

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.

REPLY BRIEF OF APPELLANT

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

COUNSEL FOR APPELLANT

PETE WOOD
1604 N. 30th St.
Boise, ID 83703
petewood_333@hotmail.com

COUNSEL FOR APPELLEE

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K. PLUBELL
Bureau Chief
215 N. Sanders Street
P.O. Box 201401
Helena, MT 59601

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

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The State failed to satisfy its substantial burden of proving that exigent circumstances existed at 20:14:55 1

II. The State forfeited/ waived the emergency aid exception 5

III. Section 45-7-102(1)(a)(i) is unconstitutionally overbroad 6

 A. The State wrongly contends Friscia bears the burden of proof 6

 B. *State v. Spottedbear* is not dispositive 7

 C. The State failed to satisfy its burden to prove that 45-7-102(1)(a)(i) is not unconstitutionally overbroad 8

IV. *Counterman* invalidated Friscia’s conviction 16

 A. *Counterman* is applied retroactively 16

 B. Friscia’s *Counterman* challenge is reviewed de novo 21

 C. Friscia’s conviction is constitutionally infirm 21

CONCLUSION 26

CERTIFICATE OF COMPLIANCE 27

TABLE OF AUTHORITIES

Cases

<i>Broadrick v. Okla.</i> , 413 U.S. 601 (1973)	14, 15
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010)	20, 21
<i>Counterman v. Colorado</i> , 600 U.S. 66 (2023)	<i>passim</i>
<i>Cross v. VanDyke</i> , 2014 MT 193, 375 Mont. 535, 332 P.3d 215	25
<i>Elonis v. United States</i> , 575 U.S. 723 (2015)	23
<i>Florida v. Jardines</i> , 569 U.S. 1 (2013)	1
<i>Georgia v. Randolph</i> , 547 U.S. 103 (2006)	1
<i>Gooding v. Wilson</i> , 405 U.S. 518 (1972)	11
<i>Griffith v. KY</i> , 479 U.S. 314 (1987)	19
<i>Houston v. Hill</i> , 482 U.S. 451 (1987)	11
<i>In re Rendelman</i> , 129 F.4th 248 (4th Cir. 2025)	18, 19, 20

<i>In re Winship</i> , 397 U.S. 358 (1970)	3
<i>Kentucky v. King</i> , 563 U.S. 452 (2011)	1
<i>Montgomery v. Louisiana</i> , 577 U.S. 190	19
<i>N.Y. State Rifle & Pistol Ass’n v. Bruen</i> , 597 U.S. 1 (2022)	7, 10
<i>Peel v. Atty. Registration & Disciplinary Comm’n</i> , 496 U.S. 91 (1990)	21
<i>People v. Counterman</i> , 2021 COA 97	20
<i>People v. Janousek</i> , 871 P.2d 1189 (Colo. 1994)	13
<i>R. A. V. v. St. Paul</i> , 505 U.S. 377 (1992)	7
<i>Reed v. Town of Gilbert</i> , 576 U.S. 155 (2015)	7, 9, 11
<i>Schriro v. Summerlin</i> , 542 U.S. 348 (2004)	18
<i>State v. Dawley</i> , 455 P.3d 205 (WA Ct. App. 2019)	13
<i>State v. Dugan</i> , 2013 MT 38, 369 Mont. 39, 303 P.3d 755	9, 10
<i>State v. LaFreniere</i> , 2008 MT 99, 342 Mont. 309, 180 P.3d 1161	5

<i>State v. Lance</i> , 222 Mont. 92, 721 P.2d 1258 (Mont. 1986)	10
<i>State v. Michaud</i> , 2008 MT 88, 342 Mont. 244, 180 P.3d 636	6
<i>State v. Otto</i> , 2012 MT 199, 366 Mont. 209, 285 P.3d 583	7, 8
<i>State v. Reichmand</i> , 2010 MT 228, 358 Mont. 68, 243 P.3d 423	19
<i>State v. Sanchez</i> , 165 Idaho 563 (2019)	13
<i>State v. Spottedbear</i> , 2016 MT 243, 385 Mont. 68, 380 P.3d 810	7, 8, 12
<i>State v. Stephenson</i> , 950 P.2d 38 (Wash. 1998)	13
<i>State v. Wakeford</i> , 1998 MT 16, 287 Mont. 220, 953 P.2d 1065	2, 4, 5
<i>State v. Waters</i> , 1999 MT 229, 296 Mont. 101, 987 P.2d 1142	16, 17
<i>State v. Watts</i> , 2016 MT 331, 386 Mont. 8, 385 P.3d	17
<i>State v. Wiedenheft</i> , 136 Idaho 14 (Ct. App. 2001)	5
<i>United States v. Alvarez</i> , 567 U.S. 709 (2012)	7, 11
<i>United States v. Stevens</i> , 559 U.S. 460 (2010)	7

<i>Virginia v. Black</i> , 538 U.S. 343 (2003)	8, 9, 15
<i>Virginia v. Hicks</i> , 539 U.S. 113 (2003)	15, 16
<i>Watts v. United States</i> , 394 U.S. 705 (1969)	8, 9

Montana Code

§ 1-2-101, MCA	24, 25
§ 45-2-101, MCA	<i>passim</i>
§ 45-7-102, MCA	<i>passim</i>
§ 46-13-101, MCA	18

United States Constitution

U.S. Const. Amend. I	<i>passim</i>
U.S. Const. Amend. IV	1, 3, 6
U.S. Const. Amend. XIV	3

Other Authorities

United States Supreme Court, “Proceedings and Orders”, <i>William Trevor Case v. Montana</i> , Cause No. 24-624, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/24-624.html	6
--	---

ARGUMENT

I. **The State failed to satisfy its substantial burden of proving that exigent circumstances existed at 20:14:55.**

Frischia has already explained in detail why officers lacked exigent circumstances at 20:14:55—rendering their continued presence in his stairwell unlawful. (See Op. Br., 17-35.) Friscia will not reiterate that lengthy analysis here, but a few brief clarifications are warranted.

First, Friscia is not challenging the officers’ initial entry into his stairwell. *Florida v. Jardines*, 569 U.S. 1, 8 (2013) (“[A] police officer not armed with a warrant may approach a home and knock...”)

Second, the precise Fourth Amendment issue before the Court is whether the officers’ *continued presence* in Friscia’s stairwell (curtilage) was justified under the exigent circumstances doctrine after Friscia explicitly told them to “please get out of my house” at 20:14:55; (Ex. 2, 20:14:53-55; 4/24/23 Tr., 32); see *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... **the occupant has no obligation to open the door or to speak.**”) (Emphasis added.)

Third, the State improperly uses facts unknown to the officers at 20:14:55 e.g. there was a baby inside the home, Friscia eventually opened the door and slammed it shut, and that Friscia became increasingly angry as the interaction progressed. (Resp., 16-17.) Those facts were unknown to officers at 20:14:55 and are therefore irrelevant to the exigent circumstances analysis. *State v. Wakeford*, 1998 MT 16, ¶24, 287 Mont. 220, 953 P.2d 1065 (To determine whether exigent circumstances existed Courts look only at the facts known to the officers “at the moment of entry.”)

The critical moment therefore is 20:14:55 when 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.) If the facts known to officers at 20:14:55 were insufficient to establish exigency as Friscia contends, any evidence obtained thereafter including Friscia’s statement (approximately 40-seconds later) that he had “a right to defend myself from people who are in my house” must be suppressed as unlawful

fruit.¹ (Ex. 2, 20:15:38-42.)

Fourth, the State contends the fact that dispatch tried to call Ms. Parker back—and she didn’t answer—supports a finding of exigency. (Resp., 18.) Friscia concedes that had dispatch *immediately* tried to call Ms. Parker and she failed to answer that scenario could provide some support for the State’s exigency argument. But that did not happen; instead, dispatch waited approximately *10-minutes* before trying to call her back. (See Ex. 2, 20:12:50-13:05.) The fact that dispatch waited so long to call Ms. Parker back actually evidences a *lack of exigency*.

Moreover, the longer dispatch waited to call Ms. Parker back the weaker the inference that her failure to answer warranted concern. Indeed, it is noteworthy that by the time dispatch finally got around to calling Ms. Parker back Officer O’Meara thought the call had been a hoax. (Ex. 2, 20:13:00-05.)

¹ Additionally, if exigent circumstances did not justify the officers’ continued presence after 20:14:55, then Friscia’s statement that he had “a right to defend myself from people who are in my house” could not be construed as threatening harm for the purpose of influencing the officers’ “discretionary function” as officers lack discretion to violate the Fourth Amendment. Accordingly, if the officers’ presence in Friscia’s stairwell became unlawful at 20:14:55, there is insufficient evidence to sustain a conviction under 45-7-102(1)(a)(i). See *In re Winship*, 397 U.S. 358, 364 (1970) (The Fourteenth Amendment’s Due Process Clause “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”)

Fifth, the State relies heavily on *Wakeford*, but that case is distinguishable in several key respects. (See Resp., 16-17.) In *Wakeford*, police were dispatched to a hotel after receiving a call that Mr. Wakeford was suicidal (hence possibly armed) and immediately upon arrival officers could hear Mr. Wakeford and his female companion arguing loudly. See *Wakeford*, ¶¶3, 4, 7, 25. And when officers made contact with Mr. Wakeford he was visibly angry, sweating, breathing heavily, his eyes were dilated, and he refused to fully open the door thereby preventing officers from determining whether he was holding a weapon. *Wakeford*, ¶¶5, 6, 7, 26.

Conversely, in this case officers were dispatched to Friscia's residence for a *verbal dispute* with no mention of suicide. (*Compare Wakeford*, ¶¶3, 7, 25 with 4/24/23 Tr., 21.) And unlike in *Wakeford*, in this case officers were on scene for over 7-minutes before they heard any disturbance whatsoever from Friscia's apartment. (*Compare Wakeford* ¶4 with Ex. 2, 20:13:15-25.) Most important of all, in this case the officers' presence in Friscia's curtilage became unlawful at 20:14:55—which was *before* officers ever saw Friscia or had any real interaction with him. (*Compare Wakeford*, ¶¶5, 7, 26 with Ex. 2,

20:14:53-55; 4/24/23 Tr., 32.)

As the above illustrates, the facts known to the officers in *Wakeford* at the time of entry were substantially different than the facts known to officers in this case at 20:14:55. Indeed the only reasonable conclusion from the facts available to the officers at 20:14:55 was that Friscia and Ms. Parker had engaged in a *verbal* argument inside the privacy of Friscia’s home—which is not an exigent circumstance. *See State v. Wiedenheft*, 136 Idaho 14, 16 (Ct. App. 2001) (Even an actual “report of domestic violence does not per se amount to exigent circumstances.”)

II. The State forfeited/ waived the emergency aid exception.

For the first time on appeal the State contends the officers’ entry was authorized under the emergency aid exception. (Resp., 23-24.) The State did not raise the emergency aid exception in the district court and therefore waived/ forfeited this argument. *State v. LaFreniere*, 2008 MT 99, ¶11, 342 Mont. 309, 180 P.3d 1161 (“We have repeatedly held that we consider issues presented for the first time on appeal to be untimely and will not consider them.”)

It is further noteworthy that, for the reasons articulated in the

exigency analysis above, the slim facts known to the officers at 20:14:55 would not support a reasonably objective basis for entry under the emergency exception doctrine—let alone probable cause as Friscia contends the Fourth Amendment requires.²

III. Section 45-7-102(1)(a)(i) is unconstitutionally overbroad.

A. The State wrongly contends Friscia bears the burden of proof.

The State asserts Friscia “bears the burden of proving, beyond a reasonable doubt, that the statute [45-7-102(1)(a)(i)] is unconstitutional, and [that] any doubt must be resolved in favor of the statute.” (Resp., 26 *citing State v. Michaud*, the 2008 MT 88, ¶15, 342 Mont. 244, 180 P.3d 636.) The State has it backwards.

For starters, *Michaud* dealt with a due process challenge—not a First Amendment overbreadth challenge. *See Michaud*, ¶¶5, 15. More importantly, the case law is unequivocal that when a law imposes a content-based (First Amendment) restriction on speech—e.g. a “threat”

² The State correctly advises that the United States Supreme Court is expected to issue a decision this term clarifying whether an objectively reasonable basis—or instead probable cause—is required for entry under the emergency aid exception. (See Resp., 25 n.8; see also Proceedings and Orders in *William Trevor Case v. Montana*, Cause No. 24-624: <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/24-624.html> (last visited January 11, 2026).

statute like 45-7-102(1)(a)(i)—the statute is “presumptively invalid” and the Government bears the burden to rebut the presumption that the statute is unconstitutional. *R. A. V. v. St. Paul*, 505 U.S. 377, 382 (1992); *United States v. Stevens*, 559 U.S. 460, 468 (2010); *United States v. Alvarez*, 567 U.S. 709, 709 (2012); *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); and *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 24-25 (2022).

B. *State v. Spottedbear* is not dispositive.

The State contends the holding in *State v. Spottedbear*, 2016 MT 243, 385 Mont. 68, 380 P.3d 810 dispositively established that 45-7-102(1)(a)(i) is not unconstitutionally overbroad. (See Resp., 26-30.) The State is incorrect.

First, Mr. Spottedbear failed to raise an overbreadth challenge in the district court, meaning this Court reviewed his argument(s) under the highly deferential plain error doctrine. *Spottedbear*, ¶¶13, 17.

Second, in *Spottedbear* this Court explicitly “decline[d] to consider... [45-7-102’s] alleged overbreadth...”, the precise issue Friscia raises here. *Spottedbear*, ¶19. This means at best *Spottedbear* constitutes nonbinding dictum. See *State v. Otto*, 2012 MT 199, ¶17,

366 Mont. 209, 285 P.3d 583 (“Dictum is not binding upon this Court as controlling precedent, and it is not persuasive authority for this Court in resolving the issue before us.”)

Third, the holding in *Spottedbear* was narrow (as-applied based on the specific circumstances in that case); in fact, the *Spottedbear* Court was clear that whether 45-7-102 could survive a facial challenge would have to be addressed in a future case. *Spottedbear*, ¶19 (“To the extent the statute [45-7-102] may reach constitutionally protected expression, *any constitutional deficiencies not implicated by Spottedbear’s case can be addressed at another time.*”) (Internal citations omitted, emphasis added.) That future case is now before this Court.

C. The State failed to satisfy its burden to prove that 45-7-102(1)(a)(i) is not unconstitutionally overbroad.

As a brief refresher, threat statutes like 45-7-102(1)(a)(i) are a *content*-based First Amendment restriction as they criminalize the *message* communicated by the Defendant i.e. “make[] criminal a form of pure speech...” *Watts v. United States*, 394 U.S. 705, 707 (1969) (*per curiam*). The fact that threat statutes criminalize “pure speech” does not mean all threats are communicated in words; for example, “[i]ndividuals burn crosses as opposed to other means of communication

because cross burning carries a message in an effective and dramatic manner.” *Virginia v. Black*, 538 U.S. 343, 360 (2003).

However, regardless of whether the threat is communicated with words (e.g. orally) or without words (e.g. cross burning), what matters for First Amendment purposes is that threat statutes impose criminal liability based on the *content* of the message communicated i.e. the threat to cause harm to the other. *Watts*, 394 U.S. at 707; *see also* *Counterman v. Colorado*, 600 U.S. 66, 85 (2023) (Sotomayor, J., concurring) (The “[t]rue-threats doctrine covers content-based prosecutions for single utterances of pure speech...”); and *Reed*, 576 U.S. at 163 (“[R]egulation of speech is content based if a law applies to particular speech because of the... message expressed.”)

Circling back to this case, the State does not attempt to argue that 45-7-102(1)(a)(i) only criminalizes so-called “true threats”, a narrow category of unprotected speech 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 358 (emphasis added); *see also* *State v. Dugan*, 2013 MT 38, ¶48, 369 Mont. 39, 303 P.3d 755 (“[T]rue

threat[s]” are “statement[s] meant to communicate an intent to commit an act of unlawful violence[.]”)

Nor could the State argue 45-7-102(1)(a)(i) is limited only to “true threats” as it is undisputed 45-7-102(1)(a)(i) criminalizes threats to harm a government employee’s “property”—broadly defined as any “tangible or intangible thing of value” including “money.” § 45-2-101(61), MCA. And because 45-7-102(1)(a)(i) is a *content*-based speech restriction that reaches constitutionally protected speech by criminalizing communications outside the exceedingly narrow category of “true threats”, 45-7-102(1)(a)(i) is particularly vulnerable to an overbreadth challenge. *State v. Lance*, 222 Mont. 92, 98, 721 P.2d 1258 (Mont. 1986) (Threat statutes are “particularly susceptible to an overbreadth attack because [they] make[] criminal a form of pure speech.”)

In fact, because 45-7-102(1)(a)(i) is a content-based restriction on pure speech, the State “must generally point to historical evidence about the reach of the First Amendment’s protections.” *Bruen*, 597 U.S. at 24-25. The State failed to provide even a scintilla of historical evidence.

Moreover, because 45-7-102(1)(a)(i) is a content-based speech restriction, the State bears the burden of proving 45-7-102(1)(a)(i) is narrowly tailored to serve a compelling government interest. *Reed*, 576 U.S. at 163 (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests[]); *Houston v. Hill*, 482 U.S. 451, 465 (1987) (“Th[e] Houston ordinance, however, is not narrowly tailored to prohibit only disorderly conduct or fighting words”); *Counterman* 600 U.S. at 83 (First Amendment exceptions such as statutes criminalizing true threats “must be well-defined and narrowly limited...”); *Alvarez*, 567 U.S. at 725 (“The First Amendment requires that the Government’s chosen restriction on the speech at issue be ‘actually necessary’ to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented[]”); and *Gooding v. Wilson*, 405 U.S. 518, 522 (1972) (A statute criminalizing pure speech “must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression.”)

The State argues 45-7-102(1)(a)(i) serves a legitimate purpose of “deter[ing] people from threatening harm to a public servant in order influence that person’s actions as a public servant.” (Resp., 27 citing *Spottedbear*, ¶17.) Friscia does not dispute that the State has a legitimate interest in deterring “*true threats*” against government employees communicated for the purpose of influencing their decision(s). Yet as noted above, 45-7-102(1)(a)(i) is not limited to “true threats”—nor does the State argue otherwise—and the State does not have a legitimate interest in criminalizing unprotected speech e.g. threats that do not rise to the level of “true threats.” Nor does the State even attempt to argue it is *actually necessary* to restrict speech outside the context of “true threats.”

For example, the State has no legitimate interest in preventing a citizen from threatening a government official’s employment (i.e. money and/or loss of professional stature (intangible thing of value). To illustrate, it is perfectly acceptable for a citizen to tell her local Mayor, “either pass the school levy or I will fund your opponent and you will be out of a job.” This innocuous statement is a felony under 45-7-102(1)(a)(i) owing to the expansive definitions of “harm” (defined as the

“loss, disadvantage, or injury or anything so regarded by the person affected...” and “property” (defined as any “tangible or intangible thing of value” including “money”). § 45-2-101(27) & (61), MCA.

Accordingly, by definition 45-7-102(1)(a)(i) is not narrowly tailored as 45-7-102(1)(a)(i) unnecessarily criminalizes speech outside the exceedingly narrow category of unprotected “true threats.”³ Yet rather than the facing the undeniable reality that 45-7-102(1)(a)(i) criminalizes a frighteningly array of protected speech, the State attempts to downplay 45-7-102(1)(a)(i)’s staggering scope by suggesting criminal liability is only imposed when the threat is communicated for the “purpose of influence[ing]” a government employee’s decision. (Resp., 30.) But that is irrelevant because the fact that a given “threat” was

³ To buttress its argument the State points to three decisions in state appellate courts that rejected overbreadth challenges to unlawful influence statutes. (Resp., 28-30 citing *State v. Sanchez*, 165 Idaho 563, (2019); *People v. Janousek*, 871 P.2d 1189 (Colo. 1994); and *State v. Stephenson*, 950 P.2d 38 (Wash. 1998).) But those cases are unhelpful to the State as none involved a “harm” element defined from the subjective perspective of the purported victim. See *Sanchez*, 165 Idaho at 568-569; *Janousek*, 871 P.2d at 1193; and *Stephenson*, 950 P.2d at 40. The validity of *Stephenson* was also recently called into question in *State v. Dawley*, 455 P.3d 205, 215 (WA Ct. App. 2019) (“We disagree with the *Stephenson* court’s conclusions that the intimidating a public servant statute involves only incidental restrictions and that the statute is narrowly tailored.”) Moreover, because the dispositive issue at bar involves a First Amendment inquiry this Court should look to the plethora of United States Supreme Court cases for guidance—not state appellate courts.

communicated for the purpose of influencing a government employee's decision is meaningless.

Rather, what matters is whether the "threat" was a "*true threat*"—otherwise the "threat" is perfectly legal. Because as the hypothetical above illustrates, a citizen who tells the Mayor if she doesn't pass the school levy she will be out of a job is communicating a "threat" to cause "harm" to the Mayor's financial situation and/or professional stature for the purpose of influencing the Mayor's decision (voting yes on the school levy). Yet that sort of "threat" is precisely what politics is about i.e. influencing lawmakers. Indeed, the entire lobbying industry is based on "threats" e.g. "if you vote against the pending bill authorizing drilling on public lands the oil companies I represent will fund your challenger in the midterms and you will lose your seat in congress."

The State also attempts to downplay 45-7-102(1)(a)(i)'s alarming scope by opining that Friscia's "hypotheticals" "could be effectively dealt with on a case-by-case basis." (Resp., 30 citing *Broadrick v. Okla.*, 413 U.S. 601, 615 (1973). For starters, the State's assertion that Friscia's examples are merely "hypotheticals" is incorrect as 3 out of the 7 are real-life communications that would constitute felonies under 45-7-

102(1)(a)(i). (See Op. Br., 41-43.) Nor does the State dispute that Friscia’s examples would constitute felonies under 45-7-102(1)(a)(i).

It is also critical to understand that the case-by-case approach referenced in *Broadrick* pertained to an overbreadth challenge targeting prohibiting *conduct* by government employees i.e. “no employee in the classified service... shall, directly or indirectly, solicit, [or] receive... [any] contribution... [from] any political organization.” *Broadrick*, 413 U.S. at 604-606. In other words, the Court in *Broadrick* was addressing an overbreadth challenge to a *conduct*-based restriction (prohibition on government employee’s taking money from political organizations)—as opposed to a *content*-based restriction on pure speech e.g. a threat statute. *Compare Broadrick*, 413 U.S. at 604-606 *with Black*, 538 U.S. at 358.

And because threat statutes e.g. 45-7-102(1)(a)(i) are *content*-based speech restrictions, the “case-by-case” approach for *conduct*-based restrictions articulated in *Broadrick* is an ill-suited instrument owing to concerns of “chilling” or “self-censorship.” *See Virginia v. Hicks*, 539 U.S. 113, 124 (2003) (“[T]he overbreadth doctrine’s concern with ‘chilling’ protected speech ‘attenuates as the otherwise unprotected

behavior that it forbids the State to sanction moves from ‘pure speech’ toward conduct.”) In other words, because 45-7-102(1)(a)(i) is a *content* (rather than *conduct*) based restriction on pure speech, the case-by-case approach articulated in *Broaderick* is strictly at odds with the First Amendment’s concern with chilling protected speech. This is obvious because it is impossible for courts to address—“on a case-by-case basis”—the communications Montana citizens *choose not to express* to government employees out of fear they will be prosecuted under 45-7-102(1)(a)(i).

IV. *Counterman* invalidated Friscia’s conviction.

A. *Counterman* is applied retroactively.

The State asserts “Friscia does not dispute that his *Counterman* challenge is unpreserved.” (Resp., 35.) The State provides no citation for this argument and for good reason—it’s not true. To the contrary, Friscia was explicit that the holding in “*Counterman* applies [to his conviction]... 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.” (Op. Br., 44 n.19 citing *State v. Waters*, 1999 MT 229, ¶21, 296 Mont. 101, 987 P.2d

1142.)

The State next argues “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.”

(Resp., 30 *citing State v. Watts*, 2016 MT 331, ¶9, 386 Mont. 8, 385

P.3d.) But Friscia’s case is unlike *Watts*, where the defendant signed a plea agreement that,

[contain[ed] no language reserving the right to appeal after his guilty plea... [and] specifically acknowledge[d] that Watts waive[d] his right to all appeals, except an appeal based on ineffective assistance of counsel. Watts has not preserved the right to challenge his conviction based on the constitutionality of the underlying statute. *Watts*, ¶10.

The exact opposite occurred here, as Friscia explicitly reserved his right to appeal the constitutionality of his conviction prior to entering his *Alford* plea. (9/29/23 Tr., 10, 12.)

The State further argues that because *Counterman* was decided on June 27, 2023—which was before Friscia entered his *Alford* plea on September 29, 2023—Friscia is now barred from raising a *Counterman* challenge. (Resp., 30-33.) While not entirely clear, the State appears to

argue that to preserve a *Counterman* challenge Friscia would have had to file a second motion to dismiss after *Counterman* was decided on June 27—but before he changed his plea on September 29. The State is incorrect.

For starters, because dispositive motions must be filed by the omnibus hearing, Friscia was statutorily prohibited from filing a second motion to dismiss when the *Counterman* decision was issued in June of 2023. See § 46-13-101(1), MCA.

More importantly, the holding in *Counterman* created a new “substantive [First Amendment] rule” by mandating that any statute criminalizing “true threats” must contain an element requiring the fact finder to determine that the defendant *subjectively understood* his communication was in fact threatening. *Counterman*, 600 U.S. at 73, 83; *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (A rule is substantive when it “alters the range of conduct or the class of persons that the law punishes”); see also *In re Rendelman*, 129 F.4th 248, 254 (4th Cir. 2025) (“*Counterman* placed particular conduct—making communications that are objectively threatening but not subjectively understood by the speaker as threatening—‘beyond the State’s power to

punish.”)⁴

And because *Counterman* issued a “substantive rule”, the holding is applied retroactively to Friscia’s case. *Montgomery v. Louisiana*, 577 U.S. 190, 200 (2016) (“[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule[]”);⁵ *Griffith v. KY*, 479 U.S. 314, 328 (1987) (“We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review ***or not yet final***, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past”); (emphasis added); and *In re Rendelman*, 129 F.4th 248, 254 (“Counterman’s rule is a substantive one that applies retroactively.”)⁶

The State next contends Friscia is barred from challenging his conviction under *Counterman* because *Counterman* involved an “as-

⁵ Retroactivity is a question of law reviewed de novo. *State v. Reichmand*, 2010 MT 228, ¶6, 358 Mont. 68, 243 P.3d 423.

⁶ In fact, because *Counterman* proffered a “substantive rule” Friscia’s conviction would be reviewable even if it were final. *See Montgomery*, 577 U.S. at 200; *see also In re Rendelman*, 129 F.4th at 254.

applied” constitutional ruling. (Resp., 34-35.) The State is wrong.

As a threshold matter, Friscia does not dispute that the petition Mr. Counterman filed with the Colorado Court of Appeals raised an as-applied First Amendment challenge. *See People v. Counterman*, 2021 COA 97, ¶¶13-58. But that fact is meaningless because, as noted above, retroactivity is based on whether the *United States Supreme Court’s holding* proffered a substantive rule—not whether Mr. Counterman labeled his claim facial or as-applied in his petition to the Colorado Court of Appeals. And as addressed above, it is undisputed the holding in *Counterman* proffered a substantive First Amendment rule.

Counterman, 600 U.S. at 73, 83; and *In re Rendelman*, 129 F.4th at 254.

Moreover, it is not uncommon for the Supreme Court to convert an as-applied challenge into a facial holding. *See Citizens United v. FEC.*, 558 U.S. 310, 331 (2010) (“[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge.... [And] [o]nce a case is brought, no general categorical line bars a court from making broader

pronouncements of invalidity in properly ‘as-applied cases’...”⁷

B. Friscia’s *Counterman* challenge is reviewed de novo.

The State next contends Friscia’s *Counterman* challenge should be reviewed for plain error owing to his purported failure to preserve it. (Resp., 35.) This is erroneous because as noted above Friscia did not waive or fail to preserve his *Counterman* challenge. Friscia’s *Counterman* challenge is a constitutional inquiry and thus receives de novo review. *Peel v. Atty. Registration & Disciplinary Comm’n*, 496 U.S. 91, 108 (1990) (“Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this Court should exercise de novo review.”)

C. Friscia’s conviction is constitutionally infirm.

Turning finally to the merits, the State contends 45-7-102(1)(a)(i) contains a subjective mental state i.e. purposely or knowingly because “courts 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.” (Resp., 37 citing *State v. Bryson*, 2024 MT 315, ¶31,

⁷ Nor did the *Counterman* Court mention a “facial” versus “as-applied” distinction. See *Counterman*, 600 U.S. at 69-83.

419 Mont. 490, 560 P.3d 1270.) Friscia does not dispute the State’s citation to the *general rule* is correct, but the general rule does not apply to the “harm” element under 45-7-102(1)(a)(i) which is controlled by a separate statute—45-2-101(27)—which defines “harm” as the “loss, disadvantage, or injury or anything *so regarded by the person affected...*” (Emphasis added.)

To illustrate, consider the elements under 45-7-102(1)(a)(i), which provide that a person commits a felony offense if s/he purposefully or knowingly;

- (1) Communicates a threat to a government employee or the government employee’s property (defined as “a tangible or intangible thing of value” including “money”);⁸
- (2) To cause harm (defined as “loss, disadvantage, or injury or anything so regarded” by the government employee”);⁹ and
- (3) Does so for the purpose of influencing the government employee’s decision or other exercise of discretion.

As the above makes clear, the purposefully and knowingly scienter requirement goes to the defendant’s communicating the purport threat

⁸ See § 45-2-101(61), MCA.

⁹ See § 45-2-101(27), MCA.

to the public servant (element 1) as well as element (3).

But the purposefully and knowingly scienter requirement does not go the “harm” element, as the scienter requirement for element 2 is specifically articulated under 45-2-101(27), which defines “harm” entirely from the subjective perspective of the purported victim (“harm” means the “loss, disadvantage, or injury or anything ***so regarded by the person affected...***”) (Emphasis added.)

The Supreme Court’s holding in *Elonis v. United States* further illustrates the distinction between the scienter requirement for the act of communicating a threat vis-à-vis the defendant’s subjective understanding that the communication was actually threatening harm. 575 U.S. 723, 733 (2015) (The terms “threat” or “threaten” “speak to what the statement conveys—not to the mental state of the author. For example, an anonymous letter that says ‘I’m going to kill you’ is ‘an expression of an intention to inflict loss or harm’ regardless of the author’s intent. A victim who receives that letter in the mail has received a threat, even if the author believes (wrongly) that his message will be taken as a joke.”)

In other words, the purposefully and knowingly scienter

requirement goes to Friscia's intent to communicate the "threat" to Officer O'Meara (element 1) i.e. "I have a right to defend myself from people who are in my house." But the purposefully and knowingly scienter requirement does not go to whether Friscia himself was subjectively aware that his statement was actually a threat to harm Officer O'Meara (element 2). We know this because such a reading would be impossible owing to the definition of "harm" under 45-2-101(27), defined as the "loss, disadvantage, or injury or anything so regarded by the person affected..." In other words, because harm is defined entirely from the subjective perspective of the purported victim, by definition the jury would not be required to conclude that Friscia himself subjectively believed his communication was actually threatening harm to Officer O'Meara.

Nor would it be possible to read a knowingly element into the "harm" definition as doing so would require the Court to completely disregard the statutory definition of "harm" under 45-2-101(27) in violation of § 1-2-101, MCA ("In the construction of a statute... [Courts should] declare what is in [the] terms... not... insert what has been omitted or to omit what has been inserted. Where there are several

provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all[]”); *see also Cross v. VanDyke*, 2014 MT 193, ¶19, 375 Mont. 535, 332 P.3d 215 (“Where Congress includes particular language in one section of a statute but omits it in another it is generally presumed that Congress acts intentionally...”)

Accordingly, whether Friscia’s statement that he had “a right to defend myself from people who are in my house” was actually a threat to “harm” Officer O’Meara is based entirely on whether Officer O’Meara *subjectively* interpreted the statement as threatening—regardless of whether Friscia himself *subjectively intended and understood* the statement as communicating a threat—precisely what *Counterman* forbids. This is particularly noteworthy (and troubling) given that the record is clear Friscia did not subjectively perceive his statement as threatening harm to Officer O’Meara.

For example, during his PSI interview Friscia was adamant that, “I REALLY DON’T FEEL LIKE I MADE ANY THREATS...” (D.C. Doc. 54, 4 (capitalization in original).) And during his *Alford* colloquy Friscia agreed with his attorney’s assertion that, “while there was some disagreements about the nature of the[] statements to the officers... [if

CERTIFICATE OF SERVICE

I, Peter Allan Wood, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 01-16-2026:

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

Roy Lindsay Brown (Govt Attorney)
Appellate Services Bureau
Attorney General's Office
215 N Sanders St
P.O. Box 201401
Helena MT 59601
Representing: State of Montana
Service Method: eService

Electronically Signed By: Peter Allan Wood
Dated: 01-16-2026