

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0023

STATE OF MONTANA,

Plaintiff and Appellee,

v.

PHILLIP MICHAEL FRISCIA,

Defendant and Appellant.

BRIEF OF APPELLEE

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

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
ROY BROWN
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
roy.brown2@mt.gov

PETE WOOD
Attorney at Law
1604 North 30th Street
Boise, ID 83703

ATTORNEY FOR DEFENDANT
AND APPELLANT

JOSHUA A. RACKI
Cascade County Attorney
AMANDA L. LOFINK
Deputy County Attorney
121 4th Street North, Suite 2A
Great Falls, MT 59401

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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STATEMENT OF THE ISSUES

1. Whether the district court correctly denied Appellant’s suppression motion.
2. Whether Appellant has met his burden of proving beyond a reasonable doubt that Mont. Code Ann. § 45-7-102(1)(a)(i)—the offense statute pertaining to threats and other improper influence—is facially overbroad.
3. Whether Appellant has waived his right to challenge his conviction for threats under *Counterman v. Colorado*, 600 U.S. 66 (2023), by failing to raise and preserve the claim prior to his guilty plea, by otherwise pleading guilty and waiving his right to appeal, or by improperly raising an as-applied constitutional challenge for the first time on appeal. If not, whether Appellant shows plain error in his unpreserved claim that his conviction was violative of *Counterman*.

STATEMENT OF THE CASE

The State charged Appellant Philip Michael Friscia with threatening an officer and tampering. (Docs. 1, 3.)

Friscia filed a suppression motion, alleging that police unlawfully entered his apartment without exigent circumstances. (Doc. 18 at 1-5.) He also argued that Mont. Code Ann. § 45-7-102(1)(a)(i) was overbroad and thus facially

unconstitutional. (*Id.* at 6-12.) After briefing and a hearing, the district court denied both challenges. (Doc. 29.)

Frischia entered into a Mont. Code Ann. § 46-12-211(1)(c) plea agreement to plead guilty via *Alford*¹ to the threats charge in exchange for the State's dismissal of the tampering charge. (Doc. 45 at 3-4.) The State agreed to recommend a five-year suspended Department of Corrections (DOC) sentence. (*Id.* at 4.) Friscia reserved the right to appeal the denial of his motion to suppress and dismiss. (Doc. 45 at 5; 9/29/23 Tr. at 12.) The district court accepted the guilty plea and dismissed the tampering count. (Doc. 47; 9/29/23 Tr. at 13-14; Doc. 51.) Friscia received a three-year suspended DOC sentence. (Doc. 57; 11/13/23 Tr. at 13.)

Frischia appeals the denial of his motion to suppress and dismiss. He also raises an additional constitutional challenge to the threats statute, for the first time on appeal, based on the United States Supreme Court's *Counterman* decision.

STATEMENT OF THE FACTS

I. The offense

On November 18, 2022, the following 911 call occurred between dispatch and a woman later identified as Shanelle Parker (Parker):

DISPATCH: Dispatch, can I help you?

¹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

PARKER: My ex-partner locked me out of the house. He has our baby.

DISPATCH: Where are you . . . where are you at?

PARKER: 1626 6th Avenue North.

DISPATCH: Okay, what is your name?

PARKER: . . .

[Parker screaming, 'Don't! Don't! Don't!']

[muffled sound of man's voice]

[Parker screams something inaudible]

[man says 'youre gonna break the fucking door down?']

[Parker says 'I'm not gonna break the door! Don't do this!']

[muffled response, then male says, 'that's what you're gonna do?']

[Parker screams, 'Don't! Don't AGH! Don't!']

[man exclaims]

[sounds like shuffling noises]

[line disconnects]

(State's Ex. 1, admitted at 4/24/23 Tr. at 4; *see* 4/24/23 Tr. at 6, 10.)

Great Falls Police Officer Zaine O'Meara was told by dispatch about a “phone call from a female” and that dispatch had heard “a lot of yelling and screaming, that the female provided an address, and then that the female had hung up.”² (4/24/23 Tr. at 20-21.) The incident was coded as a disturbance, priority

² As the district court described in its order, the fact that could be discerned from the call was that the “call disconnects.” (Doc. 29 at 2; *see also* Doc. 1 at 6 (the State explaining that Parker's broken phone was located, and Parker had alleged Friscia broke her phone when he discovered “she had called the police”).)

two, requiring immediate police response. (*Id.* at 65.) The advisory was to “use caution[.]” (*Id.*)

Officer O’Meara reasoned that this was a serious situation. (4/24/23 Tr. at 65-66.) He was concerned that “there was a female who was potentially being assaulted.” (*Id.* at 24.) Based on his experience, “it isn’t uncommon for someone to call 911 frantically screaming when they’re being assaulted [and] asking for assistance but not being able to relay information because of the assault that’s occurring.” (*Id.*) He also factored in the “time of night” as 8 p.m. (*Id.* at 41.)

Upon his arrival to the multi-unit apartment complex, Officer O’Meara contacted a man in one of the apartments. (Doc. 18 at 1; Doc. 25 at 2; *see* 4/24/23 Tr. at 22.) The man was holding a gun “because of the ongoing disturbance” from another apartment, later identified as Friscia’s apartment. (Doc. 29 at 2; *see* Doc. 18 at 1; Doc. 25 at 2.) The man was deemed not to be involved with the disturbance. (Doc. 18 at 1; Doc. 25 at 2.)³

³ While this encounter was only briefly addressed at the hearing, (4/24/23 Tr. at 22), the parties agreed on the facts. Doc. 18 at 1 (Friscia explaining officers encountered a man at a unit of the apartment complex, and he was holding a gun because he “didn’t know who was approaching his door and because he heard yelling upstairs.”); Doc. 25 at 2 (State explaining a man was holding a handgun “as he had heard the disturbance from the upstairs apartment and was concerned those individuals could be the ones knocking on his door.”) Some audio from the encounter and a contemporaneous summary was captured in the watchguard audio, which the district court reviewed. (Ex. 2 at 1:30-1:40, admitted at 4/24/23 Tr. at 6-7 (Officer O’Meara summarizing: “Well, he came to the door with a gun.”); 4/24/23 Tr. at 52 (district court explaining it “watched [the video].”).)

Officer O’Meara worked to ascertain where the disturbance was occurring, while asking dispatch to try to re-contact the 911 caller. The attempt to reach Parker was unsuccessful. (4/24/23 Tr. at 25, 66; Ex. 2 at 4:00-6:00, 6:08-6:30.)

Officer O’Meara observed a man exit one of the ground level apartments in the complex. (4/24/23 Tr. at 23.) The man saw Officer O’Meara and “turned around to return back to his residence.” (*Id.*) But Officer O’Meara asked to talk, whereupon the man provided his name, “Marc.” (*Id.*) Marc explained that his “brother”—later identified as Friscia—“lived upstairs.” (*Id.* at 25.) Marc confirmed “he had heard a disturbance” but explained he “didn’t know” whether it was coming from police or “if it was somebody in the unit.” (*Id.* at 23.)

During this conversation, both Officer O’Meara and his trainee Officer Whitsitt heard a “disturbance happening between a female and a male in the upper residence.” (4/24/23 Tr. at 23.) Specifically, Officer O’Meara heard “a male and a female screaming back and forth to each other loudly.” (*Id.* at 24.) It was apparent that “there was some form of a physical or verbal disturbance happening upstairs.” (*Id.*) He recalled the 911 dispatch report of a woman “yelling and screaming” in light of the now confirmed instance of a woman screaming in the apartment upstairs. (*Id.*) Officer O’Meara also factored in the fact that he had asked dispatch to call the woman back, which was unsuccessful.

(*Id.* at 25.) He developed a resulting fear that the woman was “being assaulted” and “needed immediate assistance.” (*Id.* at 24.)

The officers ceased talking with Marc and “immediately went to where that disturbance was occurring.” (4/24/23 Tr. at 31-32.) Officer O’Meara was accompanied by Officers Witsitt and Patina. (*See id.* at 34, 58.) Officer O’Meara did not see a doorbell on the exterior door and the door was already unlocked. (*Id.* at 26, 28; State’s Ex. 3, offered and admitted at 4/24/23 Tr. at 12.) He opened the exterior door and perceived what appeared to be an apartment complex common area that would lead to individual apartments. (*Id.* at 26, 28.) He did not stand around knocking on the exterior door because: (1) he assumed it led to an apartment common area; (2) the apartment unit occupants likely could not hear knocks on the exterior door; and (3) he wanted to “make contact with someone as quick as possible because of the exigency that exists[.]” (*Id.* at 45-46.) And, given the exigency, there was no time for a “sidebar conversation[.]” with his accompanying officers either. (*Id.* at 63-64.) While Officer O’Meara generally does not “take precautionary entry” into a residence, he does so in circumstances where a need exists to “try and ensure people’s safety.” (*Id.* at 57.)

Officer O’Meara went up an L-shaped staircase in the hallway and discovered a closed door—revealing that just a single apartment was up the stairs. (4/24/23 Tr. at 26-28; State’s Ex. 6.) He shouted, “Police Department! Police

Department!” (Ex. 2 at 8:10-18; 4/24/23 Tr. at 30-31.) Upon reaching the closed door, Officer O’Meara saw the shadow of someone’s feet moving under the door, indicating that someone was standing just on the other side of the door. (4/24/23 Tr. at 30; *see also* Ex. 2 at 8:20-8:25: (“I can see your feet, Police Department!”).)

Without attempting to open the door, Officer O’Meara made verbal contact with Friscia, who refused to come out and talk with him. (4/24/23 Tr. at 32; Ex 2. at 8:25-8:35.) He felt that the exigency was “increasing” based on Friscia’s lack of cooperation. (4/24/23 Tr. at 62.) He asked, “Is there anybody in the house with you?” Friscia responded, “Yeah, my [inaudible].” (Ex. 2 at 8:40-8:44; 4/24/23 Tr. at 55.) Officer O’Meara remained concerned for the occupants inside. (4/24/23 Tr. at 31.)

Friscia “rapidly opened the door[,]” and Officer O’Meara “observed that he had a small child in his arm” before Friscia slammed the door shut again. (4/24/23 Tr. at 32.) Friscia continued on “several occasions” to “open the door rapidly” and then “shut the door.” (*Id.* at 32-33.) Sometimes when he opened the door, he would be holding the child, but sometimes not. (*Id.* at 33.) Officer O’Meara was “rapidly trying to process this information and determine what his intent is.” (*Id.*) He wondered whether Friscia was “planning to harm the child[.]” and was concerned about the status of the woman inside. (*Id.*) He also considered whether Friscia was planning to access a weapon after he shut the door. (*Id.*)

After Friscia slammed the door “four or five times,” Officer O’Meara recalled that Friscia told him that if he “didn’t leave his house he had the f-ing right to defend it.” (4/24/23 Tr. at 33.) Friscia’s statement from the watchguard audio—as incorporated into the district court’s order—is: “I have the right to fucking defend myself from people that are in my house!” (Ex. 2 at 9:13-9:17; Doc. 29 at 3.)⁴ Officer O’Meara—as the authority investigating the incident—took the comment as “threatening to cause harm to me if I don’t omit from my investigation and just simply leave.” (4/24/23 Tr. at 33.) Immediately after Friscia’s threatening comment, Officer O’Meara advised the officers behind him to “back out” of the hallway in case Friscia were to charge down at them with a weapon. (4/24/23 Tr. at 34, 58; Ex. 2 at 9:18-9:20.) They were in a “fatal funnel” or an unfavorable position to defend themselves. (4/24/23 Tr. at 34.) The officers backed out and exited the building. (*Id.*)

Upon exiting, Officer O’Meara noticed the curtains on the upstairs windows shifting and became concerned about Friscia possibly taking up a firing position. (4/24/23 Tr. at 35; *see* State’s Ex. 2 at 9:28-9:30 (Officer O’Meara advising fellow officers to “get away from the windows.”).) Now he was concerned for the

⁴ While the State disputes Friscia’s argument that the watchguard audio is unclear as to whether Friscia said “fucking,” the evidence also speaks for itself, which aligns with the district court’s finding of fact and the officer’s recollection. (*See* Ex. 2 at 9:13-9:17.)

woman, the baby, and all of the officers. (4/24/23 Tr. at 35.) Officer O’Meara was “beginning to posture for a hostage rescue and considering what next steps” to take. (*Id.* at 36.) He contemporaneously explained, “Yeah, we’re gonna have to . . . this guy’s like threatening stuff.” (Ex. 2 at 9:43-9:48.)

But Friscia appeared downstairs and was speaking with Marc near the exterior door. (4/24/23 Tr. at 36.) Reasoning Friscia had made space between himself and the potential hostages, Officer O’Meara seized the opportunity to contact him. (*Id.* at 36-37.) Officer O’Meara approached Friscia and said, “Okay. Look, you’re outside. Let’s have a conversation.” (*Id.* at 37.) Friscia went back inside, slammed the door, locked it, backed away from the door, and started to head back upstairs to his residence. (*Id.*) Officer O’Meara reasoned that he needed to pursue Friscia to take advantage of him temporarily disengaging with the other people in his residence. (*Id.* at 37-38.) He broke through the exterior door, drew his taser, and fired it at Friscia while Friscia was retreating on the staircase landing. (*Id.* at 39.) Friscia was incapacitated and taken into custody. (*Id.*) The other people in the building were contacted and their well-being was assured. (*Id.* at 39-40.)

II. The suppression challenge

Frischia argued “this was not an exigent” circumstance “initially.” (4/24/23 Tr. at 69-70.) He first claimed that the 911 call was a “normal disturbance call[],” while later conceding it was “a dramatic 911 call.” (*Id.* at 70, 72.) But Friscia argued that “no one ever said they were assaulted[.]” during the 911 call. (Doc. 18 at 5.) Friscia faulted police for not standing at the exterior door knocking or not alternatively sending Friscia’s brother Marc into Friscia’s apartment instead of going in themselves. (4/24/23 Tr. at 72-73.) He claimed a true exigency would have required the police to immediately breach the second door. (*Id.* at 71, 74.)⁵

The State responded that the exigency existed based on the facts and circumstances present. (4/24/23 Tr. at 81.) The State explained Friscia’s suggestion to send in a citizen “into a potentially harmful situation[.]” rather than have police investigate an emergency then occurring was unreasonable. (*Id.* at 82.) The State noted that dispatch attempted to contact Parker again but got no answer and there were several attempts to control the situation and contact Friscia. (*Id.*)

The district court ruled that an exigent circumstance existed and the officers “had a reasonably urgent concern about safety for all person’s involved.” (Doc. 29

⁵ Friscia’s briefing or argument at the hearing below did not challenge whether probable cause existed here. He exclusively confined his argument to disputing exigent circumstances. (*See* Doc. 18 at 4-6; Doc. 26 at 1-3; 4/24/23 Tr. at 68-72.)

at 6.) The court found the exigency already existed by the time Officer O’Meara arrived on scene because he was already concerned “a woman was actively being assaulted.” (*Id.*) The court summarized that the officers knew “about the 911 call,” including the “frantic and desperate sounding behavior of the female caller,” that abruptly ended, was categorized as a disturbance, and required a high priority response. (*Id.* at 5.) The court explained that dispatch attempted to call the woman back and the call was not answered. (*Id.*) Finally, the court reasoned that police already “knew the female was in Friscia’s apartment” and upon contact, Friscia’s behavior was “very angry, hostile, and manic[.]” (*Id.*)

III. The facial constitutional challenge

Friscia also argued at the hearing that the threats statute was “facially unconstitutional.” (4/24/23 Tr. at 75.) He argued that the term “harm” in the statute had insufficient “limiting language.” (4/24/23 Tr. at 76; Doc. 18 at 9.) He claimed without the limitation of the term “unlawful” before “harm,” the law could be applied unconstitutionally and was overbroad. (4/24/23 Tr. at 78; Doc. 18 at 9.) Friscia nonetheless conceded that this Court had “to a certain extent, weighed in on this on the *Spottedbear*⁶ case.” (4/24/23 Tr. at 78.)

⁶ *State v. Spottedbear*, 2016 MT 243, 385 Mont. 68, 380 P.3d 810.

The district court denied the motion, citing *Spottedbear* for the conclusion that the threats statute “serves a plainly legitimate purpose—to deter people from threatening harm to a public servant in order to influence that person’s actions as a public servant.” (Doc. 29 at 8-9 (citing *Spottedbear*, ¶ 17).)

SUMMARY OF THE ARGUMENT

Here, based on the totality of the circumstances, exigent circumstances and probable cause existed to justify an exigent entry—even before the officers breached the exterior door leading to Friscia’s apartment—including: (1) a frantic 911 call in which a woman initially provided her address but was unable to provide any more information in the midst of an apparent altercation with a man and the line disconnecting; (2) the responding officer becoming aware of the above facts and suspecting a domestic assault; (3) the on-scene officers confirming from two separate witnesses—at the same apartment complex address that the distressed 911 caller provided—that an ongoing disturbance was occurring in one of the apartments; (4) an attempt to re-contact the woman subject to the altercation was unsuccessful, supporting the reasonable conclusion that an exigency or emergency situation existed; and (5) two officers heard “a male and a female screaming back and forth to each other loudly” in the apartment that would be determined to be Friscia’s apartment. In fact, as further explained herein, the circumstances in this

case are over and above that in cases where this Court has found exigent circumstances coupled with probable cause.

Frischia fails to meet his burden to show beyond a reasonable doubt that the threats statute is unconstitutionally overbroad. While Friscia presents a claim identical to the claim raised in *Spottedbear*, he does not identify any reason why this Court's resolution of the facial constitutional claim in *Spottedbear* was incorrect. Even if this Court further considered the claim, a threat under the statute only becomes criminal if done with the "purpose to influence" a public servant's behavior or decision. Mont. Code Ann. § 45-7-102(1)(a)(i). And to the extent the unlikely hypotheticals raised by Friscia were to arise, they could be effectively dealt with on a case-by-case basis.

Frischia's constitutional challenge to his conviction based on *Counterman* is waived via: (1) his voluntary guilty plea; (2) his failure to preserve the issue for appeal and his waiver of the right to appeal his conviction; and (3) because Friscia improperly brings an as-applied challenge for the first time on appeal. Even if this Court reached Friscia's claim under plain error (which he does not urge this Court to do), the claim would still fail. Unlike in *Counterman* when Colorado's stalking statute contained no subjective mental state and only contained an objective reasonable person standard, here, the threats statute contains a subjective mental

state of “purposely” and “knowingly,” notably higher than the minimum constitutional standard of “recklessly” approved in *Counterman*.

STANDARD OF REVIEW

“The standard of review for a district court’s denial of a motion to suppress is whether the court’s findings of fact are clearly erroneous and whether those findings were correctly applied as a matter of law.” *State v. Wakeford*, 1998 MT 16, ¶ 18, 287 Mont. 220, 953 P.2d 1065.

This Court exercises plenary review of constitutional issues. *State v. Jensen*, 2020 MT 309, ¶ 9, 402 Mont. 231, 477 P.3d 335.

ARGUMENT

I. The district court correctly applied the law in denying Friscia’s suppression motion because exigent circumstances existed to enter Friscia’s apartment.

A. Exigent circumstances coupled with probable cause existed for law enforcement to enter Friscia’s apartment.

“The Fourth Amendment of the United States Constitution, and Article II, Section 11, of the Montana Constitution, affords all persons the freedom from unreasonable searches and seizures.” *Wakeford*, ¶ 21. “Warrantless searches and seizures conducted inside a home are per se unreasonable, subject to a few carefully drawn exceptions.” *Wakeford*, ¶ 21; *see also Kentucky v. King*, 563 U.S.

452, 459 (2011) (“[T]his presumption may be overcome in some circumstances because the ultimate touchstone of the Fourth Amendment is reasonableness.”) (cleaned up) (citing *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *Michigan v. Fisher*, 558 U.S. 45, 47 (2009) (per curiam)).

“One well-recognized exception applies when ‘the exigencies of the situation’ make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.” *King*, 563 U.S. at 460 (citing *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)). This Court considers whether exigent circumstances coupled with probable cause exist. *State v. Vegas*, 2020 MT 121, ¶ 11, 400 Mont. 75, 463 P.3d 455. Exigent circumstances exist when “the situation at hand would cause a reasonable person to believe that prompt action is necessary to prevent physical harm to an officer or other person, the destruction of relevant evidence, the escape of a suspect, or some other consequence improperly frustrating law enforcement efforts.” *State v. Ruggirello*, 2008 MT 8, ¶ 17, 341 Mont. 88, 176 P.3d 252. Probable cause exists when “the facts and circumstances within the officer’s personal knowledge, or imparted to the officer by a reliable source, are sufficient to warrant a reasonable person to believe that the suspect has committed an offense.” *Vegas*, ¶ 11 (collecting cases).

This Court looks to the “totality of the circumstances” when evaluating “whether exigent circumstances exist.” *Vegas*, ¶ 11 (citations omitted). This Court

examines probable cause “in light of an officer’s knowledge and all relevant circumstances” at the time. *State v. Carter-Brueggeman*, 2025 MT 193, ¶ 40, 423 Mont. 514, 574 P.3d 906 (citations omitted).

In *Wakeford*, police responded to a dispatch report that Wakeford was possibly suicidal and might harm himself. *Wakeford*, ¶ 25. They responded in a hallway outside a motel room and “heard two voices, male and female, arguing.” *Id.* Based on the officers’ experience, they believed that “a potential domestic abuse situation[]” was currently in progress. *Id.* When Wakeford opened the door slightly, the officers “concern over the situation increased[]” because they were unable to see into the room or whether Wakeford was “holding anything in his hands.” *Id.* ¶ 26. Wakeford also “appeared angry and upset.” *Id.* ¶ 6. While the officers had earlier heard a female voice, they did not “see or hear anything from” her when talking with Wakeford. *Id.* ¶ 26. Wakeford assured the officers that everything was fine and he was not suicidal, but the officers nonetheless entered the room to check on the woman. *Id.* ¶¶ 17-18, 27.

This Court held that both exigent circumstances and probable cause existed for police to enter the room. *Wakeford*, ¶¶ 25-27, 31. This Court considered the totality of the circumstances, including: (1) the dispatch report about Wakeford; (2) the voices of the male and female arguing, indicating, “[b]ased on th[e] [officer’s] experience,” a possible “domestic abuse situation”; (3) Wakeford’s behavior and

demeanor; and (4) the officers' inability to confirm the status of the woman in question when "talking to Wakeford at the door." *Wakeford*, ¶¶ 25-27, 31.

While in *Wakeford*, this Court found that a 911 call in conjunction with the officers on-scene observations constituted sufficient probable cause/exigent circumstances for entry, this Court found just a 911 call sufficient in *State v. Saxton*, 2003 MT 105, 315 Mont. 315, 68 P.3d 721. In that case, Saxton called 911 and reported "that her son was 'drunk and violent, and he was hurting people and throwing things' in her trailer." *Saxton*, ¶ 7. Saxton further reported she was at her daughter's house and was not planning on returning home. *Id.* The dispatcher reported to police an "urgent domestic situation." *Id.* ¶ 8. Police responded to the trailer park and met a man who directed them to Saxton's trailer. *Id.* ¶ 10. After knocking at the door and nobody answering, police went into the trailer to see if anyone was inside, immediately recognizing a marijuana grow operation. *Id.* After continuing to search the rest of the house, police left. *Id.*

This Court held that, based on the information provided in the call, "there were exigent circumstances and probable cause that justified" the police's "warrantless entry into Saxton's trailer." *Saxton*, ¶ 27. This Court reasoned that Saxon had reported an assault in her trailer, and that while Saxton also reported she would not be there, she had reported others were injured too. *Id.* This Court concluded that "[i]t was reasonable for [police] to conclude, when knocking on

Saxton’s trailer door and hearing no response, that it was necessary to enter her home to discover and protect Saxton or other potentially incapacitated victims.” *Id.*

Here, based on the totality of the circumstances, exigent circumstances and probable cause existed to justify an exigent entry—even before the officers breached the exterior door leading to Friscia’s apartment—including: (1) a frantic 911 call in which a woman initially provided her address but was unable to provide any more information in the midst of an apparent altercation with a man and the line disconnecting; (2) the responding officer becoming aware of the above facts and suspecting a domestic assault; (3) the on-scene officers confirming from two separate witnesses—at the same apartment complex address that the distressed 911 caller provided—that an ongoing disturbance was occurring in one of the apartments; (4) an attempt to re-contact the woman subject to the altercation was unsuccessful, supporting the reasonable conclusion that an exigency or emergency situation existed; and (5) two officers heard “a male and a female screaming back and forth to each other loudly” in the apartment that would be determined to be Friscia’s apartment. And given the urgent situation created by an audible altercation occurring between a man and woman right above the officers—which supported the details that police already knew—an exigent circumstance existed because it was “[im]practicable to secure a warrant.” *State v. Kenfield*, 2009 MT 242, ¶ 24, 351 Mont. 409, 213 P.3d 461.

Here, there were even more exigent circumstances supported by probable cause than in *Wakeford* and *Saxton*. Unlike in *Wakeford*, where the initial report of a possible suicide attempt morphed into a suspicion of a domestic assault based on the on-scene circumstances, here, the compounding evidence all aligned from: (1) the dispatch report and information relayed to the officer; (2) the witness reports of a disturbance; (3) the screaming heard from outside by the officers indicating an emergency situation of a possible assault against a woman; and (4) the failure of dispatch to re-contact the woman who made the 911 call. And in *Saxton*, law enforcement encountered a cold scene with nobody in the residence, and this Court still found an exigency for entry based only on a prior 911 report about people being hurt. But here, in addition to a frantic 911 call and on-scene witness accounts, it was clear that not only was the apartment occupied but there was an active and ongoing altercation occurring between a man and a woman shortly after police arrived.

Otherwise, *Wakeford* shows that probable cause and an exigency existed here. Like in *Wakeford*, the officers used their training and experience to reason that the sounds of a loud argument between a male and a female could indicate an ongoing assault. *Wakeford*, ¶ 25. Thus, Friscia's suggestion that the police needed to additionally hear a thumping sound indicating a physical beating to respond to the disturbance is inapt under *Wakeford*. (See Appellant's Br. at 31-32.) And

contrary to Friscia's suggestion, police were not required to stand idly by or somehow attempt to peer into Friscia's upper-level windows (which, as Officer O'Meara testified, had curtains on them) for visual confirmation of a contemporaneous physical assault before taking any action.

Friscia next argues that no exigency existed and police did not treat the situation as an exigency because they were at the scene for several minutes before contacting Friscia and they did not immediately breach Friscia's door. (*See* Appellant's Br. at 33-34.) These contentions readily fail. When arriving to a multi-apartment complex, the officers did not immediately know which apartment to respond to. (4/24/23 Tr. at 22-23.) They reasonably and immediately contacted on-scene witnesses to ascertain the apartment in question, even while asking dispatch to re-contact the 911 caller. Both actions supported the conclusion that the officers were treating the situation as exigent. And, as Officer O'Meara testified, they promptly responded to the woman screaming by immediately ceasing conversing with Marc and moving toward the disturbance, which demonstrated their heightened response in a circumstance they treated as exigent. *See Ruggirello*, ¶ 17 (exigency requires "reasonable person to believe that prompt action is necessary" to protect a person). Regarding the approach to the door, Officer O'Meara explained that, based on his training, he does not typically "just barg[e] into" someone's home "during an active disturbance." (4/24/23 Tr. at 29.)

He explained that he tries to “deescalate the situation or diffuse the situation verbally” first “if possible[,]” which is what he did in this case. (*Id.*) The response to the exigency was appropriately matched to the exigent threat—particularly considering that Friscia already knew they were there and he was standing right behind the door.

Friscia next argues that no exigency was present because Parker did not immediately cry out for help when police approached Friscia’s door. (Appellant’s Br. at 34.) But Parker’s failure to cry out upon the police’s arrival did not oblige police to simply walk away and assume Parker was not incapacitated or otherwise in danger. As this Court acknowledged in *Wakeford*—where police earlier heard a woman’s voice upon their approach to the door, but they were unable to ascertain her status when talking with the male defendant—entry was permissible to check on the woman. *Wakeford*, ¶¶ 25-27, 31. Here, like in *Wakeford*, Officer O’Meara’s contact with the defendant near the doorway did not alleviate his concern about the woman he had just heard screaming, nor did he get any confirmation about her well-being. Indeed, after encountering Friscia, Officer O’Meara remained concerned about Parker (4/24/23 Tr. at 33 “Is there a woman that’s harmed inside?”) and developed a new concern about a baby and the officers given the apparent hostage situation. (4/24/23 Tr. at 35.) And like in *Wakeford*, officers were also concerned about Friscia potentially having a weapon. *See Wakeford*, ¶ 26;

4/24/23 Tr. at 32. It would have been a dereliction of duty for the officers to cease investigating in this circumstance.

But even assuming for argument's sake that the numerous corroborative details that were apparent to Officer O'Meara prior to breaching the external door did not constitute an exigency and/or probable cause, these bases developed upon law enforcement's initial contact with Friscia.⁷ Shortly after the encounter began, Friscia himself chose to open and slam shut his door numerous times, voluntarily giving officers a glimpse of him holding a baby at times, while becoming increasingly angry and belligerent towards the officers and even threatening to harm them. Friscia also confirmed that other people were in the apartment with him. He did not simply waive police off with his door closed; instead, he was actively providing police with *more* probable cause and exigent circumstances. As Officer O'Meara testified, the exigency only increased and the situation became more serious based on Friscia's actions and his direct threats towards the officers.

⁷ 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[.]" (Appellant's Br. at 19-20.)

B. Alternatively, the emergency aid exception allowed the police to enter Friscia’s apartment.

In the event that this Court determines that probable cause combined with exigent circumstances did not exist, the emergency aid exception would still have allowed police to enter Friscia’s apartment.

“Under the ‘emergency aid’ exception, for example, ‘officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.’” *King*, 563 U.S. at 460 (citing *Brigham City*, 547 U.S. at 403; *Fisher*, 558 U.S. at 49 (upholding warrantless home entry based on emergency aid exception)). “This ‘emergency aid exception’ does not depend on the officers’ subjective intent or the seriousness of any crime they are investigating when the emergency arises.” *Fisher*, 558 U.S. at 47 (citing *Brigham City*, 547 U.S. at 403). “It requires only ‘an objectively reasonable basis for believing’ that ‘a person within [the house] is in need of immediate aid.’” *Fisher*, 558 U.S. at 47 (citing *Brigham City*, 547 U.S. at 406; *Mincey*, 437 U.S. at 392). “[T]he test, . . . is not what [the officer] believed, but whether there was ‘an objectively reasonable basis for believing’ that medical assistance was needed, or persons were in danger.” *Fisher*, 558 U.S. at 49.

“Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate

aid.” *Mincey*, 437 U.S. at 392 (citing *Wayne v. United States*, 318 F.2d 205, 212 (U.S. App. DC 1963) (opinion of Burger, J.) (“The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.”); *Brigham City*, 547 U.S. at 403-04 (citing *Georgia v. Randolph*, 547 U.S. 103, 118 (2006)) (“[I]t would be silly to suggest that the police would commit a tort by entering . . . to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur.”)).

The United States Court of Appeals for the Ninth Circuit has adopted a two-pronged test for applying the “emergency doctrine.” *United States v. Snipe*, 515 F.3d 947, 950-54 (9th Cir. 2008). This test “asks whether: (1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search’s scope and manner were reasonable to meet the need.” *Snipe*, 515 F.3d at 952. The Ninth Circuit stated that a probable cause requirement would be “superfluous” because the United States Supreme Court “failed to conduct any traditional probable cause inquiry” when applying the emergency aid exception in *Brigham City*. *Id.* Instead, the Ninth Circuit recognized that *Brigham City* “assumed that probable cause to associate the emergency with the place to be searched exists whenever law enforcement officers

have an objectively reasonable basis for concluding that an emergency is unfolding in that place.” *Id.*

Here, there was an objectively reasonable basis from the 911 call alone for the police to believe that Parker was in immediate danger when she was unable to communicate with the 911 operator amidst screaming and the sounds of an apparent struggle with a man. *See, e.g., Snipe*, 515 F.3d at 949 (warrantless entry upheld after police entered a home in response to a 911 call in which a “very hysterical sounding” caller “screamed . . . [g]et the cops here now”). Or the objectively reasonable basis to enter Friscia’s home was concretely developed when police heard a woman screaming at the same address Parker had earlier provided before the 911 call disconnected. Finally, the scope and manner of the officers’ entry was reasonable to meet the need to check on the woman and attempt to obviate the danger. Accordingly, as an alternative basis, the emergency aid exception applies here.⁸

⁸ This Court’s recent emergency aid decision in *State v. Case*, 2024 MT 165, 417 Mont. 354, 553 P.3d 985, is currently under review. The United States Supreme Court granted certiorari in *Case v. Montana*, No. 24-624, on June 2, 2025, and held oral argument on October 15, 2025. A decision is expected in mid-2026.

II. Friscia fails to meet his heavy burden to show beyond a reasonable doubt that the threats statute is facially unconstitutional.

There is a “strong presumption” in favor of a statute’s constitutionality. *State v. Davidson*, 266 Mont. 404, 407, 880 P.2d 1331, 1334 (1994). The party challenging the constitutionality of the statute “bears the burden of proving, beyond a reasonable doubt, that the statute is unconstitutional, and any doubt must be resolved in favor of the statute.” *State v. Michaud*, 2008 MT 88, ¶ 15, 342 Mont. 244, 180 P.3d 636.

Friscia argues that the threats statute is “unconstitutionally overbroad” because it “criminalizes a substantial quantity of protected speech[.]” (Appellant’s Br. at 43-44.) Friscia repeats his argument below that the term “harm” is too broad. (*Id.* at 40.) Friscia lists examples of types of speech that he believes could fall within the ambit of the threats statute, including warnings to appeal adverse rulings, fund opponent’s campaigns, vote against a candidate, and utilize permissible administrative processes. (*Id.* at 41-42.) Finally, Friscia urges this Court to ignore its resolution of a facial overbroad challenge related to the same statute in *Spottedbear*, contending that decision is inapplicable here because it was decided within the context of an IAC challenge. (*Id.* at 37.)

The *Spottedbear* appellant raised a facial overbroad challenge to the same statute, similarly arguing that the Legislature defined “harm” too “expansively[.]”

and that “if a person can conceive of something as disadvantageous, then it is ‘harm’ under the statute.” *State v. Spottedbear*, DA 15-0127, Appellant’s Br. at 13 (filed 12/31/15). As argued here, Spottedbear argued that the term “unlawful” should have been used as a qualifier term before the term “harm.” (*Id.* at 14.) Like Friscia’s hypotheticals on appeal, Spottedbear hypothesized that threats to “mount political opposition” and “dismiss a government attorney’s case” and “file a complaint against a supervisor” could fall within the ambits of the statute. (*Id.* at 14-15.)

This Court identified the issue as: “Whether the improper influence statute is unconstitutionally overbroad.” *Spottedbear*, ¶ 11. This Court acknowledged the facial overbread claim as elucidated in the appellant’s brief and even described in detail Spottedbear’s overbreadth facial challenge including his challenge to the term “harm.” *Id.* ¶ 14. This Court held that “§ 45-7-102(1)(a)(i), MCA, serves a plainly legitimate purpose—to deter people from threatening harm to a public servant in order to influence that person’s actions as a public servant.” *Id.* ¶ 17. This Court explained that “a statute is unconstitutionally overbroad only if its overbreadth is not only ‘real but substantial as well, judged in relation to the statute’s plainly legitimate sweep.’” *Id.* ¶ 15 (citing *State v. Lilburn*, 265 Mont. 258, 264-65, 875 P.2d 1036, 1040 (1994)) (in turn quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). This Court reasoned that when compared to the

“statute’s plainly legitimate sweep,” Spottedbear would have “a high hurdle to clear in showing how the statute adversely affects the rights of others in a real and substantial way.” *Id.* ¶ 18 (*citing Lilburn*, 265 Mont. at 264-65, 875 P.2d at 1040) (internal quotations omitted). This Court observed that although Spottedbear pointed to “hypothetical remote situations in which the statute could be applied unconstitutionally, he would have to have demonstrated a realistic danger or a significant possibility that the law will be unconstitutionally applied.” *Id.* ¶ 18 (*citing Lilburn*, 265 Mont. at 265, 875 P.2d at 1043) (internal quotations omitted).

Here, while Friscia presents a claim identical to the claim raised in *Spottedbear*, he does not identify any reason why this Court’s resolution of the facial constitutional claim in *Spottedbear* was incorrect. The scope of the opinion addressed and resolved the challenge raised. While Friscia argues *Spottedbear* is different because it considered a facial overbroad challenge within an IAC claim, that same argument did not stop the Supreme Court of Idaho from substantially relying on *Spottedbear* in resolving a facial constitutional challenge to its own threats statute. *State v. Sanchez*, 448 P.3d 991, 999 (Idaho 2019). This Court should accordingly decline to revisit *Spottedbear*.

But even if this Court further considered Friscia’s repetitive arguments to that in *Spottedbear*, the Idaho Supreme Court’s *Sanchez* decision rejected a similar

claim.⁹ A person similarly commits threats under Idaho’s statute if the person “threatens harm to any public servant with purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion in a judicial administrative proceeding . . .” and “harm” is similarly defined as “loss, disadvantage or injury, including loss, disadvantage or injury to any other person or entity in whose welfare he is interested.” *Sanchez*, 448 P.3d at 996-97 (citing Idaho Code Ann. §§ 18-1353(1)(b), -1351(4)). As here and as in *Spottedbear*, *Sanchez* argued that because the statute only prohibited “harm” and not “unlawful harm,” the statute swept broadly to encompass any “disadvantage[.]” *Id.* at 997. The Idaho Supreme Court rejected the argument, explaining that “the harm threatened only becomes criminal under section 18-1353(1)(b) if the harm has the ‘purpose to influence’ the public servant’s behavior.” *Id.* at 999. The Court further explained that a “threat that falls within constitutionally protected speech or conduct, such as one that ‘merely embarrasses or inconveniences’ a public servant would be outside the ambit of section 18-1353(1)(b) and dealt with on a case by case basis.” *Id.* at 998-99 (citing *Broadrick*, 413 U.S. at 615-16).

Like in *Spottedbear*, *Frischia* fails to show overbreadth that is not only real but substantial, judged in relation to the statute’s plainly legitimate sweep.

⁹ In addition, other appellate courts have rejected similar facial constitutional challenges. *See People v. Janousek*, 871 P.2d 1189, 1196 (Colo. 1994); *State v. Stephenson*, 950 P.2d 38, 40 (Wash. 1998).

Spottedbear, ¶ 15. Like Idaho’s statute, a threat under Montana’s statute only becomes criminal if done with the “purpose to influence” a public servant’s behavior or decision. Mont. Code Ann. § 45-7-102(1)(a)(i). Finally, to the extent the hypotheticals raised by Friscia were to arise, they could be effectively dealt with on a case-by-case basis. *Broadrick*, 413 U.S. at 615-16. Friscia’s renewed facial constitutional challenge fails.

III. Friscia’s *Counterman* challenge is waived and would fail on plain error review.

A. The challenge is waived several times over.

“[D]efendants waive fundamental state and federal constitutional rights when they are induced to plead guilty by reason of a plea agreement.” *State v. Collins*, 2023 MT 78, ¶ 14, 412 Mont. 77, 528 P.3d 1106 (citing *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring); *State v. Rardon*, 2002 MT 345, ¶ 16, 313 Mont. 321, 61 P.3d 132). “Montana’s long standing jurisprudence holds that ‘where a defendant voluntarily and knowingly pleads guilty to an offense, the plea constitutes a waiver of all non-jurisdictional defects and defenses, including claims of constitutional rights violations which occurred prior to the plea.’” *State v. Watts*, 2016 MT 331, ¶ 9, 386 Mont. 8, 385 P.3d 960 (collecting cases). Thereafter, “[a] defendant may only attack the voluntary and intelligent character of the guilty

plea and may not raise independent claims relating to prior deprivations of constitutional rights.” *Id.* ¶ 9.

In *Watts*, the defendant entered into a plea agreement that contained “no language reserving the right to appeal after his guilty plea” and, in fact, the agreement specified that Watts had waived his right to all appeals, reserving only the right to challenge his counsel’s effectiveness on appeal. *Watts*, ¶ 10. On appeal, Watts asked this Court “to declare a former statute unconstitutional, apply that determination retroactively to his case, and then reduce his conviction to a misdemeanor.” *Id.* ¶ 13. This Court declined, reasoning that Watts pleaded guilty, thus waived the right to “appeal the constitutionality” of the PFMA statute. *Id.* ¶ 14. This Court concluded that because Watts pleaded guilty without reservation, he could “only challenge the voluntariness and intelligent character of his guilty plea.” *Id.*

Counterman was decided on June 27, 2023. Friscia entered into a plea agreement with the State and pleaded guilty in late September 2023. (Docs. 45-47.) While Friscia reserved “the right to appeal the denial of his motion to suppress and dismiss[,]” (Doc. 45 at 5), Friscia never raised any *Counterman* claim in any pretrial motion or at any point in the district court proceedings—despite his opportunity to do so prior to pleading guilty. Instead, Friscia opted to plead guilty to the threats charge in exchange for the dismissal of the tampering count, to further

“waiv[e] any factual dispute” on whether he committed the offense, and to give up his “right to appeal [his] conviction.” (Doc. 45 at 3-5; Doc. 46 at 8-9.)

Like in *Watts*, while Friscia preserved the right to appeal discrete issues, he otherwise waived the right to appeal his conviction and failed to exercise his opportunity to raise and preserve a constitutional challenge here based on *Counterman*. See Mont. Code Ann. § 46-12-204(3) (statute allowing the defendant to reserve the right to appeal any “adverse determination of any specified pretrial motion” upon the approval of the court and the consent of the prosecutor after a guilty plea). This Court has explained that “the language of [Mont. Code Ann. § 46-12-204(3)] . . . clearly indicates that a claim must be specifically *reserved* in order to be appealable, not that a claim is automatically appealable unless it is expressly *waived*.” *State v. Pavey*, 2010 MT 104, ¶ 12, 356 Mont. 248, 231 P.3d 1104. Friscia failed to preserve a *Counterman* challenge upon his guilty plea, thus the claim is waived.

Friscia nonetheless argues (in a footnote) that he should be entitled to “retroactive” application of *Counterman*, apparently somehow based on the date of the district court’s denial of his other pretrial issues. (Appellant’s Br. at 44 n.19.) But given that *Counterman* was published long before Friscia’s guilty plea, this is not a circumstance where an intervening decision was published while a case was pending on direct review. In any event, while the United States Supreme Court

announced “a new rule for the conduct of criminal prosecutions is to be applied retroactively” in cases “pending on direct review or not yet final[,]” in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), it has never abandoned the requirement that an issue be preserved in order for it to be cognizable on appeal, even for cases otherwise subject to the retroactivity rule. *United States v. Booker*, 543 U.S. 220, 268 (2005) ([W]e expect . . . courts to apply ordinary prudential doctrines, . . . for example, whether the issue was raised below.”); *Shea v. Louisiana*, 470 U.S. 51, 58 n.4 (1985) (noting the rule of retroactivity is “subject . . . to established principles of waiver, harmless error, and the like”). And federal circuit courts have accordingly acknowledged that plea agreement waivers remain valid despite the rule of retroactivity.¹⁰

This Court has never abandoned waiver principles either, particularly in guilty pleas, and even in cases that retroactive review would otherwise be applicable. *See State v. Andrews*, 2010 MT 154, ¶ 12, 357 Mont. 52, 236 P.3d 574; *State v. Ferris*, 2010 MT 252, ¶¶ 16-19, 358 Mont. 244, 244 P.3d 732.¹¹ Indeed,

¹⁰ Where “developments in the law later expand a right that a defendant has waived in a plea agreement, the change in law does not suddenly make the plea involuntary or unknowing or otherwise undo its binding nature.” *United States v. Bradley*, 400 F.3d 459, 463 (6th Cir. 2005); *accord United States v. Cortez-Arias*, 425 F.3d 547, 548 (9th Cir. 2005) (“[A] favorable change in the law does not entitle a defendant to renege on a knowing and voluntary guilty plea.”).

¹¹ *See also* dissents in both cases arguing for application of *Griffith*.

a “voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.” *Andrews*, ¶ 12 (citing *Brady v. United States*, 397 U.S. 742, 757 (1970)). And a defendant who waives his state court remedies and enters a plea to the charges against him “does so under the law then existing.” *Id.* (citing *McMann v. Richardson*, 397 U.S. 759, 774 (1970)). This Court has “follow[ed] the rule” that “a post-plea change in the law does not invalidate the plea.” *Andrews*, ¶ 14 (collecting numerous cases). Thus, even if there had otherwise been any merit to Friscia’s claim he was entitled to retroactively, his claim would still be waived.

Friscia’s claim is waived for yet another reason: *Counterman* involved an as-applied constitutional challenge to the Colorado stalking statute. *People v. Counterman*, 497 P.3d 1039, 1042 (Ct. App. Colo. 2021), *vacated*, 600 U.S. 66, 83 (2023). Friscia argues on appeal—despite his valid and voluntary guilty plea—that he subjectively did not believe that he made any threats, and that his conviction is thus infirm based on *Counterman*. (Appellant’s Br. at 47-48.) This Court will not review “an as-applied constitutional challenge raised for the first time on appeal.” *State v. Alford*, 2025 MT 171, ¶ 12, 423 Mont. 269, ___ P.3d ___. Accordingly, Friscia has waived any as-applied challenge based on *Counterman* to challenge his conviction by failing to raise the issue below.

And to the extent Friscia attempts to shoehorn his *Counterman* claim into a facial constitutional challenge, such a claim would fail. Friscia argues that the threats statute “is unconstitutional” but he does not ask this Court to invalidate the statute. (Appellant’s Br. at 48.) Nonetheless, the *Counterman* Court never invalidated Colorado’s stalking statute, nor did it address a facial constitutional claim. *See, e.g., State v. Labbe*, 314 A.3d 162, 178 (Maine 2023) (“*Counterman* did not hold that [] the Colorado stalking statute was facially unconstitutional; it was an as-applied challenge based on the specific facts in, and posture of, that case. To the extent that [Appellant] relies on *Counterman* (or on any other reason) to argue that the Maine stalking statute is facially unconstitutional, the argument does not stand.”).

B. The challenge would fail on the merits.

Friscia does not dispute that his *Counterman* challenge is unpreserved. This Court has consistently held that it will not consider issues raised for the first time on appeal. *See, e.g., State v. Taylor*, 2010 MT 94, ¶ 12, 356 Mont. 167, 231 P.3d 79; *see also* Mont. Code Ann. § 46-20-104(2) (“Failure to make a timely objection during trial constitutes a waiver of the objection” for purposes of appeal). This Court may review an unpreserved claim alleging a violation of a fundamental constitutional right under the common law plain error doctrine where the defendant invokes the Court’s inherent authority and ‘firmly convince[s]’ this Court that

failure to review the claimed error would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process.” *Taylor*, ¶ 32. This Court relies upon its “inherent power of common law plain error review sparingly, on a case-by-case basis, and we will invoke that doctrine only in the class of cases aforementioned.” *State v. Finley*, 276 Mont. 126, 134-35, 137-38, 915 P.2d 208, 214, 216 (1996). Friscia has not asked the Court to invoke the plain error doctrine. Having failed to request plain error review in his opening brief, it is too late for Friscia to ask for plain error review in a reply brief. *See State v. King*, 2013 MT 139, ¶ 40, 370 Mont. 277, 304 P.3d 1.

Friscia would be unable to show a manifest miscarriage of justice entitling him to plain error reversal of his conviction based on *Counterman* anyway because that decision does not apply here. The *Counterman* defendant was originally charged under a Colorado stalking statute that made it unlawful to “[r]epeatedly . . . make [] any form of communication with another person’ in ‘a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress.’” *Counterman*, 600 U.S. at 70 (citing Colo. Rev. Stat. § 18-3-602(1)(c)). Thus, under Colorado’s statute, prosecutors did not need to prove that Counterman had “any kind of subjective intent to threaten” the victim. *Id.* at 71 (internal citations omitted). Under

Colorado’s standard for true threats, the State only had to “show that a reasonable person would have viewed the [conduct] as threatening.” *Id.*

The Supreme Court framed the issue narrowly as “(1) whether the First Amendment requires proof of a defendant’s subjective mindset in true-threats cases, and (2) if so, what *mens rea* standard is sufficient.” *Id.* at 72. The Court answered those questions by concluding that in a true threats case, the First Amendment requires proof that a defendant “had some subjective understanding of the threatening nature of his statements . . . [and] that a mental state of recklessness is sufficient.” *Id.* at 69. The Supreme Court found that the First Amendment was violated in *Counterman* because Colorado “only” required a showing “that a reasonable person would understand [Counterman’s] statements as threats” without having to also show “any awareness on [Counterman’s] part that [his] statements could be understood [as threatening].” *Id.* at 82.

Here, unlike the stalking statute at issue in *Counterman*, which only had an objective standard without any subjective mental state, the threats statute has a subjective mental state as “purposely” or “knowingly.” Mont. Code Ann. § 45-7-102(1). “[C]ourts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word ‘knowingly’ as applying that word to each element.” *State v. Bryson*, 2024 MT 315, ¶ 31, 419 Mont. 490, 560 P.3d 1270 (citing *State v. Hamernick*, 2023 MT 249, ¶ 16, 414 Mont. 307,

545 P.3d 666; *State v. Deveraux*, 2022 MT 130, ¶ 32, 409 Mont. 177, 512 P.3d 1198; *Fores-Figueroa v. United States*, 556 U.S. 646 (2009)); *see also* Mont. Code Ann. § 45-2-103(4) (application of particular mental state as applying to each element). Applying the mental state here, Friscia had to have a mental state of “purposely” or “knowingly” toward each element of the offense. And applying a “purposely” or “knowingly” mental state results in a more demanding mental state than the constitutional floor of “recklessly.” The statute further requires that the person issuing the threats have the specific “purpose to influence” a public servant’s action or decision. Mont. Code Ann. § 45-7-102(1)(a). Thus, the *Counterman* problem—the lack of any subjective mental state—is not present here.

Friscia fails to meet his burden to show that failure to review the claimed error would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process.

CONCLUSION

For the above reasons, the State respectfully requests that this Court affirm Friscia’s conviction.

Respectfully submitted this 5th day of December, 2025.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: /s/ Roy Brown
ROY BROWN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal 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 9,025 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Roy Brown
ROY BROWN

CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-05-2025:

Joshua A. Racki (Govt Attorney)
121 4th Street North
Suite 2A
Great Falls MT 59401
Representing: State of Montana
Service Method: eService

Peter Allan Wood (Attorney)
1604 N 30th St
Boise ID 83703
Representing: Phillip Michael Friscia
Service Method: eService

Tammy Ann Hinderman (Attorney)
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena MT 59620
Representing: Phillip Michael Friscia
Service Method: eService

Electronically signed by LaRay Jenks on behalf of Roy Lindsay Brown
Dated: 12-05-2025