/24/23 Tr., 31.)

three officers exited Friscia's stairwell and stepped outside. (Ex. 2, 20:15:45-46; & 4/24/23 Tr., 34, 58.) Once outside Officer O'Meara asked Marc whether his brother (Friscia) had any weapons and Marc advised he did not. (Ex. 2, 20:16:20-23.) During the evidentiary hearing Officer O'Meara testified that he perceived Friscia's statement as a threat to impose physical harm. (4/24/23 Tr., 33-34.)

5. Officer O'Meara tases Friscia in the stairwell.

Shortly after stepping outside Officer O'Meara looked over and saw Friscia speaking with his brother Marc near his (Friscia's) exterior door i.e. the ground level door to Friscia's apartment. (4/24/23 Tr., 36.) Officer O'Meara believed Marc was trying to calm Friscia down. (4/24/23 Tr., 60.) Officer O'Meara testified that he decided to take action out of fear for anyone that might be in Friscia's apartment. (4/24/23 Tr., 36-37.) Officer O'Meara began walking toward Friscia and said, "Look, you're outside. Let's have a conversation." (4/24/23 Tr., 37.) Friscia responded by re-entering his stairwell and locking his exterior door. (4/24/23 Tr., 37.) Officer O'Meara shattered the glass with his shoulder and kicked open the exterior door. (4/24/23 Tr., 38.) Friscia began retreating up the L-shaped stairs but was tased by Officer

O'Meara before reaching his apartment. (4/24/23 Tr., 39; & Ex. 2, 20:17:35-17:45.)

After taking Friscia into custody Officer O'Meara made contact with the other individuals in Friscia's apartment i.e. Ms. Parker, the couple's child, and Friscia's 15-year-old nephew (Marc's son). (4/24/23 Tr., 39-40.) Officers also located Ms. Parker's phone inside the apartment, which Friscia had purportedly broken. (See 4/24/23 Tr., 39-40; see also D.C. Doc. 1, 5-6.)

STANDARDS OF REVIEW

A lower court's denial of a motion to suppress is reviewed to determine whether the findings of fact are clearly erroneous and whether the findings were correctly applied as a matter of law. *City of Missoula v. Metz*, 2019 MT 264, ¶12, 397 Mont. 467, 451 P.3d 530. "A [factual] 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.

While factual findings are generally reviewed for clear error, appellate courts will not ignore objective and neutral video evidence even when it contradicts an officer's testimony. *Metz*, ¶30 *citing Wiggins v. Florida Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1172 (Fla. 2017); *see also Scott v. Harris*, 550 U.S. 372, 380–81 (2007) (Advising that when a party's version of events is contradicted by video evidence appellate courts should "view[] the facts in the light depicted by the videotape.")

The existence of probable cause is reviewed de novo. *Ornelas v.*

United States, 517 U.S. 690, 699 (1996). Similarly, whether historical facts constitute "exigent circumstances" is also a legal conclusion reviewed de novo. *State v. Saxton*, 2003 MT 105, ¶19, 315 Mont. 315, 68 P.3d 721. The denial of a motion to dismiss and the constitutionality of a criminal statute receive de novo review as well. *State v. Dugan*, 2013 MT 38, ¶¶13-14, 369 Mont. 39, 303 P.3d 755.

SUMMARY OF THE ARGUMENT

At 20:14:55 Friscia unequivocally told the officers—who were standing in the stairwell (curtilage) of his apartment—to "please leave." The officers remained in Friscia's stairwell despite his explicit request to "please leave." The officers' presence became unlawful at 20:14:55 as the officers lacked probable cause that Friscia was physically assaulting Ms. Parker and that she was in imminent physical danger at that time. Ergo, the district court erred in concluding the officers' presence was justified under the exigent circumstances doctrine.

The district court also erred in denying Friscia's motion to dismiss because § 45-7-102(1)(a)(i), MCA is unconstitutionally overbroad in violation of the First Amendment. The statute is overbroad because of the extraordinarily expansive definitions of "harm" and "property" under § 45-2-101(27) & (61), MCA, resulting in the criminalization of pure speech far beyond the narrow boundaries of unprotected "true threats." Section 45-7-102(1)(a)(i) is also unconstitutional under the holding in *Counterman v. Colorado*, 600 U.S. 66 (2023) because the statute lacks an element requiring the State to prove the defendant (e.g. Friscia) *subjectively* understand his speech as threatening.

ARGUMENT

I. The district court should have granted Friscia's motion to suppress because the officers' presence in the curtilage of his home became unlawful at 20:14:55.

The Fourth Amendment protects persons against unreasonable searches and seizures and is enforced against the States through the Fourteenth Amendment's Due Process Clause. *United States v. Jones*, 565 U.S. 400, 404 (2012); & *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 greater protection than the Fourth Amendment. Mont. Const. art. II, §§ 10 & 11; & *State v. Nixon*, 2013 MT 81, ¶27, 369 Mont. 359, 298 P.3d 408.[9]

Warrantless searches and seizures are per se unreasonable unless conducted in strict accordance with certain narrow exceptions to the warrant requirement. *State v. Zeimer*, 2022 MT 96, ¶26, 408 Mont. 433, 510 P.3d 100. The State bears the burden of proving warrantless searches were conducted in accordance with a recognized exception.

[9] Friscia contends the officers violated his rights under both the United States and Montana constitutions. In the interest of brevity, however, Friscia will refer to the officers' unlawful conduct as "Fourth Amendment violation(s)" rather than violation(s) of both the Fourth Amendment and Article II, Sections 10 & 11 of the Montana Constitution.

State v. Loberg, 2024 MT 188, ¶8, 418 Mont. 38, 554 P.3d 698. Evidence emanating from unlawful searches is suppressed. *State v. McElroy*, 2024 MT 133, ¶15, 417 Mont. 68, 551 P.3d 282*; see also Wong Sun v. U.S.*, 371 U.S. 471, 484-85 (1963).

A. Friscia's stairwell is constitutionally protected curtilage.

"[P]hysical entry of the home is the chief evil against which [the Fourth Amendment] is directed." *Payton v. New York*, 445 U. S. 573, 585 (1980) (internal quotation marks omitted). Indeed the "very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"; *Id*., 589-590 (internal citations and quotations omitted); *see also Cassady v. Yellowstone County Mont. Sheriff Dep't*, 2006 MT 217, ¶27, 333 Mont. 371, 143 P.3d 148 ("[W]e deem the potential privacy violation greater where police enter a residence without a warrant because law enforcement's entry into the home is not inevitable as it is in situations where police hold a warrant.")

A home's curtilage receives equal Fourth Amendment protection; curtilage is defined as "the area immediately surrounding a dwelling… [e.g. the] front porch, the area outside the front window, and [the]

garage…" *State v. Smith*, 2021 MT 324, ¶15, 407 Mont. 18, 501 P.3d 398 *citing Florida v. Jardines*, 569 U.S. 1, 6-7 (2013).

Here, it cannot be disputed that Friscia's stairwell—which incidentally was filled with personal property items e.g. a bike, a sled, a spare tire, a water cooler, and a baby stroller—constituted "curtilage" warranting Fourth Amendment protection. (See Exs. 4-6; & 4/24/23 Tr., 49.)

B. Friscia concedes the officers' initial entry into his stairwell was lawful under the "knock and talk" exception; however, the scope of the officers' implied license to remain in the curtilage of Friscia's home ended at 20:14:55 when he explicitly told the officers to leave.

The United States Supreme has made clear that a "knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds… Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do." *Jardines*, 569 U.S. at 8 (internal citations and quotations omitted). Friscia concedes the officers' initial entrance (i.e. when the officers opened the exterior door and proceeded up the L-shaped stairwell to Friscia's apartment) was lawful under the so-called

knock and talk exception.

However, at 20:14:55 Friscia, *who was behind his closed interior door*, unequivocally told the officers (who were standing in his stairwell i.e. the curtilage) to "please get out of my house." (See Ex. 2, 20:14:53-55; 4/24/23 Tr., 32.) Because the officers did not have a warrant, the moment Friscia told them to leave they were legally required to do so unless a separate exception to the Fourth Amendment's warrant requirement justified their presence. *See Smith*, ¶21 ("Society would recognize Smith's actual expectation of privacy as reasonable when he refused to answer a law enforcement officer's questions outside his own home absent a warrant[]"); *Jardines*, 569 U.S., at 6 (2013) ("The presumption against warrantless searches and seizures would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity[]"); *Georgia v. Randolph*, 547 U.S. 103, 122 (2006) ("[A] physically present inhabitant's express refusal of consent to a police search is dispositive as to him…"; and *Kentucky v. King*, 563 U.S. 452, 469-470 (2011):

> When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to

> speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. He may decline to listen to the questions at all and may go on his way… And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time. (Internal citations and quotations omitted.)

In other words, because the officers' implied license to stand in the curtilage of Friscia's home ended at 20:14:55—when Friscia told the officers to "please leave"—their continued presence after 20:14:55 was unlawful unless the State proved the existence of a separate exception to the warrant requirement e.g. exigent circumstances. *See Smith*, ¶21; *Jardines*, 569 U.S. at 6; *Randolph*, 547 U.S. at 122; and *King*, 563 U.S. at 469-470.

C. The State failed to meet its *heavy burden* of proving that the exigent circumstances exception justified the officers' presence in the curtilage of Friscia's home after 20:14:55.

Under the exigent circumstances exception a warrantless entry is lawful if there are both exigent circumstances and probable cause for the violation of a criminal statute. *Saxton*, ¶26; *see also Brigham City v. Stuart*, 547 U.S. 398, 402 (2006) (The exigent circumstances exception applies when "police have probable cause and where a

reasonable person would believe that the entry was necessary to prevent physical harm to the officers or other persons.") (Internal citations, quotations, and modifications omitted.)

Probable cause is defined as "a reasonable ground to suspect that a person has committed or is committing a crime." *City of Helena v. O'Connell*, 2019 MT 69, ¶16, 395 Mont. 179, 438 P.3d 318 (internal citations and quotations omitted). Probable cause exists when:

> [T]he facts and circumstances within an officer's personal knowledge, or related to the officer by a reliable source, are sufficient to warrant a reasonable person to believe that another person is committing or has committed an offense. The probable cause determination must be based on an assessment of all relevant circumstances, evaluated in light of the knowledge of a trained law enforcement officer. Mere suspicion is not enough to establish probable cause. *Id.*

An exigent circumstance is defined as *inter alia* a situation "that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers or other persons…" *Smith*, ¶24. "The State bears the heavy burden of showing the existence of exigent circumstances and can meet that burden only by demonstrating specific and articulable facts." *State v. Vegas*, 2020 MT 121, ¶12, 400 Mont. 75, 463 P.3d 455.

To determine whether probable cause and exigent circumstances were present courts employ a totality of circumstances tests. *Vegas*, ¶11. The existence of probable cause and exigent circumstances is based on an objective standard and limited to the facts known to the officer(s) at the time of the Fourth Amendment search. *See Brigham City*, 547 U.S. at 402; *see also Devenpeck v. Alford*, 543 U.S. 146, 152 (2004); and *United States v. Banks*, 540 U.S. 31, 39 (2003).

Two illustrative cases on the exigent circumstances doctrine are *Brigham City* and *Saxton*. In *Brigham City* officers were dispatched to a home at 3 a.m. after receiving noise complaints. *Brigham City*, 547 U.S. at 406. As the officers approached they heard "thumping and crashing" and people inside the home screaming "stop, stop" and "get off me." *Id.* Looking through a window officers saw a juvenile punch an adult in the face "sending the adult to the sink spitting blood." *Id.* Under those facts the Supreme Court held that the officers' warrantless entry was justified under the exigent circumstances doctrine. *Id.*

In *Saxton*, dispatch received a 911 from a woman (Ms. Saxton) advising that her adult son ("Tommy") "was 'drunk and violent… [and] hurting people and throwing things' in her trailer." *Saxton*, ¶7. Ms.

Saxton also told dispatch that the responding officers should enter her home "for the possible discovery and protection of unconscious or helpless victims." *Id.*, ¶24. Ms. Saxton was so afraid of Tommy that after the 911 call she went and hid in the bathroom of a nearby bar until the authorities arrived. *Id.*, ¶9.

Upon arrival officers knocked on the door of Ms. Saxton's trailer causing a portion of a recently broken window to fall to the ground. *Id.*, ¶10. Nobody answered so officers entered to look for potential victims (as Ms. Saxton herself had requested) and while inside discovered marijuana plants resulting in criminal charges against Ms. Saxton. *Id.*, ¶¶10, 15, 24. Under those facts the Montana Supreme Court concluded the officers had probable cause and exigent circumstances as required to justify their warrantless entry. *Id.*, ¶27.

As addressed below, the facts known to the officers in this case—at 20:14:55—were nothing like those in *Brigham City* and *Saxton*.

1. Historical facts the district court found in support of its legal conclusion that the officers' presence was justified under the exigent circumstances doctrine.

The district court concluded that "exigent circumstances justified entry into Friscia's apartment…. [because the officers] reasonably

believed that a citizen might be in imminent danger…. [and that] a woman was being actively assaulted." (D.C. Doc. 29, 5-6.) To support this legal conclusion the district court found the following eight historical facts (or cluster of facts):

- Fact #1: Great Falls dispatch received a call from a frantic female who hung up the phone. (D.C. Doc. 29, 5.)

- Fact # 2: During the call the female asserted that her partner had her baby and that she was locked out of the house. (Id., 2.)

- Fact # 3: Dispatch tried to call the woman back but she did not answer. (Id., 5.)

- Fact #4: "[T]he situation was so escalated that a neighbor armed himself [with a gun] before police arrived." (Id., 6.)

- Fact #5: "Officer O'Meara was concerned that a male was assaulting the [female] 911 caller." (Id., 2.)

- Fact #6: During his conversation with Friscia's brother (Marc), Officer O'Meara "heard a male and female in an active disturbance in an upstairs unit." (Id., 2.)

- Fact #7: Officers entered the stairwell of Friscia's apartment but before reaching the interior door, Officer O'Meara saw a person's feet directly below the gap in the closed door. Officer O'Meara announced several times that he was law enforcement and Friscia, who had not yet opened the door, loudly, repeatedly, and angerly told Officer O'Meara to "please leave." (Id.)

- Fact #8: Officer O'Meara did not leave but instead continued to request that Friscia exit his apartment. Friscia

> eventually opened the door and was "clearly angry." Officer O'Meara continued to request that Friscia speak with him and Friscia eventually said something to the effect of, "I have the right to fucking defend myself from people that are in my house." Officer O'Meara became concerned and exited the stairwell. Officer O'Meara later testified that he believed at that point he might be facing a hostage situation. (Id., 3.)

The facts above can be divided into four buckets: The first bucket consists of facts Officer O'Meara discovered *after* his presence became unlawful at 20:14:55, rendering them immaterial. The second bucket consists of facts which are legally irrelevant to the probable cause and exigent circumstances analysis. The third bucket consists of a fact the district erroneously found as it is not supported by substantial evidence. The fourth bucket consists of relevant facts that could be used to establish the existence of probable cause and exigent circumstances.

(a) First Bucket: Facts 2 & 8 are immaterial as they came to light *after* the officers' presence became unlawful at 20:14:55.

Fact 2 concerns certain specific details of the 911 call e.g. that the female caller (Ms. Parker) asserted that her partner had her baby and locked her out of the house. (D.C. Doc. 29, 2.) But Fact 2 was unknown to Officer O'Meara at 20:14:55, remembering Officer O'Meara testified he had no idea there was a child in the apartment until *after* Friscia

opened the door, which of course was *after* Friscia had told the officers to leave at 20:14:55. (4/24/23 Tr., 31-32; & Ex. 2, at 20:14:53-55.)

Similarly, Fact 8 also concerns information Officer O'Meara learned *after* Friscia opened the door (e.g. that Friscia was "clearly angry" and purportedly threatened the officers), which as noted only came to light *after* Friscia told the officers to leave at 20:14:55. (4/24/23 Tr., 32; see also Ex. 2, 20:14:45-15:45.)

Accordingly, the district court erred in using Facts 2 & 8 to support its legal conclusion that the exigent circumstances exception justified the officers presence because Facts 2 & 8 came to light *after* the officers' presence in Friscia's stairwell became unlawful at 20:14:55. *See Devenpeck*, 543 U.S. at 152 (2004); *see also Banks*, 540 U.S. at 39; and *King*, 563 U.S. at 470 ([E]xigent circumstances cannot justify a warrantless search if the police themselves "create the exigency by engaging… in conduct that violates the Fourth Amendment.")

(b) Second Bucket: Facts 5 & 7 are legally irrelevant in determining whether the officers had probable cause and exigent circumstances.

Fact 5 concerns Officer O'Meara's subjective belief that Friscia was physically assaulting Ms. Parker. (D.C. Doc. 29, 2.) Fact 5 is not

relevant because "the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment…" *Brigham City*, 547 U.S. at 404.

Fact 7 concerns Friscia's refusal to leave his apartment as well as Friscia's repeatedly telling the officers to leave. (D.C. Doc. 29, 2.) Fact 7 is legally irrelevant because Friscia had every right to stay in his home, to not answer questions, and to tell the officers to leave. *See Smith*, ¶22; *see also King*, 563 U.S. at 469-470 ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. He may decline to listen to the questions at all and may go on his way.")

Thus, the district court erred in using Facts 5 & 7 to support its legal conclusion that the officers' presence in Friscia's stairwell was lawful because Facts 5 & 7 have no legal relevance to the exigent circumstances analysis. *See Brigham City*, 547 U.S. at 404; *King*, 563 U.S. at 469-470; and *Smith*, ¶22.

(c) Third Bucket: Fact 4 is not supported by substantial evidence.

Fact 4 concerns the district court's finding that, "the situation was so escalated that a neighbor armed himself [with a gun] before police arrived." (D.C. Doc. 29, 6.) Fact 4 should be disregarded as it is not supported by substantial evidence.

As an initial matter, Officer O'Meara did not mention the neighbor with the gun during his testimony at the evidentiary hearing. (See 4/24/24 Tr.) Accordingly, the only evidence of the encounter is Officer O'Meara's dashcam video/audio during which the neighbor can be heard saying something to the effect of, "you're wasting a lot of time in my mind." (Ex. 2, 20:07:00-10.) And roughly 5-minutes later Officer O'Meara tells another officer that he didn't get "too deep into with him [i.e. the neighbor]" and that "he started to say he was having neighbors that were causing issues or something and then stopped talking…" (Id., 20:11:35-45.)

Thus, in light of the only evidenced presented (i.e. Officer O'Meara's dashcam video/audio), the district court erred in concluding that the neighbor came to the door with a gun *because* "the situation was so escalated…" (D.C. Doc. 29, 6.) There is simply no evidence—let

alone substantial evidence—to support such a finding. *Gill*, ¶10 ("A [factual] finding is clearly erroneous if it is not supported by substantial evidence…") Rather, the only evidence we have is that a neighbor came to the door with a gun; there is no evidence concerning *why* the neighbor came to the door with gun.

(d) Fourth Bucket: Facts 1, 3, & 6 could be used to establish probable cause and exigent circumstances.

The only facts the district court properly considered in determining whether the officers had probable cause and exigent circumstances were Facts 1, 3, & 6.

As a brief refresher, Fact 1 concerns the district court's finding that dispatch received a call from a frantic female who hung-up the phone. (D.C. Doc. 29, 5.) Fact 3 concerns the district court's finding that dispatch tried to call the woman back but she did not answer. (Id.)[10] Fact 6 concerns the district court's finding that while speaking

[10] Note that the district court explicitly found that, "dispatch had attempted to call the female back after the call abruptly ended [but] the call was not answered[.]" (D.C. Doc. 29, 5.) To the degree the district court believed dispatch immediately called Ms. Parker this conclusion is incorrect as dispatch did not attempt to call Ms. Parker back until the officers had been on the scene for approximately 6.5-minutes. (See Ex. 2, 20:12:50-13:05.) In other words, roughly 10-minutes or so had passed from when Ms. Parker initially placed the call to when the dispatcher tried to call her back.

with Marc (Friscia's brother) Officer O'Meara "heard a male and female in an active disturbance in an upstairs unit." (Id., 2.)

As addressed below, Facts 1, 3, & 6 were insufficient to support the district court's legal determination that probable cause and exigent circumstances existed at 20:14:55 when Friscia told the officers to "please leave." (Ex. 2, 20:14:53-55.)

2. Under the totality of circumstances, Facts 1, 3, & 6 were insufficient to meet the State's *heavy burden* of proving that probable cause and exigent circumstances existed at 20:14:55.

Facts 1, 3, & 6 do not support the district court's legal conclusion that officers had probable cause to believe Friscia was *physically assaulting* Ms. Parker and that she was in imminent danger at 20:14:55 as required to invoke the exigent circumstances doctrine.

For example, unlike the police in *Brigham City*, the officers in this case did not hear a person inside the home yelling "get off me"; nor did the officers observe someone getting punched in the face then spitting up blood. *See Brigham City*, 547 U.S. at 406. Similarly, unlike the officers in *Saxton*, the officers in this case were not dispatched to a call

from a mother advising her adult son was "drunk and violent… [and] hurting people…" and that the officers should enter her home for the "protection of unconscious or helpless victims." *Saxton*, ¶¶7 & 24.

Rather, Facts 1, 3, & 6 provided the officers in this matter with only the following scant information: "Dispatch had received a phone call from a female. [Dispatch] advised that they heard a lot of yelling and screaming[] [and] that the female provided an address[], and then… hung up." (4/24/23 Tr., 21.) After being on scene for approximately 6.5-minutes Officer O'Meara asked dispatch to try and call the woman back (i.e. Ms. Parker back) and purportedly she did not answer. (See Ex. 2, 20:12:45-55; see also 4/24/23 Tr., 25.) And while speaking with Friscia's brother Marc, Officer O'Meara "heard a male and a female screaming back and forth to each other loudly… [although] what they were saying specifically was garbled. But it was clear there was some form of a physical or verbal disturbance happening upstairs." (4/24/23 Tr., 24.) The only reasonable conclusion from Facts 1, 3, & 6 was that a male and a female were engaged in a *verbal* argument inside the privacy of Friscia's home.

Moreover, as addressed below, there are a legion of additional

facts in the record that further undermine the district court's conclusion that the officers had probable cause to believe Ms. Parker was being physically assaulted and in imminent physical danger at 20:14:55:

- The neighbor with the gun actually told Officer O'Meara that he was "wasting a lot of time[.]" (Ex. 2, 20:07:00-10.) In other words, when reviewing what the neighbor actually said, his statement supports a finding that Friscia was *not assaulting* Ms. Parker and that she was *not in physical danger*.

- Officer O'Meara did not ask dispatch to call Ms. Parker back until officers had been on scene for approximately 6.5-minutes. (*Compare* Ex. 2, 20:06:25 *with* 20:12:45-55.)

- After being on scene for over 6.5 minutes Officer O'Meara opined that the call "looks kind of fake to me now." (Ex. 2, 20:13:00-05.)

- When Officer O'Meara saw Friscia's brother Marc exiting his ground level apartment he said to him, "hey, can we talk to you, bud?" (Ex. 2, 6:50-6:55; see also 4/24/23 Tr., 23.) The fact that Officer O'Meara referred to Marc as "bud" suggests Officer O'Meara did not believe there was an active physical assault underway.

- It was not until Officer O'Meara began conversing with Friscia's brother Marc that he heard Friscia and Ms. Parker arguing in the upstairs unit. (4/24/23 Tr., 23-24.) Yet by this point in time Officer O'Meara had been on scene for approximately 7-minutes. (See Ex. 2, 20:13:15-14:15.)

- The fact that Officer O'Meara was speaking to Friscia's

brother (Marc) when he heard the disturbance also militates against finding exigency because if Ms. Parker was in fact being physically assaulted and in imminent danger, Marc would have intervened himself or requested that the officers do so. Additionally, the fact that Officer O'Meara could hear *both* Friscia and Ms. Parker arguing in the upstairs unit also militates against concluding that Ms. Parker was being physically assaulted and in imminent danger.

- While standing outside Friscia's apartment Officer O'Meara repeatedly announced he was a police officer; if Ms. Parker was in physical danger she would have yelled out for help—she did not do so. (See Ex. 2, 20:14:35-15:45.)

- At 20:14:55 Friscia unequivocally told the officers to leave—they did not—although they also did not attempt to breach Friscia's door at that time. If officers had probable cause to believe Ms. Parker was being physically assaulted and in imminent physical danger at 20:14:55, the officers certainly would have breached the door at that moment—yet they did not do so.

In sum, when the totality of circumstances are considered, it is clear beyond cavil that the State failed to satisfy its *heavy burden* of proving that at 20:14:55 officers had probable cause and exigent circumstance as required to justify their continued presence in the curtilage of Friscia's home.[11] This in turn means any evidence obtained

[11] It is also worth mentioning that after Friscia was taken into custody officers determined there was no physical altercation only a "verbal disturbance" between Friscia and Ms. Parker concerning the custody of their child. (D.C. Doc. 1, 5-6.)

after 20:14:55 was obtained unlawfully and thus inadmissible. *See 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.") Thus, the district court should have granted Friscia's suppression motion.

II. The district court also erred in denying Friscia's motion to dismiss because 45-7-102(1)(a)(i) is unconstitutional under both the overbreadth doctrine and *Counterman*.

"The First Amendment, applicable to the States through the Fourteenth Amendment, provides that Congress shall make no law . . . abridging the freedom of speech." *Virginia v. Black*, 538 U.S. 343, 358 (2003) (internal citations and quotations omitted); *see also* Mont. Const. Article II Section 7 ("No law shall be passed impairing the freedom of speech or expression.") "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (internal quotations omitted).

Freedom of speech is not absolute, however, as there are several

well-defined and narrow exceptions. *Watts v. United States*, 394 U.S. 705, 708 (1969). One narrow class of unprotected speech are so-called "true threats" defined as "statements where the speaker means to communicate a serious expression of an intent to commit ***an act of unlawful violence*** to a particular individual or group of individuals." *Black*, 538 U.S. at 359 (emphasis added) *citing Watts*, 394 U.S. at 708; *see also Dugan*, ¶48. Whether a given communication constitutes a "true threat" is based on an objective standard. *Counterman*, 600 U.S. at 715 *citing Elonis v. United States*, 575 U.S. 723, 733 (2015) ("The existence of a [true] threat depends not on the mental state of the author, but on what the statement conveys to the person on the other end.")

A. Prior to addressing the merits of Friscia's overbreadth challenge, two preliminary clarifications are warranted.

First, because 45-7-102(1)(a)(i) criminalizes pure speech (verbal threats), and because threat statutes are content-based restrictions, 45-7-102(1)(a)(i) is "presumptively invalid" and the Government bears the burden to rebut the presumption that the statute (e.g. 45-7-102(1)(a)(i)) is unconstitutional. *R. A. V. v. St. Paul*, 505 U.S. 377, 382 (1992);

United States v. Alvarez, 567 U.S. 709, 709 (2012); & *United States v. Stevens*, 559 U.S. 460, 468 (2010).

Second, in denying Friscia's motion to dismiss the district court relied heavily on the holding in *State v. Spotted Bear*, 2016 MT 243, 385 Mont. 68, 380 P.3d 810. (See D.C. Doc. 29, 8-9.) The district court's reliance on *Spotted Bear* was improper because in that case the Montana Supreme Court "decline[d] to consider… [45-7-102's] alleged overbreadth…" *Spotted Bear*, ¶19. Moreover, in *Spotted Bear* this Court reviewed 45-7-102 for plain error based on an ineffective assistance of counsel challenge raised for the first time on appeal. *Spotted Bear*, ¶¶13 & 17.

B. The State failed to meet its burden of proving that 45-7-102(1)(a)(i) is not unconstitutionally overbroad.

"[T]he overbreadth doctrine instructs a court to hold a statute facially unconstitutional even though it has lawful applications, and even at the behest of someone to whom the statute can be lawfully applied." *United States v. Hansen*, 599 U.S. 762, 769 (2023). The Montana Supreme Court has defined the overbreadth doctrine as follows:

> An over-broad statute is one that is designed to burden

> or punish activities which are not constitutionally protected, but the statute includes within its scope activities which are protected by the First Amendment. The crucial question in addressing an overbreadth challenge is whether the statute sweeps within its prohibitions what may not be punished constitutionally. Even if an enactment is clear and precise, it may nevertheless be deemed overbroad if it reaches constitutionally protected conduct. *Dugan*, ¶52 (internal citations and quotations omitted).

The justification for the overbreadth doctrine is rooted in the belief that prior restraints on free speech cause greater harm to society than unprotected speech that goes unpunished. *Hansen*, 599 U.S. at 769-70.

Step #1: Determine the scope of 45-7-102(1)(a)(i).

The first step in an overbreadth challenge is determining the scope of the challenged statute as "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). Of important here, 45-7-102(1)(a)(i), 45-2-101(27), 45-2-101(61), and 45-2-101(64)(a) provide in pertinent part as follows:

> **45-7-102(1)(a)(i):** Makes it a felony offense to purposefully or knowingly "threaten[] ***harm*** to any [public servant]… or the [public servant's] property with the purpose to

influence the [public servant's] decision… or other exercise of discretion…" (Emphasis added.)

45-2-101(27): Defines "harm" as the "***loss, disadvantage, or injury or anything so regarded by the person affected***…" (Emphasis added.)

45-2-101(61): Defines "property" as "a ***tangible or intangible thing of value***" including *inter alia* "money." (Emphasis added.)[12]

45-2-101(64)(a): Defines "public servant[s]" as "officer[s] or employee[s] of government…"

Thus, taken together, 45-7-102(1)(a)(i), 45-2-101(27), 45-2-101(61), and 45-2-101(64)(a) advise that an individual commits a felony offense if s/he:

(1) Purposefully or knowingly;

(2) Threatens a government employee or the government employee's property (meaning any tangible or intangible thing of value including money);

(3) With loss, disadvantage, or injury or anything so regarded by the government employee; and

(4) Does so for the purpose of influencing the

[12] See § 45-2-101(61)(b), MCA.

> government employee's decision or other exercise of discretion.

As the above illustrates, the scope of pure speech criminalized under 45-7-102(1)(a)(i) is staggering in light of the exceedingly broad definitions of "harm" and "property" under 45-2-101(27) & (61).[13]

Step #2: Determine whether 45-7-102(1)(a)(i) criminalizes a substantial amount of protected speech.

Having determined 45-7-102(1)(a)(i)'s scope, the next task is evaluating whether a substantially number of applications under 45-7-102(1)(a)(i) are unconstitutional when compared to the statute's legitimate sweep. *Williams*, 553 U.S. at 297. Starting first with the statute's legitimate applications, there can be no doubt that 45-7-102(1)(a)(i) criminalizes "true threats", which do not receive First Amendment protection. *Black*, 538 U.S. 359.

For example, suppose a Montana citizen tells one of her city councilman—who is about to vote on a proposed property tax increase—that: "If you cast a vote to raise my taxes tonight I will bomb your house and kill your family before the close of tonight's Council Meeting." This

[13] It is further noteworthy that while a decision by a state appellate court can narrow a statute's application; *see Smith v. Goguen*, 415 U.S. 566, 573 (1974), it does not appear that the Montana Supreme Court has proffered a narrowing interpretation of either "harm" or "property" as defined under 45-2-101(27) & (61).

communication would be a "true threat" (i.e. "a serious expression of an intent to commit an act of unlawful violence") legitimately criminalized under 45-7-102(1)(a)(i). *See Black*, 538 U.S. at 359.

Section 45-7-102(1)(a)(i)'s downfall, however, is that it criminalizes *vastly more lawful speech than unlawful speech*. To illustrate, consider the following examples:

- During a public meeting addressing funding for the local school district a wealthy and influential citizen makes the following statement to the Mayor of Helena (Mr. Collins): "If you don't endorse my levy proposal, I intend to fund the entirety of your opponent's campaign in the November 2025 election." This would constitute a felony under 45-7-102(1)(a)(i) because funding his opponent would constitute a "loss, disadvantage, or injury…" to Mayor Collins.

- Immediately after losing a criminal jury trial a defense attorney moves for a new trial and argues to the judge, "if you don't' grant a new trial we will be forced to appeal your ruling." The district judge, who intends to run for Justice Baker's seat in 2026, believes if the defendant's conviction is overturned it will harm her judicial reputation—thus diminishing her chances of winning a seat on the Montana Supreme Court. The defense attorney would thus be guilty of a felony under 45-7-102(1)(a)(i).

- A county sheriff informs his deputies that because the jail is at full capacity only those charged with violent felonies or misdemeanors should be arrested and that all non-violent defendants should receive a summons. The sheriff further warns his deputies that should any of them defy his directive he or she will be terminated immediately. The sheriff's directive is a felony under 45-7-102(1)(a)(i).

- A couple sends Montana's Lieutenant Governor Kristen Juras a cease and desist letter demanding that among things she: stop defaming them, apologize for slandering them, and begin preserving all relevant written communications. Lieutenant Governor Juras subjectively perceives the letter as a threat that if she continues speaking ill of the couple and/or fails to apologize they intend to file a lawsuit against her. The couple's letter is a felony offense under 45-7-102(1)(a)(i).[14]

- Elon Musk posts on X (formally Twitter) than he will personally fund a primary challenger against any Republican Senator who votes against President Trump's Cabinet picks. Assuming *arguendo* that Senators Shea or Daines intended to vote against one of President Trump's Cabinet picks, Mr. Musk's tweet would constitute a felony under 45-7-102(1)(a)(i).[15]

- A student sends members of the Gallatin County School District a cease and desist letter advising that the school's recent policy prohibiting cell-phone use during school hours violates the First Amendment. The student further warns that if the members do not re-instate the former policy allowing cell-phone use during school hours the student intends to pursue "formal proceedings" i.e. file a lawsuit against the members. The student's letter is a

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[14] This example is not a hypothetical. See Daily Montanan, *Glasgow couple sends 'cease and desist' letter to Montana's lieutenant governor*, May 21, 2024, available at: https://dailymontanan.com/2024/05/21/glasgow-couple-sends-cease-and-desist-letter-to-montanas-lieutenant-governor/

[15] This example is not a hypothetical. See Spectrum News 1, *How key Republican senators are responding to Trump allies' primary threats*, Jan. 25, 2025, available at: https://spectrumlocalnews.com/nc/charlotte/news/2025/01/25/how-key-republican-senators-are-responding-to-trump-allies--primary-threats

felony under 45-7-102(1)(a)(i).[16]

- Police officers are called to the scene of a purported domestic disturbance. The officers, who are standing within the protected curtilage of the boyfriend's apartment, order the boyfriend to come outside so they can talk. The boyfriend repeatedly tells the officers to leave, but they refuse. Frustrated by the officers refusal to leave despite his repeated requests, the boyfriend eventually opens the door and says, "I have a right to defend my home and if you don't leave immediately I'm going to sue you under 42 U.S.C.S. § 1983 which holds officers personally liable for money damages for constitutional violations pursuant to the holding in *Monroe v. Pape*, 365 U.S. 167 (1961)." The boyfriend's statement is a felony under 45-7-102(1)(a)(i).[17]

As the examples above make clear, the quantity of pure speech criminalized under 45-7-102(1)(a)(i) is almost limitless given the exceptionally broad definitions of "harm" and "property" under 45-2-101(27) & (61).[18] Accordingly, 45-7-102(1)(a)(i) is unconstitutionally

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[16] This example is not a hypothetical. See Change.org, *Bozeman School District: Cease and Desist letter-Restore student-access to Wi-fi, NOW!*, available at: https://www.change.org/p/bozeman-school-district-cease-and-desist-letter-restore-student-access-to-wi-fi-now

[17] *See also State v. Peoples*, 2022 MT 4, ¶41, 407 Mont. 84, 502 P.3d 129 (J. Baker, Concur.) ("[T]he threat of civil action against an officer for his or her unlawful conduct is a real one in Montana… [and] law enforcement officers take this threat seriously…")

[18] A side-by-side comparison with Montana's intimidation statute (§ 45-5-203(1)(a), MCA) further illustrates why 45-7-102(1)(a)(i) is unconstitutionally overbroad:

overbroad because it criminalizes a substantial quantity of protected speech vis-a-vis its legitimate application to the exceedingly narrow category of "true threats." *Williams*, 553 U.S. at 297; & *Dugan*, ¶52.

C. Section 45-7-102(1)(a)(i) is also unconstitutional under *Counterman*.[19]

Counterman involved a challenge to a Colorado statute criminalizing "repeated[]… communication[s] with another person" in "a manner that would cause a reasonable person to suffer serious

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> Under 45-5-203(1)(a), a person commits the felony offense of intimidation if s/he communicates to another a threat to ***"inflict physical harm*** on the person threatened or any other person." (Emphasis added.)
>
> Conversely, a person commits the felony offense of threatening a public servant under 45-7 102(1)(a)(i) if s/he purposely or knowingly threatens a government employee ***or the government employee's property*** with ***"loss, disadvantage, or injury or anything so regarded*** by the [government employee] affected…"]

As the above illustrates, Montana's intimidation statute (45-5-203(1)(a)) only criminalizes non-protected "true threats" i.e. threats of ***unlawful physical violence against a person***. *See Black*, 538 U.S. at 359. Conversely, 45-7-102(1)(a)(i) criminalizes a vast quantity of speech far outside the narrow boundary of "true threats", including threats to inflict mere financial harm or "anything so regarded" by the government employee.

[19] The district court issued its decision denying Friscia's motion to dismiss on April 15, 2023, approximately 2-months before the Supreme Court issued its decision in *Counterman* (on June 27, 2023). *Counterman* applies, therefore, because a new rule for the conduct of criminal prosecutions is applicable to all cases subject to direct review but not yet final as of the date the decision was entered. *State v. Waters*, 1999 MT 229, ¶21, 296 Mont. 101, 987 P.2d 1142.

emotional distress and does cause that person… to suffer serious emotional distress." *Counterman*, 600 U.S. at 70-71.

Mr. Counterman was charged with violating the Colorado statute after sending hundreds of Facebook messages to a local singer named C.W. *Id.* Some of the messages were innocuous e.g. "Good morning sweetheart", while others were not e.g. "Staying in cyber life is going to kill you." *Id.* C.W. believed Mr. Counterman was "threatening her life" and his communications resulted in her experiencing severe emotional distress. *Id.*

Mr. Counterman moved to dismiss arguing that while his statements may have *objectively* been "true threats", the First Amendment mandates that the State also prove that the defendant (i.e. Mr. Counterman himself) *subjectively* understood his communications as true threats. *Id.*, 71. Both the district court and Colorado Court of Appeals disagreed, holding that under the First Amendment the State need only prove that Mr. Counterman's communications were *objectively* true threats. *Id.*, 71-72.

The case eventually made it to the Supreme Court to answer the following question: "[Does] the First Amendment… require[] proof that

the defendant had some subjective understanding of the threatening nature of his statements[?]" *Id*., 69. In other words, the question is what happens when a defendant (e.g. Mr. Counterman or Mr. Friscia) "understands the content of the words, but may not grasp that others would find them threatening. Must he do so under the First Amendment, for a true-threats prosecution to succeed?" *Id*., 74 n.2. The Supreme Court concluded the answer was yes, holding that in a true threats prosecution the State must prove "that the defendant had some understanding of his statement's threatening character." *Id*., 73.

Similar to the reasoning behind the overbreadth doctrine, the *Counterman* Court noted that a subjective scienter element was necessary out of a concern for the chilling of protected First Amendment speech, a harm deemed more dangerous to society than true threats themselves. *Compare Hansen*, 599 U.S. at 769-70 *with Counterman*, 600 U.S. at 75. The *Counterman* Court further opined that a subjective scienter element is consistent with other First Amendment exceptions such as defamation, which requires a public figure to prove the speaker acted "with knowledge" that his or her statements were false. *Id*., 76 *citing New York Times Co. v. Sullivan*, 376 U. S. 254, 280 (1964).

Circling back to this case, whether a given communication constitutes a crime under 45-7-102(1)(a)(i) hinges on whether the purported victim (e.g. Officer O'Meara) subjectively perceived the speaker's (e.g. Friscia's) communication as threatening. *See* § 45-2-101(27), MCA (Defining "harm" as the "loss, disadvantage, or injury or anything ***so regarded by the person affected***…" (Emphasis added.) In other words, criminal liability under 45-7-102(1)(a)(i) turned on whether Officer O'Meara *subjectively perceived* Friscia's statement, "I have a right to defend myself from people who are in my house" as threating him—*regardless of whether Friscia himself subjectively intended the communication to constitute a threat.*

Counterman's subjective scienter requirement is particularly noteworthy here given that the record is clear Friscia did not subjectively perceive his statement to Officer O'Meara as threatening. For example, during his plea colloquy Friscia agreed with his attorney's assertion that "***while there was some disagreements about the nature of the[] statements to the officers***... [if the case went to trial] you could be found guilty of threats to a law enforcement officer ***based on the statutory requirements***." (9/29/23 Tr., 11 (emphasis added).)

And when asked during his PSI interview what he thought the district court should do, Friscia said the court should drop the charge because, "I REALLY DON'T FEEL LIKE I MADE ANY THREATS…" (D.C. Doc. 54, 4 (capitalization in original).)

In sum, 45-7-102(1)(a)(i) is unconstitutional under *Counterman* because a statute criminalizing true threats must contain an element requiring the government to prove that the *speaker himself* [e.g. Friscia] *subjectively understood* his communication as threatening. *Counterman*, 600 U.S. at 78-79. Because 45-7-102(1)(a)(i) does not contain this type of subjective scienter element, the statute is unconstitutional under *Counterman*.

CONCLUSION

For the reasons addressed above, the district court erred in denying Friscia's motions to suppress and dismiss. Accordingly, Friscia requests that this Court issue an Order reversing the denial of his motion to suppress and dismiss and remand with instructions allowing Friscia to withdraw his conditional guilty plea.

Respectfully submitted this 3rd day of July, 2025.

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 9,543 (including footnotes), but excluding Title Page, Table of Contents, Table of Authorities, Certificate of Compliance, Appendix, and Certificate of Service.

By /s/ Pete Wood
Pete Wood, Attorney for Appellant

APPENDIX

CERTIFICATE OF SERVICE

I, Peter Allan Wood, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-03-2025:

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